Journal of Criminal Law and Criminology

Volume 46 | Issue 4 Article 16

1956

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POLICE SCIENCE LEGAL ABSTRACTS AND NOTES

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Whether Police Officer is Liable in Tort for Alleged Wrongful Shooting is a Question for the Jury—Police officers were called by a bartender to stop a fight between two men who had been drinking. When the officers arrived the men were seated quietly drinking beer. According to the plaintiff's witnesses, the officers proceeded to the table where the men were seated and began to pummel one of the men with their night sticks. Drawing back from the victim, one of the officers shot the man to death. Subsequently the plaintiff, as sole survivor of the intestate, brought an action against the two police officers and the City of Yonkers for wrongful death of the deceased, alleging in separate counts that the officers were negligent, that they had committed an assault and battery upon the deceased and that the city was guilty of having negligently employed unreliable police officers. At the close of plaintiff's proof the trial judge granted a motion to dismiss the action against the city and at the close of all the evidence dismissed the first cause of action against the police officers for negligence, submitting only the assault count to the jury. The plaintiff appealed from the dismissal of the negligence count against the police officers after the jury had found for the defendants on the issue of assault. In granting a new trial to the plaintiff, the Court of Appeals of New York stated that it was a question of fact for the jury as to whether or not the officers were engaged in making an arrest at the time of the shooting and whether or not the force used in making such an arrest was more than was required so as to constitute negligence on the part of the arresting officers. *Flamer v. City of Yonkers*, 127 N.E.2d 838 (N.Y. 1955).

Force Required to Arrest Suspect Renders Confession Obtained Soon Thereafter Inadmissible—The defendant was captured after a short chase by police officers. Compelled to use force in order to effect the arrest, the arresting officer injured the defendant, causing him to bleed. Approximately one hour later the defendant confessed to a charge of housebreaking and larceny. During the course of the trial the defendant repudiated his confession which was admitted over his objection. Upon appeal to the Court of Appeals for the District of Columbia it was held, assuming that the arresting officers had used no more force than reasonably necessary to effect the arrest, that "when a confession is elicited so soon after the use of violence upon the prisoner, resulting in bloodshed, the compelling inference is that the confession is not the free act of the prisoner. It is immaterial that other coercion did not occur at the very moments he was questioned and signed the statement. Violence at the hands of the Police admittedly had occurred within about an hour. A confession made in such circumstances, and thereafter repudiated by the accused, should not be admitted in a criminal trial in a Federal court." *Payton v. United States*, 222 F.2d 794 (D.C.Cir. 1955).

Witness Not Entitled to Counsel in Hearing Before State Fire Marshal—An investigation was commenced by the Ohio Fire Marshal concerning a certain fire. During the course of the proceedings witnesses called by the Marshal refused to testify on the ground that the Marshal refused to permit them to be represented by counsel. The Marshal thereupon sentenced the witnesses to a term in the county jail. The witnesses then petitioned for a writ of habeas corpus, arguing that the Fire Marshal is not authorized to exclude counsel, and, in the alternative, that if the statute does authorize exclusion of counsel, it is violative of both the 14th Amendment and of Article I, §10 of the Constitution of Ohio, relating to

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self-incrimination and the right to representation by counsel.

The statute states, in applicable part: "Investigation by or under the direction of the fire marshal may be private. The marshal may exclude from the place where such investigation is held all persons other than those required to be present, . . ." OHIO REV. CODE, §3737.13 (1954). In affirming a judgment denying the relief sought, the Supreme Court of Ohio held that the statute gives no intimation that counsel for a witness is required to be present and that the Marshal may properly exclude counsel. Addressing itself to the constitutional objections, the court said: "There is no 'trial' or 'criminal case' pending; there is no 'accused party'; this matter is not pending in 'any court'; self-incrimination is not involved, inasmuch as the Fire Marshal agrees that the appellants can not be compelled to testify against themselves; the privilege is not personal; and these appellants have not even been sworn, as this court held necessary in the case of *State v. Cox*, 87 Ohio St. 313, 101 N.E. 135 (1915), before the privilege can be asserted." *In re Groban*, 128 N.E.2d 106 (Ohio 1955).

