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Criminal Procedure--Surgical Removal of Evidence--United States v. Crowder

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CRIMINAL PROCEDURE—SURGICAL REMOVAL OF EVIDENCE

United States v. Crowder [1]

On the afternoon of December 18, 1970, Crowder and an accomplice entered the office of a doctor, intending to rob him.[2] Crowder confronted the doctor with a toy pistol; the doctor produced a gun of his own, and the accomplice ran away. A struggle ensued; four shots were fired and Crowder ran out of the office. He rejoined his accomplice, telling her that he had been shot in the arm and leg, and that he thought he had killed the doctor. The police later found the doctor's .32 caliber revolver across the street. The gun had been fired four times.

The police later arrested the accomplice, who in turn implicated Crowder. After Crowder's arrest, the police noticed bandages over his right wrist and left thigh. X-rays were taken of the wounds, disclosing what appeared to be .32 caliber slugs.

On February 10, 1971, the United States Attorney filed an application in federal district court for an order authorizing surgical removal of the bullet from the defendant's right wrist. The application was supported by affidavits relating the above evidence and the perceived medical risks of the operation.[3] The defendant appeared with counsel and objected to entry of the order. In a carefully drawn order,[4] Chief Judge Curran authorized removal of the bullet from the subcutaneous tissue of Crowder's wrist.[5] Defendant petitioned for a writ of prohibition against execution of the judge's order.[6] This being denied, the defendant moved prior to trial to have the bullet suppressed. This motion also was denied and the bullet, along with the testimony of a ballistics expert that the bullet was fired from the doctor's pistol, was admitted into evidence at trial. The defendant was convicted of second degree murder, robbery, and carrying a dangerous weapon.

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1. 543 F.2d 312 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977).

2. The evidence presented by the defendant differs substantially from that introduced by the government. However, as the difference in facts is not determinative of the surgery issue, the government's version is included herein.

3. Dr. Marcus Goumas, Senior Medical Officer at the jail where Crowder was incarcerated, expressed the opinion that removal of the slug would be considered minor surgery because: (1) the bullet was lying superficially under the skin of the right forearm, and (2) removal would not involve any harm or risk of injury to defendant's arm or hand or the use thereof.

4. The order directed that only the bullet in defendant's right arm was to be removed, under accepted medical procedures, and that if during the operation danger to defendant's life developed, removal procedures must cease. 543 F.2d at 314.

5. United States v. Crowder, No. 70-71 (D.C. Cir. Feb. 19, 1971).

6. Crowder v. Curran, No. 71-1105 (D.C. Cir. 1971).

On appeal, the conviction was affirmed five to four, the majority finding the conclusion "irresistible" that removal of the bullet from defendant's wrist was reasonable.[7]

The scant case law dealing with intrusive body searches[8] is of recent origin.[9] The first intrusive search case to be considered by the Supreme Court was *Rochin v. California*.[10] On the basis of information that Rochin was selling narcotics, three Los Angeles County deputies entered his house and forced open Rochin's bedroom door. The deputies observed two capsules on the nightstand beside the bed where Rochin was sitting and asked to whom they belonged. Rochin put the capsules in his mouth. The three deputies seized Rochin but were unable to retrieve the capsules from his mouth. He was then taken to a hospital, where a doctor forcibly administered an emetic solution. In the vomited matter were found two capsules containing morphine, which were admitted into evidence over objection at Rochin's trial. Justice Frankfurter, reversing the conviction on the basis of the due process clause of the fourteenth amendment, concluded that the methods used to acquire the evidence were "conduct that shocks the conscience" and "too close to the rack and the screw to permit of constitutional differentiation."[11] The standard established in *Rochin* was unclear, however, as the Court did not indicate whether it was the body intrusion alone or the aggregate of police misconduct that was unlawful.[12]

Five years later, in *Breithaupt v. Abram*[13] the Court distinguished the "brutal" and "offensive" conduct in *Rochin* from the taking of a blood sample from an unconscious patient. Breithaupt was injured in an automobile accident which resulted in the deaths of three persons. An empty whiskey bottle was found in his glove compartment and the smell of liquor was detected on his breath. He was taken to a hospital, still unconscious, and

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7. 543 F.2d at 316.

8. The most frequently occurring examples of body evidence consist of external physical characteristics consisting of voice and handwriting identification, fingerprints, line-ups, taking a stance, etc. These areas include vastly different considerations than the search and seizure issues involved in this note and as such will not be dealt with herein.

