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Constitutional Law—Motorist Denied Right To Counsel Prior To Sobriety Test

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a return to the old standard was proper, if not because it was a good standard, then because of an absence of a better one. This legislation was presumed to be constitutional, that is, presumed to be supported by facts known to the Legislature, and "while this presumption is rebuttable, unconstitutionality would have to be demonstrated beyond a reasonable doubt.[12] This could not be done. Appellants argued that there was inequality as between landlords and tenants in the statute. Their argument was that in different assessing units the ratio between using the 1954 rate and using the "most recent" equalization rate would not be uniform, and that in some parts of the state landlords would be receiving large profits while in others they would not be receiving a fair rate of return. This argument was answered by the Court in two ways: first, "the fact that the 1954 equalization acts do not reflect the full underassessments in certain areas is unfortunate, but it had to be viewed by the Legislature in the light of the effect on tenants generally if the revised acts were used,"[13] and second, the precedent of the recent *Abromo* case which foreshadowed this decision.

In *Four Maples Drive Realty Corp. v. Abromo*,[14] the Court held that the mere fact that the particular legislation under consideration did not affect all areas uniformly does not render it unconstitutional upon equal protection grounds "since the fact that the legislation does not affect all areas uniformly may furnish the necessary means of giving equal protection to all persons." Under these considerations, this court, cognizant of its own obligation toward legislative enactments, upheld the constitutionality of this statute. Appellants' arguments, although well conceived, fell short of rebutting the presumption of constitutionality. The 1954 rate is not the best, but it is as the Court states, simple, objective, and readily ascertainable, making it therefore practical and feasible.[15] If a different and perhaps more complicated rate was desired, the Legislature could have turned to the method used in condemnation or tax certiorari proceedings, but this was intentionally avoided. It remains for the Legislature to turn again to this problem, and establish a rate which cannot be said to be archaic,[16] and yet will be reasonable and fair.

B. B. F.

MOTORIST DENIED RIGHT TO COUNSEL PRIOR TO SOBRIETY TEST

A motorist, placed under arrest for driving while intoxicated, was asked by police to submit to a sobriety test. By provision of the Vehicle and Traffic Law, refusal to take the test is cause for the administrative revocation of an

12. Wiggins v. Town of Somers, 4 N.Y.2d 215, at 218, 149 N.E.2d 869, at 871, 173 N.Y.S.2d 579, at 582 (1958).
13. Bucho, supra note 10, at 477, 184 N.E.2d at 573, 230 N.Y.S.2d at 983.
14. 2 A.D.2d 753, 153 N.Y.S.2d 747 (2d Dep't 1955); motion for leave to appeal denied, 2 N.Y.2d 707, 138 N.E.2d 345, 163 N.Y.S.2d xc; appeal dismissed, 2 N.Y.2d 837, 140 N.E.2d 870, 159 N.Y.S.2d 976 (1957), appeal dismissed, 355 U.S. 14 (1956).
15. Bucho, supra note 10, at 477, 184 N.E.2d at 573, 230 N.Y.S.2d at 983.
16. Bucho, supra note 10, at 479, 184 N.E.2d at 574, 230 N.Y.S.2d at 984.

operator's license.[1] The suspect conditioned his submission to the test on being allowed to consult his attorney. The police denied his request to telephone, whereupon he refused to take the test. All this occurred well within the two hour limit set upon administration of an admissible test.[2] Without this requisite evidence[3] the criminal charge failed. However, for his refusal, the Commissioner of Motor Vehicles, after a hearing, revoked the unwilling motorist's license. Upon a petition to review this determination, the lower court annulled the revocation. On appeal, *held*, reversed and the Commissioner's order reinstated (memorandum decision), two judges concurring in an opinion. Denial of counsel does not render the subsequent refusal of a sobriety test an improper ground for the revocation of an operator's license by an administrative proceeding. *Finocchairo v. Kelly*, 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403 (1962) (mem.).

In *criminal* proceedings, especially in the early stages, the right to counsel has received growing protection. Post-arraignment admissions made in the absence of counsel are now inadmissible.[4] Even in earlier stages the denial of counsel when combined with such other deficiencies as the youth or mental incapacity of an accused may affect a confession to the extent of rendering it constitutionally involuntary.[5] Precisely in the instance where an accused inquires as to his right to have counsel before being required to make a statement, a statement secured by a failure to advise him of his rights cannot be used.[6] The rationale behind this trend is that the accused, in the face of unchallenged official detention and interrogation, all too easily may conclude that he is under a duty to inform the police about the crime, even his own crime. Instead, the law interposes his attorney authoritatively to advise the accused of his privilege against incriminating himself. This purpose is all the more necessary where at arraignment the power and skill of the State are declared to be against the probable criminal. In comparable civil situations the denial of counsel has long been allowed. Judicial and legislative investigating committees may exclude the counsel for a witness summoned before them.[7] This is so in spite of the apparent object of the committee's investigation, the gathering of facts for eventual prosecution perhaps of the very witness who appears before them without counsel. The justification given for such *in camera* procedure is that the accused has a sufficient shield in his privilege against self-crimination, which right is presumably well known. Under the statutory characterization of the procedure to revoke a license for refusing a blood test, that it is a civil

1. N.Y. Vehicle and Traffic Law § 1194.
2. N.Y. Vehicle and Traffic Law § 1192.
3. N.Y. Vehicle and Traffic Law § 1192.
4. People v. Rodriguez, 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962); People v. Meyer, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962).
5. Culombe v. Connecticut, 367 U.S. 568 (1961).
6. People v. Noble, 9 N.Y.2d 571, 175 N.E.2d 451, 216 N.Y.S.2d 79 (1961).
7. Anonymous v. Baker, 360 U.S. 287 (1959); In re Groban, 352 U.S. 330 (1957).

administrative proceeding reviewable as such,[8] there is, according to existing law, no right to counsel before making a choice regarding the test.

