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Implied Consent for Intoxication Tests

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Ever since automobiles became more than a novelty, the problem of the drinking operator has been an increasing threat to the health, welfare, and safety of the people of the United States. In Wyoming the incidence of drinking in fatal accidents has increased from 20.7% in 1957 to 28.1% in 1961.[1]

Wyoming, like the other states, has been cognizant of this problem. We have a statute providing for a fine of not more than one hundred dollars or not more than thirty days in jail, or both, plus suspension of a license, if a person is convicted of driving while "under the influence of intoxicating liquor to a degree which renders him incapable of safely driving a motor vehicle."[2]

However, obtaining a conviction for this offense under the statute, requires proof beyond a reasonable doubt that the defendant "has taken into his stomach a sufficient quantity of intoxicating liquor so as to deprive him of the normal control of his bodily or mental faculties." *State* v. *Dobbs*.[3] In its form prior to 1955 the statute placed an almost impossible burden on the prosecution and very few convictions were obtained. Basically, the problem was one of proof. Establishing intoxication required testimony as to the outward symptoms shown by the defendant, and convincing witnesses were hard to obtain.

In recognition of this fact, Wyoming added to its statute in 1955[4] a provision allowing the results of various chemical tests to be admitted as evidence, and setting up a presumption that any person shown by such tests to have ".15% or more by weight of alcohol" in his blood stream will be presumed to be under the influence of intoxicating liquor to a degree which renders him incapable of safely driving a motor vehicle. This aids in the solution of the problem of proof by reducing the question to a matter of reliable objective standards. However, the problem of the drunken driver has not been eliminated, for the simple reason that there are no means provided in the statute compelling anyone to undergo these tests; they were and still are purely a matter of voluntary submission. For this reason, only those persons who are confident that the tests will vindicate them ever volunteer. For what it is worth the prosecution may be able to comment upon the refusal to take a test,[5] but this is a poor sub-

1. Traffic Accident Facts, 1961, prepared by the Accident Reports Section of the Wyo. Highway Dept.
2. Wyo. Stat. § 31-129 (1957).
3. 70 Wyo. 26, 244 P.2d 280, 284 (1952).
4. Chapter 97, § 1 Session Laws of Wyo. (1955).
5. State v. Durrant, 188 A.2d 526 (Delaware, 1963); City of Columbus v. Waters, 124 N.E.2d 841 (Ohio, 1954); State v. Buek, 80 Idaho 296, 328 P.2d 1065 (1958); State v. Gatton, 60 Ohio App. 192, 20 N.E.2d 265 (1938); State v. Benson, 230 Iowa 1168, 300 N.W. 275 (1941). Contra, see State v. Serverson, 75 N.W.2d 316 (North Dakota, 1956); People v. Stratton 286 App. Div. 323, 143 N.Y.S.2d 362, aff. 133 N.E.2d 516, 1956); People v. Stratton 286 App. Div. 323, 143 N.Y.S.2d 362, aff. 133 N.E.2d 516 (1956); Duckworth v. State, 309 P.2d 1104 (Oklahoma, 1957).

stitute for the tests and probably not the solution that the legislators were hoping for when they added the chemical tests provision to the statute.

At the present time the alternative is for the arresting officers to force the defendant to submit to the intoxication tests. This is especially tempting where the defendant is unconscious. This procedure probably violates several of the defendant's constitutional rights and therefore is likely to be inadmissible as evidence.

The main constitutional issue likely to be raised, if the tests are forced, is that the taking of the blood, breath, urine, or whatever, constitutes an unreasonable search and seizure in violation of the Fourth Amendment to the United States Constitution, and Article 1, Section 4, of the Wyoming Constitution. If the evidence is so obtained, it is inadmissible as evidence against the defendant.[6]

Clearly, the taking of a body sample is considered to be a search and seizure within the meaning of the Fourth Amendment.[7] The question then to be resolved is whether the search is reasonable and lawful. A search and seizure will be lawful if made pursuant to a valid search warrant,[8] if made as incident to a lawful arrest,[9] or if made with the consent of the person.[10] Since we are assuming that the consent of the person involved has not been obtained, we will examine the other two possibilities only.

The law of arrest is well settled and a summary should suffice. A lawful arrest for a misdemeanor such as drunken driving may be made pursuant to a valid warrant of arrest, or if the misdemeanor is actually committed in the presence of the arresting officer.[11] If one of these two elements is present, the officer may search the person of the defendant for evidence.[12] An officer could not arrest without a warrant on his mere suspicion that the person is drunk. If the arrestee is later acquitted because of the difficulty of proving drunkeness, the officer might be subject to civil liability.

