6. *Resentencing after Revocation of Probation*

During the past year, the Indiana Supreme Court was confronted with two challenges to the statute which permits a court, after a probation violation, to set aside the defendant's original sentence and impose any sentence which was available at the time of the original conviction.[203] In *Nicholas v. State*,[204] the statute withstood an attack based on the theory that the defendant was actually being resentenced for a purported crime of violating his probation.[205] In the other case, *Smith v. State*,[206] the statute withstood a challenge based upon a double jeopardy argument. In that case, the defendant was given a suspended sentence of imprisonment for one year for carrying a pistol without a license. After violating the terms of his probation, he was resentenced to serve a term of ten years in prison. In rejecting the defendant's argument that this increased sentence violated his right not to be placed in double jeopardy, the court held that a more severe penalty could be imposed if justified by the defendant's conduct from the time of the first sentencing to the time of the resentencing.[207] Here the more severe penalty was justified by the probation violation, the uttering of a forged instrument.

VIII. Evidence—Civil

*Marshall J. Seidman**

A. *Demonstrative Evidence*

1. *Admissibility of Photographs*

In *Richmond Gas Corp. v. Reeves & Reinke*,[1] the Indiana Court of Appeals dealt with the power of the trial court to exclude photographic evidence. The case resulted from a series of violent explosions which killed forty-one persons in downtown Richmond, Indi-

---

as *id.* § 35-8-2.5-1 (IND. ANN. STAT. § 9-1828, Burns Supp. 1974). Because of this duplication, the 1974 General Assembly repealed the 1973 statute. *See* Ind. Pub. L. No. 147 (Feb. 19, 1974).

[203]IND. CODE § 35-7-2-2 (IND. ANN. STAT. § 9-2211, Burns Supp. 1974).

[204]300 N.E.2d 656 (Ind. 1973).

[205]*Id.* at 664.

[206]307 N.E.2d 281 (Ind. 1974).

[207]*See* North Carolina v. Pearce, 395 U.S. 711, 723 (1969).

*Professor of Law, Indiana University Indianapolis Law School. LL.M., Harvard University, 1970.

[1]302 N.E.2d 795 (Ind. Ct. App. 1973).

ana. Photographs showing damage to a building following a gas explosion in Terre Haute, Indiana, were introduced by the defendant gas corporation during cross-examination of one of plaintiff's expert witnesses. The key issue at trial was whether the explosion was a gas explosion, as argued by the plaintiff, or a gunpowder explosion as advocated by the defendant. The examiner stated that he wished to use the photographs during cross-examination of plaintiff's witness to test the witness' credibility as to the distinctions between the two types of explosions. The plaintiff objected on the grounds that admission of these photographs would raise questions of conditions and circumstances at a different time and place from the one at issue and would thereby lead to confusion of the jury and to pursuit of a collateral issue. The objection was sustained. Subsequently, the examiner, through his own expert witness, again attempted to introduce the photographs to illustrate "brisance,"[2] a factor in determining the type of explosion. The plaintiff reiterated his objection and the judge once again refused to admit the photographs into evidence.

The court of appeals stated that admission and exclusion of photographic evidence is within the discretion of the trial judge, and his decision will not be overturned unless an abuse of discretion is shown. The court found no such abuse and stated that photographs should be admitted only when they might enlighten a jury. Photographs are improper, however, when they are a potential source of confusion or distraction. The court concluded that the admission of photographs illustrating another explosion which occurred under different conditions and circumstances could have confused and misled the jury.[3] Thus, the potential for delay of the trial, distraction of the jury, and introduction of collateral issues adequately justified the trial court's exclusion of the photographs. Furthermore, when a jury has been adequately informed by the testimony of an expert, it should be within the court's discretion to exclude questionable demonstrative evidence.

---

[2]Brisance is the "relatively shattering effect resulting from the detonation of various types of explosives. This effect is measured by experts and considered as a factor in arriving at an opinion as to the cause of the explosion." *Id.* at 799 n.1.

[3]This holding involves a fusion of two branches of evidentiary law—that of demonstrative evidence and of relevancy. The court followed the accepted balancing rule in disallowing the admittance of relevant photographs. The commonly accepted counterbalancing factors which may cause a court to exclude relevant evidence are that the evidence may unduly arouse the jury's prejudices, distract the jury, consume an undue amount of time, and involve the danger of unfair surprise. *See* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 185, at 439-40 (2d ed. E. Cleary 1972) [hereinafter cited as McCORMICK]. *See also* Proposed Fed. R. Evid. 403, 56 F.R.D. 183, 218 (1972).

