SMU | Dedman School of Law

SMU Law Review

Volume 7 | Issue 1 Article 6

1953

Intoxication Tests in Dallas County

Henry M. Wade

NOTES AND COMMENTS

INTOXICATION TESTS IN DALLAS COUNTY

CHEMISTS and medical scientists have known for quite some time that it is the concentration of alcohol reaching a person's nerve centers in the brain and spinal cord, and not necessarily how much he has had to drink, that makes him intoxicated and affects his ability to drive a motor vehicle. Further, scientists know that the concentration of alcohol in the blood stream is an accurate index to the amount of alcohol which reaches the brain and nerve centers of the body. Yet, it is only recently that scientific tests to show the concentration of alcohol in an accused's blood stream have been used in Texas to any large extent in driving-while-intoxicated (DWI) cases.

Generally, three methods have been developed by scientists to determine the blood alcohol concentration. The most direct, of course, is a chemical analysis of the blood itself. But the same determination may also be obtained by a chemical analysis of the breath or urine, inasmuch as scientists have established a direct correlation between the amount of alcohol in the blood and that present in the breath or urine.

All three types of tests have been used to some extent in Texas. The Texas Highway Patrol has used blood tests for some time, and the chemical analyses of blood are made at the Department of Public Safety laboratories in Austin. Other law enforcement agencies in Texas have used, at least in some cases, the breath and urine tests in addition to blood tests.

In Dallas County only the blood and breath tests are used.[1] Some blood tests are taken by both city and county authorities where the accused is sent to the hospital because of possible in-

[1] The first intoximeter was used in August, 1950.

juries, and the necessary personnel and equipment are available. But in most cases a breath specimen is taken at the scene of the arrest by means of an instrument known as the intoximeter, and the test is administered by an officer trained in the necessary procedure. Later the chemical analysis of the breath is made at the laboratory at Parkland Hospital, where the blood specimens are also analyzed. The urine test is not used in Dallas County.

The intoximeter is an instrument which is really two tests in one. The accused inflates a balloon, and the breath is allowed to pass through a colored solution. If the concentration of alcohol is great enough, the solution will discolor in a given number of seconds. This is an approximate test which indicates to the officer whether or not to file a charge against the accused. The remainder of the breath passes through a chemical train consisting of two tubes which have already been weighed and analyzed by the chemist at the laboratory. One tube absorbs the alcohol and water in the breath, and the other tube absorbs the carbon dioxide. The instrument is then sealed and labeled and sent to the laboratory where the chemist can analyze the chemicals in the tubes and determine the concentration of alcohol in the accused's blood. Another instrument known as the Harger breath test or drunkometer is used elsewhere in Texas.

According to our experiences in Dallas County, in excess of 25 percent of the cases the chemical analysis shows that the accused was not sufficiently intoxicated to warrant the chemist's testimony that in his opinion the person to whom the test was administered was intoxicated. Such cases are, of course, dismissed. This fact, coupled with the circumstance that many people apprehended for drunk driving pass the first part of the test and are never filed on, shows that this scientific test is a boon to the innocent as well as a great aid to the prosecution of the guilty.[2] Before these tests were used, a person apprehended would

[2] The accused has been found guilty in approximately 98 percent of the cases in Dallas County where the tests have been used, but the percentage is much smaller where the jury did not have benefit of the scientific evidence.

have to plead guilty before the court or take his chances on a jury verdict where the only testimony would be the opinion of officers and lay witnesses as to whether or not he was intoxicated. It is not difficult to see how unreliable opinion testimony of this type can be, especially where there is some evidence of drinking. It is even more unreliable where there has been a collision and the accused, as well as the passengers of the other vehicle, is badly shaken up or knocked unconscious. As the Texas Court of Criminal Appeals has recently pointed out, it would appear to be an advantage to both the prosecution and the defense to have a completely accurate means of determining the debatable question of intoxication.[3]

Assuming that proper care, control, and custody of the tests are proved, three main objections have been leveled in Texas at their admissibility in evidence:[4]

1. They are unreliable or inaccurate.
2. They violate Article 727 of the *Revised Code of Criminal Procedure (1925)* (the so-called confession statute).
3. They violate the constitutional right of the accused against self-incrimination (Article 1, Section 10 of the Constitution of the State of Texas and Article 3 of the *Revised Code of Criminal Procedure (1925))*.

