Tulsa Law Review

Volume 1 | Issue 2

1964

Practice and Procedure: Submission of a Plaintiff to Physical Examination by Order of Trial Court

William H. Bruckner

In *People v. Whitlock*[19] the court said that before the evidence of trailing by a bloodhound could be introduced, there must be a testimonial sponsor to lay a proper foundation for its introduction. It must be shown that the dog was trained and tested in the tracking of human beings, by experience had been found reliable in such cases, and that the dog was laid on the trail, whether visible or invisible, at a point where the circumstances clearly showed the guilty party had been. The reliability of the dog must be proved by persons having personal knowledge of his tracking ability and may be strengthened by proof of pedigree, purity of blood, or the exalted standing of his breed and performance.[20]

In *Buck v. State*[21] the Oklahoma Court adopted the above precautionary methods of admitting the evidence and went further by saying that before introduction of evidence of trailing is heard, the trial court should hear testimony of witnesses out of the presence of the jury, as to blood, training and experience and determine as a matter of law whether it is such as to permit the introduction of the evidence to the jury.

Courts adhering to the view that bloodhound evidence is admissible concede that such evidence is to be accepted with caution and is not, under any circumstance, to be regarded as conclusive evidence of guilt.[22] It is generally held that this class of evidence is cumulative or corroborative only and not sufficient by itself to support a conviction.[23] Those jurisdictions where such evidence is excluded altogether, statements are frequently found that bloodhound evidence is of little probative value and is not looked upon with favor.[24]

The use of bloodhound or police dog evidence would be more probative and occupy a more useful function in criminal courts if it were limited to cases where the criminal had, as Wigmore suggests, left behind some identifying object. Where the courts depart from this and allow police dogs to indiscriminately select defendants by sniffing microscopic particles of effluvia, the evidence comes very near to passing Justice Douglas' "Puke Test."

Don E. Cummings

PRACTICE AND PROCEDURE: SUBMISSION OF A PLAINTIFF TO PHYSICAL EXAMINATION BY ORDER OF TRIAL COURT

In late 1962, the Supreme Court of Oklahoma overruled more than a half century of prior decisions upon the question of whether

[19] People v. Whitlock, 183 App.Div. 482, 171 N.Y.S. 109 (Sup.Ct. 1918).
[20] *Ibid.*
[21] Buck v. State, 77 Okla. Crim. 17, 138 P.2d 115 (1943).
[22] State v. Fixley, 118 Kan. 1, 233 Pac. 796 (1925).
[23] Meyers v. Commonwealth, 194 Ky. 523, 240 S.W. 71 (1922).
[24] Hayes v. Commonwealth, 211 Ky. 716, 277 S.W. 1004 (1925); Fisher v. State, 150 Miss. 206, 116 So. 746 (1928).

a trial court can order a plaintiff, in an action for personal injuries, to submit to a physical examination. In *Witte v. Fullerton, 376 P.2d 244 (Okla. 1962)*, the Oklahoma court held that upon a timely request from the defendant, the trial court had the discretionary power to require the plaintiff to submit to a physical examination. Thus, Oklahoma adopted the rule of most jurisdictions.[1]

Prior to the *Fullerton* decision, the Oklahoma courts had followed the rule established in 1903 in *City of Kingfisher v. Altizer*,[2] that held that the courts of this state could not require a plaintiff to submit to a medical examination either before or during the trial. This view stemmed from a Supreme Court decision in *Union Pac. Ry. v. Botsford*.[3]

In *Botsford*, the Court held that a federal court could not order the physical examination of a party in the absence of any statutory authority. The reasoning of the majority stressed the basic idea of the sanctity of the person. Justice Gray, writing for the majority, said: "No right is held more sacred or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . ."[4]

After the *Botsford* and *Altizer* decisions, the Oklahoma courts continued to adhere strictly to the rule established in those cases;[5] even though many jurisdictions began to adopt the opposite of the decision of the *Botsford* case by statute,[6] or by the decisions of their highest courts.[7] They made only one exception to this rule. In the case of *Jewel Tea Co. v. Ransdell*,[8] the court held that if a plaintiff offers his body into evidence, then he may not thereafter decline to submit to a physical examination.[9]

[1] 8 WIGMORE, EVIDENCE § 2220 (McNaughton Rev. 1961); See Annot., 51 A.L.R. 183 (1927); supplemented by 108 A.L.R. 142 (1937).

[2] 13 Okla. 121, 74 Pac. 107 (1903).

[3] 141 U.S. 250 (1891).

[4] *Id.* at 251.

[5] Oklahoma Ry. v. Thomas, 63 Okla. 219, 164 Pac. 120 (1917); Atchison T. & S.F. Ry. v. Melson, 40 Okla. 1, 134 Pac. 388 (1913).

[6] *Eg.*, ARIZ. REV. CODE ANN. § 4468 (Struckmeyer, 1928); FLA. COMP. GEN. LAWS § 7054 (1927); N. J. REV. STAT. § 2.99-1 (1937); WASH. REV. STAT. ANN. §§ 1230-1231 (Remington, 1932).