9. Many of the cases dealing with intrusive body searches arose out of border searches for drugs. Although conceptually similar, the legal considerations governing searches for narcotics concealed in an individual's body cavities differ procedurally as well as substantively. *See* Note, *From Bags to Body Cavities: The Law of the Border Search,* 74 COLUM. L. REV. 53 (1974); Note, *Border Searches and the Fourth Amendment,* 77 YALE L.J. 1007 (1968); Note, *At the Border of Reasonableness: Searches by Customs Officials,* 53 CORNELL. L. REV. 871 (1968).

10. 342 U.S. 165 (1952).

11. *Id.* at 172.

12. For arguments supporting the latter position, see Note, *Intrusive Body Searches—Is Judicial Control Desirable?* 115 U. PA. L. REV. 276, 280-81 (1966). As to stomach searches generally, see Note, *Constitutionality of Stomach Searches,* 10 U.S.F.L. REV. 93 (1975).

13. 352 U.S. 432 (1957).

upon the request of a state patrolman, the attending physician took a sample of Breithaupt's blood with a hypodermic needle. Testimony regarding the results of the blood test was admitted into evidence at trial over objection. A conviction for involuntary manslaughter resulted.

At the time of *Breithaupt,* the fourth amendment limitations on search and seizure were not yet considered applicable to the states. The Court therefore limited its inquiry to the consistency of the search with the due process clause of the fourteenth amendment.[14] Finding nothing "brutal" or "offensive" in a blood sample taken by a physician from an unconscious patient,[15] the Court balanced the right of an individual to hold his person inviolable against the interests of society in having the test performed. Influenced by both the probative value and the deterrent effect of the test, the Court found that Breithaupt's right to immunity from the invasion of his person was "far outweighed" by the societal interests involved, and affirmed Breithaupt's conviction.[16]

Several years after *Breithaupt,* the exclusionary rule was applied to criminal trials in state courts.[17] In addition, the fifth amendment's privilege against self-incrimination was made applicable to the states by virtue of the fourteenth amendment.[18] Thus, when the Court decided *Schmerber v. California*[19] in 1966, the validity of the body intrusion was judged not merely in light of the due process clause of the fourteenth amendment, but also under the search and seizure requirements of the fourth amendment and the fifth amendment's privilege against self-incrimination.

The facts of *Schmerber* were similar to *Breithaupt* except that Schmerber refused to take the blood test on the advice of counsel.[20] The Court disposed of Schmerber's due process claim by citing *Breithaupt.* More considered attention was given to the issues of self-incrimination and search and seizure. The Court distinguished the blood test from a situation in which a person is compelled "to submit to testing in which an effort will be made to determine his guilt on the basis of physiological responses."[21] The Court held that the application of the privilege against self-incrimination

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14. Wolf v. Colorado 338 U.S. 25 (1949) was still controlling and denied Breithaupt the benefit of having the search tested in terms of the fourth amendment. Breithaupt's contention that the introduction of the evidence also violated his fifth amendment rights was similarly disposed of by Twining v. New Jersey, 211 U.S. 78 (1908).

15. 352 U.S. at 435.

16. *Id.* at 439-40.

17. Mapp v. Ohio, 367 U.S. 643 (1961).

18. Malloy v. Hogan, 378 U.S. 1 (1964).

19. 384 U.S. 757 (1966).

20. Schmerber's claim that, by compelling him to take the test despite contrary advice of counsel, the state had denied him his sixth amendment rights was summarily rejected by the Court.

21. 384 U.S. at 764. Presumably this is the only situation in which the use of a suspect's body as the source of "real or physical evidence" would violate the privilege.

was otherwise confined to instances of compelled "communications" or "testimony."[22] As such, the blood test was not inadmissible on privilege grounds.

