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Admissibility of Blood Sample Evidence in Civil Case

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Use of the Uniform Ticket simplifies and reduces the administrative burden on all officials concerned with enforcing the traffic safety program. The police officer can quickly and conveniently meet all legal requirements of drawing, certifying, filing, and serving a complaint and summons. The police records bureau has a complete record of traffic arrests and case dispositions. The judge has a permanent traffic docket and a convenient report form for reporting traffic convictions. The Uniform Ticket also has the quality of being "non-fixable." The active aid of three public officials—the individual officer, his supervisor, and the judge—would be required to dispose of a traffic citation without judicial process. But most important, proper use of the Uniform Ticket will insure compliance with the Traffic Rules for Courts of Limited Jurisdiction, thus avoiding needless reversal of traffic convictions on procedural grounds. Effective traffic safety programs depend upon certainty of punishment of traffic law violators. Eliminating dismissals of traffic violation prosecutions because of procedural technicalities would do much to further this end.

ADMISSIBILITY OF BLOOD SAMPLE EVIDENCE IN CIVIL CASE

At the instigation of a police officer, a blood sample was taken from defendant Clinton as he lay hospitalized with serious injuries resulting from an automobile collision in which another person was killed. The alcohol reading of the blood sample was 0.210, well above presumptive intoxication.[1] Plaintiff, in an action for personal injuries and wrongful death, sought to introduce defendant's blood test in evidence. The trial court, in the absence of the jury, heard conflicting testimony and concluded that the blood sample was inadmissible because taken without conscious consent. On appeal from a judgment for defendant, the court reversed and remanded. *Held*: "Conscious

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[1] Wash. Laws Ex. Sess. 1965, ch. 155, § 60(2)(c), at 1993. The court in the principal case said: "The importance of the blood sample evidence is apparent from the reading which was 0.210, which is well above presumptive intoxication under R. C. W. 46.56.010..." 66 Wash. Dec. 2d at 898, 406 P.2d at 625. However, such presumption cannot be applied in a civil case, according to Patton v. Tubbs, 66 Wash. Dec. 2d 269, 402 P.2d 355 (1965).

consent" of the person from whom blood is taken is necessary for it to be admissible in evidence; if the trial judge finds there is some evidence of consent, the question of consent is to be decided by the jury, which should be given "all ... evidence, including the result of the blood test." *Poston v. Clinton,* 66 Wash. Dec. 2d 896, 406 P.2d 623 (1965).

The Revised Code of Washington specifies that no person shall be required to "submit" to chemical analysis of his blood, and that "refusal to submit ... shall not be admissible in evidence in any criminal prosecution ... or in any civil action."[2] The Washington court has construed this statute as granting a right to "refuse to consent."[3] The existence of consent is a question of fact.[4] It is a widely accepted principle of evidence in both civil and criminal cases that the trial judge should decide preliminary questions of fact necessary to determine admissibility of evidence challenged under an exclusionary rule.[5] There are, however, exceptions to this general principle.[6] Among the exceptions are holdings that, on a preliminary showing that a reasonable man might find either way upon a disputed question of fact, the judge must pass the question of admissibility along to the jury for their determination.[7]

In the principal case, the court reasoned that the legislature intended to require consent to the taking of any blood sample. Without distinguishing between civil and criminal cases, the court concluded that, if conscious consent is not given, the blood test is inadmissible. The court then said: "[W]isely or not, our system leaves the resolution of issues of fact on conflicting evidence to the jury."[8] In holding the

[2] Wash. Laws Ex. Sess. 1965, ch. 155, § 60(3), at 1994, (formerly WASH. REV. CODE § 46.56.010).

[3] Zenith Transport, Ltd. v. Bellingham Nat'l Bank, 64 Wn. 2d 967, 395 P.2d 498 (1964), 40 WASH. L. REV. 375 (1965).

[4] State v. Reed, 56 Wn. 2d 668, 676, 354 P.2d 935, 941 (1960).