Examination of Exhibit Slide under Microscope by Trial and Appellate Judges Held Proper—In *State v. Martin*, 128 N.E.2d 7 (Ohio 1955) the defendant was convicted of manslaughter in the second degree by reason of his reckless operation of a motor vehicle. The evidence introduced by the state at the trial without a jury was largely circumstantial, one portion thereof consisting of an exhibit slide on which was mounted fibers taken from the defendant's car together with fibers taken from the jacket of the deceased. After the state's expert had testified that he could find no difference between the two fibers in composition, size or color the trial judge examined the slide under the microscope. On appeal the judges of the Court of Appeals also examined the slide, assisted by the expert from the Toledo crime laboratory. This, the defendant argued, was error. The Supreme Court of Ohio held that it was proper for the appellate court to examine the exhibit and the fact that it was necessary for an expert to demonstrate the use of the microscope did "not affect the propriety of such examination." Although an appellate court is not required to determine the weight of the evidence it may examine the record to ascertain whether or not the proper rules as to the weight of the evidence and the degree of proof have been applied.

Radar Evidence Held to be Admissible Without Expert Testimony as to its General Nature or Trustworthiness—A radar team working the New Jersey Turnpike issued a summons and complaint to the defendant charging him with traveling 66 miles per hour in a 60-mile speed zone. At the time of the trial the evidence showed that the troopers had been operating the radar equipment—consisting of transmitting and receiving devices, a calibrated speedmeter needle and a permanent graph indicating the speed of cars passing within its range—for approximately a year; and that on the day in question they had set up their equipment, allowed it to warm-up, tested it by driving their car within its range and comparing its reading with that of the speedometer on the car and had otherwise properly and carefully insured that it would give accurate readings. The state also produced an expert witness who testified as to the general nature and trustworthiness of radar devices in general and of the one used in this case in particular. The trial court found the defendant guilty of exceeding the speed limit, expressly finding that the radar equipment "was properly set up and tested for accuracy and was functioning properly and was a correct recorder of speed."

On appeal from his conviction the defendant attacked the radar evidence primarily on the ground that the testimony indicated that there was possible tolerance of error, thereby rendering the radar evidence inaccurate and unreliable. The Supreme Court of New Jersey held that the testimony showed that any inaccuracies resulting from the placing of the equipment or other factors would produce lower rather than higher readings. The Court then proceeded to examine prior decisions and nu-

merous articles dealing with the use of evidence from radar speedmeters. Analogizing the development of radar to other scientific discoveries, such as fingerprinting, X-ray machines, blood grouping tests and the like, the Court said: "The writings on the subject assert that when properly operated they accurately record speed (within reasonable tolerances of perhaps two to three miles per hour) and nothing to the contrary has been brought to our attention; under the circumstances it would seem that evidence of radar speedmeter readings should be received in evidence upon a showing that the speedmeter was properly set up and tested by the police officers without any need for independent expert testimony by electrical engineers as to its general nature and trustworthiness." Thus, the Court, in effect, indicated that the accuracy of a radar speedmeter device is a proper subject for judicial notice. Once the state has shown that device was properly tested and operated, its readings will constitute admissible evidence to be weighed with other evidence introduced into the record. *State v. Dantonio*, 115 A.2d 35 (N.J. 1955). For an examination of the impact of this decision, See, 3 TRAFFIC DIGEST & REV. 10 (No. 9, Sept. 1955).

Polygraph "Lie-Detector" Held to be Insufficiently Reliable to Permit Acceptance of Test Results in Judicial Proceedings—Appellant, who had been previously convicted of robbery, petitioned for special relief in the form of a habeas corpus proceeding. One of the points upon which the appellant relied was that he had repeatedly requested a lie-detector test to prove his innocence. In the process of denying the writ, the Superior Court of Pennsylvania made the following observations concerning lie-detector tests: "The request for a lie-detector is quite unusual. Appellant urges us to hold that the polygraph test has now reached the stage of scientific reliability that it should be so recognized in our law of evidence.... Appellant does not suggest to what use the results of the test would be put in this proceeding in the event they were favorable to him. He says merely that it would be some more evidence of his innocence. How much more evidence of his innocence it would be is highly questionable. We know of no recognized authority which has ventured to state that the polygraph test is judicially acceptable. The basic case of *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013, 34 A.L.R. 145, in 1923 held that such tests were not yet developed to the point of reliability, and thus an offer to introduce the results of such test were properly refused. Subsequent cases in other jurisdictions have similarly so held. Our Supreme Court has on two occasions recognized the use of the lie-detector as an inducement by interrogators to procure a statement or confession. *Com. v. Hipple*, 333 Pa. 33, 2 A.2d 353; *Com. v. Jones*, 341 Pa.541, 19 A.2d 389. That does not mean, however, that the test results themselves will be recognized and admitted into evidence. The reliability and scientific infallibility of the polygraph, lie-detector, or other psychological deception test must be more definitely established before our courts will accept their results as credible." *Commonwealth v. Dilworth*, 115 A.2d 865 (Pa.Super. 1955).