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POLICE OFFICER'S HANDBOOK

ARREST, SEARCH AND SEIZURE

1973

PART III

FORCING HANDWRITING SAMPLES

FORCING VOICE EXEMPLARS

BLOOD SAMPLES FOR ALCOHOL TEST

REMOVAL OF EVIDENCE BULLET

DRAGNET ARRESTS

FLEMING'S NOTEBOOK...Chapter 86:

Arrest on Teletype Information
Hot Pursuit Search
Auto Search From Radio Report

Prepared Under the Direction of E. Fleming Mason, Producer of Crime-to-Court ETV Law Enforcement Informational Programs in cooperation with SLED and South Carolina Law Enforcement Officers' Educational Television Training Program Committee.

South Carolina LAW ENFORCEMENT - ~~ETV~~ (Educational Television) TRAINING PROGRAM -

POLICE OFFICER'S HANDBOOK —

ARREST, SEARCH AND SEIZURE,

1973,

PART ~~III~~ 3

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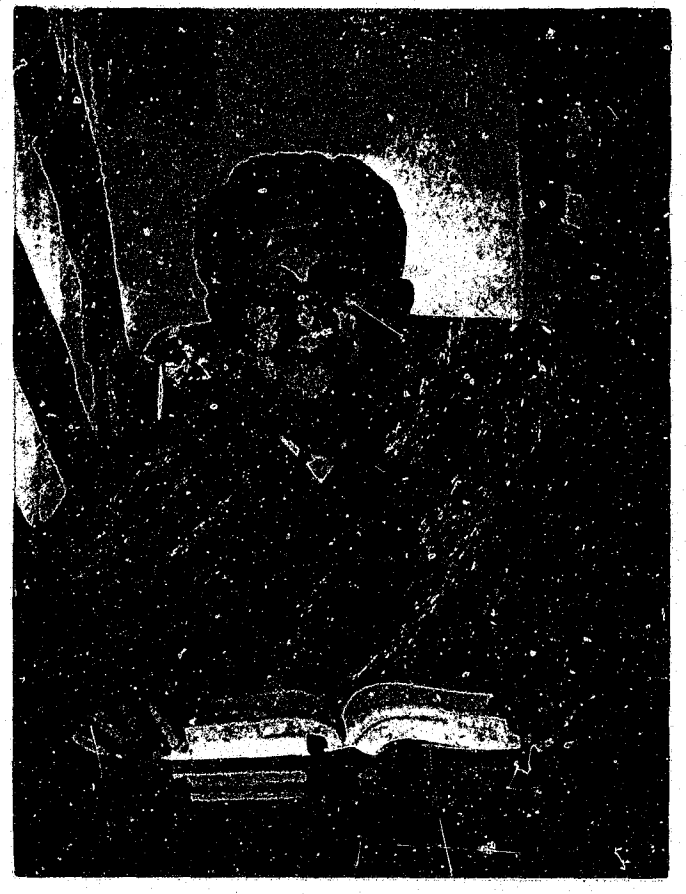

Hon. Louis Rosen
Resident Circuit Judge
First Judicial Circuit
State of South Carolina

C O N T E N T S

F O R E W O R D

When we speak of search and seizure, we usually have thoughts of search warrants to search houses or other buildings, or motor vehicles, perhaps, for tangible things, such as weapons, contraband, or stolen goods. It is somewhat difficult to conceive that the obtaining of a voice sample, or exemplar, or a handwriting sample, is also a seizure. But these things do involve seizures, nevertheless.

It was argued for a long time that a person's voice or handwriting, obtained in circumstances in which voluntariness could not be established, amounted to requiring a defendant to testify against himself...in violation of the Fifth Amendment to the Constitution of the United States. This argument has been soundly rejected by the Supreme Court of the United States, the most recent rulings on the question having been handed down in January of this year.

But the fact that such evidence may be used against a defendant in court does not mean that it may be used in any and all circumstances. There is a seizure involved, and the Supreme Court has said again, as it has done repeatedly over the years with deadly consistency, that law enforcement officers, weilding a part of the awesome power of official government, may not use unlawful tactics in obtaining such evidence...that basic fairness is a part of due process.

The fine police officers of this State can protect themselves from much grief in courtroom results if they will learn thoroughly the few simple rules that will insure the required basic fairness in all seizures.

Louis Rosen
Resident Judge
First Judicial Circuit
State of South Carolina

FORCING DEFENDANT TO GIVE HANDWRITING AND VOICE SAMPLES

For a very long time the law has not been clear on the power of the State to force a defendant to give samples (exemplars) of his handwriting or voice ...in forgery and other cases in which identification of the accused by his handwriting or voice is important.

