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Requirement Of Arrest In Implied Consent Laws

REQUIREMENT OF ARREST IN IMPLIED CONSENT LAWS

By using the public highways, under an Implied Consent Law,[1] a motorist impliedly consents in advance to take chemical tests[2] *if arrested* for driving while intoxicated, and forfeits his driving privilege if he refuses to take the prescribed test. Focusing its attention upon the arrest requirement,[3] the Supreme Court of North Dakota recently handed down a unique decision which could, to a large extent, nullify the Implied Consent Law in that jurisdiction.

In the case of *Colling v. Hjelle*,[4] according to the State's evidence, a police officer saw Colling speeding, weaving, and twice almost hitting a bridge. The officer stopped Colling and asked him to get out of his car and walk back to the patrol car. He was staggering, and there was a strong smell of alcohol about him. The officer then arrested Colling for driving while under the influence of alcohol, and took him to the police station, where he was asked to take a sobriety test. Colling refused to submit to the test.

Pursuant to North Dakota's Implied Consent Statute,[5] the State Highway Commissioner revoked Colling's motor vehicle operator's license for this refusal to submit to the test. Subsequently, Colling was acquitted of the criminal charge of drunk driving. Colling then sought to have his license reinstated. The State Highway Commissioner denied the request. The district court reversed the Commissioner's

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[1]E.g., Neb. Rev. Stat. § 39-727.03 (1960); N.Y. Vehicle and Traffic Law § 1194 (1960); N.D. Cent. Code § 39-20-01 (Supp. 1963); Va. Code Ann. § 18.1-55 (Supp. 1962).

[2]Tests determine the percentage of alcohol in the blood, by weight, through a direct analysis of the blood, or by analyzing urine, saliva or breath and correlating it to concentration in the blood. Rabinowitch, Medicolegal Aspects of Chemical Tests of Alcohol Intoxication, 39 J. Crim. L., C & P.S. 225 (1948). The generally accepted results are: 0.00% to 0.05%, definitely not under the influence; 0.05% to 0.15% questionable zone; 0.15% or higher, definitely under the influence. Some statutes provide that introduction of test results establishes a prima facie case. Some courts hold that test results establish practically conclusive presumptions. See Heise, Chemical Tests for Intoxication—Scientific Background and Public Acceptance, 41 Marq. L. Rev. 296 (1957-58); 29 Conn. B.J. 147 (1955); note, 37 N.D.L. Rev. 212 (1961); 18 Wash. & Lee L. Rev. 370 (1961).

[3]As pertinent here, the Implied Consent Law provides: "The test or tests shall be administered at the direction of a law enforcement officer only after placing such person . . . under arrest and informing him that he is or will be charged with the offense of driving . . . a vehicle . . . while under the influence of intoxicating liquor." N.D. Cent. Code § 39-20-01 (Supp. 1963).

[4]125 N.W.2d 453 (N.D. 1963).

[5]N.D. Cent. Code § 39-20-04 (Supp. 1963).

order and restored Colling's license, which action was affirmed by the Supreme Court of North Dakota.

The court based its decision on a finding that Colling was not under lawful arrest when asked to take the sobriety test, as required by the Implied Consent Law.[6] The crime charged was a misdemeanor, for which under North Dakota law, a lawful arrest could be made only when the crime was committed in the presence of the arresting officer.[7] According to the court, acquittal of the accused was a determination that the crime charged had not been committed, either in the presence of the officer or otherwise. Therefore, the arrest was not lawful and the sanctions of the Implied Consent Law could not be invoked.

The correctness of the court's holding depends upon the validity of its premise that an arrest is not lawful if the accused is acquitted of the charge for which he is arrested. It seems there is only scant authority to support this premise in its application to the *Colling* case. A few courts have held that an officer making an arrest for a misdemeanor without a warrant must determine at his peril whether an offense has been committed. But, these holdings involve circumstances distinguishable from the *Colling* case, such as where the officer's conduct was improper,[8] where the arrest was based on outside information (rather than the officer's knowledge),[9] or where authority to arrest

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[6]Supra, note 3. As shown in the above excerpt, the statute requires an arrest. That the arrest must be lawful is an obvious presumption, but the statute requires nothing extraordinary to make it lawful.

