



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable Homer Garrison, Jr., Director  
Department of Public Safety  
Austin, Texas

Dear Sir:

Opinion No. 0-1929

Re: Is it permissible in cases where the defendant is charged with driving a motor vehicle while under the influence of intoxicating liquor to present evidence of the amount of alcohol in the system of the defendant as determined by breath tests, blood tests, and urine tests made when such charges were filed?

We are in receipt of your request for our opinion, from which we quote in part:

"Under the existing statutes, would it be permissible, in cases where the defendant is charged with driving under the influence of intoxicating liquors, to present evidence of the amount of alcohol in the system of the defendant as determined by breath tests, blood tests, and urine tests made when such charges were filed?"

Article 802 of the Penal Code of Texas, 1925, as amended, reads as follows:

"Any person who drives or operates an automobile or any other motor vehicle upon any street or alley or any other place within the limits of any incorporated city, town, or village, or upon any public road or highway in this state while such person is intoxicated, or in any degree under the influence of intoxicating liquor, shall upon conviction be confined in the penitentiary for not more than two (2) years, or be confined in the county

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jail for not less than five (5) days nor more than ninety (90) days and fined not less than Fifty Dollars (\$50) nor more than Five Hundred Dollars (\$500)."

The above article was first incorporated into the statutes by the Acts of the Second Called Session of the Thirty-eighth Legislature in 1923. (Acts 2nd C.S. 1923, p. 56). It has been twice amended, once in 1925 at the First Called Session of the Forty-fourth Legislature, (Acts 44th Leg. 1st C. S., p. 1654), and again by the Forty-fifth Legislature at its Regular Session in 1937 (Acts 45th Leg. p. 108). However, the amendments did little to change the original definition of the crime, being principally devoted to the penalty. No effort has been made to prescribe any different rule of evidence with reference to the specific offense. Of course, it is always incumbent on the State to prove beyond a reasonable doubt that the defendant was under the influence of intoxicating liquor at the time of the alleged offense. *Hittson v. State*, 134 Tex. Cr. R. 131, 114 S. W. (2d) 891.

The question presented by you involves a consideration of several factors. In the first place, while the courts will go a long way in admitting expert testimony, deduced from a well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. See *Frye v. United States*, 293 Fed. 1013 (District of Columbia, 1923; systolic blood pressure deception test held inadmissible); *State v. Bohner*, 210 Wis. 651, 246 N. W. 314, 86 A. L. R. 611 (1933, Wisconsin court rejected evidence obtained through use of so-called "lie detector"); *People v. Forte*, 279 N. Y. 204, 18 N. E. (2d) 31, 119 A. L. R. 1098 (1938, same holding by New York Court of Appeals).

We also wish to point out that the Texas Court of Criminal Appeals has repeatedly held that non-expert witnesses may testify as to intoxication of accused, in one case quoting with approval an expression of a Pennsylvania court that "drunkenness is of such common occurrence that its recognition requires no peculiar scientific knowledge." *Inness v. State*, 106 Tex. Cr. R. 524, 293 S. W. 821, citing *Commonwealth v. Kyler*, 217 Pa. 512, 66 A. 746, 10 Ann. Cas. 786, 11 L. R. A. (N. S.) 639. See also *Underhill's Crim. Ev.* (3d Ed.) [ 278; *Spears v. State*, 20 S. W. (2d) 1063; *Riddle v. State*, 107 Tex. Cr. R. 571, 298 S. W. 580; *Boyd v. State*,

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106 Tex. Cr. R. 492, 292 S. W. 1112; Wallace v. State, 100 Tex. Cr. R. 499, 271 S. W. 911, and many others.

In prosecutions for driving a motor vehicle while intoxicated, or under the influence of intoxicating liquor, it is apparently not even necessary for the court in its charge to the jury to give any definition of the terms "intoxicated or in any degree under the influence of intoxicating liquors." Lockhart v. State, 108 Tex. Cr. R. 597, 1 S. W. (2d) 894; Stewart v. State, 108 Tex. Cr. R. 199, 299 S. W. 646.

