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Abstract

Neither the United States Supreme Court nor the Florida Supreme Court has yet ruled whether a defendant's refusal to take the Blood Alcohof Test1 is admissible evidence.

KEYWORDS: test, alcohol, refusal

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Introduction

Neither the United States Supreme Court nor the Florida Supreme Court has yet ruled whether a defendant's refusal to take the Blood Alcohol Test[1] is admissible evidence. The legal issues involved came into focus in *Schmerber v. California,*[2] where the the Supreme Court ruled that a defendant did not have a fourth or fifth amendment right to resist the withdrawal of blood which would be tested to measure the alcoholic content of his bloodstream. Justice Brennan, speaking for the majority, ruled that the results of the blood alcohol test were not testimonial in nature and did not infringe on the defendant's fifth amendment right not to incriminate himself.[3] However, the Court left unanswered the question of whether admission into evidence of a defendant's refusal to submit to the blood alcohol test would violate his fifth amendment rights.

After *Schmerber,* Florida's legislature passed an Implied Consent Statute.[4] The statute stated that any person accepting the privilege of driving in Florida consented *in advance* to permit a blood test if he were arrested for driving under the influence of alcohol [DUI].[5] If the alcohol level equalled or exceeded 0.10% by weight of his blood, the defendant was presumed to be under the influence of alcohol.[6] If a de-

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1. The term "test", unless otherwise stated, means any and all tests given to the defendant to determine the level of alcohol in his blood stream.
2. 384 U.S. 757 (1966).
3. *Id.* at 763, citing Holt v. United States, 218 U.S. 245 (1910).
4. FLA. STAT. § 322.261 (1969).
5. FLA. STAT. § 322.261(1)(a) (1979).
6. FLA. STAT. § 322.262(2)(c) (1979).

fendant refused to take the test, his license was suspended for six months.[7]

In order to determine whether a defendant's refusal to take the test is admissible, four issues must be examined. The analysis will focus on the courts' choice of words in expressing their holdings.

First, does introduction of a defendant's refusal violate his fifth amendment right concerning self incrimination? Since the defendant is required to take the test, his refusal may be testimonial in nature, thereby compelling him to testify against himself.[8] Introduction of his refusal might be impermissible comment by the prosecutor on the right of the defendant to remain silent.[9]

Second, does a defendant have the statutory right not to take the test?[10] If a defendant does have such a right, it would be unfair and a denial of fundamental due process to penalize his exercise of that right by admitting his refusal.[11] Since the Florida Statute requires informing a defendant his license will be suspended for three months, but does not specify his refusal would be admissible, the legislature may have intended to prohibit the refusal from being admitted into evidence.

Third, would the probative value of such a refusal be outweighed by its prejudicial effects?[12]

Fourth, regardless of a defendant's statutory or constitutional rights, are there instances where admitting a defendant's refusal would be fundamentally unfair?[13]

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7. FLA. STAT. § 322.261 (1969) (amended 1970). The amendment lowered the suspension period to three months. FLA. STAT. § 322.261(1)(a) (1979).

8. *See* text accompanying notes 16-27 *infra* at 210-15.

9. *See* text accompanying notes 28-41 *infra* at 216-18.

10. *See* text accompanying notes 44, 50-77 *infra* at 219-29.

11. *See* text accompanying notes 45-49 and note 78 *infra* at 220-21. *See* Gay v. Orlando, 202 So. 2d 896 (Fla. 4th Dist. Ct. App. 1967); *but see* State v. Duke, 378 So. 2d 96 (Fla. 2d Dist. Ct. App. 1979). Neither case fully explains the legal consequences of admitting or not admitting such evidence. The conflict was resolved in Miller v. State, 403 So. 2d 1307 (Fla. 1981) discussed in text accompanying notes 99-102 *infra* at 236-37.

12. *See* text accompanying notes 79-94 *infra* at 230-34.

13. *See* text accompanying notes 95-110 *infra* at 235-38.

Fifth Amendment Right

Background

In *Schmerber,* the defendant refused to take a breathalyzer test; the refusal was admitted into evidence by the trial court. Because the defendant failed to object to the admission of his refusal at trial, the Supreme Court declined to decide whether the refusal was admissible. The Supreme Court nevertheless discussed the issue in a footnote:

> This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test - products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the 'search,' and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case.
>
> Petitioner has raised a similar issue in this case, in connection with a police request that he submit to a 'breathalyzer' test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under *Griffin v. California.* We think general Fifth Amendment principles, rather than the particular holding of *Griffin,* would be applicable in these circumstances, see *Miranda v. Arizona.* Since trial here was conducted after our decision in *Malloy v. Hogan,* . . . making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements.[14]

14. 384 U.S. at 765 n.9 (citations omitted) (emphasis in original).

Decisions in Foreign Jurisdictions

First, since the defendant is required to take the test, his refusal may be "testimonial" in nature thereby compelling him to testify against himself.

The majority of cases hold that a defendant's refusal to take the test is *not* testimonial in nature.[15] Since the fifth amendment right not to incriminate oneself protects testimony but not conduct, such decisions permit a court to admit the defendant's refusal. In deciding this delicate issue, it is necessary to determine what the United States Supreme Court meant in footnote nine in *Schmerber.*

Newhouse v. Misterly offered an explanation of the *Schmerber* footnote:

> 'If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test - products which would fall within the privilege.' In context the Court seems here to be talking of an incriminating statement by the accused which is induced by the requirement that the test be taken. See *United States v. Wade.*
>
> The second portion of footnote 9 muddies up the waters somewhat. It discusses a 'similar issue,' i.e., the consequences of refusing to take the test.
>
> Read together to us the two portions of the *Schmerber* footnote indicate that a refusal to take a blood test is not a testimonial 'statement' within the Fifth Amendment; rather, it is best described as conduct indicating a consciousness of guilt. See *People v. Ellis.* Nonetheless, the reference to the *Miranda* footnote can be read to imply that where an underlying right to refuse such a blood

15. People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1967); Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971); Commonwealth v. Rutan, 229 Pa. Super. 400, 323 A.2d 730 (1974); Welch v. District Ct. of Vermont, 594 F.2d 903 (2d Cir. 1979); People v. Thomas, 46 N.Y.2d 100, 385 N.E.2d 584, 412 N.Y.S.2d 845 (1978) *appeal dismissed sub nom* Thomas v. New York, 444 U.S. 891 (1979); Newhouse v. Misterly, 415 F.2d 514 (9th Cir. 1969); Davis v. State, 367 N.E.2d 1163 (Ind. 1st Dist. Ct. App. 1977); Hill v. State, 366 So. 2d 299 (Ala. Crim. App. 1978); State v. Meints, 189 Neb. 264, 202 N.W.2d 202 (1972); City of Waukesha v. Godfrey, 41 Wis. 2d 401, 164 N.W.2d 314 (1969); State v. Holt, 261 Iowa 1069, 156 N.W.2d 884 (1968); State v. Dugas, 252 La. 345, 211 So. 2d 285 (1968).

> test is present, it would be improper to draw adverse inferences from failure of the accused to respond to a request for a blood test because the accused would thereby be penalized for exercising his rights to refuse the test.[16]

A similar view was expressed by Chief Justice Traynor of the California Supreme Court in *People v. Ellis*.[17] That decision held admissible a defendant's refusal to submit to voice exemplars.[18] Justice Traynor explained why footnote nine of *Schmerber* never intended to suppress a defendant's refusal to do a legally required act.

> We are aware that the United States Supreme Court in *Schmerber v. State of California* has cautioned that in some cases the administration of tests might result in 'testimonial products' proscribed by the privilege. We do not believe, however, that the inferences flowing from guilty conduct are such testimonial products. Rather, the court's concern seemed directed to insuring full protection of the testimonial privilege from even unintended coercive pressures. In the case of a blood test, for example, the court considered the possibility that fear induced by the prospect of having the test administered might itself provide a coercive device to elicit incriminating statements. Such a compelled testimonial product would of course be inadmissible.[19]

Justice Traynor explained that unlike confessions, which might be coerced, no useful purpose would be served in excluding a defendant's refusal to take a voice identification test.