[5] MCCORMICK, EVIDENCE § 53, at 123 (1954); 9 WIGMORE, EVIDENCE § 2550 (3d ed. 1940); Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence,* 40 HARV. L. REV. 392 (1927). The question of consent to the taking of a blood sample was held to be a preliminary question for the judge to decide in People v. Knox, 178 Cal. App. 2d 502, 3 Cal. Rep. 70, 75 (Dist. Ct. App. 1960); People v. Cavallero, 178 Cal. App. 2d 5, 2 Cal. Rep. 687, 691 (Dist. Ct. App. 1960). On the respective functions of judge and jury as to preliminary questions of fact, see generally Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

[6] *E.g.,* People v. Miner, 96 Cal. App. 2d 43, 214 P.2d 557 (1950) (fact question whether statement was accusatory left to the jury); State v. Perelli, 128 Conn. 172, 21 A.2d 389 (1941) (fact question whether testimony was based on inadmissible memorandum left to jury); Cline v. Commonwealth, 312 Ky. 646, 229 S.W.2d 435 (1950) (fact question whether defendant gave consent to search of home left to jury).

[7] This approach is discussed, and other cases cited, in Maguire & Epstein, *supra* note 5, at 420-21.

[8] 66 Wash. Dec. 2d at 900, 406 P.2d at 626.

question of consent to be one for the jury, the court reasoned that "appropriate instructions" would serve as a safeguard against the "possible prejudicial effect" of the blood test should it be found to be inadmissible.

The court's requirement of "*conscious* consent" to the taking of a blood sample raises problems with respect to police investigation and trial procedure. The blood test for intoxication apparently now cannot be used when the subject is temporarily unconscious[9] or in such a high state of intoxication that consent cannot be given.[10] And at trial a question of fact—difficult to resolve—will always be raised.

By its decision in the principal case it appears that the Washington Court has taken a more restrictive approach than is required under the federal constitution.[11] The court has made it clear that it considers such invasion of a human being's veins, without his consent, to be in all cases a violation of basic rights to privacy and protection against forced self-incrimination. That this was the legislative intent is made clear by the recent passage of a provision requiring a "warning" to be given of the "constitutional right" to refuse to submit to a blood test.[12]

It is not clear from the opinion what the standard of consent will be. An affirmative showing of consent does not seem required by the statute, which speaks in terms of submission.[13] Cases in other juris-

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[9] Many authorities are to the contrary, holding that blood test evidence obtained from an unconscious person is admissible. *E.g.*, Breithaupt v. Abram, 352 U. S. 432 (1957); People v. Haeussler, 41 Cal. 2d 252, 260 P.2d 8 (1953), *cert. denied*, 347 U. S. 931 (1954); State v. Sturtevant, 96 N. H. 99, 70 A.2d 909 (1950).

[10] It has been argued that a very high blood alcohol reading shows that the subject was too intoxicated to consent. Courts which have considered this argument have rejected it. Bowden v. State, 95 Okla. Crim. 382, 246 P.2d 427 (1952); Jones v. State, 159 Tex. Crim. 29, 261 S. W.2d 161 (1952), *cert. denied*, 346 U. S. 830 (1953).

[11] The question whether the unconsented to taking of blood samples would violate federal constitutional standards was investigated by the United States Supreme Court in Briethaupt v. Abram, 352 U.S. 432 (1957), where it was held that consent was not required. However, when the Court made federal self-incrimination standards binding on the states, Mallory v. Hogan, 378 U.S. 1 (1964), some doubt was cast on *Briethaupt*. The question whether the Court has changed its approach was resolved by Schmerber v. California, 34 U.S.L. Week 4586 (U.S. June 20, 1966), where the Court held the taking of a blood sample without the subject's consent did not deny petitioner due process, did not violate his privilege against self-incrimination, and did not constitute unlawful search and seizure.

The Court in *Schmerber* found, as to the self-incrimination claim, that a distinction between "testimonial" and "physical" evidence allowed introduction of the blood sample evidence. Such a distinction might be crucial under WASH. REV. CODE § 4.44.080 (1956). See text at note 21 *infra*.

[12] Wash. Laws Ex. Sess. 1965, ch. 155, § 60(4). The court in the principal case rejected the argument that this statute should operate retrospectively.

