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Self-Incrimination: Testimonial vs. Non-Testimonial Evidence

Jerry E. McAdow

NOTES

SELF-INCRIMINATION: TESTIMONIAL VS. NON-TESTIMONIAL EVIDENCE

One may note with alarm or satisfaction that recent judicial decisions have displayed increasing concern for the protection of the constitutional rights of suspected criminals. This concern spreads across the full range of the criminal process, from arrest and interrogation to eventual trial and possible conviction. The problem posed by this Note focuses upon the protections afforded a defendant from involuntary self-incrimination. The scope of this problem necessarily encompasses a citizen's treatment from the moment he enters the police station until his trial is completed.

To place the problem area in perspective, consider the circumstance of a drunken driving suspect who is being detained at the police station for questioning and an examination of his intoxicated condition. This man, hereafter referred to as the defendant, is placed in a small room with police officers and miscellaneous testing equipment designed to determine the alcohol content of his blood. The defendant is generally uncooperative and vocally refuses to submit to coordination tests. Without the defendant's consent, and perhaps even without his knowledge, the entire scene is preserved by sound motion pictures. At a subsequent trial, the sound motion picture is introduced into evidence to show the defendant's demeanor and appearance. In order to show the slurred speech of the defendant, a portion of the sound track is played for the jury; by coincidence or intention, that portion contains the defendant's verbal refusal to submit to the sobriety and coordination tests. In this situation, the defendant's reasonable contention could be that such "evidence" violated his right to be free from compulsory self-incrimination. It is submitted that the validity of such a contention is primarily dependent upon whether the sound track of the motion picture is testimonial or non-testimonial in character. The distinctions between testimonial and non-testimonial evidence, and which type of evidence is provided with protection from compulsory self-incrimination, is the thrust of this Note.

It should be noted that the above "hypothetical" situation is, in fact, based upon a recent Colorado decision.[1]

[1] Lanford v. People, 409 P.2d 829 (Colo. 1966).

I. ADMISSIBILITY OF PHOTOGRAPHS AND MOTION PICTURES

A brief reference to these types of evidence will clarify later discussion. The admissibility of a motion picture is based on the theory of the admissibility of still photographs, thereby making discussion of still photographs relevant.

The rule admitting still photographs into evidence is well established. It is generally held that photographs of persons, places and things, when authenticated by a showing that the scene depicted is an accurate reproduction, are admissible.[2] The admission of such a photograph is discretionary with the trial judge.[3] It would seem that such evidence is admissible whenever it can relevantly supplement the testimonial descriptions of a witness.[4]

Photographs commonly depict a scene, object, or person as it or he was at the time an offense or act occurred. Such evidence assumes importance when physical appearances have significantly changed and an essential aspect of the issues presented is appearances as they were at the time of the commission of the offense[5] or happening of the act.

Based on the theory that motion pictures are nothing more than a series of single or still pictures,[6] the rules governing the admissibility of still photographs are equally applicable to the admissibility of motion pictures. Motion pictures have been found particularly useful for the documentation of confessions[7] and the recordation of interrogation and statement signing scenes.[8]

The use of a motion picture to document a confession would seem incomplete unless a sound track were included. A California decision has taken this position by stating that, "[A]s a method of presenting confessions, sound motion pictures appear to have a unique advantage in that, while presenting the admission of guilt, they simultaneously testify to facts relevant to the issue of volition."[9]

When a prosecutor employs motion pictures and their sound tracks in his effort to secure a conviction, the question of self-incrimination may be raised. Clearly, if the movie and sound track pertain to a voluntary confession, the defendant has manifested his consent

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[2] Potts v. People, 114 Colo. 253, 158 P.2d 739 (1945).

[3] *Ibid.*

[4] See Martinez v. People, 124 Colo. 170, 235 P.2d 810 (1951).

[5] State v. Sanders, 358 S.W.2d 45 (Mo. 1962); *accord,* Vigil v. People, 134 Colo. 126, 300 P.2d 545 (1956); State v. Hughes, 244 La. 774, 154 So. 2d 395 (1963).

[6] Heiman v. Market St. Ry. Co., 21 Cal. App. 2d 311, 69 P.2d 178 (1937); Housewright v. State, 154 Tex. Crim. 101, 225 S.W.2d 417 (1949).

