

Procedure Crime
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STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

September 10, 1974

Opinion No. 74- 313

Mr. Nick A. Tomasic
District Attorney
Twenty-Ninth Judicial District
Wyandotte County Courthouse
Kansas City, Kansas 66101

Dear Nick:

You inquire whether a medical technician employed, e.g. in the emergency room of a hospital, may be required by a police officer to withdraw blood from a person brought to the medical facility by said officer, for the purpose of performing a test to determine the amount of alcohol in the blood.

K.S.A. 22-2407 states thus:

"(1) a law enforcement officer making an arrest may command the assistance of any person who may be in the vicinity.

"(2) A person commanded to assist a law enforcement officer shall have the same authority to arrest as the officer who commands his assistance.

"(3) A person commanded to assist a law enforcement officer in making an arrest shall not be civilly or criminally liable for any reasonable conduct in aid of the officer or any acts expressly directed by the officer."

In Schmerber v. California, 384 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966), the Court stated thus:

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"It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment." [Emphasis supplied.]

Under K.S.A. 22-2407, a law officer "making an arrest may command the assistance of any person who may be in the vicinity." The assistance which the officer is empowered to command extends, on the face of the statute, only to that assistance necessary to effect an apprehension and arrest of the subject and, perhaps, depending upon specific factual circumstances, assistance necessary to maintain custody of a subject once technically arrested. K.S.A. 22-2407(3) confers immunity upon civilians assisting an officer for "any reasonable conduct" or "acts expressly directed by the officer" to assist in making an arrest. The taking of blood samples is not an arrest. It is a search which may or may not be incident to an arrest. The assistance of a medical technician may be necessary in order to obtain a blood sample, but that assistance is in and of itself unrelated to any arrest of the subject.

Thus, K.S.A. 22-2407 has no application to assistance which an officer may require of another person in making a search, e.g. taking a blood sample, whether incident to an arrest or otherwise.

K.S.A. 8-1001 states thus in pertinent part:

"Any person who operates a motor vehicle upon a public highway in this state shall be deemed to have given his consent to submit to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood whenever he shall be arrested or otherwise taken into custody for any offense involving operating a motor vehicle under the influence of intoxicating liquor in violation of a state statute or a city ordinance The test shall be administered at the direction of the arresting officer. If the person so arrested refuses a request to submit to the test, it shall not be given" [Emphasis supplied.]

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An arrest is thus a necessary prerequisite to a warrantless search, including the taking of a blood sample. In State v. Brunner, 211 Kan. 596, 507 P.2d 233 (1973), the court considered the admissibility of evidence of a blood alcohol test, the sample being taken from the accused while he was hospitalized. When the court found he was not under arrest or in custody of the officer, the court stated thus:

"Thus, insofar as the constitution goes, a blood sample could have been taken from the defendant Brunner even in the absence of consent -- if he had been arrested.

"Our statute, however, does not go so far, although like the constitutional right to make a 'search,' it comes into play only when a driver is 'arrested or otherwise taken into custody.'

* * *

"The difference, then, between the constitutional and statutory requirements is that, while both require a prior arrest, the statute prohibits it." 211 Kan. at 603.
[Emphasis supplied.]

There is, of course, no general statutory authority for an officer to command the assistance or services of another person to assist in the making of a search subsequent to an arrest. Nor has our research discovered any judicial authority for such direction. Although K.S.A. 8-1001 provides that the "test shall be administered at the direction of the arresting officer," the language does not, in our opinion, empower the officer to order and thus compel an unwilling person to administer the test. Indeed, K.S.A. 8-1003 states thus:

"Only a physician or qualified medical technician acting at the request of the arresting officer can withdraw any blood of any person submitting to a chemical test under this act."
[Emphasis supplied.]

Moreover, a physician or medical technician administering a blood test at the direction of an officer subsequent and incident to an arrest, or indeed without an arrest, would be exposed to possible civil liability for his actions and would not enjoy the protection afforded by K.S.A. 22-2402.

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Whether a blood test which is sought is pursuant to the Kansas implied consent law, or for other purposes not involving motor vehicle offenses, administration of the test constitutes a search, and we find no statutory or judicial authority whereby a police officer may command the services of another person, including a physician or medical technician, to render professional services in the execution of a search.

Very truly yours,



VERN MILLER
Attorney General

VM:JRM:gh

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