> A suspect asked to speak for voice identification is not subjected to the same psychological pressures said to be generated by a demand for testimony. It is no more unfair to ask a suspect to speak for voice identification than to ask him to appear in a lineup for visual identification. The psychological pressures are reduced to the same degree, through a limitation of alternatives. *Deceit is improbable; the simple choice for a guilty person is between conduct*

16. 415 F.2d at 518 (citations omitted).
17. 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).
18. The Court in United States v. Dionisio, 410 U.S. 1 (1973), held that voice examplars were admissible.
19. 65 Cal. 2d at 538, 421 P.2d at 398, 55 Cal. Rptr. at 390 (citations omitted).

> *likely to expose incriminating evidence and inferences as to guilt likely to flow from a successful refusal to participate.*
>
> A voice test, however, contemplates no such intrusion into privacy; no disclosure of thought or privately held information is requested. One's voice is hardly of a private nature. It is constantly exposed to public observation and is merely another identifying physical characteristic.
>
> It thus appears that an extension of the privilege to voice identification would serve none of the purposes of the privilege. It would only exclude evidence of considerable importance when visual identification is doubtful or impossible . . . denial of access to a pertinent identifying trait can only weaken a system dedicated to the ascertainment of truth.[20]

A small minority of cases have held that a defendant's refusal to take the alcohol test is testimonial in nature;[21] thus to permit his refusal into evidence would violate his fifth amendment right against self-incrimination. These courts have also ruled that since the defendant is required to take the test, his decision to take or not to take the test is "compelled" by the state.

In *Clinard v. State* the Texas appellate court reasoned:

> A defendant's silence or negative reply to a demand or request by an officer made upon him while under the necessary compulsion attendant with custodial arrest, which demand or question reasonably called for an immediate reply by the defendant is clearly a *tacit* or overt expression and communication of the defendant's thoughts in regard thereto. *Doyle v. Ohio.* The obvious purpose and certain result of proving a person accused of intoxication refused a request to take a blood test is to show the jury that the accused, with his full knowledge of the true amount he had consumed, thought that

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20. *Id.* at 535, 421 P.2d at 396, 55 Cal. Rptr. at 388 (emphasis added) (footnote omitted).

21. State v. Andrews, 297 Minn. 260, 212 N.W.2d 863 (1973); Clinard v. State, 548 S.W.2d 716 (Tex. Crim. App. 1977); State v. Wilson, 613 P.2d 384 (Kan. 1980); People v. Rodriguez, 80 Misc. 2d 1060, 364 N.Y.S.2d 786 (Sup. Ct. Bronx Cty. 1975). *Rodriguez* seems to be overruled by People v. Thomas, 46 N.Y.2d 100, 385 N.E.2d 584, 412 N.Y.S.2d 845 *appeal dismissed sub nom* Thomas v. New York, 444 U.S. 891 (1979). *See also* Note, *Constitutional Limits on the Taking of Body Evidence,* 78 YALE L.J. 1074 (1969).

> he could not afford to take said test. Such was the only reason for its relevancy. Thus said evidence is without doubt of communicative and testimonial character and not mere factual proof of a then existing physical characteristic. . . .[22]

But that does not appear to be a fair reading of what Justice Brennan had in mind when he wrote footnote nine in *Schmerber*. This author is persuaded by the reasoning of *Newhouse*[23] and *Ellis*[24] that what Brennan intended was to forbid actual *statements* made by the defendant out of fear of taking the test. For example, if the defendant stated he did not want blood withdrawn because he had consumed ten beers, the statement concerning how much beer he had consumed would not be admissible.

Even if defendant's refusal were considered "testimonial" in nature, there remains the question of whether the defendant is really compelled to refuse the test. Numerous courts have compared refusal to take the test with a defendant's attempted escape.[25] Both have been held admissible as indicating a course of conduct by the defendant. However, one court distinguished a defendant's escape which was admissible from a defendant's refusal to take a test.

> [T]he distinction lies in the fact that the escape and flight are not compelled or even requested; whereas, if an accused under custodial arrest is requested or offered a chemical test for intoxication, anything he does other than affirmatively agree to same is a refusal to submit. Thus escape and flight are not 'compelled', a necessary factor under the fifth amendment, but a refusal to take a chemical test by silence or negative reply to a State's request or offer is compelled.[26]

Is it truly fair to say that a defendant is compelled *not* to take the test? *People v. Thomas* explained why there is no such compulsion:

> In no way in such a circumstance is there any compulsion on the

22. 548 S.W.2d at 718 (emphasis added) (citations omitted).
23. 415 F.2d 514 (9th Cir. 1969).
24. 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).
25. *See* text accompanying notes 88-92 *infra.*
26. 548 S.W.2d at 718-19.

> defendant to *refuse* to take the test - the conduct which is the subject of the challenged evidence; on the contrary the compulsion is to *take* the test. Submission to the test, not its evasion, was what was desired by the police officers in this case.[27]

Second, does admission into evidence of a defendant's refusal to take the test constitute impermissible comment on a defendant's right to remain silent?

In *Griffin v. California,*[28] the Supreme Court ruled that a prosecutor could not comment on a defendant's refusal to testify at time of trial. The Court recently ruled that this principle is so important that if the defendant requests, a judge must inform the jury that a defendant's refusal to testify can not be considered by the jury as inferring his guilt.[29]

One court has ruled directly that admission of a defendant's refusal to take the test constitutes impermissible comment on his right to remain silent.[30] As authority for this position, *Johnson v. State* cited the Florida case of *Gay v. Orlando.*[31] However, the Georgia court misunderstood *Gay*, which specifically held comment on a defendant's refusal to testify was *not* comment on his right to remain silent. Judge Eberhardt's dissent (in a 4-3 decision) strongly criticized the majority:

> The refusal to take the test is not to be equated with the failure of the accused to take the stand and make an unsworn statement or testify in his own behalf. We agree readily that is it improper for the court or the state's counsel to make reference to that. But that is not a circumstance connected with the arrest - it is something which happens in the course of the trial itself.[32]

The majority of cases have held that admission of a defendant's refusal does *not* constitute impermissible comment on a defendant's

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27. 46 N.Y.2d at 108, 385 N.E.2d at 588, 412 N.Y.S.2d at 849 (emphasis in original).

28. 380 U.S. 609 (1965).

29. Carter v. Kentucky, 101 S. Ct. 1112 (1981).

30. 125 Ga. App. 607, 188 S.E.2d 416 (1972). *But see also* People v. Hayes, 64 Mich. App. 203, 235 N.W.2d 182 (Ct. App. 1975), discussed at note 49 *infra.*

31. 202 So. 2d 896 (Fla. 4th Dist. Ct. App. 1968).

32. 125 Ga. App. at 617, 188 S.E.2d at 422.

right to remain silent.[33] In explaining why admitting a defendant's refusal would not be an impermissible comment on the right of a defendant to remain silent, the Supreme Court of California stated in *People v. Sudduth*:

> The sole rationale for the rule against comment on a failure to testify is that such a rule is a necessary protection for the exercise of the underlying privilege of remaining silent . . . . A wrongful refusal to cooperate with law enforcement officers does not qualify for such protection. A refusal that might operate to suppress evidence of intoxication, which disappears rapidly with the passage of time . . ., should not be encouraged as a device to escape prosecution.[34]

Decisions by Florida Courts

First, no Florida appellate court has ruled that comment by a prosecutor on a defendant's refusal to do a lawfully required act constitutes impermissible comment on the defendant's right to remain silent.

