1980 WL 120861 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
September 10, 1980

***1** Lee M. Thomas
Director
Alcohol Subcommittee of the Governor's Committee on Highway Safety
Division of Public Safety Programs
Edgar A. Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

Dear Mr. Thomas:
You have requested an opinion from this office on the following question: Would legislation requiring that blood samples be taken for blood/alcohol analysis from all drivers of motor vehicles involved in accidents in which a fatality occurs violate the Constitution?

The Fourth Amendment prohibits unreasonable searches and seizures by government authorities, both federal and state. Wolf vs. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949); See also South Carolina Constitution Article 1, Section 10. The leading case involving withdrawal of blood samples at the request of state authorities for purposes of determining blood alcohol content is Schmerber vs. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The U.S. Supreme Court plainly ruled in that case that the Fourth Amendment applied to blood tests:
. . . But if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment. That Amendment expressly provides that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ..' (Emphasis added.) It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches

In addition to requiring a valid arrest, Schmerber requires a reasonable belief that the sought after evidence will actually be found. 'The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions (beyond the body's surface) on the mere chance that desired evidence might be obtained.' 384 U.S. 757 at 770. This constitutional prerequisite that there be more than a mere chance that the evidence might be obtained would preclude the State from requiring anyone to surrender blood for purposes of a blood/alcohol test where the subject is plainly not drunk, nor is there probable cause to believe that he was driving under the influence.

In the situation where the driver does appear to be under the influence and the officer places him under arrest for driving under the influence, the normal implied consent procedures would be placed in motion. The driver would be taken in for the breathalyzer test, as would any driver suspected of DUI. See State vs. Martin, Smith's Advance Sheets, Op. No. 21258 July 2, 1980.

South Carolina Code Section 17-7-80 requires coroners to withdraw blood samples of victims of vehicle or boat accidents within four hours after death to determine the presence of alcohol or drugs. It is a well recognized principle of constitutional law that 'Post-mortem examination is not an unreasonable search and seizure within the contemplation of the Constitution.' 79 CJS Searches and Seizures, S. 11, P.89. Therefore, the same standard of constitutionality cannot be applied to living persons as is applied to dead bodies.

***2** The United States Court of Appeals for the Seventh Circuit held in Division 241, Amagamated Transit Union (AFL-CIO) vs. SUSCY, 538 F.2d 1264 (1976), that the Fourth and Fourteenth Amendments to the U.S. Constitution were not violated by the Chicago Transit Authority Regulation requiring its employee bus drivers and train operators to submit to mandatory blood and urine tests when they were involved in a serious accident or were suspected of having alcohol or drugs in his system. However, the court noted a clear distinction between operators of public conveyances and operators of private vehicles. Retired Supreme Court Justice Tom Clark, sitting by designation, held that:

The public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse . . .. so that employees who fail to comply with these rules . . . may be discharged. Id. at 1267.

Addressing the union's contention that the Illinois implied consent law precluded the Authority from making such tests mandatory, he noted that:

[t]he distinction between bus drivers and other drivers justifies a stricter standard for the former. Therefore, the Illinois breathalyzer laws (Ill. Rev. Stat. (1975), Ch. 95 ½, §§ 11-501-11-501.1) are of no concern in resolving the Union's Fourth Amendment claim. Similarly, Holland vs. Parker, 354 F.Supp. 196 (D.S.D. 1973), deals with drivers in general and is inapt. In view of the more substantial interest a state has in the competence of its bus drivers, the requirement of a lawful arrest prior to submitting to the blood test is inapplicable here.

Although not addressed directly by the court, the analysis used by the Seventh Circuit depends heavily on the distinction drawn between transit operators and ordinary drivers. The suggested legislative proposal would include all drivers and therefore would fail under Amalgamated Transit Union analysis.

It is, therefore, the opinion of this Office that any statute requiring all drivers involved in an accident in which a fatality occurs to submit to a blood/alcohol test would be a violation of the Fourth and Fourteenth Amendments of the United States Constitution, and Article 1, § 10 of the South Carolina Constitution.

Sincerely yours,

Patrick M. Teague
State Attorney

ATTACHMENT

1. Holland vs. Parker, held the South Dakota Implied Consent Law unconstitutional on Fourth Amendment grounds because it did not require either a lawful arrest or emergency circumstances. Prior to requesting motorist to submit to blood test, when motorist's refusal would result in automatic loss of his license.

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