The same court reached an opposite result from the *Richmond Gas* case in *Smith v. Indiana State Board of Health.*[4] *Smith* involved an appeal from an interlocutory order that granted a temporary injunction prohibiting a rock festival in Warrick County. During the trial the State was permitted, over objection, to introduce photographs of rock festivals held in other locations. The evidentiary purpose was to show the trial judge the nature and effect of a rock festival. The pictures from the other rock festivals showed members of the audience trafficking in illegal drugs, engaging in sexual intercourse, and littering the grounds. The defendant argued that the photographs of other rock festivals were inadmissible since the other festivals occurred at different times and in different locations. Significantly, the State had failed to show a similarity in the planning, promotion, and preparation of the other festivals and the proposed festival.

As in *Richmond Gas,* the court of appeals stated that the admission of photographs of similar acts, occurrences, or transactions rests in the discretion of the trial court and will not be disturbed unless an abuse of discretion is shown.[5] The court, without explanation, did not find any abuse of discretion and indicated the admission of the photographs would, at most, be considered harmless error. Significantly, the hearing was before a judge and not a jury. The trial judge, therefore, without prejudice, could consider the exhibits and determine their propriety and weight in relation to legal and evidentiary principles. Despite the supposed ability of a judge to overlook the prejudicial aspects of such photographs, his neutrality in a case arousing such widespread public interest is still questionable. The *Smith* case may be criticized for not dealing adequately with this possibility.

2. Polygraph Tests

In *Freeman v. Freeman,*[6] a mother appealed when the trial court refused to terminate a father's visitation rights. The mother alleged that the father had sexually molested their daughter. Apparently, a polygraph test taken by the father was introduced into evidence either by stipulation of the parties or by the mother with-

---

[4]307 N.E.2d 294 (Ind. Ct. App. 1974).

[5]The initial question seems to be one of relevancy, rather than one of counterbalancing the adverse effects of admission. McCormick states that proof of the existence of habit may justify the introduction of evidence of other specific instances, so long as the other instances are not too few or too many in number, are near in time, and involve sufficiently similar circumstances. McCormick § 195, at 465. *See also* Proposed Fed. R. Evid. 406, 56 F.R.D. 183, 223 (1972).

[6]304 N.E.2d 865 (Ind. Ct. App. 1973).

out objection from the father.[7] The results of the test suggested that the father's denials of sexual molestation were not truthful. The court of appeals affirmed the admittance of the test results and stated that such results are not conclusive[8] but are only one facet of all the evidence to be weighed by the finder of fact. In civil cases, courts should be more receptive to polygraph tests and these tests should be admitted after a proper foundation has been laid, and, in jury trials, only with cautionary instructions.

Robinson v. State[9] foreshadows the ultimate use of polygraph evidence in Indiana trials when there is an absence of stipulation in a civil case or a waiver of objections in a criminal case. The court stated that a qualified examiner, using proven techniques, might someday be able to produce evidence so reliable as to be admissible. This language should encourage counsel to utilize polygraph evidence favorable to their clients. Today, the qualifications of the examiners, the sophistication of the techniques, the psychological and physiological underpinnings of the examination, the technical quality of the instruments, and the experience gained in polygraph utilization should be sufficient to permit qualified and experienced operators to testify with as much assurance about the results of their testing as do other experts when questioned about results they achieved through testing.[10]

B. Impeachment by Prior Inconsistent Statements

In *Gradison v. State*,[11] a landowner appealed from a judgment awarding him $140,000 for land condemned by the state for highway use. At the trial, the State produced the appraiser as a witness. On cross-examination, the witness denied making a previous statement that the land was worth a certain sum. The landowner

---

[7]Indiana follows the minority view which allows the results of a polygraph test to be admitted by stipulation of the parties. *See* People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948). *But see* Pulakis v. State, 476 P.2d 474 (Alaska 1970); Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951).

[8]The main reason for the exclusion of such evidence seems to be the fear of the judiciary that the trier of fact will place too much weight on this type of evidence. McCORMICK § 207, at 507.

[9]309 N.E.2d 833 (Ind. 1973). *Cf.* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). In *Frye*, the court held that the requirement of scientific acceptance had not been met by polygraph tests. It is questionable whether this conclusion would be valid today.

[10]Burkey, *Privacy, Property and the Polygraph*, 18 LAB. L.J. 80 (1967); Horvath & Reid, *Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 J. CRIM. L.C. & P.S. 276 (1971). The general consensus is that polygraph tests have an accuracy rate of eighty percent. McCORMICK § 207, at 506 n.9.

