

LEXSEE 53 OHIO ST. 2D 123

THE STATE OF OHIO, APPELLEE, v. SOUEL, APPELLANT

No. 77-486

Supreme Court of Ohio

53 Ohio St. 2d 123; 372 N.E.2d 1318; 1978 Ohio LEXIS 504; 7 Ohio Op. 3d 207

February 22, 1978, Decided

PRIOR HISTORY: [***1] CERTIFIED by the Court of Appeals for Franklin County.

On May 1, 1975, Ralph Allan Steinman was robbed and murdered. There were apparently no clues as to the perpetrator(s) of these crimes until February 1976, when appellant, Gene Souel, who was being held in Franklin County jail on an unrelated charge, offered to supply the police with information relative to certain homicides. After questioning individuals named by appellant in the course of three separate interviews the investigating police officers began to suspect that Souel was implicated in the crimes which he described.

On March 5, 1976, the Franklin County Grand Jury returned a two-count indictment charging appellant with the aggravated murder, with a death penalty specification, and the aggravated robbery of Ralph Steinman. Appellant entered a plea of not guilty to both charges, and thereafter expressed the desire to undergo a polygraph examination. Accordingly, a detailed, written stipulation was entered into by all parties,¹ and on May 6, 1976, a polygraph examination was administered to appellant at the Columbus headquarters of the Ohio State Highway Patrol.

1 The stipulation signed by appellant, his counsel and the assistant prosecuting attorney reads as follows:

"By agreement among the defendant, the defendant's counsel, and counsel for the State of Ohio, certain understandings and stipulations have been reached and entered into by said parties, as hereafter follows:

"1. The defendant will submit to an examination process utilizing in part, a device commonly known as a 'polygraph' or 'lie detector,' which examination process may involve a series of interviews and tests employing such device;

"2. Counsel for the State of Ohio shall arrange all necessary appointments for such examination process hereinafter referred to as 'Polygraph Testing' or, simply, 'testing';

"3. Counsel for the State of Ohio shall designate the person who will administer and conduct the testing of the defendant, such person to be selected from those persons employed by the Ohio State Patrol as properly trained, experienced and qualified to conduct such testing;

"4. Such person designated by counsel for the State of Ohio shall be permitted if called as a witness by the State of Ohio or the Defendant, to testify at trial of this cause as an 'expert' regarding all aspects of the test administered, and such testimony shall be offered and received as evidence in the trial of this cause without objections of any kind by any party to this agreement except as to the weight of evidence it is to be given. EXCEPTION: Should any person administering such test pursuant to this Entry determine the results of such test to be 'inconclusive' as to deception, or lack thereof, on the part of the defendant, then such 'inconclusive' test shall not be the subject of any testimony whatsoever and this entire 'Entry of Stipulation of Use of Polygraph Test' shall be set aside and held for naught;

"5. The defendant and his counsel are under obligation to disclose prior to any testing, any known condition which might affect the reliability of testing pursuant to this Entry; for example, the concealment of medication used by the defendant shall be regarded as a willful breach of this Entry and shall be dealt with as provided in paragraph 9 of this Entry;

"6. The person chosen to administer the testing may refuse to administer the test, if, in the judgment of such person the defendant is not

deemed a proper subject for examination at the time of examination (*e. g.*, the defendant is or appears to be under the influence of a drug which might distort test results); in such situation, the person chosen to administer the examination process may determine whether reasonable delay of examination would permit a reliable rest [*sic* test] to be given and may conduct said test at the appropriate time. If, in the judgment of the person chosen to administer the examination process, the defendant can, through no fault of his own, never be reliably tested, this Entry shall be set aside and held for naught;

"7. Prior to signing this Entry and agreeing thereby to submit to 'Polygraph Testing,' the defendant has been fully advised of his constitutional and statutory rights, and by signing this Entry, he knowingly, intelligently, and voluntarily waives his right to remain silent and his right to seek advice of counsel during any stage of the administration of the polygraph test procedure. Admissions or other inculpatory statements made by the defendant during 'testing' shall be admissible and may be testified to during the trial of this cause.