Second, with one exception, the Florida appellate courts have ruled that a defendant's refusal to do a lawfully required act is not testimonial in nature; therefore, a defendant's refusal is admissible.[35] In following the majority trend, the Florida Supreme Court explained why

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33. People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1967) *cert. denied* 389 U.S. 850 (1967), *reh. denied* 389 U.S. 996 (1967); Hill v. State, 366 So. 2d 296 (Ala. Crim. App. 1978) *aff'd* 366 So. 2d 318 (Ala. 1979); People v. Thomas, 46 N.Y.2d 100, 385 N.E.2d 584, 412 N.Y.S.2d 845 (1978) *appeal dismissed sub nom* Thomas v. New York, 444 U.S. 891 (1979); Newhouse v. Misterly, 415 F.2d 514 (9th Cir. 1969); State v. Meints, 189 Neb. 264, 202 N.W.2d 202 (1972); City of Westerville v. Cunningham, 15 Ohio St. 2d 119, 239 N.E.2d 40 (1968); Davis v. State, 367 N.E.2d 1163 (Ind. Ct. App. 1977); City of Waukesha v. Godfrey, 41 Wis. 2d 401, 164 N.W.2d 314 (1969); State v. Holt, 261 Iowa 1069, 156 N.W.2d 884 (1968); State v. Dugas, 252 La. 345, 211 So. 2d 285 (1968).

34. 65 Cal.2d at 546, 421 P.2d at 403, 55 Cal. Rptr. at 395.

35. State v. Esperti, 220 So. 2d 416 (Fla. 2d Dist. Ct. App. 1969) (defendant's refusal to submit to a nitrate test to determine gunpowder residue held admissible); Clark v. State, 379 So. 2d 97 (Fla. 1980); Lusk v. State, 367 So. 2d 1088 (Fla. 3d Dist. Ct. App. 1979); Joseph v. State, 316 So. 2d 585 (Fla. 4th Dist. Ct. App. 1975) (defendant's refusal to give voice exemplar admissible); Smith v. State, 394 So. 2d 407 (Fla. 1981) (defendant's failure to explain possession of recently stolen property held admissible).

such refusal is not testimonial in nature:

> [Defendant's] privilege against self-incrimination would not have been violated by compelling him to speak the words spoken by the extortionist, and therefore his refusal to speak was not an exercise of this right. Since the fifth amendment offers no protection against compulsion to submit to a voice exemplar and since it does not privilege refusal to submit, the admission of [defendant's] refusal into evidence was not error.[36]

The only Florida appellate court to state that a defendant's refusal was "testimonial" in nature was *Gay v. Orlando,*[37] decided prior to the passage of Florida's Implied Consent Law. The Fourth District Court of Appeal stated: "In the case before us petitioner was confronted with a choice of either voluntarily submitting to the test or refusing and thereby making a self-incriminating statement. While the results of a properly admitted breathalyzer test are not within the privilege, self-incriminating testimonial by-products are."[38]

The *Gay* rationale was strongly criticized by the Second District Court of Appeal in *State v. Esperti.*[39] In admitting evidence of defendant's obstruction of police attempts to administer a test measuring gun powder burns, the court stated that "his actions were a direct by-product, not of the administration of the test, but of the wrongful refusal to submit thereto; and wrongful conduct poisons its own fruit."[40] *Esperti* pointed out that *Gay*'s statment that defendant's refusal was testimonial was pure dicta. The Second District declined to be bound by such dicta.[41]

Thus Florida courts other than *Gay* have uniformly ruled that a defendant's refusal to do a lawfully required act is admissible evidence. Comment on a defendant's refusal does not constitute comment on a

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36. 379 So. 2d at 102.
37. 202 So. 2d 896 (Fla. 4th Dist. Ct. App. 1967).
38. *Id.* at 898.
39. 220 So. 2d 416 (Fla. 2d Dist. Ct. App. 1969).
40. *Id.* at 419.
41. *Id.* The dicta in *Gay* was also criticized in Becker, *Admissibility of Testimonial By-Products of a Physical Test,* 24 U. MIAMI L. REV. 50 (1969). Becker prophecied that future Florida courts would follow *Esperti* rather than *Gay.* His prediction proved correct.

defendant's right to remain silent. Nor is the defendant's refusal to do a lawfully required act "testimonial" in nature. Florida is in accord with the majority of states throughout the country which have decided this issue; the majority position is the better reasoned one. In Florida the fifth amendment self-incrimination clause should not constitute a barrier to admission of a defendant's refusal to take the test.

Statutory Right Not to Take the Test

Decisions From Foreign Jurisdictions

In order to fully understand whether in Florida a defendant has the statutory "right" to refuse the test, it is necessary to compare Florida's Implied Consent Law with those of other states. Some states statutorily permit a defendant's refusal to be admissible evidence,[42] other states statutorily prohibit such refusal to be admissible evidence.[43] Unfortunately, Florida Statute Section 322.261 fails to specifically indicate whether a defendant's refusal to take the test would be admissible.

First, does the state statute give the defendant the "right" to refuse the alcohol test? A large number of state statutes, while not specifically stating whether a defendant's refusal is or is not admissible, do state that a defendant has the *right* not to take the test.[44] In states with

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42. a) Alabama: ALA. CODE § 32-5-192(a) (1975); Hill v. State, 366 So. 2d 318 (Ala. 1979). b) Arizona: ARIZ. REV. STAT. § 28-692-H (1981); Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971). c) Delaware: 21 DEL. CODE ANN. tit. 21, § 2749 (1979); State v. Lynch, 274 A.2d 443 (Del. Sup. Ct. of New Castle 1971); Warren v. State, 385 A.2d 137 (Del. 1978). d) Iowa: IOWA CODE § 321B.11 (1975); State v. Tierman, 206 N.W.2d 898 (Iowa 1973). e) North Carolina: N.C. GEN. STAT. § 20-139.1(f) (1978); State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976). f) Vermont: VT. STAT. ANN. tit. 23, § 1205(a) (1981); State v. Welch, 136 Vt. 442, 394 A.2d 1115 (1978).

43. a) Illinois: ILL. ANN. STAT. ch. 95 ½, § 11-501(h) (Smith-Hurd 1981); People v. Boyd, 17 Ill. App. 3d 879, 309 N.E.2d 29 (1974). b) Maine: ME. REV. STAT. ANN. tit. 22, § 1312(8) (Supp. 1981); State v. Gillis, 199 A.2d 192 (Me. 1964). c) Maryland: MD. CTS. & JUD. PROC. CODE ANN. § 10-309(a) (1980). Davis v. State, 8 Md. App. 327, 259 A.2d 567 (Ct. Spec. App. 1969) (construing the prior statute, MD. ANN. CODE art. 35, § 100(c) (1954) (repealed 1969). d) Massachusetts: MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (1969 & Supp. 1981); Commonwealth v. Scott, 269 N.E.2d 454 (Mass. 1971).

