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Evidence -- Lay Opinion as to Whether a Person is Under the Influence of Narcotics

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can only be activated by the judiciary through the sentencing process. Failure here weakens the rehabilitative ideal. The judiciary must recognize its crucial role within the criminal process before this *ideal* can be transformed into reality.

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Evidence—Lay Opinion as to Whether a Person is Under the Influence of Narcotics

In *State v. Cook*[1], defendants appealed from a conviction of possession of a quantity of barbiturates without a prescription.[2] One of the defendants' objections related to the admission of the testimony of a police officer that, in his opinion, based on his observation, the defendants were under the influence of narcotics.[3] Apparently, the officer was not qualified as an expert. The court, however, did not feel this necessary. Relying on a long line of North Carolina cases[4] allowing a lay witness to give his opinion when, by reason of better opportunities for observation, he is in a better position than the jury to make a judgment, the court stated: "Seeing defendants in their drugged condition and observing their manner of speech and movement, the witness was better qualified than the jury to draw inferences and conclusions from what he saw and heard."[5] A rule permitting admission of lay opinion regarding people under the influence of narcotics ventures beyond the limits

[1] 273 N.C. 377, 160 S.E.2d 49 (1968).

[2] N.C. GEN. STAT. § 90-113.2(3) (1965).

[3] He testified that defendants were "sleepy . . . had glassy dilated eyes. . . ." They were "in a stupor . . . mumbling . . . staggering." 273 N.C. at 381, 160 S.E.2d at 52. He also mentioned the fact that there was no odor of alcohol about them. *Id.* This last fact implies that his opinion was at least partially arrived at by the process of elimination (*i.e.*, since they were not drinking, their conduct could be explained only by drugs). The accuracy of this method, standing alone, seems doubtful.

[4] Greensboro v. Garrison, 190 N.C. 577, 130 S.E. 203 (1925); State v. Brodie, 190 N.C. 554, 130 S.E. 205 (1925); Hill & Brooks v. Louisville & N.R.R. Co., 186 N.C. 475, 119 S.E. 884 (1923); Sheperd v. Sellers, 182 N.C. 701, 109 S.E. 847 (1921); Marshall v. Interstate Tel. & Tel. Co., 181 N.C. 292, 106 S.E. 818 (1921).

[5] 273 N.C. at 381, 160 S.E.2d at 52. It should be noted that the court said: "Seeing defendants in their *drugged condition. . . .*" *Id.* Whether or not defendants were drugged was one of the factual issues in dispute. The court, by this language, assumed what was to be proven. It was merely the policeman's opinion that defendants were in a "drugged condition."

imposed by courts in other jurisdictions, which require at least some experience with narcotics addiction before the witness can testify.[6]

The issue involved can be simply stated: What, if any, experience or expertise does a witness need before he can give his opinion as to whether someone was or was not under the influence of narcotics? Although some courts have been slightly stricter than others, the relatively few decisions have been generally uniform, even though they dealt not only with criminal law, but also with such diversified fields as wills,[7] divorce,[8] and slander.[9]

The California courts, contrary to most jurisdictions, have addressed themselves to this question with relative frequency. They have had no trouble admitting testimony if the witness is a medical expert. Thus, in *People v. Vignoli*,[10] the court permitted a doctor to draw an inference that the defendant had been under the influence of narcotics some five hours before the medical examination. But California decisions have not restricted the giving of opinions to such medical experts. In *People v. Mack*,[11] the court expressly rejected the notion that "the subject of narcotic addiction is a medical matter which should only be testified to by medical men, and that the use of non-medical persons to give their opinion is erroneous and prejudicial."[12] California courts consistently have allowed police officials, *with experience in narcotics*, to give their opinion.[13] However, where the witness is inexperienced with narcotics,

[6] The court did rely on two precedents from other states, Commonwealth v. Johnson, 27 Pa. D. & C.2d 301, 182 A.2d 541 (1962), *aff'd*, 198 Pa. Super. 51 (1962), and Miller v. Hamilton Brown Shoe Co., 89 S.C. 530, 72 S.E. 397 (1911), to support its decision. The cases are distinguishable, however, and were misconstrued insofar as the court attempted to have them support its opinion. See notes 25-29 *infra* and accompanying text. Thus, the court cited no precedent for its rule. Nor has a search of the cases disclosed another, with the possible exception of Ellis v. Ellis, 160 Miss. 345, 134 So. 150 (1931). See note 30 *infra* and accompanying text.