"8. No testimony or other evidence concerning polygraph test or tests of the defendant shall be received at any stage of the trial of this cause unless such test or test[s] had been conducted pursuant to this or any subsequent Entry.

"9. It is further understood by all parties that upon signing this Entry of Stipulation of Use of Polygraph Test, permitting the results of such test to be introduced into evidence, all parties and their successors in interest (*i. e.* such other counsel as the State of Ohio or the defendant may retain or employ or be represented by for the trial of this cause) shall be mutually bound to the terms of said Entry. The willful refusal of any party to submit to or comply with any provision of this Entry shall be the proper subject of evidence and testimony to be adduced during the case in the trial of this cause, and may, further, in the Court's discretion, be punishable by additionally appropriate civil and/or criminal contempt remedies and procedures; except that the State of Ohio or the defendant may withdraw from this agreement as herein agreed at any time prior to the commencement of the test procedure in which event this Entry shall be set aside and held for naught;

"10. It is further understood, in keeping with normal testing procedure, that the polygraph ex-

aminer will hold in confidence any admissions or statements made by the defendant which pertain to matters not under investigation."

[**2] Prior to the date set for trial, appellant moved to suppress the results of the polygraph examination. The trial court overruled this motion, noting that the test had been conducted solely at appellant's request, and the cause came on for hearing before a jury on May 12, 1976.

At trial, the examining pathologist, Dr. Von Ham, testified that the victim's death occurred between midnight and 2:00 A. M. on May 1, 1975, and resulted from two severe skull fractures caused by blows from a blunt instrument. The state also presented, as witnesses, two individuals whom appellant had accused of involvement in the homicide. Cap Anderson stated that sometime after 11:00 P. M. on the evening of April 30, 1975, he observed appellant entering an automobile which contained an alleged female impersonator and a man with a beard, later identified as the victim. Anderson testified that appellant returned 20 to 30 minutes later and offered to buy Anderson a drink, claiming that he had some money because he had just "busted a honky in the head." Artrela Hill, Anderson's girlfriend, testified that she observed appellant in the early morning hours of May 1, 1975, counting a sum of money, and that appellant [**3] attempted to sell Anderson a gold Timex watch. She stated further that at this time appellant related that he had just knocked off a trick, that the trick had fought back, and that appellant had hit the trick on the head with a pipe.

Over the objection of defense counsel the polygraph examiner, Sergeant Richard Wilcox of the Ohio State Highway Patrol, was called as a witness. Wilcox testified to his extensive training and experience as a polygraph examiner, and explained at length how the test had been administered to appellant.² Wilcox then expressed the opinion that appellant was deceptive in response to the following four questions: "Do you know for sure who murdered Ralph Steinman?" "Did you murder Ralph Steinman?" "Did you strike Ralph Steinman on the head with a blunt object?" "Did you participate in the Ralph Steinman murder?" Defense counsel thereafter subjected Wilcox to an intensive cross-examination respecting his qualifications and training as a polygraph examiner, the conditions under which the test had been administered to appellant, and the various possibilities for error in the technique of polygraphic interrogation.

² As is ordinarily the case, the polygraph machine operated by Sergeant Wilcox consisted of a cardiograph, which registers pulse rate, a sphygmograph, which measures blood pressure, a pneumograph, which measures respiration, and a

53 Ohio St. 2d 123, *, 372 N.E.2d 1318, **;
1978 Ohio LEXIS 504, ***; 7 Ohio Op. 3d 207

galvanometer, which measures electrodermal responses. The theory underlying the employment of the polygraph device for lie detection is that the act of lying causes a conscious conflict in the mind of the examinee, producing an emotion of fear or anxiety, which in turn causes the autonomic nervous system to respond involuntarily, as manifested by fluctuations in pulse rate, blood pressure, respiration and perspiration. For further discussion of the relationship between deceptive conduct and physiological responses thereto see, generally, Reid & Inbau, *Truth and Deception: The Polygraph ("Lie Detector") Technique 1-5* (1966); and Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 *Yale L. J.* 694 (1961).