[11]300 N.E.2d 67 (Ind. 1973).

then offered for impeachment purposes part of the land's appraisal report which the witness had previously prepared for the State. The pages tendered reflected the witness' valuation of the property based upon hypotheticals which resulted in a higher value for the land than the one given by the appraiser at trial. The result was not his ultimate opinion or even a statement of fact because, both in his direct testimony and in the report, he clearly rejected as too speculative the "income analysis" method of appraisal which the plaintiff sought to use in this case and which the witness had considered only hypothetically in his report. The trial judge excluded the offer as having no tendency to impeach.

The Indiana Supreme Court affirmed and stated that the proper procedure for impeaching a witness through prior inconsistent statements is to have the examiner lay a proper foundation by calling the witness' attention to the time when, the place where, and the person to whom the contradictory statement was alleged to have been made. The purpose of such a specific foundation is to alert the witness to the particular statement which the examiner deems inconsistent so that the witness may intelligently admit and explain the statement or deny it. Although this approach follows the traditional view, it would seem that such particularity for the foundation is not really necessary and unduly limits effective cross-examination. McCormick criticizes the traditional view for this reason and suggests it is particularly inappropriate when the witness is an expert.[12]

C. Hearsay

1. Admissions of a Party-Opponent

Brattain v. Herron[13] involved an automobile accident in which the defendant driver's vehicle struck another vehicle resulting in the death of all the occupants of the other vehicle. The trial judge permitted plaintiffs to introduce, over defendant's objection, a cer-

---

[12] The purposes of the requirement are (1) to avoid unfair surprise to the adversary, (2) to save time, as an admission by the witness may make the extrinsic proof unnecessary, and (3) to give the witness, in fairness to him, a chance to explain the discrepancy. On the other hand, the requirement may work unfairly for the impeacher. He may only learn of the inconsistent statement after he has cross-examined and after the witness by leaving the court has made it impracticable to recall him for further cross-examination to lay the foundation belatedly. It is moreover a requirement which can serve as a trap since it must be done in advance before the final impeachment is attempted and is supremely easy to overlook.

McCormick § 37, at 72.

[13] 309 N.E.2d 150 (Ind. Ct. App. 1974).

tified copy of defendant's guilty plea to a criminal charge arising out of the same accident. This charge was that of causing the death of another while driving under the influence of intoxicating liquor.

A criminal *judgment* upon a plea of *not guilty* is generally inadmissible in a civil action, and this is especially true if the civil action is for damages resulting from the crime.[14] This rule is premised upon the disparity between the parties to civil and criminal actions, the different standards of proof, and the nature and effect of civil and criminal trials. However, a *guilty plea* and a *resulting judgment* in a criminal case may be admissible in a civil action arising from the same conduct. The criminal record is admitted as an admission of a party-opponent rather than as a certification of facts contained therein.[15] In *Brattain,* the court of appeals applied this rule and affirmed the trial court's decision to admit the plea.

2. Business Records

American United Life Insurance Co. v. Peffley[16] involved an interesting application of the business records exception to the hearsay rule. The trial judge entered judgment for the deceased's second wife who was the beneficiary of a group life insurance policy issued by the defendant. The defendant claimed that the proceeds were properly payable to the first wife of the decedent, and the appeal was based upon the exclusion of evidence concerning an alleged change of beneficiary by the insured prior to his death.

The trial judge sustained plaintiff's objections to the introduction of the defendant company's form letter designating a new beneficiary, the company's form acknowledging receipt of a change card from the decedent, which certified the designated beneficiary to be the first wife, and another change form acknowledging a correction of the decedent's name. After presentation of the insurance company's case, the trial judge granted plaintiff's motion for judgment on the evidence. The probable basis for this decision was that

---

[14] *Cf.* Proposed Fed. R. Evid. 803(22), 56 F.R.D. 183, 303 (1972), which provides in part that evidence of a "final judgment, entered after a trial or upon a plea of guilty (but not on a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year" is not excluded by the hearsay rule. UNIFORM RULE OF EVIDENCE 63(20) is similar to proposed federal rule 803(22).

[15] *See generally* MCCORMICK § 265. Significantly, the probative value of such an admission may be reduced by showing special circumstances or a satisfactory explanation for the guilty plea.

