DOT HS-803 593

THE HITCH CASE - SAVING AMPOULES FOR A DEFENDANT FROM A CHEMICAL TEST FOR ALCOHOLIC INTOXICATION

Robert H. Reeder

National Safety Council
444 North Michigan Avenue
Chicago, Illinois 60611

Contract No. DOT HS-4-00965
Contract Amt.$7,000

DECEMBER 1977
FINAL REPORT

This document is available to the U.S. public through the
National Technical Information Service,
Springfield, Virginia 22161

Prepared For
U.S. DEPARTMENT OF TRANSPORTATION
National Highway Traffic Safety Administration
Washington, D.C. 20590

Prepared for the Department of Transportation, National Highway Traffic Safety Administration under Contract DOT-HS-4-00965. The opinions, findings, and conclusions expressed in this publication are those of the authors and not necessarily those of the National Highway Traffic Safety Administration.

The United States Government does not endorse products or manufacturers. Trade or manufacturers' names appear herein solely because they are considered essential to the object of this report.

This document is disseminated under the sponsorship of the Department of Transportation in the interest of information exchange. The United States Government assumes no liability for its contents or use thereof.

Technical Report Documentation Page

1. Report No.	2. Government Accession No.	3. Recipient's Catalog No.
DOT-HS-803 593		

4. Title and Subtitle	5. Report Date
The Hitch Case - Saving Ampoules for a Defendant from a Chemical Test for Alcoholic Intoxication	December, 1977
	6. Performing Organization Code
	8. Performing Organization Report No.

7. Author(s)	
Robert H. Reeder	

9. Performing Organization Name and Address	10. Work Unit No. (TRAIS)
National Safety Council 444 North Michigan Avenue Chicago, Illinois 60611	11. Contract or Grant No. DOT-HS-4-00965
	13. Type of Report and Period Covered
12. Sponsoring Agency Name and Address Department of Transportation Office of Driver and Pedestrian Programs National Highway Trafffic Safety Administration Washington, D.C. 20590	Final Report 1977
	14. Sponsoring Agency Code

15. Supplementary Notes

16. Abstract

The author provides a review of the Hitch Case, as decided by the California Supreme Court in 1974, and its subsequent impact in the field of chemical tests for alcoholic intoxication. The report reviews the scientific basis for the Hitch decision and also reviews appellate court decisions since Hitch (1974-1977). The latter illustrates the lack of agreement among scientific experts who testified in Hitch, as well as, the lack of agreement among courts as to what due process of law requires in this area.

The decisions of eleven states appellate courts are dicussed, along with that of one U.S. Disctrict Court. The report includes 33 footnotes.

17. Key Words	18. Distribution Statement
Alcohol ampoule, blood alcohol, breath test, chemical test, breathalyzer, due process, Hitch Case, implied consent.	Document is available to public through the National Technical Service, Springfield, VA 22161

19. Security Classif. (of this report)	20. Security Classif. (of this page)	21. No. of Pages	22. Price
Unclassified	Unclassified	33	

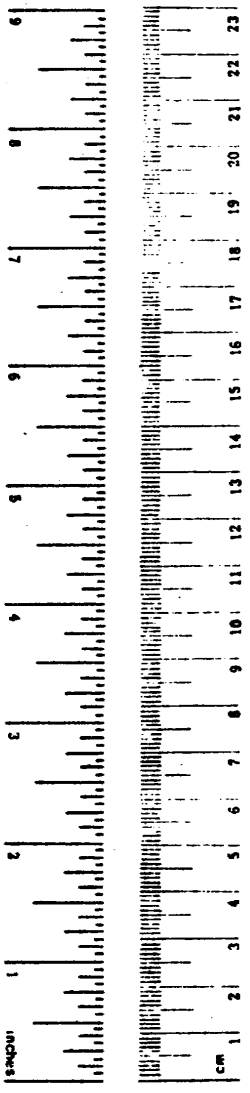
Form DOT F 1700.7 (8-72) Reproduction of completed page authorized

METRIC CONVERSION FACTORS

Approximate Conversions to Metric Measures

Symbol	When You Know	Multiply by	To Find	Symbol
		LENGTH		
in	inches	*2.5	centimeters	cm
ft	feet	30	centimeters	cm
yd	yards	0.9	meters	m
mi	miles	1.6	kilometers	km
		AREA		
in^2	square inches	6.5	square centimeters	cm^2
ft^2	square feet	0.09	square meters	m^2
yd^2	square yards	0.8	square meters	m^2
mi^2	square miles	2.6	square kilometers	km^2
	acres	0.4	hectares	ha
		MASS (weight)		
oz	ounces	28	grams	g
lb	pounds	0.45	kilograms	kg
	short tons (2000 lb)	0.9	tonnes	t
		VOLUME		
tsp	teaspoons	5	milliliters	ml
Tbsp	tablespoons	15	milliliters	ml
fl oz	fluid ounces	30	milliliters	ml
c	cups	0.24	liters	l
pt	pints	0.47	liters	l
qt	quarts	0.95	liters	l
gal	gallons	3.8	liters	l
ft^3	cubic feet	0.03	cubic meters	m^3
yd^3	cubic yards	0.76	cubic meters	m^3
		TEMPERATURE (exact)		
°F	Fahrenheit temperature	5/9 (after subtracting 32)	Celsius temperature	°C

