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Animal Behavior Evidence

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ANIMAL BEHAVIOR EVIDENCE

I. INTRODUCTION

Evidence as to the actions of animals occupies a small niche in the field of criminal evidence. Within the area of animal behavior evidence the major preoccupation has been with problems relating to tracking dogs, particularly bloodhound testimony.[1] The Montana Supreme Court, however, has not only been confronted with bloodhound testimony, but, with far more frequency, testimony of bovine behavior in cattle rustling cases. The problem posed by these cases has been whether testimony as to animal behavior is admissible as competent evidence, or inadmissible as hearsay. The following investigation sets forth the contradictory positions taken by the Montana Court. While allowing evidence of cattle behavior, the Court balked at admitting bloodhound testimony. Possible reasons for this divergence, such as a distinction between instinctive and learned behavior or distinctions between the species of animals involved, have been suggested in order to attempt a determination of the present status of animal behavior evidence in Montana and what effect it may have on the increasing use of canine detection by police.

II. THE QUANDRY

The Montana rule on the admissibility of cattle behavior evidence stems from *State v. Foley*[2] where the defendant was convicted of stealing four calves. Over objections, three witnesses, experienced cattlemen, testified that they saw four of the complainant's cows near a corral on the defendant's ranch containing nine calves. They turned the calves out to the cows and four calves began nursing. These were the same cows seen running with calves in a location twelve miles from where defendant claimed to have found them. The complainant, over objection, testified that when sucking calves are separated from their mothers and corralled, the cows will stay within the corral area. According to the Montana Supreme Court, testimony as to habits, conduct and actions of cattle under certain circumstances by witnesses having knowledge of cattle and their habits was admissible.[3]

This rule appears to have been reaffirmed in *State v. Grimsley*,[4] again involving larceny of calves. Complainant testified that he saw two of his cows wandering near defendant's corral containing a number of calves. Complainant gained defendant's permission to bring the cows to the corral to see if they would claim their calves, but before the test could be made, defendant shot the calves. In determining that the admission of the testimony did not constitute prejudicial error, the Court

[1] *See* 2 WIGMORE, EVIDENCE § 177 (3d ed. 1940); 94 A.L.R. 413 (1935); 18 A.L.R.3d 1221 (1968).
[2] 44 Mont. 311, 120 P. 225.
[3] *Id.* 120 P. at 227.
[4] 96 Mont. 327, 30 P.2d 85 (1934).

stated: "The evidence might have had some bearing on the test proposed to determine whether or not the cows would claim the calves found in defendant's possession. . . ."[5] Impliedly the Court seemed willing to accept the test proposed by complainant to establish ownership of the calves; that is, the Court apparently would have accepted testimony of the actions of the cows in selecting their calves.

These two cases indicate that the Court considered testimony of cattle behavior admissible as a type of opinion evidence given by an expert in the field. The *Foley* court expressly defined the expert as one having knowledge of cattle.[6] In both *Foley* and *Grimsley*, the witnesses were apparently ranchers who had gained their knowledge by raising or working with cattle.

From 1911 to 1951 the admissibility of actions of cattle as interpreted by one experienced in cattle behavior was an established rule of evidence in Montana. In 1951, however, the case of *State v. Storm*[7] struck a resounding blow to this rule and the resulting chaos has not yet settled in peaceful resolution. Without reservation, the *Storm* court refused to allow bloodhound testimony.

Storm was convicted of murder in the first degree. To place him at the scene of the crime, the State was allowed, over defendant's repeated objections, to introduce testimony concerning the actions of two bloodhounds. The dogs allegedly had picked up the scent of the murderer at the scene of the crime and traced it to defendant. During the tracking their trainer had pulled them off their course for a distance of 100 feet, from which the dogs then continued until they reached defendant. In ruling the testimony inadmissible, the Court gave the following reasons: (1) "Dogs and other dumb animals do not qualify as witnesses in the courts of this state. They know not the nature of the oath. They may not be sworn. They cannot be cross-examined. They testify only through professed interpreters whose translations and conclusions are always hearsay."[8] (2) Even those jurisdictions that allowed bloodhound testimony did not allow such evidence when the dogs had been dragged off the initial scent by their handler.[9] (3) There is no guarantee of reliability in this type of evidence since the dog is capable of error. The defendant in a criminal proceeding should not be jeopardized by the fallibility of a dog.[10] (4) The danger exists of jurors placing too much weight on evidence of canine detection due to a super-