One Federal Circuit Court of Appeals had held that Fourth Amendment rights prevented the forcible production of handwriting and voice samples...on the ground that such police activity was an unreasonable search and seizure. 442 F2d 276, Seventh Circuit. Another Federal Court of Appeals had reached the opposite conclusion...that, in cases in which the defendant was properly and lawfully in custody or before the court in some other lawful manner, a suspect or defendant could be required to furnish

such samples. US v. Doe (Schwartz), 457 F2d 895, Second Circuit.

Largely because of this conflict of opinion in the Federal Court System itself, the United States Supreme Court decided to rule on the question, doing so in an opinion entitled US v. Dionisio, 41 LW 4180, filed January 22, 1973.

THE DIONISIO RULE

A DEFENDANT LAWFULLY IN CUSTODY OR LAWFULLY BEFORE THE COURT OR INVESTIGATING GRAND JURY MAY BE REQUIRED TO FURNISH VOICE SAMPLES THAT MIGHT BE USED AGAINST HIM IN COURT.

The suspect Dionisio was before a Federal Grand Jury on Subpoena in the investigation of certain illegal gambling activity. A recording of a telephone conversation with known gamblers had been taken, and the prosecutor wished to have a sample

of Dionisio's voice to compare with the voice on the recording. Dionisio refused...one ground being that such requirement would be the same as forcing him to testify against himself. He was not actually under arrest at the time, but was before the Federal Grand Jury by subpoena. Upon Dionisio's refusal to furnish the voice sample, the Circuit Judge committed him to jail for contempt.

The United States Supreme Court upheld the right of the prosecution to require that the suspect furnish voice samples to be compared with known voice recordings...even though such samples could produce evidence to be used against the suspect.

NOT TESTIFYING AGAINST HIMSELF

The Supreme Court said again, as it had earlier in US v. Wade, 388 US 218, that the Fifth Amendment privilege against being required to testify against one's self applies to information communicated by

the defendant...such as, testimony as to what the defendant had done, or had not done, etc. ...and not to the voice itself. Previous cases were reviewed by the court:

Gilbert v. California, 388 US 263, re-affirmed... handwriting exemplars (samples) not protected against Constitutional self-incrimination provision.

See also latest case on handwriting samples... US v. Mara, January 22, 1973, 41 LW 4185.

BLOOD SAMPLES AND OTHER PHYSICAL CHARACTERISTICS

Schmerber v. California, 384 US 757, re-affirmed, holding that forcible production of several physical characteristics was not unlawful (Dionisio, supra):

(1) Fingerprinting.

(2) Photographing.

(3) Measurements (bodily).

(4) Writing samples.

(5) Speaking (voice) samples...including particular words.

(6) Appearance in Court.

(7) To stand.

(8) To assume a particular stance.

(9) To walk.

(10) To make a particular gesture.

(11) Blood sample to be analyzed for alcoholic content...if taken in clinical conditions.

(12) Wearing of particular clothing.

RESTRICTIONS ON RULE

Like most rules having to do with search and seizure, there are conditions that must be observed to make them work. The Dionisio case makes it clear that the defendant or suspect must be under lawful arrest or must be lawfully before the court or a grand jury. Otherwise, the evidence will be the result of an unreasonable seizure, and will not be

admissable in evidence. So, the two things required to make the forcible giving of physical evidence lawful are:

(1) Lawful custody of the suspect.*

(2) Taking of evidence in clinical conditions.**

*The suspect could be in lawful custody although not in a jail. He could be in a hospital, for example, under arrest, or before a court or grand jury under subpoena.

**This requirement is essential for the most part in things like the forcible taking of blood samples, or other body fluids...fingernail residue or hair samples...or evidence bullets from the body.

IS A WARRANT NECESSARY?

Warrants for searches and seizures are so often spoken of as search warrants that it is often overlooked that they are also seizure warrants!

The true name of such a warrant should be a search and seizure warrant. It is as important to have a warrant for seizures...in proper cases...as for searches.

REMOVAL OF EVIDENCE BULLET

When a bullet must be removed, for example, and the suspect will not consent to the operation, a warrant to search for and seize the evidence bullet should be obtained. Such a warrant can be issued by a magistrate, but doctors and hospitals are usually so uncertain as to their possible liability in such situations that it would probably be much more effective to get the warrant in the form of a court order from a circuit or county judge.

EMERGENCY CIRCUMSTANCES

More often than not, the circumstances involving the necessity of drawing a blood sample from a wreck

victim for alcohol content analysis do not afford the time in which to get a warrant. Alcohol dissipates at a rather rapid rate, and many times a wait of a few hours will render the test useless. For this reason, in exigent or emergency circumstances, where time is not available in which to obtain a warrant or order, the law permits the taking of a blood sample, in clinical conditions, without a warrant. Normally, with an evidence bullet, no such emergency circumstances exist.

