Admissibility of Post-Hypnotic Testimony

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PART III

Nevertheless, many appellate courts have opted to curtail drastically the use of previously hypnotized witnesses in criminal proceedings.[14] The courts that have limited the use of post-hypnotic testimony have done so on the ground that prior hypnosis renders a witness intrinsically unreliable. However, like their counterparts in the scientific community, appellate court judges are unable to agree on what constraints should be placed on the use of post-hypnotic testimony. As a result, a wide discrepancy exists among the courts with regards to the admissibility of testimony of a previously hypnotized witness. This discrepancy, in turn, has created a dilemma for the investigator deciding when to use hypnosis to enhance witness recall and for the prosecutor determining how to present his best evidence to support a criminal conviction.

A review of the Federal and State appellate court decisions which address the issue of admissibility of post-hypnotic testimony indicates that the variance in treatment by these courts can be analyzed by grouping their decisions into four categories: (1) Those that find prior hypnosis to be an issue affecting credibility, not admissibility; (2) those that make admissibility of post-hypnotic testimony contingent upon a showing of reliability; (3) those that declare inadmissible any testimony based on hypnotic recall while permitting testimony relating to events recalled prior to hypnosis; and (4) those that hold prior hypnosis to be an absolute bar to admissibility. The cases in each category, although factually different, are decided on similar rationale. Each category is discussed below in terms of factors considered by courts in deciding the legal admissibility of such testimony.

Law enforcement officers of other than Federal Jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some Police procedures ruled permissable under Federal constitutional law are of questionable legality under State Law or are not permitted by law or are not permitted at all.

Credibility Not Admissibility

This first category was created in the 1968 case of *Harding* v. *State*.[15] In that case, the Maryland Court of Special Appeals became the first appellate court to address specifically the issue of the admissibility of post-hypnotic testimony. The trial court in *Harding* had heard the testimony of Mildred Coley, the victim of an apparent attempted rape and murder, and had admitted her testimony over defense objections, despite the fact that the evidence clearly demonstrated the victim had little or no accurate recall of the assault prior to hypnosis. The trial judge allowed the case to go to the jury in its entirety with the following precautionary statement:

> "You have heard, during this trial, that a portion of the testimony of the prosecuting witness, Mrs. Coley, was recalled by her as a result of her being placed under hypnosis. The phenomenon commonly known as hypnosis has been explained to you during this trial. I advise you to weigh this testimony carefully. Do not place any greater weight on this portion of Mrs. Coley's testimony than on any other testimony that you have heard during this trial. Remember, you are the judges of the weight and the believability of all the evidence in this case."[16]

On appeal, the Maryland Court of Special Appeals upheld the defendant's conviction and found that the post-hypnotic testimony of the prosecuting witness was sufficient to support that verdict. Essentially, the court held that prior hypnosis, in and of itself, does not render a witness incompetent to testify and that any ill effects the hypnotic process may have on accurate recall create issues of credibility, not admissibility. In so holding, the court considered neither the potential dangers of hypersuggestibility, hypercompliance, or confabulation nor the viewpoints of the scientific community on the reliability of hypnotically induced recall. Rather, the court simply emphasized the witness' own statement that she was testifying from her own refreshed recollection of the events as they occurred, the opinion of the hypnotist that there was "no reason to doubt the accuracy of the witness' recollections,"[17] and the trial court's cautionary instruction to the jury. Based on the foregoing observations, the appellate court believed it was justified in drawing the following conclusion:

> "The admissibility of Mildred Coley's testimony concerning the assault with intent to rape case causes no difficulty. On the witness stand she recited the facts and stated she was doing so from her own recollection. The fact that she has told different stories or had achieved her present knowledge after being hypnotized concerns the question of the weight of the evidence which the trier of facts, in this case the jury, must decide."[18]

Although the rather simplistic approach adopted by the court in *Harding* drew considerable criticism from legal commentators and the Maryland court's position was subsequently reversed in the 1982 case of *Collins* v. *State*,[19] the case won immediate acceptance among many State and Federal courts faced with like issues, and the opinion has managed to retain considerable vitality.[20]

Footnotes

[14]The admissibility of testimony given while under hypnosis and evidence of what was said under hypnosis is well-settled. All courts which have considered the question are in agreement that such testimony is inadmissible. *See, e.g., Pearson* v. *State*, 441 N.E. 2d 468 (Ind. 1982); *State* v. *Pusch*, 46 N.W. 2d 508 (N.D. 1950); *Jones* v. *State*, 542 P. 2d 1316 (Okla. Crim. 1975).

[15]246 A.2d 302 (Md. 1968).

[16]*Id.* at 310.

[17]*Id.* at 311.

[18]*Id.* at 306.

[19]447 A. 2d 1272 (Md. App. 1982), *aff'd.* 464 A.2d 1028 (Md. 1983). In *Collins*, a differently constituted Maryland court of appeals abandoned the position stated in *Harding* and held that testimony developed through hypnotism was inadmissible.

[20]*See, e.g., Clay* v. *Vose*, 771 F. 2d 1 (1st Cir. 1985); *United States* v. *Awkard*, 597 F. 2d 667 (9th Cir. 1979); *United States* v. *Adams*, 581 F. 2d 193 (9th Cir. 1978); *Crum* v. *State*, 433 So. 2d 1384 (Fla. App. 1983); *Key* v. *State*, 430 So. 2d 909 (Fla. App. 1983); *State* v. *Little*, 674 S.W. 2d 541 (Mo. 1984); *State* v. *Brown*, 337 N.W. 138 (N.D. 1983); *State* v. *Glebock*, 616 S.W. 2d 897 (Tenn. Cr. App. 1981); *Chapman* v. *State*, 638 P. 2d 1280 (Wyo. 1982).