[7]In North Dakota an officer derives authority to make an arrest without a warrant for a misdemeanor from § 29-06-15, N.D. Cent. Code which provides:

"A peace officer, without a warrant, may arrest a person:

1. For a public offense, committed or attempted in his presence; ...

5. For such public offenses. not classified as felonies and not committed in his presence as provided for under section 29-06-15.1"

(§ 29.06-15.1 referred to in paragraph 5 pertains to the arrest of a non-resident driver involved in a traffic accident. The principal case involved neither an accident nor a non-resident driver.)

[8]Edgin v. Talley, 169 Ark. 662, 276 S.W.691 (1925). (officer standing on sidewalk, suspecting minor offense shot through car, injuring passenger, when driver failed to heed shouted instruction to stop); Adair v. Williams, 24 Ariz. 422, 210 Pac. 853 (1922) (after forcibly entering house on mere suspicion, officer arrested occupants for misdemeanors thereafter committed in his presence).

[9]When an accused was arrested for driving without a license because the officer had been informed that accused's license had been suspended, the court said:

"[W]here an officer makes an arrest without a warrant for an alleged crime which has not been committed in his presence, such arrest is illegal if the crime has not actually been committed, and if the arrest is followed by imprisonment, the officer is liable for false imprisonment, notwithstanding he had reasonable and probable cause for believing that a crime has been committed by the person arrested...." McKendree v. Christy, 29 Ill. App. 2d 195, 172 N.E.2d 380, 381 (1961).

without a warrant was restricted by statute to misdemeanors constituting breaches of the peace.[10]

As pointed out in the leading case of *Coverstone v. Davies*,[11] the fact that an accused was exonerated in the criminal proceedings has no bearing upon the legality of the arrest.[12] An acquittal is merely an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.[13] The critical question is whether the acts done in the presence of the arresting officer *justified* him in making the arrest without a warrant.[14] Courts have stated the various ways in which an officer can justify such an arrest, usually including expressions such as reasonable or probable cause. As far back as 1922, in *Garske v. United States*,[15] it was said:

> "It is the well established doctrine now throughout the United States that for a crime, which they have reasonable cause to believe is being committed in their presence, though it be a misdemeanor, duly authorized officers may make arrest without a warrant."[16]

The minimum grounds for reasonable cause would be such that on those circumstances alone, the officer would be justified in making a complaint upon which a warrant might be issued.[17] Some consider an officer to have reasonable grounds when "his senses afford him knowledge,"[18] or when "facts and circumstances occurring within his observation, in connection with ... common knowledge, give him probable cause to believe"[19] a crime is being committed in his presence. However, reasonable cause is most often said to justify an arrest simply when "circumstances exist that would cause a reasonable person to believe that a crime has been committed in his presence."[20]

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[10]For a good discussion of this distinction, see State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954), where the court points out that broadening the power to arrest for a misdemeanor without a warrant should be accomplished by the legislature.

[11]38 Cal. 2d 315, 239 P.2d 876 (1952).

[12]239 P.2d at 878.

[13]Helvering v. Mitchell, 303 U.S. 391, 397 (1938); Lewis v. Frick, 233 U.S. 291, 302 (1914).

[14]239 P.2d at 878.

[15]1 F.2d 620 (8th Cir. 1924).

[16]Id. at 622.

[17]State ex rel. Neville v. Mullen, 63 Mont. 50, 207 Pac. 634, 636 (1922).

[18]4 Am. Jur. Arrest § 29 (1936).

[19]Cave v. Cooley, 48 N.M. 478, 152 P.2d 886, 888 (1944).

[20]Ryan v. Conover, 59 Ohio App. 361, 18 N.E.2d 277, 279 (1938). This rule, stated in various forms, was followed in these cases: Peru v. United States, 4 F.2d 881, 883 (8th Cir. 1925); United States v. Stafford, 296 Fed. 702, 704-05 (5th Cir. 1923); United States v. Wiggins, 22 F.2d 1001, 1002 (D. Min. 1927); Coverstone v.

