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Virginia-Implied Consent And The Drunk Driver

VIRGINIA COMMENTS

VIRGINIA—IMPLIED CONSENT AND THE DRUNK DRIVER

The problem of the drinking driver is not a new one, but the growing number of fatalities attributable to him painfully points up the need for a solution. In 1958, 9,826 drivers were convicted in Virginia of driving while under the influence of alcohol, but nevertheless a drinking driver was still involved in 24.8 per cent of all fatal accidents on Virginia highways.[1] The Virginia General Assembly took notice of this appalling toll and, in an effort to remedy a deplorable situation, empowered the Virginia Advisory Legislative Council to conduct a study of the problem of drunk drivers and to recommend a possible solution. Recognizing that the present drunk driving statute is difficult to enforce[2] and that "juries are reluctant to convict a man who, when they see him, is stone sober . . . ,"[3] the VALC strove to provide law enforcement authorities with better tools to solve the problem.

After nearly a year's study the Council recommended that the General Assembly enact what is commonly known as an "implied consent" statute. In accord with this recommendation, a bill was introduced in the House in 1960 to amend and re-enact the present sections 18-75.1, 18-75.2, and 18-76, of the Virginia Code so as to provide that any person operating a motor vehicle on Virginia's highways "shall be deemed thereby to have agreed as a condition of such operation" to consent to a blood alcohol test when he is arrested for driving under the influence of alcohol. Should a driver refuse, the proposed amendment would have made such refusal grounds for revocation of his license. The driver who refused to submit to the test would be afforded a summary hearing in court to determine whether such refusal was reasonable. If the accused's refusal was found to have been unreasonable, his license would be revoked for one year

[1] "This percentage may well be considerably higher due to the fact that intoxication is not always reported when there does not exist enough legal evidence for prosecution." VALC, Virginia Laws Relating to Driving Under the Influence of Intoxicants, at 4 (1959).

[2] This is true mainly because the present law allows a chemical test at the defendant's request, and, therefore, there is no compulsion on the accused to submit to a chemical analysis. This results in the test being taken only when the accused believes it will be to his advantage.

[3] 6 Baylor L. Rev. 404, 405 (1954).

regardless of the outcome of a later criminal trial on the charge of driving while intoxicated. An implied consent statute, almost identical to the one advanced, was passed by the New York legislature in 1953, and has been upheld under every conceivable attack.[4] The Virginia bill was passed by the House with crippling amendments and was killed in the Senate Courts of Justice Committee during the closing days of the session.

In light of the General Assembly's failure to adopt this bill and in view of the doubts expressed concerning its validity and legal effect, this comment will consider problems that might arise if such a law were enacted in Virginia.

I. *Constitutional Considerations*[5]

The theory upon which an implied consent statute rests is that driving a motor vehicle on a state's highways is a privilege, rather than a right, and, therefore, the state can attach conditions to the granting of this privilege.[6] In other words, "the state owns its roads in trust for the benefit of the people and, through its police power, it can enforce any reasonable regulation of the use of those roads."[7] The cases in Virginia have generally followed this premise,[8] but there is some qualified authority that "the right of a citizen to travel upon the public highways . . . is a common right which he has under his right to enjoy life and liberty . . . and to pursue happiness and safe-

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[4]N.Y. Vehicle & Traffic Law § 71(a). The original statute enacted in 1953 was amended in 1954 to meet the decision of Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954), which held the law unconstitutional because there was no provision requiring arrest before giving the test, or allowing the defendant to be heard in revocation proceedings.

[5]For a general treatment of the constitutional questions concerning blood tests see, Burgee, A Study of Chemical Tests for Alcoholic Intoxication, 17 Md. L. Rev. 193 (1957); Williams, Admissibility and Constitutionality of Chemical Intoxication Tests, 35 Texas L. Rev. 813 (1957); Annot., 25 A.L.R.2d 1407 (1952).