The first objection has been held by the court of criminal appeals as being one that goes to the weight of the evidence and not to its admissibility. Two recent decisions stand out on this proposition: *Holloway v. State*,[5] a case in which a urine test was

[3] Jones v. State, ...Tex. Crim. Rep....., ...S. W. 2d.....(1952).

[4] For a comprehensive survey of the law of admissibility of intoxication tests in the United States see DONIGAN, CHEMICAL TEST CASE LAW (Traffic Institute, Northwestern University, 1950) 27-61. A fourth objection has been raised in other jurisdictions that the tests violate the Fourth Amendment to the United States Constitution (illegal search and seizure), but such an objection in Texas has not come to this writer's attention. For a discussion of this point see *op. cit.* at 27-30.

[5] 146 Tex. Crim. Rep. 353, 175 S.W. 2d 258 (1943).

involved, and *McKay v. State*,[6] a case in which a Harger breath test was used. A more recent case, *Jones v. State*,[7] appealed from Dallas County and not yet reported, reviews the whole question of scientific tests for intoxication and will be discussed further below.

In the *Holloway* case the accused signed a "waiver," giving his consent to a urine test. The results of the chemical analysis were not contested but were objected to on the grounds that they were obtained by a formula the accuracy or reliability of which had not been established. Further, it was argued that if the accused were intoxicated, it was apparent that he did not know what he was doing when he signed the "waiver" and therefore did not voluntarily give his consent. The court held that the first objection went to the weight of the evidence and not to its admissibility. On the second proposition the court distinguished *Apodaca v. State*[8] as being a case where no consent to any of the things done to the accused was shown. The court observed that the accused in the instant case never claimed in his testimony that he was so drunk that he did not know what he was doing, but denied that he was under the influence of alcohol at all, and the evidence was held admissible.

In the *McKay* case the defense complained of the accuracy or reliability of the Harger breath test and of the testimony of an expert witness. The conclusions based on the results of test, testified to by an expert, were excepted to because there was some disagreement among scientists as to the machine's accuracy. Again the court held that these objections went to the weight of the evidence and not to its admissibility. The court held that the evidence was admissible for what it was worth. Comment was made that there are many scientific facts with which some sci-

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[6] ..... Tex. Crim. Rep. ....., 235 S.W. 2d 173 (1950).

[7] Commented upon *supra* at note 3.

[8] 140 Tex. Crim. Rep. 593, 146 S.W. 2d 381 (1941).

entists would disagree, and that in all probability a scientist may be found who will disagree with practically every generally accepted theory — even to the fact that the world is round. But the opinion of these dissenters by no means bars the evidence of a scientific truth where the expert is qualified by training and experience to testify and to give his opinion.

The court quoted at length from the work done at the Traffic Institute of Northwestern University with reference to scientific intoxication tests and pointed out:

> ... [T]he President's Highway Safety Conference, the American Medical Association's Committee on Street and Highway Accidents, the National Safety Council's Committee for Tests for Intoxication, and other national organizations have recommended the passage of laws by the states which will recognize the value of chemical analyses of the blood, urine, breath, or other bodily substances, and give rise to the presumption that if the test shows the accused to have .05 per cent or less by weight of alcohol that he is not under the influence of intoxicating liquor; that if he has in excess of that amount but less than .15 per cent, no presumption rests one way or the other; that where a test shows .15 per cent or more by weight of alcohol in his blood it shall be presumed that the defendant was under the influence of intoxicating liquor and that such evidence shall not be construed as limiting the introduction of other competent evidence bearing upon the question of his intoxication.[9]

The Court further stated:

> ... The Legislature of Texas may pass such law, if within its constitutional powers, but the courts of Texas have no legislative duties or powers.... [I]t is our view that the bill as taken goes only to the accuracy of the instrument.[10]

Objections numbered 2 and 3 above have usually been lumped together in one objection, and it was only recently that our court of criminal appeals has made a distinction between them in driving-while-intoxicated cases. For years some lawyers and courts

[9] 235 S. W. 2d at 175.