[7] Grant v. State, 171 So. 2d 361 (Fla. 1965).

[8] Hammil v. People, 145 Colo. 577, 361 P.2d 117, *cert. denied,* 368 U.S. 903 (1961); Martinez v. People, 124 Colo. 170, 235 P.2d 810 (1951).

[9] People v. Dabb, 32 Cal. App. 2d 491, 495, 197 P.2d 1, 5 (1948) (voluntary re-enactment of robbery and murder by accused).

to self-incrimination. But not infrequently, the motion picture is taken without the defendant's consent or even his knowledge, raising the defense of compulsory self-incrimination in contravention of the privilege contained in the United States Constitution[10] and many state constitutions.[11]

II. Testimonial or Non-Testimonial Evidence

A. *Types of Evidence*

There appears to be a confusion of meaning between "evidence" and "testimony." An apparent minority of courts have held either that testimony means all evidence or that testimony is synonymous with the term evidence.[12] However, the better reasoned decisions hold that "evidence" is inclusive of "testimony," and thus that testimony is merely a particular kind of evidence.[13] A case illustrative of this concept stated,

> Is there not a difference between giving evidence and being a witness (which implies testimonial evidence only)? The word evidence is a broad embracing term, including all classes of proof, testimonial or otherwise . . . .
>
> 'Evidence' is the broader term and includes all testimony, but 'testimony' is accurately used to designate only a particular kind or species of evidence . . . .[14]

Having noted that "evidence" and "testimony" are not synonymous, the phrase "testimonial evidence" requires further definition. Testimonial evidence is that evidence which is the result of a witness having made a statement or given non-physical evidence under oath.[15] It would seem, therefore, that the elements of testimonial evidence are three: (1) a witness; (2) an oath; and (3) communication of evidence, written or oral, by the witness, to the tribunal.

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[10] U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

[11] See, *e.g.*, Colo. Const. art. II, § 18 ("No person shall be compelled to testify against himself in a criminal case . . . .").

[12] See Aldrich v. State, 220 Ga. 132, 137 S.E.2d 463 (1964); Roberts v. Carlson, 142 Neb. 857, 8 N.W.2d 175 (1943); United States v. Clark, 5 Utah 226, 14 Pac. 288 (1887).

[13] Stern v. Superior Court, 78 Cal. App. 2d 9, 177 P.2d 308 (1947) (testimony limited to evidence given by witnesses under oath or affirmation); Columbia Nat'l Bank v. German Nat'l Bank, 56 Neb. 803, 77 N.W. 346 (1898) (testimony is a species of evidence given orally by witnesses); Worland v. McGill, 26 Ohio App. 442, 160 N.E. 478 (1927) (evidence includes exhibits; testimony does not); Hendrickson v. Myers, 393 Pa. 224, 144 A.2d 367 (1958) (evidence including everything submitted to the jury); Crooks v. Harmon, 29 Utah 304, 81 Pac. 95 (1905) (testimony is evidence but evidence may or may not be testimony).

[14] Bednarik v. Bednarik, 18 N.J. Misc. 633, 643, 16 A.2d 80, 89 (1940).

[15] *E.g.*, People v. Krotz, 341 Ill. 214, 172 N.E. 135 (1930); Flick v. Gately, 328 Ill. App. 81, 65 N.E.2d 137 (1946); Meyers v. State, 112 Neb. 149, 198 N.W. 871 (1924); People v. Chu, 193 Misc. 1043, 85 N.Y.S.2d 436 (1949); Baker v. Woodward, 12 Ore. 3, 6 Pac. 173 (1884).

B. *Testimonial Compulsion*

At the point of oral communication with the tribunal, a witness may assert the privilege against self-incrimination only in the context of "testimonial compulsion."[16] This compulsion can be best understood by reference to the aforementioned elements of testimonial evidence. The first two elements and an order of the court compelling a witness to communicate with the tribunal results in testimonial compulsion. Thus, it shall be found that the testimonial or non-testimonial nature of the "evidence" determines the validity of invoking the privilege against self-incrimination.

