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## Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983)

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## COMMONWEALTH v. KATER

In *Commonwealth v. Kater*,<sup>1</sup> the Supreme Judicial Court of Massachusetts formulated a rule of per se inadmissibility of testimony given by a witness who has been hypnotized concerning facts not recollected before hypnosis.<sup>2</sup> The court held that “hypnosis simply lacks general acceptability by experts in the field as a reliable method of enhancing the memory of a witness.”<sup>3</sup> Furthermore, the court adopted various procedures for assessing the reliability of testimony obtained from a witness’s prehypnotic memory and for conducting hypnotic sessions involving potential witnesses.<sup>4</sup>

Kater was tried and convicted of first degree murder and of kidnapping a teenage girl.<sup>5</sup> The prosecution obtained the conviction based upon circumstantial evidence which included hypnotically aided testimony.<sup>6</sup> At trial, the prosecution failed to inform the court that four of its witnesses had been hypnotized. Believing that two of the four witnesses had been subjects of hypnosis, the defense counsel objected to the admissibility of their testimony.<sup>7</sup> After a preliminary examination of the witnesses, the judge decided to admit their testimony.<sup>8</sup>

On appeal, the defendant filed a motion for leave to file a motion for a new trial. Upon the recommendation of a single justice, the supreme judicial court remitted the motion to the trial court to

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1. 388 Mass. 519, 447 N.E.2d 1190 (1983).

2. *Id.* at 520, 447 N.E.2d at 1193. It is essential to note that this holding does not disqualify a witness who has undergone hypnosis from testifying. It allows a witness to testify as to facts contained in his or her prehypnotic memory but does not permit a witness to color that testimony with any facts which became “known” as a result of the hypnotic session. *Id.* at 529, 447 N.E.2d at 1197.

Hypnotism has been defined as the “production of a sleeplike condition in a person who is then very susceptible to suggestion and who acts only if told to do so.” OXFORD AMERICAN DICTIONARY 322 (1980).

3. 388 Mass. at 520-21, 447 N.E.2d at 1193.

4. *Id.* at 529-31, 447 N.E.2d at 1197-98.

5. *Id.* at 520, 447 N.E.2d at 1192.

6. *Id.* at 522-23, 447 N.E.2d at 1193-94. The *Kater* court defined hypnotically aided testimony as testimony first made available from a witness after hypnosis. *Id.* at 520, 447 N.E.2d at 1192-93.

7. *Id.* at 523, 447 N.E.2d at 1194. Sheila Berry and Helena McCoy had been subjects of hypnotic sessions twice. *Id.*

8. *Id.*

decide the issue of a new trial. At the hearing on that motion, the judge declined to establish whether or not the four witnesses had actually been hypnotized despite the fact that the expert testimony on hypnosis, offered solely by the defendant, indicated that at least three of the prosecution's witnesses had been hypnotized.<sup>9</sup> The record of the trial judge's findings, however, revealed that the hypnotic sessions were conducted in a haphazard manner—i.e. no record was kept as to (1) what knowledge each witness possessed prior to hypnosis, (2) what knowledge the hypnotist possessed about the crime, and (3) what environment existed prior to and during each session.<sup>10</sup> In denying the defendant's motion for a new trial, the judge stated that "the defendant failed to establish that the 'hypnotic' sessions developed any additional substantial or material facts or changes in testimony and that the testimony of Helena McCoy and Sheila Berry was the product of their memory as opposed to the product of hypnosis."<sup>11</sup>

Many courts have recognized the use of hypnosis for the purposes of memory enhancement and investigation in developing evidence admissible at trial.<sup>12</sup> These courts have held that hypnosis affects the credibility, but not the admissibility, of testimony.<sup>13</sup> It is argued that although a witness's present memory can be impaired by hypnosis, the dangers of suggestion and confabulation<sup>14</sup> are tem-

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9. *Id.* at 524, 447 N.E.2d at 1194. The trial judge doubted that an hypnotic session occurred since the "hypnotist" was a police officer whose qualifications were almost non-existent. When the police officer attempted to testify that the witnesses were hypnotized, the judge did not permit him to do so. *Id.*

10. *Id.*

11. *Id.* at 524, 447 N.E.2d at 1194-95.