[10] *Ibid.* Such a statute adapted to our Code has been drafted under the author's supervision and has been recommended to the Legislature as an addition to the driving-while-intoxicated statute (to become Article 802d of the TEX. REV. PEN. CODE (1925)). This statute would make a legal presumption out of what is now only a medical or scientific presumption. Twelve states have a similar statute at the present time.

did not realize that the rules on which the objections were based are over a hundred years apart in origin and that they were founded for different reasons and are based on different principles. These lawyers and courts have been under the misconception that the confession statute and guaranty against self-incrimination were based on the same proposition.[11]

Article 727 of the *Code of Criminal Procedure* states that a *confession* may not be used if it was made while the accused was in jail or in custody of an officer unless it was voluntarily made after proper warning by the person to whom it was made and was reduced to writing and signed by the accused. For some time it was thought that the arresting officer was required to get the accused's permission in writing in the form used for confessions in order to give the accused an intoxication test of any kind. But very recently the court of criminal appeals recognized the distinction between the confession statute and the constitutional provision against self-incrimination and stated that an agreement to take a scientific alcoholic test was not in the nature of a confession. Thus, Article 727 had no application to the obtaining of consent for such a test.[12] This holding is an important one, and it is a great step forward when one considers the broad interpretation formerly given to the statute by the court.[13]

The constitutional and statutory provisions against self-incrimination in Texas provide that one accused of crime shall not be compelled to give evidence against himself. The constitutions of some other states employ slightly different wording ("shall not be compelled to testify against himself" or "furnish evidence against himself"), but regardless of this variation the courts and text writers trace the rule to the ecclesiastical courts of England and agree that our constitutional and statutory provisions are merely

[11] See 3 WIGMORE, EVIDENCE (3d ed. 1940) §§ 817 *et seq.* and 8 *id.*, § 2250 *et seq.*

[12] Heath v. State, ... Tex. Crim. Rep. ....., 244 S. W. 2d 815 (1951); Brown v. State, ... Tex. Crim. Rep. ....., 240 S. W. 2d 310 (1951).

[13] The court of criminal appeals has held the statute applicable to any act "tantamount to or in the nature of a confession." See MCCORMICK AND RAY, TEXAS LAW OF EVIDENCE (1937) § 527.

declaratory of the common law. Moreover, these statutory and constitutional provisions neither enlarge nor diminish the common law rule,[14] and the only principle behind it is to prevent an accused from being forced to *testify* or be a *witness* against himself. The rule was never intended to exclude physical evidence or evidence which speaks for itself, but only to exclude *testimonial* evidence of the accused against himself.

McCormick and Ray state: "The privilege has its limits, and anything which does not make the accused a witness does not violate the privilege."[15] In cases not involving drunk driving the court of criminal appeals has accepted this view. The court has held that a defendant may be required to stand up in court or to put on his hat for identification; that an accused may be compelled to put his foot in tracks made at the scene of the crime and officers may be allowed to testify as to the result; that an accused may be allowed to testify as to the result; that an accused may be compelled to submit to a medical examination for the purpose of determining whether he is insane or has a certain disease.[16] Further, it has been held that an accused may be compelled to stand before a fluoroscope and to take an enema in order that stolen rings may be recovered;[17] that his finger prints may be taken after arrest and used as evidence;[18] and that he may be compelled to write for the purpose of having his handwriting compared with written documents.[19] In all these cases it is important to note that the accused was not asked to consent to do certain things but was *compelled* to do them.

However, in *Apodaca v. State, supra,* where drunk driving was an issue, the accused was compelled by officers after arrest to

[14] 8 WIGMORE, EVIDENCE (3rd ed. 1940) § 2252; MCCORMICK AND RAY, TEXAS LAW OF EVIDENCE (1937) § 194.

[15] MCCORMICK AND RAY, TEXAS LAW OF EVIDENCE (1937) § 203.

[16] *Ibid.*

[17] Ash v. State, ...Tex. Crim. Rep....., 141 S. W. 2d 341 (1940).

[18] Conners v. State, 134 Tex. Crim. Rep. 278, 115 S. W. 2d 681 (1938).

[19] Long v. State, 120 Tex. Crim. Rep. 373, 48 S. W. 2d 632 (1931); *but see* Beachem v. State, 144 Tex. Crim. Rep. 272, 162 S. W. 2d 706 (1942).

take a coordination test and a urine test. The court of criminal appeals held that this violated the accused's constitutional right against self-incrimination, and the testimony of the officers and the results of the test were held inadmissible. But *Holloway v. State, supra,* and the *Brown* and *Heath* cases[20] are clear that where oral consent to a test is shown, this is sufficient. The most recent case, *Jones v. State, supra,* re-affirms what the court said in the *McKay* case, *supra,* calls for legislation on the subject, and distinguishes the *Apodaca* case as one in which the officers *forced* the accused to do things which were "tantamount to forcing him to testify." The *Jones* opinion explains that the finger print cases and the cases in which the accused's shoes were placed in a track were cases where *the mechanical acts the accused* was put through were used merely for the purpose of obtaining proof of existing facts, and not to support opinions of his condition. This appears to the writer to be a very weak distinction in view of the fact that the court has held from the beginning that an officer may testify as to the defendant's thick tongue, staggering, etc., to support his opinion of his condition. Nevertheless, it would appear from the foregoing cases that, with reference to the use of intoxication tests, the law of Texas at the present time is clear at least to this extent: the tests are admissible for what they are worth; the accused need not give consent in writing — oral consent is sufficient — but the test is inadmissible if taken over the protest of the accused. This leaves unanswered the question of a test taken while the accused is unconscious or where neither consent nor protest is shown.

