Washington and Lee Law Review

Volume 21 | Issue 1 Article 17

Spring 3-1-1964

Police Refusal Of A Blood Test As Suppression Of Evidence

is chosen, it would force the legislatures either to repeal the laws or to revise them so that their meaning is made clear to the executive branch of government.

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POLICE REFUSAL OF A BLOOD TEST AS SUPPRESSION OF EVIDENCE

In recent years, much has been written about the value of blood tests in determining whether drivers of automobiles are under the influence of alcohol. Most of this writing deals with the problem of whether administering such a test against one's will violates constitutional rights. Furthermore, there has been much discussion about the evidentiary value of such tests. However, very little has been said about the right of an accused to take a blood test. Closely connected with this problem is the growing idea that a suppression of evidence favorable to the accused is a denial of due process and a violation of the fourteenth amendment of the Constitution. The recent California case of *In Re Martin*[1] sets forth both problems: (1) suppression of evidence as a violation of the due process clause, and (2) the right to take a blood test when accused of drunk driving.

After having been arrested, Martin demanded a blood test to determine the alcoholic content of his blood. This request, which was first made to the arresting officer immediately after his arrest, was denied. Martin made a second request, to the booking officer, offering to bear the expense of the blood test. This was also denied. After posting bond, Martin was released. He then made three more attempts to have a blood test administered. He first telephoned his personal physician, who said he would be unable to arrange for the test since the laboratories were closed. Martin's last two attempts proved futile, because the local hospitals refused to administer the test without having police authorization, which officials refused to grant.

The defendant, upon being convicted of driving while under the influence of alcohol and sentenced to fifteen days in jail, sought release by writ of habeas corpus from the Supreme Court of California.

The Supreme Court ordered release of Martin, saying that the refusal to give authorization was "analogous to a suppression of evidence and a violation of due process of law."[2] While the police were

[1]58 Cal. 2d 509, 24 Cal. Rptr. 833, 374 P.2d 801 (1962).
[2]374 P.2d at 803.

under no duty to assist the petitioner in his efforts to gain evidence, they were under a duty not to interfere in any manner with his efforts to obtain evidence necessary to his defense.[3]

The idea that a suppression of evidence is a denial of due process is a relatively new facet of legal thinking.[4] Most of the cases dealing with this problem usually contain two basic elements: one, the evidence is already in existence, and two, the evidence is intentionally suppressed by the prosecution.[5] If the evidence is favorable to the accused, and material, there seems to be little doubt that any intentional suppression by the prosecution will result in a denial of due process. This will have the effect of either entitling the defendant to a new trial or release from custody, depending on the materiality and the type of evidence involved.[6] But more recently, cases have gone further by holding that the fact that evidence has been suppressed is alone enough to constitute a violation of due process.[7] Whether or not the evidence has been intentionally suppressed and whether or not it is favorable to the accused are no longer essential ingredients in the violation of due process.[8] The basic requirement of the fourteenth amendment is that of a fair trial, and when there has been a suppression of evidence, this is not fulfilled.[9]

The *Martin* case presents a further extension in that the denial of an *opportunity to obtain evidence* is held to constitute a suppression of evidence. Here the evidence, the chemical analysis of the alcoholic content of the defendant's blood, is not yet in existence. However, an earlier California case had said "that when, in the exercise of their power to arrest, the police deprive the arrested person of the opportunity to obtain evidence that might establish his innocence, they are suppressing it just as effectively as if it did exist and they withheld it."[10]

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[3]Ibid.

[4]The first case of importance which deals with the subject of suppression of evidence was Mooney v. Holohan, 294 U.S. 103 (1935).

[5]Wilde v. Wyoming, 362 U.S. 607 (1960); Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957); Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935).

[6]Ibid.

[7]Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963) (appeal docketed); People v. Kiihoa, 53 Cal. 2d 748, 3 Cal. Rptr. 1, 349 P.2d 673 (1960); People v. Savvides, 1 N.Y.2d 554, 136 N.E.2d 853 (1956).

