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Self Incrimination

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SELF INCRIMINATION

U. S. CONST. amend. V:

No person shall . . . be compelled in any criminal case to be a witness against himself. . . .

N.Y. CONST. art. I, § 6:

No person shall . . . be compelled in any criminal case to be a witness against himself. . . .

COURT OF APPEALS

People v. Berg[1]
(decided February 23, 1999)

On September 30, 1995, Berg drove her car into a ditch near the residence of off-duty State Trooper, Andrew Lindeman ("Lindeman").[2] Awakened by the accident, Lindeman went outside to investigate.[3] Berg asked him to assist her in removing the vehicle from the ditch and not to call the police.[4] Lindeman smelled alcohol on Berg and observed that her speech was slurred.[5] When it became evident that the vehicle was inoperable, Berg left the scene.[6]

Following a brief search, Berg was found a short distance down the road by State Trooper Keane ("Keane"), hiding in the bushes.[7]

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[1] People v. Berg, 92 N.Y.2d 701, 708 N.E.2d 979, 685 N.Y.S.2d 906 (1999).
[2] People v. Berg, 239 A.D.2d 97, 670 N.Y.S.2d 57 (3d Dep't 1998).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Berg*, 239 A.D.2d at 98, 670 N.Y.S.2d at 58.
[7] *Id.*

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At that time, she was placed in police custody and returned to the accident scene.[8] Thereafter, Keane proceeded with Berg to her home to obtain her driver's license.[9] When he discovered that Berg had provided a false identity, he took her to the police station.[10] Here, Keane asked her to perform sobriety tests which she refused.[11] Then, Keane placed her under arrest and administered *Miranda*[12] warnings.[13] Berg was indicted for the crimes of driving while intoxicated (as a felony) and aggravated unlicensed operation of a motor vehicle.[14]

A *Huntley* hearing[15] was held regarding the inadmissibility of, *inter alia*, defendant's refusal to perform the sobriety tests.[16] Following the hearing, the County Court ruled that evidence of defendant's refusal to take the tests was not admissible in the

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[8] *Id.*

[9] *Id.*

[10] *Berg*, 239 A.D.2d at 98, 670 N.Y.S.2d at 58.

[11] *Id.*

[12] *See* Miranda v. Arizona, 384 U.S. 436 (1966). The Supreme Court held that statements from custodial interrogation of a defendant may not be used unless the prosecution uses procedural safeguards necessary to secure the privilege against self-incrimination. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of any attorney, either retained or appointed." *Id.* at 444.

[13] *Berg*, 239 A.D.2d at 98, 670 N.Y.S.2d at 58.

[14] *Id. See* N.Y. VEH. & TRAF. LAW §§ 1192 and 511 respectively.

[15] *See* People v. Huntley 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965) (establishing the Huntley hearing: a separate proceeding in a criminal case wherein

> [t]he Judge must find voluntariness [of the confession] beyond a reasonable doubt before the confession can be submitted to the trial jury. The burden of proof as to voluntariness is on the People. The prosecutor must, within a reasonable time before trial, notify the defense as to whether any alleged confession or admission will be offered in evidence at the trial. If such notice be given by the People[,] the defense, if it intends to attack the confession or admission as involuntary, must, in turn, notify the prosecutor of a desire by the defense of a preliminary hearing on the such issue.).
> *Id.* at 78.

[16] *Berg*, 239 A.D.2d at 98, 670 N.Y.S.2d at 58.

absence of *Miranda* warnings and granted defendant's motion to suppress that evidence.[17] On appeal, the County Court's decision was reversed by the Appellate Division, Third Department,[18] and further appeal was taken by permission.[19]

This appeal focused on the federal[20] and New York State[21] constitutional privilege against self-incrimination. In general, this privilege protects an accused "from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."[22]

Both federal[23] and New York State[24] constitutions provide a constitutional protection against self-incrimination that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." This protection or "privilege" bars the state from compelling a person to provide "evidence of a testimonial or communicative nature."[25] Thus, two essential elements must be presented before an accused is afforded the protections of *Miranda*.[26] First, evidence of a "testimonial or communicative nature" must be elicited from the accused. Second, the custodial interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself."[27]

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[17] *Id.*

[18] *Berg*, 239 A.D.2d at 100, 670 N.Y.S.2d at 60.

[19] People v. Berg, 92 N.Y.2d at 702, 708 N.E.2d at 980, 685 N.Y.S.2d at 907.

[20] U.S. CONST. amend. V (stating in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

[21] N.Y. CONST. art. I, § 6 (stating in pertinent part: "No person . . . shall . . . be compelled in any criminal case to be a witness against himself . . . . ").

[22] Pennsylvania v. Muniz, 496 U.S. 582, 582 (1990). *See also* Schmerber v. California, 384 U.S. 757, 761 (1966) (holding that the privilege protects an accused only from being compelled to testify against himself).

[23] U.S. CONST. amend. V. *See* associated text note 20 *supra*.

[24] N.Y. CONST. art. I, § 6. *See* associated text note 21 *supra*.

