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POLICE SCIENCE

THE ADMISSIBILITY OF THE NALLINE TEST AS EVIDENCE OF THE PRESENCE OF NARCOTICS

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NARCOTIC USE STATUTES

The California Health and Safety Code provides that:

"No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. . . . Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail."¹

As construed by the California courts, the statute makes it unlawful (1) to use narcotics (an act) or (2) to be addicted to the use of narcotics (a condition or status).² Thus, one may be guilty under the act at any time and place he is found, so long as his condition or status is that of a drug addict, even though at the time he is arrested, he is then and there innocent of the act of using narcotics.³ This paper will emphasize the "condition" aspect of such statute.

California, by recent amendment, has also made provision for periodic Nalline tests of probationers and parolees who are suspected of drug addiction:

"(a) Whenever any court in this State grants probation to a person who the court has reason to believe is or has been a user of narcotics, the court may require as a condition to probation that the probationer submit to periodic tests by a city or county health officer, or by a physician

¹ 40 WEST'S ANN. CALIF. CODE, HEALTH AND SAFETY CODE, §11721, 1958 P.P. p. 61, as amended Stats. 1957, c. 1064, p. 2343, §1.

² *People v. Thompson*, 144 Cal. A. 2d 854, 301 P. 2d 313 (1956).

³ *People v. Jaurequi*, 142 Cal. A. 2d 555, 298 P. 2d 896 (1956).

and surgeon appointed by the city or county health officer with the approval of the State Division of Narcotic Enforcement, *to determine by means of the use of synthetic opiate antinarcotic in action* whether the probationer is a narcotic addict. . . .

(b) In any case in which a person is granted parole by a county parole board and the person is or has been a user of narcotics, a condition of the parole may be that the parolee undergo periodic tests as provided in subdivision (a) and that the county or city health officer, or the physician and surgeon appointed by the city or county health officer with the approval of the State Division of Narcotic Enforcement shall report the results to the board.

"(c) In any case in which any state agency grants a parole to a person who is or has been a user of narcotics, it may be a condition of the parole that the parolee undergo periodic tests as provided in subdivision (a) and that the county or city health officer, or the physician and surgeon appointed by the city or county health officer with the approval of the State Division of Narcotic Enforcement, shall report the results of the test to the state agency."⁴

That narcotic addiction constitutes one of our grave social problems today is recognized by all concerned. The courts are well aware of the problem and have taken judicial notice of the fact that the inordinate use of a narcotic tends to create an irresistible craving, forms a habit for its continued use until one becomes an addict, and often leads to the moral, mental, and physical destruction of the individual involved. The courts will also judicially

⁴ 40 WEST'S ANN. CALIF. CODE, HEALTH AND SAFETY CODE, §11722, 1958 P.P. pp. 62-63, added Stats. 1957, c. 1894, p. 3298, §1, italics supplied.

notice that a drug addict respects no convention or obligation and will lie, steal, or use any other base means to gratify his passion for the drug, being lost to all consideration of duty or social position.⁵

The historical note to the 1954 amendment contains this very illuminating language, of universal application:

"There exists in this state (California) an extremely serious problem due to the rapid and alarming increase in the use and addiction to narcotics. This condition has become worse in that many addicts are punished too lightly as a result of the excessive granting of probation."⁶

The California statute as to unlawful use of narcotics is quite typical of legislation in this country.⁷ However, the provisions as to periodic tests of probationers and parolees by the use of synthetic opiate antinarcotics are unique.

The mere statement of the statute as to unlawful use of narcotics points up the difficulty of proving this particular crime. Whether a substance is a narcotic is a question which should be left to the experts, not laymen, for solution. As a matter of fact, the qualities, attributes, characteristics, and effects of narcotics are not within the common experience of mankind, and this poses a problem for law enforcement officials, although some lay opinion evidence has been held admissible in this area.

PROBLEMS IN PROVING NARCOTIC ADDICTION

Proof of use of a narcotic by an individual is a difficult process. Obviously, from the standpoint of proof, the best evidence of such use is a sample of the narcotic taken from the body of the accused and properly analyzed and identified as a narcotic by an expert in the field. In practice, however, this is not always possible and law enforcement agencies may have to resort to circumstantial evidence in a great many cases. That circumstantial evidence is quite often the basis of the people's case is evident from an examination of the decisions of the appellate courts. In the absence of a sample of the narcotic, the state may prove its case by circumstantial evidence. Thus, in *People v. Hines*,⁸ in

⁵ *People v. Jaurequi*, 142 Cal. A. 2d 555, 298 P. 2d 896 (1956).