[**4] The defense consisted solely of testimony by appellant. Souel denied robbing or murdering the victim, but admitted, on cross-examination, that he had given the police three conflicting stories in the course of the three separate interviews. Although a police officer testified that Souel had drawn an accurate diagram of the scene of the crime, which diagram was admitted in evidence, appellant denied having done so. Souel claimed that he merely elaborated upon information which had been suggested to him by the police, and he persisted in his allegation that Anderson was the perpetrator of the crimes.

The case was submitted to the jury after the court delivered instructions, including one to the effect that the opinion of the polygraph examiner was not to be deemed conclusive on any point, but rather should be considered and weighed along with all the evidence presented during the trial. The jury returned verdicts of guilty to the lesser included offenses of involuntary manslaughter and robbery, and appellant was sentenced to prison terms of from 7 to 25 years on the manslaughter conviction and from 5 to 15 years on the robbery conviction, with the two terms to run consecutively.

[**5] On appeal to the Court of Appeals appellant's principal arguments centered about the admission in evidence of the polygraph examination results. In affirming the convictions below the appellate court held as follows:

"* * * [W]e believe that the preponderance of expert opinion in this field indicates that the test, if conducted by a qualified operator under fair conditions, has substantial probative value in the determination of the question of whether the subject test [*sic*] is lying or is deceptive, based upon the physiological responses of the examinee during the testing period."

On April 26, 1977, the Court of Appeals for Franklin County found its pronounced judgment to be in con-

flict with the judgment of the Court of Appeals for Montgomery County in *State v. Hill* (1963), 40 Ohio App. 2d 16, and therefore certified the record of the case to this court for review and final determination, pursuant to Section 3(B)(4) of Article IV of the Ohio Constitution.

DISPOSITION: *Judgment affirmed.*

HEADNOTES:

Criminal law -- Evidence -- Polygraph examination results -- Admissibility in evidence -- Requisite conditions.

SYLLABUS

The results of a polygraphic examination are admissible [**6] 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) 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 [**7] 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.

COUNSEL: *Mr. George C. Smith*, prosecuting attorney, and *Mr. Alan C. Travis*, for appellee.

Mr. Myron Shwartz, for appellant.

53 Ohio St. 2d 123, *; 372 N.E.2d 1318, **;
1978 Ohio LEXIS 504, ***; 7 Ohio Op. 3d 207

JUDGES: CELEBREZZE, J. HERBERT, W. BROWN, SWEENEY and LOCHER, JJ., concur. O'NEILL, C. J., and P. BROWN, J., dissent.

OPINION BY: CELEBREZZE

OPINION

[*129] [**1321] The appellate court below certified the following question for final determination by this court:

"Whether the results of a polygraph examination are admissible into evidence when the defendant, prior to the examination, consents by written stipulation to the admissibility thereof, but withdraws his consent after the results of the test are known but prior to introduction of the testimony at trial."

For the reasons hereinafter set forth we resolve this question in the affirmative.

The decisions of other jurisdictions relative to this precise issue have not been consistent or uniform. Basically, there are three views on this [***8] subject.³ One line of authority holds that the results of a polygraph test are almost always inadmissible, regardless of whether the test is taken pursuant to a stipulation. See, e. g., *Pulakis v. State* (Alaska, 1970), 476 P. 2d 474; *State v. Corbin* (La. 1973), 285 So. 2d 234. Other courts, applying principles of estoppel, have held that once an individual has stipulated to the admissibility of polygraph examination [**1322] results it would be unreasonable to allow him to prevent their introduction solely because the results appear to be unfavorable. See, e. g., *State v. McNamara* (1960), 252 Iowa 19, 104 N. W. 2d 568; *State v. Fields* (Mo. 1968), 434 S. W. 2d 507. A third view, and the one which this court endorses, is that where a polygraphic examination is administered [*130] pursuant to a stipulation entered into by the parties, the results thereof are admissible in evidence in a criminal trial, but only when certain safeguards have been observed. Examination of the leading decision in this line of authority discloses the qualifications which this court deems to be essential.