[7] Johnston v. Southern Pac. Co., 150 Cal. 535, 89 Pac. 348 (1907); Brown v. Hotzler Bros. Co., 152 Md. 39, 136 Atl. 30 (1927); S.S. Kresge Co. v. Trester, 123 Ohio St. 383, 175 N.E. 611 (1931); Carnine v. Tibbetts, 158 Ore. 21, 74 P.2d 974 (1937).

[8] 180 Okla. 203, 69 P.2d 69 (1937).

[9] *Id.* at 205, 69 P.2d at 71 the court stated: "While the courts are in disagreement as to the authority to require a plaintiff to submit to an examination in the first instance, they are in practical unanimity with respect to the rule to be followed when the plaintiff has offered a portion of his body in evidence, and hold that the same then becomes an exhibit in the case, and that within reasonable limitations the opposite party has the right to make such inspection of it as will enable him to explain, criticize or impeach its value as evidence and to that end have it examined by experts."

The adoption of Federal Rule 35 (a) in 1938,[10] and the decision upholding its constitutionality,[11] seemed to cause the court to adopt a new course. In subsequent cases, where a defendant sought a physical examination of the plaintiff the court either affirmed, without discussion, citing *Altizer* and similar cases,[12] or the court evaded the question by stating that the request of the defendant had come too late in the proceedings.[13]

In 1960, in *Transport Ins. Co. v. McAlister*,[14] the court approached the problem from the position that the court had no inherent power to order a plaintiff to submit to a physical examination. The court said that this problem was one to be resolved by the Oklahoma legislature rather than by the courts.

Justice Jackson, in a concurring opinion, gave a clear indication of what the law would eventually be in Oklahoma. He agreed with the majority rule on the question, and added that the main reason for the minority rule had almost completely disappeared over the years.[15] Justice Jackson also stated that in the future the court should apply the majority rule in similar cases.[16]

Two years later the court was confronted with the same problem in the *Fullerton* case. The defendant in this action was denied his request that the trial court require plaintiff to submit to a physical examination by a physician to be selected by the court. The defendant based his appeal on the argument that without such examination he could not determine the true nature and extent of plaintiff's injuries.

The author of the opinion, Chief Justice Williams, cited the majority rule and agreed that it was the better view. The court withdrew the language in the *McAlister* case, that a changing of the rule presents a legislative and not a judicial question, and specifically overruled the *Altizer* case.[17]

But the court refused to reverse the trial court in this case for two reasons. First, the court felt the *McAlister* case did not give sufficient warning to the attorneys and judges of this state that a change of holding by the court would occur in the near

[10] FED. R. CIV. P.35(a), which provides: "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physiican . . . ."

[11] Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

[12] Law v. Corsin, 206 Okla. 151, 244 P.2d 831 (1952).

[13] Oklahoma Transp. Co. v. Stine, 280 P.2d 1020 (Okla. 1955); Phillips Petroleum Co. v. Myers, 202 Okla. 151, 210 P.2d 944 (1949). In this later case, Justice Gibson, in a dissent, spoke in favor of the adoption of the majority rule.

[14] 355 P.2d 576 (Okla. 1960).

[15] *Id.* at 582.

[16] *Id.* at 583.

[17] Witte v. Fullerton, 376 P.2d 244, 248 (Okla. 1962).

future; and secondly, that the trial court should not be reversed for merely relying upon former decisions of this court.[18]

The shortcoming of the *Fullerton* case is not that the court failed to reverse the trial court, but that the court missed an excellent opportunity to establish some guide lines within which the trial courts should exercise their discretion. In practically every jurisdiction which has adopted the majority rule two main problems have had to be resolved. First, what constitutes a timely request by the defendant for a physical examination? Secondly, may the defendant designate the particular physician to examine the plaintiff?

Had the court reversed the trial court in the *Fullerton* case, it would have had to rule on the question of whether the request of the defendant was timely. The request in the *Fullerton* case was tendered to the trial court two weeks before the scheduled trial. This gave the court an excellent fact situation in respect to the question of what constitutes a timely request.

Prior to the *Fullerton* case, the court held in *Phillips Petroleum Company v. Myers*[19] and in *Oklahoma Transportation Company v. Stine*.[20] that defendant's request for a physical examination of the plaintiff was tendered too late in the proceedings.

In the *Myers* case, defendant made his request after the commencement of the trial and the court, in affirming the overruling of the request, stated "if such an application, as here, is made after commencement of the trial, the burden of showing a good excuse for the delay rests upon the applicant and the application will rarely be approved when made after the commencement of the trial."[21]

In the *Stine* case, the court considered an identical situation as the *Myers* case, but held the request untimely upon different grounds. In this case, the last pleading had been filed two years before the commencement of the trial and the court felt that the defendant had ample time to request a physical examination of the plaintiff.[22]

From the *Myers* and *Stine* cases, it can be concluded that any defendant, requesting a physical examination of the plaintiff after the commencement of the trial, will have to show extremely good cause in order to overcome the untimely nature of his request.