[13] The court in the principal case read the statute to require *consent*. This is not a necessary interpretation; other courts have rejected the contention that the terms "submit" and "consent" are synonymous. See State v. Trumbull, 23 Conn. Supp. 41, 176 A.2d 887, 889-90 (1961), and cases cited therein.

dictions have held that failure to resist implies consent.[14] It would be unfortunate if actual expressed or written consent was required by the Washington court. Public policy would not seem to require such expression. Washington's blood sample statute is more favorable to the drinking driver than statutes of many sister states,[15] and police investigatory powers should not be unnecessarily restricted while highway slaughter increases. Consent is required in order to protect the dignity of the individual and prevent his will from being overcome by force. If no force is used, and the subject consciously submits to the taking, the objectives are met.

In contrast to the commendable position taken by the court on the consent issue is its decision to let the disputed question of fact go to the jury. The opinion fails to give a satisfactory rationale why this approach was adopted in the principal case.[16] The holding was not dictated by principles of stare decisis. The cases cited by the court for the proposition that the jury should decide questions of fact did not involve *preliminary* facts upon which admissibility of evidence turned.[17]

The approach of the court in the principal case is not consistent with the Washington position in related areas of criminal law. The trial judge, in Washington, makes the preliminary determination on the question of voluntariness of a confession.[18] The court has recognized that it is correct for the trial judge to decide factual issues necessary for determining admissibility of evidence gained by search and seizure.[19] And the court has held that it is the province of the judge to determine whether dying declarations were, in fact, given in anticipation of death.[20] The principal case is, of course, distinguish-

[14] State v. Koenig, 240 Iowa 592, 36 N.W.2d 765 (1949). In Marshall v. State, 159 Tex. Crim. 268, 262 S.W.2d 491 (1953), a laboratory technician told defendant that he intended to take a specimen and defendant offered his arm in the proper position; this was held to be sufficient consent. *Cf.* State v. Chavis, 83 R. I. 360, 116 A.2d 453, 455 (1955).

[15] Some states, for example, "imply" consent from the application for a drivers license. See discussion of the various state statutes in Slough & Wilson, *Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing*, 44 MINN. L. REV. 673 (1960).

[16] The court simply fails to recognize that, in many cases, preliminary questions are decided by the trial judge.

[17] The court cited Shaw v. Browning, 59 Wn. 2d 133, 367 P.2d 17 (1961), and Trosper v. Heffner, 51 Wn. 2d 268, 317 P.2d 530 (1957). Neither case involved preliminary questions of fact necessary to determine admissibility of evidence challenged under an exclusionary rule.

[18] WASH. R. PLEAD., PRAC., PROC. 101.20W.

[19] State v. Reed, 56 Wn. 2d 668, 676, 354 P.2d 935, 941 (1960).

[20] State v. Power, 24 Wash. 34, 45, 63 Pac. 1112, 1114 (1901) *(semble)*; Territory v. Klehn, 1 Wash. 584, 21 Pac. 31 (1889). *But see* State v. Mooney, 185 Wash. 681, 56 P.2d 722 (1936).

able in that it was a civil, rather than a criminal, action. Yet the court here construed the statute, which is directed toward *both* civil and criminal actions, without suggesting that a different procedure should apply in a criminal trial. It appears, then, that the court, in blood sample cases, has departed from the procedure which it has adopted in related areas of law.

Further the court failed to refer to a statutory provision which appears to be in point. The Washington Code specifies: "All questions of law including the admissability of testimony, [and] the facts preliminary to such admission ... are to be decided by the court ... "[21]

The right to refuse to submit to a blood test is usually based on the right to be free from unreasonable search and seizure.[22] The primary purpose of excluding evidence seized in violation of this right is to prevent illegal police activities.[23] It appears, however, that in *civil* cases the exclusion of evidence taken in violation of this right is not favored.[24] Yet the Washington blood test statute requires exclusion in *both* civil and criminal cases. It is suggested that, by allowing the preliminary fact question to go to the jury, the court indicated an unwillingness to extend this exclusionary rule beyond the minimum requirements of the statute. This reflects the disfavor with which the rule is viewed in civil cases. The requirements of admissibility set out by the statute are technically met by instructing the jury to disregard the evidence if they find a lack of consent.[25]

There is basis for criticism of the court's failure in the principal case to give full effect to the statutory exclusionary rule. Here the evidence was seized by police order. This fact should cause applica-

[21] WASH. REV. CODE § 4.44.080 (1956). Neither party referred to this statute in his brief.