44. a) State v. Oswald, 90 S.D. 342, 345, 241 N.W.2d 566, 568 (1976) quoting

such statutes, courts held that a defendant's refusal is not admissible. They did so on fundamental fifth amendment due process grounds. These courts reasoned that since a defendant has a statutory right to refuse the test, it would be grossly unjust to penalize a defendant, other than by statutorily suspending his license, for exercising that right. In *State v. Oswald,*[45] the South Dakota Supreme Court explained:

> In the case before us the Defendant was informed of his statutorily guaranteed right and, for whatever reason we do not know, he elected not to submit to the test. Certainly it is unfair to create by statute a right not to submit to a chemical test and to allow the accused to exercise that right and then in open court before a jury to permit testimony concerning that refusal which can all too easily work in the minds of the jury members to the prejudice of the defendant.[46]

The court went on to adopt the position of the Oklahoma Supreme Court in *Duckworth v. State*:[47]

> '[T]he defendant's refusal to take the test was used by the state in its case in chief for purely prejudicial purposes. The accused's refusal should have ended the inquiry on the subject. It ill behooves the courts to say you have a right to refuse to do something, which may prove either beneficial or detrimental to you, and yet, notwith-

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S.D. COMP. LAWS ANN. § 32-23-10 (1976): "such person shall be requested by said officer to submit to such analysis and shall be advised by said officer of his right to *refuse* to submit to such analysis." (emphasis added). b) People v. Hayes, 164 Mich. App. 203, 235 N.W.2d 182 (1975); MICH. COMP. LAWS ANN. § 257.625(a) (1967); Collins v. Secretary of State, 384 Mich. 656, 663, 187 N.E.2d 423, 426 (1971) quoting MICH. COMP. LAWS ANN. § 257.625(d) (1967): "A person under arrest shall be advised of his *right* to refuse to submit to chemical tests; and if he refuses the request of a law enforcement officer to submit to chemical test no test shall be given." (emphasis added). c) State v. Stuart, 157 A.2d 294 (D.C. 1960). *See also* Washington v. Parker, 16 Wash. App. 632, 633, 558 P.2d 1361, 1362 (1976); WASH. REV. CODE § 46.61-505 (repealed 1968): "Evidence of the chemical analysis or scientific breath test of any kind of such person's blood shall not be admissible unless such person shall have been advised by the person given the test . . . that such person has a constitutional *right* not to submit to such test." (emphasis added).

45. 90 S.D. 342, 241 N.W.2d 566 (1976).
46. *Id.* at 346, 241 N.W.2d at 569.
47. 309 P.2d 1103 (Okla. 1957).

> standing your right to do so, we will permit your refusal to be shown and enable the state to destroy your right and achieve indirectly by innuendo what it was prevented by law from accomplishing directly. We can conceive of no greater inconsistency.'[48]

An appellate Michigan court took a similar view in *People v. Hayes*:

> Under § 625a, an individual arrested for drunk driving has a choice. He can either submit to a test the results of which could create a virtually irrefutable presumption of guilt against him, or he can refuse the test and suffer the revocation. If the fact that a defendant has chosen not to submit to a test can be placed before the jury as an inference of his guilt, then he will be put in the position of having to risk providing evidence for the prosecution by submitting to the test or of certainly providing it by refusing to submit. It would be fundamentally unfair to put a defendant in such a 'damned if he does, damned if he doesn't' position. The Legislature provided a definite choice, and we cannot render a decision which would make that choice an illusory one.[49]

Where a defendant is told he has a *right* to refuse the test, it would be unfair to punish the defendant for exercising that statutory right. Therefore, I believe these cases are correctly decided.

However, in states where a defendant is not specifically given a statutory or constitutional "right" to refuse, the refusal may be admissible. The majority of states whose statutes do not confer on the defendant the right to refuse the test have permitted such refusal to be admitted into evidence.[50] These courts reasoned that it is a misnomer to

48. 90 S.D. at 347, 241 N.W.2d at 569.

49. 164 Mich. App. at 208, 235 N.W.2d at 185. Although Michigan gave the defendant the statutory right to refuse the test (*see* note 44(d) *supra*), the *Hayes* court never relied on that statute. In fact, the court found that whether a particular state statute gave the defendant a "right" to refuse the test was essentially irrelevant. *Id.*

50. People v. Thomas, 46 N.Y.2d 100, 385 N.E.2d 584, 412 N.Y.S.2d 845 (1978) *appeal dismissed sub nom* Thomas v. New York, 444 U.S. 891 (1979); Newhouse v. Misterly, 415 F.2d 514 (9th Cir. 1969); State v. Tabisz, 129 N.J. Super. 80, 322 A.2d 453 (Super. Ct. App. Div. 1973); State v. Albright, 98 Wis. 2d 663, 298 N.W.2d 196 (1980); State v. Meints, 189 Neb. 264, 202 N.W.2d 202 (1972); People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1967); State v. Miller, 257

state a defendant has a "right" to refuse the test. The best explanation of how the term "right" has been misused was discussed by Justice Jasen in his concurring opinion of *People v. Paddock*:

> [The] 'right' of refusal is not really a right in the sense of a fundamental personal privilege, but rather was merely an accommodation to avoid a distasteful struggle to forcibly take blood. Since the statute itself equates a refusal with guilt (by revoking the driver's license) and expresses a strong policy to protect the public from the threat of drunken driving, there appears no compelling reason to forbid comment on a person's refusal to take a blood test.[51]

Justice Jasen hit the nail on the head. In general, legislatures recognized that people under the influence of alcohol tend to be more abusive, obtrusive and combative than they would be if sober. To require law enforcement officials to withdraw blood or make an accused take a breath test could easily lead to a pitched battle between police and the accused. Injuries to either or both could easily occur; hence the necessity for permitting the defendant not to take the test. Others have reached the same conclusion:

> [I]f it be admitted that the privilege of refusal stems from a legislative effort to eliminate unreasonable force in terms of police action, the accused has received all benefits due him when he is granted merely the right [sic] of refusal. For the sake of peace and order the State has surrendered evidence of significant value and beneficence at the sacrifice of effective law enforcement should not be compounded by denying the state the privilege of comment.[52]

This explanation for not forcing a defendant to take a blood alco-

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S.C. 213, 185 S.E.2d 359 (1971); Gardner v. Commonwealth, 195 Va. 945, 81 S.E.2d 614 (1954); State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958); City of Westerville v. Cunningham, 15 Ohio St. 129, 239 N.E.2d 40 (1968); State v. Dugas, 252 La. 345, 211 So. 2d 285 (1968). *See also* Commonwealth v. Rutan, 229 Pa. Super. 400, 323 A.2d 730 (1974). Pennsylvania subsequently amended its implied consent statute to prohibit admission of such evidence. 75 PA. CONS. STAT. ANN. § 1547(c) (Purdon 1977). *See* Commonwealth v. Charles, 270 Pa. Super. 280, 411 A.2d 527 (1979).

51. 29 N.Y.2d 504, 506, 272 N.E.2d 486, 487, 323 N.Y.S.2d 976, 977 (1971).

52. Slough & Wilson, *Alcohol and the Motorist: Practical and Legal Problems,* 44 MINN. L. REV. 673, 705 (1960).

hol test was adopted in *Hill v. State*:

> Therefore, it seems that the act does not contemplate a per se right of refusal, rather this acquiescence in refusal is in the posture of avoiding potential violent conflicts. . . . See *Campbell v. Superior Court* . . . 'this language does not give a person a 'right' to refuse to submit to the test only the physical power [to].'[53]

By informing the defendant his license will be suspended, but not specifying in the statute that a refusal to take the test could be used against him, legislatures may have intended to prohibit as evidence a defendant's refusal to take the test.

A small minority of non-Florida courts have held a defendant's refusal inadmissible, even though the state statute does not specifically grant a defendant the "right" to refuse.[54] These courts reasoned that when the state legislature imposed a mandatory license suspension that was the *only* penalty intended. Legislative silence on the issue of admissibility indicated that refusal would not be admissible. This view was expressed by the Alaska Supreme Court in *Puller v. Municipality of Anchorage:*

> An intrinsic aid to statutory construction is found in the maxim expressio unius est exclusio alterius. The maxim establishes the inference that, where certain things are designated in a statute, 'all omissions should be understood as exclusions.' The maxim is one of long-standing application, and it is essentially an application of common sense and logic.
> With respect to AS 28.35.032, we find that the enumeration of cer-

53. 366 So. 2d 318, 323 (Ala. 1979).

