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Constitutional Law: Self-Incrimination and Intoxication Tests

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CONSTITUTIONAL LAW: SELF-INCRIMINATION AND INTOXICATION TESTS

In the case of *Spencer v. State*,[1] the accused was stopped by the police while driving a car on the streets of Oklahoma City. He was taken to the police station where he was charged with driving while intoxicated. After being jailed, the accused was taken to a room where he was requested to perform certain acts under the direction of the police. He was first directed to place his finger to his nose while his eyes were closed and his head was back. The officer giving him the test testified that the accused was uncooperative. Next the accused was directed to walk a line. The officer showed him how he was too walk, heel and toe. These coordination tests are called the Alcoholic Influence Test.

While he was performing these tests, a movie camera set in the corner of the room took pictures of the accused without his knowledge or consent, and without him being advised of his right against compulsory self-incrimination. The moving pictures were introduced in evidence and shown to the jury in the trial court. This was objected to by the defense as a violation of the accused's right against self-incrimination under the federal and state constitutions. The objection was overruled and the accused was convicted. The Court of Criminal Appeals reversed the conviction on the ground that the introduction of the film violated the accused's right against compulsory self-incrimination under the Oklahoma Constitution. The court further held that no waiver of the accused's right took place because: (1) he did not of his own volition freely pose for the pictures; (2) he was not advised that the tests he performed were optional; (3) he was not advised of his rights concerning the tests.

Tracing the origin of the concept "that no man shall be compelled to incriminate himself"[2] would involve a lengthy historical survey. The concept as we know it got its start as a rule of law during the period of the great struggle between the common law and the ecclesiastical courts.[3] The right against compulsory self-incrimination came to us through our English heritage and has constitutional sanction in the United States.[4]

The law regarding the extent of the right is not clearly defined. A majority of state courts apply the right against self-incrimination only to testimonial evidence and not to physical demonstrations or moving pictures of tests.[5] Under the majority rule even a compulsory examination is admissible in evidence as long as the defendant is not compelled to answer questions about the examination. The Oklahoma Constitution is broader in scope and includes all evidence involuntarily given.[6]

The cases in Oklahoma concerning the results of intoxication tests, where the constitutional question of self-incrimination has been raised, are

[1] 404 P. 2d 46 (Okla. Cr. App. 1965).
[2] 8 WIGMORE, EVIDENCE § 2250 (3d. ed. 1940).
[3] 8 WIGMORE, EVIDENCE § 2250 n. 47 (3d ed. 1940).
[4] U.S. CONST. amend. V.
[5] Skidmore v. State, 59 Nev. 320, 92 P.2d 979 (1939); State v. Grayson, 239 N.C. 453, 80 S.E.2d 387 (1954).
[6] OKLA. CONST. art. 2, § 21.

few and most are recent.[7] The latest decision was in September, 1965.[8] It concerned the taking of a blood sample from the accused while the accused was unconscious. The court held the admission of the results of the blood test for alcohol to be in violation of the accused's right against self-incrimination.

The Oklahoma Court has been consistent in the interpretation of the state constitutional provision against compulsory self-incrimination. In the *Spencer* case the court cites *Apodaca v. State*[9] as controlling on the question of the extent of the right against compulsory self-incrimination. In the *Apodaca* case the accused was compelled to submit to a urinalysis to determine alcoholic influence. In ruling that the results of the test were inadmissable, the Texas court said: "[T]he demonstration by an act which tends to self-incrimination is as obnoxious to the immunity guaranteed by the Constitution as one by words."[10]

The element of compulsion is the crux of the concept. Oklahoma adheres to the view that individual rights should be construed liberally to prevent compulsory self-incrimination.[11] Several other jurisdictions hold the same as Oklahoma on the consent to giving evidence. They hold that consent must be clearly given by the accused with full knowledge of his rights and full knowledge of the nature of the test. The mere failure to object to the test or demonstration in those states does not amount to a waiver of the accused's constitutional right against compulsory self-incrimination.[12] This is the same rationale as that of the *Spencer* case. The accused never objected to performing the tests; but this did not amount to consent because he was not informed enough about the transaction taking place so that he could make a decision.

The compulsion involved need not be actual physical violence or threats; the presence of a police officer being sufficient. When the accused does not freely enter into such examinations or tests, but does so under fear engendered by the police, sufficient compulsion is present.[13] "Compulsion is the keynote of the prohibition and to render evidence inadmissible on the grounds that the defendant was compelled to produce it against himself, it must appear that such compulsion was used to rob the accused of his volition in the matter."[14] The Court of Criminal Appeals in the *Spencer* case cites a Georgia case and an Alabama case on the question of compulsion.[15] In both those cases the accused was charged

[7] Hinkefent v. State, 267 P.2d 617 (Okla. Cr. App. 1954); Logan v. State, 269 P.2d 380 (Okla. Cr. App. 1954); Alexander v. State, 305 P.2d 572 (Okla. Cr. App. 1956); Cox v. State, 395 P.2d 954 (Okla. Cr. App. 1964).

[8] Lorenz v. State, 406 P.2d 278 (Okla. Cr. App. 1965).

[9] 140 Tex Cr. 593, 146 S.W.2d 381 (1941).

[10] *Id.* at 383.

[11] Kuhn v. State, 70 Okla. Cr. 119, 104 P.2d 1010 (1940).

[12] Bethel v. State, 178 Ark. 277, 10 S.W.2d 370 (1928); State v. Newcomb, 220 Mo. 54, 119 S.W. 405 (1909); People v. Corder, 244 Mich. 274, 221 N.W. 309 (1928); State v. Coleman, 96 W.Va. 544, 123 S.E. 580 (1924).

[13] Alexander v. State, *supra* note 7.

[14] 16 C. J. *Criminal Law* § 1097 (1918).

[15] Allbright v. State, 92 Ga. App. 251, 88 S.E.2d 468 (1955); Bates v. State, 40 Ala. App. 549, 117 So.2d 258 (1959).