Louisiana Law Review

Volume 19 | Number 4
June 1959

Evidence - Prejudicial Effects of Unanswered Question

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EVIDENCE — PREJUDICIAL EFFECTS OF UNANSWERED QUESTION

During the course of a trial for murder the district attorney asked a state's witness whether or not the defendant had been given a lie detector test. Defense objected to the question and the district attorney stated that he would "withdraw it if any objection were made." The objection was sustained, but a motion by the defense for a mistrial on the ground that the prosecution had, in effect, commented on the accused's failure to take the stand was overruled. The court did not instruct the jury relative to the matter and the district attorney's question was never answered. On appeal from conviction, *held*, affirmed. Although it is reversible incurable error for the district attorney to call to the attention of the jury by direct statement or plain inference the fact that the defendant has not testified, the question here involved cannot be construed as a reference to that fact. *State v. Stahl*, 236 La. 362, 107 So.2d 670 (1958).

The majority of common law jurisdictions prohibit comment on the failure of an accused to testify.[1] A minority of the states hold that such comment cannot be cured by instruction from the court.[2] This latter position has been adopted by Louisiana.[3] Although the argument has been made that the prohibition against commenting on the accused's failure to take the stand was abolished with the enactment of the Louisiana Code of Criminal Procedure in 1928,[4] the Louisiana Supreme Court has found such a

second offense was not consummated when the former prosecution was initiated; or

"(2) the former prosecution was terminated, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted."

1. 1 WHARTON, CRIMINAL EVIDENCE §§ 146, 147 (12th ed. 1955). See Annot., 84 A.L.R. 784 (1933).

2. Rowe v. State, 87 Fla. 17, 98 So. 613 (1924); Quinn v. People, 123 Ill. 333, 15 N.E. 46 (1888); State v. Cameron, 40 Vt. 555 (1868); Elliott v. Commonwealth, 172 Va. 595, 1 S.E.2d 273 (1939); 1 WHARTON EVIDENCE § 146 (12th ed. 1955).

3. State v. Hoover, 219 La. 872, 54 So.2d 130 (1951); State v. Richardson, 175 La. 823, 144 So. 587 (1932); State v. Sinigal, 138 La. 469, 70 So. 478 (1915); State v. Marceaux, 50 La. Ann. 1137, 24 So. 611 (1898); *The Work of the Louisiana Supreme Court for the 1951-1952 Term — Criminal Precedure*, 13 LOUISIANA LAW REVIEW 326, 337 (1953).

4. The argument is: (1) that Act 29 of 1886, Act 185 of 1902, and Act 41 of 1904, in dealing with the competency of the accused as a witness, contained a provision that his failure to testify should not be construed for or against him; (2) further that Act 157 of 1916 provided that the neglect or refusal of the accused to testify should create no presumption against him; (3) since Article 461 of the Code of Criminal Procedure superseded the 1916 act and provides simply that "a

prohibition in the State Constitution.[5] The motion for a mistrial in the instant case was grounded upon the case of *State v. Hoover*.[6] In that case the district attorney remarked that the manner in which the defendant observed and discussed with counsel certain photographs of the scene of the crime showed that he was familiar with the actual scene, rather than just the photographs. The opinion, authored by Justice Moise, found no uncertainty in the implication which flowed from the district attorney's statements. The court said that the remarks, though made without malice, "infringed the defendant's constitutional privilege against circumstantially forced self incrimination, which the defendant had to cure, if he so desired, by the waiving of his constitutional right not to take the stand, as provided in Article 1, Section 11 of the Constitution of 1921, and likewise by the provisions of the Criminal Code, Art. 461."[7] However, only three of the seven Justices were of the opinion that the remarks made by the district attorney were a comment on the defendant's failure to take the stand. Other members of the court based their decision to grant a new trial on other grounds.[8] It follows, therefore, that the *Hoover* opinion is of questionable authority to sustain a result contrary to that reached in the instant case. It is submitted that the instant case was correctly decided on the point that there was no comment on the failure of the defendant to