3 A small minority of jurisdictions will admit, or recognize the possibility of admitting, polygraph test results in the absence of a stipulation between the parties. The subject must voluntarily agree to take the test, since the United States Supreme Court has held that polygraph evidence is "essentially testimonial" (*Schmerber v. California* [1966], 384 U.S. 757, 764). However, there is no corresponding necessity that the prosecutor stipulate to the admissibility of the results at trial. A

defendant who wishes to take a polygraph examination and admit the results will be permitted to do so, subject only to broad discretion in the trial judge to disallow the evidence in a particular case if the test was improperly conducted. See *United States v. Ridling* (E. D. Mich. 1972), 350 F. Supp. 90; *Commonwealth v. A Juvenile* (1974), 365 Mass. 421, 313 N. E. 2d 120; *State v. Dorsey* (1975), 88 N. M. 184, 539 P. 2d 204.

[***9] In *State v. Valdez* (1962), 91 Ariz. 274, 371 P. 2d 894, the defendant appealed his conviction for possession of narcotics. At trial a polygraph examiner had testified, over objection, as to the results of an examination (unfavorable to defendant) conducted pursuant to a written stipulation. In the course of its review the Supreme Court of Arizona discussed several earlier cases involving the admissibility of lie detector evidence, and noted the considerable improvements in instrumentation and technique since the first such decision was rendered in *Frye v. United States* (1923), 54 App. D. C. 46, 293 F. 1013.⁴ The court expressed its opinion [*131] that although the polygraph had [**1323] not as yet been perfected, or risen to the status of "general acceptance," the standard for admissibility proposed in *Frye, supra*, the device was "developed to a state in which its results [**132] are probative enough to warrant admissibility upon stipulation." *Valdez*, at page 283. The Arizona high court therefore held that polygraphic evidence was admissible in evidence in criminal trials, provided that the following qualifications were met:

"(1) That [***10] the county attorney, defendant and his counsel all 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) That notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial judge, i. e. 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) That 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) That if such evidence is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with [***11] which a defendant is charged but at most tends only to indicate that at the time of the examination defendant was not telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given." *Valdez*, at pages 283-284.

4 In holding that the forerunner of the polygraph had not yet achieved general recognition and acceptance among psychologists and physiologists so as to support the admission in evidence of expert testimony relative thereto, the court in *Frye v. United States* (1923), 54 App. D. C. 46, 293 F. 1013, stated, at page 1014:

"* * * Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

This standard for admissibility of polygraph evidence has not gone unchallenged, and some commentators contend that normal evidentiary requirements should be substituted for the artificially high test first established in *Frye*. See, e. g., Kaplan, *The Lie Detector: An Analysis of Its Place in the Law of Evidence*, 10 Wayne L. Rev. 381, 402-407 (1964). With regard to the *Frye* decision, Professor McCormick has made the following comments:

"* * * 'General scientific acceptance' is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness [footnote omitted] should be received unless there are other reasons for exclusion. Particularly, probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, and undue consumption of time. If the courts used this approach, instead of repeating a supposed requirement of 'general acceptance' not elsewhere imposed, they would arrive at a practical way of utilizing the results of scientific advances." (Footnotes omitted.) McCormick *On Evidence* (2d Ed. 1972), 491, Section 203.

As to the judicial reluctance to accept polygraph evidence in the more than five decades since *Frye* was decided, Professor McCormick concludes at pages 506-507, as follows:

"In the numerous opinions and the large commentary, the principles underlying the test, the qualifications and procedures of the polygraph operator, and the considerable statistics developed concerning the technique, have been subjected to a more searching and critical analysis than that accorded to any other form of evidence considered in this chapter. Neither the concessions of critics that its accuracy in the detection of insincerity is of the order of 70 percent or more, nor the widespread use of and reliance upon it in police investigation, business, industry, and government, nor the persistent efforts of trial courts to make some use of the evidence, have made any inroads on that position.

"As suggested in a previous section, the explanation can scarcely be found in any serious contention that even the opinion of a qualified expert in the field throws no light on the question of whether relevant statements made by a party or witness were sincere or not. The exclusion seems to rest more upon a judicial estimate of the weight that the trier of fact will give to the opinion, and a demand that the opinion be almost infallible because the trier will think it so.