*1 in = 2.54 (exactly). For other exact conversions and more detailed tables, see NBS Misc. Publ. 286, Units of Weights and Measures, Price $2.25, SD Catalog No. C13.10:286



Approximate Conversions from Metric Measures

Symbol	When You Know	Multiply by	To Find	Symbol
		LENGTH		
mm	millimeters	0.04	inches	in
cm	centimeters	0.4	inches	in
m	meters	3.3	feet	ft
m	meters	1.1	yards	yd
km	kilometers	0.6	miles	mi
		AREA		
cm^2	square centimeters	0.16	square inches	in^2
m^2	square meters	1.2	square yards	yd^2
km^2	square kilometers	0.4	square miles	mi^2
ha	hectares (10,000 m^2)	2.5	acres	
		MASS (weight)		
g	grams	0.035	ounces	oz
kg	kilograms	2.2	pounds	lb
t	tonnes (1000 kg)	1.1	short tons	
		VOLUME		
ml	milliliters	0.03	fluid ounces	fl oz
l	liters	2.1	pints	pt
l	liters	1.06	quarts	qt
l	liters	0.26	gallons	gal
m^3	cubic meters	35	cubic feet	ft^3
m^3	cubic meters	1.3	cubic yards	yd^3
		TEMPERATURE (exact)		
°C	Celsius temperature	9/5 (then add 32)	Fahrenheit temperature	°F

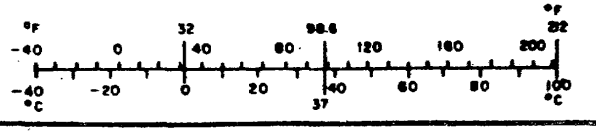


TABLE OF CONTENTS

1. INTRODUCTION

The defendant, Warner H. Hitch,[1] was arrested for driving a motor vehicle while under the influence of intoxicating liquor. Under California's implied consent law, he chose to submit to a test of his breath and the officer administered a Breathalyzer test.

After the test, the officer discarded the contents of the test ampoule into a glass bottle and threw away the ampoule. The glass bottle was then delivered to the Ventura County crime laboratory according to established policy. The contents were eventually disposed of by the laboratory.

Prior to trial, the defendant moved to suppress the results of the breath test on the grounds that the destruction of the test ampoule and its contents deprived him of due process of law.

Expert testimony was presented on this point at the hearing to suppress. The trial court found that based on this testimony: "...it was possible to actually retest the chemical change that had occurred in the contents of the test ampoule during the test." The Supreme Court of California further summarized the findings of the trial court:

> "In its detailed findings the court found inter alia that it is always possible to retest the ampoule and contents to determine if it conforms to specifications and if it contained the requisite three cubic centimeters of solution; that it is always possible to determine whether there was in fact a 0.025 percent potassium dichromate solution; that optical defects in the glass of the test ampoule and of the reference ampoule may have an

effect on the accuracy of the test; and that the accuracy of a retest will depend upon factors such as the time elapsed since the actual test, the manner in which the test ampoule and solution have been stored, and the continued chemical change in the contents of the test ampoule and that upon a retest the original test cannot be duplicated with 100 percent accuracy."[2]

The Supreme Court of California upheld the argument of the defendant that failing to save the ampoule and its contents denied him due process of law. In a subsequent Ahnemann case, the Court summarized its holding in Hitch as follows:

"In Hitch, we held (1) that these items constitute material evidence on the issue of guilt or innocence of the charge of driving a vehicle under the influence of intoxicating liquor; (2) that due process requires such evidence to be disclosed by the prosecution; (3) that since the prosecution has the duty to disclose such material evidence, the investigative agency involved in the test has the duty to preserve it for disclosure; (4) that if such evidence cannot be disclosed because of its intentional, but nonmalicious destruction by the investigative officials, sanctions shall in the future be imposed for such nonpreservation and nondisclosure unless the conditions specified in our opinion in Hitch are satisfied; (5) that if such conditions are not met, the trial court shall apply sanctions for nondisclosure which under due process would not require dismissal of the action, but merely exclusion from evidence of the results of the breathalyzer test; and (6) that our holding in Hitch shall apply only to chemical tests of breath administered after the date of filing of that opinion."[3]

The holding of the Court was based on the constitituonal premise that the intentional suppression of material evidence favorable to the defendant who has requested it constitutes a violation of due process of law, irrespective of the good or bad faith of the prosecution. This rule was established by the U.S. Supreme Court in Brady vs. Maryland.[4]

Scientific Basis for Hitch Opinion

The lynchpin of the Hitch case was the expert testimony that a later retesting of the Breathalyzer ampoules could provide material evidence concerning the chemical change which had occurred during the testing of the defendant. It should be noted, however, that the scientific community is far from general agreement on this point. The Committee on Alcohol and Drugs of the National Safety Council, which is composed of the leading toxicologists and other scientists in the field of chemical tests for alcoholic influence, adopted the following resolution in response to the Hitch decision:

RESOLUTION
of
Committee on Alcohol and Drugs
National Safety Council
Chicago, Illinois
October 2, 1975

"Some issues have been raised in the California Supreme Court's decision in People vs. Hitch and allied cases in which the court held that chemicals and ampoules used in breath test cases must be preserved for possible pre-trial examination and analysis by defendants should they so demand it.

A review of the scientific merits of this position has been made. It is concluded that, at the present time, a scientifically valid procedure is not known to be available for the re-examination

of a Breathalyzer ampoule, that has been used in the breath test for ethanol, in order to confirm the accuracy and reliability of the original breath analysis."

