Recent Developments in the Constitutionality of Chemical Testing in the United States

(abstract)

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Use of chemical tests in the recognition and control of alcoholic intoxication in the United States is progressing. Chemical tests are now being used in 369 of the 1,224 (one-third) municipalities with population of 10,000 or over. Of the state agencies, tests are now used by 28 of the 48 (about 60%). During 1952 the municipal and state enforcement agencies employed chemical tests in more than 100,000 instances of intoxication in the enforcement of traffic laws. About one-third of the agencies use blood tests exclusively; about a third, breath tests exclusively; about one-tenth urinalysis, exclusively. In nearly one-third of the agencies, tests in combination are employed, principally blood-breath and blood-urine. Use of breath tests, in particular, is expanding rapidly. During 1952 two state legislatures enacted chemical testing legislation, bringing the number of states with the chemical test statutes to 16.

That chemical test evidence has an important bearing upon the arrest and conviction rate for alcoholic intoxication is emphasized in the enforcement record. In comparing the enforcement index of agencies which arrest with and without chemical testing evidence, arrests followed in six out of ten cases where tests were used, in four of ten cases where not used. The conviction rate was substantially higher in chemical test cases. With reference to municipal agencies, 85% had a conviction rate of 90% or over in chemical tests cases but only 40% in non-chemical test cases. It is becoming increasingly apparent that tests provide an important substantiating evidence in traffic cases involving intoxication.

Are chemical tests reliable in the opinion of our courts, and therefore admissible? Today, our courts tend to group into one of three classes: (1) "Negatives" who believe that chemical tests have not yet acquired sufficient credibility as evidentiary proof, (2) the "acceptors" who believe that chemical tests have become sufficiently established as a scientific fact as to warrant admission, but require other substantial supporting evidence,
(3) the “affirmatives” who approve admissibility and place substantial credance in test reliability. The “negatives” are now in the definite minority; most opinions group in the “acceptor” classification. An overview of the judicial attitude may be expressed as follows: The courts are now in substantial agreement that chemical tests have sufficient reliability as to warrant their admission as evidence. Where there is conflicting testimony regarding liability, the courts hold that it is for the jury to weigh the evidence and to decide thereon. Most courts hesitate to affirm conviction where based primarily or exclusively on chemical test analysis.

In many intoxication cases, the constitutionality of conditions precedent forms a main basis of challenge. With regard to the familiar principle of self-incrimination, most of the courts no longer hold to the premise that anything gained from an examination of the defendant’s person is within the privilege. Rather, the great majority of courts confine the privilege to testimonial utterances. Most courts hold that consent to taking of the specimen must be voluntary. But the courts no longer require the rigid specifications made obligatory under confession statutes. In fact, many courts now hold that the confession statutes do not apply to the obtaining of consent to the taking of samples. In many instances testing evidence was held admissible although the consent was not in writing, the test was taken while the subject was unconscious, he was given no statutory warning of his constitutional rights, etc.

Today, two of the main areas of contention, if not the main ones, involve the constitutionality of conditions instant and subsequent. It is in these areas that chemical tests have met their most critical challenges. In the area of conditions instant (dealing with the actual taking of the sample) chemical testing has met with defeat because the test was not taken by a qualified person with proper equipment according to accepted techniques, not because there was not proper identification of the sample and the body from which taken, etc. In almost a third of the cases where error was upheld in use of chemical tests, the above challenges were considered decisive.

In conditions subsequent lies another area of significant contention, and one in which chemical testing has met defeat in many instances. Some of the many contentions raised were: sample was not properly sealed, and identified; identification of the specimen was lost in transmission; tests results were determined by one not competent; admission of testimony of operator violated hearsay rule; test evidence altered legislative rules; test evidence invaded province of the jury; test results fall short of proving intoxication within the meaning of the law; et cetera.

Yet despite the legion of challenges raised to chemical test evidence (the record would include more than 100 specific challenges to admissibility and weight), it is now clear that chemical tests will be admitted if the following procedures are followed: (1) specimen is obtained with the knowledge and consent of the accused; (2) the specimens are taken according to accepted techniques, by qualified persons, in the presence of witnesses, (3) the specimens are preserved,
sealed, labelled, transported and stored properly, with care taken to record all facts so that no questions of identification or transportation may arise, (4) the specimens are analyzed by qualified persons, using acceptable chemical methods, (5) all witnesses are available to testifying in court including a physician or other qualified person who can present expert testimony in court on the meaning of tests results in terms of the degree of intoxication.

In brief, chemical testing has acquired a definite place in the enforcement control of intoxication. But the controversy continues unabated concerning the reliability and use of chemical testing. The future is encouraging.