[7] Tucker v. Houston, 216 Ala. 43, 112 So. 360 (1927).

[8] Burt v. Burt, 168 Mass. 204, 46 N.E. 622 (1897).

[9] Miller v. Hamilton Brown Shoe Co., 89 S.C. 530, 72 S.E. 397 (1911).

[10] 213 Cal. App. 2d 855, 29 Cal. Rptr. 260 (1963).

[11] 169 Cal. App. 2d 825, 338 P.2d 25 (1959).

[12] *Id.* at 830, 338 P.2d at 29.

[13] People v. Gurrola, 218 Cal. App. 2d 349, 32 Cal. Rptr. 368 (1963) (not an abuse of discretion to allow officer with four years experience, during which time he had examined many narcotic addicts under all stages of influence, to give his opinion that defendant was under the influence of narcotics); People v. Hernandez, 188 Cal. App. 2d 248, 10 Cal. Reptr. 267 (1961) (officer with twenty hours of narcotics schooling who had lived two months with addicts permitted to testify); People v. Holland, 148 Cal. App. 2d 933, 307 P.2d 703 (1957) (officer experienced with narcotics had probable cause for arrest when

California courts have been strict in not permitting opinion evidence. The argument against allowing inexperienced opinion reached its logical extreme in *People v. McLean*,[14] where the court held it was error to permit a sixteen year old girl to testify that a cigarette given to her by the defendant contained marijuana. She had had no previous experience with marijuana and had based her opinion on her own reactions to the cigarette compared with what she had read and seen and with the effects of marijuana as described to her by other people.[15] It follows that an inexperienced bystander observing someone else would not be permitted to give his opinion either.

Other jurisdictions are in accord with California. In one early case,[16] the plaintiff attempted to obtain a divorce on the grounds of "gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs." The court permitted persons "who had been with [the alleged addict] for a long period of time and were familiar with her habits as to the use of morphine"[17] to testify that at various times she was under the influence of that drug. The court carefully restricted this exception to the opinion rule to situations where "a person has seen many times a certain condition resulting from the use of a certain drug. . . ."[18] In *Tucker v. Houston*,[19] the Alabama Supreme Court refused to allow an inexperienced person to testify that the testatrix was under the influence of morphine just before her will was made.

Federal courts have also had occasion to pass on this problem in deciding whether defendants were competent to stand trial. The United States Supreme Court noted in a recent decision that "whether or not

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he observed defendants under the influence of narcotics). See also note 24 *infra* and accompanying text.

[14] 56 Cal. 2d 660, 365 P.2d 403, 16 Cal. Rptr. 347 (1961), *cert denied*, 370 U.S. 958 (1962).

[15] *But cf.* People v. Robinson, 14 Ill. 2d 325, 153 N.E.2d 65 (1958), where the witnesses' testimony that they received heroin from the defendant was held admissible, but where, in contrast to *McLean*, the witnesses had used narcotics on many previous occasions. The court stated:

> [C]ourts have recognized that lay or inexpert witnesses may have, by use, observation, or experience, sufficient knowledge of the appearance, odor, taste, characteristics and effect of intoxicating liquor or drugs to enable them to identify and distinguish them. By analogy, we think it feasible that a narcotics addict would, as the People's expert testified, come to know a narcotics drug by its reaction upon him.

Id. at 332, 153 N.E.2d at 69.

[16] Burt v. Burt, 168 Mass. 204, 46 N.E. 623 (1897).

[17] *Id.* at 206, 46 N.E. at 623.

[18] *Id.*

[19] 216 Ala. 43, 112 So. 360 (1927).

petitioner was under the influence of narcotics would not necessarily have been apparent to the Trial Judge," and thus held that he did not possess the expertise to decide whether defendant was able to stand trial.[20] Likewise, a court of appeals in a 1966 decision[21] judicially noticed that the effects of narcotics are "idiosyncratic"[22] and added that "the symptoms and effects . . . produced by narcotics will often not be apparent to a lay observer, even a judge, but only to an expert."[23]