54. a) Puller v. Anchorage, 574 P.2d 1285, 1286 (Alaska 1978). ALASKA STAT. § 28.35.032 (1978): "If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test of his breath . . . after being advised by the officer that the refusal will result in the suspension, denial or revocation of his license, a chemical test shall not be given." b) City of St. Joseph v. Johnson, 539 S.W.2d 784 (Mo. Ct. App. 1976). MO. REV. STAT. § 577.050 (1979): "If a person under arrest refuses upon the request of the arresting officer to submit to a chemical test, which request . . . shall inform the person that his license may be revoked upon his refusal to take the test, then none shall be given." c) Kansas v. Wilson, 5 Kan. App. 2d 130, 613 P.2d 384 (1976). KAN. STAT. ANN. § 8-1001(c) (Supp. 1980): "If the person so arrested refuses a request to submit to a test of breath or blood, none shall be given."

> tain sanctions, suspension or revocation of license, and the requirement that those sanctions be included in a warning preclude the imposition of additional consequences. The admissibility of evidence of the fact of refusal would constitute such an additional consequence.[55]

These courts have interpreted their statutes to mean that a defendant has a real choice to refuse and is not merely revoking his previously granted implied consent to the test. In *City of St. Joseph v. Johnson* the court commented:

> Acceptance by a motorist of a license to operate a vehicle upon the highways of this state does not amount to an implied consent to submit himself to chemical analysis when charged with driving in an intoxicated condition. The sobriquet 'implied consent law' both misnominates § 566.444 and also misleads as to its legal effects.[56]

Of course, whether a legislature intended its silence to prohibit a defendant's refusal to be admissible is a matter of interpretation for each state. One could just as easily argue that by never specifically stating a defendant's refusal is "not admissible" the legislature intended that it be admissible.

Comparison of Florida Statute to Other State Statutes

Florida's Implied Consent Statute does not give a defendant the "right" to refuse to take a chemical test to determine his blood alcohol level. Florida's statute has virtually the same language as statutes in those states which have ruled that a defendant has no statutory "right" to refuse the breath test. There is no substantial difference between Florida's Implied Consent Statute and New Jersey's 39:4-50.2(a), which *State v. Tabisz*[57] held did not grant the defendant a statutory right to refuse.

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55. 574 P.2d at 1288.

56. 539 S.W.2d at 786.

57. 129 N.J. Super. 810, 322 A.2d 453 (Super. Ct. App. Div. 1973). *But see* Kansas v. Wilson, 5 Kan. App. 2d 130, 132 n.17, 613 P.2d 384, 385-86 n.17, citing KAN. STAT. ANN. § 8-1001(a) (Supp. 1980). The *Wilson* court was an appellate court which felt bound by dicta of the Kansas Supreme Court in State v. Haze, 218 Kan. 60,

FLA. STAT. § 322.261 Suspension of license; chemical test for intoxication.
(1)(a) Any person who shall accept the privilege extended by the laws of this state of operating a motor vehicle within this state shall by so operating such vehicle be deemed to have given his consent to submit to an approved chemical test of his breath for the purpose of determining the alcoholic content of his blood if he is lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of alcoholic beverages. The test shall be incidental to a lawful arrest and administered at the request of a peace officer having reasonable cause to believe such person was driving a motor vehicle within this state while under the influence of alcoholic beverages. Such person shall be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle for a period of three months.

N.J. STAT. § 39:4-50.2(a):
Any person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood. . . .

When the implied consent statute is read in its entirety, it is clear the legislature never intended to give a suspected DUI defendant the "right" to refuse the test. In enacting Florida Statute Section 322.262, the Florida legislature specifically gave an individual a "statutory right" to refuse a pre-arrest breath test to determine the percentage of alcohol in his blood. "Prior to administering any *pre*-arrest breath test, a law enforcement officer shall advise the motor vehicle operator that

542 P.2d 720 (1975). Ironically, this same situation exists in Florida with State v. Sambrine, 386 So. 2d 546 (Fla. 1980) discussed in text accompanying notes 72-78 *infra*.

he has the *right* to refuse to take such test, and, prior to administering such test, a law enforcement officer shall obtain the written consent of the motor vehicle operator."[58]

Significantly, no such "right" is given a defendant after he has been arrested for DUI pursuant to Florida Statute Section 322.261(a).

> [W]here language is used in one section of a statute different from that used in other sections of the same Chapter, it is presumed that the language is used with different intent. Accordingly, the presence of a provision in one portion of a statute and its absence from another are an argument against reading it as implied by the section from which it is omitted.[59]

The Florida legislature has specifically mandated that a pre-arrest breath test is *not* admissible evidence. "The results of any [pre-arrest] test administered under this section shall *not* be admissible into evidence in any civil or criminal proceeding."[60] Since the Florida legislature specifically excluded as evidence a pre-arrest test, by its silence it appears the legislature intended that a post-arrest test should be admissible.

It is also necessary to look at the overall purpose of Florida Statute 322.261 in conjunction with Florida's DUI Statute.[61] The supreme court asserted this in *Bender v. State*: "The overall purpose of this chapter [322] is to address the problem of drunk drivers on our public roadways and to assist in implementing Section 316.193 which provides that driving while intoxicated is unlawful."[62] Thus, when viewing the legislative purpose as a whole, it does not appear the Florida legislature ever intended to prohibit as evidence a defendant's refusal. The Wisconsin court commenting on legislative silence concerning a defendant's refusal to take the test stated in *State v. Albright*:

> '[T]he clear policy of the [implied consent] statute is to facilitate the identification of drunken drivers and their removal from the highways [and] the statute must be construed to further the legis-

58. FLA. STAT. § 322.261(b)(2) (1979) (emphasis added).
59. 30 FLA. JUR. *Statutes* § 96 (1974).
60. FLA. STAT. § 322.261(1)(b)(1) (1979) (emphasis added).
61. FLA. STAT. § 316.193 (1979).
62. 382 So. 2d 697, 699 (Fla. 1980).

> lative purpose.' Evidence of refusal is relevant and constitutionally admissible. We do not interpret the silence of a legislature which maintained a strong desire to remove drunk drivers from Wisconsin roads to mean that this relevant evidence is inadmissible in a proceeding for driving while intoxicated.[63]

In Florida, unless specifically excluded by the legislature, "all relevant evidence is admissible except as provided by law."[64] Thus, if the refusal to take the test is relevant, the Florida legislature could have prohibited admitting this evidence by explicitly saying so.[65] Its silence could easily be interpreted to mean the evidence is admissible.

Florida case law has constantly interpreted the Florida Implied Consent Statute to require a defendant to take the test unless he revokes his previous consent.[66] Thus, the theory used by Missouri in *City of St. Joseph v. Johnson,*[67] which indicated that a driver does not agree in advance to take the test, would not apply in Florida. Seemingly, Florida courts should adopt the rationale used in *People v. Thomas*: "The admissibility of refusal evidence may also be viewed as a permissible condition reasonably attached to the grant of permission to operate a motor vehicle on the highways of the state."[68]

During the 1981 legislative session, a bill[69] was introduced which would have substantially amended Florida Statute Section 322.261. One of the many revisions of this bill contained statutory language specifically permitting as evidence a defendant's refusal to take a blood alcohol test. The bill passed the House, but was never voted on by the Senate. Since the bill contained numerous revisions and was never actually rejected by the Senate, the failure to pass this bill sheds no new light on legislative intent regarding the admissibility of the refusal to

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63. 98 Wis. 2d at 672-73, 298 N.W.2d at 201, quoting State v. Neitzel, 95 Wis. 2d 191, 193, 289 N.W.2d 828, 830 (1980).

64. FLA. STAT. § 90.402 (1979).

65. *See* note 44 *supra* for statutes so worded.

66. Sambrine v. State, 386 So. 2d 546 (Fla. 1980); State v. Smith, 278 So. 2d 281 (Fla. 1976); State v. Riggins, 348 So. 2d 1209 (Fla. 4th Dist. Ct. App. 1977). "[T]hus it appears that the implied consent in this state may be revoked at the time the chemical test is suggested by an officer." *Id.* at 1210.

