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September 4, 2001

Opinion No. 01-138

Constitutionality of Grand Jury Subpoena of Blood Alcohol Tests

QUESTION

When a compelled blood-alcohol test is administered to a motorist pursuant to the guidelines in *State v. Jordan*, are constitutional privacy concerns implicated when a district attorney or grand jury subpoenas the results for the grand jury's consideration?

OPINION

Constitutional privacy concerns are not implicated when a district attorney or a grand jury subpoenas compelled blood-alcohol test results for the grand jury's consideration.

ANALYSIS

In Tennessee, a compelled blood-alcohol test may be performed if the following conditions are met:

a) The officer compelling the extraction of blood from the accused has probable cause to believe that the accused committed the offense of aggravated assault or vehicular homicide while under the influence of an intoxicant or drug, and there is a clear indication that evidence of the accused's intoxication will be found if the blood is taken from the accused's body and tested;
b) Exigent circumstances exist to forego the warrant requirement;
c) The test selected by the officer is reasonable and competent for determining blood-alcohol content; and
d) The test is performed in a reasonable manner.

State v. Jordan, 7 S.W.3d 92 (Tenn. Crim. App. 1999). *Jordan* is based on *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). In *Schmerber*, the United States Supreme Court reiterated that, "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Id.* at 767. The court, relying on the same rationale as that underlying warrantless searches justified by probable cause, held that a defendant's rights under the Fourth and Fifth Amendment were not violated when a blood sample was drawn without consent, provided that the investigating police officer had probable cause to suspect that the defendant was intoxicated and the test was performed in a reasonable manner. *Id.*

at 767-770. The court, relying on its previous decision in *Breithaupt v. Abram*, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d (1957), also held that such state action did not violate due process concerns. *Id.* at 760.

Thus, if the dictates of *Schmerber* and *Jordan* are obeyed, neither due process concerns nor privacy concerns are implicated by compelled blood-alcohol testing of drivers involved in accidents. When considered in light of the Supreme Court's decision in *United States v. Jacobsen*, 466 U.S. 109, 117, 104 S.Ct. 1652, 1658-59, 80 L.Ed.2d 85 (1984), the subsequent release by subpoena of the results of those tests to a grand jury also does not implicate either due process or privacy concerns. In *Jacobsen*, the Supreme Court held that "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." 466 U.S. at 117, 104 S.Ct. at 1658-59. Clearly, if a compelled blood-alcohol test has been performed pursuant to the guidelines in *Schmerber* and *Jordan*, it can hardly be said that there exists a reasonable expectation of privacy in the results of that test.

This conclusion is supported by the Supreme Court's recent ruling in *Ferguson v. City of Charleston*, 532 U.S. ----, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001). In *Ferguson*, the court held that, in the absence of a warrant or individualized suspicion, pregnant women enjoyed a reasonable expectation of privacy in routine medical tests administered by a state hospital, even when such test results indicated the presence of cocaine. *Id.* at 1288. Since *Schmerber* is premised on the grounds that probable cause must exist before the involuntary taking of a blood sample, it is in accord with *Ferguson*.

Given that the Tennessee law authorizing compelled blood-alcohol testing expressly addresses the requirement of probable cause, it cannot be said that a motorist has any reasonable expectation of privacy in the results of such tests and, accordingly, the concerns addressed in *Ferguson* are not implicated. Furthermore, motorists in Tennessee are put on notice by Tennessee's implied consent statute that they are subject to such testing. The implied consent law is applicable regardless whether the defendant is convicted of driving under the influence. *See* Tenn.Code Ann. § 55-10-406; *see e.g., Oman v. State*, 737 N.E.2d 1131, 1146 (Ind.2000)(implied consent statute reduces expectation of privacy in test results)

Also not implicated are several Tennessee statutes which restrict public access to medical records. *See* Tenn. Code Ann. §§68-11-304, 68-11-1503, 37-1-612. In *State v. Fears*, 659 S.W.2d 370 (Tenn. Crim. App. 1983), the court addressed a similar issue as it related to statutes protecting medical records of patients treated for venereal disease. The court stated that, while such statutes protected medical records of patients from the public, "they do not protect the medical records from the courts and public officials, such as the District Attorney General, in the performance of their official duties . . . Courts, grand juries, and district attorneys are not embraced in the term 'public' as used in these statutes." *Id.* at 376.

The function of the grand jury is to determine the question of probable cause. *State v. Hudson* 487 S.W.2d 672 (Tenn. Crim. App. 1972). Rule 6 of the Tennessee Rules of Criminal

Procedure delineates the powers of a grand jury. Rule 6(d) states, "[T]he grand jury shall have *inquisitorial powers* over and shall have authority to return a presentment of all indictable or presentable offenses found to have been committed or to be triable within the county." (emphasis added). Sub-section (e) states, "[I]t is the duty of the grand jury to: (1) *inquire into*, consider and act upon all criminal cases submitted to it by the District Attorney General." (emphasis added). Sub-section (g) states, "[I]n term time, the foreperson and/or District Attorney General may order the issuance of subpoenas for witnesses to go before the grand jury." Finally, sub-section (j) states, "[T]he grand jury shall send for witnesses whenever they or any of them suspect that an indictable offense has been committed." Based on the language of Rule 6, both the grand jury and the district attorney acting on behalf of a grand jury are authorized to subpoena witnesses and/or documents for the determination of indictable offenses.

Based on the above, a grand jury or district attorney acting on behalf of a grand jury does not abridge any constitutional right to privacy when a subpoena is issued for the results of compelled blood-alcohol tests conducted in accordance with *State v. Jordan, supra.*

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