The North Carolina Supreme Court in the principal case cited three precedents dealing with this issue. It was admitted that one of the cases cited—*People v. Moore*[24]—was contrary to its holding. In that case, a policeman testified as to both alcoholic and narcotic insobriety. The California court distinguished between alcohol and drugs, declaring that no expertise was needed for alcohol, but that the witness had to qualify as an expert before he could testify that someone was under the influence of narcotics. However, the court cited two other cases—*Commonwealth v. Johnson*[25] and *Miller v. Hamilton Brown Shoe Co.*[26]— as supporting its opinion that no expertise is needed before one can testify as to whether someone is under the influence of drugs. On close analysis, these two cases do not support the court's holding. In *Johnson*, the policeman testifying was on special assignment to the Narcotics Unit of the Philadelphia Police Department and had had four years experience with addicts, having observed over one hundred persons under the influence of narcotics. In fact, the *Johnson* court expressly noted: "It must be pointed out that the arrest was made by a police officer experienced in, and familiar with, the narcotic problem and not by a casual citizen or a generally-trained police officer."[27] Likewise, in *Miller*, every witness who testified that the plaintiff[28] was under the influence of narcotics testified that they had previously seen persons under the influence of narcotics. The language of the *Miller* court is clear:

> That the opinion of a witness as to whether a person under his observation was drunk or sober is admissible will hardly be doubted.

[20] Sanders v. United States, 373 U.S. 1, 20 (1963).
[21] Hansford v. United States, 365 F.2d 920 (D.C. Cir. 1966).
[22] *Id.* at 923.
[23] *Id.* at 924.
[24] 70 Cal. App. 2d 158, 160 P.2d 857 (1945).
[25] 27 Pa. D. & C.2d 301, 182 A.2d 541 (1962), *aff'd*, 198 Pa. Super. 51 (1962).
[26] 89 S.C. 530, 72 S.E. 397 (1911).
[27] 27 Pa. D. & C.2d at 304, 182 A.2d at 543.
[28] Plaintiff was suing for slander, charging that the defendant had falsely said that plaintiff used narcotics. The witnesses were attempting to justify the defendant's accusation.

> On the same principle a witness *who has observed some of the numerous victims of the drug habit* may express his conclusion, based on observation, that the condition of a certain person was due to the influence of a drug.[29]

While the standard of expertise may have been relatively low in *Miller,* some degree of expertise was necessary before the witness could express his opinion. Thus, both *Miller* and *Johnson* appear contrary to the court's opinion in the principal case.

The only other case the court might have cited (though it did not) as supporting its opinion is *Ellis v. Ellis,*[30] where a lay person with no experience was permitted to give an opinion that the testator was *not* under the influence of drugs at the time he made his will. But this case is distinguishable in several respects: (1) Bromedia and liminol amytol (forms of sleeping pills) were the drugs involved; (2) the question was the mental capacity of the testator to make a will—not whether testator was under the influence of narcotics *per se*; (3) the witness testified that testator was *not* under the influence, an opinion which obviously would require less expertise than pinpointing the cause of a person's abnormal demeanor, that is, testifying that testator *was* under the influence of narcotics.

The court in the principal case placed great stress on the many North Carolina cases[31] reflecting the generally held rule that a non-expert may give his opinion as to whether someone was under the influence of intoxicating liquors.[32] The rationale for this rule is well stated by the New

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[29] 89 S.C. at 534-35 72 S.E. at 399 (emphasis added).

[30] 160 Miss. 345, 134 So. 150 (1931).

[31] There are many other cases besides the ones cited by the court: State v. Mills, 268 N.C. 142, 150 S.E.2d 13 (1966) (drunk driving); State v. Willard, 241 N.C. 259, 264, 84 S.E.2d 899, 902 (1954) (drunk driving); State v Warren, 236 N.C. 358, 359, 72 S.E.2d 763, 764 (1952) (drunk driving); State v. Dawson, 228 N.C. 85, 44 S.E.2d 527 (1947) (involuntary manslaughter); State v. Harris, 213 N.C. 648, 197 S.E. 142 (1938) (drunk driving); State v. Dills, 204 N.C. 33, 167 S.E. 459 (1933) (involuntary manslaughter); State v. Holland, 193 N.C. 713, 138 S.E. 8 (1927) (self defense); Moore v. Jefferson Stand. Life Ins. Co., 192 N.C. 580, 135 S.E. 456 (1926) (automobile accident insurance); Taylor v. Security Life & Annuity Co., 145 N.C. 383, 59 S.E. 139 (1907) (opinion regarding habits of temperance admissible).

