IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,	)	FOR PUBLICATION
	)	
Appellee,	)	Filed: January 29, 1996
	)	
v.	)	PUTNAM CRIMINAL
	)	
BILLY D. FRASIER,	)	Hon. John A. Turnbull, Judge
	)	
Appellant.	)	
	)	No. 01S01-9503-CC-00036

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O P I N I O N

COURT OF CRIMINAL APPEALS
AFFIRMED. DROWOTA, J.

This case presents the following issues for our determination: (1) whether a

person who has been stopped by the police for driving under the influence (DUI) has a right, under either the state or federal constitutions, to consult with an attorney prior to making a decision as to whether to submit to or refuse a blood or breath test; and (2) whether such a person's state or federal constitutional right against self-incrimination prohibits a refusal to submit to such a test from being admitted as evidence at trial, when the person was not informed that the evidence could be used against him or her. We answer both questions in the negative, and therefore affirm the judgment of the Court of Criminal Appeals, which declined to suppress the evidence of the refusal.

FACTS AND PROCEDURAL HISTORY

On May 25, 1992, Officer Reno Martin of the Cookeville Police Department stopped Billy D. Frasier, the defendant, after he drove his vehicle through a red light. Frasier smelled of alcohol; and Officer Martin arrested him for DUI after Frasier failed a field sobriety test. After the arrest -- which was not preceded by a recitation of any Miranda rights -- Officer Martin requested that Frasier submit to a breath test. Frasier asked to speak to an attorney before making this decision, and he also offered to take a blood test in lieu of the breath test. Officer Martin denied both these requests. Frasier ultimately refused to submit to the test; and he signed an implied consent form which explained that a refusal to submit to the test could result in the suspension of his driver's license. However, the implied consent form did not reveal that his refusal to submit to the test could be introduced as evidence against him at trial; and Officer Martin did not orally advise him of this.

After the grand jury indicted Frasier, he moved to suppress the evidence of his refusal to submit to the breath test. Following an evidentiary hearing, the trial court found that: (1) the defendant was never "Mirandized"; (2) the defendant requested and was not permitted to call his attorney before he refused to take the breath test; (3) the implied consent form did not advise defendant that his refusal to take the test could be used as evidence against him; and (4) defendant was not advised orally that his refusal to take the test could be used against him. Based on these findings, the trial court suppressed the evidence of Frasier's refusal to take the test. The State then appealed from this ruling to the Court of Criminal Appeals pursuant to Rule 9, Tenn. R. App. P.

The Court of Criminal Appeals, while agreeing with the trial court's findings of fact, held that the evidence of defendant's refusal to submit to the test was not due to be suppressed under several of the decisions of that court. Because this Court has not yet addressed these issues, we granted Frasier's Rule 11 application for that purpose.

RIGHT TO COUNSEL CLAIM

The first issue that we address is whether Frasier had a constitutional right to speak with an attorney prior to making the decision as to whether to submit to or refuse the breath test. First, we note that Frasier has no such right under the Sixth Amendment[1] to the federal constitution or its state counterpart, Tenn. Const. Art. I,

[1]The Sixth Amendment provides, in pertinent part, that: "In all criminal prosecutions, the accused shall ... have the assistance of counsel for his

§ 9.[2] In State v. Mitchell, 593 S.W.2d 280 (Tenn. 1980), a case dealing with a defendant's constitutional right to counsel at a post-arrest lineup, we surveyed the applicable federal and state precedent and concluded that:

> We hold that right to counsel attaches when adversary judicial proceedings are initiated. Initiation is marked by formal charge, which we construe to be an arrest warrant, or at the time of the preliminary hearing in those rare cases where a preliminary hearing is not preceded by an arrest warrant, or by indictment or presentment when the charge is initiated by the grand jury.

Mitchell, 593 S.W.2d at 286.

In accordance with the United States Supreme Court's decision in Kirby v. Illinois, 406 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), we stated that an arrest warrant signalled the initiation of formal proceedings because the warrant "brings to an end the investigative stage and inaugurates the beginning and adversarial stage" of a criminal case. Id. It was only then, we reasoned, that the State clearly commits itself to prosecution and "a defendant finds himself faced with prosecutorial forces of organized society." Id. at 287, quoting Kirby, 406 U.S. 689-90, 92 S.Ct. at 1882.

