

IN THE MATTER OF BENEDICTO LIZAMA, ET AL.

Criminal Case No. 298

Trial Division of the High Court

Mariana Islands District

May 3, 1972

Hearing on motion to require a voice identification sample test on certain named persons. The Trial Division of the High Court, H. W. Burnett, Chief Justice held that motion would not be granted where affidavit in support of the motion did not establish probable cause for its issuance.

1. Search and Seizure—Physical Tests

The Trust Territory has the right to compel individuals suspected of crimes to submit to physical tests, such as voice identification samples, under some circumstances. (1 T.T.C. § 3)

2. Search and Seizure—Physical Tests

Physical tests of individuals suspected of crimes is not violative of the privilege against self-incrimination, because evidence so derived is not of a testimonial or communicative nature. (1 T.T.C. § 4)

3. Search and Seizure—Probable Cause

Probable cause must be established before a search and seizure may be undertaken. (1 T.T.C. § 3)

4. Search and Seizure—Probable Cause

Not only must there be a belief that probable cause exists, but also the circumstances giving rise to this belief must be communicated to the judicial officer from whom the authorization to search is sought. (1 T.T.C. § 3)

5. Search and Seizure—Probable Cause

Where affidavit in support of motion to compel voice tests of certain suspects failed to establish that the proposed search and seizure was reasonable, did not show facts to indicate why suspicion was directed at named individuals rather than others and contained nothing other than a conclusory averment that the named individuals were suspect then it did not establish probable cause and the motion to compel tests would be denied. (1 T.T.C. § 3)

BURNETT, *Chief Justice*

The Trust Territory filed a motion on April 18, 1972, to require a voice identification sample test to be made on the persons of Benedicto Lizama, Ricardo R. Santos, Isidro

Lizama, Miguel Muna and Pedro P. Cabrera. An affidavit signed by Carl L. Lindh, Superintendent of Public Safety for the Trust Territory, was submitted in support of this motion. The affidavit stated: "As a result of investigation, it has been determined that the primary suspect in regard to the telephone call is Benedicto Lizama. Another suspect is Ricardo R. Santos. Other persons who had an opportunity to be present with Benedicto Lizama near the time of the telephone call were Isidro Lizama, Miguel Muna and Pedro P. Cabrera." No supplementary affidavits were filed.

[1, 2] There is no question that the Trust Territory has the right to compel individuals suspected of crimes to submit to physical tests, such as voice identification samples, under some circumstances. These tests have been held not to be violative of the Fifth Amendment privilege against self-incrimination (1 T.T.C. 4), because evidence so derived is not of a "testimonial or communicative nature." *Schmerber v. State of California*, 384 U.S. 757, 86 S.Ct. 1826 (1966).

[3] It is also clear, however, that detention for any physical test is a search and seizure which comes within the area guarded by the Fourth Amendment (1 T.T.C. 3). The *Schmerber* decision articulates the principle that the security of one's privacy against arbitrary intrusion is at the core of Fourth Amendment rights, and that intrusions must be justified by the circumstances and carried out in a proper manner. Since the Fourth Amendment prohibits only unreasonable searches and seizures, the limitation placed on any search and seizure is that it must be reasonable. This requirement has evolved into the rule that probable cause must be established before a search and seizure may be undertaken. This probable cause rule pertains to all searches and seizures.

[4] Not only must there be a belief that probable cause exists, but also the circumstances giving rise to this belief must be communicated to the judicial officer from whom the authorization to search is sought. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967) equates the taking of blood samples, the compulsion to submit to fingerprinting, photography, or measurements, to stand, walk or assume a stance, to the demand to speak for identification, and further makes it clear that this whole class of physical tests is subject to the same rules by which reasonableness is to be determined.

In *Davis v. Mississippi*, 394 U.S. 721, 22 L.Ed.2d 676, 89 S.Ct. 1394 (1969), the Supreme Court held that detention to obtain fingerprints without probable cause was an unconstitutional search and seizure under the Fourth Amendment, and a violation of the due process clause of the Fifth Amendment. It held that whether the test was made during the investigatory or accusatory stage of the proceedings made no difference, and stated that detention for the sole purpose of a physical test, such as obtaining fingerprints, is subject to the constraints of the Fourth Amendment; making it very clear that the general requirement that authorization by a judicial officer be obtained in advance of detention would not admit to any exception in the context of a detention for the sole purpose of an investigatory/physical test.

[5] The Trust Territory's affidavit in support of its motion to compel voice tests on the named individuals indicates only that suspicion is directed at the individuals "as a result of investigation." It gives no further justification, and recites no facts or circumstances from which the court might find probable cause. It fails to meet the Fourth Amendment requirement in that it fails to establish that the proposed search and seizure is reasonable, because it

shows no facts to indicate why suspicion is directed at these particular individuals rather than others, and contains nothing other than the conclusory averment that the named individuals are suspect.

Because the Trust Territory has not met the search and seizure requirements of 1 T.T.C. 3 (the Fourth Amendment), as articulated in *Schmerber, Davis and Aguilar* by the Supreme Court, in that it has not established probable cause and shown why the demanded search would be reasonable, the motion to compel voice identification tests must be denied.