DECEMBER 1974

POLICE OFFICER'S HANDBOOK

THE CRIMINAL LAW

PART VII

EVIDENCE FROM THE HUMAN BODY

THE EVIDENCE CHAIN

FLEMING'S NOTEBOOK...Chapter 107:

(1) ASAP (affected by Fennell?)
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(5) Trunk Search of Car after Smelling Marijuana?
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LAW ENFORCEMENT - ETV TRAINING PROGRAM

POLICE OFFICER'S HANDBOOK

EVIDENCE FROM THE HUMAN BODY

THE EVIDENCE CHAIN

By

Joseph C. Coleman
Deputy Attorney General
State of South Carolina

Endorsed by

South Carolina Governor, John C. West
South Carolina Law Enforcement Division
South Carolina Sheriffs' Association
South Carolina Enforcement Officers' Association
South Carolina Police Chiefs' Executive Association
South Carolina FBI National Academy Associates
South Carolina Southern Police Institute Associates

J. Kendall Few
Judge of Oconee County
Civil - Criminal - Family Court

"The prohibition of compelling a man in a criminal court to be a witness against himself (5th Amendment) is a prohibition of the use of physical or moral compulsion to exort communications from him, not an exclusion of his body as evidence when it may be material."

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EVIDENCE FROM BODY OF SUSPECT

The basic decision of the United States Supreme Court holding that it is lawful in certain circumstances to make physical intrusion into the body of a suspect to obtain evidence is Schmerber v. California, 16 Led 2d 908, decided in 1966.

Schmerber was involved in an automobile accident in Los Angeles and was taken to the emergency room of a hospital. There was evidence to constitute probable cause that Schmerber was under the influence while driving one of the cars involved in the accident (odor of alcohol on breath). A sample of Schmerber's blood was taken at the direction of a police officer by a physician over the suspect's protest. Chemical analysis showed the blood to contain more than the legal amount of alcohol and Schmerber was convicted of DUI, largely on the basis of evidence of the blood test.

The defendant appealed his conviction on several grounds, contending that the drawing of blood:

1. Violated due process of law.

(2) Required him to testify against himself.

(3) Violated right to privacy (unreasonable search and seizure).

(4) Violated his right to counsel. (No attorney was present when the blood was taken.)

The United States Supreme Court, holding the taking of the blood in the circumstances, said:

DUE PROCESS OF LAW

(1) Breithaupt was also a case in which police officers caused blood to be withdrawn from the driver of an automobile involved in an accident, and in which there was ample justification for the officer's conclusion that the driver was under the influence of alcohol. There, as here, the extradition was made by a physician in a simple, medically acceptable manner in a hospital environment.

*(384 US 760)

*There, however, the driver was unconscious at the time the blood was withdrawn and hence had no opportunity to object to the procedure. We affirmed the conviction there resulting from the use of the test in evidence, holding that under such circumstances the withdrawal did not offend "that 'sense of justice' of which we spoke in Rochin v. California, 342 US 165 (96 Led 183, 72 S Ct 205, 25 ALR2d 1396)."

352 US, at 435, 1 Led 2d at 450. Breithaupt thus requires the rejection of petitioner's due process argument, and nothing in the circumstances of this case or in supervening events persuades us that this aspect of Breithaupt should be overruled.

SELF - INCRIMINATION

THE PROTECTION OF THE FIFTH AMENDMENT AGAINST SELF-INCRIMINATION APPLIES TO COMMUNICATIONS FROM THE ACCUSED, NOT TO EVIDENCE THAT MIGHT BE OBTAINED FROM THE SUSPECT'S PHYSICAL BODY.

"(T)he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to exort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof." 218 US, at 252-253, 54 Led at 1030.

It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance

with a subpoena to produce one's papers. Boyd v. United States, 116 US 616, 29 Led 746, 6 S Ct 524. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony", but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain "physical evidence", for example, lie detector tests measuring changes in

body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege "is as broad as the mischief against which it seeks to guard", Counselman v. Hitchcock, 142 US 547, 562, 35 Led 1110, 1114, 12 S Ct 195.

In the present case, however, no such problem of application is presented. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical

analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.

NOTES FROM

WHARTON'S CRIMINAL EVIDENCE

CHARLES E. TORCIA

13TH EDITION

In Schmerber v. California, a prosecution for driving a vehicle while under the influence of intoxicating liquor, the accused had been arrested at a hospital while receiving treatment for injuries sustained in an automobile accident and, at the direction of a police officer, a blood sample was withdrawn from the accused's body by a physician, despite the accused's refusal, on the advice of counsel, to submit to the test. Chemical analysis

of the sample disclosed such a percentage by weight of alcohol in his blood as to indicate intoxication, and the analysis report was admitted in evidence. The United States Supreme Court ruled that, inter alia, the accused's privilege against self-incrimination had not been violated. The court observed that "the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.