Even though we concluded that an arrest warrant was necessary for the constitutional right of counsel to attach, we also noted that a criminal defendant is not without a degree of constitutional protection even before that stage. We specifically addressed the situation of a defendant subjected to a lineup after a warrantless

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defense."

[2]Art. I, § 9 provides, in pertinent part: "That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel ..."

arrest:

> When an arrest is made without a warrant and a lineup is conducted there is no constitutional right to counsel; however, even then the accused is constitutionally protected against unnecessarily suggestive procedures. We noted in Forbes v. State, that 'since the identification occurred during the investigative phase and prior to arrest, we are not dealing with the Sixth Amendment right to counsel.' However, we considered the Due Process aspect and determined that the identification procedure was not impermissibly suggestive.

Mitchell, 593 S.W.2d at 286, n.4 (citations omitted).

Turning to the case at hand, it is undisputed that Frasier was arrested without a warrant; therefore, the constitutional right to counsel as defined in Mitchell never attached. Frasier acknowledges this, but argues that since the decision of whether to submit to or refuse the test is a "critical stage" of the proceedings, the Due Process clause of the Tennessee Constitution, Art. I, § 8,[3] requires that he be afforded a right to counsel.

In assessing the merits of this argument, we first note that some jurisdictions have held that the notion of fundamental fairness, as embodied in the Due Process Clause, requires that a DUI defendant be permitted to consult with an attorney before making this decision. Sites v. State, 481 A.2d 192 (Md. 1984); State v. Newton, 636 P.2d 393 (Or. 1981); Scarborough v. State, 261 So. 2d 475 (Miss. 1972). The rationale for the rule was aptly set forth by the court in Sites, supra:

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[3]Art. I, § 8 provides, in pertinent part: "That no man shall be taken or imprisoned ... but by the judgment of his peers or the law of the land."

> The due process clause ... has long been recognized as a source of a right to counsel independent of the Sixth Amendment [and analogous state constitutional provisions] where critically important to the fairness of the proceedings ... The concept of a due process right [has been described] as a guarantee of respect for those personal immunities which are so rooted in the traditions and conscience of our people as to be ranked as fundamental or implicit in the concept of ordered liberty. While the exact contours of the due process right are not definable with precision, the right ... is one that assures that convictions cannot be brought about in criminal cases by methods which offend a sense of justice.

Sites, 481 A.2d at 199 (citations omitted).

After explaining the essence of the due process notion, the Sites court stated that "we think to unreasonably deny a requested right of access to counsel to a drunk driving suspect offends a sense of justice which impairs the fundamental fairness of the proceeding," id. at 200; and it concluded that the state and federal Due Process Clauses required that the defendant be afforded a right to counsel. Having come to this conclusion, however, the Sites court was quick to qualify it:

> [The Due Process clauses require that the defendant be afforded a right to communicate with counsel], as long as such attempted communication will not substantially interfere with the timely and efficacious administration of the testing process. In this regard, it is not possible to establish a bright line rule as to what constitutes a reasonable delay, although the statute itself mandates that in no event may the test be administered later than two hours after the driver's apprehension. Of course, it is the statutory purpose to obtain the best evidence of blood alcohol content as may be practicable in the circumstances, and it is common knowledge that such content dissipates rapidly with the passage of time. Thus, if counsel cannot be contacted within a reasonable time, the arrestee may be required to make a decision regarding testing without the advice of counsel. We emphasize that in no event can the right to communicate with counsel be permitted to delay the test for an unreasonable time since, to be sure, that would impair the accuracy of the test and defeat the purpose of the statute.

Id.