During an investigation of this privilege, Wigmore concluded that "the *history* of the privilege . . . suggests that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to *extract from the person's own lips* an admission of guilt, which would thus take the place of other evidence."[17] Recognizing the importance of the distinctions between testimonial and non-testimonial evidence, Wigmore, in a later section of his book, stated that,

> From the general principle (§ 2263 *supra*) it results that an inspection of the bodily features by the tribunal or by witnesses does not violate the privilege because it does not call upon the accused as a witness — i.e., upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action — as when he is required to take off his shoes or roll up his sleeves — is immaterial, unless all bodily action were synonymous with testimonial utterance; for . . . not compulsion alone is the component idea of the privilege, but testimonial compulsion.[18]

Confining the operation of the privilege solely to testimonial compulsion seems to be the general thrust of case law.[19] If, in fact, the privilege is so confined, real or physical evidence (non-testimonial) which has no element of verbal communication will not be excluded on the ground of involuntary self-incrimination. This is true even though the source of the evidence involves fingerprinting,[20] photo-

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[16] People v. Sykes, 47 Cal. Rptr. 596, 599 (1965).

[17] 8 WIGMORE, EVIDENCE § 2263, at 378 (McNaughton Rev. 1961).

[18] *Id.* § 2265, at 386.

[19] See, *e.g.*, Gilbert v. United States, 163 F.2d 325 (10th Cir. 1947); People v. Sykes, 47 Cal. Rptr. 596 (1965); Vigil v. People, 134 Colo. 126, 300 P.2d 545 (1956); Berney v. Volk, 341 Mich. 647, 67 N.W.2d 801 (1955).

[20] Schmerber v. California, 86 Sup. Ct. 1826, 1832 (1966); Smith v. United States, 324 F.2d 879 (D.C. Cir.), *cert. denied*, 377 U.S. 954 (1963); United States v. Krapf, 285 F.2d 647 (3d Cir. 1960); 12 A.B.A.J. 175 (1926); 29 MICH. L. REV. 1, 191 (1930).

graphing,[21] or an examination of the body of the defendant in search of identifying characteristics.[22]

The leading United States Supreme Court opinion of *Holt v. United States*[23] supports this analysis. In this case, a witness other than the defendant was allowed to testify that the accused had put on a blouse and that the blouse had fit him. The defendant, stating that this had been done under duress, contended that he had been involuntarily compelled to incriminate himself. The Court disagreed and held that

> the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort *communications* from him, not an exclusion of his body as evidence when it may be material . . . . For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent.[24]

The *Holt* rule, having withstood the test of time, has been cited with approval as recently as 1966.[25] The blood within an individual has also been treated as merely the "body" of said individual and therefore outside of the protection afforded by the privilege.[26] One jurisdiction that has clearly limited the protection afforded by the privilege, stated that "the [constitutional] provision against self-incrimination is limited to protection against testimonial compulsion, and does not extend to the exclusion of the body as evidence when such evidence may be relevant and material."[27]

The formulation of law requires the drawing of lines. Distinguishing between testimonial and non-testimonial evidence is no exception to this general rule. When lines between legal and illegal conduct are sought to be drawn, or decisions made regarding the question of whether given evidence is testimonial or non-testimonial, gray, borderline areas necessarily develop.[28] A correctly drawn line

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[21] Schmerber v. California, *supra* note 20; Smith v. United States, *supra* note 20; United States v. Amorosa, 167 F.2d 596 (3d Cir. 1948); State v. Linebarger, 71 Idaho 255, 232 P.2d 669 (1951).

[22] Schmerber v. California, *supra* note 20; McFarland v. United States, 150 F.2d 593 (D.C. Cir.), *cert. denied,* 326 U.S. 788 (1945).

[23] Holt v. United States, 218 U.S. 245 (1910).

[24] *Id.* at 252. (Emphasis added.) *Accord,* Blackford v. United States, 247 F.2d 745 (9th Cir.), *cert. denied,* 356 U.S. 914 (1957); People v. Tomaszek, 54 Ill. App. 2d 254, 204 N.E.2d 30 (1964).

[25] Schmerber v. California, 86 Sup. Ct. 1826 (1966).

[26] See, *e.g.,* Block v. People, 125 Colo. 36, 240 P.2d 512, *cert. denied,* 343 U.S. 978 (1952) (results of a sample of a defendant's blood, taken while defendant was unconscious, admitted into evidence); *accord,* Mestichelli v. Mestichelli, 44 Misc. 2d 707, 255 N.Y.S.2d 185 (1964) (civil action).