[16] 301 N.E.2d 651 (Ind. Ct. App. 1973).

the original records of the insurance company demonstrated that plaintiff was the beneficiary. Furthermore, there was no acceptable evidence of a change of beneficiary since the original change of beneficiary card furnished to the deceased was not produced at the trial.

The Indiana Court of Appeals held that the three excluded documents tended to prove that such a card was received, and the carbon copies in the carrier's records were, therefore, relevant and admissible under the business records exception to the hearsay rule.[17] The carrier laid an adequate foundation showing that the documents were prepared in the ordinary course of the carrier's business, that those documents were prepared upon receipt of a change card, and that they were prepared by an employee whose duty it was to type them and who had personal knowledge of the card's existence, receipt and content.[18] The court further found that the best evidence rule did not bar the admission of the three internal documents since the parties stipulated that a diligent search for the original change card was conducted through the files of both the carrier and decedent's employer. Secondary evidence of a writing is admissible, therefore, if it has been shown that there was a diligent search for the original writing and that the original writing is unavailable.[19]

The court of appeals then considered whether the offer of decedent's policy, on which decedent had made a notation regarding the change of beneficiary, was hearsay. Judge Buchanan stated that the notation was hearsay since it constituted a declaration by dece-

---

[17]The common law exception to the hearsay rule for regularly kept business records had four elements:

> (a) the entries must be original entries made in the routine of a business, (b) the entries must have been made upon the personal knowledge of the recorder or of someone reporting to him, (c) the entries must have been made at or near the time of the transaction recorded, and (d) the recorder and his informant must be shown to be unavailable. . . .
>
> . . . Today, the inconvenience of calling those with firsthand knowledge and the unlikelihood of their remembering accurately the details of specific transactions convincingly demonstrates the need for recourse to their written records, without regard to physical inability.

McCORMICK § 306, at 720.

[18]*See also* UNIFORM RULE OF EVIDENCE 63(13); Proposed Fed. R. Evid. 803(3), 56 F.R.D. 183, 300 (1972). Both provide that the requisite foundation testimony may be furnished either by the custodian of the records or by other qualified witnesses.

[19]McCORMICK § 230, at 560, defines the original document rule as follows: "In proving the terms of a writing, where the terms are material, the original writing must be produced unless it is shown to be unavailable . . . ."

dent that he had changed beneficiaries and since it was offered to prove that fact. The view of the majority, however, differed with that of the opinion's author. Thus it was decided that Indiana should take a flexible approach with regard to exceptions to the hearsay rule and should allow the admission of any evidence if there is a "Circumstantial Probability of Trustworthiness and a Necessity for [its use]."[20] Both of these requirements were apparently met in the instant case. The decedent's copy of the policy was found among his effects in a logical place for its storage, and his writing was authenticated. Therefore, the element of trustworthiness was established. The loss of the original change of beneficiary card supplied the necessity for the use of the evidence.

The majority opinion in this case implicitly overruled prior cases[21] by stating that all exceptions to the hearsay rule have not been finally determined. This holding should be commended since a contrary view would perpetuate the present status of the hearsay rule and its exceptions. The many exceptions to the hearsay rule indicate the substantial discontent which courts have demonstrated in applying the rule over the years, and it would be unwise to freeze these exceptions now for all time.

D. Discretion in the Admission of Evidence

In *Apple v. Apple*,[22] the Indiana Court of Appeals again demonstrated that, in a bench trial, a judge has wide discretion in ruling on procedural and substantive evidentiary matters. The court commended the trial judge for his liberal admission of evidence and stated that such a policy would more easily determine the truth of all the facts. The court emphasized that, in this case, there was

---

[20]301 N.E.2d at 658, *quoting from* 5 J. WIGMORE, EVIDENCE § 1420, at 202 (rev. ed. 1970). This would seem to conform with Proposed Fed. R. Evid. 803(24), 56 F.R.D. 183, 303 (1972), which allows hearsay evidence to be admitted if the statement has "circumstantial guarantees of trustworthiness." The comments to this rule state: "It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system."

One may only speculate as to why neither counsel nor the court suggested the state of mind exception to the hearsay rule. *See* Proposed Fed. R. Evid. 803(3), 56 F.R.D. 183, 300 (1972); MCCORMICK § 249; UNIFORM RULE OF EVIDENCE 63(12). *See also* Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394 (1934). It could have been argued that the writings were admissible either to show the decedent's belief that the beneficiary had been changed or to show the intent of the decedent to change the beneficiary. *Cf.* Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892).

[21]*See, e.g.*, Barger v. Barger, 221 Ind. 530, 48 N.E.2d 813 (1943).

