

CHAPTER 9

MIRANDA, RIGHT TO COUNSEL, AND SELF-INCRIMINATION

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9.1 GENERALLY

The Fifth Amendment to the United States Constitution provides that “[n]o person shall be compelled in any criminal case to be a witness against himself.” In *Malloy v. Hogan*, 378 U.S. 1 (1964), the United States Supreme Court reversed the holdings in prior cases and extended this privilege against self-incrimination to the states as a privilege and immunity of citizens under the Fourteenth Amendment. In that case, the Court stated, “the Fourteenth Amendment secures against state invasion the same privileges that the Fifth Amendment guarantees against federal infringement - the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty . . . for such silence.”

Both state and federal courts have long recognized a distinction in the application of the privilege. The distinction is that the privilege is a bar against compelling “communication” or “testimony”, but the privilege does not extend to barring compulsion which makes the accused the source of “real” or “physical” evidence. The leading case in this area is *Holt v. United States*, 218 U.S. 245 (1910). In that case Mr. Justice Holmes state, “[t]he prohibition of compelling a man in criminal court to being a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.”

Thus, it seems that the privilege only extends to the extraction of guilt from a person's own lips. As a result, the use of the witness' body or aspects of his body which do not communicate thoughts or ideas is not proscribed. Illustratively, defendants may be compelled to walk, stand, gesture, give handwriting exemplars, repeat phrases for voice identification, submit to finger or footprinting, don particular items of clothing, etc. See *Schmerber v. California*, 384 U.S. 757 (1966)

9.2 CHEMICAL OR PHYSICAL TESTS

The *Miranda* rule, which mandates that an accused be apprised of his constitutional rights before he is subjected to custodial interrogation or his statements will be inadmissible in evidence, is grounded on the privilege against self-incrimination. *Miranda* has been held inapplicable to physical or performance tests and chemical tests of bodily substances because they are "non-testimonial" in nature and therefore outside the scope of one's Fifth Amendment privileges. *American Fork City v. Cosgrove*, 701 P.2d 1069 (Utah 1985), *Sandy City v. Larson*, 733 P.2d 137 (Utah 1987), *Larson v. Schwendiman*, 712 P.2d 244 (Utah 1985). Thus, no warnings need be given prior to the administration of these tests. It should also be noted that the majority of states, Utah included, have adopted implied consent statutes. Utah Code Ann. 41-6a-520. Under the Utah and similar statutes, a driver is deemed to have consented to these tests simply by virtue of the fact that he is driving upon the highways. As a result, the driver has no right to the assistance of counsel before making a decision to decline because he has no legal right to refuse.

9.3 FIELD SOBRIETY TESTS

The question has arisen as to whether physical or performance tests, such as the Standardized Field Sobriety Tests currently used in Utah, are "communicative" or "testimonial" in nature. In the overwhelming majority of cases in which the constitutionality of these tests has been at issue, the court has held them to be non-testimonial in nature and analogized them to those cases in which bodily exhibitions such as walking, making gestures, etc., have been held to be outside the scope of the Fifth Amendment privilege. *Schmerber*, *infra*.

In *State v. Cornell*, 462 P.2d 949 (Wash. 1969), it was held not to be error to admit testimony concerning physical sobriety tests performed at the scene of the arrest prior to defendant being advised of his constitutional right to counsel and the privilege against self-incrimination. Similarly, in *State v. Corrigan*, 228 A.2d 568 (Conn. 1968), it was held that tests such as walking a line, picking up a pencil, and telling time were not verbal acts protected by the privilege against self-incrimination.

In *Salt Lake City v. Carner*, 664 P.2d 1168 (Utah 1983), the Utah Supreme Court was called upon to interpret the Utah Constitution concerning this issue. In that case, the court stated:

Where field sobriety tests were requested and taken in a public street, no indicia of arrest such as readied handcuffs, locked doors or drawn guns were present when defendant was asked to perform the tests, and length of performance of tests was only minutes, setting was not “custodial”, even though investigation had focused on the accuses; therefore, the defendant in taking field sobriety tests was not compelled to give evidence against himself.

The foundation for these types of cases is most often the aforementioned holding in *Schmerber*. In that case, the court utilized the “testimonial” or “physical” distinction. In holding the admission of the results of a non-voluntary blood test did not violate the privilege against self-incrimination, the Court stated:

Petitioner’s testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and that alone.

9.4 BLOOD ALCOHOL

Again, the critical question in this area is whether the withdrawal of a blood sample, in the absence of consent, and its introduction into evidence constitutes “testimonial” or “physical” evidence. As previously mentioned, the decision *Schmerber v. California*, *infra*, finally decided this issue. In that case the Court left no room for doubt when it stated:

Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved in either the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.