Similarly, it may be shown that the accused, at the time of his arrest, had blood spots on him; appeared intoxicated; had injection marks on his arm; or had a bitten tongue. Moreover, under appropriate circumstances, the accused may be subjected to a physical or mental examination.

For the purpose of identification, an accused may be required to wear clothing alleged to have been

worn by the actor; to appear in a police lineup; to give a demonstration of his voice; to provide a sample of his handwriting; to submit to the taking of his photograph; to provide scrapings from his fingernails for comparison with tissue from the body of the victim; to provide a sample of his blood; to submit to the taking of fingerprints, palm prints, or footprints; to make tracks for the purpose of comparison with tracks found at the scene of the crime, or to put his foot in such tracks; to surrender his shoes for the purpose of comparison with certain tracks; to submit to a paraffin test to determine whether he had recently fired a gun; to wear sunglasses alleged to have been worn by the actor; to appear at the scene of the crime; to be examined after his beard has grown; to expose his hands to special light to detect tracing powder; to place his hands under ultraviolet light to reveal fluorescence from fluorescein powder which had been dusted over a bank's stolen moneybags; to provide a sample of his hair; to rub his head with a paper

towel in order to obtain a sample of silver particles observed in his hair; or to remove a bandage to show the condition of his hand. The weight to be accorded the results of an examination or test is for the jury to determine.

At the trial itself, an accused may be required to stand so that he may be observed; to remove a veil, visor, mask, or glasses; to exhibit his hands; to roll up his sleeve to show a tattoo; to submit to the taking of his fingerprints; to remove his coat and shirt to show scars; to allow inspection of his face for identifying marks; to move his feet into view; or to put on a garmet, hat, or cap. If the accused has testified on his own behalf, he may be required, on cross-examination, to roll up his sleeve to show a wound; to allow his feet to be measured; to demonstrate certain actions or positions; to pronounce certain words; or to provide a sample of his handwriting.

BALLISTICS

A witness, who is sufficiently qualified by training and experience to state an expert opinion on the subject of ballistics, may identify the gun from which a bullet or cartridge was fired, by making a comparison between the markings on a test bullet or cartridge and those on the bullet or cartridge connected with the crime charged. In making such a comparison, the expert may enlist the aid of a microscope, a microscopic magnifying glass, or photographs. The weight of such expert testimony is for the jury to determine.

RIGHT TO COUNSEL

"Since the petitioner (defendant) was not entitled to assert the privilege (against self-incrimination), he has no greater right because counsel erroneously advised him that he could assert it."

RIGHT TO PRIVACY

"The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions (into the body) on the mere chance that desired evidence might be obtained."

"The Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."

PHYSICAL EVIDENCE

Where physical evidence such as a bullet or gun is involved in a case, the prosecutor must be able to prove each step of its possession as well as the positive identity of the evidence.

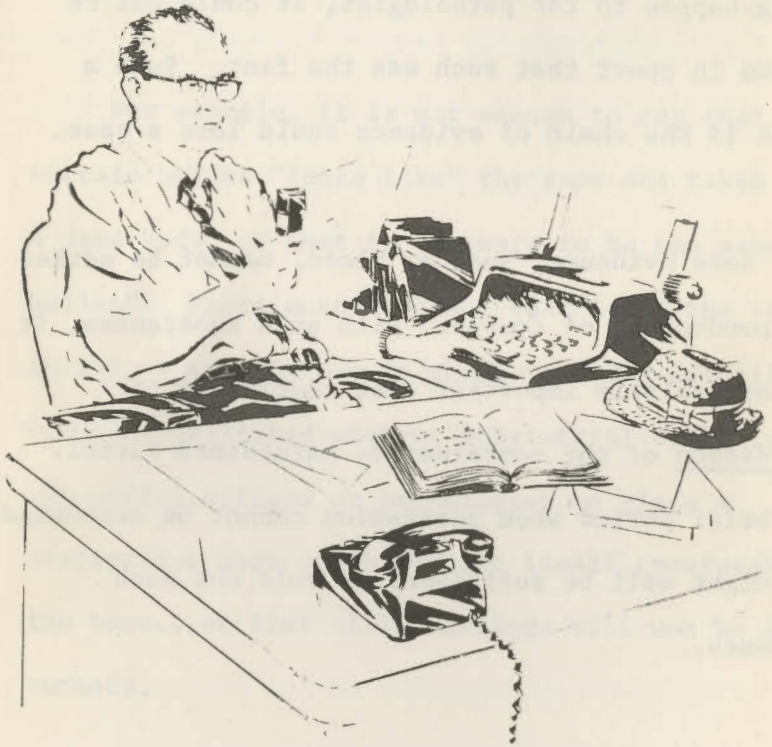
For example, it is not enough to say that a certain bullet "looks like" the same one taken from a dead body, or that it "appears to be the same bullet". There must be proof that it is the same bullet. The only way in which positive identification can be established without substantial doubt is for the police officer or pathologist to place a distinctive mark on the bullet itself (preferably the base...so that rifle markings will not be disturbed).