⁶ 40 WEST'S ANN. CALIF. CODE, HEALTH AND SAFETY CODE, §11721, p. 197, *198.

⁷ For typical statutes, see: 11 ARIZ. REV. ST. ANN., §36-1062, p. 512; BURNS, IND. STATS. ANN., §10-3520, Vol. 4, Pt. 2(1956), p. 618; 63 OKL. ST. ANN., §469, 1958 P.P. p. 65.

⁸ 128 Cal. App. 2d 421, 275 P. 2d 585(1954).

a prosecution for giving a narcotic to a minor, the complainant was permitted to testify that the accused had given her heroin; that because of her past experience, she knew that it was heroin; that she knew the effects of such narcotic, and that she had such effects when she took the narcotic given to her by the accused. An expert doctor testified that a patient can tell the effect produced by the use of a narcotic and can discern withdrawal symptoms. This was held to be sufficient evidence to sustain the conviction, even though no sample of the narcotic was available for analysis.

In a prosecution for unlawful use of narcotics, a doctor was permitted to testify that he observed scabs, scars, and discoloration on the arms of the accused and that these constituted the signs of a narcotic user. In addition to this testimony, there were admissions by defendant as to the use of narcotics. While the court indicated that this was sufficient to sustain a conviction, the case was sent back for a new trial because of failure to prove venue.⁹

Three other cases illustrate the use of circumstantial evidence and lay opinion evidence. In all of these, involving convictions for *actual possession* of narcotics, the defendants were arrested for *using* narcotics on the basis of testimony of experienced narcotic investigators, laymen, that the accused: (1) had unusually red eyes; (2) had pupils which were pointed or contracted—this being a sign of the use of narcotics; (3) was in a somnolent state; (4) had the tell-tale scars on his arms or appendages; (5) wore clothing on which the characteristic odor of narcotics could be detected; (6) had been dealing in narcotics prior to the arrest in question. The California courts have held that this is sufficient evidence to warrant an arrest on the *use* charge; consequently, narcotics discovered on the person in a search incidental to arrest, could be used against an accused on a *possession* charge. Implicit in these holdings is the inference that the evidence above enumerated would be relevant and competent proof of the *use* of narcotics.¹⁰

A certain amount of lay opinion evidence in this type of case is admissible. Thus, a lay witness, who is not a chemist but nevertheless familiar with opium through habitual use thereof, is qualified to render an opinion that a certain substance was

⁹ *People v. Garcia*, 122 Cal. A. 2d 962, 266 P. 2d 233 (1953).

¹⁰ *People v. Jaurequi*, 142 Cal. App. 2d 555, 298 P. 2d 896 (1956); *People v. Holland*, 148 Cal. App. 2d 933, 307 P. 2d 703 (1957); *People v. Johnson*, 155 Cal. App. 2d 369, 317 P. 2d 1000 (1957).

opium.¹¹ It has also been held that a trained police officer, who has seen many people under the influence of narcotics, may express a lay opinion that an accused was under the influence of narcotics.¹²

Expert testimony as to the preparation, use, and effect of narcotics is always properly admitted when a jury is in no position, as a matter of common knowledge or ordinary experience, to evaluate the ordinary witness' testimony concerning the effect of the narcotic on her.¹³ If a sample of the narcotic used or body fluid is available, either may be subjected to standard chemical tests.¹⁴

Obviously, even in the absence of a sample, the medical men and those trained in the field may reach conclusions that an accused is using narcotics by observation of physical and mental condition and accompanying symptoms. But the search for definite, scientific tests was almost a necessity, and the Nalline test for such use was one of the products of scientific investigation. In the first and only case on the subject, a California Appellate court has upheld the use of such test to prove the presence of a narcotic in the human body.

THE NALLINE TEST

The recent case of *People v. Williams*¹⁵ considered the admissibility of the Nalline test for the determination of the presence of narcotics in the human body. The defendants were convicted of violating the California law prohibiting the use of narcotics. Defendants were arrested on a charge of violating Section 11721 of the Health and Safety Code of the State of California.¹⁶ Following their arrest, and under voluntary written authority from them, the state subjected defendants to a Nalline test, conducted by Dr. T.

After making a preliminary physical examination, the doctor conducts the test by seating the subject on a specially designed barber type chair with a fixed lamp on one side and a steel hand rest

¹¹ *Pennacchio v. United States*, 263 F. 66 (C.C.A.-2nd, 1920), cert. den. 253 U.S. 497, 40 S. Ct. 588, 64 L. Ed. 1031 (1920).

