Louisiana Law Review

Volume 18 | Number 2
February 1958

Evidence - Production of Documents - Right of Accused to Inspect Prior Statements of State Witnesses

Jerre Lloyd

statement of its witness, the trial court would dismiss the action; under the act the trial court may either strike the testimony of that witness or, if the interests of justice require it, declare a mistrial.[29]

Thus the instant case and the ensuing act appear to have settled the clash between the interests of privilege and production. The defendant in a federal criminal case may, by demanding specific documents, compel production of prior statements touching the testimony of a government witness who has testified,[30] and the trial judge will determine relevancy of these statements in chambers.[31] However, should the government elect to claim its privilege and withhold the documents, the witness' testimony will be stricken or a mistrial declared.[32]

Jerre Lloyd

EVIDENCE — PRODUCTION OF DOCUMENTS — RIGHT OF ACCUSED TO INSPECT PRIOR STATEMENTS OF STATE WITNESSES

Defendant was convicted of rape. At the trial the prosecutrix stated during cross examination that she had made a written statement to the police just after the alleged offense. Defendant moved for production of the statement by the prosecution for possible use in impeaching the prosecutrix.[1] The district attorney offered to produce the statement voluntarily if defendant would read all of it to the jury, but defendant refused this conditional offer. The trial court then declined to compel production, and the Louisiana Supreme Court *held,* affirmed. Defendant had not laid the foundation necessary for production by showing either that production of the prior statement was "essential" to defendant or "was contrary in any respect" to the prosecutrix's testimony. *State v. Weston,* 232 La. 766, 95 So.2d 305 (1957).

29. 71 STAT. 595 (1957), 18 U.S.C. § 3500 (Supp. 1957).

30. Jencks v. United States, 353 U.S. 657 (1957). However, defendant cannot utilize this procedure *prior* to trial to obtain statements of a prospective government witness. United States v. Benson, 20 F.R.D. 602 (S.D.N.Y. 1957).

31. 71 STAT. 595 (1957), 18 U.S.C. § 3500 (Supp. 1957).

32. *Ibid.*

1. The credibility of a witness may be impeached by showing that the witness has made a prior statement which contradicts his testimony, provided a foundation is laid by calling the attention of the witness to the circumstances in which the prior statement was made. LA. R.S. 15:493 (1950). If the prior statement is introduced, it does not serve to prove the truth of what it says, but is admitted solely to neutralize the testimony of the witness. *E.g.,* State v. Bodoin, 153 La. 641, 96 So. 501 (1923).

Many jurisdictions have been reluctant to allow the defendant in a criminal case the right to pre-trial discovery[2] or production at the trial[3] of documents in the possession of the prosecution. Indeed, Louisiana permits the defendant *pre-trial* discovery only of his written confession, and denies him discovery of written confessions of co-defendants, police reports in the hands of the sheriff, police department, or district attorney, and written statements of witnesses.[4] The courts are reluctant to allow a defendant to engage in a "fishing expedition" into the prosecution's file in the hope that something of value may turn up.[5] Yet when defendant seeks, *during trial,* to compel production by the prosecution of a prior statement by a state witness which may be contradictory to the witness' testimony and hence relevant for impeachment purposes, the demand may be specific enough to separate it from the "fishing expedition" category.

In an early Louisiana case, *State v. Guagliardo,* it was clear from the evidence that the prior statement sought by defendant would probably contradict the testimony of the state witness, and the court held that the prosecution should have been compelled to produce it.[6] Although this decision can be harmonized with other early cases, it was never mentioned by any of them. In *State v. Simon*[7] the court indicated that something more than defendant's mere allegation that the prior statement would be relevant for impeachment purposes was needed, and suggested that a possible foundation for production might be an affidavit or affirmation under oath by defense counsel that the statement contradicted the witness' testimony.[8] The court added that it was not *prejudicial* error to deny defense counsel the inspection of a prior statement if, as a practical matter, he could not use it to impeach the witness due to his failure to lay the proper