Passed unanimously by the Executive Board and passed unanimously by the Committee on Alcohol and Drugs at its meeting in Chicago, October 2, 1975.

J. D. Chastain
Chairman

---

2. REVIEW OF APPELLATE COURT DECISIONS

A review of the appellate court decisions from other states since the Hitch decision in 1974 further illustrates the lack of agreement in the scientific community with the experts who testified in Hitch, as well as the lack of agreement among the courts as to what due process of law requires in this area. The reported appellate court decisions are summarized as follows.

a. Alaska

In Lauderdale vs. State,[6] the defendant was charged with operating a motor vehicle while intoxicated. He submitted to a Breathalyzer test under Alaska's implied consent law. Before trial he filed a motion to discover and inspect the ampoule used in the test. The prosecution could not produce the ampoules because they had been destroyed and a hearing to suppress the results was held. At the hearing Charles King, a medical technologist, whose job it was to test and certify the Breathalyzer ampoules used in Alaska by law enforcement agencies, testified as an expert witness. "The district court found from such testimony that there was plausible evidence that could be derived from later testing of the test ampoule which could bear upon the propriety of the

examination of the ampoule in the breathalyzer machine and which, in turn, would bear upon the guilt or innocence of the defendant."[7] The Supreme Court of Alaska upheld the finding of the District Court and noted that:

> "The test and reference ampoules could be probative evidence of the propriety or impropriety of the breathalyzer test for several reasons. From the witness's testimony, it appeared that it was critical to the results of the test that precisely three milliliters of solution be contained in the ampoules; if the volume was less than three milliliters, the final result would be a falsely elevated level of alcohol. This would be true as to both the test and reference ampoules. After the test is given, the quantity of the solution in the reference ampoule can be accurately measured, and the test itself does not materially change the quantity of solution in the test ampoule, which can also be measured."
>
> "Each ampoule must contain .025 percent of potassium dichromate, which is critical to the test within a range of approximately a 33 1/3 percent variance. The amount of potassium dichromate in the reference ampoule can be measured after the test has been given. This is not necessarily true as to the test ampoule. If the person taking the test had been drinking, there would be a chemical change in contents of the ampoule and the percentage of potassium dichromate originally present would be different. However, the witness did say that even in the test ampoule, it would be "probably possible" to measure the potassium dichromate, but that he did not know how to do it at the present time."

"The character of the glass of the ampoule is also important. Any imperfections in the glass would cause diffusion of the light going through it, and this would tend to make the reading on the galvanometer incorrect. The same would be true if the glass ampoule were not the correct thickness, and this could be measured after the test had been given.

"Apparently, at the present time, it is not possible to return a test and obtain accurate results. There is the possibility, however, that further studies and improved techniques may be developed in the future which would provide some reliable data on a rerun of a test ampoule. But even now, the test of a used ampoule could be made again, and if the results were less than those originally obtained, the original results would be suspect. The reason for this is that the passage of time, with the chemical changes in the solution in the ampoule, would normally cause the test results to show an increase in blood alcohol."[8]

Another factor which convinced the Alaska Supreme Court was the fact that the regulations of the Department of Health and Social Services required that 10 ampoules selected at random from each "lot" were to be analyzed by an approved laboratory to verify the proper chemical composition and volume. In this case the "lot" consisted of 10,000 ampoules and the court noted that in other instances the "lot" was only 100 ampoules. Thus in this case, only 1/10 of one percent were tested and in other cases 10% would be tested. The Court concluded that the probability of not detecting defective ampoules was an additional argument in favor of the defendant.

The Court followed Hitch in holding that the remedy was to suppress the results of the breath test. The ruling was not retroactive, but in addition to the Lauderdale case, it was applied to all cases pending on review at the time, as well as to all future cases.

b. Arizona

In State v. Superior Court,[9] the defendant was arrested in Phoenix for driving while under the influence of intoxicating liquor and submitted to a chemical test of his breath as provided under Arizona's implied consent law. Prior to trial, he moved for the production and inspection of the Breathalyzer machine, the standard ampoule, the test ampoule, and the contents of the test ampoule. The State replied that it was ready to produce everything except the test ampoule and its contents since it had been destroyed under standard procedures due to its corrosive and dangerous nature after use.

Upon the failure to produce the defendant moved to suppress the evidence which the trial court did. The State appealed this ruling. The Arizona Supreme Court held:

> "We agree with respondent that Rule 195, Rules of Criminal Procedure, 17 A.R.S. and its supporting case law, bestows on the trial court a wide range of discretion in the area of criminal discovery. However, in order to initiate this range of discretion, the respondent must show how the production of the requested evidence would aid in the presentation of his defense. In the instant case respondent has failed to show how the post test chemical composition of the test ampoule, had it not been discarded, could have made a valid contribution to his defense."

"Respondent next urges that A.R.S. § 28-692, subsec. G requires production of the test ampoule. A careful reading of the entire section, however, indicates this position to be in error. A.R.S. § 28-692, subsec. F provides that a person who submits to a chemical test under the statute is entitled to have a physician of his own choosing administer any chemical test in addition to the one administered at the direction of a law enforcement officer. The clear intent of this provision to provide the defendant with an opportunity to secure full medical information if he so desires. If a defendant, such as respondent, fails to take advantage of this subsection, the State cannot be expected to re-create for the defendant the conditions existing at the time of the original test."

