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CRIMINAL LAW AND PROCEDURE — EVIDENCE — ADMISSIBILITY OF LIE DETECTOR TESTS IN EVIDENCE — After all the evidence had been produced for the jury's consideration in a murder trial, defendant's counsel moved to reopen the case and be permitted to take defendant to a laboratory to be examined under a pathometer, or lie detector. *Held*, that as the court could not take judicial notice that the instrument was or was not effective for determining the truth, because the record gave no indication of general scientific recognition, the motion was denied. *People v. Forte*, 279 N. Y. 204, 18 N. E. (2d) 31, affg. (King Co. Ct. 1938) 4 N. Y. S. (2d) 913.

There are four well-known types of psycho-physiological deception tests: (1) measurement of the electric phenomena developed at the surface of the body during emotional changes; (2) the association reaction time test by the use of key words; (3) the respiration test; and (4) the systolic blood pressure test.¹ The scientific basis for any such test is the theory that more energy is expended in telling a falsehood than in telling the truth,² and that this extra energy involuntarily developed during lying may be recorded in such a way³

¹ Marston, "Psychological Possibilities in the Deception Tests," 11 J. CRIM. L. 551 (1921).

² MARSTON, THE LIE DETECTOR TEST 44 (1938).

³ Marston, "Psychological Possibilities in the Deception Tests," 11 J. CRIM. L.

that a reading of the chart in collaboration with the questions asked will show which answers of the witness were true and which were false.⁴ Although most publicity has attended the systolic blood pressure experiments,⁵ the attention of the public at present is focused upon the first named test.⁶ Courts generally have refused to allow the results of these tests to be used in evidence.⁷ The primary legal reason relied on is that the tests themselves and the theory upon which they are founded have not yet been generally accepted by science so as to enable the courts to take judicial notice of the accuracy of their results.⁸ This deductive reasoning has afforded a way out for the courts so far. It is suggested that an inductive approach would reach the same conclusion; that is, a court may easily say that it rejects this evidence in order to prevent collateral issues that would necessarily arise by arguments pro and con relative to the degree of perfection and scientific acceptance that these lie detectors have achieved.⁹ The constitutional guarantee against self-incrimination may be the source of an issue in some instances, but could not have arisen in the principal case because the defendant volunteered to take the test.¹⁰ The writers who advocate refusal of the evidence explain their position by saying that since the results of the test depend upon the type of questions asked, the sequence in which they are asked, and the correct interpretation of the entire record by an expert examiner, it would be

551 (1921); LARSON, "Modification of the Marston Deception Test," 12 J. CRIM. L. 390 (1921); MARSTON, THE LIE DETECTOR TEST (1938); LARSON, LYING AND ITS DETECTION (1932).

⁴ Inbau, "Methods of Detecting Deception," 24 J. CRIM. L. 1140 (1934). See also note 3, *supra*.

⁵ 46 HARV. L. REV. 1138 at 1168 (1933); 24 COL. L. REV. 429 (1924); 33 YALE L. J. 771 (1924); 34 A. L. R. 145 (1925).

⁶ Forkosch, "The Lie Detector and the Courts," 16 N. Y. UNIV. L. Q. REV. 202 (1939).

⁷ *Frye v. United States*, (App. D. C. 1923) 293 F. 1013; *State v. Bohner*, 210 Wis. 651, 246 N. W. 314 (1933). However, such evidence has been admitted in a number of unreported cases in lower state courts. MARSTON, THE LIE DETECTOR TEST 69 (1938); Inbau, "Detection of Deception Technique as Admitted as Evidence," 26 J. CRIM. L. 262 (1935). But in *People v. Kenny*, 167 Misc. 51, 3 N. Y. S. (2d) 348 (1938), the court allowed the introduction of results from a test of type (1). This was the same device involved in the principal case.

⁸ In *Frye v. United States*, (App. D. C. 1923) 293 F. 1013 at 1014, the court said, "We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development and experiments thus far made."

⁹ In *State v. Bohner*, 210 Wis. 651 at 658-659, 246 N. W. 314 (1933), the court said, "The present necessity for elaborate exposition of its theory and demonstration of its practical working, in order to convince the jury of its probative tendencies, together with the possibility of attacks upon the soundness of its underlying theory and its practical usefulness, may easily result in a trial of the lie detector rather than the issues in the cause."

¹⁰ Forkosch, "The Lie Detector and the Courts," 16 N. Y. UNIV. L. Q. REV. 202 (1939); Inbau, "Methods of Detecting Deception," 24 J. CRIM. L. 1151 (1934); MARSTON, THE LIE DETECTOR TEST 78 (1938).

almost impossible to get examiners and counsel to agree,¹¹ thereby resulting in a trial of the lie detector. It is interesting to note in this connection that even the writers disagree as to the respective merits of the two most widely publicized tests.¹² It is submitted that a more vital objection to the admission of this evidence is that, if it is judicially recognized before the technique has become standard, incompetent and unscrupulous individuals will appear and hold themselves out as experts ready to interpret the results as best suitable for a particular occasion.¹³ Since science has not yet assured the courts that this art is being practiced with true scientific spirit, the principal case in refusing the evidence may have followed a wise policy as well as an almost unbroken line of authority.

¹¹ BURTT, *LEGAL PSYCHOLOGY* 246 (1939), says, "As mentioned above, it is not merely a matter of noting whether the blood pressure goes up, but of a careful interpretation in the light of the whole record. Further, the general attitude of the suspect, getting an adequate amount of normal data before approaching crucial materials, noting involuntary responses, and making a comparative study of the various measurements requires a very definite type of expert." See also, Inbau, "Detection of Deception Technique Admitted as Evidence," 26 *J. CRIM. L.* 262 (1935); Forkosch, "The Lie Detector and the Courts," 16 *N. Y. UNIV. L. Q. REV.* 202 (1939).

¹² Forkosch, "The Lie Detector and the Courts," 16 *N. Y. UNIV. L. Q. REV.* 202 (1939); MARSTON, *THE LIE DETECTOR TEST* 59 (1938).

¹³ Inbau, "The Admissibility of Scientific Evidence in Criminal Cases," 2 *LAW & CONTEMP. PROB.* 495 at 502 (1935), says in discussing the general problem, "but they also realize, and only too well, that once given unlimited judicial approval the entire field immediately lends itself to prostitution by unethical and incompetent examiners. The fact that the method is nothing more nor less than a diagnostic technique, the value of which depends to a very considerable extent upon the competency of the examiner, and certainly to the same degree upon his integrity, entirely justifies the conservative position taken by the courts in the *Frye* and *Bohmer* cases." See also, Inbau, "Detection of Deception Technique Admitted as Evidence," 26 *J. CRIM. L.* 262 (1935); Keeler, "Debunking the 'Lie Detector,'" 25 *J. CRIM. L.* 153 (1934).