2. 6 WIGMORE, EVIDENCE § 1859g (3d ed. 1940).
3. 9 WIGMORE, EVIDENCE § 2444. See also Annot., 52 A.L.R. 207 (1928).
4. State v. Shourds, 224 La. 955, 71 So.2d 340 (1954); State v. Haddad, 221 La. 337, 59 So.2d 411 (1952); State v. Martinez, 220 La. 899, 57 So.2d 888 (1952); State v. Simpson, 216 La. 212, 43 So.2d 585 (1949); State v. Mattio, 212 La. 284, 31 So.2d 801 (1947); State v. Dorsey, 207 La. 928, 22 So.2d 273 (1945).
5. State v. Lee, 173 La. 966, 139 So. 302 (1932); State v. Bankston, 165 La. 1082, 116 So. 565 (1928); State v. Simon, 131 La. 520, 59 So. 975 (1912).
6. 146 La. 949, 84 So. 216 (1920).
7. 131 La. 520, 59 So. 975 (1912).
8. The court was evidently grappling with the essential problem of determining defendant's *need* for the statement as a justification for compelling production. Yet requiring an oath that the prior statement contradicts the testimony would hardly seem feasible, since defense counsel might not know what the prior statement contained.

foundation for such a use. However, in *State v. Bankston*[9] the court held there would be no *error* in denying production if the foundation for impeachment had not been laid. Although the court was understandably reluctant to allow production when defendant could not use the statement, it seemed to confuse the foundation necessary for production with that required for introduction of the statement into evidence for impeachment. Furthermore, the *Bankston* decision forecast the tone of the cases that were to follow, when the court complained that defendant had not even stated his purpose in demanding production. The same complaint was made in a later case.[10] This continual failure of the defendant to present any practical reasons for compulsory production evidently caused the court in the later decisions to neglect the problem of the proper foundation, and the cases denied production in strict terms, rejecting defendant's argument that prior statements were public records.[11] In the last case prior to the instant one defendant's counsel did inform the court that he wanted the prior statement for impeachment purposes, but the court followed the pattern of the later decisions and denied production.[12]

The meaning of the instant case in terms of its effect on prior jurisprudence is not entirely clear. It is certain that the court rejected as being too strict the blanket denial of production observed in the later decisions.[13] However, it is difficult to determine exactly what is required in order to compel production. In one place the opinion states that production could be compelled "in instances where a proper foundation for the *impeachment* of the witness has been laid."[14] (Emphasis added.) Taken literally, this language would indicate a confusion of the foundation required for introduction of the statement into evidence with that necessary to compel production of the statement

9. 165 La. 1082, 116 So. 565 (1928).

10. State v. Lee, 173 La. 966, 139 So. 302 (1932).

11. State v. Haddad, 221 La. 337, 59 So.2d 411 (1952) (court seemed puzzled that defendant should even ask for production); State v. Williams, 216 La. 419, 43 So.2d 780 (1949); State v. Vallery, 214 La. 495, 38 So.2d 148 (1948); State v. Dallao, 187 La. 392, 175 So. 4 (1937) (semble) (apparent extension of denial of pre-trial inspection to inspection during trial).

12. State v. Labat, 226 La. 201, 75 So.2d 333 (1954).

13. In a review of most of the jurisprudence the court stated that the later cases denying production had impliedly overruled the earlier ones allowing it, including State v. Hodgeson, 130 La. 382, 58 So. 14 (1912). The *Hodgeson* case, however, held that defendant could use a subpoena duces tecum to compel production of a prior statement in the hands of a *third person*. Since the later cases dealt with production by the *state*, it would seem that they could not have impliedly overruled the *Hodgeson* case.

14. State v. Weston, 232 La. 766, 780, 95 So.2d 305, 310 (1957).

for inspection by the defense. A more reasonable interpretation of the holding would be to give full force to a statement in the opinion indicating two methods of laying a foundation for production: first, when "circumstances" exist which would indicate that production is "essential" to the defendant; second, when defendant shows the prior statement to be "contrary in any respect" to the witness' testimony.[15] The first instance would include the situation presented in the *Guagliardo* case, in which it was obvious from the evidence that the prior statement would be valuable for impeachment.[16] Thus the substance of the *Guagliardo* holding is preserved in the instant case, although the court did not mention that case in its opinion. The second situation presents difficulty. The court suggests that an admission of inconsistency on the stand would be sufficient.[17] However, since in Louisiana it seems that a prior statement cannot be introduced into evidence for the purpose of impeachment once the witness has admitted the statement was made,[18] the act of laying a sufficient foundation would render the statement useless as evidence. Certainly it may be concluded that the instant case represents a retreat from the rigidity of the later decisions, but what foundation is necessary in order to compel production remains unclear. It is well to note that in support of its decision the court cited the United States Supreme Court case of *Gordon v. United States,*[19] which most federal courts had interpreted as requiring a foundation of inconsistency for production.[20] Yet three months after the instant case was decided the United States Supreme Court, in *Jencks v. United States,* held

15. *Id.* at 780, 95 So.2d at 310.

