Opinion No. 64-38

March 24, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Mr. K. K. Miller, State Police Chief, Cerrillos Road Santa Fe, New Mexico

QUESTION

QUESTIONS

1. May a police officer request a person arrested for driving while intoxicated to take a series of tests, such as walking a straight line, standing on one foot, placing finger to nose, etc.?

2. If the person does voluntarily submit to such physical tests, is the officer's testimony as to the results of such tests admissible in court?

3. May a police officer testify in court that a person charged with driving while intoxicated refused to take a blood-alcohol test?

CONCLUSIONS

1. Yes.

2. Yes.

3. Yes.

OPINION

ANALYSIS

It is almost universally held that evidence tending to show the circumstances of the arrest of an accused, his acts and conduct, his physical and mental conduct, his physical and mental condition, and any declarations by him are pertinent and admissible evidence. 22 C.J.S., **Criminal Law,** Section 628, p. 962. The evidence to which you refer in your second question falls within these categories and is admissible. There are a number of New Mexico cases in which a conviction has been upheld on the basis of this general type of testimony.

In the case of **State v. Alls,** 55 N.M., 168, 228 P. 2d 952 the Supreme Court related the following testimony that had been admitted in the district court trial and held that it was sufficient to sustain a conviction.

"Tucumcari City Policeman De Olivera testified he had seen and talked to defendant in Tucumcari about one o'clock P.M., just three or three and one-half hours before the fatal accident, and that defendant was drunk then, and that he saw him at the scene of the accident, a few minutes after it occurred, and that defendant was still drunk, but more so.

Police Desk Sergeant Tatum, City Policeman Wier, and State Policeman Brunk all saw him at the scene of the accident a few minutes after it happened and testified that he was drunk. These same witnesses testified as to his manner of talking and walking, his lack of equilibrium, the odor of alcohol, etc., at the scene of the accident. . . ."

In the case of **City of Albuquerque v. Arias,** 64 N.M. 337, 328 P. 2d the following testimony was admitted in evidence and was held by the Supreme Court to be sufficient to sustain a conviction for driving while intoxicated.

". . . The officer then asked the appellant for his driver's license and noticed a strong odor of alcohol emerging from the window; the appellant got his billfold out and seemed to have a great deal of difficulty in getting the license out of it, fumbling with the papers therein and dropping some of them in his lap and on the floor of his car. The appellant was then asked to get out of his car and at about that time the car started to roll back slightly and the officer asked him to apply his emergency brake. The appellant pulled the brake back three or four times and then released it again and again before he finally got it set. He then clumsily stepped out of the car. The officer testified he could smell the appellant's breath and that it had a strong odor of alcohol. Also the officer testified the appellant's pants were disarranged and that he was having difficulty in maintaining his balance and in walking. There was other testimony by the officer indicating intoxication on the part of the appellant, but the above is surely sufficient to support a conviction. . . ."

In the 1960 case of **City of Raton v. Cowan,** 67 N.M. 463, 357 P. 2d 52 the defendant was convicted of driving a motor vehicle while under the influence of intoxicating liquor. A portion of the evidence which was admitted by the Court is related in the opinion of the Supreme Court as follows:

". . . There is ample evidence that appellant was in an intoxicated condition at the time he was apprehended at the Crystal Bar. He argued with Officer Casias, he was noisy and didn't talk like a normal person; he was incoherent, he smelled of liquor on his breath and was staggering. . . ."

It has long been the custom of the courts of this state to receive in evidence the testimony of police officers relative to the condition of a person charged with driving while intoxicated, and there has never been any indication by our Supreme Court that such testimony should be excluded.

In your third question you ask whether a police officer may testify in court that a person charged with driving while intoxicated refused to take a blood-alcohol test.

This same question has been before various State Supreme Courts. While there is some authority to the contrary, the majority rule, in the absence of a statute governing the matter, is that testimony relative to the refusal of a person charged with driving while intoxicated to take a blood-alcohol test is admissible. See 8 **Wigmore on Evidence,** Section 2265, Note 6.

The Supreme Court of Virginia had this to say on the subject in the case of **Gardner v. Commonwealth,** 81 S.E. 2d 614, 619:

"Defendant's second contention is that the court over his objection erroneously permitted the officer who made the arrest to testify that defendant refused to submit to a blood test to determine the amount of alcohol in his system.

The testimony to which defendant objected was admitted while the Commonwealth was examining its witness, E. A. Austin, a member of the State police force. This officer testified that at approximately 11:30 P.M., on August 9, 1952, he saw defendant driving his automobile from side to side of the two northbound lanes on U.S. Route 1, approximately two miles north of Colonial Heights. He stopped the defendant and arrested him for driving while intoxicated. Defendant denied that he was intoxicated and asked the officer to reduce the charge to reckless driving, which the officer refused to do. During the course of the conversation at the scene of the arrest and en route to a justice of the peace to obtain a warrant, the officer 'asked defendant if he would submit to a blood test.' The defendant refused.

Defendant contends that the admission of this evidence was a violation of that part of section 8 of the Constitution which provided that an accused shall not "be compelled in any criminal proceeding to give evidence against himself."'

The court in holding that the admission of such evidence did not violate the constitutional inhibition against self-incrimination noted that the defendant was not forced to testify, that he was not compelled to take the stand on his own behalf, and that the evidence was given by a witness for the state in describing the incidents of the arrest, the condition of the defendant, and his declarations voluntarily made.

The same question was raised in **State v. Benson,** Iowa, 300 N.W. 275, 277, where the court said:

"It is proper to show the defendant's conduct, demeanor and statements (not merely self-serving), whether oral or written, his attitude and relations toward the crime, if there was one. These are circumstances which may be shown. Their weight is for the jury to determine. **The fact that defendant declined to submit to a blood test is such a circumstance."** (Emphasis added).

Accord: **State v. Bock,** Idaho, 328 P. 2d 1065; **City of Barron v. Covey,** Wis., 72 N.W. 2d 387; **State v. Gatton,** Ohio, 20 N.E. 2d 265; **Aldredge v. State,** Ind., 156 N.E. 2d

888; **State v. Nutt,** Ohio, 65 N.E. 2d 675; **State v. Smith,** S.C., 94 S.E. 2d 886. Contra: **State v. Severson,** N.D., 75 N.W. 2d 316; **Duckworth v. State,** Okl., 309 P. 2d 1103.

It is the opinion of this office that our Supreme Court would follow the majority rule, particularly since this is one of the jurisdictions which permits, by Court rule, comment on the failure of an accused to testify in his own behalf. Section 41-12-9, N.M.S.A., 1953 Compilation.