

Opinion No. 60-104

June 3, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: A. P. Winston, Jr., Chief New Mexico State Police P. O. Box 919 Santa Fe, New Mexico

QUESTION

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"In our effort to determine causes of traffic accidents, it is highly desirable that we determine as near as possible the condition of the driver at the time of accident. In instances where the driver is killed: DOES A POLICE OFFICER HAVE AUTHORITY TO DIRECT THE TAKING OF A SAMPLE OF BLOOD FROM THE DECEASED FOR THE PURPOSE OF DETERMINING ALCOHOLIC CONTENTS?"

CONCLUSION

Yes.

OPINION

{*473} ANALYSIS

There is no court decision in this state which specifically answers your question; however, it might be well to recall a now famous case, **Breithaupt v. Abram**, 352 U.S. 432 (1956) wherein a police officer directed a physician to take a sample of blood from an unconscious man for the purpose of determining alcoholic content. The United States Supreme Court held in that case that such action did not "shock the conscience" of the court and, therefore, it does not come within the rationale of **Rochin v. California**, 342 U.S. 165. The Court in so holding stated:

"As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must beset the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. .."

The usual objection to this type of procedure is that it requires a person to in fact incriminate himself in violation of the Federal Constitution. No such objection can be used in the case where blood is withdrawn from a dead person since his right against self-incrimination is a personal right and dies with him. This was rather strongly pointed out in a very recent Texas case wherein the sons of a deceased person who was

driving an automobile in which he was killed when it collided with a truck, brought an action against the trucking company whose truck was involved. **Hartman v. Harter**, 322 S.W. 2d 555. The police authorized withdrawing blood from the body of a deceased person to determine alcoholic content. It will be noted that the case involves substantially the same set of facts as you propose in your question. The Court of Civil Appeals held in that case that such an action was not prohibited and did not violate any rights under either the Federal or State Constitution. The Texas court held:

"We believe appellant's point just stated is without merit. In the case of *Breithaupt v. Abram*, (citation), a blood sample was taken at the request of a police officer, by a physician from the accused, while he was alive and unconscious. Self-incrimination, unlawful searches and seizures and due process clause were all raised in the case and the United States Supreme Court denied all three contentions. Anyhow, the claim of self-incrimination could not possibly apply here because the donor is dead and could not be prosecuted. Additionally, {474} such complaint is personal to the party the testimony would incriminate, (citation)."

The court held further and said:

"Our case, on the facts, certainly does not come within the offense against that 'sense of justice' of which the United States Supreme Court spoke in *Rochin v. People of the State of California*, (citation), and we believe is not subject to even as much complaint as that made in the *Breithaupt* case, *supra*. . . . Accordingly we hold appellant's constitutional violations complained of about self-incrimination, unlawful search and seizures, and the due process clause are, under the authority of the *Breithaupt* case, without merit."

Based under this very recent decision of the Texas Court and the rationale of the *Breithaupt* case, we are of the opinion that a police officer may authorize the taking of blood from a dead person to determine alcoholic content without violating any rights the person or his heirs might have and without incurring any personal liability for his actions so long as the taking of blood is done in a manner consistent with the normal rules of human decency.

By: Boston E. Witt

Assistant Attorney General