[32] The court summarized the rule in State v. Dawson, 228 N.C. 85, 88, 44 S.E.2d 527, 529 (1947):

> A lay witness is competent to testify whether or not in his opinion a person was drunk or sober on a given occasion on which he observed him. The conditions under which the witness observed the person, and the opportunity to observe him, go to the weight, not the admissibility of the testimony.

York court in what is considered to be the leading case:[33] "A child six years old may answer whether a man (whom it has seen) was drunk or sober; it does not require science or opinion to answer the question, but observation merely. . . ."[34] The implicit assumption in this rationale is that even a six year old child probably has been exposed to enough drunks to know one when he sees one.[35] But it is doubtful that any lay person—six years old or sixty years old—has had enough contacts with dope addicts to easily recognize when one is under the influence of narcotics. Perhaps if the use of narcotics, legally or illegally, continues to become more commonplace, the day may come when the ordinary layman will have as much exposure to addicts as to drunks. But it is still safe to say that the ordinary layman has had little or no exposure to narcotic addiction and that therefore this exposure should be proven (by way of establishing expertise) and not be assumed as it is in the case of drunkenness.

It should be noted that it is no answer to this problem to argue, as the court did, that "the witness was better qualified than the jury to draw inferences and conclusions from what he saw or heard."[36] A witness, for instance, to a chemical explosion may have been in a better position than the jury to draw inferences, but unless the witness had some knowledge of chemistry, he would be no more able than the jury to conclude that it was some careless act of the chemist rather than an unavoidable accident which caused the misfortune. Likewise, a person who has no knowledge or experience of how persons act while under the influence of narcotics is no more qualified than the jury to opine the cause of the unusual behavior. The witness would be in a better position than the jury to state that the persons were acting abnormally, and he should be allowed to do so; but unless he has knowledge of the symptoms of drug-taking, he should not be allowed to express the conclusion that the drugs caused the abnormal behavior.

It is questionable whether the North Carolina Supreme Court actually intended to pronounce a rule contrary to almost all precedent from other jurisdictions. Even if the admission of this non-expert testimony had been held to have been error, it probably would have been non-prejudical

[33] People v. Eastwood, 14 N.Y. 562 (1856). *See also* Ackerman v. Kogut, 117 Vt. 40, 44, 84 A.2d 131, 134 (1951).

[34] 14 N.Y. at 566.

[35] Query whether it could be argued that the presumption inherent in this rule is rebutable if the witness, because of age or lack of contacts with society, had never been in contact with intoxicated persons.

[36] 273 N.C. at 381, 160 S.E.2d at 52.

error in view of the great amount of circumstantial evidence supporting the conviction.[37] For this reason the court may not have given much thought to the question. If this case had turned on the opinion evidence, and if the court had not misconstrued two cases it thought to be good precedent, it is possible that the court would have reached a contrary result. But until the issue is reconsidered in a future case, what remains is the rule that in North Carolina an ordinary layman is qualified to give his opinion as to whether a person is under the influence of narcotics just as he has always been able to do with regard to alcohol.

RICHARD J. BRYAN

Labor Law—Expulsion From a Union as an Unfair Labor Practice

The question whether a labor union has the power to expel a member for filing an unfair labor practice charge with the National Labor Relations Board, without first exhausting internal union processes, was considered in *NLRB v. Industrial Union of Marine & Shipbuilding Workers.*[1] The United States Supreme Court, in effect, said that expulsion of a member for filing a charge with the Board, even where his job status was not affected by the expulsion, may be itself an unfair labor practice. Such conduct by a union, because it is considered to restrain and coerce union members, is prohibited by section 8(b)(1)(A) of the National Labor Relations Act, which provides:

> It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .[2]

Although the Act generally permits a union to control its internal matters, the Court concluded that "where a union penalizes a member for filing an unfair labor practice charge with the Board, other considerations of

[37] Circumstantial evidence has been held in many cases to support a charge of possession of narcotics. *See* Carroll v. State, 90 Ariz. 411, 368 P.2d 649 (1962); People v. Anitista, 129 Cal. App. 2d 47, 276 P.2d 177 (1954); People v. Robinson, 14 Ill. 2d 325, 153 N.E.2d 65 (1958); State v. Worley, 375 S.W.2d 44 (Mo. 1964).

[1] 391 U.S. 418 (1968).

[2] 29 U.S.C. § 158(b)(1)(A) (1964).