67. 539 S.W.2d 784 (Mo. Ct. App. 1976). *See* note 54 *supra.*

68. 46 N.Y.2d at 110, 385 N.E.2d at 589, 412 N.Y.S.2d at 851.

69. FLA. H.B. 1117 (1981).

take a blood alcohol test.

Florida Decisions on the "Right" to Refuse a Blood Alcohol Test

Three Florida appellate decisions, *State v. Duke*, *State v. Sambrine* and *State v. Ducksworth*, have now dealt with the legal issue of whether Florida Statute 322.261 gives a defendant the "right" to refuse a blood alcohol test.[70] None of the courts discussed foreign cases in their written opinions.

Duke adopted the theory that a defendant may have the physical power to refuse the blood alcohol test, but not the "right" to do so. In addition, *Duke* felt that it would be better public policy not to reward those who refuse to take the test:

> A driver retains the physical power to refuse a sobriety test, but not the *legal* right to withdraw his implied consent.
> Public policy considerations favor the physical power/legal right distinction. If Section 322.261(1)(a) is concluded not to be compulsory, the driver who refuses the test is penalized only by the suspension of his license for 3 months. However, the driver who takes the test faces a greater penalty as the results could be evidence against him at trial. This non-compulsory interpretation would lead to drivers not taking the test.[71]

The *Duke* court went on to hold that a defendant's refusal to take the test is generally admissible.

In *Sambrine* the Florida Supreme Court never ruled on the issue of whether a defendant's refusal is admissible evidence. The issue in *Sambrine* was whether a sample of blood taken over the defendant's objection was admissible evidence. The court held that the legislature intended to exclude such evidence: "The legislature may have concluded that it was preferable to enforce the implied consent law through this method [license suspension] than mandate that law enforcement officials be required to physically restrain every individual

70. State v. Duke, 378 So. 2d 96 (Fla. 2d Dist. Ct. App. 1979); State v. Sambrine, 386 So. 2d 546 (Fla. 1980); State v. Ducksworth, 408 So. 2d 589 (Fla. 2d Dist. Ct. App. 1981) *reh. denied* Jan. 25, 1982.

71. 378 So. 2d at 98.

who refused to submit to the test."[72] This author's research of other states' implied consent statutes indicates that such a conclusion was correct. Unfortunately, the *Sambrine* court muddied this entire area of law by stating:

> The Court is not free to ignore such plain language and obvious legislative intent. Any careful reading of Section 322.261 leads to the inescapable conclusion that a person is given the *right* to refuse testing. If this were not so, it is unclear why the legislature provided for a definite sanction and a detailed procedure for the enforcement of such sanction.[73]

The court's use of the word "right" is troubling for a number of reasons. First, the court's analysis of the legislature's "obvious" intent was less than thorough, for it did not consider the legislative intent evidenced in the different statutory language for pre- and post-arrest tests.[74]

Second, the court never bothered to cite, much less distinguish or overrule, *Duke.* Had it done so, it might have seen the difference between saying a defendant can not be physically forced to take a blood test and saying he has a "right" not to do so.

Third, the court never analyzed decisions from other jurisdictions with statutes which did not use the term "right" (and which generally permit admission of a defendant's refusal) and those states with statutes which used the term "right" (and generally exclude admission of such a refusal).

What is even more perplexing is that the "right" language was not essential to the court's decision, hence dicta. Although not binding, since it emanated from the Florida Supreme Court such language is considered highly persuasive.[75]

In *State v. Ducksworth*[76] the Second District Court of Appeal, because of *Sambrine,* retreated from *Duke.* In a terse two paragraph opinion, it ruled a defendant's refusal to take a breathalyzer test inad-

72. 386 So. 2d at 549.
73. *Id.* at 548.
74. *See* text accompanying notes 58-60 *supra.*
75. Milligan v. State, 177 So. 2d 75 (Fla. 2d Dist. Ct. App. 1965).
76. 408 So. 2d 589 (Fla. 2d Dist. Ct. App. 1981) *reh. denied* Jan. 25, 1982.

missible. It upheld a trial court decision that admired the *Duke* analysis but felt bound by *Sambrine*.[77] Whether the Second District Court thought *Sambrine's* use of the term "right" was binding or dicta was not discussed.

Thus, if the dicta in *Sambrine* is taken at face value, a defendant has a right to refuse to take the test. With such a right a defendant's refusal would be inadmissible since it would violate fundamental fairness by penalizing a defendant for exercising his right.[78]

However, if the term "right" as used by Justice Atkins is a misnomer, then the better reasoning would be to admit the refusal. The purpose of the implied consent statute is to prevent violence by not physically forcing a defendant to take the test; it is not to give the accused a better chance to avoid conviction of DUI. Further, public policy dictates that a defendant not be "rewarded" for refusing to take the test: to do so would simply nullify the legislative intent.

Prejudicial Effects Outweighing Probative Value

Decisions in Other Jurisdictions

Courts which have ruled there is no constitutional nor statutory "right" to refuse the test have uniformly ruled that a refusal has sufficient probative value to be admissible.[79] These courts have ruled that a refusal indicates a consciousness of guilt on the part of the defendant. It infers that the defendant knew if he took the test, he would fail. This was expressed by the Supreme Court of Ohio in *Westerville v. Cunningham*:

> Where a defendant is being accused of intoxication and is not intoxicated, the taking of a reasonably reliable chemical test for intoxication should establish that he is not intoxicated. On the other hand, if he is intoxicated, the taking of such a test will probably establish that he is intoxicated. Thus, if he is not intoxicated, such

77. Ducksworth v. State, # 80-3029-AP-01 at 2 (Fla. 12th Cir. filed Mar. 2, 1981).

78. *See* text accompanying notes 45-49 *supra.*

79. *See* notes 33 and 50 *supra.* Conversely, those courts which held that a defendant has either a statutory or constitutional right to refuse have ruled that the results of such tests have no probative value. *See* text accompanying notes 83-87 *infra.*

> a test will provide evidence for him; but, if he is intoxicated, the test will provide evidence against him. Thus, it is reasonable to infer that a refusal to take such a test indicates the defendant's fear of the results of the test and his consciousness of guilt, especially where he is asked his reason for such refusal and he gives no reason which would indicate that his refusal had no relation to such consciousness of guilt.[80]

These courts have also ruled that no undue prejudice is borne by the defendants. As Justice Traynor explained in *People v. Ellis*:

> Evidence of the refusal is not only probative; its admission operates to induce suspects to cooperate with law enforcement officials. Only the overriding interest in protecting the privilege against compulsory self-incrimination, itself the result of a delicate balance, prohibits evidence or comment in the refusal to testify cases. But the privilege itself is not at issue here. Without exception, none of the reasons that support the privilege lends support to a rule that would exclude probative evidence obtained from an accused's effort to conceal nonprivileged evidence.[81]

Some courts have argued that a defendant is never required to cooperate with the police, but Justice Traynor rejected this argument:

> It has been urged that the privilege reflects an ultimate sense of fairness that prohibits the state from demanding assistance of any kind from an individual in penal proceedings taken against him. . . . Criminal proceedings are replete with instances where at least passive cooperation of an accused may be constitutionally required.[82]

Most courts holding that a defendant's refusal does not have sufficient probative value have based their decisions on the defendant's statutory or constitutional "right" not to take the test.[83] This was ex-

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80. 15 Ohio St. 2d 129, 130, 239 N.E.2d 40, 41 (1968).

81. 65 Cal. 2d at 538, 421 P.2d at 398, 55 Cal. Rptr. at 390.

82. *Id.* at 534, 421 P.2d at 395, 55 Cal. Rptr. at 387.

