

1983 WL 182056 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

November 15, 1983

*1 The Honorable Ken Formby
County Coroner
Bamberg, South Carolina 29003

Dear Mr. Formby:

You have inquired whether a coroner has the authority to order a blood-alcohol test for a driver of an automobile who, because of injuries suffered in an accident, is unable to take a breathalyzer test. This Opinion will address two issues raised by this inquiry: the constitutional issue involved and the coroner's statutory authority under South Carolina law. While there is no absolute constitutional bar to such action, authority for a coroner to so act is not free from doubt.

The constitutionality of a non-consensual, warrantless blood-alcohol test has been resolved by [Schmerber v. California](#), 384 U.S. 575, 86 S.Ct. 1826 (1966) and its progeny. [Schmerber, supra](#), held that, as a matter of constitutional law, a police officer who has validly arrested a suspect, need not obtain a warrant before ordering the taking of blood without consent. Case law since [Schmerber, supra](#), has focused on the need for a formal arrest before non-consensual blood taking. Recently, in [United States v. Harvey](#), 701 F.2d 800 (9th Cir., 1983), the Ninth Circuit reaffirmed that the arrest of the individual must precede or be substantially contemporaneous with seizure of blood. The Ninth Circuit noted, however, that this requirement is not without exception. One relevant exception discussed in [United States v. Harvey, supra](#), was where 'a suspect is at the level of incapacity which makes it unnecessary to effect a prior arrest,' [United States v. Harvey](#), 701 F.2d at 806. The Court noted that 'there is no compelling reason why a prior arrest is necessary when it is shown that the suspect could not appreciate the significance of such action.' [United States v. Harvey](#), 701 F.2d at 805-806.

Therefore, as a matter of constitutional law, the following is well established:

1. If a suspect has been formally arrested and the blood test is reasonably likely to produce evidence in a forthcoming criminal prosecution, a non-consensual, warrantless blood seizure is permissible, and
2. If the suspect has not been arrested, such a blood seizure is permissible when the suspect is unconscious or so incapacitated as to be unable to appreciate the significance of an arrest. Even though a formal arrest is not required, the seizure of the person and the blood must be supported by probable cause.

The question remains whether a coroner possesses the statutory authority, under South Carolina law, to order a blood-alcohol test on a surviving driver unable to undergo the breathalyzer. Opinions issued by this office previously have not taken a consistent stand on this issue: see opinions dated September 17, 1957, January 16, 1979, and March 15, 1983, for the view that no such authority exists, but see opinions dated January 2, 1973, July 10, 1973, and June 24, 1974, for the view that the coroner does have such authority.

*2 [Section 17-7-80, Code of Laws of South Carolina \(1976\)](#) has been cited for the view that the coroner has no statutory authority to order blood-alcohol tests on a survivor. That section reads in pertinent part:

Every coroner or other official responsible for performing duties of coroner shall examine the body within eight hours of death of any driver and any pedestrian, sixteen years or older, who dies within four hours of a motor vehicle accident or any swimmer or boat occupant who dies within four hours of a boating accident, and take or cause to have taken by a qualified person such blood or other fluids of the victim as are necessary to a determination of the presence and percentages of alcohol or drugs. . . .

(Emphasis added.) It would appear from this statute that the coroner is authorized to order a blood-alcohol test only for the victim of an automobile accident and not for a surviving driver.

Opinions stating the view that the coroner would have such authority have relied upon the reasoning in Schmerber v. California, supra, and the fact that the Fifth Amendment prohibition against self-incrimination would not be violated. The opinion dated January 2, 1973, concluded:

Based upon this leading case [Schmerber], it is the law that you as coroner may require an individual under the circumstances posed [blood sample being drawn from an individual involved in an automobile accident resulting in a fatality] to submit to a blood test for purposes of determining intoxication and as a part of your investigative procedure pursuant to your powers as coroner.

(Emphasis added.) These opinions did not cite any statutory authority from South Carolina to support their views for the coroner's authority.

The powers of a coroner are either ministerial or judicial. Concerning judicial powers, the South Carolina Supreme Court has stated:

The judicial power of a coroner, is first to inquire into or concerning the death of a man, when any one is slain or dies suddenly, by a jury inquest *supervisum corporis*, and this must be done at the place where the death happened. And if any one be found guilty, by this inquest of murder, or other homicide he is to commit him to prison for further trial. They are also to make inquiry of the accessories before the fact, or whether they have fled for it or not; and, indeed, of all things which occasioned it.

Giles v. Brown, 1 Mill's Const. 230, 231-232 (1871). The coroner has also been given the power to 'issue warrants, summon witnesses and examine before the jury any person present . . . concerning the death.' Section 17-7-30.

Not only does a coroner have the power to investigate, as emphasized above; he would also have a duty to make a preliminary investigation or examination into the cause of death before he holds a formal inquest. The coroner must 'decide for himself . . . whether blame probably attaches to any living person for the death . . .' See Section 17-7-20. The coroner also has a duty to file his finding if, after a preliminary examination, he finds that the deceased came to death from an act of God or from mischance, without blame on the part of another person. See Section 17-7-30.

***3** As these powers and duties relate to an automobile accident resulting in a fatality, the coroner would be mandated to determine for himself, prior to holding an inquest, whether death was caused by a criminal act. He would also 'furnish the foundation for a criminal prosecution in case the death was shown to be felonious' and would have a duty 'to preserve evidence there found which might show that the death was the result of an unlawful and criminal act.' Parsons v. State, 271 S.W.2d 643 at 652 (Tex. Cr. App. 1953), cert. den. 348 U.S. 837, 75 S.Ct. 36, 99 L. Ed. 660. Ruling out the presence of alcohol in the blood could serve to characterize the death as an accident rather than a result of manslaughter or reckless homicide. Further, it is well-recognized that alcohol in the blood is 'fleeting evidence;' to discover and preserve evidence, if it is indeed present, action must be taken without delay by the coroner (or other investigative officer). Following guidelines set by Schmerber and Harvey and using warrant issuance powers in Section 17-7-170, the coroner arguably has the power to authorize the drawing of blood from a surviving driver from a fatal automobile accident to determine blood alcohol content, as a part of his investigative powers and duties.

In conclusion, it is the opinion of this office that there is no constitutional bar to a coroner ordering a blood-alcohol test for a survivor of an automobile accident unable to take a breathalyzer test. However, the authority of a coroner to so act is not free from doubt. To resolve this doubt, corrective legislation or a declaratory judgment action may be advisable.

Sincerely,

Patricia D. Petway
Staff Attorney

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