person so charged shall, at his own request, but not otherwise, be deemed a competent witness," (4) therefore the prohibition against commenting on an accused's failure to take the stand was thereby removed. An attempt further to strengthen this argument is made by citing paragraph 15 of the Redactor's explanation of Article 461 in LA. CODE CRIM. LAW AND PROC. ANN. xvii (Dart, 1942), wherein the Redactors stated that their intention was to eliminate the rule prohibiting the district attorney from commenting on the accused's failure to take the stand. See Justice Hawthorne's dissenting opinion in State v. Hoover, 219 La. 872, 54 So.2d 130 (1951), and his concurring opinion in State v. Bentley, 219 La. 893, 54 So.2d 137 (1951), to this effect. However, it would seem that the fallacy of this argument is aptly demonstrated in a noteworthy opinion by Chief Justice Fournet in the *Bentley* case, in which he points out that, although the Redactors sought to eliminate the rule prohibiting comment by placing express grants to that effect in Articles 384 and 385, the legislature rejected and deleted the portions of these articles designed to accomplish the Redactor's purpose.

5. LA. CONST. art. I, § 11; State v. Hoover, 219 La. 872, 54 So.2d 130 (1951).

6. 219 La. 872, 54 So.2d 130 (1951).

7. *Id.* at 873, 54 So.2d at 131.

8. Chief Justice Fournet delivered a separate concurring opinion in which he agreed that the accused was entitled to a new trial. Justice McCaleb, in concurring, also was of the view that the accused was entitled to a new trial, but on the ground that the district attorney's remarks were an expression of his belief of the defendant's guilt, based upon the defendant's demeanor and not solely upon evidence adduced at the trial. In dissenting from a refusal to grant a rehearing, Justice Hamiter was in accord with the views expressed by Justice McCaleb and felt that a rehearing was necessary, since a majority of the court did not agree that comment on the accused's failure to testify had been made. Justice Hawthorne dissented.

testify. In this respect the decision is in line with other prior Louisiana jurisprudence.[9] However, questions such as the one asked in the instant case give rise to other noteworthy problems.

The earliest appellate decision dealing with the admissibility of the results of a lie detector test is *Frye v. United States*,[10] decided by the Court of Appeals for the District of Columbia in 1923. In that case the court held that the lie detector had not yet gained sufficient scientific recognition to justify the admission of expert testimony in connection with its use. With rare exception[11] subsequent cases have followed this result.[12] It has been suggested that the reasons given for excluding the result of the lie detector test in the *Frye* case are not accurate today.[13] However, the overwhelming weight of authority is still to the effect that the results of lie detector tests are inadmissible.[14] Innumerable cases at common law have applied the principle that inadmissible evidence cannot be laid before a jury under the guise of a question propounded to a witness.[15] When the result is to plant

9. In State v. Delatte, 219 La. 715, 53 So.2d 906 (1951), the defendant was on trial for theft of cattle. In his closing argument the district attorney stated: "He can't explain by a single witness that has taken the witness stand where he got those cattle from." On appeal the Supreme Court found no comment on the failure of the defendant to testify. In State v. Bentley, 219 La. 893, 54 So.2d 137 (1951), the district attorney's remark that the evidence was uncontroverted and uncontradicted was found to be proper argument. The statement made in State v. Martinez, 220 La. 899, 57 So.2d 888 (1952) appears particularly difficult to distinguish from that in the *Hoover* case. The defendant was on trial for burglary and in his opening statement the district attorney declared: "Where was Louis Bommarito that night? Nobody knows but Louis Bommarito and the police officers." The Supreme Court found no direct or indirect reference to the failure of the defendant to take the stand.

10. 293 Fed. 1013 (D.C. Cir. 1923).

11. See People v. Houser, 84 Cal. App.2d 686, 193 P.2d 937 (1948), where the results were admitted upon stipulation of both parties. In People v. Kenny, 167 N.Y. Misc. 51, 3 N.Y.S.2d 348 (1938), an unappealed trial court case, the results of a lie detector test were admitted over the objection of opposing counsel. However, this case must be considered in the light of a later New York trial court case, People v. Forte, 167 N.Y. Misc. 868, 4 N.Y.S.2d 913 (1938), where the court refused to admit the results of a lie detector test.

