Indiana Law Journal

Volume 4 | Issue 7 Article 2

4-1929

Power of Courts to Compel Defendant in Criminal Case to Submit to Physical Examination

Sumner Kenner
Huntington Circuit Court

POWER OF COURTS TO COMPEL DEFENDANT IN CRIMINAL CASE TO SUBMIT TO PHYSICAL EXAMINATION

SUMNER KENNER*

It is provided in Chapter 102, Acts 1927, that in a criminal case where the defense of insanity is interposed that the court shall appoint two or three competent disinterested physicians to examine the defendant and testify at the trial. It is further provided that such testimony shall follow the presentation of the evidence for the prosecution and defense and that such medical witness may be cross-examined by both parties and that each side may introduce evidence in rebuttal to the testimony of such medical witnesses.

The validity of this section has been vigorously assailed by attorneys upon the ground that it is compelling the defendant to furnish evidence against himself in violation of the constitutional provision. The question has not been passed upon by the courts of last resort in this state and the holdings of the lower courts have not been harmonious, some courts upholding the statute, while the news reports within the last week record the granting of a new trial in a murder case on the ground that the admission of the doctors' testimony taken under the statute was erroneous.

Section 14 of Article 1 of the Bill of Rights provides that "No person in any criminal prosecution shall be compelled to testify against himself."

In view of the increasing number of murder cases wherein insanity is pleaded as a defense, the question becomes one of importance to the judiciary and to the attorneys, especially those engaged in the criminal practice.

An early case in Nevada[1] is a leading case upholding the right to such an examination. This was a murder case where insanity was pleaded and the trial court appointed physicians to examine defendant and allowed them to testify over defend-

---

* See page 492 for biographical note.

Citations

[1] *State v. Petty*, 32 Nev. 384, 108 Pac. 934.

ant's objection that it was in violation of his constitutional right of not being required to testify against himself. In affirming the case, the higher court said, "The constitution means just what a fair and reasonable interpretation of its language imparts. No person shall be compelled to be a witness—that is, to testify—against himself. To use the common phrase, 'it closes the mouth' of the prisoner. A defendant in a criminal case cannot be compelled to give evidence under oath or affirmation or make any statement for the purpose of proving or disproving any question at issue before any tribunal, court, judge or magistrate. This is the shield under which he is protected by the strong arm of the law, and this protection was given, not for the purpose of evading the truth, but, as before stated, for the reason that in the sound judgment of the men who framed the constitution, it was thought that, owing to the weakness of human nature and the various motives that actuate mankind, a defendant accused of crime might be tempted to give testimony against himself that was not true. From whatever standpoint this question can be considered, the truth forces itself upon my mind that no evidence of physical fact can, upon any established principle of law, or upon any substantial reason, be held to come within the letter or spirit of the constitution." The court further held that the defendant was not compelled to exhibit himself in such a manner as to unjustly or improperly prejudice his case before the jury.

In the year 1924, the question was before the Supreme Court of West Virginia.[2] Defendant therein complained of the evidence of a physician to whose office the defendant was brought handcuffed several days before the trial by the prosecuting attorney and several officers from the penitentiary, without notice to his attorneys, and without his consent. The doctor made an X-ray examination of the defendant's skull and testified relative thereto at the trial. Defendant contended that such evidence was not proper for the reason that such examination without his consent, violated his constitutional right not to be compelled to give evidence against himself. In holding that the evidence was properly admitted, Justice Litz, speaking for the court, said:

"Ordinarily the result of a physical examination made without consent of the accused is not admissible in evidence, but we find the weight of

[2] *State v. Coleman*, (W. V.) 123 S. E. 580.

authority in this country to be to the effect, that where the defense of insanity is made, evidence of the facts disclosed by a physical and mental examination of accused by physicians either prior to or during the trial, with or without his consent, does not violate the constitutional privilege of accused not to be a witness against himself. It is further held that neither does such examination violate the constitutional relations of physician and patient."

In a New York case[3] the court said:

"The only exceptions taken by the defendant that are urged before us relate to the examination of the defendant by Dr. Flint during one of the adjournments of the court, while the defendant was on trial, and also to the subsequent testimony of Dr. Flint, in which he related to the jury the conversation which he had with the defendant, and described what he found upon a physical examination. It is claimed on behalf of the defendant that such examination was obtained by entrapping the defendant, and that it was generally unfair and prejudicial to him, and that he was thereby compelled to give testimony against himself in violation of his constitutional rights . . . The defendant was distinctly told that he might decline to answer any questions that were put to him, and that anything that he said in answer to questions might be used against him . . .