ROUND-UP OR DRAGNET SEIZURES

It should be understood that so-called 'round-up' arrests and fingerprinting or 'mugging' will not receive the OK of the courts. Such a situation developed in a case called Davis v. Mississippi, 394 US 721, in which a large number of persons were arrested in a 'dragnet' operation and fingerprinted. One of those seized and fingerprinted proved to be the wanted criminal, but the evidence was suppressed

because the first test of lawful seizure of bodily evidence was not met. There was no probable cause or good reason to arrest the suspect initially. He was simply brought in with the rest of the 'fish' caught in a broad net. The suspect must first be under lawful arrest before the seizure of any physical evidence is permitted. See also Dionisio, supra. How to get such a person under lawful arrest ...or before the court or grand jury by subpoena? There must be some adequate reason to believe that he is the wanted person.

The United States Supreme Court explained this distinction in these words, speaking of forcible seizure of blood sample:

"The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence be obtained. Schmerber v. California, 384 US 757."

The Court said this, however, in setting forth the rule when there is probable cause to believe that the subject is the suspected person, such seizures are lawful:

"It has long been held that the compelled display of identifiable physical characteristics infringes no interest protected by the privilege against self-incrimination." Dionisio, supra.

MORE ON CONSENT SEARCHES

Although it is a general rule that a suspect may consent to search of his person, house, or automobile by police officers, and the resulting search is lawful because of the consent, more and more emphasis is being placed on the circumstances surrounding the request by the officers and the consent by the suspect. There are circumstances in which consent to search may not be voluntary. If not voluntary, the consent is legally no consent at all!

The argument has been made that a suspect cannot voluntarily give consent to search to a policeman...particularly a uniformed one...because his will is overborne by the policeman's authority. The courts so far have refused to buy this argument, holding, generally, that consent to search may be given voluntarily to a police officer. It is emphasized, however, that a showing of a lack of

voluntariness on the part of the suspect will make the search unlawful.

It is for this reason that it is very important for every police officer making a consent search to be able to establish that the consent was voluntary. If this is not done, the officer runs the risk of having his search ruled unlawful and the evidence he has found inadmissable at trial.

FLEMING'S NOTEBOOK!

FLEMING'S NOTEBOOK...Chapter 86:

ARREST ON TELETYPE INFO

Police in Portland, Oregon, received information on interstate teletype that suspect was wanted for escape from prison in Kansas while serving felony sentence...arrest warrant was in Kansas. Police in Portland arrested suspect without any kind of warrant, relying on teletype from official source in Kansas. Arrest without warrant OK, said Federal Court. Police in felony cases may rely on official communication from another Department to justify arrest without warrant. US v. McCray, 468 F2d 446 (10th Circuit). See also US v. Smith, 468 F2d 381 (3rd Circuit).

ENTERING WITHOUT DEMANDING ENTRY

Officers with search warrant for house went to front door and knocked...no answer after two or three

seconds...officers tried door knob, found door unlocked, turned knob and entered. Hashish was found. Illegal entry, said Federal Court of Appeals. There was no real emergency, and reasonable time should have been allowed for response to knock before entry made. US v. Pratter, 465 F2d 227.

SEARCH OF JAIL CELL

A prisoner's cell was searched...not for contraband...but for papers that would be evidence against him in a tax prosecution. There was no search warrant. The search was legal, said the court! A prisoner cannot claim the right of privacy in a jail cell. US v. Hitchock, 467 F2d 1107 (9th Circuit).

HOT PURSUIT SEARCH

Bank was robbed...one bandit wounded...trail of blood led to house...three robbers involved... officers entered, found wounded bandit, but no sign

of other two. Entire house was searched without search warrant.

Court Ruling: Search was legal...not as an incident-to-arrest...but because two armed men were missing and were likely to be in the house...search was legal as protection to officers. US v. Johnson, 467 F2d 630. (2nd Circuit, Conn.).

SEIZURE OF ARTICLE NOT LISTED

Search was being made on basis of search warrant for certain listed items...in process of search, contraband items not listed were discovered and seized. Seizure lawful...because search being conducted for listed items was lawful and extent of search was not abused. Taylor v. Minn., 467 F2d 283.

PHOTO BASIS OF WARRANT

A photo identification of a suspect is lawful basis for issuance of arrest warrant. This should be set out in the affidavit, i.e. that defendant has been identified by photograph. US v. Smith, 467 F2d 283.

MUST WARRANT CONTAIN FACTS?

The arrest warrant did not set forth any facts, but the affidavit upon which the warrant was based contained facts to support probable cause. This was sufficient. Only the affidavit need set out facts. It is not necessary to repeat them in the warrant. US v. Rael, 467 F2d 333.