We, therefore, express the opinion that since the courts have taken cognizance of the existence of non-technical, well recognized and readily available means of establishing intoxication, it would be necessary for the State to show the efficiency of the scientific methods used and the dependability of the results reached before the admission of the evidence.

However, if we concede that the tests you mention are of such scientific standing and well recognized as would render expert opinion as to the result thereof competent evidence, it would appear that if a person voluntarily permitted the taking of specimens of breath, blood or urine for such tests, the result thereof would be admissible in evidence against him. We quote from Herzog, Medical Jurisprudence, 1 488, p. 355;

"Accused's right not to be compelled to be a witness against himself by a compulsory exhibition or examination of his body may be waived by his express or implied consent. Where positive consent is shown, the mere fact that accused was in custody when examined would clearly not prevent admission of evidence of such examination. . . . Where a defendant voluntarily submits to the examination, some courts hold that he thereby waives his right to object thereto. . . ."

A footnote refers to the Texas case of Cordes v. State, 54 Tex. Cr. R. 204, 112 S. W. 943. In that case it was held that on trial of a woman for infanticide, where she consented to a physical examination during her incarceration, after being advised by the physician that he would not examine her without her consent, the physician's testimony of her condition was admissible. We have no doubt of the ability of the defendant to waive any privilege incident to the use of such evidence as suggested in your inquiry.

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We next consider whether a person might be compelled to submit to the taking of specimens of breath, blood, or urine for the purpose of making scientific tests to determine whether such person was intoxicated or under the influence of intoxicating liquors. In the course of our investigation of this problem, we have been furnished an able opinion written in January of this year by the Honorable John E. Cassidy, Attorney General of the State of Illinois, in response to an inquiry by a prosecuting attorney of that state, whether a coroner or other officer would have the right to take a sample of the blood of the person causing a death, for the purpose of having the blood analyzed to determine whether or not such person was intoxicated at the time the death was caused. We acknowledge our appreciation to Mr. Cassidy for a copy of his opinion, from which we take the liberty to quote at length:

" . . . It is essential to the protection of the public and the prevention of crime that police officers and law enforcing agencies engaged in the investigation and detection of crime be permitted to avail themselves of all reasonable means to accomplish the purposes for which they exist. On the other hand, every citizen is entitled to certain rights, liberties and immunities which by their nature and by constitutional guarantee transcend all others.

"Section 6, of Article II, Illinois Constitution, 1870, provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; . . ."

"Section 10 provides:

"No person shall be compelled to give evidence against himself, . . ."

"The restrictions on methods of police investigation are but complementary to the rights of every citizen as guaranteed under the above quoted provisions of the Bill of Rights. By the very nature of their offices, coroners, sheriffs, and police officials generally are charged with the duty not only of enforcing the law but also of obeying the same and honoring the constitutional guarantees applicable to all citizens,

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the accused as well as the innocent."

Reference is made to a discussion of corresponding guarantees of the Federal Constitution by the United States Supreme Court in the case of *Couled v. U. S.*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647, and Mr. Cassidy quotes from that case:

"The fourth amendment reads:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized."

"The part of the fifth amendment here involved reads:

"No person . . . shall be compelled in any criminal case to be a witness against himself."

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd v. U. S.* 116 U. S. 616, in *Weeks v. U. S.*, 232 U. S. 385, and in *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is; That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guarantee of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen, - the right to trial by jury, to the writ of habeas corpus and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment of the home, or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly overzealous executive officers."

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Our own Bill of Rights (Constitution of Texas, Art. I, Sections 9 and 10), contains almost identical language to the Illinois and United States Constitutions.

