Admissibility of Post-Hypnotic Testimony

By KIMBERLEY A. KINGSTON
Special Agent • FBI Academy • Legal Counsel Division
Federal Bureau of Investigation • Quantico, VA

PART V

Prior to trial, the defendant moved to suppress the victim's proposed in-court identification on the ground that the original identification procedure was tainted by the suggestive hypnotic process, and therefore, was inherently unreliable. After hearing expert testimony regarding the reliability of hypnotically refreshed recall in general and reviewing the circumstances of the particular hypnotic process in question, the trial court granted the defendant's motion to suppress. On appeal, the New Jersey Supreme Court upheld the trial court's decision to suppress the in-court identification and imposed the following procedural safeguards to insure the reliability of post-hypnotic testimony:

1) The hypnotic session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis.
2) The qualified professional conducting the hypnotic session should be independent of and not responsible to the prosecutor, investigator, or the defense.
3) Any information given to the hypnotist by law enforcement personnel prior to the hypnotic session must be in written form so that subsequently the extent of the information the subject received from the hypnotist may be determined.
4) Before induction of hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them, carefully avoiding adding any new elements to the witness' description of the events.
5) All contacts between the hypnotist and the subject should be recorded so that a permanent record is available for comparison and study to establish that the witness has not received information or suggestion which might later be reported as having been first described by the subject during hypnosis. Videotape should be employed if possible, but should not be mandatory.
6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and post-hypnotic interview.[28]

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.

Clearly, these safeguards, when made a condition precedent to admission of post-hypnotic testimony, are designed to limit the effects of hypersuggestion, hypercompliance, and confabulation while, at the same time, providing the court with adequate grounds on which to judge the reliability of post-hypnotic recall.[29]

No matter what test in this category is used to determine the admissibility of post-hypnotic testimony—the elementary test of reliability, balancing, compliance with procedural safeguards, or a combination of all three—the result is the same: The party attempting to use a previously hypnotized witness must first persuade the court that the post-hypnotic recall of the witness is reliable and not simply the product of the hypnotic process. Once the initial burden is met, the testimony will be admitted, "leaving the jury free to hear and weigh all evidence the opponent of the testimony may offer regarding possibilities of pseudomemory resulting from suggestion, confabulation, or deliberate untruthfulness."[30]

"...The qualified professional conducting the hypnotic session should be independent of and not responsible to the prosecutor, investigator, of the defense..."

Hypnotically Induced Recall Inadmissible

In a third category of cases involving hypnosis, a growing number of appellate courts are retreating from the case-by-case analysis of admissibility of post-hypnotic testimony, contingent upon its reliability. These courts are holding, as a matter of law, that the probative value of hypnotically induced recall is outweighed by the danger of prejudice in every instance.[31] In their analysis, the courts that subscribe to this view unanimously rely on the test for the admissibility of scientific evidence announced in the 1923 case of *Frye* v. *United States*[32] to support their decisions.

Footnotes

[28] *Id.* at 89–90.

[29] Oregon has adopted similar safeguards by statute. *See*, Or. Rev. Stat, §136.675.

[30] *Supra* note 10, at 1290.

[31] *See, e.g., Prewitt* v. *State*, 460 So. 2d 296 (Ala. Cr. App. 1984); *People* v. *Quintanar*, 659 P. 2d 710 (Colo. App. 1982); *State* v. *Atwood*, 479 A. 2d 258 (Conn. Super. 1984); *Felker* v. *State*, 314 S.E. 2d 621 (Ga. 1984); *State* v. *Moreno*, 709 P. 2d 103 (Hawaii 1985); *State* v. *Seager*, 341 N.W. 2d 420 (Iowa 1983); *State* v. *Goutro*, 444 So. 2d 615 (La. 1984); *Commonwealth* v. *Kater*, 447 N.E. 2d 1190 (Mass. 1983); *State* v. *Ture*, 353 N.W. 2d 502 (Minn. App. 1984); *State* v. *Patterson*, 331 N.W. 2d 500 (Neb. 1983); *People* v. *Hughes*, 453 N.E. 484 (N.Y. 1983); *State* v. *Payne*, 325 S.E. 2d 205 (N.C. 1985); *State* v. *Maurer*, 473 N.E. 2d 768 (Ohio 1984); *Robinson* v. *State*, 677 P. 2d 1080 (Okla. Cr. 1984); *Com.* v. *Smoyer*, 476 A. 2d 1304 (Pa. 1984); *State* v. *Coe*, 684 P. 2d 668 (Wash. 1984).

[32] 293 F. 1013 (D.C. Cir. 1923).