"As to the due process contentions, we find that the opportunities afforded under A.R.S. § 28-692 to check the accuracy of the medical findings of chemical tests administered by the State are sufficient to provide any defendant with the full measure of due process of law."

"In light of the foregoing, we hold that the Magistrate's Court abused its discretionary power in the area of criminal discovery by granting respondent's motion to produce the test ampoule and respondent's motion to suppress based thereon."[10]

c. Colorado

In People vs. Hedrick,[11] the defendant was arrested and charged with driving under the influence of intoxicating liquor and submitted to a breath test under the Colorado implied consent law. Nearly three months later he made a motion to produce the breath sample (not the ampoule). The motion requested that if the prosecution did not produce

the sample, the test results and all evidence derived there from be suppressed. The defendant argued that since the rules of the Colorado Board of Health required that blood and urine samples be retained for subsequent independent testing by the defendant, it denied him due process of law if the breath sample was not retained for the same purpose. Neither the defense nor the prosecution introduced any evidence at the suppression hearing concerning the type of instrument used in administering the test, nor was there any evidence introduced that the test did or did not comply with the Health Department's rules. The only testimony came from the defendant and this was to the effect that he did not feel like he was under the influence so he did not think the test was right.

The Colorado Supreme Court rejected the defendant's argument in this case. In so holding, the Court noted that the test as laid down by the U.S. Supreme Court in the Brady case had not been met: (1) whether the evidence was suppressed by the prosecution after a request by the defense; (2) whether the evidence is favorable to the defense, i.e., exculpatory in nature; and (3) whether the evidence is material.

d. Illinois

The defendant was charged with the offenses of improper lane usage and driving a motor vehicle while under the influence of intoxicating liquor in People vs. Godbout.[12] He submitted to a breath test and prior to trial he moved the court to require the prosecution to produce the Breathalyzer "test" and the test ampoules. The trial court denied the request after hearing the testimony at the suppression hearing. The defendant argued on appeal that since the ampoule had been destroyed and could not be produced, results of the breath test should have been

suppressed citing the Hitch case as well as an Illinois statute which required that "Upon request of the person who submitted to a chemical test or tests at the request of a law enforcement officer, full information concerning the test or tests must be made available to him or his attorney."[13]

The Illinois Appellate Court rejected this argument because -- in contrast to the Hitch case -- the record in this case had "...little, if any, scientific evidence from which to determine what the significance would be of preserving the ampoules." Hence a proper determination of the defendant's arguments could not be made. The case was remanded for a new trial.

e. Michigan

In the Stark case,[14] the defendant was convicted for a third offense of driving under the influence of intoxicating liquor which in Michigan is a felony. He appealed trying to reverse his conviction on the grounds that the routine practice by law enforcement officials of discarding the ampoules used in a breath test constituted a constitutionally impermissible suppression of evidence in violation of due process citing Hitch and Brady.

After an extensive hearing by the trial court on the attributes of the ampoules and the accuracy of the Breathalyzer test, this argument was rejected. The Defense's own expert testified that in only 2% of the 200 ampoule retesting that he had conducted, had he found any significant variation in result. Also he admitted that the used ampoule was of little value after 30 days and in this case the defendant had waited 72 days before requesting its production.

On the other hand, the prosecution's expert, Dr. Edgar W. Kivela, systematically refuted the defense expert's testimony on the accuracy of the instrument. He testified to the guarantees of accuracy gained from Michigan's ampoule spot-check system which the court noted had been held sufficient in a New Jersey case of State vs. Bryan.[15] Also, at the time of the test, the defendant had undergone two tests, the results of which were 0.21% and 0.22%.

The trial court concluded that in this case the ampoules would not be material evidence and hence the defendant's reliance on Hitch and Brady was misplaced. The Michigan Court of Appeals agreed.

f. New Hampshire

In State vs. Shutt,[16] appeals by two separate defendants were combined into one case. In both cases, the defendants raised the same point that the results of the Breathalyzer test should have been suppressed because the State failed to preserve the test ampoules used in their breath tests.

In support of their argument, the defendants point to a New Hampshire statute which requires that blood and urine samples must be preserved for 30 days so that the defendant may conduct his own test thereof, and this impliedly requires the same on the breath ampoules. The court rejected this argument noting that the statute makes no provision either specific or implied for the preservation of breath or ampoules used in a breath test.

Secondly, the defendants argued that the Hitch decision requires the preservation of the ampoules. The Court rejected that argument noting that there was a factual difference between Hitch and the cases at bar.

In Hitch, the Court said, the California court found the law required that the ampoules be preserved, that they could easily and safely be preserved, and that they could be retested. However, in New Hampshire, the ampoules, unlike those used in California, are factory sealed and broken in the test.[16] After the test, the ampoules are open glass tubes with jagged edges containing a solution of sulfuric acid. The possibility of sealing them is remote and the possibility of contamination is great. Nor had there been any evidence presented to suggest that any information of value could be obtained from the ampoules.

g. New Jersey

In State vs. Teare,[17] the defendant was charged with operating a motor vehicle while under the influence of intoxicating liquor. The trial court granted a motion to suppress the results of a Breathalyzer test because the ampoule used in the test had been destroyed and since it was not available for the defendant's examination, he had been denied due process of law. The State appealed this suppression order.