Therefore, it appears that any conflicts in existing case law were settled in accordance with what was previously the majority position, i.e., that the taking of blood tests, even in the absence of consent, does not infringe upon a defendant's privilege against self-incrimination.

This does not mean; however, that a defendant has a right to a blood test rather than some other chemical test. In *Conrad v. Schwendiman*, 680 P.2d 736, 739 (Utah 1984), made the point clear when the Utah Supreme Court stated, “[p]laintiff thus had no right to demand a blood test rather than a breathalyzer test. Further, the refusal of the arresting officer to arrange a blood test is no defense to plaintiff's refusal to take a breathalyzer test.”

9.5 BREATH TESTS

The question of whether breath test evidence falls under the privilege against self-incrimination has also arisen. In *Miranda v. Arizona*, 384 U.S. 439 (1966), it became clear that defendants under custodial interrogation need to be advised and warned of certain specified rights. However, *Miranda* could only be applied to breath testing situations if they were found to be “communicative” or “testimonial” acts within the scope of the Fifth Amendment privileges. Not surprisingly, state courts have most often analogized breath testing to other types of chemical tests and found them to be non-testimonial in nature and therefore not suppressible for failure to give *Miranda* warnings.

The Utah case of *American Fork City v. Cosgrove*, 701 P.2d 1069, 1075 (Utah 1985) follows the majority position. In that case the court unequivocally stated, “[d]efendant's right under the Utah Constitution's self-

incrimination provision were not violated when, after his arrest, he was required to submit to a breathalyzer test under threat of losing his driver's license."

9.6 RIGHT TO COUNSEL

As a result of *Miranda*, no statement made by a defendant during custodial interrogation is admissible unless the police have complied with certain prerequisites set forth in that opinion. The prerequisites are that prior to any question, the defendant must be informed that (1) he has the right to remain silent; (2) that any statement he does make may be used against him as evidence in a court of law; (3) he has the right to the presence of counsel; and (4) if he cannot afford an attorney, one will be appointed to him prior to questioning if he so desires.

However, as has been demonstrated, the administration of physical or chemical tests have been deemed not to be "testimonial" in nature. As a result, they cannot be deemed "custodial interrogations". Therefore, defendant need not be apprised of his right to counsel at this stage of the DUI investigation. *Salt Lake City v. Carner*, 664 P.2d 1168 (Utah 1987)

Further, Utah Code Ann. §41-6a-520(5) provides that,

For the purpose of determining whether to submit to a chemical test or tests, the person to be tested does not have the right to consult an attorney or have an attorney, physician, or other person present as a condition for the taking of any test.

9.7 ARREST

Miranda requires that an accused be advised of certain constitutional rights before custodial interrogation takes place if those statements are to be admissible into evidence. Custodial interrogation is defined in *Miranda* as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*, at 1612

When a motorist is stopped by a police officer for suspicion of driving under influence of alcohol or when the police arrive at an accident scene and

suspect that alcohol was in some way involved, the person is generally questioned on the scene as to whether he was drinking, the amount of alcohol consumed, whether he was driving, and other questions which might serve to incriminate the motorist. The issue thus becomes, do the actions of the peace officer “deprive the defendant of his freedom in any significant way”? The majority of the courts have held that they do not and therefore the courts do not require *Miranda* warnings to be given prior to on-the-scene questioning in traffic offenses.

Following the majority, the Utah Supreme Court has stated:

[The] accused must be apprised of his *Miranda* rights if the setting is custodial or accusatory rather than investigatory; however, for purposes of determining whether a crime has been committed, investigation and interview are critical and, under such circumstances, the warning is not required. *Salt Lake City v. Carner*, 664 P.2d 1168 (Utah 1983).

Where the incriminating statement is volunteered during on-the-scene questioning and is not made in response to any specific inquiry, the evidence is similarly admissible without any previous *Miranda* warnings. “Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence.” *Miranda* at 1630. However, where the questioning is in depth, occurs or is continued in a police car, hospital, or station house, a *Miranda* warning should be given.

The Utah Supreme Court has set forth four important factors in making the determination whether the accused has been formally arrested and is in custody. These are (1) site of interrogation; (2) whether investigation is focused on the accused; (3) whether objective indicia of arrest were present; and (4) length and form of the interrogation. *Carner*, at 1172. In that case, dealing with the issue of whether administering the field sobriety test was “custodial in nature”, the court stated:

Therefore, the officer requesting the field sobriety tests was continuing to ascertain whether a crime had been committed at all. As soon as the officer determined that the defendant’s driving appeared to be impaired due to alcohol, he did arrest him. Until that time the officer was entitled to investigate circumstances at the scene without giving the defendant a *Miranda* warning.

Since the defendant was not in custody, or otherwise significantly deprived of his freedom, custody did not compel him to take the field sobriety tests.

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