With respect to the security of persons, however, it is to be noted that the rights secured by the Federal Constitution and the Texas Constitution, supra, does not prohibit all searches and seizures but extends only to those considered unreasonable. *Kiers v. State*, 136 Tex. Cr. R. 475, 126 S. W. (2d) 484; *Moore v. Adams*, (Civ. App.) 91 S. W. (2d) 447. Ordinarily a lawful arrest carries with it the right to search for weapons, any article which might aid or facilitate escape, establish identification or which appear to be fruits of the crime. 5 C. J. 454, | 74, 38 Tex. Jur. 73, | 50, *Melton v. State*, 110 Tex. Cr. R. 439, 10 S. W. (2d) 384; *Hayes v. State*, 115 Tex. Cr. R. 644, 28 S. W. (2d) 556; *Agnello v. U. S.*, 269 U. S. 20, 46 Sup. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409.

We have found no case wherein our Court of Criminal Appeals has had for consideration whether a forced physical examination would violate the constitutional prohibition against unreasonable searches and seizures. But in civil cases the appellate courts have passed upon the question in several instances. *Texas Employers Ins. Ass'n. v. Downing*, (Civ. App., writ refused) 218 S. W. 112; *A. & N. W. Ry. Co. v. Cluck*, 97 Tex. 172, 77 S. W. 403, 64 L. R. A. 494, 104 Am. St. Rep. 863, 1 Ann. Cas. 261; *Gulf C. & S. F. Ry. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583; *Mo. Pac. Railway Company v. Johnson*, 72 Tex. 95, 10 S. W. 325; *I. & G. N. Ry. Co. v. Underwood*, 64 Tex. 463.

In the earlier cases the courts expressed doubt whether or not an order of the court to compel a plaintiff in a personal injury suit to submit to an examination by a physician violated the constitutional guaranty against unreasonable search and seizure, but in the case of *Ry. Co. v. Cluck*, supra, the Supreme Court in an opinion by Justice Brown held that neither the common law nor the statutes of this State authorized such an examination, and in the absence of specific legislative sanction, the examination was unwarranted. We quote from the opinion:

"Since the common law furnishes no precedent for such proceeding, we must look to our Constitution and statutes for authority in our courts to order the examination. The provisions of our Constitution and of our statutes with regard to the practice and jurisdiction of courts

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are antagonistic to the spirit and purpose of such proceedings. To make sure of the immunity of the person of citizens from improper interference by any authority, the convention which framed our Constitution adopted as a part of the Bill of Rights this section 9 of article I:

"The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches, and no warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation." Whether, under this guaranty of immunity from interference with the person, the legislature might authorize the physical examination of a party to a suit, is not before us for determination, but we are of the opinion that our Constitution secures every citizen of this State against any seizure or search of his person which is not plainly authorized by some law of this State.

". . .

"The common law proceeding most analogous to physical examination is the right of view, by which a party sought to have his witnesses examine the premises to qualify them to testify. 'There are but two such cases reported in the English Reports. *Newman v. Tate*, 1 Arnold, 244, and *Turquand v. Strand Union*, 8 Dowling, 201.' The request was refused in both cases. *Railway Co. v. Botsford* (141 U. S. 250). It is significant that the legislature of this state after adopting the common law of England, within a short time after those cases were decided, repealed the right of view by this article, 1451, Revised Statutes. 'All vouchers, views, essoins, and also trials by wager of battle and wager of law, shall stand repealed.' Thus we see that the legislature has not only failed to provide for a physical examination of parties, but has actually repealed from the common law in this state the only proceedings that bore the slightest resemblance to it.

". . .

"It is the province of a court to try issues formed by the pleadings of parties according to

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the rules of procedure, to furnish all process authorized by law to secure evidence, and to administer justice according to the evidence adduced on the trial. The common law and our statutes provide all of the means which courts are authorized to use in the administration of justice between parties, and no court has authority to originate and introduce a new process to enable parties to secure evidence in support of their cases. A court with power to make subser- vient to its order all persons and things that will afford the most reliable evidence 'would be an anomaly in constitutional republican gov- ernment. It is better for the common good that a court should be restrained within prescribed limits, than that judges be invested with un- limited and irresponsible powers over the per- sons and property of the citizen.