[25] *Schmerber*, 384 U.S at 761. *See supra* note 22 and associated text. *See also* People v. Hager, 69 N.Y.2d 141, 142, 505 N.E.2d 237, 238, 512 N.Y.S.2d 794, 795 (1987) (holding that "[t]he privilege against self-incrimination bars the State from compelling a person to provide 'evidence of a testimonial or communicative nature.'" (*quoting* Schmerber v. California, 384 U.S. at 761)).

[26] *See* note 12 *supra* and accompanying text.

[27] South Dakota v. Neville, 459 U.S. 553, 564 (1983) (holding that a "refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not

For testimony to be characterized as "testimonial or communicative," it must reveal a person's "subjective knowledge or thought processes."[28] The privilege is asserted "to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government."[29] Physical performance tests such as blood alcohol tests,[30] balancing tests,[31] and breathalyzers[32] do not reveal a person's "subjective knowledge or thought processes but, rather, exhibit a person's degree of physical [performance] for observation by police officers."[33] Thus, *Miranda* warnings are not required to allow the results of such physical performance tests into evidence.[34]

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an act coerced by the officer, and is thus not protected by the privilege against self-incrimination"). *See also* People v. Thomas, 46 N.Y.2d 100, 107, 385 N.E.2d 584, 591, 412 N.Y.S.2d 845, 852 (1978) (holding "only evidence that has been extracted from the defendant by compulsion in some form falls before the constitutional proscriptions").

[28] *Berg*, 92 N.Y.2d at 704, 708 N.E.2d at 981, 685 N.Y.S.2d at 909. *See also*, *Hager*, 69 N.Y.2d at 142, 505 N.E.2d at 238, 512 N.Y.S.2d at 795 (1987) (holding that for evidence to be considered "testimonial or communicative" it "must itself, explicitly or implicitly relate a factual assertion or disclose information").

[29] Doe v. United States, 487 U.S. 201, 213 (1988).

[30] *Schmerber*, 384 U.S. at 765 (stating "since the blood test evidence, although an incriminating product of compulsion was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds").

[31] *Hager*, 69 N.Y.2d at 142, 505 N.E.2d at 238, 512 N.Y.S.2d at 795. "The defendant's responses to those [physical coordination, balancing and breathalyzer] tests in this case indicated he had imbibed alcohol, not because the tests revealed defendant's thoughts but because his body's responses differed from those of a sober person." *Id.*

[32] *Id. See* associated text note 31 *supra*.

[33] *See Schmerber*, 384 U.S. at 764. "The distinction which has emerged . . . is that the privilege [against self-incrimination] is a bar against compelling 'communications' or 'testimony' but that compulsion which makes a suspect or accused a source of 'real or physical' evidence does not violate it." Id. at 774 (Warren, CJ., Black, Douglas, and Fortas, JJ., dissenting) (urging that the report of the blood test was "testimonial" or "communicative" because the test was performed in order to obtain the testimony of others who would communicate facts to the jury about petitioner's condition). *Id.*

[34] *Berg*, 92 N.Y.2d at 702, 708 N.E.2d at 980, 685 N.Y.S.2d at 907.

The unsettled question in the federal and New York State courts is whether a person's refusal to take a sobriety test is, in fact, "testimonial or communicative." The Court of Appeals in *Berg* did not "address whether defendant's refusal to perform the tests was also non-testimonial"[35] parroting the Supreme Court's evasion of the issue in *South Dakota v. Neville*.[36] In *Neville*, a case somewhat similar to *Berg*, the Supreme Court declined to address the issue because "the distinction between real or physical evidence, on the one hand, and communications or testimony, on the other, is not readily drawn in many cases."[37] The Supreme Court reasoned that the "situations arising from a refusal present a difficult gradation from a person who indicates refusal by complete inaction, to one who nods his head negatively, to one who states, 'I refuse to take the test,' to the situation presented [Neville] where respondent stated, 'I'm too drunk, I won't pass the test.'"[38] Thus, the Supreme Court in *Neville* and the Court of Appeals in *Berg*, saved this discussion for another day and rested their decision on the second *Miranda* exception: the "compulsion" exception.[39]

The privilege against self-incrimination protects persons from being "compelled in any criminal case to be a witness against" themselves.[40] In order to qualify as "compulsion," a custodial interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself."[41] New York's controlling authority on this issue is the Court of Appeals' decision in

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[35] *Id.* at 705, 708 N.E.2d at 984, 685 N.Y.S.2d at 910.

[36] *Neville*, 459 U.S. at 561.

[37] *Id.*

[38] *Id.*

[39] *Berg*, 92 N.Y.2d at 705, 708 N.E.2d at 982, 685 N.Y.S.2d at 910. *See also Neville*, 459 U.S. at 562 (stating "[s]ince no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of refusal, we prefer to rest our decision on this ground . . .").

[40] *See* notes 20 and 21 *supra*.

[41] Rhode Island v. Innis, 446 U.S. 291, 300 (1980). *See also, Neville*, 459 U.S. at 564 (holding that "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege . . . ").