We are not insensitive to the due process concerns in this context. It does strike one as unfair that a person suspected of DUI, particularly one who has had no prior experience with the law, should be compelled to make a decision having such important consequences for his or her guilt or innocence without the benefit of counsel. Having stated this, however, we nevertheless believe that the Sites court's above-quoted qualification of the due process argument carries with it the seeds of that argument's destruction. It is common knowledge that a person's blood alcohol content rapidly dissipates over time; therefore, delaying the test while waiting on counsel to arrive would potentially compromise the accuracy of the test. This is a crucial consequence, given the importance of scientific evidence in DUI cases. Moreover, as the Sites court noted, it is impossible to formulate rigid temporal boundaries for such a right, as blood alcohol content dissipates at widely divergent speeds, depending on the person's body size and metabolism. In short, the prompt administration of the blood alcohol test is a necessary condition for its efficacy; and we conclude that the State's interest in having an accurate measurement of the defendant's blood alcohol level, coupled with the manifold practical problems inherent in a Sites-type rule, override the due process concerns cited by the defendant. Therefore, we hold that a person arrested without a warrant on a reasonable suspicion of DUI does not have a due process right under the Tennessee Constitution to consult with an attorney before making the decision.

THE IMPROPER EVIDENCE CLAIM

The next issue we address is whether the admission into evidence of the

defendant's refusal to submit to the test violated either his due process rights, or his rights, either under the Fifth Amendment to the federal constitution or Article I, § 9 of the Tennessee Constitution, against self-incrimination. We first note that the defendant's arguments under the federal constitution can be rather quickly disposed of. In South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983), the United States Supreme Court addressed precisely the same factual situation and the same arguments; and the Court rejected both contentions. With regard to the due process claim, the Court acknowledged that it had held that a prosecutor could not use a defendant's silence after Miranda warnings were administered to impeach the defendant's testimony at trial. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). However, it distinguished the State's use of "silence" in the context of a request for a blood alcohol test -- a situation for which Miranda protection is unavailable[4] -- from that presented in Doyle, stating that:

> We do not think it fundamentally unfair for South Dakota to use the refusal to take the test as evidence of guilt, even though respondent was not specifically warned that his refusal could be used against him at trial ...
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> The Miranda warnings emphasize the dangers of choosing to speak ('whatever you say can and will be used as evidence against you in court'), but give no warning of adverse consequences from choosing to remain silent. This imbalance in the delivery of the Miranda warnings, we recognized in Doyle, implicitly assures the suspect that his silence will not be used against him. The warnings challenged here, by contrast, contained no such misleading implicit assurances as to the relative consequences of his choice ... [T]he officers specifically warned

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[4]Miranda protection is not available when the police request a suspect to submit to a blood alcohol test because such a test is not deemed to be an interrogation within the meaning of Miranda. Rather, it constitutes police words or action "normally attendant to arrest and custody," Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980), such as requests to submit to fingerprinting or photography. Neville, 459 U.S. at 464, 103 S.Ct. at 923, n.15.

> respondent that failure to take the test could lead to loss of driving privileges for one year. It is true the officers did not inform respondent of the further consequence that evidence of refusal could be used against him in court, but we think it unrealistic to say that the warnings given here implicitly assure a suspect that no consequences other than those mentioned will occur. Importantly, the warning that he could lose his driver's license made it clear that refusing the test was not a 'safe harbor,' free of adverse consequences.
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> While the State did not actually warn respondent that the test results could be used against him, we hold that such a failure to warn was not the sort of implicit promise to forego use of evidence that would unfairly 'trick' respondent if the evidence were later offered against him at trial. We therefore conclude that the use of evidence of refusal after these warnings comported with the fundamental fairness required by due process.

Neville, 459 U.S. at 565-66, 103 S.Ct. at 923-24.

In its rationale as to the Fifth Amendment claim, the Court first noted that Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), clearly established that a State could compel a defendant to submit to a blood alcohol test without violating the Fifth Amendment. The Court then considered a defendant's refusal to take such a test:

> [T]he values behind the Fifth Amendment [being free of compulsory self-incrimination] are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him. The simple blood-alcohol test is so safe, painless, and commonplace, that respondent concedes, as he must, that the State could legitimately compel the suspect against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced respondent into choosing the option that it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than a refusal to take the test.

Neville, 459 U.S. at 563, 103 S.Ct. at 922 (emphasis in original).