[22]301 N.E.2d 534 (Ind. Ct. App. 1973).

no jury that might be prejudiced by admission of the evidence[23] and noted that a judge has complete control of the scope, extent, method, and manner of direct and cross-examination of all witnesses. Consequently, a judge's rulings in such a case will not be overturned except for an abuse of the wide discretion accorded him. Even if evidence is erroneously admitted, the appellate courts presume that trial judges, because of their experience, would adequately consider the propriety and weight of all of the evidence and would not rely on the erroneously admitted evidence in making their findings of fact and in drawing their conclusions of law. Thus, a reversal will only occur when a trial judge makes direct reference to his exclusive reliance on clearly inadmissible evidence.[24]

Another example of the almost limitless powers of a trial judge as to evidentiary matters in a bench trial is found in *City of Indianapolis v. Medenwald*,[25] an eminent domain proceeding. Two of plaintiff's witnesses testified, over the City's objection, that the value of plaintiff's property had substantially deteriorated because the rights of ingress and egress were impaired. The Indiana Court of Appeals stated that, if this were the only evidence of value, the City would have been entitled to a reversal. The court found, however, that there was adequate testimony in the record from which the trial judge could determine value without regard to this evidence and stated that the decision of a trial judge will not be overturned if there is sufficient evidence of probative value to support it. The court of appeals further noted that, in a bench trial, a presumption arises that the trial judge only considers proper evidence in arriving at his judgment.

While these cases appear to allow trial judges some freedom to make evidentiary errors in bench trials, *State v. Maplewood Heights Corp.*[26] demonstrates that this freedom does not apply to evidentiary errors made by trial counsel. In this case, the State appealed from an award of damages for land condemned for a highway project. At trial, counsel for the State objected and moved to strike the valuation testimony of witnesses for the defendant

---

[23]*Id.* at 539. In theory, the jury trial system of evidentiary admission governs in trials before the judge as well. Arguments concerning special rules for judge-tried cases, however, do exist. *See* Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A.J. 723 (1964); Davis, *Hearsay in Nonjury Cases*, 83 HARV. L. REV. 1362 (1970).

[24]Indiana courts follow the majority rule. *See* General Metals, Inc. v. Truitt Mfg. Co., 259 N.C. 709, 131 S.E.2d 360 (1963); Lenahan v. Leach, 245 Ore. 496, 422 P.2d 683 (1967). On the other hand, if the judge excludes admissible evidence, his ruling may well be reversed. *See, e.g.*, Kelly v. Wasserman, 5 N.Y.2d 425, 158 N.E.2d 241, 785 N.Y.S.2d 538 (1959).

[25]301 N.E.2d 795 (Ind. Ct. App. 1973).

[26]302 N.E.2d 782 (Ind. 1973).

upon the grounds that their appraisal was predicated on the improper assumption that the land consisted of developed residential lots rather than of undeveloped land. The Indiana Supreme Court found this testimony inadmissible, but for different reasons from those cited by the State's counsel. The court stated in conclusory terms that the testimony was objectionable because it was speculative and likely to mislead the jury. Although this conclusion was in factual terms substantially the same as the original objection, the court stated that the correct grounds for the objection had not been made before the trial judge. The court emphasized that an objection varying from the one made at trial may not be urged upon appeal.[27]

This case emphasizes the need for counsel to utilize specific rather than general objections. In addition, if counsel fails to advance among his several objections the correct one for the exclusion of the evidence, the trial judge's admission of the evidence will be sustained even though counsel subsequently comes upon a correct objection and presents it to the appellate court. Trial counsel, therefore, are charged with knowledge of the law of evidence and all of its intricacies. Trial judges, however, are not expected to exclude improper evidence unless trial counsel specifically and correctly call it to their attention. Obviously, this ruling places a significant burden upon trial counsel, while it lightens the burdens of trial judges.

The Proposed Federal Rules of Evidence, which are presently under consideration by Congress, move toward according trial judges the widest possible discretion in making evidential rulings,[28] and the Indiana cases show tentative steps in the same direction. This liberalizing trend seems appropriate and appellate judges should probably encourage trial judges to err on the side of admission rather than exclusion. Also, trial judges should be urged to prevent possible prejudicial situations in jury trials through the use of appropriate instructions. Even if a jury is unable to properly evaluate the evidence, the trial judge has ultimate judicial safeguards over the jury's actions either through granting a motion for a new trial or a motion for judgment notwithstanding the verdict.