[5] *Id.* 30 P.2d at 88.
[6] *Supra* note 2, 120 P. at 227; *see* Miller v. Territory, 9 Ariz. 123, 80 P.321 (1905).
[7] 125 Mont. 346, 238 P.2d 1161; subject of a Case Comment in 9 WASH. & LEE L. REV. 248 (1952).
[8] *Id.* 238 P.2d at 1176.
[9] *Id.*
[10] *Id.* 238 P.2d at 1179 citing Rex v. White, 37 B.C. 43, 3 D.L.R. 1 (1926) and at 1181 citing State v. Grba, 196 Iowa 241, 194 N.W. 250 (1923).

stitious awe held by most people of the actions of animals.[11] However, the Court concluded by stating that "irrespective of the rule obtaining elsewhere, we here hold that in this jurisdiction such so-called 'bloodhound testimony' is incompetent and inadmissible."[12]

The "rule obtaining elsewhere," at the time of the *Storm* decision as well as now, allows bloodhound testimony if a proper foundation has been laid.[13] This foundation usually consists of the pedigree and training of the dog.[14] The qualifications and experience of the trainer who is the usual witness to testify and interpret the dog's actions,[15] the dog's prior experience and success in tracking,[16] and whether the scene of the crime where the scent is first picked up is protected from intrusion.[17] If the foundation is properly laid and the testimony admitted, the evidence is circumstantial; it alone cannot support a conviction.[18]

Other jurisdictions remain opposed to bloodhound testimony because of the reasons put forth by the majority of the *Storm* court;[19] however,

[11]*Id.* 238 P.2d at 1179 citing McWhorter, *The Bloodhound as a Witness*, 54 AM. LAW REV. 109 (1920).
[12]*Id.* 238 P.2d at 1181-1182.
[13]Alabama—Burks v. State, 240 Ala. 587, 200 So. 418 (1941); Aaron v. State, 271 Ala. 70, 122 So.2d 360 (1960).
Arkansas—Padgett v. State, 125 Ark. 471, 188 S.W. 1158 (1916); Rolen v. State, 191 Ark. 1120, 89 S.W.2d 614 (1936).
Florida—Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937).
Georgia—Schell v. State, 72 Ga.App. 804, 35 S.E.2d 325 (1945); Mitchell v. State, 202 Ga. 247, 42 S.E.2d 767 (1947).
Kansas—State v. Netherton, 133 Kan. 685, 3 P.2d 495 (1931).
Kentucky—Pedigo v. Comonwealth, 103 Ky. 41, 44 S.W. 143, 42 L.R.A. 432 (1898); Bullock v. Commonwealth, 249 Ky. 1, 60 S.W.2d 108, 94 A.L.R. 407 (1933); Daugherty v. Commonwealth, 293 Ky. 147, 168 S.W.2d 564 (1943).
Louisiana—State v. Greene, 210 La. 157, 26 So.2d 487 (1946).
Massachusetts—Commonwealth v. Smith, 342 Mass. 180, 172 N.E.2d 597 (1961); Commonwealth v. LePage, ... Mass. ...., 226 N.E.2d 200 (1967).
Mississippi—Hinton v. State, 175 Miss. 308, 166 So. 762 (1936).
Missouri—State v. Long, 336 Mo. 630, 80 S.W.2d 154 (1935).
North Carolina—State v. Dorsett, 245 N.C. 47, 95 S.E.2d 90 (1956); State v. Rowland, 263 N.C. 353, 139 S.E.2d 661 (1965).
Ohio—State v. Dickerson, 77 Ohio St. 34, 82 N.E. 969 (1907).
Oklahoma—Buck v. State, 77 Okl.Cr. 17, 138 P.2d 115 (1943).
Pennsylvania—Commonwealth v. Hoffman, 52 Pa.Super. 272 (1912).
South Carolina—State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916).
Tennessee—Copley v. State, 153 Tenn. 189, 281 S.W. 460 (1926).
Texas—Parker v. State, 46 Tex.Cr. 461, 80 S.W. 1008 (1904).
West Virginia—State v. McKinney, 88 W.Va. 400, 106 S.E. 894 (1921).
[14]Short v. Commonwealth, 291 Ky. 604, 165 S.W.2d 177 (1942); State v. McLeod, 196 N.C. 542, 146 S.E. 409 (1929); Copley v. State, 153 Tenn. 189, 281 S.W. 460 (1926). *See also* cases in note 13, *supra*.
[15]State v. Barnes, 289 S.W. 562 (Mo. 1926); State v. King, 144 La. 430, 80 So. 615 (1919); Harris v. State, 143 Miss. 102, 108 So. 446 (1926); State v. Evans, 115 Kan. 538, 224 P. 492 (1924).
[16]State v. Harrison, 149 La. 83, 88 So. 696 (1921); State v. Yearwood, 178 N.C. 813, 101 S.E. 513 (1919); State v. Rowland, N.C., *supra* note 13.
[17]Bullock v. Commonwealth, Kentucky, *supra* note 13; State v. Davis, 154 La. 295, 97 So. 449 (1923); Meyers v. Commonwealth, 194 Ky. 523, 240 S.W. 71 (1922).
[18]State v. Fixley, 118 Kan. 1, 233 P. 796 (1925); Daugherty v. Commonwealth, Kentucky, *supra* note 13; State v. Storm, *supra* note 7, at 1185.
[19]People v. Pfanschmidt, 262 Ill. 411, 104 N.E. 804 (1914); Brott v. State, 70 Neb. 395, 97 N.E. 593, 63 L.R.A. 789 (1903); State v. Grba, *supra* note 10. *Cf.* People v. Callahan, 324 Ill. 101, 154 N.E. 463 (1926).