The Wyoming Supreme Court set out the requirements of a valid search warrant in *State v. Patterson*.[13] The opinion points out that the supporting affidavit must be supported by probable cause and not merely information and belief.

The second possible constitutional objection to forcing the tests and

6. Mapp v. Ohio, 367 U.S. 643 (1961); Silverman v. U.S., 365 U.S. 505 (1961).
7. State v. Wolf, 53 Del. 88, 164 A.2d 865 (1960); State v. Kroening, 274 Wis. 266, 79 N.W.2d 810 (1957).
8. Wyo. Const. art. 1, § 4; State v. Peterson, 27 Wyo. 185, 194 Pac. 342 (1920); Wiggins v. State, 28 Wyo. 480, 206 P. 373 (1922).
9. Wiggin v. State, supra, note 8 at 491; State v. George, 32 Wyo. 223, 231 Pac. 683 (1924). Pac 683 (1924).
10. Tobin v. State, 36 Wyo. 369, 255 Pac 788 (1927).
11. State v. George, supra note 9 at 231.
12. Wiggin v. State, supra note 8.
13. Supra note 8.

attempting to use the results as evidence is that they would probably violate the Wyoming Constitution Article 1, Section 11, which states that "No person shall be compelled to testify against himself in any criminal case . . .".[14]

There are two views as to the meaning of this provision in the various state constitutions. The majority view is that it only applies to testimonial compulsion.[15] The minority view is that this provision protects from all evidence which requires the active participation of the defendant to obtain, but does not protect from evidence taken from him which merely requires his passive cooperation. Under this view, whether he consented or not would be immaterial.[16] A second minority group applies the protection to all evidence taken from a defendant without his consent including any real evidence taken from his person. Wyoming has had no occasion to meet this issue squarely. However, dictum indicates that the Wyoming court may follow the minority view and apply the restriction to any evidence taken from a person without permission.[17]

If Wyoming restricts the meaning of Article 1 Section 11 to testimonial compulsion as many of its neighbors do[18] there would be no problem. If, however, Wyoming would follow the minority view, under any of the tests which require active participation, the evidence would be inadmissible.[19] It is submitted, however, that all of the chemical tests for alcohol in the blood could be performed without defendant's active participation. Of course every one of the tests could be performed without his consent.

The third possibility is that these tests would fall within the *Rochin v. California* rule.[20] That case held inadmissible under the due process provision[21] evidence which was obtained by such a process as "shocks the conscience." It seems highly unlikely that chemical intoxication tests, including blood tests, would shock the conscience. The Supreme Court of Arizona has held that a defendant who refuses to submit to a drunkometer test may be compelled to do so by any force reasonably necessary to fit the apparatus over his head; and that the use of such force does not violate due process.[22] A Kansas case has held that chemical tests for intoxication do not violate due process.[23]

Clearly these constitutional barriers are formidable enough to prevent the effective use of the Wyoming intoxication test statute if suspects are

14. The Fifth Amendment to the Constitution of the United States is similar, but it has been held in Twining v. New Jersey, 211 U.S. 78 (1908) not to be a fundamental right binding on the states under the Fourteenth Amendment.
15. McCormick, Handbook of the Law of Evidence, 264; 8 Wigmore on Evidence § 2263; People v. Trujillo, 32 Cal.2d 105, 194 P.2d 681 (1948).
16. Bartletta v. McFeeley, 107 N.J.Eq. 141, 152 A. 17 (1930); State v. Sturtevant, 96 N.H. 99, 70 A.2d 909 (1950); Aiken v. State, 16 Ga. App. 848, 86 S.E. 1076 (1915); People v. Sturman, 209 Mich. 284, 176 N.W. 397 (1920).
17. State v. George, supra note 9 at 236, (dictum).
18. (Idaho) State v. Buek, supra note 5; (New Mexico) Breithaupt v. Abram, 58 N.M. 385, 271 P.2d 827 (1959); (Colorado) Vigil v. People, 134 Col. 126, 300 P.2d 545 (1956).

forced to submit to the tests. For this reason it has been proposed that an "implied consent" statute be added to the Wyoming Driver's Licensing Law.[24] Basically, such a provision would make the driving on Wyoming highways an implied consent to submit to an intoxication test if arrested on a charge of drunken driving. Upon a refusal, the driver's license of the suspect would be subject to forfeiture. This will not force the drinking driver to submit to an intoxication test, but it would accomplish the legislative purpose by removing him from the highways.

