

HYPNOSIS NEWS # 2

Hypnotic-Enhanced Testimony OK

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10-19-2002

The Kentucky Supreme Court, setting a binding precedent using a Campbell County case in which a rape victim identified her attacker under hypnosis, has said prosecutors may use hypnotically enhanced testimony under certain circumstances. Instead of issuing a definitive rule to either allow such testimony or prohibit it outright as most states do, the seven justices threw the decision back into the laps of trial judges.

It's the same standard that is in effect in nine other states, including Ohio.

"We agree and conclude that the `totality of circumstances' approach is the soundest approach thus far developed for evaluating the admissibility of evidence that is the product of an hypnotically induced, refreshed or enhanced recollection," said the decision, written by Justice William Cooper.

In doing so, the court upheld the conviction of Franklin Roark Jr., who is serving two life prison terms for twice breaking into the home of an Alexandria woman, sexually assaulting her and stealing her jewelry.

Roark also was convicted of rape and sentenced to life in prison in Boone County. He has a history of sex crimes, and was also a suspect in rapes in Fort Wright and Pendleton County.

"I was more than pleased — I was ecstatic with the ruling," said Campbell Commonwealth Attorney Jack Porter, who prosecuted Roark. "He's the kind of person who needs to be locked up in prison for the rest of his life."

Roark's conviction hinged on the woman's hypnotically enhanced identification of her attacker.

The victim first gave an inaccurate description of her assailant. It was only after she was hypnotized that she was able to accurately describe Roark, including the fact that he was balding and had a beard.

The problem with such testimony, as defense attorneys see it, is that a person can be induced or swayed by a false belief while under hypnosis. But the belief then becomes definitive for the person, whose confident testimony becomes credible to a jury.

"What's going to be next — séances?" asked Steve Dowell, who represented Roark

during his Campbell County trial. "I don't think (hypnotism) has been scientifically reliable enough to be let into court."

He envisions that prosecutors next will seek to have the results of lie detector tests — which long have been banned by the courts — entered into evidence.

"If I were a prosecutor looking to allow a polygraph in, I'd hold the Franklin Roark decision high above my head and say, "If they let in hypnosis, why not polygraphs?" Dowell said.

Veteran defense attorney Robert Carran of Covington said it's dangerous to place much emphasis on eyewitness testimony, whether it's hypnotically induced or not.

"It's ironic that we would receive an opinion that potentially makes post-hypnotic eyewitness identification admissible during the same time period when the use of DNA evidence is proving once again how unreliable eyewitnesses identification can be," he said.

F. Dennis Alerding, a top Northern Kentucky defense attorney, said some people may be more susceptible to hypnotism than others. Thus, the person who was hypnotized may simply be parroting the hypnotist's suggestions rather than her own memories.

"I think that would be very dangerous waters to start treading in," Alerding said.

Although such testimony has been debated across the country for decades, the issue never had gone before the Kentucky Supreme Court before the Roark case. Thus, Kentucky was one of the last states to decide the issue when the justices reached their decision Sept. 26.

The Ohio Supreme Court adopted the "totality of circumstances" position in 1988. Indiana's highest court banned hypnotically enhanced testimony in 1983.

Kentucky's Supreme Court previously allowed testimony from hypnotized people only if it was about matters they could remember before they were hypnotized. The Roark case deals with matters that a person could only recall after being hypnotized.

Most states — 26, including California, New York and Florida — reject such testimony automatically. Another four states — North Dakota, Oregon, Tennessee and Wyoming — allow such testimony, leaving it up to a jury to determine its validity.

Six states — including New Jersey — allow the testimony if certain standards are met during the hypnotism. But the Kentucky justices said that standard is falling into disfavor because the safeguards cannot recognize a difference between distorted hypnotic memories and real memories.

Instead, the "totality of circumstances" approach is gaining favor because it allows a

judge to consider the importance of the evidence with the way it was gathered. For instance, a judge can look at whether the person's memory was tainted by suggestions during the hypnotism, or whether other evidence corroborates the enhanced memory.

In the Roark case, Campbell Circuit Judge William Wehr allowed the woman to testify because of several factors.

The appellate judges noted that among those factors was that police found jewelry stolen from the victim's house in Roark's possession. Also, Roark had not been named previously or identified as a suspect when the woman, under hypnosis, accurately described him.

Porter said the additional evidence helped confirm the woman's recollections. He said hypnotism sometimes will be needed to bring out repressed memories — something that may not be uncommon in those who have been sexually assaulted or abused.

And with a judge able to look at the evidence and the circumstances surrounding the hypnotism, a defendant's rights should be well protected, he said.

"This gives them the opportunity to point out any flaws that may exist," Porter said.

"I think we'll make our case, and the defendants will make their cases, and we'll let the judge decide."