The paramount issue considered by the Court in *Schmerber* was the reasonableness of body intrusions in light of the fourth amendment. The Court began its discussion by noting that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[23] The Court said that in the context of compelled intrusions into the body, the amendment's function was to constrain intrusions unjustified by the circumstances or made in an improper manner.[24] Scrutinizing the justifications for requiring the defendant to submit to the blood test, the Court found that the attempt to secure evidence was warranted.[25] Similarly, the type of test chosen and its administration were found to be reasonable. The factors supporting the reasonableness of the blood test were the probative value of test, its commonplace occurrence in contemporary society, and the de minimus nature of the risk, trauma, and pain involved.[26] The performance of the test was reasonable because the blood was "taken by a physician in a hospital environment according to acceptable medical practices."[27] Repeating that their judgment was confined to the facts of the present case, the Court concluded with the now proverbial caveat "[t]hat the Constitution does not forbid the States *minor* intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."[28]

The *Schmerber* decision has been criticized for failing to articulate more specifically the difference between permissible "minor" intrusions and impermissible "major" intrusions.[29] However, in the context of fourth amendment search and seizure, it has long been held that reasonableness is properly decided only on the facts and circumstances of each case.[30] Thus,

22. *Id.* at 761.
23. *Id.* at 767.
24. *Id.* at 768.
25. The Court pointed out that the fourth amendment would forbid intrusions on the mere chance that desired evidence would be obtained. However, in this instance the Court found that there was probable cause to arrest Schmerber for driving while intoxicated. The Court further concluded that given the evanescent nature of alcohol in the bloodstream, the search was an appropriate incident of Schmerber's arrest. *Id.* at 768-71.
26. *Id.* at 771.
27. *Id.*
28. *Id.* at 772.
29. *See* Comment, *Search and Seizure: Compelled Surgical Intrusions?* 27 BAYLOR L. REV. 305, 309 (1975). *See also* Note, *Constitutional Law—Search & Seizure—Georgia Supreme Court Expands Upon Extent of Permissible Body Intrusions,* 24 MERCER L. REV. 687, 690 (1973).
30. Ker v. California, 374 U.S. 23 (1963); United States v. Rabinowitz, 339 U.S. 56 (1950). *See generally* Weinreb, *Generalities of the Fourth Amendment,* 42 U. CHI. L. REV. 47 (1974).

"major" and "minor" are tantamont to "unreasonable" and "reasonable" in this instance. However, the absence of a carefully delineated standard has allowed state courts to reach conflicting results on similar facts.[31]

Only one state appellate court has indicated that surgical intrusions may be *per se* unreasonable. In *Adams v. State*[32] the Indiana Supreme Court flatly stated that "an operation performed upon a defendant to secure evidence comes within the constitutional prohibition of an unreasonable search."[33] The surgery performed upon the defendant in *Adams* was the removal of bullet fragments located a short distance under the skin, in the soft tissues of the buttocks and on the left side of the pelvis. The operation was performed under a local anesthetic. The court nevertheless characterized the operation as "an intrusion of the most serious magnitude"[34] and reversed the trial court's determination that the evidence so obtained was admissible.

One state appellate court and one state trial court have found surgical removal to be *unreasonable* in particular factual situations.[35] In *Bowden v. State*[36] the Supreme Court of Arkansas quashed a search warrant authorizing surgical removal of a bullet located in defendant's lower spinal cord. Expert medical testimony had established that removal could cause a worsening of defendant's condition and that a general anesthetic would be required. In addition, the opinion was expressed that the operation involved a fatal risk, and that the surgery would be a "major" intrusion. Applying *Schmerber,* the court found the requested intrusion to be both unreasonable and offensive to due process because the risk of serious complication of defendant's condition by non-consensual "major" surgical removal was equal to or greater than the risk of non-removal.[37]

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31. State courts are at liberty to define "reasonableness" in a more restrictive manner than the fourth amendment would require. Cooper v. California, 386 U.S. 58 (1967).

32. 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied,* 415 U.S. 935 (1974).

33. *Id.* at 669, 299 N.E.2d at 838. Curiously, although the court referred to *Schmerber*, it cited and purported to be following *Rochin.*

34. *Id.* at 668, 299 N.E.2d at 837.

35. These two cases were decided only on the basis of the reasonableness of the intrusion, without concurrent inquiry into the rapidly developing procedural protections being recognized by some courts. *See* notes 46-59 and accompanying text *infra.*

36. 256 Ark. 820, 510 S.W.2d 879 (1974).

37. *Id.* at 824, 510 S.W.2d at 881. The due process implications of surgical removal, although not the focal point of this note, are important enough to warrant attention. Any time the state, acting as such, causes an operation to be performed upon a suspect-defendant prior to trial and thus in advance of any adverse judgment, it is risking injury or "punishment" of the suspect before any ultimate determination of the suspect's guilt or innocence.