"In this state by our Constitution and the common law the person of a citizen is so sacred that an officer may not disregard the right of personal freedom, even to satisfy an execution by levying upon property which is up- on the person of the defendant. . . ."

While the confession of a defendant may be used in evidence against him if made without compulsion or per- suasion under statutory rules designated to safeguard his rights (Arts. 726, 727, Code Cr. Proc. 1925), according to Branch's Annotated Penal Code, p. 32, [ 59, the statute is not limited to actual verbal or written acknowlodge- ment of guilt. We quote:

"The statute relating to confessions is not confined to a technical confession, but covers any act in the nature of a confession, statement or circumstance done or made by de- fendant while in confinement or custody, and not having been properly warned, which may be used by the state as a criminative fact against him."

The statement of the text has been expressly ap- proved by the Court of Criminal Appeals. Kennison v. State, 97 Tex. Cr. R. 154, 260 S. W. 174. In that case, in a for- gery prosecution, the county attorney caused the defendant, while under arrest, to be brought to his office and had him write certain words, his own name and other writing without

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warning as to its use. It was held that admission of the paper with the writing thereon, as a standard of comparison was reversible error, being violative of the present Articles 726 and 727, Code Cr. Proc. 1925. See also Bratton v. State, 102 Tex. Cr. R. 181, 277 S. W. 387, Click v. State, 119 Tex. Cr. R. 118, 44 S. W. (2d) 892.

The Texas constitutional provision that no person accused of a criminal offense shall be compelled to give incriminating evidence has been held to protect one from being required to produce private papers which are incriminating, Wilson v. State, 41 Tex. Crim. R. 115, 51 S. W. 916, Meredith v. State, 73 Tex. Cr. R. 147, 164 S. W. 1019.

In a prosecution for assault with intent to rape in which defendant claimed to have had frequent intercourse with prosecutrix prior to the alleged assault, the trial court refused to require prosecutrix to be examined by physicians appointed by the court to ascertain whether she had led a virtuous life. The Court of Criminal Appeals declared the ruling of the lower court to be a proper one. Rettig v. State, 90 Tex. Cr. R. 142, 233 S. W. 839. Likewise, in prosecutions for slander in using language imputing want of chastity to the prosecutrix, where defendants urged a medical examination to show whether the imputations were true or false. Whitehead v. State, 39 Tex. Cr. R. 89, 45 S. W. 10; Bowers v. State, 45 Tex. Cr. R. 185, 75 S. W. 299.

In our search for precedents, it appears the Texas courts have never been called upon to sanction a forcible invasion of the body of a person charged with a crime. We have, therefore, looked to other jurisdictions.

In the case of Wragg v. Griffin, 185 Iowa 243, 170 N. W. 400, 2 A. L. R. 1327, petitioner who had been committed to custody of the sheriff by order of the health authorities, for the purpose of subjecting him to a physical examination and blood tests to determine whether or not he was affected with a venereal disease sought relief through a writ of habeas corpus.

The contention of respondent was that authority for the proposed blood test existed in rules of the State Board of Health. We quote from the opinion sustaining the writ and releasing the petitioner:

"This petitioner may be a bad man, but we have no right to assume such a fact for the purpose of minimizing his claim to protection of

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the ordinary rights of person, which law and the usages of civilized life regard as sacred until lost or forfeited by due conviction of crime. Even when charged with the gravest of crimes, he cannot be compelled to give evidence against himself, nor can the state compel him to submit to a medical or surgical examination, the result of which may tend to convict him of a public offense. (State v. Height, 117 Iowa 650, 59 L. R. A. 437, 94 Am. St. Rep. 323, 91 N. W. 935); and, if there be any good reason why the same objections are not available in a proceeding which may subject him to ignominious restraint and public ostracism, it is, at least a safe and salutary proposition to hold that, before the court will uphold such an exercise of power, it must be authorized by a clear and definite expression of the legislative will. This we do not have, and, in our judgment, the restraint of the petitioner, not as a diseased person whose detention in a separate house or hospital as the statute authorizes, but solely as a suspect and for the avowed purpose of forcing the exposure of his body to visual examination, and compelling the extraction of blood from his veins in search of evidence of a loathsome disease, which may or may not exist, is a deprivation of his liberty without due process of law, and he is entitled to be set free."