No expert had testified for the prosecution at the trial court hearing, and the issue was not fully developed in the record. Because of the importance of this question to the administration of justice, the appellate court reversed the suppression order and sent the case back to the trial court for a "thorough development of the scientific issues involved."

On the second appeal after the taking of further testimony, the trial court made the following findings of fact and conclusion:

Findings of Fact

"Based on the testimony and evidence presented at this hearing, the court finds as fact:

1. "It is presently impossible to preserve the breathalyzer ampules so as to reliably eliminate all the factors which cause unpredictable changes in the ampule contents subsequent to the administering of the breathalyzer test.
2. "The reactions begun inside the ampule by the original breathalyzer test continue in an unpredictable and uncontrollable manner. These unpredictable reactions cause subsequent analysis or retesting of the ampule to be totally unreliable evidence as a check on the accuracy or validity of the original breathalyzer test.
3. "There is no predictable relationship to the changes that occur within the test ampule and the passage of time.
4. "At the present time, subsequent retesting of chemical analysis of the test ampules provides no acceptable scientific relationship to the accuracy or validity of the original test results.
5. "The theory of Dr. Volpe and the experimentation of Dr. Jones have not been thoroughly tested or scientifically scrutinized as to be considered acceptable as scientific fact or accurate enough to produce results admissable as evidence.

Conclusion

"Preservation of the test ampule is not feasible or practical since subsequent testing will not give any scientifically reliable results, this being due to the uncontrollable changes that occur in the breathalyzer test ampules after their use in the breathalyzer test. Furthermore, even if these changes or variations

could be scientifically accounted for and accurately analyzed, you still could not properly analyze a test ampule subsequent to a breathalyzer test because there is simply no predictable relationship between the changes that occur and the lapse of time."[18]

The Appellate Court found that these findings of fact and conclusion were supported by substantial credible evidence in the record and held that the failure of the State to produce the ampoule did not deny defendant due process of law.

Thus, New Jersey based on the testimony of expert witnesses completely rejects the holding of California in Hitch.[19]

h. Ohio

In State vs. Watson[20] upon a motion of the defendant the trial court suppressed the results of a Breathalyzer test on the grounds that the State failed to produce the test ampoule and its solution citing the Hitch decision. The State appealed this ruling.

The Ohio Court of Appeals found that the Criminal Rules of Procedure did not require production of the ampoule since the discovery rule required that the item be something "intended for use by the prosecuting attorney as evidence at the trial" or "obtained from or belonging to the defendant." Since the ampoule did not fall within these requirements, there was no right of the defendant to discover the ampoule. In reversing the suppression ruling the Court said:

"Further, the state presented an expert who testified concerning the test ampoule, its solution, and preservability. He stated that any later chemical analysis by backtitration of the test ampoule used in giving the original test to the defendant would be inconclusive. The defendant presented no expert testimony to rebut this expert opinion that backtitration would be inconclusive.

"People vs. Hitch (1974), 520 P. 2d 974, upon which defendant heavily relies, is distinguishable. In Hitch, expert testimony was adduced that backtitration of the test ampouled used would be probative evidence with reference to the accuracy of the original test. No such expert testimony was presented in the present case. Further, the court in Hitch interpreted the California statute to require the preservation of the test ampoule. That statute reads in pertinent part:

> "Upon the request of the person tested full information concerning the test taken at the direction of the peace officer shall be made available to him or his attorney." Deering's Calif. Code (Vehicle), Section 13354(c).
>
> "There is no such requirement by Ohio statute or case law. ...
>
> "Therefore, we hold that while the test ampoule and its solution used in the breathalyzer test given to the defendant may be "material to the preparation of his defense" (within the meaning of Crim. R. 16(B) (1) (c)) and ordinarily excludable from evidence when made unavailable to him, where there is no evidence that the ampoule and solution, if preserved, could be scientifically examined so as to produce conclusive results, nor that it was maliciously destroyed, the results of the breathalyzer test may be admitted. The circumstances surrounding destruction of the test ampoule is admissible testimony which may be elicited by the parties. Such circumstances are relevant to determine the credibility of the witnesses and the weight of the evidence."[21]

i. Oklahoma

In Edwards vs. State,[22] the defendant was convicted of operating a motor vehicle while under the influence. On appeal from this conviction, the sole issue was the refusal of the trial court to suppress the results of the Breathalyzer test. In affirming the trial court and holding that destruction of the ampoule went to the weight of the evidence and not to admissibility of the results the Oklahoma Court of Criminal Appeals said:

> "Defendant does not purport to question the court's acceptance of either the technological basis upon which the instrument operates or the results derived from its use generally, rather, he does instead claim as his right the opportunity to challenge the technical accuracy of the particular device employed in the examination to which he himself was subjected. The component to which he specifically refers may be described as a sealed glass vial or ampoule, containing a prepared, mixed chemical solution which is considered an essential factor in this system of measurement. It is the content of the ampoule to which the sample breath is exposed, and once exposed, acts to directly influence the reading of a gauge on the device which is calibrated in terms of percentage of alcohol in the blood. Defendant, in support of his argument, almost totally relies upon the decision rendered in People vs. Hitch, 12 Cal. 3d 641, 117 Cal. Rptr. 9, 527 P. 2d 361 (1974), by the California Supreme Court wherein the ampoules, in a situation which compares similarly to the one herepresent, were deemed to have a sufficiently important evidentiary nature

that their actual destruction, by the results of established procedure, "could only operate to deprive (the) defendant of a fair trial."