Since *Fullerton*, another case has been decided in Oklahoma in which the question of timeliness of request was indirectly re-

[18] *Ibid.* Chief Justice Williams said: "While we agree with the majority view in principle, we determine that the judgment of the trial court involved in this appeal should not be reversed because of such court's failure to follow such view. In so doing the trial court merely relied upon the former decisions of this court and such action by the trial court is affirmed."

[19] 202 Okla. 151, 210 P.2d 944 (1949).

[20] 280 P.2d 1020 (Okla. 1955).

[21] 202 Okla. at 154, 210 P.2d at 949.

[22] 280 P.2d at 1024.

ferred to by the court. In *Ellsworth v. Brown*,[23] the court was confronted with the problem of a trial court's granting defendant's request for a physical examination prior to the *Fullerton* decision.

In *Ellsworth*, the request of the defendant was tendered at the pre-trial conference. The trial court granted this request and the supreme court, in deciding the appeal, did nothing more than note that the request was tendered at the pre-trial conference.[24] The court had an excellent opportunity to avoid the major issue raised on appeal by stating that the defendant's request came too late in the proceedings. The fact that the court did not do this might indirectly infer that a request for a physical examination, tendered at the pre-trial conference, is not untimely in the proceedings. But, the only conclusion that can be drawn from *Fullerton* and *Ellsworth*, is that timeliness is still a question to be resolved in future decisions.

In *Fullerton*, the defendant called upon the trial court to designate a physician to examine the plaintiff. On appeal, the court did not comment as to how a physician should be selected. May a defendant, in his motion, designate a physician to perform the examination? This question will certainly be raised in Oklahoma in the future as there is a diversity of views upon it.

The prevailing view, if there is one, is that the party who moves for the physical examination has no absolute right to the choice of physician; but, in lieu of an objection, the court will appoint the physician suggested by the moving party.[25] The basis of this principal is that the physician, by the very nature of his profession, will make a fair and impartial examination, regardless of which party requests the examination.

But, in a recent North Carolina case, the court stressed that the trial court should not name a physician suggested by either party, but should make an independent choice.[26] The court reasononed that by this procedure it would avoid the appearance of favoritism to either party.

Not only will the Oklahoma courts have to decide how to select a physician to perform a physical examination, but they may have to decide whether one or more physicians may perform the examination.[27] Clearly, this is the age of specialization in medicine and seldom do serious injuries result to a person that do not require consultation and treatment by more than one specialist. At the trial, plaintiff quite naturally brings forth all the specialists that have examined and treated him. Should a defendant be burdened

[23] 387 P.2d 634 (Okla. 1963).
[24] *Id.* at 636.
[25] The Italia, 27 F.Supp. 785, 786 (E.D.N.Y. 1939).
[26] Helton v. J. P. Stevens Co., 254 N.C. 321, 118 S.E.2d 791 (1961).
[27] Red Top Cab & Baggage Co. v. Grady, 90 So.2d 871 (Fla.App. 1958). The defendant requested that an examination be performed by an orthopedist and a neurosurgeon, but the court held that it would be an abuse of discretion to permit both to examine the plaintiff.

and handicapped by being allowed to have only one physician examine the plaintiff?

The problem of the selection of a physician was partially resolved in *Ellsworth v. Brown,* where the court commented at great length upon the selection of a physician. The defendant requested that he be permitted to name the physician to conduct the examination.[28] After apparent spirited discussion, the trial court decided to submit a list of five physicians to both parties. Later, when the parties failed to agree upon a physician, the court appointed a physician to conduct the examination.[29] On appeal, the court gave tacit approval to this method of selecting a physician.[30] Thus, the court established one guide line for trial courts to follow in the future.

However, there are two facets of this case that lessen the court's statements, regarding the selection of a physician. First, the major issue, on appeal, was whether the trial court's granting of a physical examination materially affected the substantial rights of the plaintiff. The method of selection of the physician was not directly involved.[31]

Secondly, the plaintiff chose to exhibit his injury from the witness stand; thus, the rule of the *Ransdell* case was applicable and the court felt that it was not important that the physician was chosen to examine the plaintiff before he exhibited his injuries.[32] Therefore, this act of the plaintiff, coupled with the major issue of the appeal, tempers the court's language regarding the selection of the physician.

Ellsworth, like *Fullerton,* has its incomplete aspect. The court again became too preoccupied with the overruling and the explaining of previous decisions[33] and therefore, missed an opportunity to comment on the major questions involved in a defendant's request for a physical examination. But, it is encouraging to note that the court did take the opportunity to comment upon the selection of the physician. Perhaps, these comments were an indication that the court intends to resolve the question of timeliness and selection of a physician in the near future.

William H. Bruckner

[28] 387 P.2d at 636.
[29] *Ibid.*
[30] *Id.* at 638.
[31] *Id.* at 635.
[32] *Id.* at 637.
[33] *Id.* at 635-636.