[6]This premise is not new or novel. Nonresident service statutes state that a nonresident is deemed to have consented to service on the secretary of state as his agent for any action arising from any accident he has while in the state. Such laws have been held constitutional. Hess v. Pawloski, 274 U.S. 352 (1927); Kane v. New Jersey, 242 U.S. 160 (1916). The Virginia nonresident statute, Va. Code Ann. § 8-67.1 (Repl. Vol. 1957), was upheld in Weiss v. Magnussen, 13 F. Supp. 948 (E.D. Va. 1936).

[7]6 Baylor L. Rev. 404, 406 (1954).

[8]Tate v. Lamb, 195 Va. 1005, 81 S.E.2d 743 (1954); Lamb v. Parsons, 195 Va. 353, 78 S.E.2d 707 (1953); C.I.T. Corp. v. W. J. Crosby & Co., 175 Va. 16, 7 S.E.2d 107 (1940); Commonwealth v. Ellett, 174 Va. 403, 4 S.E.2d 762 (1939); Law v. Commonwealth, 171 Va. 449, 199 S.E. 516 (1938).

ty . . . ,"[9] and therefore, in light of the fourteenth amendment, a due process analysis must be made.

The first phase of such an analysis involves three questions relating to the police power of the state. Is the statute aimed at a legitimate end? Is the statute reasonably adapted to meet this end? Is the menace of the drinking driver great enough to justify a minor infringement of individual rights in order to protect the rights of society generally, i.e., the public's safety on the highways?

It is apparent from legislation in *every* state, that maintaining highway safety is a legitimate end. That an implied consent statute is reasonably adapted to accomplish this end has been statistically proven in New York.[10] The third question should also be answered affirmatively, for a statute of this type does not impair individual liberty to any greater extent than the requirement of a pre-marital blood test, or of fingerprinting.[11] In view of the fact that Virginia cases have consistently recognized the right of the State to exercise its police power to regulate and impose conditions on the use of vehicles on its highways,[12] there is good reason to believe that the courts would logically extend such reasoning and allow the imposition of the further condition embodied in an implied consent statute. Therefore, should such a statute be introduced in the 1962 General Assembly, it is suggested that the draftsmen follow the form of the original bill to avoid any problem of due process infringement along these lines.

A more usual due process objection, based on the decision of the United State Supreme Court in *Rochin v. California*,[13] arises when physical force that offends "decencies of civilized conduct" is employed to extract the blood necessary for an alcohol analysis. However, this objection can be avoided altogether by the very terms of the implied

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[9]Thompson v. Smith, 155 Va. 367, 154 S.E. 579 (1930). Even though the court here termed the citizen's use of the highways a right, it still held that in "the exercise of such a common right the city may, under its police power, regulate in the interests of the public safety and welfare. . . ." Id. at 583. It would appear, therefore, that Virginia holds that the use of the highways can be regulated and conditions may be imposed.

[10]New York Times, July 14, 1954, p. 1, col. 3.

[11]Va. Code Ann. § 20-1 (Supp. 1958) provides for pre-marital syphilis tests, while Va. Code Ann. § 15-555.1 (Repl. Vol. 1956) and § 52-4.1 (Repl. Vol. 1958) give law enforcement authorities the right to fingerprint anyone arrested. If the implied consent law contained the safeguard of the defeated bill, that the driver must first be arrested before the test is given, then there would seem to be a direct analogy to the fingerprinting statute. See note 25 infra and accompanying text.

[12]See notes 6, 8, and 9 supra.

[13]342 U.S. 165 (1952).

consent bill. The use of force should not be authorized in any degree. Under the 1960 bill the test would not have been given if the accused refused to submit, but his license to drive or his nonresident privilege to use the roads might have been revoked.[14]

One question which deserves an answer before such a statute is enacted is: would one accused of drunk driving have the absolute right to demand and receive such a blood test? A simple provision covering this would avoid any argument that the statute is applied at the whim of police officers, and thereby deprives the driver of his liberty without due process.