---

[27]This is the general rule. People *ex rel.* Blackmon v. Brent, 97 Ill. App. 2d 438, 240 N.E.2d 255 (1968); Kroger Grocery & Baking Co. v. Harpole, 175 Miss. 227, 166 So. 335 (1936). *See* McCormick § 52, at 117. Both Proposed Fed. R. Evid. 103(a)(1), 56 F.R.D. 183, 194 (1972), and Uniform Rule of Evidence 4 require that the specific ground for objection be stated at the trial.

[28]*See* Proposed Fed. R. Evid. 103, 56 F.R.D. 183, 194 (1972).

E. Experts

1. Use of Authoritative Treatises

In *Miller v. Griesel*,[29] a student plaintiff appealed from a judgment for defendants in a suit for personal injuries brought against his teacher, his principal and the School City of East Gary. Griesel, the principal and a defense witness, testified on direct examination concerning certain rules that he had promulgated for classroom teachers. On cross-examination, plaintiff asked the trial judge to rule that the principal, on the basis of his training and experience, was an expert. The defendants objected. The trial judge declined to so rule because the principal was originally presented as a factual witness and not as an expert. The Indiana Court of Appeals' affirmation of the trial judge's ruling emphasizes that the trial judge determines whether a witness is qualified to testify as an expert, and his ruling will not be set aside on appeal unless there is an abuse of discretion.[30]

The plaintiff next attempted, unsuccessfully, to continue his cross-examination of the principal by using an authoritative text. The court of appeals held that, while learned treatises are not admissible as independent evidence, they are permissible when used in cross-examining a witness who testifies as an expert. However, in the instant case, this form of cross-examination was improper because the trial judge had refused to qualify Griesel as an expert. The court held that, since Griesel was not offered as an expert witness on direct examination, he could not be qualified as such on cross-examination.

This is probably an unnecessarily rigid rule. There are no strong policy reasons why a witness cannot be demonstrated to be an expert and qualified as such by an opponent. The proponent should have no right to deprive a jury of expert testimony simply by offering a witness, who may be an expert, solely as a factual witness. As a matter of trial strategy, one should normally refrain from calling an opponent's witness, especially an opponent's expert witness who may be expected to cooperate fully with offering counsel. Although an attempt to qualify an opponent's witness as an expert so that his testimony may be used in support of one's own case is a gambit almost foredoomed to failure as a practical matter, as a theoretical matter it should not be objectionable.

---

[29]297 N.E.2d 463 (Ind. Ct. App. 1973).

[30]Salem v. United States Lines Co., 370 U.S. 31 (1962); Oborski v. New Haven Gas Co., 151 Conn. 274, 197 A.2d 73 (1964); Hanson v. Christensen, 275 Minn. 204, 145 N.W.2d 868 (1966). *See* McCormick § 13, at 29.

2. *Scientific Evidence*

Beck v. Beck[31] concerned the admissibility of expert testimony regarding blood grouping test results used to establish nonpaternity in a divorce action. The trial court admitted the testimony and this was affirmed on appeal. The Indiana Court of Appeals noted that, although at common law it was conclusively presumed that any child born during wedlock was legitimate,[32] the rule today is that the presumption may be rebutted by direct, clear and convincing evidence.[33]

The court concluded that blood tests in divorce actions are admissible only if the tests are conducted by a qualified expert and only if they exclude paternity.[34] The court emphasized that the adversary system of justice is a means of arriving at the truth and that the modern rules of discovery, the procedures for pretrial hearings, and to some extent, the rules of evidence, are drawn to permit the case trier to hear all pertinent facts so that the truth may be more readily ascertained. In the instant case, not only were the results of the test exculpatory, but also the husband failed to accept the child as his own, denied paternity, and denied having sexual intercourse with his wife during the possible period of conception. Thus, the circumstances were such that to hold the results of the blood grouping test inadmissible would result in a travesty of justice.

The *Beck* case raised the interesting and yet unanswered question of whether the trier of fact could ever find a husband to be a child's father in disregard of admissible scientific blood tests and based solely upon the wife's testimony that she had sexual intercourse only with her husband during the period when she could medically have conceived. The result in the *Beck* case may indicate that the exclusion of scientific blood test evidence would be erroneous under such circumstances.[35]

Brattain v. Herron[36] concerned blood sampling for alcoholic content. The driver of a car involved in a fatal accident was admitted to a hospital and examined by a physician who, upon police

---

[31]304 N.E.2d 541 (Ind. Ct. App. 1973).

[32]9 J. WIGMORE, EVIDENCE § 2527 (3d ed. 1940).