as the Court also noted, it is doubtful that the evidence presented in *Storm* would have been admitted in a jurisdiction where bloodhound testimony generally is allowed, since the dogs were dragged off their initial scent at one point during the tracking.[20]

Justice Angstman, in a lengthy dissent, refuted the majority's arguments by insisting that the testimony had adequate safeguards since the site where the initial scent was picked up had been sufficiently guarded to insure the dogs were tracking no one but the suspected murderer,[21] and the dogs could not be considered as witnesses. The witness, according to Angstman, is the trainer and the defendant had the opportunity to cross-examine him.[22] He analogized the actions of the dogs to those of ewe sheep being able to pick out their offspring from a flock containing a hundred almost identical lambs.[23] As authority for this proposition, he cited *Grimsley*. This is the only reference made in the entire *Storm* decision to any type of animal behavior evidence other than the actions of dogs. No mention was made of the *Foley* decision.

Several perplexing questions could have been asked following the *Storm* decision. Did *Storm* overrule the admissibility of animal behavior evidence in the *Foley* and *Grimsley* decision? Could the *Storm* holding be narrowly construed to apply only to bloodhound testimony, thus leaving the admissibility of cattle behavior evidence alive and well? There was no reference in *Storm* to the admission of cattle behavior evidence that had been an established rule in Montana for forty years. It seems doubtful that the Court's holding could be construed to apply solely to bloodhound testimony when it specifically referred to "dogs and other dumb animals" as incompetent witnesses.[24] By this language it appears that the Court ruled all animal behavior evidence inadmissible. The dissent may have been fighting for the survival of the cattle evidence rule as well as the admission of the bloodhound testimony by equating the actions of dogs and sheep. Although not expressly stated, the dissent contended that all animal behavior evidence is admissible if the witness is properly qualified to interpret the behavior. If a Montana lawyer had followed this labyrinth of decisions, concluded that *Storm* terminated the admissibility of all animal behavior evidence in Montana, and rested on this supposition, the *Perkins* case[25] in 1969 could only have renewed his confusion.

Perkins was convicted of grand larceny of eleven calves. The complainant, Williamson, in checking his cattle after a snowstorm, noticed a number of cows bawling for their calves; their full udders indicated they had not been nursed recently. Tire tracks in the snow placed

[20] *Supra* note 9.
[21] *Supra* note 7 at 1182.
[22] *Id.* at 1186.
[23] *Id.*
[24] *Supra* note 8.
[25] State v. Perkins, ... Mont. ..., 457 P.2d 465 (1969).

suspicion on the defendant. Perkins granted Williamson permission to bring the cows whose calves were missing to his corral which contained 75 or 80 calves. At the trial, the court allowed testimony as to the actions of these eleven cows and calves when the cows were released in defendant's corral. Each cow singled out a calf as her own. Then the eleven pairs were separated, tagged and again released. The calves returned to the same cows they had previously paired with and began nursing. This "mothering up" proved Williamson's ownership of the calves.[26] Perkins' counsel failed to object to any of the "mothering up" testimony;[27] thus, when considered by the Montana Supreme Court, the admissibility of this evidence was not in issue. The Court, however, in upholding the conviction, relied heavily on the "mothering up" of the cattle as an indication of defendant's guilt.