83. Duckworth v. State, 309 P.2d 1103 (Okla. 1957). *See also* Engler v. State, 316 P.2d 625 (Okla. Crim. Ct. App. 1957); Johnson v. State, 125 Ga. App. 607, 188 S.E.2d 416 (1972); City of St. Joseph v. Johnson, 539 S.W.2d 784 (Mo. Ct. App.

pressed by the Missouri court in *St. Joseph's*:

> The admissibility of the refusal as evidence of intoxication in a collateral criminal proceeding, therefore, depends upon whether the probative value of such evidence outweighs its prejudicial effect. Our decisions recognize that a motorist must make his choice to refuse or submit in the atmosphere of his arrest and restraint. . . . In this environment, the refusal may result equally from rational causes of disquiet as from a consciousness of guilt.[84]

One state, Oklahoma, went so far as to say that a defendant's refusal is of no evidentiary value. In *Duckworth v. State,* the Oklahoma Supreme Court said:

> The defendant [would be] the victim of prejudice created by no real fact produced by the test, but by surmise, speculation and innuendo based only on the assertion by the defendant of his fundamental right to refuse the test. In no other way can the right to refuse have any meaning or constitute more than a mere shadow of substance.[85]

It must be remembered that this decision came prior to *Schmerber* and at a time when the reliability of such tests were seriously in question.[86]

One court, in *State v. Annonymous,* ruled that such evidence was incompetent:

> Implicit in such testimony of refusal is the irremediable suggestion that had the test been given, the results would have been as nearly infallible on the issue of intoxication, providing either guilt or innocence of the accused, as scientific ingenuity could devise, and, thus, from a mere refusal to submit to such test, fairly and reasonably, could be derived an inference of guilt. With this basic assumption we do not agree. The evidence objected to was incompetent for the

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1976); Kansas v. Wilson, 5 Kan. App. 2d 130, 613 P.2d 384 (1976); Washington v. Parker, 16 Wash. App. 632, 558 P.2d 1361 (1976); Crawly v. State, 219 Tenn. 707, 413 S.W.2d 370 (1967); People v. Hayes, 64 Mich. App. 203, 235 N.W.2d 182 (1975).

84. 539 S.W.2d at 787.

85. 309 P.2d at 1105.

86. The theory in *Duckworth* was severely criticized at Note, *Effect of Comment on Refusal to Submit to Intoximeter Test,* 10 OKLA. L. REV. 331 (1957).

purpose for which it was offered and should have been excluded.[87]

But the Connecticut court failed to state why it was incompetent. Justice Traynor relied upon Professor Wigmore in *Ellis*:

> The inferential chain here is no different from that which makes any event that does not directly illuminate the circumstances of the crime charged a relevant fact. The trier of fact must reason from, for example, an escape from jail, to a consciousness of guilt that would motivate the escapee's conduct, and, from that premise, to the conclusion that such conduct is relevant to the ultimate issue of guilt or innocence.[88]

Florida Decisions

No appellate Florida court has yet ruled directly on the prejudicial aspect of admitting the refusal to take an alcohol test. It is, therefore, important to look at how Florida courts have ruled in analogous situations.

In *Young v. State* the Florida Supreme Court held certain photographs inadmissible because of their inflammatory nature:

> Where there is an element of relevancy to support admissibility then the trial judge in the first instant and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence.[89]

Florida appellate courts have ruled that a defendant's refusal to take a "required" test is of sufficient probative value to be admissible.[90] In making these decisions the courts necessarily have ruled that the evidence had sufficient probative value to outweigh any prejudicial ef-

87. 6 Conn. Cir. Ct. 470, ___, 276 A.2d 452, 455 (1971).

88. 65 Cal. 2d at 538 n.12, 421 P.2d at 398 n.12, 55 Cal. Rptr. at 390 n.12.

89. 234 So. 2d 341, 348 (Fla. 1970) quoting Leach v. State, 132 So. 2d 324, 331-32 (Fla. 1961).

90. State v. Esperti, 220 So. 2d 416 (Fla. 2d Dist. Ct. App. 1969) (nitrate test); Clark v. State, 379 So. 2d 97 (Fla. 1980) (voice identification).

fects. In describing why the possession of recently stolen property by the defendant had probative value, the Florida Supreme Court stated in *State v. Young*:

> Moreover, the inference of guilt that the jury may infer from the unexplained possession of recently stolen goods does not arise from the possessor's failure to explain or demonstrate by evidence of exculpatory facts and circumstances that his possession of the recently stolen goods is innocent. It is the fact of *possession* that provides the basis for the inference of guilt. This inference is founded on '. . . the manifest reason that when goods have been taken from one person, and are quickly thereafter found in the possession of another, there is a strong possibility that they were taken by the latter.'[91]

The court went on to explain the probative value of such evidence:

> It can be seen, therefore, that the rule of evidence respecting possession of recently stolen goods is no different, in kind, from the rule respecting the probative value of any other circumstantial evidence. Flight, concealment, resistance to a lawful arrest, presence at the scene of the crime, incriminating fingerprints - the whole body of circumstantial evidence relevant in a given case - are all incriminating circumstances which the jury may consider as tending to show guilt if evidence thereof is allowed to go to the jury unexplained or unrebutted by evidence of exculpatory facts and circumstances.[92]

Florida has a low threshold for admitting evidence of probative value. In most states, a court must balance whether the probative value of evidence outweighs the possible prejudice to the defendant. In Florida, the proof necessary to admit such evidence is much lower; a defendant's refusal will be admitted unless its prejudicial effect substantially outweighs its probative value.[93]

Thus, in determining whether a defendant's refusal to take the test has sufficient probative value, courts will look to whether the defendant

91. 217 So. 2d 567, 570 (Fla. 1968) *cert. denied* 396 U.S. 853 (1969).
92. *Id.* at 571.
93. FLA. STAT. § 90.403 (1979).

has a statutory or constitutional "right" to refuse. As stated previously, there is confusion at the appellate level in Florida whether a defendant has such a statutory "right" to refuse.[94] If there is no "right" the evidence will have sufficient probative value; if there is a "right" the evidence would probably be considered too prejudicial.

Violation of Fundamental Due Process

Florida Statute Section 321.261(1)(e) requires a defendant be told that if he refuses to take the test his license will be suspended for three months; he need not be told that his refusal might be used against him at trial. It would, therefore, be possible for a defendant to be misled into believing that the only consequence of his refusal would be the suspension of his license.

Decisions in Other Jurisdictions

In *Washington v. Parker*[95] the Washington Supreme Court reasoned that a defendant would have to be told that his refusal could be used against him.

> In other words, had the statute intended evidentiary use of the right of refusal, it is logical that the arresting officer would be required to inform [defendant] that his refusal could be used as evidence in a criminal proceeding as well as the consequential loss of the privilege to drive. Since the statute does not require such warning, we conclude that the legislation did not contemplate the additional consequence.[96]

In *Puller v. City of Anchorage* the Alaska Supreme Court adopted a similar rational: "We view the warning requirement as a protective device to assure an informed choice on the part of the motorist. It would be unfair to have the driver believe that refusal would have one consequence and then permit the state to assert an additional

94. For discussion, *see* notes 50-77 *supra.*
95. 558 P.2d 1361 (Wash. 1976).
96. *Id.* at 1363. Washington specifically gives the defendant the statutory "right" to refuse the test.

consequence."[97]

Whether the police are required under the due process clause of the fifth amendment to give such a warning is an open question. In answering this question one must first determine what due process requires. The United States Supreme Court set forth a three prong test in *Mathews v. Eldridge*:[98]

1. The private interest at stake.
2. The government interest at stake.
3. The risk that procedures used will lead to erroneous decisions.