The Supreme Court of the United States has called the probable cause rule the best compromise that has been found for accommodating the interests of the state and its citizens. On one hand, it protects citizens from unreasonable or arbitrary conduct on the part of law enforcement officers. On the other, it gives fair leeway to the state in enforcing the law for the community's protection.[21]

In light of the strong support for holding an arrest without a warrant to be lawful when an officer reasonably believes a misdemeanor is being committed in his presence, it is submitted that the *Colling* case was wrong in holding the arrest was rendered unlawful by defendant's subsequent acquittal.

Although not expressed in the *Colling* case, no doubt one reason for the holding is that the court felt a revocation following acquittal would be harsh.[22] In this connection it must be noted that the revocation under the Implied Consent Law is for refusing to submit to a sobriety test, not for drunk driving.[23]

The *Colling* decision was based almost entirely upon North Dakota's statutes, but the same reasoning could have been applied in any state with similar statutes, such as in New York.[24] New York, however, has dealt with this problem and reached the opposite result.

Davies, 38 Cal 2d 315, 239 P.2d 876, 879 (1952); State v. Reynolds, 101 Conn. 224, 125 Atl. 636, 637 (1924); Hill v. Day, 168 Kan. 604, 215 P.2d 219, 224 (1950); Commonwealth v. Chaplin, 307 Ky. 630, 211 S.W.2d 841, 845 (1948); Giannini v. Garland, 296 Ky. 361, 177 S.W.2d 133, 135 (1944); Cave v. Cooley, 48 N.M. 478, 152 P.2d 886, 889 (1944); Bock v. City of Cincinnati, 43 Ohio App. 257, 183 N.E. 119, 121 (1931); Noce v. Ritchie, 109 W. Va. 391, 155 S.E. 127, 128 (1930); State ex rel. Verdis v. Fidelity & Cas. Co. of N.Y., 120 W. Va. 593, 199 S.E. 884, 887 (1938).

[21]Brinegar v. United States, 338 U.S. 160, 176 (1949).

[22]In upholding a revocation under the Implied Consent Law, a New York case conceded that it appeared a bit harsh, but pointed out that petitioner's acquittal did not preclude revocation. Anderson v. MacDuff, 208 Misc. 271, 143 N.Y.S.2d 257 (Sup. Ct. 1955).

[23]Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N.W.2d 75 (1961); People v. Wagonseller, 25 Misc. 2d 217, 205 N.Y.S.2d 933 (Sup. Ct. 1960); Combes v. Kelly, 2 Misc. 2d 491, 152 N.Y.S.2d 934 (Sup. Ct. 1956); Anderson v. MacDuff, 208 Misc. 271, 143 N.Y.S.2d 257 (Sup. Ct. 1955).

[24]In both New York and North Dakota Implied Consent Laws were initially proposed which did not make arrest a prerequisite. Both were amended—North Dakota's before enactment, and New York's after the initial enactment—to include a requirement that the accused be placed under arrest before a test could be demanded. See N.Y. Vehicle and Traffic Law § 1194-1; N.D. Cent. Code § 39-20-01 (Supp. 1963).

Also, statutes in both states authorize an officer to arrest without a warrant only when a misdemeanor is "committed or attempted in his presence." See N.Y. Code Crim. Proc. § 177; N.D. Cent. Code § 29-06-15 (1960).

In *Anderson v. MacDuff*,[25] a New York trial court sustained a commissioner's revocation of the petitioner's license for failure to take a blood test after petitioner had been acquitted of drunk driving charges. The court pointed out that the operation of vehicles upon public highways is a privilege, not a right, and that when conditions prescribed by the legislature are not met, the privilege may be denied to prevent unsafe driving on the highways.[26] Consent to take a sobriety test under the Implied Consent Law is such a condition.

Also, a Nebraska case, *Prucha v. Department of Motor Vehicles*,[27] upheld a revocation after acquittal. The court felt acquittal of a criminal charge of drunk driving had no bearing upon the separate statutory proceedings under the Implied Consent Law. This holding is analogous to the United States Supreme Court decisions holding that acquittal on a criminal charge does not bar a remedial civil action by the Government.[28]

A decision such as *Colling* is not only unnecessary; it is positively harmful. In addition to confusing the law of arrest in that jurisdiction, and perhaps making officers liable whenever a defendant is acquitted,[29] it has the further effect of virtually invalidating the Implied Consent Law.