"The one avenue of admissibility that has not been completely closed is that of stipulation by the parties. From an early case, allowing the use of the test evidence on this basis, there has developed a growing minority view that the results may be received if the parties enter into an adequate stipulation to that effect. The experience gained in this way, especially on the question whether triers are actually unable to evaluate this type of evidence, may make possible a more informed conclusion on the larger question of general admissibility of polygraph results." (Footnotes omitted.)

[***12] This qualified approach to acceptance of polygraphic test results as evidence has been approved in other jurisdictions, several of which have adopted the guidelines set [*133] out in *Valdez, supra*. See *State v. Galloway* (Iowa, 1969), 167 N. W. 2d 89; *State v. Lassley* (1976), 218 Kan. 758, 545 P. 2d 383; *State v. McDavitt* (1972), 62 N. J. 36, 297 A. 2d 849; *State v. Steele* (1975), 27 N. C. App. 496, 219 S. E. 2d 540; *State v. Ross* (1972), 7 Wash. App. 62, 497 P. 2d 1343; *State v. Stanislawski* (1974), 62 Wis. 2d 730, 216 N. W. 2d 8; *Cullin v. State* (Wyo. 1977), 565 P. 2d 445.

53 Ohio St. 2d 123, *, 372 N.E.2d 1318, **;
1978 Ohio LEXIS 504, ***; 7 Ohio Op. 3d 207

We adopt the *Valdez* qualifications because these requisites respond to the major objections to the admission of polygraph evidence. The requirement of mutual agreement to a written stipulation, and the supervisory power of the trial judge, will insure control over what is generally recognized as the single most important variable affecting the accuracy of the polygraph test results, *viz.* the polygraph examiner. See Note, 48 N. Y. U. L. Rev. 339 (1973). In addition, the opportunity for cross-examination of the operator by opposing [***13] counsel and the delivery of a limiting instruction by the trial court will help to prevent encroachment upon the jury function by undue reliance on this expert testimony.

Despite the ongoing controversy concerning the degree of accuracy of the polygraph device,⁵ it is our opinion that observance of [**1324] the *Valdez* qualifications establishes a proper foundation for the admission of polygraph test results, and that these results have probative value in the determination of whether the examinee has been deceptive during interrogation. We note with approval the sentiments expressed by the Supreme Court of Wyoming in *Cullin v. State, supra*, a very recent decision on the [*134] precise issue *sub judice*, wherein the following appears at page 458:

"We see no reason why the polygraph expert should be treated in any more restrictive manner than other experts. That the polygraph deals with mind and body reactions should not subject it to exclusion from consideration any more than other testimony of a scientific nature. We have long utilized the expertise of psychiatrists and psychologists to furnish advice and assistance to the jury to explore the mysteries [***14] of the mind with respect to mental illness as a defense. Medical doctors are regularly called upon to testify as to the intricate work-

ings of the body in sensitive questions of a complex physical condition or cause of death. It is the normal obligation of the trial judge to protect the jurors from exposure to evidence which might mislead them, regardless of whatever kind of scientific evidence is under scrutiny. The device of cross-examination soon smokes out the inept, the unlearned, the inadequate self-styled expert."

5 For estimates of accuracy see F. Horvath and J. Reid, *The Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 *Journal of Criminal Law, Criminology and Police Science* 276, 278-279 (1971) (91.4 percent accurate for examiners with more than one year's experience); R. Pfaff, *The Polygraph: An Invaluable Judicial Aid*, 50 *A. B. A. J.* 1130, 1132 (1964) (96 percent accurate, 3 percent inconclusive, 1 percent maximum known error); L. Burkey, *The Case Against the Polygraph*, 51 *A. B. A. J.* 855, 856 (1965) (70 percent accurate).

[***15] In the cause at bar we find that the requisite conditions for admissibility of polygraph evidence were met. There was substantial evidence tending to indicate that appellant committed the offenses for which he was convicted, and the polygraph evidence was thus merely corroborative. Under these circumstances we hold that the trial court did not err in admitting in evidence the polygraph test results and the expert opinion relative thereto.

Accordingly, the judgment of the Court of Appeals is hereby affirmed.

Judgment affirmed.