[27] Vigil v. People, 134 Colo. 126, 129, 300 P.2d 545, 547 (1956). See also note 19 *supra* and accompanying text. *Contra,* Cox v. State, 395 P.2d 954 (Okla. 1964).

[28] Allen v. State, 183 Md. 603, 39 A.2d 820 (1944).

will separate physical evidence from testimonial evidence, and by so separating, will indicate which evidence is a proper subject for application of the privilege against self-incrimination.

C. *Results of Tests Indicating Physical Facts*

It is common practice to use the results of a blood test to prove non-paternity.[29] Such evidence is usually considered to be real or physical, or, using other terminology, non-testimonial rather than testimonial. As such, the evidence is outside the protection of the privilege.

The blood test is also used to indicate the extent of intoxication, if any. When used for this purpose, the evidence resulting from analysis of the blood is clearly considered to be non-testimonial, even though taken without the consent of the supposed offender and at the express direction of a police officer.[30] In reaching this conclusion, the United States Supreme Court stated,

> We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonal or communicative nature . . . and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.[31]

In attempting to define what is meant by the phrase "testimonial or communicative nature," the Court offered the following explanation in footnote five to the decision.

> But the Fifth Amendment relates only to acts on the part of the person to whom the privilege applies, and we use these words subject to the same limitations. A nod or head-shake is as much a 'testimonial' or 'communicative' act in this sense as are spoken words. But the terms as we use them do not apply to evidence of acts non-communicative in nature as to the person asserting the privilege, even though, as here, such acts are compelled to obtain the testimony of others.[32]

The Court is clearly declaring this class of "blood test" evidence non-testimonial. This should come as no surprise because such evidence can be placed before a tribunal without utilizing the testimonial responsibility of an accused person. To forcefully remove a sample of blood from a suspect's body is analogous to requiring fingerprinting or examination of a defendant's body. In each case, the suspect or defendant is required to submit to governmental authority and the practical result of this submission is the procurement of evidence.

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[29] Mestichelli v. Mestichelli, 44 Misc. 2d 707, 255 N.Y.S.2d 185 (1964) (civil action). See also note 26 *supra* and accompanying text.

[30] Schmerber v. California, 86 Sup. Ct. 1826 (1966).

[31] *Id.* at 1830-31.

[32] *Id.* at 1830-31 n.5.

But, such evidence is physical in nature and does not involve the testimonial capacity of the defendant.

For any evidence, whether verbal or physical, to be valuable, it must have some element of communication. One can thus conclude that it is not *what* is communicated that is important, but rather the *mode* of communication, since only if the mode of communication involves testimonial responsibility can the privilege be successfully invoked. Therefore, while all evidence communicates by conveying useful information to the tribunal for its consideration while arriving at a decision, such communication, even when compelled, violates no privilege provided that the information pertains to real or physical evidence rather than testimonial evidence.

The United States Supreme Court has recently discussed the scope of the fifth amendment privilege in the context of testimonial and non-testimonial compulsion.

> It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications . . . . On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk or to make a particular gesture. The distinction which has emerged . . . is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.[33]

The Court appears to equate "communications" with "testimony," but it does so in a very narrow context. Testimonial communication is within the privilege, but to be technically correct, the general term "communication," must be equated to the general term "evidence," and the narrow term "testimonial communication," must be taken to be a special kind of communication.

D. *Conclusion*

1. Motion Picture without a Sound Track

It will be useful to place the conclusion in the context of the previously related hypothetical.[34] To draw the line in this borderline situation, the question requiring an answer is whether or not the motion picture alone was testimonial or non-testimonial.

It cannot be doubted that the conduct of the defendant at the time of the filming of the motion picture was an essential aspect of the issue of intoxication, subject to change by the passage of time.[35]

[33] *Id.* at 1832.

[34] See note 1 *supra* and accompanying text.

[35] See note 5 *supra* and accompanying text.

Nor can it be doubted that the motion picture was intended to prove the truth of the prosecution's allegations, *i.e.,* for the motion picture to have been admissible, it must have been shown that it was an accurate reproduction of the scene as it actually was at the time of the filming.[36] In effect the film is a type of witness which has been sworn to tell or show the whole truth and nothing but the truth. The foundation of authenticity which is required before the film becomes competent evidence is analogous to the oath.