If the risk of removal is perceived to be smaller than or equal to the risk of nonremoval, no due process problem should arise because removal could not logically be conceived of as punishment. This situation is somewhat analogous to compulsory vaccination, where it has long been held that under proper circumstances the state may require an individual to submit to the risks of vaccination as a legitimate exercise of its police power. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

In *People v. Smith*[38] a New York trial court refused to grant an order authorizing surgical removal of a bullet from deep within defendant's back. Removal would have required a six-inch incision, general anesthesia, assisted respiration, and hospitalization for seven or eight days after the operation. The doctor who was to perform the surgery stated that although removal would not substantially endanger life or limb, the operation was major surgery.[39] It was the surgeon's opinion that the bullet could remain in defendant for the rest of his life without endangering his life or health. The court found the proposed operation a "major" intrusion and thus beyond the permissible boundaries of *Schmerber*.[40]

Two state appellate courts have found surgical removal *reasonable* on the facts of the respective cases. The Supreme Court of Georgia, in *Creamer v. State*[41] found that the removal of a bullet from the subcutaneous area of the right side of the chest by surgery lasting no more than fifteen minutes with a local anesthetic would amount to a "minor" intrusion and thus be reasonable under the *Schmerber* standard. Less than a year later, a Georgia court of appeals unwillingly followed *Creamer* in *Allison v. State*.[42] The uncontradicted medical testimony in *Allison* showed that the bullet lodged under defendant's skin could be surgically removed without danger to life or limb.

The surgery in *Crowder* consisted of an incision one-quarter inch deep and one inch long in fat immediately under the skin. Crowder lost less than five cubic centimeters of blood during the ten minute operation. The hospital's chief medical officer performed the surgery, and testified at the hearing on a motion to suppress that he and his staff had taken every precaution to protect defendant's health.[43]

Although *Crowder* involves a factual situation in which almost every substantive element appears to favor surgical removal,[44] the decision was extremely close. Indeed, the Court of Appeals for the District of Columbia originally reversed Crowder's conviction.[45] The opinion was withdrawn at the request of the court, and after an en banc hearing, Crowder's conviction

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It is only when the risk of removal substantially exceeds the risk of nonremoval that pretrial surgery initiated by the state could be conceived of as punishment.

38. 80 Misc. 2d 210, 362 N.Y.S.2d 909 (Sup. Ct. 1974).

39. Possible complications were listed as minimal risk of death from general anesthesia, respiratory complications, lung irritation, infection, hemorrhage, abnormal reaction from any of the anesthesia related drugs, and a very small risk following general anesthesia of the development of pulmonary embolism. *Id.* at 211-12, 362 N.Y.S.2d at 911.

40. *Id.* at 215, 362 N.Y.S.2d at 914.

41. 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. dismissed,* 410 U.S. 975 (1973).

42. 129 Ga. App. 364, 199 S.E.2d 587 (1973), *cert. denied,* 414 U.S. 1145 (1974).

43. 543 F.2d at 315.

44. *See* note 46 *infra*. This assumption rejects per se unreasonableness as an alternative to any objective test.

45. United States v. Crowder, No. 73-1635 (D.C. Cir. May 27, 1975) (opinion withdrawn at the request of the court on grant of an en banc hearing).

was affirmed by a margin of five to four.[46] The majority emphasized that: (1) the evidence was relevant,[47] could be obtained in no other way, and probable cause existed to believe it would be found; (2) the operation was "minor" and performed by a skilled surgeon taking all possible precautions to reduce the risk of permanent injury; (3) defendant appeared with counsel at an adversary hearing on the application for the order authorizing surgical removal; and (4) before the operation was performed defendant was afforded an opportunity for appellate review of the order.[48]

It can be argued that the court in *Crowder* broke no new ground by finding the surgery "minor" within the meaning of *Schmerber* because *Creamer* and *Allison* had already characterized similar surgery as minor. However, the same cannot be said of the emphasis laid on the set of procedural protections which until *Crowder* had developed almost unnoticed in fourth amendment surgical removal cases.