[8]Kyle v. United States, 297 F.2d 507, 512-15 (2d Cir. 1961); People v. Savvides, 1 N.Y.2d 554, 136 N.E.2d 853 (1956).

[9]Napue v. Illinois, 360 U.S. 264 (1959); McGarty v. O'Brien, 96 F. Supp. 704 (D. Mass. 1951), aff'd, 188 F.2d 151 (1st Cir. 1951), cert. denied, 341 U.S. 928 (1951).

[10]Application of Newbern, 175 Cal. App. 2d 862, 1 Cal. Rptr. 80, 82 (Dist. Ct. App. 1959).

If the *Martin* case is to be taken as an extension of the suppression of evidence idea, then one must face the question of what are the limitations to this denial of due process theory. It can hardly be said that if a man is arrested for a felony and requests to be released so he can go in search of evidence, a refusal will result in a suppression of evidence and thus a denial of due process. The only way Martin could be sure of a favorable verdict of not guilty is by having a scientific test taken which establishes his innocence. Thus, the authorities closed off this avenue of defense, by refusing authorization, and as a result, Martin could not obtain a fair trial. In this case, the suppression of evidence did go far enough so as to become a violation of the due process clause of the fourteenth amendment.[11] But due process of the law does not mean infallible process of law,[12] and to extend the idea of suppression of evidence to its limits would not only have drastic results but would also be ridiculous.

As to the second problem presented by the *Martin* case, what is meant by a "reasonable opportunity" to obtain a blood test?[13] The earlier California case of *McCormick v. Municipal Court*[14] discussed this question. The court said:

> The mandatory duty imposed by section 851.1 of the Penal Code, of requiring that an arrested person shall be permitted at booking to make at least one telephone call can not *ipso facto* be equated with "reasonable" opportunity to procure a physician.[15]

As the court indicated, what constitutes a reasonable opportunity to secure a blood test must be determined in relation to the particular circumstances. The controlling factor, it would seem, should be the sincerity of the accused in his efforts to obtain the test as evidence on his behalf. If he is sincere, he should be given a wide opportunity, including the privilege of having a qualified person of his choice make the test.[16] The same standards, logically, would seem to apply in providing a reasonable opportunity to obtain any of the other chemical tests used for the purpose of determining intoxication. All are admissible as evidence.[17] The blood test, in comparison with saliva, urine,

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[11]374 P.2d at 803.

[12]McGarty v. O'Brien, supra note 9, at 707-08.

[13]Annot., 78 A.L.R. 2d 905 (1961).

[14]195 Cal. App. 2d 819, 16 Cal. Rptr. 211 (Dist. Ct. App. 1961).

[15]16 Cal. Rptr. at 215.

[16]People v. Dawson, 184 Cal. App. 2d 881, 7 Cal. Rptr. 384 (Super Ct. 1960). Compare with Application of Howard, 208 Cal. App. 2d 709, 25 Cal. Rptr. 590 (Dist. Ct. App. 1962).

[17]37 N.D.L. Rev. 212, 217 (1961).

cerebro-spinal fluid, and breath tests, is the most accurate, and so most cases deal with blood tests.[18]

In at least four states, the problem of a "reasonable opportunity" is dealt with by statute.[19] In Maryland[20] and Rhode Island,[21] the statutes place on the arresting officer a duty to inform the accused of his right to a physical examination. A Michigan statute requires that the arrested person "shall be advised" of his right to a blood test.[22] And Virginia imposes a duty upon the person to whom the request is made to take the accused to a qualified person for the purpose of obtaining a blood test.[23]

The test should be given in close proximity in time with the arrest in order to be of evidentiary value.[24] In Virginia, the test must be given within two hours of the arrest in order to be used as evidence.[25] This was not a problem in the *Martin* case as the evidence shows the accused made his request immediately after his arrest. In *Application of Howard*,[26] the refusal of the authorities to grant a request for a

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[18]Id. at 218-19.

[19]Md. Ann. Code art. 35, § 100 (Supp. 1963); Mich. Comp. Laws § 257.625a (Supp. 1961); R.I. Gen. Laws Ann. § 31-27-3 (1956); Va. Code Ann. § 18.1-55(b) (Supp. 1962).