Subdivision (g) of the defeated bill set out the procedure to be followed in establishing the reasonableness of an accused's refusal—a summary hearing prior to the trial on the criminal charge of driving while intoxicated—and expressly gave the defendant an opportunity to be heard, thereby avoiding any due process objections on such grounds.[15] However, in view of authority holding that "revocation of (an automobile) license . . . without hearing does not operate so as to deprive of property without due process,"[16] it is suggested that the 1962 General Assembly could set up a speedier and more summary method of dealing with refusals.

The privilege against self-incrimination, contained in the fifth amendment to the United States Constitution and section eight of the Virginia Constitution,[17] is the constitutional argument perhaps most frequently raised against this particular type of statute. There is no problem under the fifth amendment since it is not applicable to

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[14]Subsection (g) of House Bill 357 provided "if the person so arrested refuses, on request of the officer, to submit to the test . . . it shall not be given." The New York statute contains an identical provision, and it would seem to be essential to prevent the law from becoming unconstitutional through enforcement.

[15]See note 4 supra. In connection with such summary hearing two questions arise. First, who has the burden of proof, the Commonwealth or the defendant? It would not seem unfair if the answer were the defendant, in which case the proceeding would be much the same as that of a show cause order. However, in actuality, there would probably be no problem since the State would merely present its case and the accused would attempt to rebut it by establishing reasonableness. Second, what would constitute a reasonable refusal? The answer to this question does not appear as readily. Perhaps if the driver could prove he was a hemophiliac then the court would adjudge his refusal to take the blood test to be reasonable. Even so, it seems that a reasonable refusal would be so difficult to establish that in effect "reasonableness" would be a dead letter.

[16]Law v. Commonwealth, 171 Va. 449, 454, 199 S.E. 516, 519 (1938), quoting Nutler v. State Rd. Comm'n, 119 W.Va. 312, 193 S.E. 549 (1937).

[17]See Comment, 3 Wash. & Lee L. Rev. 122 (1941) for a general treatment of blood tests and the constitutional privilege against self-incrimination.

the states.[18] Nor would there be any problem under the State Constitution—either because the blood is real evidence or because of a waiver of the privilege. Mr. Justice Holmes stated that "the prohibition of compelling a man . . . to be a witness against himself is not an exclusion of his body as evidence . . . ."[19] The great majority of states, Virginia included,[20] make this same differentiation between testimonial and real evidence.[21] However, if this distinction were not accepted by the Supreme Court of Appeals, then the doctrine of waiver would surely cover the situation. Under an implied consent statute an accused is given the choice of waiving his privilege against self-incrimination,[22] or of losing his privilege to use the highways. Since there is a great public interest in highway safety it would be within the power of the legislature to so condition the privilege to use the highways and to put such a choice to motorists.[23] Therefore, the potential defendant who submits to the blood test has no grounds for a self-incrimination objection,[24] and the legislators need not worry about abridging an individual's privilege against self-incrimination by passing an implied consent statute.

The least effective constitutional objection to the taking of tests under compulsion is that of unreasonable search and seizure. The statute itself could squarely solve this problem by following the second clause of the 1960 bill providing that an accused should first be arrested and that the arresting officer must have reasonable grounds to believe him drunk before any test is given.[25] Even if the procedure

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[18]Twining v. New Jersey, 211 U.S. 78 (1908).

[19]Holt v. United States, 218 U.S. 245, 252-53 (1910).

[20]Sprouse v. Commonwealth, 81 Va. 374 (1886). The case of Gardner v. Commonwealth, 195 Va. 945, 951, 81 S.E.2d 614 (1954), cites with apparent approval an Ohio decision which made such a distinction.

[21]8 Wigmore, Evidence §§ 2263-65 (3d ed. 1940).

[22]It is clear that one may waive a constitutional privilege. 16 C.J.S. Constitutional Law §§ 89-91 (1956).