The rules enunciated in Neville have been followed many times by our Court of Criminal Appeals. State v. Morgan, 692 S.W.2d 428 (Tenn. Crim. App. 1985); State v. Wright, 691 S.W.2d 564 (Tenn. Crim. App. 1984); State v. Smith, 681 S.W.2d 569 (Tenn. Crim. App. 1984). Despite this, the defendant argues that the evidence of his refusal should be suppressed because the Tennessee Constitution affords criminal defendants broader protection against self-incrimination than the federal constitution. The defendant cites as support for this assertion the fact that Article I, § 9 of the Tennessee Constitution provides that "the accused ... shall not be compelled to give evidence against himself," whereas the Fifth Amendment of the federal constitution provides that "no person ... shall be compelled in any criminal case to be a witness against himself." (emphasis added). The defendant admits that the Fifth Amendment has been construed to prohibit statements of only a "testimonial or communicative nature," see Schmerber v. California, 384 U.S. at 763-64, 86 S.Ct at 1832, and not "real" evidence, such as blood, hair samples, and fingerprints. And he admits that Tennessee courts have followed the Schmerber distinction. Nevertheless, he argues that the word "evidence" in Art. I, § 9 is not limited to statements of a "testimonial or communicative nature," but that it means "whatever is submitted to the judge or jury to elucidate an issue, to prove a case, or to establish or disprove a fact in issue," State v. Harris, 839 S.W.2d 54, 79 (Tenn. 1993)(Reid, J. dissenting) -- including evidence of a refusal to submit to the test. The defendant relies heavily upon the dissent in Harris, 839 S.W.2d at 78-81 (Tenn. 1992) to support his argument.

Initially, while we stated in Delk v. State, 590 S.W.2d 535, 540 (Tenn. 1979), that Tennessee's prohibition against self-incrimination is no broader or different than its federal counterpart, it is true that this Court is not bound by the interpretations of the Fifth Amendment by the federal courts, except to the extent that they establish a "floor" of constitutional protection. Thus, this Court is free to construe Art. I, § 9 more broadly than the Fifth Amendment. The fact that we have this power, however, obviously does not mean that we are compelled to do so; and we have never construed the word "evidence" in Art. I, § 9 literally, as the defendant urges. Indeed, even Justice Reid's dissent in Harris, which simply suggested the possibility of such a literal interpretation, did not ultimately endorse that position in an unambiguous fashion. Rather, Justice Reid based the dissent on an entirely different ground, arguing that the defendant's refusal to provide a handwriting exemplar violated Art. I, § 9 because the act of giving a handwriting sample was "communicative or testimonial" in the Schmerber sense. In other words, Justice Reid argued that because the defendant had the choice of either intentionally altering his or her handwriting or providing a "true" sample, the act of providing a handwriting exemplar thus involved the veracity of the defendant, the "heart of testimonial evidence." Harris, 839 S.W.2d at 80. Justice Reid carefully distinguished this type of evidence from "real" evidence, stating that "it is not within the accused's power to change his fingerprints, hair, breath, or blood." Id. (emphasis added).

Here, by contrast, the refusal to submit to the test did not involve the defendant's veracity in any way. His refusal of the test was functionally the same as if he had submitted to the test -- in neither instance was the defendant forced to choose between participating truthfully or giving false testimony. Thus, the

defendant's argument fails under the actual analysis employed by the Harris dissent.

In summary, we decline to overrule a long line of Tennessee cases[5] by adopting a literal interpretation of the term "evidence"; and we formally announce our agreement with the principles enunciated in Neville. Because the refusal of the test did not violate the defendant's right against self-incrimination under Neville, we hereby affirm the judgment of the Court of Criminal Appeals.

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FRANK F. DROWOTA III
JUSTICE

Concur:
Anderson, C. J.
Birch, J.

White, J. - Not Participating.

Reid, J. - Dissenting - See Separate Dissent.

[5]See e.g., Biggers v. State, 411 S.W.2d 696 (Tenn. 1967); State v. McAlister, 751 S.W.2d 436 (Tenn. Crim. App. 1987); State v. Mabon, 648 S.W.2d 271 (Tenn. Crim. App. 1982); State v. Henderson, 623 S.W.2d 638 (Tenn. Crim. App. 1981); Trail v. State, 526 S.W.2d 127 (Tenn. Crim. App. 1974).