¹² *People v. Moore*, 70. Cal. App. 2d 158, 160 P. 2d 857 (1945).

¹³ *People v. Hines*, 128 Cal. App. 2d 421, 275 P. 2d 585 (1954). See also, *State v. Matassa*, 222 La. 363, 62 S. 2d 609 (1953); *State v. Espinosa*, 223 La. 520, 66 So. 2d 323 (1953).

¹⁴ O'HARA, CHARLES E., and OSTERBURG, JAMES W., AN INTRODUCTION TO CRIMINALISTICS, Ch. 33, Narcotics, pp. 432-453 (MacMillan Co., N. Y. 1949); TURNER, RALPH F., FORENSIC SCIENCE AND LABORATORY TECHNICS, Ch. 8, Chemistry, pp. 131-144 (Charles C. Thomas, Springfield, Ill., 1949).

¹⁵ 331 P. 2d 251 (Cal. App. 1958).

¹⁶ See Note 1, *supra*.

on the other. By means of a card containing a series of dots known as a "pupillometer", the doctor then measures and records the size of the pupil. This is done by using the hand rest to steady the hand and by matching the pupil size with one of the dots on the "pupillometer". Thereafter 3 milligrams of Nalline (N-allylnormorphine), a synthetic opiate antinarcotic in action, is injected under the skin, and the patient is then placed in another room for a period of at least 30 minutes. Upon the expiration of 30 minutes or more, the suspect is again seated in the chair and his pupils measured in the manner above described.

As regards each defendant in the *Williams* case who was tested in the above manner, there was a dilation of the pupils of the eyes. Dr. T. testified that such dilation is a positive reaction and indication of the recent use of narcotics.

Based upon the history of prior use of narcotics by defendants, needle marks which were observed on defendants' appendages, and upon the results of the Nalline test, Dr. T. expressed the opinion that defendants were mildly under the influence of a narcotic. Dr. T. further testified that for 3 years he had carried on Nalline experiments in this field on 2300 persons; that he conducted these tests on non-users (his control group), mild users, and confirmed addicts; that the Nalline test is a valid test for such purposes. Other medical men testified that in their opinion the medical profession generally had accepted the use of Nalline as a reliable means of detecting the presence of an opiate in a person's system and that they personally accepted such test. However, all of the experts on behalf of the state admitted on cross-examination that *the medical profession generally is unfamiliar with such use of the Nalline test and that it cannot be truthfully said that the Nalline test has met with general acceptance by the medical profession as a whole, general acceptance being at present limited to those few in a specialized field who deal with the narcotic problem.* No experts were called by the defendants, so that the people's expert testimony was uncontradicted, except for the above admissions on cross-examination.

In holding the results of the Nalline test admissible to prove the presence of narcotics in an individual, the court alluded to the argument that only a specialized few know about the test and answered it with this language:

"Should this fact render the testimony inadmissible? We believe not. All of the medical testimony points to the reliability of the test. It

has been generally accepted by those who would be expected to be familiar with its use. In this age of specialization more should not be required.

"There being uncontradicted evidence in the record before us that the Legislature had the Nalline test in mind when in enacted Section 11722, this enactment must be accepted as a legislative mandate that the Nalline test has probative value."¹⁷

It is fair to say that the California Appellate court had to reach its conclusion as to the admissibility of the Nalline test independent of the statute, since no probationer or parolee was involved in the case, and the statute itself pertains to them alone. But the court fortifies its conclusion by referring to the legislative sanction of the test in the cases of probationers and parolees. The California decision, therefore, may be considered of universal application in the field of evidence, since it is not based and could not have been based on a local statute. It is important to note also that there was other confirmatory evidence in the record and that the court does not base its decision upon the Nalline test alone.

CONSIDERATIONS OF COMPETENCY

The *Williams* case¹⁸ presented no problems of self-incrimination, searches and seizure, or due process, because the defendants were under lawful arrest and of their own free will consented to the taking of such tests.

Assuming, however, a lawful arrest, but no consent on the part of the accused, may the law enforcement agencies, through appropriate medical aids, inject Nalline under the skin of the accused? Inbau teaches us that this can be done, over self-incrimination objections, because no testimonial compulsion is involved.¹⁹ Assuming a lawful arrest,

¹⁷ *Ibid.*, P. 2d cit. p. 254. Nalline is a white, odorless powder, used to reverse symptoms of excessive narcotism. It has a specific respiratory stimulating effect against the respiratory depression caused by morphine, heroin, and other narcotics: JORDAN, EDWIN P., MODERN DRUG ENCYCLOPEDIA, p. 727, (Drugs Publ., 7th Ed., N. Y. 1958). See also: BRAUMOELLER and TERRY, "Nalline: An Aid in Detecting and Controlling the Illicit Use of Narcotics, 2 JOUR. FOR. SCIENCES 475 (1957).