Consider, briefly, the pictorial nature of this cellulose "witness." It must be noted that officers present in the interrogation room could have testified to the demeanor, attitude and general condition of the defendant as they had observed him. Because such testimony would have been proper, it seems clear that the same information could have been photographed and conveyed by means of a motion picture camera. It therefore appears reasonable to conclude that the movie, when offered to show the demeanor of the defendant, is non-testimonial in nature and outside the protection afforded by the privilege. This is in accord with two Texas decisions[37] wherein the Texas judiciary allowed as evidence, motion pictures purporting to show the demeanor and bodily condition of the defendants in both cases.

2. Motion Picture with a Sound Track

The essence of the privilege against self-incrimination is the defendant's right not to incriminate himself by compelled testimonial communication.[38] In this context, it is clear that the results of some physical tests, particularly blood tests, are non-testimonial and therefore outside the privilege.[39] However, when a defendant is asked to submit to a blood test and refuses to do so, what begins as an attempt to secure purely physical evidence, may result in testimonial evidence if evidence of the defendant's refusal to cooperate is presented to the tribunal. Evidence of such a refusal may appear in the form of a prosecutor's comment or might be contained in the sound track of a motion picture made at the time the defendant was being interrogated. The issue to be resolved, therefore, is whether a vocal refusal to submit to a physical test is testimonial or non-testimonial, and if testimonial, whether the refusal is incriminating.

The United States Supreme Court has considered the question of refusal to testify on several occasions, the first being *Wilson v. United States* where the Court said,

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[36] See note 2 *supra* and accompanying text.

[37] Carpenter v. State, 169 Tex. Crim. 383, 333 S.W.2d 391 (1960); Housewright v. State, 154 Tex. Crim. 101, 225 S.W.2d 417 (1949).

[38] See note 32 *supra* and accompanying text.

[39] See note 31 *supra* and accompanying text.

> The act of Congress permitting the defendant in a criminal action to appear as a witness in his own behalf upon his request declares . . . that his failure to request to be a witness in the case *shall not create any presumption against him.*
>
> To prevent such presumption being created, comment, especially hostile comment, upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it.[40]

Wilson established only a federal rule regarding prosecution comments on a defendant's refusal to testify. A suggested rationale for this federal rule is that a defendant, by electing not to testify, is exercising his privilege against self-incrimination. If this election is subsequently commented upon, the protection offered by the privilege will likely be destroyed by the creation of an inference of the defendant's guilt in the mind of the jury. This may, in effect, result in involuntary self-incrimination.

In 1963, in *Malloy v. Hogan,*[41] the Court extended the self-incrimination clause of the fifth amendment to the states via the fourteenth amendment. Two years later, in *Griffin v. California,*[42] the Court stated that the self-incrimination clause of the fifth amendment contained the same prohibitions as the statute construed in *Wilson,* and that because of *Malloy,* "the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[43]

Aside from the previously mentioned adverse inference, if the evidence of a refusal is conveyed by the sound track of a motion picture, there is again created the issue of involuntary self-incrimination. This is due to the compelled testimonial nature of the sound track, which is an authenticated reproduction of the defendant's own voice emanating from his own lips,[44] and recorded either without the defendant's knowledge or consent, or both. The elements of testimonial

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[40] Wilson v. United States, 149 U.S. 60, 65 (1893). The act referred to in text is set out fully below:

> That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.

Act of March 16, 1878, 20 Stat. 30, ch. 37.

[41] 378 U.S. 1 (1963).

[42] 380 U.S. 609 (1965).

[43] *Id.* at 615. See also Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966) (*Griffin* not to be applied retroactively).

[44] See note 17 *supra* and accompanying text.

compulsion are all present: (1) the defendant's personal appearance in the motion picture; (2) the proven accuracy of the film substituting for the oath; and (3) an involuntary, oral communication to the tribunal.

Little more need be said. Let it suffice to say that a sound track should be generally inadmissible in a criminal prosecution, except when part of a voluntary confession, because of its unmistakable compelled testimonial characteristics, and it should be specifically inadmissible when it communicates evidence of a defendant's refusal to take physical tests and the source of the refusal is the defendant's own voice. It is submitted that a decision contrary to these principles is contrary to the fifth amendment of the United States Constitution.

Jerry E. McAdow