The record does not disclose any justification for the claim that Dr. Flint was used to entrap the defendant into making a statement for use against him on the trial. There is no denial of the testimony that Dr. Flint examined the defendant after being told that it was requested by the court, and that the examination was made without the knowledge or presence of either counsel. . . . The statement made to Dr. Flint was not within the constitutional prohibition against compelling a defendant to give testimony against himself."

In a Missouri case[4] the court said:

"The point is made that error was committed in allowing certain physicians to visit the jail and examine the defendant and then give evidence for the state as to his mental condition. But we are unable to agree to this contention. The defendant made no objection to the examination, but submitted to it."

The court then quotes from a New York case as follows:

"The practice of allowing the experts for the people and the defense to make examinations of the prisoner, as to his mental condition, is the ordinary procedure in cases where the defense of insanity is interposed, and was resorted to in this case by defendant's counsel."

---

[3] *People v. Furlong*, 187 N. Y. 198, 79 N. E. 978.

[4] *State v. Church*, (Mo.) 98 S. W. 16.

The court then concludes that,

"under such circumstances a witness may be sent to examine him while in jail as to his mental condition"[5]

The Supreme Court of Washington has quoted with approval the rule as laid down in the New York cases[6] and has held that it was not error for a physician to testify as to the condition of a defendant, based upon an examination made in jail at the request of the prosecuting attorney, but without the knowledge or consent of the defendant's attorneys. The court points out that the physicians were not questioned on the stand as to any conversations with defendant or as to the transactions in the jail, their testimony being simply their opinion of his mental condition as they saw him in his cell and in the court room, but they gave no evidence of his statements, or of his physical condition.

In New Jersey[7] it was held that notwithstanding the rule of the common law that no person shall be compelled to be a witness against himself (there being no such constitutional provision in force in New Jersey), a physician who made an examination of the defendant could testify as to wounds found on the back of defendant's hands, and that it was immaterial that prior to making the examination the physician required the defendant to strip; and it was further suggested that even if the wounds had been disclosed only after the removal of the defendant's clothing, the testimony of the physician as to their existence would nevertheless have been admissible. Of this the court said:

"If the wound were upon the face or hand, or a part of his person exposed to common view, it would be absurd to say that testimony of what the wound presented to common observation was compelling a person on whom the wound was to be a witness against himself. I think it is equally absurd to say that the testimony of the observation of a wound in any part of the body, although obtained by a forcible removal of what concealed it, is to be rejected as produced by compelling a person to be a witness against himself. There are cases which carry the protection of the accused under such constitutional restrictions to an extent which seems unwarranted."

---

[5] See *People v. Glover* (Mich.) 38 N. W. 874; 1 Greenleaf on Evidence, (16th ed.) Sec. 469-E.

[6] *State v. Spangler*, 92 Wash. 636, 159 Pac. 810, citing *People v. Kemmler*, 119 N. Y. 580, 24 N. E. 9.

[7] *State v. Miller*, 71 N. J. L. 527, 60 Atl. 202.

Although the Indiana courts have not passed upon the exact question as presented by the validity of the Act of 1927, yet our court has passed upon and upheld the introduction of evidence obtained in such a manner as the defendant claimed was causing him to testify against himself.

In the case of *O'Brien v. State*[8] it appeared that the defendant had been confined in jail in another state and that when witnesses arrived for the purpose of identifying him they requested permission to make an examination of his body for certain marks or scars. The request being refused, the prisoner was handcuffed and the proposed examination was made forcibly and against his will. On the trial witnesses proposed to testify as to the marks and scars found by them, and it was objected that the testimony was within the inhibition found in Article 1, Section 14 of the State Constitution, which has been quoted earlier in this article. In holding that the testimony was admissible the court said:

"The question of duress and its effect upon information thereby obtained is not involved, because the facts to which the witness was called to testify did not depend upon a confession made by the appellant, nor upon any act of his; the marks and scars upon the body had no relation to the force used to enable the witness to find them. The case is much like the examination of a person under arrest, for concealed weapons with which he could have committed the crime of murder of which he is accused. . . . and the right to examine the person of the accused for such purpose has never been questioned. The conclusion can be reached that the offered testimony was within the constitutional prohibition only upon the theory that the witness was the mere mouthpiece, and that the appellant was the real witness, which would be a strained construction of the constitutional provision when applied to the offered testimony."

In a recent Utah case a somewhat similar question was presented, although the physician's evidence was chiefly based upon the facts stated in a hypothetical question.[9] In holding the testimony competent, the court said:

"It certainly would be a strange doctrine to permit one charged with a public offense to put in issue his want of mental capacity to commit the offense, and in order to make his plea of want of capacity invulnerable prevent all inquiry into his mental state or condition."

---

[8] *O'Brien v. State*, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323.

[9] *State v. Cerar*, (Utah) 207 Pac. 597.