The most obvious purpose of Implied Consent Laws is to coerce drivers into submitting to chemical tests. To hold that acquittal precludes revocation removes any incentive to take the test. When a driver refuses the test and is subsequently convicted, his license will be revoked for the refusal, but it would usually be suspended anyway for the conviction of drunk driving.[30] On the other hand, if he refuses the test and is acquitted of drunk driving charges, he goes free of any penalty. Moreover, in many jurisdictions, refusal to take sobriety tests cannot be commented upon in the trial for drunk

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[25]208 Misc. 271, 143 N.Y.S.2d 257 (Sup. Ct. 1955).

[26]Id. at 258-59; accord, Prucha v. Deparment of Motor Vehicles, 172 Neb. 415, 110 N.W.2d 75 (1961); Combes v. Kelly, 2 Misc. 2d 491, 152 N.Y.S.2d 934 (Sup. Ct. 1956).

[27]172 Neb. 415, 110 N.W.2d 75 (1961).

[28]Helvering v. Mitchell, 303 U.S. 391, 397 (1938); Murphy v. United States, 272 U.S. 630, 631-32 (1926); Stone v. United States, 167 U.S. 178, 188-89 (1897).

[29]"[T]he court has... also invited all motorists to sue honest, conscientious law enforcement officials for false arrest, where the officials have made a reasonable mistake in the course of doing their duty." Dissent, Colling v. Hjelle, 125 N.W.2d at 467.

[30]E.g., Va. Code Ann. § 18.1-59 (Repl. Vol. 1960), which provides that a conviction of drunk driving will, of itself, operate to deprive the convicted person of the right to drive for a period of one year from the date of such judgment.

driving.[31] In such jurisdictions, the accused would be further encouraged to refuse a sobriety test.

Holding that an arrest without a warrant is made unlawful by acquittal renders an Implied Consent Law ineffective as an alternative method of invoking legal sanctions for driving while drinking. The Implied Consent Law could be invoked independent of the outcome of the criminal prosecution only where the arresting officer first obtained a warrant, thereby making the arrest "lawful." The disadvantages of requiring a warrant to arrest a driver for drunk driving are fairly obvious. While the officer is engaged in obtaining a warrant and relocating the driver to serve it, the alcoholic content of the driver's blood would be decreasing.[32] Or, conversely, the driver would be free to claim that he was not intoxicated while he was driving, but that his blood-alcohol level increased due to alcohol consumed between the time he was first apprehended and the time the warrant was served.

It appears that there are three ways in which states with Implied Consent Laws could resolve the question of the relation of acquittal to the arrest requirement.

First, they could remove the requirement of arrest from Implied Consent Laws. However, a New York trial court held that this would violate due process, stating that, "conferring upon police officers the right to make a request under the guise of authority concerning one's person without specific process and without lawful arrest clearly amounts to an unlawful infringement upon one's liberty."[33] Consequently, this approach appears dubious.

Second, they could draft new Implied Consent Laws to include a provision expanding the authority of a peace officer to make a lawful arrest without a warrant when he has reasonable cause to believe

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[31]North Dakota's statute, N.D. Cent. Code § 39-20-08 (1960), provides that comment upon refusal is not admissible in evidence if accused does not testify. Accord Va. Code Ann. § 18.1-55.1(i) (1964 Supp.). Also, see e.g., State v. Munroe, 22 Conn. Supp. 321, 171 A.2d 419 (Cir. Ct. 1961); Stuart v. District of Columbia, 157 A.2d 294 (Munic. Ct. App. D.C. 1960); State v. Ingram, 67 N.J. Super. 21, 169 A.2d 860 (Passaic County Ct. 1961); State v. Paschal, 253 N.C. 795, 117 S.E.2d 749 (1961); Commonwealth v. Kravitz, 400 Pa. 198, 161 A.2d 861 (1960); Saunders v. State, 172 Tex. Crim. 17, 353 S.W.2d 419 (1961); State v. Hedding, 122 Vt. 379, 172 A.2d 599 (1961).

[32]The alcohol oxidizes and the blood-alcohol level decreases about .02% per hour. Ladd & Gibson, Legal-Medical Aspects of Blood Tests to Determine Intoxication, 29 Va. L. Rev. 749, 754 (1943).

[33]127 N.Y.S.2d at 127.