It is respectfully submitted that on the basis of the decisions discussed, and under a proper view of the privilege against self-incrimination,[21] the results of a test taken while the accused is unconscious, or where neither protest nor consent is shown, should

[20] Cited *supra* note 12.

[21] See McCORMICK AND RAY, TEXAS LAW OF EVIDENCE (1937) § 193, where it is argued that under modern conditions the whole rule of self-incrimination has lost much of its basis.

be admissible. In the *Jones* case the court, in asking for legislation on the subject, stated that it would appear to be an advantage to both the defense and the prosecution to have a scientific means of determining the debatable question of intoxication. Modern science has discovered such a means, and, if what is wanted in our courts is truth and justice, rather than opinions, these tests certainly ought to be given legal status.

Of course, no wise district attorney or law enforcement person would advocate a rule of evidence which might open the door to police brutality, or to the violation of an accused's civil rights. But if the reason for any rule of evidence is looked into, as well as the matter of protection of the accused, one finds that the general underlying principle behind any rule of evidence is, or should be, to exclude *untrue* or *unreliable* evidence and to admit that which has some basis of verity. The underlying principle of the confession statute is to keep out *untrue* confessions — those obtained by police brutality or by hope of reward or pardon — as well as to discourage brutality. The principle behind the constitutional provision is to prevent the accused from being compelled to *testify* against himself — not to exclude evidence which is naked to the eye or speaks for itself.

To resolve the problem of whether or not taking a test from an unconscious person or taking one over the objection of a conscious one violates the self-incrimination privilege, and to insure that the courts make the best use of scientific evidence available to them, the Committee on Tests for Intoxication of the National Safety Council passed a resolution at the National Safety Conference in Chicago in October, 1952. The resolution was transmitted to the Committee on Uniform Laws and Ordinances of the National Safety Council. The resolution calls for an amendment to the driver's license statutes making it a condition precedent to the obtaining of a driver's license that one agree in writing to submit to a scientific alcoholic test if he is ever arrested for driving while intoxicated. It is believed that such a statute would be

constitutional inasmuch as the use of the highways has been held to be a privilege and not a right, and any reasonable regulation of their use is constitutional.[22] It would seem that if a state under its police powers can require a safety inspection of one's automobile and require certain physical standards for driving as a condition precedent to the issuing of a license; or if a state can force an out-of-state resident to appoint a service officer as his agent if involved in an accident merely by the use of the highways;[23] a state could require an agreement to take a scientifically approved alcoholic test, if one is arrested for driving while intoxicated, as a condition precedent to the issuing of a driver's license.

As our highways become more crowded and as automobiles get faster, we can expect the problem of the drunk driver to become more acute. There is a need for scientific evidence in our courts so that the innocent person, who may have had a beer or two, will not be prosecuted because he may have had a tragic accident. There is a need for scientific evidence so that the guilty drunk driver will get his just deserts in court. The court of criminal appeals has done much in the right direction, and it can do more, but as it has pointed out, it cannot legislate. The Legislature should take the matter into hand.

*Henry M. Wade.**

[22] Packard v. Banton, 264 U. S. 140 (1924); Taylor v. State, 151 Tex. Crim. Rep. 568, 209 S. W. 2d 191 (1948); Department of Public Safety v. Robertson, 203 S. W. 2d 950 (Tex. Civ. App. 1947), and many cases cited therein.

[23] TEX. REV. CIV. STAT. (Vernon, 1948) art. 2039a; O'Sullivan v. Brown, 171 F. 2d 199 (5th Cir. 1948); Morrow v. Asher, 55 F. 2d 365 (N. D. Tex. 1932).

*LL.B., University of Texas; District Attorney, Dallas County, Texas. The author has been assisted in the preparation of this paper by Assistant District Attorney Sam Daugherty, LL.B., Southern Methodist University.