[23]See notes, 6, 8, and 9 supra.

[24]There is some disagreement with this statement "on the theory that although the evidence has all the characteristics of physical evidence, it is still in the nature of something coming from within the accused himself and is, therefore, comparable to words of an incriminating nature either spoken or written by him." The Compulsory Use of Chemical Tests for Alcoholic Intoxication—A Symposium, 14 Md. L. Rev. 111, 134 (1954). That such theory is rejected by the overwhelming weight of authority see note 19 supra.

If such a statute were passed in Virginia there would be no problem of informing the accused of his privilege against self-incrimination before he submits to the test. Laughlin, Evidence, Ann. Survey Va. Law, 44 Va. L. Rev. 1195, 1201-02 (1958). But See Ladd & Gibson. The Medico-Legal Aspects of the Blood Test to Determine Intoxication, 24 Iowa L. Rev. 191, 243 (1939).

[25]One legally arrested may be searched and evidence may be seized from him. Lucchesi v. Commonwealth, 122 Va. 872, 94 S.E. 925 (1918).

set forth were not followed in actual enforcement, the question still would be largely academic. Virginia, along with the majority of states, rejects the *Weeks* doctrine and holds that the method of acquisition of evidence has no bearing upon the question of its admissibility.[26] Hence, the guarantee against unreasonable searches and seizures should certainly be no bar to the passage of an implied consent law in Virginia.

II. *Evidence*

The proposed statute could raise some questions from the standpoint of the law of evidence. Section 18-75.1 (g) of the 1960 bill provided that "the result of the summary hearing is not evidence and shall not be subject to comment" in the later criminal proceedings, and the following section completely deleted the last sentence of the present law which provides that the defendant's refusal to request a blood test cannot be commented upon.[27] It would appear that the draftsmen thought they had embodied this last sentence of the present section 18-75.1 into the proposed section 18-75.1 (g), but it is submitted that such is not the case. The result of the summary hearing would be the opinion of one particular judge as to the reasonableness of defendant's refusal to take the blood test, and consequently would be inadmissible as mere opinion evidence, rather than because of a prohibition against comment. Thus, the defeated bill merely stated the law as it already existed, but failed to embody the "no comment" principle of the statute now in effect. Therefore, the bill would have repealed the present law and, by legislative presumption, reverted to the prior rule of the *Gardner* case,[28] allowing comment on the refusal to submit.[29] In light of this it is suggested that any new proposal should

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[26]Hall v. Commonwealth, 143 Va. 554, 130 S.E. 416 (1925); Widgeon v. Commonwealth, 142 Va. 658, 128 S.E. 459 (1925); Casey v. Commonwealth, 138 Va. 714, 121 S.E. 513 (1924); Hall v. Commonwealth, 138 Va. 727, 121 S.E. 154 (1924); McClannan v. Chaplain, 136 Va. 1, 116 S.E. 495 (1923); Quivers v. Commonwealth, 135 Va. 671, 115 S.E. 564 (1923).

Although the question has not been presented in Virginia, jurisdictions considering it have held that alcoholic tests do not violate the right against unreasonable search and seizure. Novak v. District of Columbia, 49 A.2d 88 (D.C. Munci. Ct. App. 1946); State v. Cram, 176 Ore. 577, 160 P.2d 283 (1945); Ash v. State, 139 Tex. Cr. Rep. 420, 141 S.W.2d 341 (1940). However, a federal case arising in Virginia did hold that a physical examination cannot be considered an unlawful search or seizure. Bratcher v. United States, 149 F.2d 742 (4th Cir. 1945).

[27]Va. Code Ann. § 18-75.1 (Supp. 1958).

[28]Gardner v. Commonwealth, 195 Va. 945, 815 S.E.2d 614 (1954).