"We understand the opinion proferred in Hitch to mean that both where the evidence is material to the issue of guilt or innocence with respect to the charge against the accused, and where it is clearly a matter involving the failure of the prosecuting authorities to take adequate steps to preserve the same, the only fair and proper remedy available to the court would include the exclusion of said evidence from its consideration. However, we are not convinced as was the California Court in Hitch that the evidence here in question is actually material with respect to the issue of the guilt or innocence of the defendant. True, given the very definite wording of 47 O.S. § 756, subsection C, in regard to the specific measurement established by the Legislature as prima facie evidence of a state of intoxication, we cannot do other than accept defendant's contention that the results of the breathalyzer test would constitute material evidence with a direct bearing upon defendant's guilt or innocence. See Custer vs. Oklahoma City, Okl. Cr., 481 P. 2d 788 (1971). This is not to suggest, however, that a similar significance would automatically attach to each component in the breathalyzer machine simply because it contributes to the normal operation of the instrument. To adopt this line of reasoning would have the undesired effect of exposing to continuous question any mechanical device or scientific method used by law enforcement officials in the performance of their duties not on the basis of improper use, but rather on the ground that these

devices and methods are technically unsound and incapable of achieving the expected results. A situation such as this might well lead to the limited to even discontinued use of methods and scientifically devised apparatus the need for and the value of which have often been recognized and repeatedly proven. This Court has traditionally favored, in the interest of maintaining public order, the use of any device which may be described as having demonstrated a high degree of accuracy and reliability in the furtherance of the State's effort to deal fairly and effectively with the threat directed at the public for violations such as these herein charged. Toms vs. State, 95 Okl. Cr. 60, 239 P. 2d 812 (1952). It has, however, in the past, and will continue in the future, to recognize that the adoption of such devices is basically a decision to be made by the Legislative branch as a legitimate exercise of its power in the service of the public interest, and that once that body has made its election as to the method and manner it will pursue in the discharge of this duty, its choice will not then be subjected to judicial restraint, "unless its application and enforcement impinges upon constitutional guarantees." Woody vs. State Corporation Commission, Okl., 265 P. 2d 1102 (1954). Among these guarantees we note, is the defendant's right, within the meaning of due process of law, to a fair trial. In Brady, the Supreme Court, ruling that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment ...," in effect qualified the circumstances under which suppressed or missing evidence would be deemed a violation of ones constitutional rights."

"Though the court below was not in a position to examine the evidence itself, it was not thus prevented from first, deciding whether the particular evidence in question would have been favorable to the accused, and second, determining whether or not such evidence was in fact material to the issue of guilt or innocence of the defendant with respect to the crime charged. An examination of the record shows only that the defendant sought to raise the possibility of there existing a defect in the ampoules used; that no effort was made to offer expert testimony as to scientific manner or methods which could be employed in examing the ampoules, or, for that matter, as to the likelihood that the physical nature of the evidence would be found to be of any actual value to defendant. At best, given the inevitable decomposition of a chemical solution within the vial and its alteration through use, defendant's arguments constituted mere speculation on his part, with nothing more advanced to realistically suggest the probability that information of any definite value would be obtained from any recognized or reliable process of re-examination, or that the results of this particular endeavor would have been favorable to the defendant."[23]

Edwards Case in Federal Court. After losing his appeal in the State Court of Criminal Appeals, the defendant filed a Writ of Habeas Corpus in the U.S. District Court on the grounds that his conviction was constitutionally invalid because the trial court improperly overruled his motion to suppress the Breathalyzer test results. His argument is based on the destruction of the test ampoule and its contents which he says constituted material evidence and therefore was a denial of due process. The defendant relied on Hitch and Brady vs. Maryland.

In rejecting this argument, the U.S. District Court said:

"To establish a violation of the Brady rule, the accused must show: (1) Evidence which is favorable to him; (2) Such evidence was in the possession of the prosecution at some time; (3) The evidence was suppressed and not made available to the petitioner on his request therefore; and (4) The evidence was material either to the issue of petitioner's guilt or punishment. Assuming the other requirements to be satisfied, there is no showing in this case that the test ampoule and its contents were favorable to the accused. The Hitch court found that it sufficed that there was a "reasonable possibility," that they might constitute favorable evidence. This extension of the Brady Doctrine is not justified as a matter of constitutional law. Brady focused upon the harm to the defendant resulting from non-disclosure. Hitch diverts this concern from the reality of prejudice to speculation about contingent benefits to the defendant. Without regard to the culpability of the prosecution or the specific prejudice to the accused, the rule would render constitutionally infirm every conviction in which there are missing items of evidence or evidence which may have been destroyed or damaged by careless or inept investigators. Historically, these have been matters to be argued to the jury as perhaps raising a reasonable doubt as to the strength of the prosecution's case. As a matter of policy, it may be desirable for the State to impose by statute or court rule a duty to preserve and disclose all relevant evidence, but this court has no general supervisory powers over the administration of justice in the State courts. This court, however, does not believe that the Constitution makes the State

the guarantor of a perfect investigation and the absolute insuror of all evidence. Mere absence of evidence of speculative value to the defendant without deliberate misconduct by the prosecution does not deprive a defendant of a fair trial. Here the results of the test and the manner in which it had been administered were provided to the defense. The expert on whom the issue depended was available for cross-examination. No more was required. The petitioner was not deprived of any constitutional right.

