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Mildred E. Otey

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RECENT DEVELOPMENT

EVIDENCE—TESTIMONY OF WITNESS HYPNOTIZED PRIOR TO TRIAL TO REFRESH HER RECOLLECTION IS ADMISSIBLE. *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978).

The phenomenon of hypnosis has been known for centuries,¹ and it has become more acceptable in society. Likewise, it has become recognized in both medicine and psychiatry.² This growing acceptance has resulted in its use in law enforcement³ and other legally related areas.⁴ When hypnosis is used in the context of a criminal trial, however, particular problems may arise.⁵

The purpose of a trial is the reconstruction of a past event through the testimony of individual witnesses. By the time of trial, however, a witness often may have forgotten facts that she previously observed. In order to achieve a reconstruction of a prior circumstance, it may be necessary to use some type of stimulus to refresh the witness's memory.⁶ Typically, this may entail the use of leading questions or the presentation of a memorandum or other tangible object to the witness.⁷ Once the witness's memory has been refreshed, she testifies from her memory thus revived independent of the source of refreshment.⁸ When the stimulus used to refresh the witness's memory is of questionable propriety, an issue of the admissibility of the witness's testimony arises.

1. B. REITER, ANTISOCIAL OR CRIMINAL ACTS AND HYPNOSIS 34 (1958); Herman, *The Use of Hypno-Induced Statements in Criminal Cases*, 25 OHIO ST. L.J. 1 (1964).

2. B. REITER, *supra* note 1, at 34; Herman, *supra* note 1.

3. See J. GORDON, HANDBOOK OF CLINICAL AND EXPERIMENTAL HYPNOSIS (1967).

4. Rieser, *Hypnosis as a Tool in Criminal Investigation*, The Police Chief, Nov., 1976. See H. ARONS, HYPNOSIS IN CRIMINAL INVESTIGATION (1967).

5. Stewart, *Hypnosis, Truth Drugs, and the Polygraph: An Analysis of Their Use and Acceptance By the Courts*, 21, U. FLA. L.R. 541, 558 (1969).

6. An attorney may refresh a witness's memory before or during trial, in or out of the courtroom. See *Thomas v. State*, 103 Ind. 419, 2 N.E. 808 (1885); *State v. Kwiatkowski*, 83 N.J.L. 650, 85 A. 209 (1912).

7. For example, a prior written statement signed by the witness, a police report, a picture, or an object can be used to refresh the memory of a witness. See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]. See also R. REIFF, RECONSTRUCTION, REMEMBRANCE AND MEMORIA 119 (1965); Maquire & Quick, *Testimony: Memory and Memorandum*, 3 HOW. L.J. 1 (1957).

8. This testimony should be distinguished from evidence introduced as a past recollection recorded. In past recollection recorded, it is the recordation of the past event that is submitted to the jury as evidence, and not the present testimony of the witness. See MCCORMICK, *supra* note 7, § 9, at 15.

The use of hypnosis to refresh recollection is one such controversial stimulus.⁹

In the recent case of *State v. McQueen*,¹⁰ the North Carolina Supreme Court considered a challenge to the admissibility of testimony of a witness who had been hypnotized prior to trial. The court concluded that the witness's testimony was admissible.¹¹ The fact that the witness had been hypnotized prior to trial, the court ruled, related only to the question of the witness's credibility—a matter for the jury to consider.¹²

In *McQueen*, the defendant was charged with a dual murder. The state's principal witness, an eyewitness to the slayings, could not recall the events which had transpired five years previously. In order to refresh her recollection of the crimes committed, the witness voluntarily submitted herself to hypnosis prior to trial. Then, at the trial, she testified from her refreshed memory that she had seen the defendant kill both victims.¹³ Subsequently, the defendant was convicted.¹⁴ The defendant appealed his conviction on the grounds that the witness's hypnosis prior to trial rendered her incompetent to testify, and thus her testimony was inadmissible.¹⁵

In rejecting the defendant's contention of inadmissibility of the testimony and his reliance on *State v. Pierce*,¹⁶ the court distinguished the instance where the witness testifies while in a hypnotic state from the witness's testifying after her memory had been refreshed through hypnosis. In the former case, the testimony is inadmissible.¹⁷ In the latter instance, however, the witness's testimony is admissible, since the hypnosis is used solely for the purpose of refreshing the memory of the

9. See Hutchins & Slesinger, *Some Observations on the Law of Evidence—Memory*, 41 HARV. L. REV. 860, 861 (1928).

10. 295 N.C. 96, 244 S.E.2d 414 (1978).