[20]Md. Ann. Code art. 35, § 100 (Supp. 1963).

[21]R.I. Gen. Laws Ann. § 31-27-3 (1956): "Right of person charged with operating under influence to physical examination—A person arrested and charged with operating a motor vehicle while under the influence of narcotic drugs or intoxicating liquor, whatever its alcoholic content, shall have the right to be examined at his own expense immediately after his arrest, by a physician selected by him, and the officer so arresting or so charging such person shall immediately inform such person of this right and afford him a reasonable opportunity to exercise the same, and at the trial of such person the prosecution must prove that he was so informed and afforded such opportunity." (This Rhode Island statute is probably the strongest and most liberal of all state statutes in providing for a reasonable opportunity).

[22]The Michigan statute also provides that "any person charged with driving a vehicle while under the influence of intoxicating liquor shall have the right to demand that the test provided for in this section must be given him..." Mich. Comp. Laws § 257.625a(3) (Supp. 1961).

[23]"[B]ut if the person arrested does not refuse to permit the taking of blood, or having refused, thereafter and within two hours of the time of arrest requests that a blood sample be taken the person arrested shall be entitled to the benefit of such test. It then shall be the duty of the arresting officer, or whoever has custody of the person arrested at the time such request is made, forthwith to carry the person arrested to a person qualified under this section to withdraw the blood sample." Va. Code Ann. § 18.1-55(b) (Supp. 1962). Virginia is an implied consent state but its statute is different from most such statutes in making provisions for a test on the demand of the accused.

[24]374 P.2d at 803.

[25]Va. Code Ann. § 18.1-55(b) (Supp. 1962).

[26]208 Cal. App. 2d 709, 25 Cal. Rptr. 590 (Dist. Ct. App. 1962).

blood test was upheld as not being a violation of due process. The accused had made a request that the test be given by her personal physician, who lived a great distance away, and the court felt that when the time element was considered there had been no showing that her rights had been denied.

Another important limitation imposed on the right of an accused to take a blood test is that the request must be made at the proper place, which is the scene of the booking for arrest.[27] This means that a request to take a blood test made to the arresting officer may be denied without being a violation of due process.[28] The court in *In Re Martin* said, "It would be unreasonable to impose on an arresting officer an obligation to accede to various requests made by the prisoner including a request for a blood test."[29]

In a few states the reasonable opportunity problem may have been settled by statutes which provide that drivers who use the highways impliedly consent to take the blood test.[30] In a state that has this type of statute, the driver must take a blood test when accused of drunk driving, or lose his license.[31] The accused, under some of these state statutes, is also given the right to obtain an additional test of his own.[32] It seems that with the ever increasing number of automobile accidents, implied consent statutes will be adopted by more states, and thus the problem of the accused's right to a blood test eventually may be eliminated.

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[27]In re Koehne, 54 Cal. 2d 757, 8 Cal. Rptr. 435, 437, 356 P.2d 179, 181 (1960).

[28]Ibid.

[29]24 Cal. Rptr. at 834, 374 P.2d at 802.

[30]Idaho Code Ann. § 49-352 (Supp. 1955); Kan. Gen. Stat. Ann. § 8-1001 (Supp. 1959); Neb. Rev. Stat. § 39.727.03 (1960); N.Y. Vehicle and Traffic Law § 1194 (1960); N.D. Cent. Code § 39-20-01 (1960); S.D. Code § 44.0302-2 (Supp. 1960); Utah Code Ann. § 41-6-44.1 (Supp. 1957); Va. Stat. Ann. § 18.1-55 (Supp. 1962). See also Uniform Chemical Test for Intoxication Act, 9 U.L.A. 48 (Supp. 1962).

[31]Ibid.

[32]Kan. Gen. Stat. Ann. § 8-1004 (Supp. 1959); Neb. Rev. Stat. § 39.727.03 (1960); N.Y. Vehicle and Traffic § 1194 (1960); Vt. Stat. Ann. tit. 23 § 1188 (1959).