"Moreover, if we assume that it was discovered subsequent to trial that unknown to the prosecution the test ampoule had in fact been preserved and a further test of its contents would have been favorable to the petitioner, the omission would not have constituted error of constitutional dimensions. Under such circumstances, the proper standard of materiality was only recently declared by the Supreme Court in United States vs. Agurs:"[24]

> "It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."

"In this case, the new evidence would only have undermined the credibility of the test results. The conviction did not rest alone upon this evidence. The review of the record discloses that the petitioner was weaving back and forth across four traffic lanes, striking the curb on several occasions. (Trial Tr. 3.) When petitioner was stopped, the investigating officer "detected a very strong odor of alcohol type beverage to be emitting from his breath, from his person and the interior of the vehicle." (Trial Tr. 4.)

Doubts as to the accuracy of the test would not have raised a reasonable doubt as to guilt which did not otherwise exist."[25]

j. Oregon

The Oregon Court of Appeals has ruled twice on the Hitch question. The two decisions are State vs. Michener,[26] and State vs. Reaves.[27]

In Michener, the defendant was arrested and charged with driving while under the influence of intoxicating liquor. Under the Oregon implied consent law he submitted to a Breathalyzer test. After the test, an additional charge of driving a motor vehicle while having a blood alcohol concentration of 0.15% or more was placed against the defendant. In accordance with standard operating procedures, the test ampoule was destroyed immediately after the completion of the test. Before trial his attorney filed an affidavit of discovery asking for test ampoule so that the test could be "double checked" by having a chemist make an analysis of the remaining liquid in the ampoule. The ampoule was not available and the trial court ordered the results of the breath test suppressed based on the expert testimony. The Court summarized his testimony as follows:

"Appearing on behalf of the defendant, an associate professor of biochemistry at the University of Oregon Medical School, John (J. Peter) Bentley, testified that he had, based upon three different experiments, concluded that once the test ampule solution had been exposed to alcohol, it would become chemically stable and that it would remain stable over an extended period of time if placed in an inexpensive laboratory jar and stored in a dark location. Dr. Bentley also described to the court a scientific process by which the contents of the test ampule could be used to

independently determine the amount of alcohol present. Although acknowledging that this re-examination process was a simple and commonly known one, the state's expert, an associate professor of toxicology at the medical school, disputed Dr. Bentley's conclusion that the solution within the test ampule would remain stable after initially being exposed to a breath sample. This expert's opinion that the solution would continue to react over a period of time to the point that any retest would be impossible was admittedly based on a single experiment of limited scope. When asked on cross-examination whether, as a scientist, he would expect his own or Dr. Bentley's experiments--which he had not attempted to duplicate--to produce the more accurate results, he conceded that he "would be tempted to lean" to those of Dr. Bentley."[28]

Based on this testimony, the trial court concluded that: "It is scientifically possible to independently retest the accuracy of a breathalyzer reading by chemical examination of the test ampoule to determine if the original reading was, in fact, accurate. This retest can be done at a time which is a considerable time after the original testing up to and including at least nineteen months. The storage of the ampoule is both economically and scientifically feasible and would not place a burden upon the police agencies."

On appeal the Court of Appeals upheld the ruling of the trial court and concluded:

"We deem it apparent that the Brady rule requires disclosure of material evidence where a defendant establishes some reasonable possibility, based on concrete evidence rather than a fertile imagination, that it would be favorable to his cause. Whether

the evidence remains available to the state, as was the case in Koennecke, or has been destroyed, as was the case in Jones and Hockings, is irrelevant to the question of whether the refusal to produce the evidence is violative of the state's duty to disclose.

"In consideration of these precedents and under the particular circumstances of the cases now before us, we conclude that the defendants have made a sufficient showing to support their assertion that, had the evidence--i.e., used test ampules--been available to them, it would have been both material and favorable to their defense. Evidence produced by the defendants below adequately demonstrated both that a meaningful analysis of the test ampules would have been possible and that there was a reasonable possibility that an error could have occurred in the initial administration of the breathalyzer examinations."[29]

In the second decision, State vs. Reaves,[30] while noting that the Court of Appeals was bound by its prior ruling in Michener in this case, the defendant had not made the necessary showing that there was "some reasonable possibility, based on concrete evidence rather than a fertile imagination, that ... (the breathalyzer ampoule) would be favorable to his cause." Hence the motion to suppress was denied.

k. Washington

While the decision in State vs. Wright,[31] dealt with items destroyed in a murder case, the decision relied on Hitch, Brady, and other cases involving destruction of material evidence by the prosecution. In this case, the defendant was charged with killing his wife. A body was discovered in a bedroom in the same building, but separate from the quarters

lived in by the defendant and his wife. The body was in an advanced stage of decomposition and no positive identification was possible. Among the items removed from the body were a pair of blue socks, blue shoes, pantyhose, underwear, blouse, blue jeans, blanket, pillowcase, and sheet. No attempt was made to check for blood on any of these items before they were destroyed by the police. In reversing the conviction, the Washington Supreme Court held that the evidence destroyed was intimately related to the existence of a homicide and there was a reasonable possibility that this evidence was material to the guilt or innocence and favorable to defendant. In so holding the Court said:

> "Looking to the future application of today's decision, we recognize that its rationale requires preservation of all potentially material and favorable evidence. A difficulty arises from the fact that an officer may not know what all such evidence is when he arrives at the scene of a crime. In addition, it may be virtually impossible to preserve every fragment of potential evidence. Note, The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine, 75 Colum. L. Rev. 1355, 1375-80 (1975). To alleviate these problems, before any testing or disposition of evidence occurs, the defendant should be given notice of the type of evidence involved and its planned disposition. If contact with the defendant is impossible, or if the defendant is not yet represented by counsel, the state must petition the trial court which will determine an appropriate course of action consistent with the interests of both the prosecution and defense."[32]

3. Conclusion

From the above cases, the significant lack of agreement among members of the scientific community concerning what can be learned from saving the test ampoule and its contents used in administering a Breathalyzer test for alcoholic intoxication raises doubts about the scientific validity of the Hitch decision. Only Alaska follows Hitch on all points. Several Courts, New Jersey, Michigan, New Hampshire, Ohio, Oklahoma (both State and Federal Courts), rejected the ruling in Hitch. The majority of these decisions were based on the failure of the defendant to make a showing by expert testimony that anything of value could be learned from a later testing of the test ampoule or its contents.

Two decisions, People vs. Hedrick and People vs. Miller,[33] rejected an attempt to extend the Hitch holding to the saving of the breath sample itself rather than the ampoule and its contents.

4. FOOTNOTES

1. People vs. Hitch, 12 Cal. 3d 641, 117 Cal. Rptr. 9, 527, P. 2d 361 (1974), vacating 106 Cal. Rptr. 606 (1973) and 113 Cal. Rptr. 158, 520, P. 2d, 974 (1974). See also People vs. Municipal Court; Herbert Ahnemann, 12 Cal. 3d, 658, 117 Cal. Rptr. 20, 527, P. 2d, 372 (1974), decided the same day in which the Court summarized its opinion in Hitch.
2. 527 P. 2d at 364 note 1.
3. Ahnemann case, supra n. 1.
4. Brady vs. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d, 215 (1963); Giglio vs. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d, 104 (1971).
5. The resolution was passed unanimously by the Executive Board of the Committee and passed unanimously by the Committee on Alcohol and Drugs, National Safety Council, at its meeting in Chicago, Illinois, October 2, 1975. The resolution was published in the Journal of Forensic Sciences, 22(3), July 1977, p. 486. The resolution was unanimously re-affirmed by the Executive Board of the Committee at its meeting on October 19, 1977, and by the Committee at its meeting on October 20, 1977, both in Chicago.
6. Lauderdale vs. State, 548 P. 2d 376 (Alaska-1976).
7. 548 P. 2d at 379.
8. 548 P. 2d at 379-380.
9. State vs. Superior Court; Hoffman, 107 Ariz. 332, 487 P. 2d, 399 (1971). Unlike the other decisions summarized here, this case came before Hitch.

10. 487 P. 2d at 401.

11. People vs. Hedrick, 557 P. 2d 378 (Colo.-1976). See also People vs. Miller, 52 Cal. App. 3d 666, 125 Cal. Rptr. 341 (1975), to same effect.

12. People vs. Godbout, 42 Ill. App. 3d 1001, 1 Ill. Dec. 583, 356 N. E. 2d 865 (1976).

13. Ill. Rev. Stat. Chap. 95½, Sec. 11-501(g). Uniform Vehicle Code (Supp. II, 1976), Sec. 11-902.1(a) (4) contains the same provision.

14. People vs. Stark, 73 Mich. App. 332, 251 N. E. 2d 574 (1977).

15. State vs. Bryan, 133 N. J. Super. 369, 336 A. 2d 511 (1974).

16. State vs. Shutt, 363 A. 2d 406 (N.H.-1976). The New Hampshire Court is somewhat misinformed. The ampoules are the same type in both states.

17. State vs. Teare, 129 N. J. Super. 562, 324 A. 2d 131 (1974), 133 N. J. Super. 338, 336 A. 2d 496 (1975), 135 N. J. Super. 19, 342 A. 2d 556 (1975). See also to same result, State vs. Bryan, 133 N. J. Super. 369, 336 A. 2d 511 (1974).

18. 342 A. 2d at 558.

19. Supra, n. 1.

20. State vs. Watson, 48 Ohio App. 2d 110, 355 N. E. 2d 883 (1975). See also State vs. Grose, 45 Ohio Misc. 1, 340 N. E. 2d 441 (1975), to same effect.

21. 355 N. E. 2d at 884-885.

22. 544 P. 2d at 62-63.

23. Supra, nn. 1 and 4.

24. United States vs. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

25. Edward vs. State, 429 F. Supp. 668 (1976). This case is now pending before the Court of Appeals, 10th Circuit.

26. State vs. Michener, 550 P. 2d, 449 (Ore. App.-1976).

27. State vs. Reaves, 550 P. 2d 1403 (Ore. App.-1976).

28. 550 P. 2d at 451, note 5.

29. 550 P. 2d at 454.

30. Supra, n. 27.

31. State vs. Wright, 87 Wash. 2d 783, 557 P. 2d 1 (1976).

32. 557 P. 2d at 7. Also, it has been reported that two trial court cases are on appeal in which the trial courts, based on expert testimony, rejected a Hitch argument by the defense. Those cases are: State vs. Orr and State vs. Warren.

33. Supra, n. 11.