12. Colbert v. Commonwealth, 306 S.W.2d 825 (Ky. App. 1957); Lusby v. State, 217 Md. 191, 141 A.2d 893 (1958); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495 (1951). See Annot., 23 A.L.R.2d 1306 (1952).

13. See Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 TENN. L. REV. 711 (1953), where Dean Wicker comments on the finding in the *Frye* case. "This statement is undoubtedly an accurate description of the status of lie detector techniques in 1923. It is probably also accurate for the 1930's and the early 1940's. However, it appparently does not accurately portray present day standards, nor the developments likely to be projected within the next decade or two." *Id.* at 723.

14. See note 13 *supra*.

15. See 6 WIGMORE, EVIDENCE § 1808 (3d ed. 1940) and Annot., 109 A.L.R. 1089 (1937), and cases cited therein. In Michelson v. United States, 335 U.S. 469 (1948), Justice Jackson points up the principle in noting that counsel was not "asking a groundless question to waft an unwarranted innuendo into the jury box." It is interesting to note in this connection that the Canons of Ethics of

undue prejudice in the minds of the jury, a new trial will be granted. The cases which have been reversed for such conduct of counsel fall into two general categories: (1) when the matter contained in the question is so clearly inadmissible that it would impeach "the legal learning of the attorney to say that he did not know that they were manifestly improper and wholly unjustifiable,"[16] or (2) when the inadmissibility of the matter alluded to is not so clear, but counsel has been forewarned by an admonishment from the court and persists in pursuing the same line of questioning.[17] In both instances, of course, the court must determine if the accused has suffered sufficient prejudice to warrant a new trial. The cases by no means afford a clear-cut rule as to when instruction by the court will remove the prejudicial effects flowing from an improper question. However, in the final analysis the result should turn on whether or not the accused has suffered incurable prejudice. Improper remarks of counsel are generally held to be cured by instruction from the court,[18] except in extreme cases.[19] Another point which should be considered in determining the prejudice suffered by a defendant from an improper question is the effect his own objection might have in the minds of the jury. It goes without saying that an objection will frequently emphasize the fact suggested by the question more effectively than if the objection were not made.[20]

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the Louisiana State Bar Association provide that "a lawyer shall not offer evidence which he knows the Court should reject, in order to get the same before the jury by arguments upon any point not properly calling for determination by him." ARTICLES OF INCORPORATION OF THE LOUISIANA STATE BAR ASSOCIATION, art. 14, § 22.

16. State v. Rhys, 40 Mont. 131, 132, 105 Pac. 494, 496 (1909); People v. Jones, 293 Mich. 409, 292 N.W. 350 (1940). See Annot., 109 A.L.R. 1089 (1937).

17. 6 WIGMORE, EVIDENCE § 1808 (3d ed. 1940).

18. See Annot., 84 A.L.R. 784 (1933). In Lusby v. State, 217 Md. 191, 141 A.2d 893 (1958), the prosecutrix in an incest case gave an affirmative answer when questioned by the district attorney as to whether she had taken a lie detector test. An objection to the question was sustained and the court charged the jury to disregard. On appeal the instruction was held to have cured any prejudice suffered by the accused. The objection made by the defense in the *Lusby* case put the accused in not much better a position than the defendant in the instant case. The jury would certainly be justified in inferring from defense's objection that he did not desire the results of the tests revealed. This would ground the inference that the tests were unfavorable to the accused. It is submitted that defense counsel in the *Lusby* case would have profited more by making no objection at the time. The question had already been answered and the objection only served as the basis of the aforementioned inferences. Conversely, defense in the instant case could not afford such tactics. The question had *not* been answered, and had he not objected to the question when asked he would probably have been deemed to have waived his objection.

19. See Comment, 10 LOUISIANA LAW REVIEW 486 (1950), which deals with the two most common types of incurable remarks in Louisiana: (1) a comment on the defendant's failure to testify, and (2) appeals to racial prejudice.