In *People v. McCoy*, 45 How. Prac. 216 (N. Y. Sup. Ct.) a compulsory physical examination of a female prisoner charged with the murder of her child, performed under order of a coroner for the purpose of establishing that the accused had been recently pregnant was held a violation of the constitutional provision against self incrimination and testimony as to the result of such an examination was denied admission into evidence. The pertinent portion of the opinion reads as follows:

"The forcible examination of the prisoner by the physician for the purpose of obtaining evidence that she had been pregnant, and had been delivered of a child within two or three weeks previous to the time of such examination, was in violation of the spirit and meaning of the Constitution, which declares that 'no person shall be compelled in any criminal case to be a witness against himself.' They might as well have sworn the prisoner, and compelled her,

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by threats, to testify that she had been pregnant and been delivered of the child, as to have compelled her, by threats, to have allowed them to look into her person, with the aid of a speculum, to ascertain whether she had been pregnant and been recently delivered of a child. . . ."

See also *People v. Aikens*, 25 Calif. App. 372, *McManus v. Commonwealth*, 264 Ky. 240, 94 S.W. (2d) 609, *People v. Corder*, 244 Mich. 274, 21 N. W. 309, *People v. Curran*, 286 Ill. 302, 121 N. E. 637.

We are not unmindful of the line of cases in this state and some other jurisdiction wherein it has been held not in violation of the constitutional privilege to compel a comparison of foot prints, take finger prints or to seize articles of clothing of a person under arrest for identification, but in such instances there is no forceful invasion of the body itself, for the purpose of producing evidentiary facts.

There is, of course, no disposition to quarrel with science. The twentieth century is essentially an era of scientific advancement. And while new scientific discoveries may at times furnish proof of error in a specific law, heretofore accepted, it is never the purpose or intention of science to refute the law. It has been the aim and the goal of science to benefit humanity, to add increased comforts to life and to cure human ills. But science has been inexorably opposed to the restriction of fundamental human life and liberty. On the contrary, its primary concern has been in behalf of a more expansive freedom in economic, social and political intercourse.

On the other hand, the law has welcomed science as a most valuable instrument to be used in the promulgation of justice. Not only has the law been liberal in its attitude toward science, but it has, by implication at least, championed the principle of freedom of research.

There should never be, nor should any necessity arise for, a parting of the ways between law and science. Science is predicated on certain immutable laws of nature. Law is based upon certain inalienable human rights. And although the two emanate respectively from these separate sources, they constitute in reality not a dualism but an original unit.

It must be remembered, however, that the basic problem of civilization has revolved around the struggle of man to obtain mastery over nature. And only in the degree that such mastery has been attained has civilization

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progressed. Science has aided in the struggle, but science has been the agent, not the instigator. And there is no more inalienable human right than that of sanctity of the person. Morally this axiom is older than either law or science. Legally it is the basic foundation of the Federal and State Constitutions under which this democracy operates.

It is our opinion that under our present constitutional and statutory provisions it is not permissible for the State to present evidence of the amount of alcohol in the system of a defendant charged with driving a motor vehicle while under the influence of intoxicating liquor as determined by breath tests, blood tests, and urine tests made by or at the instance of the officers where there is an invasion of the body or person to obtain the specimen, unless the said defendant waives his privilege.

Trusting that the above satisfactorily answers your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

*Benjamin Woodall*

By

Benjamin Woodall  
Assistant

EW:LM

APPROVED APR 26, 1940

*George B. Mann*

ATTORNEY GENERAL OF TEXAS