[33]McCORMICK § 211, at 520-21.

[34]

> Whenever medical science has perfected certain tests to the point where it can be said with almost medical certainty that something is a fact, the court should not hide in the dark ages and be bound by archaic rules which subvert the truth and impede the sound administration of justice.

304 N.E.2d at 545.

[35]*Cf.* Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P.2d 442 (1946).

[36]309 N.E.2d 150 (Ind. Ct. App. 1974).

request, removed a blood sample. The doctor placed the sample in a vial provided by the officer, enclosed the vial in an envelope, closed it, signed it, dated it, and gave it to the officer to deliver to the state police laboratory. A test of the blood sample by the state police chemist revealed that it contained .197 percent alcohol, which constitutes legal evidence of intoxication in Indiana.[37] The defendant objected to the admission into evidence of the analysis of the blood sample on the ground that there was inadequate evidence of the chain of custody from the time of the taking of the sample by the physician in the hospital until its analysis by the chemist in the state police laboratory.[38] The chemist who made the analysis testified that the envelope containing the blood sample had not been opened and, when he opened it, the seal on the vial containing the blood was unbroken. The Indiana Court of Appeals found this sufficient to permit the fact finder to conclude that the specimen had not been tampered with and that it had been in continuous custody of the state police from the time it was handed to an officer at the hospital until it was examined in the state police laboratory by the chemist who determined its content.

F. Competency

In *Freeman v. Freeman,*[39] a mother appealed a denial of her petition requesting termination of the father's visitation rights. At the trial, upon direct examination, the grandmother was asked if her four year old grandchild had made a statement to her accusing the father of sexual advances. An objection to this question was sustained. The Indiana Court of Appeals held that the request to the grandmother to repeat the child's statement was an attempt to introduce the hearsay statement of a four year old child who was by statute incompetent to testify in her own right.[40] The court further held that the plaintiff's failure to make an offer of proof after the objection was sustained prevented review.

Although the trial judge found the child incompetent to testify in court, he found her sufficiently competent for the purposes of

---

[37]IND. CODE § 9-4-1-56 (Burns 1973).

[38]It has been suggested that less stringent chain of custody requirements should be applied in civil cases than are applied in criminal cases. Woodby v. Hafner's Wagon Wheel, Inc., 22 Ill. 2d 413, 176 N.E.2d 757 (1961).

[39]304 N.E.2d 865 (Ind. Ct. App. 1973).

[40]IND. CODE § 34-1-14-5 (Burns 1973) provides that children under ten years of age shall not be competent witnesses *"unless it appears* that they understand the nature and obligation of an oath." (emphasis added). If the court meant that a four-year-old is presumptively incompetent, it was correct. However, even a four-year-old is competent if it appears affirmatively on the record that he understands the nature and obligation of an oath.

an ex parte interview in his chambers. A possible distinction in these conflicting competency findings can be drawn between the in-court and the in-chambers testimony. The courtroom testimony was being offered to prove the truth of the child's utterance while the testimony in the judge's chambers merely went to prove the child's state of mind. Significantly, the record of the trial court reflected the judge's conclusions derived from his interview with the child and stated that she loved both parents and feared neither parent. The court also placed ostensible reliance on the child's courtroom behavior when the child unhesitatingly ran to her father when released by the judge. The court therefore concluded that placing the child in the custody of the father would be acceptable. It seems appropriate that the trial record should reflect the substance of ex parte conversations and courtroom observations when those are used in making findings of fact. Trial judges, and appellate judges, might make their decisions more understandable by revealing rather than concealing their rationale.

Blue v. Brooks[41] is exemplary of a correct, but frequently misunderstood, application of the hearsay rule. The Indiana Supreme Court specifically held that extra-judicial statements offered in court to prove the truth of the matters asserted therein are hearsay, but that such statements, if not offered to prove the facts asserted, are not hearsay. In *Brooks*, a divorce decree granted the custody of two minor children to the father. A modified decree, however, granted custody over one of the children to the mother. The father appealed and contended that the trial court committed error by excluding testimony of a child psychologist who had examined the children prior to trial. Specifically, the witness attempted to testify to statements made to him by the minor son concerning the boy's preference as to his parents. The trial court had sustained the wife's objection to this evidence because of its prejudicial aspects.

The supreme court, in *Brooks*, stated that the testimony would not be violative of the hearsay rule because it would not be offered to prove the truth of the facts asserted.[42] The court, however, allowed the exclusion of the testimony because of its possible prejudicial impact. Emphasis was also placed on the propriety of preventing the psychologist from relating "second hand" information.