Such a statute would avoid the constitutional objections to the forced use of intoxication tests which have been discussed above. It would appear that the arrest required by the implied consent statute, coupled with the implied consent, would be sufficient to overcome any objection as to unlawful search and seizure.[25] There may be a serious question as to whether this arrest provision will protect against an unlawful search and seizure when the defendant was unconscious. There is some authority for the proposition that a person must have understood that he was being arrested.[26] However, in *State v. Cram*[27] an unconscious person was arrested and given an intoxication test, with the approval of the Supreme Court of Oregon. However, the question apparently was conceded by counsel and not raised on appeal in that instance. If the defendant is conscious and does actively object, he will not be forced to take the tests but his driver's license will be subject to revocation.

Since any evidence obtained by the means provided under the statute would be lawfully acquired, it would not be subject to the self-incrimination provision of the Wyoming Constitution.[28]

As already pointed out, intoxication tests probably do not shock the conscience so as to violate the Fourteenth Amendment to the United States Constitution, even when performed on an junconscious body. The impiled consent statute would provide the additional assurance of implied consent should this question ever arise.

If such a statute were to be enacted, it would have to meet the requirements of substantive and procedural due process to be valid. These requirements are, of course, based on the Fourteenth Amendment to the United States Constitution.

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19. Possibly even under the minority view a blood test would be admissible as it does not require any active participation of the defendant. One would do well to remember that it may be an unreasonable search and seizure, however, and thereby be inadmissible under the doctrine of State v. George, supra note 9.
20. 342 U.S. 165 (1952).
21. U.S. Const., Amend. 14.
22. State v. Berg, 76 Ariz. 96, 259 P.2d 261 (1953). (Overruled on another point).
23. Lee v. State, 187 Kan. 566, 571, 358 P.2d 765 (1961).
24. Report No. 63-8 of the Wyoming Legislative Council (1962).
25. The implied consent *without* the arrest has been held insufficient in New York, Schutt v. Macduff, 205 Misc. 43, 127 N.Y.S.2d 116 (1954).
26. 6 C.J.S., Arrest § 1, 571.
27. 176 Ore. 577, 160 P.2d 283 (1945).
28. State v. George, supra note 9, holds that evidence obtained as the result of a lawful search and seizure would not violate the privilege against self-incrimination.

The requirements of substantive due process are threefold. The statute must be directed at a matter properly subject to state regulation; the means selected must bear a real and substantial relationship to the objective of the regulation; and the measure must not be unreasonable, arbitrary or capricious.[29] Controlling drunken driving is certainly a valid object of state regulation; an implied consent statute would undoubtedly bear a real and substantial relationship to this control in that it would tend to decrease the amount of drunk driving; and there is nothing arbitrary, unreasonable or capricious about such a statute. Hence, it should meet the tests of reasonableness without difficulty.[30]

The primary requirements of procedural due process are adequate notice and an opportunity to be heard; an implied consent statute patterned after the Uniform Implied Consent Act would stand the test of procedural due process. The Uniform Act provides for notice and a hearing.[31]

It would appear then, that such a statute would be constitutional. This is strengthened by cases, in states which have adopted such statutes, wherein the constitutionality of the implied consent statute was challenged to no avail.[32] In only one instance have they been invalidated, and that was the New York case already noticed.[33] After a provision for arrest was amended into the statute, it was sustained.[34]

The big question remaining is whether it would improve the situation. At least three reasons appear to indicate that it should. First, the pressure of possible loss of driving privileges will encourage borderline persons to take the tests; secondly, persons who know the tests will prove they are drunk and refuse to take them may be removed from the highways as a threat to the safety and welfare of others; and third, knowledge of the existence of the statute may deter people from drinking before they drive.

It seems clear that the provision in the Wyoming Statutes providing for intoxication tests is not functioning as the legislators had hoped it would. It further appears that the addition of an implied consent provision would assist in obtaining adequate regulation and control of the

29. Nebbia v. New York, 291 U.S. 502, 525 (1934). The due process provision of the Wyoming Constitution, Article I, Section 6, has been interpreted the same way in McGowey v. Swan, 17 Wyo. 120, 96 Pac. 697 (1908).
30. Lee v. State, supra note 22, at p. 770 state: "The statute does not compel one in plaintiff's position to submit to a blood test, and does not require one to incriminate himself within the meaning of constitutional provisions. And *neither is it violative of due process.*" (emphasis supplied).
31. Uniform Vehicle Code § 6-205. 1 (d).
31. Uniform Vehicle Code § 6-205. 1 (d).
32. (Kansas) Lee v. State, supra note 22; (South Dakota) Stenstand v. Smith, 116 N.W.2d (1962); (North Dakota) Timm v. State, 110 N.W.2d 359 (1961); (Idaho) State v. Buek, supra note 5; (Nebraska) Prucha v. Dept. of Motor Vehicles, 172 Neb. 415, 110 N.W.2d 75 (1961).
33. Schutt v. Macduff, supra note 24.
34. Anderson v. Macduff, 208 Misc. 271, 143 N.Y.S.2d 257 (1955); Combes v. Kelly, 152 N.Y.S.2d 934 (1956); Taylor v. Kelly, 9 Misc. 2d 240, 171 N.Y.S.2d 909 (1957); Clancy v. Kelly, 7 A.D.2d 820, 180 N.Y.S.2d 923 (1958).

