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STATE OF OHIO, Plaintiff-Appellant v. TIMOTHY ROONEY, Defendant-Appellee

C.A. No. 12052

Court of Appeals, Ninth Judicial District of Ohio, Summit County, Ohio

1985 Ohio App. LEXIS 8471

August 7, 1985

PRIOR HISTORY: [*1]

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT COUNTY OF SUMMIT, OHIO, CASE NO. 84 5 541

DISPOSITION:

The judgment is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Summit Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

COUNSEL:

LYNN SLABY, Prosecuting Attorney, City-County Safety Bldg., Akron, OH 44308, for Plaintiff.

DAVID L. HERBERT and JOHN H. FRIEG, Attorneys at Law, 4665 Douglas Circle, N.W., Canton, OH 44718, for Defendant.

JUDGES:

BAIRD, P. J., COOK, J., concur.

(Cook, J., Judge of the Eleventh District Court of

Appeals, sitting by assignment pursuant to Article IV, § 5(A)(3), Constitution and Lynch, J., retired Judge of the Seventh District Court of Appeals, sitting by assignment pursuant [*2] to Article IV, § 6(C), Constitution).

OPINION BY:

LYNCH

OPINION:

DECISION AND JOURNAL ENTRY

LYNCH, J.

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Plaintiff is appealing the decision of the Summit County Court of Common Pleas which sustained the motion of defendant to suppress consideration of a polygraph test of defendant that was taken by the Akron Police Department and which plaintiff had indicated was going to be presented at defendant's probation revocation hearing.

Defendant was prosecuted through a bill of information of the prosecuting attorney for grand theft of miscellaneous lawn and garden products of his employer, O. M. Scott and Sons, Inc., amounting to \$ 427,677 in violation of R.C. 2913.02(A)(1), a felony of the third degree.

On May 24, 1984, defendant entered a plea of guilty on one count of grand theft as a result of a plea bargaining agreement with the prosecuting attorney.

Defendant was sentenced to two (2) years imprisonment at the Ohio State Penitentiary at Chillicothe, Ohio. However, such sentence was suspended and defendant was placed on probation for three (3) years upon

[*3] terms and conditions, the pertinent parts of which are as follows:

Defendant was to make restitution satisfactory to the O. M. Scott Company. This condition is not an issue in this appeal.

The condition at issue in this appeal is the following:

"4. That he [defendant] completely and truthfully cooperate with the Akron Police Department***." October 24, 1984 Journal Entry.

The state made a motion with the trial court to revoke defendant's probation on the basis that on October 23, 1984, the Akron Police Department conducted a polygraph test on defendant; that the test revealed that on at least two specific issues defendant was found to be deceitful and not truthful and that defendant had failed the condition of his probation that he would completely and truthfully cooperate with the Akron Police Department.

Defendant filed a motion to suppress consideration of subject polygraph test. The trial court sustained such motion, and this decision is the subject of this appeal.

The state requested that the defendant submit to polygraph tests. During an informal hearing before Judge Reed, the court directed the defendant to submit to such tests. The defendant submitted [*4] to two polygraph tests on October 23, 1984, and October 24, 1984, which were administered by Sergeant James Bostick of the Akron Police Department. During these two tests, defendant was questioned, among other things, about his knowledge of the knowledge of certain persons, who had purchased some of subject stolen property, as to defendant's criminal activity. On the basis of defendant's answers to these questions, Sergeant Bostick stated that in his opinion the defendant was deceptive and untruthful in his answers to two questions.

Defendant's expert witness, John G. Carroll, President of the Ohio Polygraph Examiners, testified that he reviewed the test questions asked by Sergeant Bostick for subject polygraph tests; that the two questions asked by Sergeant Bostick that are the subject of this appeal were improper because they were so loosely worded that they would not result in a valid test; that he administered a polygraph test to defendant and reworded the same questions that are the subject of this appeal and that, in his opinion, defendant truthfully answered such questions.

Plaintiff's only assignment of error is that the trial court erred in suppressing the polygraph evidence [*5] at defendant's probation violation hearing.

Evid. R. 101(C)(3) provides that courts are not bound by the Rules of Evidence in a probation revocation hearing.

The syllabus of State v. Burkholder (1984), 12 Ohio St. 3d 205, provides as follows:

"Pursuant to Section 14, Article I of the Ohio Constitution, evidence obtained through an unreasonable or unlawful search and seizure is inadmissible in a probation revocation proceeding."

We realize that the instant case is not a search and seizure case, but Burkholder is cited as the most recent expression of the Ohio Supreme Court on a probation revocation hearing.

The syllabus of State v. Souel (1978), 53 Ohio St. 2d 123, is as follows:

"The results of a polygraph examination are admissible in evidence in a criminal trial for purposes of corroboration or impeachment, provided that the following conditions are observed:

"(1) The prosecuting attorney, defendant and his counsel must sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.

"(2) [*6] Notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, and if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.

"(3) If the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:

"(a) the examiner's qualifications and training;

"(b) the conditions under which the test was administered;

"(c) the limitations of and possibilities for error in the technique of polygraphic interrogation; and,

"(d) at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

"(4) If such evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given."

The Souel case was followed in *State v. Levert* (1979),

58 Ohio St. 2d 213.

In the instant case, neither [*7] defendant nor his counsel voluntarily agreed either to subject the defendant to polygraph tests or the subsequent admission as evidence against defendant in a probation hearing. Furthermore, defendant submitted expert testimony that questioned the validity of the results of subject polygraph tests. Since there is a conflict of evidence on the validity of subject polygraph tests, we are bound by the decision of the trial court as to the credibility of the witnesses.

Under the facts of this case, we conclude that the trial court did not commit error in sustaining defendant's motion to suppress consideration of polygraph tests of defendant that are the subject of this appeal. Therefore, we overrule plaintiff's only assignment of error.