12. *E.g.*, *United States v. Awkward*, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); *United States v. Adams*, 581 F.2d 193, 198-99 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); *Kline v. Ford Motor Co.*, 523 F.2d 1067, 1070 (9th Cir. 1975); *United States v. Narciso*, 446 F. Supp. 252, 281-82 (E.D. Mich. 1977); *Clark v. State*, 379 So. 2d 372, 375 (Fla. Dist. Ct. App. 1980); *People v. Smrekar*, 68 Ill. App. 3d 379, 386, 385 N.E.2d 848, 853-54 (1979); *State v. McQueen*, 295 N.C. 96, 119, 244 S.E.2d 414, 427-28 (1978); *State v. Jorgenson*, 8 Or. App. 1, 8-9, 492 P.2d 312, 315 (1971).

13. *See cases cited supra* note 12.

14. For an explanation of these dangers, see *State v. Hurd*, 86 N.J. 525, 538-39, 432 A.2d 86, 91-93 (1981) (quoting Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 317-18 (1979)).

The hypnotic suggestion to relive a past event, particularly when accompanied by questions about specific details, puts pressure on the subject to provide information for which few, if any, actual memories are available. This situation may jog the subject's memory and produce some increased recall, but it will also cause him to fill in details that are plausible but consist of memories or fantasies from other times. It is extremely difficult to know which aspects of hypnotically aided recall are historically accurate and which aspects have been

pered by the opportunity to cross-examine the witness.<sup>15</sup>

When confronted for the first time with the question of admissibility of hypnotically aided testimony, the supreme judicial court, in *Commonwealth v. A Juvenile*,<sup>16</sup> failed to take a definitive stance on the issue. *Commonwealth v. A Juvenile* involved a rape victim who was initially unable to accurately identify her assailant.<sup>17</sup> After being hypnotized by a Boston police officer, the victim was then able to assist another detective in sketching a composite picture. This resulted in subsequent identifications by the victim and eventual arrest of the defendant.<sup>18</sup> The absence of certain factual findings<sup>19</sup> by the trial court concerning the victim's identification testimony and the possible suggestiveness of the hypnotic session led the court to refrain from deciding the case and the legal issues contained therein. The court held, however, that because hypnotically induced testi-

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confabulated. . . . Subjects will use prior information and cues in an inconsistent and unpredictable fashion; in some instances such information is incorporated in what is confabulated, while in others the hypnotic recall may be virtually unaffected.

As a consequence of these limitations, hypnosis may be useful in some instances to help bring back forgotten memories following an accident or a crime while in others a witness might, with the same conviction, produce information that is totally inaccurate. . . . As long as this material is subject to independent verification, its utility is considerable and the risk attached to the procedure is minimal. There is no way, however, by which anyone—even a psychologist or psychiatrist with extensive training in the field of hypnosis—can for any particular piece of information determine whether it is an actual memory versus a confabulation unless there is independent verification.

*Id.* (emphasis in original). See generally Diamond, *Inherent Problems in the Use of Pre-trial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313 (1980); Specter & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?* 38 OHIO ST. L.J. 567 (1977).

15. See, e.g., *United States v. Adams*, 581 F.2d 193, 198 (9th Cir.), cert. denied, 439 U.S. 1006 (1978) (the prosecution impeached a defense witness with his post-hypnotic statements); *State v. McQueen*, 295 N.C. 96, 120-21, 244 S.E.2d 414, 428 (1978) (failure to cross-examine witness who had undergone hypnosis removed the defense's chance to render the witness's testimony inadmissible or discredited); *State v. Jorgenson*, 8 Or. App. 1, 8-9, 492 P.2d 312, 315 (1971) (fact that witness had been subjected to hypnosis and administration of sodium amytal found not to be a basis for disallowing testimony since the witness underwent prolonged and rigorous cross-examination by defense counsel before the jury). But see *Polk v. State*, 48 Md. App. 382, 427 A.2d 1041 (1981) (overturning *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1967), cert. denied, 252 Md. 731, cert. denied, 395 U.S. 949 (1969) which represented the leading opinion that fact of hypnosis affects credibility and weight, not admissibility).

