

## October 2004 Feature Article

### Statements Made to a Court-Appointed Expert may be used for Impeachment

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In *People v. Pokovich* (2004) 120 Cal.App.4<sup>th</sup> 436, the Third Appellate District ruled that statements made to a court-appointed expert may be used to impeach the witness's testimony.

#### Facts

Charles Grover Pokovich was charged with four counts of shooting at a motor vehicle (Penal Code §246), eight accounts of assault with a firearm (Penal Code §245(a)(2)), and use of a firearm in the commission of the assaults (Penal Code §12022.5, subd. (a)).

At approximately 3:00 p.m. in the afternoon on Easter Sunday, Deborah Bentrim was shot as she was driving her car. A relative driving behind Bentrim heard a loud noise that sounded like a boulder had hit Bentrim's van. About the same time on the same stretch of road, a bullet passed through the passenger door of a truck being driven by the Tucker family. A car driven by the daughter of a neighbor of Pokovich was also hit and it stopped. The driver and her passenger saw Pokovich standing on his porch holding a rifle. Pokovich yelled and told them, "Get the fuck off my property." The driver and passenger then called 9-1-1.

Deputy sheriffs set up roadblocks, and Pokovich drove up and explained that he was the one they wanted because his neighbor seemed to think he was shooting at her. A rifle and ammunition were recovered from Pokovich's mobile home. Five empty shell casings found in front of the mobile home were matched to his rifle. The bullet fragment recovered from Bentrim's car matched the ammunition and the rifle. Other bullet fragments were recovered from the Tucker truck.

The trial court had appointed Dr. Kent Caruso and Dr. Aravind Pai to examine Pokovich and evaluate his competency to stand trial (see Penal Code §1367 *et seq.*). Both evaluators found he was competent.

During the trial, Pokovich testified that he fired his rifle twice, or three or four times, about 10:00 a.m. to scare blue jays away from his fruit trees. At 3:00 p.m., he claimed to be

inside his mobile home reading a novel and drinking iced tea.

The prosecutor sought the court's permission to introduce certain statements defendant made to Doctors Pai and Caruso that were inconsistent with defendant's testimony at trial, citing *People v. Crow* (1994) 28 Cal.App.4th 440, and *People v. Humiston* (1993) 20 Cal.App.4th 460, as authority for such impeachment. The trial court concluded that there was no applicable privilege preventing the impeachment, and overruled the defense attorney's Evidence Code §352 objection that the inconsistent statements were more prejudicial than probative. *Id.*

The jury convicted Pokovich on all counts. Pokovich appealed, claiming the trial court erred in admitting the impeachment testimony.

### **Appellate Analysis**

The Court of Appeal held that statements made to a court-appointed expert could be used to impeach the testimony of Pokovich. Ordinarily, a defendant's responses to questions by experts evaluating his competency are not admissible as evidence against the defendant in the guilt phase of the trial. *Estelle v. Smith* (1981) 451 U.S. 454, 466-469. California's judicially declared rule of immunity provides that statements a defendant makes to experts appointed to determine competency ordinarily may not be used at trial on the issue of defendant's guilt. *People v. Weaver* (2001) 26 Cal.4th 876, 959-961.

However, the *Pokovich* court noted that: "both the United States Supreme Court and the California Supreme Court have held that the testimonial privilege 'cannot be construed to include the right to commit perjury.' *Harris v. New York* (1971) 401 U.S. 222, 225; accord, *People v. May* (1988) 44 Cal.3d 309, 319." *Pokovich, supra*, 120 Cal.App.4<sup>th</sup> at 441. Therefore, the *Pokovich* court concluded:

**As a matter of sound public policy, the Fifth Amendment and California's judicially declared rule of immunity cannot be used by a defendant as a shield to commit perjury at trial. Hence, the trial court properly allowed the prosecution to impeach defendant's testimony at trial with inconsistent statements he made to Doctors Pai and Caruso.**

*Id.*, 129 Cal. App. at 442.

### **Conclusion**

Generally, juries will consider court-appointed experts to be "objective" experts because they are appointed by the impartial trial judge. Juries will typically view them in a better light than the "hired-gun" experts retained by the parties' lawyers. While court-appointed expert testimony may not be allowed on certain issues, when such testimony is admitted for impeachment it will be devastatingly effective.