The exclusion of the testimony in this case is questionable. The children's statements could have been permitted if accompa-

---

[41] 303 N.E.2d 269 (Ind. 1973).

[42] McCormick § 14, at 31, comments: "If an expert witness has first-hand knowledge of material facts, he may describe what he has seen, and give his expert inferences therefrom." *But see* Proposed Fed. R. Evid. 703, 56 F.R.D. 183, 283 (1972).

nied by a proper limiting instruction. Furthermore, the supreme court's reliance on the phrase "second hand" is unfortunate since it could mislead counsel by preventing a proper understanding of the hearsay rule. Thus, the supreme court did make a correct statement of the hearsay rule but failed to emphasize the harm of excluding valuable testimony when its prejudicial impact could substantially be cured by a limiting instruction.

G. Cross-examination

In *Jameson v. McCaffry*,[43] the plaintiff was the operator of a vehicle which was struck at a railroad crossing by defendant's train, allegedly because of a failure of the warning lights. A police officer called as a defense witness was cross-examined by plaintiff as to whether the plaintiff had been arrested for drunken driving or for public intoxication at the time of the collision. On redirect, the officer was asked by the defendant whether the plaintiff was charged with a traffic violation at that time. Over objection, the trial judge permitted the officer to testify that the plaintiff was charged with the offense of failure to obey warning lights. The Indiana Court of Appeals found that the plaintiff's cross-examination concerning an arrest for the named cause opened the door for defendant to question the officer concerning any arrests which were made.[44] The plaintiff had argued that his cross-examination, relating to arrests for intoxication, was limited to clarification of the officer's testimony on direct regarding alcohol associated with the plaintiff. Plaintiff argued, therefore, that the redirect should have been limited to crimes such as drunken driving. The court of appeals found this argument unconvincing and stated that, if error occurred, it was harmless error. The court enumerated a test for harmless error: assuming similar trial court circumstances, except the reversal of the evidentiary ruling, would the result have been different?

H. Conclusion

The past year demonstrated a slow but visible advance by the appellate courts of Indiana toward allowing trial judges greater discretion in evidentiary matters; a refusal to overturn even erroneous evidentiary decisions unless such evidence compelled a result different from that which would have been reached had the erro-

---

[43]300 N.E.2d 889 (Ind. Ct. App. 1973).

[44]McCormick § 32, at 64, states: "The reply to new matter drawn out on cross-examination is the normal function of the redirect, and examination for this purpose is a matter of right, though its extent is subject to control in the judge's discretion."

neous evidence been excluded; a willingness to permit more hearsay rule exceptions because of the need for the evidence and its probable reliability; an acceptance of scientific evidence such as blood grouping tests; and an indication that the results of polygraph tests taken under appropriate circumstances may be admissible in the near future. This survey indicates that evidential matters are not critical in leading to reversals in appellate litigation, and this is probably appropriate. This result reflects a belief that technical evidentiary errors made by trial judges should not be a basis for reversal when the result of the trial would not otherwise be changed. Errors are often made by a trial judge due to the myriad rulings on evidential points which must be made without the adequate opportunity for reflection and study afforded appellate judges. The appellate judges of Indiana have shown that they understand this reality in the trial of cases and have shaped the law of evidence to achieve substantial justice.

IX. Evidence—Criminal

*William Marple**

A. Demonstrative Evidence

1. Bodily Invasions

Two extremely important cases involving the obtaining of demonstrative evidence from the body of an accused reached results not entirely consistent with each other. The supreme court decided, over dissent, in *Adams v. State*,[1] that court-ordered surgery to remove bullet fragments from beneath the surface of the defendant's skin was an impermissible invasion of his fourth amendment rights. The defendant was arrested as a suspect in a supermarket robbery, during which it was believed that he had been wounded by a shot fired by the police. When he was apprehended several weeks later, the police officers observed two bullet wounds, and an X-ray examination showed metallic fragments in his flesh. The police filed an affidavit for the purpose of obtaining a search warrant to retrieve the bullets from his body. In addition to stating the

*Member of the Indiana Bar. Law Clerk for the Honorable S. Hugh Dillin. A.B., Indiana University, 1970; J.D., Indiana University Indianapolis Law School, 1973.

[1]299 N.E.2d 834 (Ind. 1973), *cert. denied*, 94 S. Ct. 1452 (1974). The denial of the petition for certiorari contained the notation that the judgment below rested upon an adequate state ground.