CRIMINAL LAW: Physical or mental examination of defendant by doctors procured by State; examination may not be made unless with the consent of defendant.

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February 18, 1947

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Col. Hugh H. Waggoner
Superintendent, Missouri
State Highway Patrol
Jefferson City, Missouri

Dear Sir:

We are in receipt of your recent request for an opinion, based on the following facts:

> "It is requested that your department give us an opinion on the following:
>
> "a. Need a person held for the commission of a crime and thought to be insane, be informed of his constitutional rights before any physical or mental examinations are made to determine sanity?
>
> "b. If the subject is examined without being informed of his rights, does that fact affect the admissibility of the testimony of the doctor or doctors who made the examination?
>
> "c. Assuming that it is necessary to inform the subject of his constitutional rights, what would be necessary to comply with this requirement?
>
> "d. Should the subject be informed of his rights and grant permission for the test to be made and if the results show that he is insane, would the testimony of the doctors be admissible or would it be excluded by reason of his insanity and inability, as an insane person, to

give permission for the examinations?

"e. Is there any possibility of the medical examiners being sued by the subject for any examination they might have subjected him to in the case where he was informed of his rights, or in the case where he was not informed of his rights?"

The main question involved in your request is: ould a physical or mental examination of a person charged with or suspected of a crime, at the instance of the State, violate such person's constitutional rights not to be compelled to furnish evidence against himself?

It is stated in 22 C.J.S., Criminal Law, Section 681, page 997, as follows:

"The admission in evidence of the findings of experts on a physical or mental examination of the accused does not ordinarily violate his privilege against self-incrimination where the examination is had without any compulsion, and even, according to some authorities, but not others, where compulsion is resorted to.

"Evidence resulting from a medical examination of accused for the purposes of the prosecution rather than for treatment, after an accusation has been made against him, is admissible where, in the absence of any compulsion, accused submits or consents to the examination. However, while some authorities hold that such evidence is admissible even where the examination is compulsory and imposed on accused against his will, others hold that its admission under such circumstances constitutes a violation of the constitutional guaranty against compulsory self-incrimination. Some authorities have gone even farther and hold that such evidence is inadmissible unless accused consents to the examination in some positive manner, mere silence and failure to object or

> resist under the circumstances being insufficient to constitute a waiver of the privilege. * * * *"
>
> (underscoring ours.)

The underlined portion of the above section states the rule followed by the courts of Missouri.

In the case of State v. Newcomb, 230 Mo. 54, l.c. 65 and 66, the Court said:

> "We are now brought to the most important question in this record. The defendant, while in custody and charged with this offense and when he was without counsel, was ordered by the justice of the peace, at the demand of the prosecuting attorney, to submit to a physical examination of his privates by a physician. He was taken into a room of the courthouse and in the presence of the sheriff was examined by Dr. Crowe, both of whom testified in this cause as to the result of that examination and as to what they saw during that examination and what they said to him.
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> "Counsel for defendant insist this was flagrant error and was a conspicuous violation of the constitutional right of the defendant to be exempt from testifying against himself. (Constitution of Missouri, sec. 23, art. 2.)
>
> "Some effort was made to show that defendant voluntarily consented to this violation of his person, but we think it is apparent that he simply submitted because he thought he was compelled to do so. When it is considered that he was at the time in custody for this very crime; that the prosecuting attorney demanded an order from the justice for his examination; that the sheriff took him into a private room for the purpose of the examination, it is not strange that the defendant thought he was compelled to submit. It is idle to talk of his having voluntarily consented to

this violation of his person. As we read the record, he had no option in the matter. * * * *

" * * * * We think the circuit court should have excluded all this testimony of Dr. Crowe and the sheriff as to this examination. We had occasion to examine the law on this subject in State v. Young, 119 Mo. 495, and the authorities are collated there. The facts of this case bring it clearly within the reasoning of that case and upon the authority of that decision and those cited and approved therein, this testimony was incompetent and inadmissible and violative of defendant's constitutional right not to be compelled to testify against himself. (See, also, State v. Height, 117 Iowa 650.)"

Also, in the case of State v. Horton, 247 Mo. 657, l.c. 663, the Court said:

"Defendant insists that the physicians who examined him while he was in custody should not have been allowed to testify to the fact that he was suffering from a venereal disease. To meet this insistence the State contends that the examination complained of was made with defendant's consent. We have read the record carefully and find that the 'consent' consisted of the failure of defendant to object to the physical examination.

"When a man is under arrest, without counsel, and, speaking metaphorically, is standing in the shadow of a policeman's club, it requires something much more substantial than silence to justify an invasion of his constitutional right not to be compelled to furnish evidence against himself.