III. CONCLUSION

One could only conclude after the *Perkins* decision that the approach to animal behavior evidence by the Montana Court had come full circle. To determine the present rule with legal precision would require divine intervention. One could only attempt to second-guess the intentions of the Court.

Did *Perkins* overrule *Storm*? The *Perkins* court did not expressly refer to the admissibility of the "mothering up" evidence since the point was not in issue. The Court was determining whether the evidence supported the conviction and in affirming it, the Court considered the "mothering up" as one of the strong points of the State's case. Without this evidence it is doubtful that the conviction could have been upheld. This reliance on animal behavior evidence tacitly implies that either *Storm* is overruled or that the Court will not allow animal behavior evidence only when it is bloodhound testimony.

Do two rules on animal behavior evidence exist? If parallel rules exist, evidence concerning the actions of cattle is admissible[28] while evidence concerning canine actions is not. The majority in *Storm* did not refer to either *Foley* or *Grimsley*, so perhaps unconsciously the Court was differentiating according to the specie of animal involved. In the dissent, however, Justice Angstman refused to distinguish animal behavior on this basis.[29] To support the concept of parallel rules, it would be necessary to develop the cattle rule from *Foley* to *Grimsley* to *Perkins* and regard *Storm* in a separate line of development for the canine species only. This may be putting too narrow a construction on the *Storm* decision.

[26] *Id.* at 468-469.
[27] State v. Perkins, Official Trial Transcript, Case No. 824.
[28] *See* State v. McAteer, 227 Iowa 320, 288 N.W. 72 (1939).
[29] *Supra* note 22.

Has the Montana Court been distinguishing quite covertly between learned behavior and instinctive behavior? In a recent Maryland decision which admitted testimony of the actions of a German Shepherd used by the police in tracking robbery suspects, the Court expressly stated that the ability of a dog to track a human scent was not an inherent characteristic but one instilled through training.[30] It is apparent that some regard the ability of a dog to track as instinctive behavior as evidenced by Angstman's view and courts which take judicial notice of certain breeds as having an inherent ability to track.[31] Nevertheless, the majority in *Storm* may have made this differentiation when it questioned the ability of bloodhounds to trace the guilty party without error. According to the Court, dogs are fallible;[32] the unexpressed reasoning behind this view may be that learned behavior is more susceptible to mistakes than instinctive behavior.

The Court could have accepted without comment a theory that a female animal has an instinctive ability to identify her young. This instinctive behavior may appear to be so much stronger than any learned behavior that fewer mistakes are likely to be made, thus guaranteeing more trustworthiness in this type of evidence. One witness in the *Perkins* trial, a rancher for fifteen years, related that a range cow, when confronted with a calf other than her own, will reject the calf by kicking and butting it.[33] From the type of cattle evidence given in the three Montana decisions, "mothering up" seems to be an accepted range test of identifying calves and the Court has tacitly adopted it.

Whatever be the Court's intent, canine evidence would not be admissible under any of the suggested, developed rules of evidence in Montana. When the probable number of cattle cases that may arise in a cattle-industry state like Montana are weighed against the probable number of cases involving tracking-dog evidence that may arise, the *Storm* ruling may be of no consequence in the devolping rules of criminal evidence. But this would ignore the increasing use of dogs in the area of drug discovery, particularly to detect marijuana. The Montana Court may be faced with the dilemma raised by *Storm* in the near future when the choice will lie among affirming the rule set down in *Storm* and refusing to admit testimony on canine detection, distinguishing *Storm* on its facts, or simply overruling that decision.

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[30]Terrell v. State, 3 Md.App. 340, 239 A.2d 128 (1968) (contains a comprehensive survey of decisions concerning bloodhound testimony); *see also* WIGMORE, *supra* note 1.

[31]Copley v. State, *supra* note 14.

[32]*Supra* note 10.

[33]*Supra* note 27 at 83.