AUTO SEARCH FROM RADIO REPORT

Officers on stake-out observed contraband being placed in auto...they radioed information to officers waiting down the road, who stopped car and made

thorough search, including trunk. Search was lawful because there was probable cause to believe contraband was in auto on-the-road. US v. McIntyre, 466 F2d 1201.

DEMAND FOR NEW COUNSEL

Indigent defendant started into trial with appointed counsel, then, in middle of trial, fired that one and demanded appointment of new counsel. Ruling: The defendant had no right to new counsel unless he could show good reason why such action was necessary. US v. Burkeen, 355 F2d 241.

DELAY IN TRIAL

Defendant was arrested on armed robbery charge in September, 1969, but was not tried on that charge until February, 1971...a period of 18 months. He was in jail on other charges during that time, but had asked for a trial. Ruling: Delay was unreasonable. Charge must be dropped. US v. Rucker, 464 F2d 823.

BLOOD SAMPLE DESTROYED

Blood sample was taken from reckless homicide suspect...test showed high alcohol content. Sample was later thrown away by mistake, before trial. Ruling: Analyist could testify as to results of test. His testimony was not ruled out by this mistake. US v. Sewar, 468 F2d 236. Same reasoning would apply to lost bullet or gun, but chain of possession to the lab technician must be shown.

FATHER MUST SUPPORT ILLEGITIMATE CHILDREN

Where a state provides by law that a legitimate child must be supported by the father, or that it is a crime for the father to fail or refuse to support his legitimate children...and South Carolina law does both...the law must apply to illegitimate children as well! So says the United States Supreme Court in Gomez v. Perez, 41 LW 4174, January 17, 1973. The Court recognized that there might be real problems in proving such fatherhood, but said that the difficulty of proof should not change the rule.

DEFENDANT OF MINORITY RACE...RIGHT TO QUESTION JURORS ABOUT PREJUDICE

A defendant has the right to have the presiding judge at a criminal trial, when the defendant requests it, to ask each prospective juror whether

or not he is prejudiced against members of that race. United States Supreme Court, Ham v. S.C., 41 LW 3171, January 17, 1973.

Comments on the Ham decision:

(1) The defendant's lawyer does not have the right to question the jurors. The judge may do the questioning if he wishes.

(2) Questions about racial prejudice need not be asked unless requested by the defendant.

(3) The Ham case applies to questioning about race only...not length of hair or beards, or other physical characteristics.

(4) The right to questioning prospective jurors about racial prejudice applies in all courts ...magistrates' and municipal courts, as well as county courts and general sessions courts.

(5) The judge may use his own words in questioning prospective jurors about racial prejudice. He is not required to ask the question in any particular words.

WASHINGTON, D.C., POLICEMEN IMMUNE TO CIVIL RIGHTS SUIT

Strangely, police of the Nation's Capital are not subject to suit under the Civil Rights Act. It is not a state or territory, says the high court! District of Columbia v. Carter, 41 LW 4127, January 10, 1973.

COMMENTS BY CIRCUIT

JUDGE LOUIS ROSEN

ETV PROGRAM MARCH 1973

LINE-UP BEFORE CHARGE MADE

"The United States Supreme Court has recently held that at a line-up identification procedure held shortly after the arrest and before the suspect has been formerly charged, it is not required that a lawyer be present."

WHEN DOES THE FORMAL CHARGE OCCUR?

"A station-house 'booking' is a necessary house-keeping item, but it is not a formal charge. Under South Carolina law, there are only two ways in which a person can be formerly charged with any crime more serious than a traffic offense. (1) An arrest warrant duly issued upon affidavit, and (2) Indictment by a grand jury."

LONE CONFRONTATION IDENTIFICATION

"...the reason it (lone confrontation) is outlawed by the courts is that when a lone suspect in the custody of police is presented to a witness, the situation is too suggestive of the suspect's guilt."

TAKING OF BLOOD SAMPLE WITHOUT CONSENT

"The Supreme Court has said that any blood sample must be taken in clinical conditions, that is, by a doctor or nurse, or, at least, in a hospital or clinic by a paramedical person."

REQUIRING PHYSICAL EVIDENCE

"The United States Supreme Court re-affirmed as late as January 1973, that a defendant charged with a crime, or lawfully before a court in some other manner, could be required to give a handwriting sample or exemplar, and even a voice sample, albeit against his will."

FORCE TO REQUIRE EVIDENCE

"When the court states that certain evidence may be obtained forcibly, it means the use of lawful force...not unlawful force."

DRAGNET OR ROUND-UP ARRESTS

"The lawfulness of the dragnet procedure depends upon the circumstances. People cannot be taken into custody on the mere chance that they might be the guilty person."

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THROUGH TELEVISION

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