16. See State v. Guagliardo, 146 La. 949, 84 So. 216 (1920).

17. State v. Weston, 232 La. 766, 780, 95 So.2d 305, 310 (1957).

18. LA. R.S. 15:493 (1950) (by implication); State v. Folden, 135 La. 791, 66 So. 223 (1914); State v. Goodbier, 48 La. Ann. 770, 19 So. 755 (1896).

Under the federal system the fact that the witness admits making a prior statement inconsistent with his testimony does not preclude the introduction of the statement into evidence. Gordon v. United States, 344 U.S. 414 (1953); United States v. Krulewitch, 145 F.2d 76 (2d Cir. 1944). It is interesting to note that this rule was announced simply to overcome the impasse created by allowing *production* if the witness admitted making an inconsistent statement while at the same time disallowing use of the statement upon such an admission. *Ibid.*

19. 344 U.S. 414 (1953).

20. United States v. Bookie, 229 F.2d 130 (7th Cir. 1956); United States v. Lightfoot, 228 F.2d 861 (7th Cir. 1956); Scanlon v. United States, 223 F.2d 382 (1st Cir. 1955); Simmons v. United States, 220 F.2d 377 (D.C. Cir. 1954); Shelton v. United States, 205 F.2d 806 (5th Cir. 1953).

Whether this was a correct interpretation of the *Gordon* decision is at least open to question. See Jencks v. United States, 353 U.S. 657 (1957), noted page 345 *supra.*

that the *Gordon* case had not required such a foundation.[21] The federal rule now is that the defendant may compel production merely by making his demand for specific documents containing prior statements which touch the testimony of the government witness.[22] It is interesting to speculate as to whether the Louisiana Supreme Court will further liberalize its views as a result of the *Jencks* decision.

Jerre Lloyd

MINERAL RIGHTS — BREACH OF CONTRACT — DAMAGES

Plaintiff landowners executed a mineral lease with defendant's assignors. The lease contained a clause obligating the lessee to drill offset wells if such were necessary,[1] and also provided that the lessor had to put the lessee in default for any alleged breach of any express or implied obligation of the lease.[2] If the lessee, within sixty days of notice, proceeded to meet the alleged breaches, he was not to be considered in default. Defendant drilled a well on the leased tract, completing it in the "D" sand, the lowest of three productive sands. Subsequently, six wells were drilled by defendant on surrounding tracts. As a consequence of a geological survey conducted by plaintiffs, it was disclosed that one of the adjoining wells was within 660 feet of the leased tract,[3] that the surrounding wells were producing from the "C" sand which underlay plaintiffs' tract, and that they were draining minerals underlying the leased tract. Plaintiffs gave notice of breach, demanding that defendant take steps to prevent drainage from the "C" sand beneath the leased tract. Within forty-two days defendant had recompleted the well on the leased tract in the "C" sand. In a suit to recover damages for failure to drill an offset well and for drainage from beneath

21. 353 U.S. 657 (1957), noted page 345 *supra.*

22. *Ibid.*

1. "In the event a well or wells producing oil in paying quantities should be brought in on adjacent lands not owned by the Lessor and within six hundred sixty (660) feet of said land, Lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances."

2. "In the event Lessor considers that Lessee has not complied with all its obligations hereunder, both express and implied, Lessor shall notify Lessee in writing, setting out specifically in what respects Lessee has breached this contract. If within sixty (60) days after receipt of such notice, Lessee shall meet or commence to meet the breaches alleged by Lessor Lessee shall not be deemed in default hereunder. The service of said notice and the lapse of sixty (60) days without Lessee meeting or commencing to meet the alleged breaches shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder."

3. See note 1 *supra.*