"If the evidence of the physicians had been objected to on the ground that the physical examination which they made under the orders of a police captain amounted to

> compelling him to testify against himself, as prohibited by section 23, article 2, of the Constitution of Missouri, then the admission of their evidence would undoubtedly have constituted reversible error. * * * *"

Again, in the case of State v. Matsinger, 180 S.W. 856, l.c. 857 and 858, the Court said:

> "After the state had established that about one or two weeks after the assault was alleged to have been committed the prosecutrix was found to be suffering from a venereal disease, it introduced the evidence of two physicians, which tended to show that at the instance of the prosecuting attorney they went to the county jail, where defendant was confined, and there made a physical examination of his privates. This examination disclosed, so they testified, that defendant was afflicted with the same venereal disease from which the prosecutrix was suffering. The evidence was admitted over the strenuous and repeated objections and exceptions of defendant, and after a preliminary examination of the physicians was made by the court on the subject of whether the physical examination was voluntarily consented to. From this preliminary examination the court concluded that the evidence was competent, but upon a re-examination of the physicians as to the conditions under which the examination took place, and after the evidence was in, the court withdrew same, both by oral and written instructions. It is our opinion that the court was entirely correct in withdrawing this evidence, as the record does not disclose that the consent which the law requires in such cases was given. The consent of the accused was not asked, he being merely informed that the physicians were there to make the examination. His only consent consisted of his failure to object, and as said by Judge Brown in State v. Norton, 247 Mo. loc. cit. 668, 153 S.W. 1053:

"'When a man is under arrest, without counsel, and, speaking metaphorically, is standing in the shadow of a policeman's club, it requires something much more substantial than silence to justify an invasion of his constitutional right not to be compelled to furnish evidence against himself.'

"When we remember that at that time defendant was confined in jail, and that one of the examining physicians was the jail physician, and that he was not apprised of his rights to resist the examination, and when the entire disclosures in this connection are considered, it is apparent that he merely submitted to this examination without consenting thereto. The record in this connection also discloses that the defendant had been advised by an attorney, with whom he was negotiating for his trial defense, that it was his intention to send a physician to the jail that morning with the view of making a physical examination, the attorney desiring to be informed as to this fact before agreeing to represent him. The defendant, not knowing that these physicians had not been sent by his own attorney, submitted the more readily. The record further discloses that the physician sent by the attorney arrived immediately after the examination began and took part therein. This evidence was clearly inadmissible, and should not have been received.
* * * *

"In view of the fact that this verdict rests entirely upon the uncorroborated testimony of the nine year old prosecutrix, and that her statements in some respects seem almost implausible, we are forced to the conclusion that the admission of this incompetent evidence was highly prejudicial, and that no instruction attempting to withdraw it could eradicate the poison and prejudice injected thereby; for, as said in State v. Webb, 254 Mo. loc. cit. 435, 162 S.W. 628:

> "'The state had sunk its fangs deep in the life blood of the defendant - too deep for the poison to be withdrawn.'
>
> "Because of this error the court should have granted a new trial."

The question (c) as to what would be necessary to inform the defendant of his rights, etc., we conclude from the authorities cited that it is not only necessary to inform the defendant of his rights to resist such examination but he must give his consent and voluntarily submit to the examination, mere silence and lack of resistance is not sufficient to render the evidence gained by the examination admissible in evidence. We think the defendant should be apprised of the purpose of the examination, what is to be determined, the fact that the findings may be used in evidence against him and that he has a right to refuse permission for the examination, and that the refusal of said permission is not a fact that can be admitted in evidence against him. Being so advised, he must affirmatively consent to the examination. We do not find any requirement that the advising him of his rights and his consent shall be in writing, but, in view of the strong language used by the Court in the cases cited, we believe it would be much safer and more conclusive if the matter was in writing and signed by the defendant; otherwise the proof should be very strong of an oral advisement and the defendant's consent.

If question d means could the State, after procuring the doctors to examine defendant and who found him insane, exclude their testimony, the answer would be no because it is the duty and the oath of law enforcement officers to uphold the Constitution and the laws of the State. This includes all prosecuting officials, prosecuting attorneys, peace officers, etc., and to withhold evidence touching either the guilt or innocence of the defendant would be a violation of their oath. It follows, as a matter of course, that the defendant would never object to such evidence.

We do not believe that a medical examiner should make the examination unless the defendant was advised of his rights and gave his consent. If this procedure was followed the examiner could not be held liable in a civil action for examining the defendant, unless, of course, he performed the tests and examination in such a manner as could be held to be negligence and injured the defendant.

Question o mentions or inquires about the possibility of a medical examiner being sued. There is a difference between being sued and being liable. There is no way to prevent a suit being filed against a person, even though such person was free from any liability and a recovery could not be had against him. It would, however, be necessary for him to defend the suit.

Conclusion.

It is therefore the opinion of this department that a person suspected or charged with a crime must be advised of his constitutional rights to refuse to permit a medical examination of his person and must affirmatively consent to same before the facts, findings and results or conclusions of said examination would be admissible in evidence against him.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. C. TAYLOR
Attorney General

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