16. 381 Mass. 727, 412 N.E.2d 339 (1980).

17. *Id.* at 728, 412 N.E.2d at 340.

18. *Id.*

19. The police officer who hypnotized the victim did not record the session nor the victim's pre-hypnotic memory. There was also controversy regarding whether or not the other policeman who assembled the composite picture knew the defendant. *Id.*

mony is inherently suggestive and because the surrounding circumstances of the hypnotic session are within the knowledge of the Commonwealth, the admissibility of such testimony should be conditioned upon a showing by the Commonwealth of its reliability.<sup>20</sup> In applying *Commonwealth v. A Juvenile* to the procedural facts of *Kater*,<sup>21</sup> the supreme judicial court interpreted the trial judge's decision as having misplaced the burden of proof placed upon the defense in that it required the defense to demonstrate that the hypnotically aided testimony proffered by the prosecution was reliable.<sup>22</sup>

Having resolved the burden of proof issue, the supreme judicial court in *Kater* sought to establish a standard for determining the admissibility of such evidence. The supreme judicial court had stated in *Commonwealth v. A Juvenile* that it would consider adopting a modified version of the test used in *Frye v. United States*<sup>23</sup> to ascertain the admissibility of any expert testimony based upon scientific principles or techniques.<sup>24</sup> The Frye test provides that admission of such evidence is contingent upon whether the scientific principle or technique employed "is sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>25</sup> In adopting this test, the *Kater* court did not attempt to analogize hypnosis to other conventional scientific processes,<sup>26</sup> but rather the court found the evidentiary reasoning underlying the *Frye* test to apply to the situation at hand.<sup>27</sup> The *Kater* court reasoned that when the situation is such that the jurors cannot realistically evaluate a principle or process because it is outside their realm of common knowledge or experience, the assistance of expert testimony is essential to their formulation of an informed decision.<sup>28</sup> Consequently, the party who is the proponent of hypnotically induced testimony must show that

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20. *Id.* at 734, 412 N.E.2d at 344.

21. Although the holding of *Commonwealth v. A Juvenile* was in effect, the trial judge in *Kater* failed to apply it.

22. *Kater*, 388 Mass. at 524, 447 N.E.2d at 1195.

23. 293 F. 1013 (D.C. Cir. 1923).

24. 381 Mass. at 732, 412 N.E.2d at 342-43.

25. *Frye*, 293 F. at 1014.

26. The prosecution attempted to argue that the *Frye* test should not apply to hypnosis cases because *Frye* deals only with psychological or physiological scientific processes.

27. 388 Mass. at 526, 447 N.E.2d at 1195.

28. The court did not explicitly state this proposition; however, when reading the reasoning behind the *Frye* test in conjunction with the *Kater* court's concern for whether a jury "can realistically evaluate the effect of hypnosis," one is lead to this conclusion. *Id.* at 526, 447 N.E.2d at 1195-96.

there exists general acceptance among experts depicting hypnosis as a reliable means of refreshing recall.<sup>29</sup> In light of the general skepticism among experts<sup>30</sup> as to the reliability of such testimony, the *Kater* court ruled that testimony induced by hypnosis is inadmissible.<sup>31</sup>

While the court held that hypnotically aided testimony was inadmissible, the court's holding did not preclude a witness from testifying as to facts remembered before hypnosis.<sup>32</sup> In order to preserve a witness's prehypnotic testimony, the court set forth the following procedural safeguards to be applied flexibly:

- (1) The hypnotic session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis.<sup>33</sup>
- (2) The qualified professional conducting the hypnotic session should be independent of and not responsible to the prosecutor, investigator or the defense.
- (3) Any information given to the hypnotic session must be in written form so that subsequently the extent of the information the subject received from the hypnotist may be determined.
- (4) Before induction of hypnosis, the hypnotist should obtain