11. *Id.* at —, 244 S.E.2d at 427-29.

12. *Id.* at —, 244 S.E.2d at 427.

13. After witnessing the double murder, the eyewitness traveled through several states with the defendant and became confused about the facts of the murders: “[S]ometimes I really knew I saw him kill them and sometimes I knew I hadn’t seen him; I just know, I couldn’t remember.” *Id.* at —, 244 S.E.2d at 417. Under a controlled setting of hypnosis, however, the eyewitness clearly remembered the details of the murders.

14. *Id.* at —, 244 S.E.2d at 415.

15. *Id.* at —, 244 S.E.2d at 427.

16. 263 S.C. 23, 207 S.E.2d 414 (1974). In *Pierce*, the court held that the testimony of the hypnotist as to what his subject stated while under hypnosis was inadmissible to prove the truth or falsity of the statement.

17. *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1950) (interrogation of the defendant while he was in a hypnotic state was inadmissible); *Jones v. State*, 542 P.2d 1316 (Okla. 1975) (results of the hypnosis were inadmissible to establish the truth of an accused's assertions).

witness.¹⁸ The fact that the witness had been hypnotized prior to trial bears only upon the credibility of the witness to recall events that have occurred—a factor which the jury may weigh in reaching its decision.¹⁹

The object of refreshing the witness's recollection is to permit the witness to testify orally from her present independent memory about a past event.²⁰ The court in *McQueen* found that hypnosis is an appropriate method for refreshing the witness's recollection.²¹ This presumably follows from the court's acceptance of the testimony of a witness who has been hypnotized prior to trial as reliable.

Under hypnosis, a person typically recalls events that are no longer in her conscious memory.²² Although the memory of the event is not available to the conscious mind, the latent memory of the past circumstances nevertheless remains unchanged in the subconscious mind.²³ When the witness is under hypnosis, the time period in which the event took place is not shortened. To the contrary, the hypnotized witness relives the original experience, refreshing her present conscious memory.²⁴

18. 295 N.C. at —, 244 S.E.2d at 427-29. See also *United States v. Adams*, 581 F.2d 193 (9th Cir. 1978); *State v. Jorgensen*, 8 Or. App. 1, 492 P.2d 312 (1971); *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), cert. denied, 395 U.S. 949 (1968), as examples of cases in which testimony of a witness who had been hypnotized prior to trial for the purpose of refreshing memory was admitted. See generally note, *Suggestibility and the Law*, 31 NEB. L. REV. 575, 590 (1952), for a discussion of the evidentiary aspects of hypnosis and its earlier contact with the criminal courts.

19. 295 N.C. at —, 244 S.E.2d at 427. The distinction between competency of the witness and credibility of the witness should be made. Competency to testify means that the witness has enough intelligence to make it worthwhile for the jury to hear her testimony and that the witness has the desire to tell the truth. See generally Rowley, *The Competency of Witnesses*, 24 IOWA L. REV. 482, 488 (1939). Credibility, on the other hand, relates to the witness's capacity to observe, recollect, and communicate truthfully. See generally Gardner, *The Perception and the Memory of Witnesses*, 18 CORNELL L.Q. 391, 409 (1933).

20. MCCORMICK, *supra* note 7, § 9, at 15.

21. 295 N.C. at —, 244 S.E.2d at 429. In reaching this conclusion, the court relied on *Jewett v. United States*, 15 F.2d 955 (9th Cir. 1926), a case in which several defendants were charged with conspiracy to possess and sell intoxicating liquors in violation of the National Prohibition Act. The Circuit Court of Appeals for the Ninth Circuit found:

It is quite immaterial by what means the memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some character. It is sufficient that by some mental operation, however mysterious, the memory is stimulated to recall the event, for when so set in motion it functions quite independently of the actuating cause.

Id. at 956. See also *Harding v. State*, 5 Md. App. 230, 246 A.2d 302, cert. denied, 395 U.S. 949 (1968) (hypnosis acceptable stimulus for refreshing witness's recollection).