20. For an illustration of the problem, see Berry v. State, 10 Ga. 522 (1851),

An analysis of the instant case will aid in determining the prejudice suffered by the defendant from the unanswered question of whether he had been given a lie detector test. As a practical matter there are two inferences which a jury might draw from such a question: (1) that the defendant has been requested to submit to a lie detector test and has refused, or (2) that the defendant has been given a lie detector test and is not willing to reveal the results thereof. Either inference would take its toll in prejudice against the accused. If the inferences are unfounded, then the accused has a choice of either taking the stand to correct them, in which case he may be cross examined upon the whole of the case and impeached as any other witness,[21] or remaining silent and suffering the prejudicial effects of the question. A question such as that asked in the instant case may achieve undesirable results even before trial. Having knowledge that the question may be asked, the accused would be in a somewhat better position if he agreed to submit to a lie detector test if so requested. Were the accused to refuse the test and the question were asked, the undesirable inference of the defendant's refusal to submit to the test could not be cured, even by his taking the stand. Further, the defendant's objection to the question would only serve to implant the matter more firmly in the minds of the jury. On the other hand, if the defendant agrees to take the test and the results are favorable to him, then in all probability the prosecution will refrain from referring to the test. If the results of the test are unfavorable to the accused, he may still escape the damaging effect of his own objection, because an affirmative answer to the question would dispel any inference as to his refusal to take the test. Only in the event the prosecution goes further and attempts to introduce the results of the test would the objection giving rise to the above noted inferences have to be interposed.

It is submitted that the court correctly concluded that the question in the instant case did not amount to a comment on the defendant's failure to take the stand. However, in the opinion of the writer the case should not be interpreted as disposing of the other issues presented in this Note. They were not stated as

where Lumpkin, J., in commenting upon a statement by the prosecutor that the defendant's slave had confessed to his master's guilt, stated that the judge must interfere without an objection by the opposing counsel; because the latter's objection is likely to be met by the offending counsel with the sarcastic turn, "Yes, gentlemen, I have touched a tender spot, the galled jade will wince."

21. LA. R.S. 15:376, 462 (1950).

the basis of the objection or the motion for a mistrial in the lower court and were not urged to the Supreme Court on appeal.

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LABOR LAW — CONFLICT BETWEEN STATE ANTI-TRUST LAW AND COLLECTIVE BARGAINING AGREEMENT

Plaintiff, a union member, brought an action under the Ohio anti-trust statute[1] to restrain a union and common carriers from carrying out that part of a collective bargaining agreement which prescribed minimum rentals for vehicles leased from drivers. Plaintiff drove equipment which he owned and leased to carriers on terms and conditions that differed substantially from those of the collective bargaining agreement. Plaintiff alleged that the fixing of prices at which the vehicles could be leased violated the state anti-trust law by placing restrictions on vehicles used in commerce. The defendant contended that the contract provisions were to protect against leasing vehicles from an owner-driver at a rental less than the actual cost of operation, thereby making the driver apply part of his negotiated wage to the operating expenses of the vehicle. The Ohio courts enjoined the parties from giving effect to these minimum rental provisions on the basis that the regulation was price fixing, which violated the Ohio anti-trust law.[2] On certiorari to the United States Supreme Court, *held*, reversed. The objective of the minimum rental provision was the protection of the negotiated wage scale. The Ohio anti-trust law could not be applied to prevent the contracting parties from carrying out their agreement on a subject matter as to which the federal law directs them to bargain. *Local 24, Teamsters v. Oliver*, 79 S. Ct. 297 (U.S. 1959).

The power to regulate interstate commerce is delegated to the federal government by the Constitution,[3] and under this power Congress has regulated the field of labor-management relations.[4] Congress has not completely occupied the field, but has

1. OHIO REV. CODE § 1331.01 (1953).
2. Appeal to the Ohio Supreme Court was dismissed for want of a debatable constitutional question. Local 24, Teamsters v. Oliver, 167 Ohio St. 299, 147 N.E.2d 856 (1958).
3. U.S. CONST. art. I, § 8; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
4. Wagner Act, 49 STAT. 449 (1935), 29 U.S.C. §§ 151-166 (1952); Taft-Hartley Act, 61 STAT. 136 (1947), 29 U.S.C. §§ 141-188 (1952). See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).