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29. *Id.* at 527, 447 N.E.2d at 1196. A few courts have adopted the *Frye* approach as requiring each party to offer expert testimony on the effects of hypnosis in each particular case. *See* *State v. Hurd*, 86 N.J. 525, 538, 432 A.2d 86, 92 (1981) (hypnosis satisfies *Frye* in certain instances). For a thorough analysis of the *Hurd* interpretation see Note, *Safeguarding Admissibility of Hypnotically Enhanced Testimony*, 5 W. NEW ENG. L. REV. 281 (1982); *see also* *State v. Beacham*, 97 N. M. 682, 643 P.2d 246 (N.M. Ct. App. 1981) (post-hypnotic recollections admissible when proper foundation has first established the reliability of hypnotic session).

30. The *Kater* court declined to cite the opinions of many experts concluding that hypnotically aided testimony is unreliable. The court did however mention the inherent dangers associated with hypnosis as expressed by Dr. Orne, *see supra* note 14, adding that previously hypnotized witnesses have a tendency to be immune from meaningful cross-examination. 388 Mass. at 528, 447 N.E.2d at 1196.

31. 388 Mass. at 527-28, 447 N.E.2d 1196-97. Most of the courts which have recently held hypnotically induced testimony inadmissible have interpreted the *Frye* standard in this manner. *See, e.g.*, *State v. Mack*, 292 N.W.2d 764, 768-71 (Minn. 1980); *People v. Shirley*, 31 Cal. 3d 18, 40, 641 P.2d 775, 787, 181 Cal. Rptr. 243, 255-56, *cert. denied*, 103 S. Ct. 13 (1982); *People v. Hughes*, 59 N.Y.2d 523, 542-44, 453 N.E.2d 484, 494-95, 466 N.Y.S.2d 255, 265-66 (1983).

32. 388 Mass. at 528-29, 447 N.E.2d at 1197. The court recognized two situations in which it would not find evidence procured through the use of hypnosis inadmissible: 1) where a person suffers loss of memory due to a physical trauma; and 2) where the evidence is discovered as a result of the hypnotism of a witness. *Id.* at 528-29 n.6, 447 N.E.2d at 1197 n.6.

33. The *Kater* court recognized that there may be situations when an individual qualified in the use of hypnosis would suffice. 388 Mass. at 530 n.8, 447 N.E.2d at 1198 n.8.

from the subject a detailed description of the facts as the subject remembers them, carefully avoiding adding any new elements to the witness's description of the events.

- (5) All contacts between the hypnotist and the subject should be recorded so that a permanent record is available for comparison and study to establish that the witness has not received information or suggestion which might later be reported as having been first described by the subject during hypnosis. Videotape should be employed if possible, but should not be mandatory.
- (6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the prehypnotic testing and post-hypnotic interview.
- (7) Opposing counsel must raise a timely objection to the introduction of testimony procured through hypnosis.
- (8) Opposing counsel must be given an opportunity to show the possible effects of hypnosis and the way in which the particular session was conducted on the witness's testimony and sense of certainty.
- (9) Opposing counsel must be entitled to an instruction to the jury that in assessing the credibility of any such witness they may consider the consequences of (a) the fact that a witness underwent questioning while hypnotized and (b) the circumstances under which the hypnotic session was conducted.<sup>34</sup>

In developing these guidelines, the court acknowledged that the decision would have a deterrent effect on the use of hypnosis for the purposes of developing testimony against a criminal defendant.<sup>35</sup> The court emphasized, however, that its decision was based upon the scientific community's present lack of conclusive evidence with regard to the reliability of hypnosis as a memory stimulant.<sup>36</sup> By excluding only the testimony which is hypnotically induced, the court safeguarded the instrumental role hypnosis might play in the investigative process.

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34. The first six guidelines can be found in *Commonwealth v. A Juvenile*, 381 Mass. at 732, 412 N.E.2d at 343. The last three can be found in *Kater*, 388 Mass. at 530-31, 447 N.E.2d at 1198.

35. *Kater*, 388 Mass. at 531, 447 N.E.2d at 1199.

36. *Id.*