22. Tietelbaum, *Admissibility of Hypnotically Adduced Evidence and the Arthur Nebb Case*, 8 ST. LOUIS U.L.J. 205 (1963).

23. See generally, J. GORDON, HANDBOOK OF CLINICAL AND EXPERIMENTAL HYPNOSIS (1967).

24. See generally H. ARONS, *supra* note 4; W. BRYAN, LEGAL ASPECTS OF HYPNOSIS (1962); A. ELLEN & D. JENNINGS, THE INTIMATE CASEBOOK OF A HYPNOTIST (1969); F. MARCUSE, HYPNOSIS: FACT AND FICTION (1959); TEITELBAUM, HYPNOSIS INDUCTION TECHNIQUES (1977).

Because hypnosis revives the memory of the witness, rather than altering it, its use does not raise problems commonly associated with lie detector tests.²⁵ In *McQueen*, the defendant attempted to analogize the use of hypnosis to the use of lie detector tests.²⁶ The North Carolina Supreme Court, however, concluded that hypnosis, unlike polygraph examinations, does not change the dormant memory of the witness.²⁷ Further, it found that the use of hypnosis, unlike polygraph examinations, does not invade the province of the jury in resolving the question of the witness's credibility or lack of it.²⁸

Although the testimony of a witness hypnotized prior to trial is reliable, a danger does exist that a suggestion made to a potential witness under hypnosis can lead to false recall of an experience.²⁹ This danger, however, is not so great that the witness's testimony refreshed through hypnosis is inherently untrustworthy.³⁰ The judicial system has adequate means to safeguard the use of hypnosis to refresh recollection.

Initially, the trial judge will determine if the hypnotic process was used solely to revive the latent memory of the witness or was used to influence the witness to voice assertions of fact not based on her own perception and memory.³¹ This judicial inquiry into the witness's refreshed memory may be conducted through asking the witness about her perception, retentiveness, imagination, and bias.³² If the judge then determines that the witness's memory was not merely refreshed, he may decline to permit the witness to testify.³³

Likewise, the adverse party should be entitled to make an independent investigation into the manner in which the witness was hypnotized.³⁴ Opposing counsel may cross-examine the witness to test the credibility of the witness's contention that her memory is refreshed, to

25. See McCORMICK, *supra* note 7, § 207.

26. 295 N.C. at —, 244 S.E.2d at 429. The defendant relied upon the supreme court's earlier decision in *State v. Faye*, 254 N.C. 704, 120 S.E.2d 169 (1961), which held it is error to admit in evidence in a criminal action the results of a lie detector test.

27. 295 N.C. at —, 244 S.E.2d at 429.

28. *Id.* at —, 244 S.E.2d at 429.

29. Hutchins & Slesinger, *Some Observations on the Law of Evidence—Memory*, HARV. L. REV. 860, 861 (1928).

30. See *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506, 509 (9th Cir. 1974): "We cannot accept Fairchild's argument that Wyller's testimony was rendered inherently untrustworthy by his having undergone hypnosis."

31. McCORMICK *supra* note 7, § 9, at 17.

32. Gardner, *supra* note 19, at 409.

33. McCORMICK, *supra* note 7, § 9, at 17.

34. *Id.*

question the witness about the hypnotic session itself, and to uncover any discrepancies between the present statements of the witness and any prior testimony. Moreover, the adverse party may examine the hypnotist concerning the procedures used by him. Finally, if the hypnosis session is recorded, the opposing party may examine the recording for indications of impermissible planting of facts into the mind of the witness during the hypnotic session.³⁵

It, therefore, appears that, under adequate judicial safeguards, hypnosis is an appropriate and reliable technique for refreshing a witness's recollection about past events. The trial judge may use his discretion in determining the issue of the admissibility of testimony of a witness hypnotized prior to trial. If he or the adverse party uncovers facts showing lack of reliability in the witness's testimony, the trial judge should properly exclude the testimony. If he finds no impropriety in either the hypnotic session or the witness's ability to recall the past events, he should admit the testimony and permit the jury to resolve the matter of the witness's credibility.

Mildred E. Otey

35. *Id.*