It is better when the bullet is marked for some other person to observe the marking in the event the one doing the marking should be unable to testify

for some reason. Also, it is better for an officer to observe the bullet being removed, so that there will be two persons...the doctor and the officer... who can testify that the evidence bullet was the one removed from the body. Otherwise, should something happen to the pathologist, it could not be proven in court that such was the fact. Such a break in the chain of evidence could lose a case.

Some evidence, such as blood, cannot be marked independently, of course. With such substances, it is particularly important that continuity of possession of the container be maintained intact. One brief period when possession cannot be accounted for might well be sufficient to rule out such evidence.

FLEMING'S NOTEBOOK



FLEMING'S NOTEBOOK...Chapter 107:

ASAP AND FENNELL

Did the Fennell case, holding that DUI charges could not be 'reduced', affect application of the ASAP program? Not necessarily! The Fennell decision said nothing more than that a magistrate or municipal judge must try the case upon the charge preferred by the traffic ticket or arrest warrant. The trial judge does not have the power to accept a plea to a lesser offense.

Fennell does not forbid an arresting officer, if his chief permits it, to nol pros the original DUI charge and write another ticket preferring another charge. The Notebook is not recommending or condemming such procedure. This comment is intended to do nothing more than clarify the question that has arisen since Fennell.

When an officer agrees to nol pros the DUI charge and substitute another on a new traffic ticket under the ASAP program, he should see that the original ticket is voided and not certified to the State Highway Department as a DUI conviction. Only the final charge should be certified to the Department.

The decision in the Fennell case was that a trial judge (magistrate or municipal judge) cannot accept a plea to a lesser offense over the objection of the arresting officer.

CONFISCATION OF CAR

Confiscation of motor vehicles used in illegal drug transportation is much more servere under Federal law than under the law of South Carolina... A Lincoln Continental Mark III was impounded by Federal officers in Missouri...the driver, who did not own the car, was caught with heroin on his person while driving. The owner, who could not be tied into the violation moved to have his car returned to him...The Federal Court held that the car was properly confiscated. US v. One 1971 Lincoln, 460 F2d 273.

TIP FROM UNKNOWN INFORMER

Police received telephone tip from unknown informer that drug drop would be made at a certain place and time, describing the car and driver... police staked out the scene and saw the described car and driver arrive as the caller said...they approached the car and saw a brown paper bag in the back seat...they seized the bag without a warrant, found cocaine in it, and arrested the driver.

A Federal court held the search and seizure lawful, even tho the informer was not known to be reliable, saying that the facts verified information furnished by the unknown caller. Canal Zone v. W., 460 F2d 1402.

INFORMER AFFIDAVITS

The lawfulness of an informer affidavit for a search warrant must be tested by the following requirements:

1. Is the informer reliable?
2. How does the officer know the informer is reliable?
3. What are the facts known to the informer to constitute probable cause?

EXAMPLE AFFIDAVIT:

1. The informer is known by the affiant to be reliable because the informer has been known by the affiant for two years, and during such period of time such informer has given the affiant information as to the location of drugs on scores of occasions, and such information has proved to be generally reliable.

2. The informer stated to the affiant that he saw packets of heroin being sold in the kitchen of the subject premises within the past two days by the suspect, who is known to the informer as a dealer in unlawful drugs.

Ref.: LeDent v. Wolff, 460 F2d 1001.

A mere statement that the informer is reliable is not enough. US v. Harris, 29 Led 723.

TRUNK SEARCH OF CAR

AFTER SMELLING MARIJUANA

Officers stopped car and smelled odor of marijuana, but saw no container or other sign of drugs in the car...they took key and opened the trunk finding marijuana. Federal court held that odor was sufficient cause to search trunk without a warrant. US v. Capps, 460 F2d 316.

ARREST ON SUSPICION

Traffic officers saw a truck on the highway that aroused their suspicions...they followed on a deserted highway until it was driven to the left of center for a short distance...the truck was stopped and the driver placed under arrest, the other occupant of the truck being told to follow the police car back to town. While proceeding to town, second driver of truck was seen to throw something on side of road. It proved to be marijuana. Search

warrant was secured for truck and 1200 pounds of marijuana was found.

Federal Court Ruling: Initial arrest was unlawful because arrest for traffic violation was nothing more than a pretense to stop the truck. Anything that was found thereafter as a result of the stop was 'fruit of the poison tree' and could not be used. Conviction reversed. US v. Borcich, 460 F2d 1391.

DISPLAY OF EXPIRED LICENSE PLATE ON FRONT OF VEHICLE

The State Highway Department, upon advise of the State Attorney General's Office, has ruled that a motor vehicle owner may lawfully display an expired license plate on the front of his vehicle...many motorists wish to continue display of personalized plate on front...OK to do so!

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