In 16 C. J. 568, the rule is stated as follows:

"Where the defense interposed is insanity, evidence of the facts disclosed at a physical and mental examination of accused by physicians, either prior to the trial or during an adjournment of the court while the trial is in progress, does not violate the constitutional privilege of accused not to be a witness against himself." [10]

On the other hand, the power to compel the defendant in a criminal case to submit to a physical examination by a physician or other person, and the admissibility in evidence of the examiner's testimony as to the facts learned by him by means of such examination have been denied in a number of jurisdictions where the question has arisen, on the ground that to compel such an examination would constitute a violation of the constitutional provision that the defendant in a criminal prosecution shall not be compelled to be a witness against himself, that no person shall be deprived of life, liberty or property without due process of law, and that the right of the people to be secure in their persons, homes, papers and effects against unreasonable seizures and searches shall not be violated.

In an Iowa case,[11] the defendant was charged with rape on a female under the age of consent. The prosecutrix was found to have a venereal disease, and for the purpose of showing that the defendant was afflicted with the same disease, physicians were called who made an examination of defendant while he was confined in jail, and later testified at the trial. In holding that the admission of such evidence was error, the court said:

"It would seem, therefore, that such an investigation as that made in the case before us is without authority as against defendant's objections, and the receipt of the evidence was error, on the ground that it was the result of the invasion of defendant's constitutional right, impliedly guaranteed under the provisions of our constitution as to due process of law, not to criminate himself."

---

[10] See 8 R. C. L. pp. 78-79, also *Comm. v. Buccieri*, (Pa.) 26 Atl. 228. See note to 16 A. L. R. page 371 citing cases holding that the constitutional provision is not violated by the introduction in evidence of photographs of finger prints. See also, *State v. Garrett*, 71 N. C. 85, 17 Am. Rep. 1.

[11] *State v. Height*, 117 Ia. 650, 91 N. W. 935, 94 Am. St. Rep. 323.

The court further held that there had been a violation of defendant's constitutional rights against unlawful search of person.

In a Missouri case,[12] which was a rape case, there was an examination of the person of defendant in jail by a physician and in the presence of the sheriff, who testified as to the result of such examination and as to what was said.

On appeal the cause was reversed for error in allowing the examination and in admitting the evidence as to same. The court held that defendant had not in fact consented to the examination and that it was a violation of his constitutional right to be exempt from testifying against himself.

In another Missouri case[13] where the testimony of the defendant given under compulsion at the coroner's inquest was held inadmissible against him, the testimony of the physician as to the result of his examination of the defendant's person was excluded.

In an early New York case[14] defendant was charged with the murder of her child immediately after its birth. At the instance of the coroner, two physicians visited the jail for the purpose of determining whether the defendant had recently given birth to a child. The defendant was told that if she did not submit to the examination, force would be used to effect it, and she in consequence made no resistance. The trial court ruled that the opinion of the physician formed as the result of such examination was inadmissible, in that the examination so held was a violation of defendant's constitutional right against testifying about herself.

In an English case[15] it was held that a magistrate was liable for ordering the physical examination of a woman prisoner charged with concealing the birth of a child.

From a somewhat careful review of the authorities, the following deductions might be made:

(1) The Indiana law authorizing the examination of a defendant entering a plea of insanity is valid.

(2) The testimony of a physician as to facts learned from such an examination is not a violation of the constitutional right given a defendant as to testifying against himself.

---

[12] *State v. Newcomb*, 220 Mo. 54, 119 S. W. 405. See also as to the rule in Missouri, *State v. Young*, 119 Mo. 495, 98 S. W. 16.

[13] *State v. Young*, 119 Mo. 495, 24 S. W. 1038.

[14] *People v. McCoy*, 45 How. Pr. (N. Y.) 216.

[15] *Agnew v. Jobson*, 13 Cox C. C. (Eng.) 625, 19 Moak 612.

(3) The 1927 act is broad enough so that the court making the order as to the examination can protect the defendant from any indecent or offensive examination of his person and from compelling him to exhibit himself in such a manner as to unjustly and improperly prejudice his case before the jury.

(4) The constitutional provision would not apply where the defendant consents to the examination[16] or voluntarily submits thereto.

---

[16] Where defendants voluntarily submit to examination, see *Gordon v. State*, 68 Ga. 814; *Thomas v. State*, 33 Tex. Crim. 607, 28 S. W. 534; *People v. Gloves*, 71 Mich. 303, 38 N. W. 874; *State v. Jones*, 153 Mo. 457, 55 S. W. 80. Note to Am. Cas. 1912 D, page 227. Under the Indiana decisions the evidence of physicians as to their examination of a defendant on order of court would not be privileged. *Chicago, etc., R. Co. v. Gorman*, 47 App. 432; *Miller v. Miller*, 47 App. 239; *Bower v. Bower*, 142 Ind. 194.