Sobriety test legislation has not been entirely without its constitutional faults. When first written, without both an arrest provision and the requirement of a hearing, the statute was struck down. Although attacked as an invasion of the privilege against self-crimination and a deprivation of the so-called freedom from bodily invasion, it has been upheld as constitutional.[9] The United States Supreme Court has inferentially approved sobriety test legislation even of the kind requiring a choice to risk conviction by submitting to a test or face civil loss of an operator's license by refusing the test.[10] However, the argument that the statute may so operate as to deprive a suspect of his right to counsel has apparently never been squarely answered before now.[11]

In the instant case the Court answered the question only by way of a memorandum. There was no invasion of the petitioner's constitutional rights by denying him counsel prior to requiring him to choose to take or decline the test. His refusal based upon this denial was not a conditional refusal to be distinguished from the refusal specified in the statute as ground for revocation of his license administratively. The concurring opinion volunteers the warning that if the petitioner stood before the Court convicted of the crime of intoxicated driving, then the deprivation of counsel would require reversal. However, the characterization of the revocation proceeding as civil prevented disagreement.

Prior to the time a choice regarding the test is compelled, there are the marks of arrest, detention, and interrogation for a crime. If this time were to fix the character of the procedure and, thus, the right to counsel, then even under existing law the accused would be entitled to counsel. That this time is critical is obvious. If the accused is realistically to choose regarding the test, he must be informed concerning what is considered intoxicaton under the law, what the legal efficacy of the test is, and in what manner the test must be administered. The accused also has the right by statute to have a private test taken as a check against the official, a prerogative about which he is probably uninformed. In short an informed choice, indeed, a meaningful right to choose depends upon the accused's access to competent advice, the only certain source of which is his attorney. The state, by setting this early time for the gathering of requisite evidence, in effect has limited the opportunity to have counsel to relatively insignificant post-test proceedings. This analysis becomes more meaningful, when it is realized that the ordinary protections available to an accused at the early stages of criminal proceedings and in investigatory proceedings are removed because of the nature of the evidence sought by the

8. N.Y. Vehicle and Traffic Law § 510(6).
9. Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954).
10. Breithaupt v. Abram, 352 U.S. 432, 435 & n.2 (1957).
11. Contra, Zdan v. Kelly, 4 A.D.2d 1004, 168 N.Y.S.2d 310 (4th Dep't 1957) (mem.); see Coleman v. Kelly, 12 Misc. 2d 116, 175 N.Y.S.2d 184 (Sup. Ct. 1957).

test. The accused may not assert the privilege against self-incrimination nor the privilege against unwarranted bodily invasion; the present case law removes these. An argument that compelling a choice regarding the test is an unwarranted search and seizure has been answered by including an arrest provision in the statute. Yet, the very cure for this ill recognizes the nature of the procedure as criminal and simply accomplishes the withdrawal of a constitutional right without replacing any comparably effective protection, such as the right to counsel. Perhaps the easiest criticism to be leveled against the Court's decision is that it was unnecessary to serve the purposes of the statute. Regardless of the interposition of counsel, intoxicated drivers will be removed, by the administrative revocation of their license or by criminal conviction, from the highway. The right to counsel will simply make their removal less arbitrary. The decision does evoke a distaste, though, for needlessly summary law enforcement. The sobriety test procedure has but one object, the removal of the intoxicated driver from our highways. There is one principal means by which this is accomplished, revocation of the important privilege of driving. Even in civil revocation the implicit ground for revocation is common to the fault evoking the criminal penalty, presumably the motorist who refuses the test is intoxicated. The sobriety test procedure can at best be called chameleon, but certainly not entirely civil in its nature. From the standpoint of the time when the statutory choice is required, then, the civil characterization of the subsequent revocation proceeding is irrelevant. If the right to counsel is to be fixed according to that point in the procedure at which it is asserted or even according to the nature of the procedure viewed as a whole, the motorist accused of intoxicated driving should be allowed counsel prior to choosing to take or decline a sobriety test.

D. R. K.

CONTRACTS

Bailee Liable for Failure to Recover Goods Attached by Erroneous Process

Plaintiff-seller sued to recover damages sustained as a result of the alleged breach by the defendant-buyer of two agreements, under each of which certain tinplate belonging to the plaintiff was stored in a warehouse of a third party in Naples, Italy. The tinplate had been a part of certain sales by defendant to defendant's customer. After the arrival of the goods in Italy, the customer rejected the goods. Following such rejection the plaintiff-seller and defendant-buyer reached two agreements—the purpose of which was to provide for adjustments satisfactory to the three merchants involved. Each agreement provided for plaintiff-seller to give defendant-buyer certain monetary credits, and for defendant-buyer to make repayment to the customer. Title to the rejected goods reverted to the seller, but the defendant-buyer, who undertook to