[29]This presents additional evidentiary questions beyond the scope of the present comment. For a treatment of the Gardner case and the problems and arguments thereunder see 12 Wash. & Lee L. Rev. 82 (1955), and also Annot., 175 A.L.R. 234 (1948).

be clarified by including a reworded version of the last sentence of present section 18-75.2—such as "the failure of the accused to take such a test is not eveidence and shall not be subject to comment in the later trial for driving while intoxicated"—so as to avoid any possible ambiguities.

A further evidentiary problem relates to the physician-patient relationship, which, once established between the doctor taking the blood and the defendant, would make the results of such tests inadmissible as privileged communications. Virginia's narrow physician-patient statute allows the privilege only when the defendant's physical or mental condition is not in issue.[30] Since the driver's physical condition would be a direct issue in the criminal prosecution the privilege would be nonexistent *even if* such a relationship were held to have been established.

III. *Practical Problems*

A number of practical considerations naturally arise in the enforcement of a statute of the type recommended. Some of these problems were well handled in the defeated bill and their incorporation into any new proposal is strongly recommended. Qualified doctors, nurses and technicians to administer the test should be required, thereby assuring the accused of trained personnel to extract his blood. Doctors might express some hesitancy to act under the statute for fear that malpractice insurance would not protect them against possible suits by drivers so tested. Such fear would appear baseless in view of the statement by the Legal Department of the Association of Casualty and Security Companies that taking blood tests under the New York implied consent law would be covered by the standard malpractice policy.[31] Also, the doctors designated by police to administer the test might be concerned about the ability of an intoxicated person to consent. But, once again, if it is realized that the accused does not need to expressly agree to take the test, and that he has the option to refuse, it is obvious that there is no need for concern. The Chief Medical Examiner should be given the authority to approve laboratories which might make the required analysis, since in all probability an implied consent law would increase the number of blood tests to be made.

In other areas of practicality the draftsmen failed to meet certain problems which definitely could, and should, be solved before a statute

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[30]Va. Code Ann. § 8-289.1 (Repl. Vol. 1957).

[31]Weinstein, Statute Compelling Submission To A Chemical Test For Intoxication, 45 J. Crim. L., C. & P.S. 541, 554 (1955).

is enacted. Although the result of the alcohol analysis would have been available to the accused upon request, such result should be made available automatically, thereby helping the defendant decide whether to plead guilty or to contest the charge. A provision allowing the person tested to have an additional test administered by a physician of his own choosing should be included as a check on the police test. Such a provision would prevent police from imprisoning the defendant on the basis of an erroneous test so that he would be unable to have the result verified by his own doctor. This section would only apply where the potential defendant is actually restrained after the test is given, since if he were released he could naturally go to his own doctor. If the driver is held he should be permitted to phone a physician, but there would be no obligation upon the police to actually obtain a private physician or to forego their test until such physician's arrival. If an independent doctor were unobtainable, the results of the state administered test could still be used. The only method of testing provided by the original bill was through the extraction of blood. Perhaps it would be feasible for the legislature to provide an alternate method such as the "drunkometer," thus allowing police to have their own trained personnel available to administer a test giving a more immediate result. A logical extension of the basic principle would be to provide for the taking of blood samples from dead or unconscious persons who were operating automobiles at the time of an accident, so as to assure complete coverage.

In order to make any law effective it must carry sufficient sanctions and penalities for its violation. This is especially true of the statute under discussion. The original bill provided for suspension of the driver's license for one year if he refused to submit to the test, but by the time the proposal reached the Senate the penalty for refusing the test was reduced to less than that for drunk driving. If the statute had been enacted in that form its entire purpose and effect would have been thwarted. Surely the driver who is drunk would automatically refuse the test and suffer the lesser penalty, rather than give valid proof of his intoxication. If an adequate penalty were provided then the very existence of such a law could exercise a tremendous deterrent force on those individuals who might be tempted to drive after having taken several drinks. This would protect their own lives as well as those of other motorists and pedestrians. Therefore, in order to solve the problem, it is suggested that the 1962 Assembly provide *effective* sanctions for the violation of an implied consent provision.