[22] See, *e.g.*, State v. Kroening, 274 Wis. 266, 79 N.W.2d 810 (1956). Occasionally the holding is grounded in part on the privilege against self-incrimination. See generally Slough & Wilson, *supra* note 15, at 688-96.

[23] See Mapp v. Ohio, 367 U.S. 643 (1961).

[24] In Sackler v. Sackler, 16 App. Div. 2d 423, 229 N. Y. S.2d 61 (1962), *aff'd*, 15 N. Y.2d 40, 203 N. E.2d 481, 255 N. Y. S.2d 83 (1964), the court said at 64: "None of the reasons given by the courts for excluding in criminal trials the evidence gathered by unreasonable search and seizure applies to civil causes." See also Walker v. Penner, 190 Ore. 542, 227 P.2d 316 (1951); 110 U. PA. L. REV. 1043 (1962); 8 UTAH L. REV. 84, 87 (1962).

The court in the principal case failed to place any emphasis on the fact that the evidence was taken at the instigation of a police officer. The Supreme Court, in Cleary v. Bolger, 371 U. S. 392 (1963), was faced with the question whether evidence illegally seized by a government official should be admissible in an administrative proceeding. Justice Goldberg took the position that there was no need for a federal injuction because of the substantial likelihood, in light of Mapp v. Ohio, 367 U. S. 643 (1961), that the illegally obtained evidence would be excluded in the state proceedings.

[25] This conclusion necessarily follows from the court's decision in the principal case.

tion of the reasons given by the courts for excluding, in criminal trials, evidence gathered by unreasonable search and seizure. Further, there is good reason not to leave this issue of fact to the jury. It is doubtful that the jury would be able to disregard the evidence, particularly when there is—as in the principal case—no question as to its validity. It is doubtful that the average jury would be interested in performing the intellectual "gymnastic" of disregarding the evidence, their basic aim being to do justice in the particular case rather than promote long-term policies of law.[26]

The court's approach, however, is not unique. On this particular question,[27] and in related areas of law,[28] other courts have given preliminary fact questions to the jury. Perhaps this is the result of a "tenderness" for the party that would be adversely affected by exclusion.[29] Whatever the basic reason behind the decision here, it seems unfortunate that the court chose to ignore a commonly accepted evidentiary principle by stating simply that "our system" gave them no choice but to submit the question to the jury.[30]

DISCRETIONARY ACTS PROTECTED BY GOVERNMENTAL IMMUNITY

Plaintiffs sought damages from the State of Washington for property destroyed by a juvenile escapee from Green Hill School, who set fire to a church and adjoining house. Plaintiffs alleged, *inter alia,* that the state was negligent in maintaining an "open program" in a "close security" institution, and in assigning the juvenile, regarded as a security risk, to the "open program."[1] Plaintiffs relied on a recent statute purportedly abolishing state immunity from liability for torts committed by officials, whether acting in a "governmental" or "prop-

[26] MCCORMICK, EVIDENCE § 53, at 123 (1954).
[27] McCreary v. State, 165 Tex. Crim. 436, 307 S.W.2d 948 (1957).
[28] Cases cited note 6 *supra.* See discussion and cases in 9 WIGMORE, EVIDENCE § 2550 (3d ed. 1940).
[29] MCCORMICK, EVIDENCE § 53, at 124 (1954).
[30] 66 Wash. Dec. 2d at 900, 406 P.2d at 626.

[1] Schools such as the one from which the juvenile escaped are "designated as close security institutions to which shall be given the custody of children with the most serious behavior problems." WASH. REV. CODE § 72.05.130(4) (1959). The institution in question was comprised of various cottages to which boys were assigned. One cottage provided "maximum security and disciplinary isolation when required," but others were part of an "open program" which became "progressively less restrictive relative to assignment to work details, unescorted movement between details and school classes, recreational outlets, and intercottage association." 67 Wash. Dec. 2d at 246-47, 407 P.2d at 442.