¹⁸ *People v. Williams*, 331 P. 2d 251 (Cal. App. 1958).

¹⁹ INBAU, FRED E., SELF-INCRIMINATION, Ch. XII, The Removal of Incriminating Evidence, pp. 70-86 (Charles C. Thomas Co., Springfield, Ill. 1950); see also, 22 C.J.S. §649, p. 993, §651, p. 998. It is logical to assume that, if a needle may be injected into a person to remove a substance, for analysis, the same type of needle may be injected to insert a substance as Nalline.

no problem of search and seizure is involved, leaving only the question of due process.

Does the Nalline test "shock the conscience of the court", as a "method too close to the rack and the screw" within the meaning of *Rochin*?²⁰ *Breithaupt v. Abram*,²¹ an extension of *Rochin*, permitted extraction of a sample of blood from an unconscious person over due process objections. Implicit in this decision, at least in this writer's opinion, is the holding that the taking of a blood test by means of a needle is an accepted, ordinary medical procedure which does not shock the conscience of the court, even though the individual is conscious of what is being done. The Nalline test, when properly administered, should be acceptable on the due process considerations involved in the *Breithaupt* case.²² That a substance, not injurious to a person's health, is injected under the skin, and its effects examined, is no different in principle from the extraction of a substance from the human body for purposes of examination.

SUMMARY

The holding of the Appellate Court of California, that the results of the Nalline test are admissible to prove the presence of a narcotic in the human body, is indeed significant in the field of scientific evidence, but the overtones of such decision are of greater consequence.

Since 1923 the *Frye* case²³ has been admonishing us that a scientific instrumentality of proof is not acceptable in the courts unless it is "sufficiently established to have gained general acceptance in the particular field in which it belongs."²⁴ Such decision has placed a judicial straightjacket on the field of scientific evidence, is very unrealistic in view of modern developments, and fails to recognize the vast specialization which is a part of our modern society.

By way of illustration of this point, the Supreme Court of Michigan, in *People v. Morse*,²⁵ struck down the use of the Harger Drunkometer as a means of proving intoxication, simply because five doctors testified that the instrument did not produce accurate results. The Michigan court stressed

²⁰ *Rochin v. California*, 342 U.S. 165, *172, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

²¹ 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed. 448 (1957).

²² See Note 21, *supra*. See also: COLEMAN, "Nalline: Some Legal Implications in Its Use," 3 JOUR. FOR. SCIENCES 425 (1958).

²³ *Frye v. United States*, 54 App. D.C. 46, 293 Fed. 1013, 34 A.L.R. 145 (1923).

²⁴ *Ibid.*, Fed. cit., p. 1014; emphasis supplied.

²⁵ 325 Mich. 270, 38 N.W. 2d 322 (1949).

that there was no general acceptance of the instrument and technique by the *medical* profession or *general* scientific recognition of the Harger Drunkometer test as accurately establishing the alcoholic content of a subject's blood, relying to a great degree on the *Frye* case.²⁶ That the universally recognized validity of the Harger Drunkometer instrument could be impaired by the testimony of five *medical* men, who were testifying out of their fields, and also by citation to one dissenter in the literature, is difficult to comprehend, especially when the medical men have always been biased in favor of the straight blood test, requiring the services of a doctor, as compared to a breath test, which requires the services of a trained technician. The absurdity of the Michigan position becomes more apparent when one considers that every other

appellate court passing upon the question has sustained the validity of this type of proof.²⁷

The holding of the California Appellate Court on the admissibility of the Nalline test, even though the medical profession generally is unfamiliar with it, and, therefore, has not accepted it generally, has dissolved the cement which has kept together the tenets of the *Frye* case.²⁸ The same may be said of the *Morse* case.²⁹ The California court establishes a new principle of scientific proof, that acceptance of a scientific instrumentality of proof by a few who specialize in the field and who are expected to be familiar with it, is sufficient authentication in this day of specialization. We shall continue to hear more about this new principle of proof in the years to come.

²⁷ 1 CONRAD, MODERN TRIAL EVIDENCE, §713, p. 601 (West, St. Paul, Minn. 1956).

²⁸ See Note 23, *supra*.

²⁹ See Note 25, *supra*.

²⁶ See Note 23, *supra*.