Crowder was afforded an adversary hearing at which he appeared with counsel, and the order authorizing surgical removal was tested by means of a writ of prohibition.[49] Probable cause to believe that the evidence existed in Crowder's person was not challenged. The majority commended the prosecuting authorities for their effort to comply with the law, and viewed the procedural methods utilized in the case as "skillful and imaginative legal planning, bottomed upon cooperative utilization, rather than utter disregard, of judicial power, and designed to achieve legitimate ends."[50] Judge McGowan, while concurring in Judge Robb's opinion, did so only because of "the Government's sensitivity to procedural orderliness and fair play,"[51] and cautioned that any future prosecutor faced with a similar situation would be "well advised to look to the procedural example set in this case."[52]

The emphasis placed upon an adversary hearing at the warrant stage and interlocutory review is extraordinary from the standpoint of typical fourth amendment search and seizure procedures. Extraordinary procedures are necessary, however, when normal methods of rejecting improperly obtained evidence, *i.e.*, the exclusionary rule, provide the suspect-defendant with no positive protection against any unwanted and possibly harmful operation. Determining the propriety of surgical removal in a given fact situation is no routine task. However, the presence

46. United States v. Crowder, 543 F.2d 312 (1976), *cert. denied,* 429 U.S. 1062 (1977). The majority opinion by Judge Robb is essentially a verbatim reproduction of his dissent in the opinion of May 27, 1975 which was withdrawn.

47. The evidence, while relevant, was not particularly probative, as it only tended to prove that Crowder was present at the time of the shooting, a fact never disputed by Crowder and proven by other evidence.

48. 543 F.2d at 316.

49. *See* text accompanying note 6 *supra.*

50. 543 F.2d at 316-17, *quoting* Adams v. United States, 399 F.2d 574, 579 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1067 (1969).

51. *Id.* at 318.

52. *Id.*

of these procedures will cause a greater amount of relevant material to be judicially scrutinized, thus minimizing the risk of error in a mixed medical and legal judgment.

The most recent surgical removal case to be decided by a state supreme court found the procedural example set forth in *Crowder* to be controlling. In *State v. Overstreet*[53] the Supreme Court of Missouri concluded that *Crowder* "clearly and correctly"[54] enunciated the appropriate standards and procedures for use in authorizing and implementing the surgical pursuit of evidence.

The reasonableness of the surgery involved in *Overstreet* was not the focal point of the majority opinion.[55] Instead, the court's concern for the procedural requirements recognized in *Crowder* caused an otherwise reasonable "minor" intrusion[56] to violate the fourth amendment's guarantee against unreasonable searches.

Two specific requirements of *Crowder,* an adversary hearing at the warrant stage and an opportunity for interlocutory appellate review, were lacking in *Overstreet*. In addition, the Missouri court in *Overstreet* found that *Crowder* required the judge and not the surgeon to decide whether the surgery was impermissible "major" surgery or permissible "minor" surgery.[57] Procedures designed to resolve questions of reasonableness in advance are not substitutes for constitutional guarantees. Indeed, it has been suggested that by placing emphasis on the authorization procedure rather than on the reasonableness of the intrusion itself, the importance of the latter may become obscured.[58] This concern is misplaced. Authorization procedures represent a minimum guarantee that the reasonableness of the intrusion will be thoroughly considered. In those jurisdictions which do not follow a "per se unreasonable" approach toward surgical removal,[59] an

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53. 551 S.W.2d 621 (Mo. En Banc 1977).

54. *Id.* at 626.

55. The court did, however, specifically reject the *Adams* per se unreasonableness approach to surgical removal. *Id.* at 625.

56. The court never specifically stated that had the *Crowder* requirements been met the surgery would have been constitutionally permissible. Two incisions, three and a half to four inches, were made into defendant's buttock after administration of a local anesthetic. Defendant was discharged from the hospital the following day. *Id.* at 624.

57. *Id.* at 628. In *Overstreet* the trial judge delegated authority to the surgeon to make the decision whether to operate.

58. Note, *Constitutional Law—Search & Seizure—Court Orders Surgical Removal of a Bullet from an Unconsenting Defendant for Evidentiary Purposes Held Reasonable Under the Fourth Amendment,* 55 TEX. L. REV. 147, 153-54 (1976); State v. Overstreet, 551 S.W.2d at 632-33 (Donnelly, J., concurring).

59. The "per se unreasonable" position is not without support, and would certainly resolve the ambiguities inherent in the surgical removal issue. Per se unreasonableness, however, takes into account neither the long standing rule that reasonableness in the context of its fourth amendment usage is properly decided only on the