Thomas.[42] *Thomas* established that when a defendant refuses to submit to a blood test, there is no "compulsion on the defendant to refuse to take the test . . . on the contrary, the compulsion is to *take* the test."[43]

The Supreme Court in *Neville* noted that the compulsion inquiry is not resolved by the fact that the government gives a defendant a choice to submit to or refuse the test. Instead, the Supreme Court qualified the compulsion inquiry by adding that unless the test is so "painful, dangerous or severe . . . that almost inevitably a person would prefer confession," the state can legitimately compel the suspect, against his will, to accede to the test. [44] Thus, a blood-alcohol test is so safe, painless, and commonplace that the use of testimony obtained from the test is not protected by the privilege.[45]

In keeping with Chief Justice Traynor's oft-cited observation that it can be "scarcely contended that the police, who seek evidence from the test itself, will tend to coerce parties into refusing to take tests,"[46] the *Berg* Court determined that "there was no direct compulsion on the defendant to refuse to perform the field sobriety tests."[47] Thus, the Court of Appeals followed *Thomas* and held that Berg's refusal "was not the product of a legally cognizable compulsion" and allowed the test to be admitted. [48]

Berg attempted to distinguish *Thomas* on the ground that in *Thomas*, a statute specifically authorized the admissibility of evidence of a refusal to submit to a chemical analysis test, while no

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[42] People v. Thomas, 46 N.Y.2d 100, 107, 385 N.E.2d 584, 412 N.Y.S.2d 845 (stating "[i]t is only . . . evidence that has been extracted from the defendant by compulsion in some form that falls before the constitutional proscriptions").

[43] *Id.* (emphasis added).

[44] *Neville*, 459 U.S. at 563. *But see Thomas*, 46 N.Y.2d at 109, 385 N.E.2d at 592, 412 N.Y.S.2d at 854 (stating "[i]n being presented with the choice, defendant was confronted with no impairment of any right enjoyed by him, for he had no constitutional privilege not to submit to the chemical test").

[45] *Id.*

[46] People v. Ellis, 421 P.2d 107 (1966).

[47] *Berg*, 92 N.Y.2d at 706, 708 N.E.2d at 982, 685 N.Y.S.2d at 911. Although this case involved field sobriety tests, the Court of Appeals found the holdings dealing with chemical analysis tests persuasive. *Id.* at 705, 706.

[48] *Id.*

such statute authorized the admissibility of one's refusal to take the test in the context of field sobriety tests.[49] The Court dispensed with this argument and held that if evidence is constitutionally permissible, the absence of statutory authorization does not make it impermissible.[50]

The Supreme Court, based on its decision in *Neville*, would likely uphold the *Berg* result. In *Neville*, South Dakota's "implied consent law"[51] specifically authorized evidentiary admission of a person's refusal to submit to a blood-alcohol test.[52] Additionally, the law required police officers to inform the suspect of his right to refuse.[53]

While in custody, Neville, an alleged drunk driver, was informed by police officers of his right to refuse to submit to the blood-alcohol test, and that if he refused to take the test his license would be revoked for one year.[54] The officer failed to warn Neville that such refusal could be used against him at trial.[55]

Neville argued that the officer's failure to fully inform him of the fact that his refusal could be used against him at trial violated his privilege against self-incrimination.[56] Despite the fact that the South Dakota law specifically required police officers to inform

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[49] *See* N.Y. VEH & TRAF LAW § 1194(2)(f) stating in pertinent part:

> [e]vidence of a refusal to submit to such chemical test or any portion thereof shall be admissible in any trial, proceeding or hearing . . . but only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that the person persisted in the refusal.
>
> *Id.*

[50] *Berg*, 92 N.Y.2d at 706, 708 N.E.2d at 982, 685 N.Y.S.2d at 911.

[51] *Neville*, 459 U.S. at 556 *citing* S.D. COMP. LAWS ANN. § 32-23-10.

[52] *Neville*, 459 U.S. at 556, 557 (Stevens and Marshall, JJ., dissenting) (noting that the State's opinion rested on an independent state ground and that the South Dakota Supreme Court clearly held that the statute violated the state and Federal constitutions).

[53] *See supra* note 51. *Id.*

[54] *Neville*, 459 U.S. at 556 n.2.

[55] *Id.*

[56] *Id.* at 564. Neville also argued that the officer's failure to fully inform him violated his Due Process rights. For the purpose of this discussion, only the self-incrimination issue is addressed. *Id.*

suspects of their rights, and the police officer failed to fully inform Neville of those rights, the Supreme Court held that the refusal was admissible at trial.[57] The Supreme Court reasoned that "the warning he could lose his driver's license made it clear that refusing the test was not a 'safe harbor', free of adverse consequences."[58]

The Supreme Court, presented with facts similar to *Berg*, and an additional statutory requirement that the accused be fully informed of his rights, held that evidence of Neville's refusal was admissible at trial.[59] Given such results, it is likely the Supreme Court would affirm the *Berg* decision.

Dianne K. LeVerrier

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[57] *Id.*

[58] *Id.* at 566.

[59] *Id.* at 564.