Applying the first prong, a defendant has a substantial interest in being warned that his refusal could be used against him at trial. His refusal might have been based solely on his willingness to accept a three month suspension for not taking the test; had he known the refusal could be used at trial he might have taken the test. Applying the second prong, the "cost" to government is minimal; in fact, the only possible cost might be the exclusion of such evidence where the police fail to warn the defendant. Finally, applying the third prong, there is a risk that a defendant might refuse under the mistaken impression the refusal could not be used at trial. The number of individuals who will be misled is probably minimal. But common sense teaches us that it would be better to avoid constitutional problems by requiring such a warning.

In dealing solely with the issue of whether the police must give the defendant a warning, the comparison of a defendant's refusal to give a voice or handwriting exemplar with refusal to give a blood alcohol test is inappropriate. In the former cases, the defendant is told to take the test, but he is told nothing else. There is no need to tell him his refusal could be used against him; there is no possibility he could be misled. In the latter case, the defendant is told his license will be suspended for three months if he does not take the test. Without being informed that his refusal could be used against him at trial, the defendant could be misled.

Florida Decisions

No Florida court has directly addressed the degree of warning the

97. 574 P.2d at 1288.
98. 424 U.S. 319 (1976).

state must give the defendant before he takes the breathalyzer test.[99] Recently the Florida Supreme Court in *Miller v. State*[100] resolved a conflict between the Second and Fourth District Courts of Appeal[101] as to the type of warning necessary in vehicle impoundment cases. Miller was arrested for not having a valid driver's license. The police impounded his car since there was no one else to drive it away. The defendant was never warned by the police that he could prevent impoundment by telephoning a friend to drive the vehicle away. The court required the warning: "[A]n officer, when arresting a present owner or possessor of a motor vehicle, *must advise* him or her that the vehicle will be impounded unless the owner or possessor can provide a reasonable alternative to impoundment."[102]

When there is the possibility that a defendant was *overtly* misled as to whether he was required to take the blood alcohol test, Florida courts have held a defendant's refusal inadmissible. In *Gay v. Orlando,* the Florida Fourth District Court stated: "Petitioner was told he had a *right* not to take the breath analysis test. He chose not to and this fact was brought out at trial."[103] *Gay* held the evidence was suppressable. Commenting on *Gay,* the Second District Court in *State v. Esperti* said:

> In that case the defendant refused to take a breathalyzer test; but it is patent therein that such refusal did not occur until after the officer told the defendant that *he need not take the test.* Evidence of such refusal was said to be inadmissible, as it should have been, since if for no other reason, it was violative of due process and fair

99. In State v. Duke, 378 So. 2d 96 (Fla. 2d Dist. Ct. App. 1979) the court discussed warnings but did not address the issue of warning a defendant that his refusal to take an alcohol test could be used against him.

100. 403 So. 2d 1307 (Fla. 1981).

101. The Second District Court of Appeal held that police need not inform defendants whose vehicles were being impounded that if they could locate a friend to drive the vehicle away there would be no impoundment. State v. Sanders, 387 So. 2d 391 (Fla. 2d. Dist. Ct. App. 1980); State v. Dearden, 347 So. 2d 462 (Fla. 2d Dist. Ct. App. 1977). The Fourth District Court of Appeal held that police must give such warnings. Session v. State, 353 So. 2d 854 (Fla. 4th Dist. Ct. App. 1977); Jones v. State, 345 So. 2d 809 (Fla. 4th Dist. Ct. App. 1977).

102. 403 So. 2d at 1314 (emphasis added).

103. 202 So. 2d at 898 (emphasis added).

play.[104]

In *State v. Duke* the arresting officer told the defendant "I am now *offering* to give an approved chemical test of your breath for the purpose of determining the alcoholic content of your blood. If you refuse to take this test your privilege of operating a motor vehicle will be suspended for a period of 3 months. . . ."[105] The Second District Court concluded that the defendant could have believed that he had a choice. Therefore, his refusal could not be admitted. "The defendant should have been told that the officer was prepared to give an approved chemical test; that the driver did not have a right to refuse, but if he did refuse, his license would be revoked for a period of 3 months."[106]

The police of Orange County, Florida, have adopted the warning suggested in *Duke*:

> You are required by the applicable provision of Chapter 322 of The Florida Statutes to submit to a breathalyzer test and your failure to submit to the same will result in the suspension of your driving privileges for a period of three months. This breathalyzer test is being given to you as a result of your being charged with the offense of driving while under the influence and is not being given to you as a continuation of the accident investigation or accident report in this case. Further, *the results of this breathalyzer test may be used against you as evidence in any subsequent criminal proceeding for the offense of driving while under the influence.*[107]

Other Factors

A defendant's refusal to take a breathalyzer test or have blood withdrawn may be based on arguably valid grounds. A defendant might not want blood withdrawn for religious reasons or out of a genuine fear of needles. The defendant might not trust the test or testing

104. 220 So. 2d at 419 (emphasis added).

105. 378 So. 2d at 98 (emphasis added).

106. *Id.*

107. Orange County, Florida, Sheriff's Department Form "Alcohol Influence Report Interviewer's Dialogue" (emphasis added). In December of 1981 the form was amended to include the words "[t]he result of this . . . test or your refusal to submit to this test may be used against you as evidence . . . ."

procedures. If that were in fact proven, one court, *Michigan v. Hayes*,[108] would suppress the results. Of course, the refusal might also be because he was so intoxicated that he was unable to make the "choice." In that case admission of the refusal should be permitted.

Other constitutional rights of the defendant might have been violated, which would warrant suppression. Suppose, before deciding whether to take the test, the defendant asked to talk to an attorney. If the police prevented him from doing so he would be denied his Fifth Amendment right to consult with an attorney.[109] The violation of this right would require the evidence be suppressed.

Of course, whether a defendant's refusal is or is not admissible must be decided on a case by case basis. The Alabama Supreme Court in *Hill v. State*[110] ruled that deciding the reason a defendant refused is ultimately an issue for the jury. This, of course, might require the defendant to take the stand. However, pursuant to Florida Statute 90.612(2), the trial court would have the authority to limit any cross-examination by the state to the question of why the defendant refused the test.

Thus, for the sake of due process and fair play, a defendant should be told prior to the test that in addition to having his license suspended, his refusal could be used against him. If a defendant refuses for some other reason, whether his refusal is admissible must be decided on a case by case basis. The burden for proving a valid reason for refusing is on the defendant.

Conclusion

A defendant's refusal to take a breathalyzer test should be admissible evidence in Florida courts. Its admission would neither violate the defendant's right not to incriminate himself nor impinge on his right to remain silent. A proper reading of Florida's Implied Consent Statute indicates that a defendant has no statutory "right" to refuse the test; thus admission would not violate a defendant's fundamental due pro-

108. 64 Mich. App. 203, 235 N.W. 2d 182 (1975).

109. In State v. Roche, 50 Fla. Supp. 127 (Fla. Orange Cty. Ct. 1980), if prior to deciding whether to take the test, the police denied the defendant's request to talk to an attorney, the defendant was deemed *not* to have refused to take the test.

110. 366 So. 2d 299 (Ala. 1978).

cess rights; but this issue has been confused by the dicta of Justice Atkins in *Sambrine v. State.* A defendant's refusal has sufficient probative value to be admissible in Florida courts.

Unless a defendant is somehow misled, and this will be substantially avoided if a defendant is told that his refusal could be used against him at trial, there is no reason why the defendant's refusal should not be admitted.[111]

111. While this article was being printed, the Florida Legislature declared its position on the admissibility of refusal to take the alcohol test. "Refusal to submit to a chemical breath or urine test upon request of a law enforcement officer . . . shall be admissible into evidence in any criminal proceedings." FLA. C.S.-C.S.-C.S.-S.B. 69, 432, 312, 351, 39, 285 (1982), passed by the legislature awaiting the governor's signature, to be effective July 1, 1982, as FLA. STAT. § 316.1932(1)(a). Blood test refusal will be admissible under subsection (1)(c) of the statute.