drinking driver. Such a statute or a similar one has already been adopted by ten states.[35] It could be done in Wyoming through the addition of such a provision to Wyo. Stat. §31-250, (1957) patterned after the following Uniform Vehicle Code Provision:

> 31-250 (b) (1) Any person who operates a motor vehicle upon the public highways of this State shall be deemed to have given consent, subject to the provisions of sec. 31-129, to a chemical test or tests of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested or otherwise taken into custody for any offense and if the arresting officer shall have reasonable cause to believe that prior to his arrest the person was driving under the influence of intoxicating liquor. The test or tests shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon the public highways of the State while under the influence of intoxicating liquor. The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered.
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> (2) Any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (b) (1) of this section and the test or tests may be administered, subject to the provisions of 31-129.
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> (3) If a person under arrest refuses upon the request of a law enforcement officer to submit to one or more chemical tests designated by the law enforcement agency as provided in subsection (b) (1) of this section, none shall be given, but the department, upon the receipt of a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle upon the public highways of this State while under the influence of intoxicating liquor and that the person had refused to submit to the test upon the request of the law enforcement officer, shall revoke his license or permit to drive, or any nonresident operating privilege; or if the person is a resident without a license or permit to operate a motor vehicle in this State, the department shall deny to the person the issuance of a license or permit for a period of six months after the date of the alleged violation, subject to review as hereinafter provided.
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> (4) Upon revoking the license or permit to drive, or nonresident operating privilege of any person, or upon determining that the issuance of a license or permit shall be denied to the person, as hereinbefore in this section directed, the department shall immediately notify the person in writing and upon his request shall

35. (Idaho) Idaho Code (1961 Supp.) §§ 49-352 to 49-355; (Kansas) Gen. Stat. of Kan. Ann. (1961 Supp.) §§ 8-1001 to 8-1004; (Minnesota) Laws of Minn. 1961, ch. 454; (Nebraska) Rev. Stat. of Neb. (1961 Supp.) § 39-727.03 et. seq.; (New York) McKinney's Cons. Laws of N.Y. Ann. (1961 Supp.) Vehicle & Traffic Law § 1194; (North Dakota) N.D. Century Code Ann. (1961 Supp.) § 39-20-01 to 39-20-12; (South Dakota) S.D.C. (1960 Supp.) § 44.0302-2 et. seq.; (Utah) Utah Code Ann. (1961 Supp.) § 41-6-44.10; (Vermont) Vt. Stat. Ann. (1959 Supp.) Title 23 §§ 1188 to 1194; and (Virginia) Acts of Assembly 1962, ch. 625. 36. Supra note 24.

afford him an opportunity for a hearing in the same manner and under the same conditions as is provided in section 31-273 (4) for notification and hearings in the cases of discretionary suspension of licenses, except that the scope of such a hearing for the purposes of this section shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle upon the public highways of this State while under the influence of intoxicating liquor, whether the person was placed under arrest, and whether he refused to submit to the test upon request of the officer. Whether the person was informed that his privilege to drive would be revoked or denied if he refused to submit to the test shall not be an issue. The department shall order that the revocation or determination that there should be a denial of issuance either be rescinded or sustained.

(5) If the revocation or determination that there should be a denial of issuance is sustained after such a hearing the person whose license or permit to drive or nonresident operating privilege has been revoked, or to whom a license or permit is denied under the provisions of this section, shall have the right to file a petition in the District Court to review the final order of revocation or denial by the department in the same manner and under the same conditions as is provided in section 6-211 in the cases of discretionary revocations and denials.

(6) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this State has been revoked, the department shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he has a license.

A simple alterative to this amendment might be available by stamping a consent on the license and thereby making the consent a condition precedent to driving privileges on the state's highways. There is some precedent in hunting license provisions which provided for consent to be searched in some states.

Two problems to be considered in connection with this alternative are the Schutt case,[36] which invalidated a New York statute because it did not provide for an arrest, and the possible problem of out-of-state drivers. Everyone driving in Wyoming obviously consents to the provisions on the license he must purchase, but out-of-state drivers clearly do nothing to give such consent. To reach them will require that the consent be given through use of the highways, and if nonresidents must be so treated, complications could be divided by treating residents in the same way.

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