

IN THE CIRCUIT COURT OF CLAY COUNTY, ARKANSAS
WESTERN DISTRICT
CRIMINAL DIVISION

FILED THIS 18 DAY OF Jan
1994
PAT WILLIAMS, PLAINTIFF
BY W. Williams a f D.C.
CR-93-47

STATE OF ARKANSAS

VS

JESSIE LLOYD MISSKELLEY, JR.

DEFENDANT

BRIEF ON ADMISSION OF POLYGRAPH EVIDENCE

The issues discussed herein are as follows:

1. Use of evidence at Denno.
2. Use of evidence at trial only to show the voluntariness of statement.
3. Use of the evidence at trial to show the defendant was not in truth and in fact guilty.

The Defendant has obtained an expert on the issue of Polygraphs. This expert reviewed the polygraph test performed on the Defendant on June 3, 1993 by the West Memphis police department. It is undisputed that at the time the officers gave defendant the examination, he was told that he was not being truthful. In fact, he was told he was "lying his ass off", and this is reflected in the officer's notes of the interrogation. The defendant's expert (the report of which has previously been filed with the Court) will testify that the defendant was not in fact being deceptive in his answers to the relevant questions concerning the homicides.

A. At the Denno hearing.

The United States Supreme Court has held that once the defendant has raised the issue of a coerced confession, all the circumstances of the interrogation must be evaluated in order to perform the "totality of the circumstances" test. In Fare v. Michael C., 442 U.S. 707, 725 (19__), the Court stated, "The totality approach permits - indeed, it mandates - inquiry into all the circumstances surrounding the interrogation." The defense has uncovered no decisions which would exclude this type of evidence from the Denno hearing. It is clearly relevant in determining whether there was any deception applied by the interrogating officers as well as showing the psychological circumstances under which the statement was induced, i.e. voluntariness.

B. Use of the Evidence at Trial to Show the Corrosive Nature of the Interrogation and the Lack of Voluntariness of the Statement

In Perkins v. State, 523 S.W.2d 191 (Ark. 1975), the Arkansas Supreme Court addressed the issue of whether evidence which was relevant at the Denno hearing as to the voluntariness of the statement is also relevant at trial after the trial Court has made a determination. The Supreme Court held, "[the evidence] is a factor which must be considered by the court and by the jury as being relevant to the issue of the veracity and voluntariness of appellant's

confession." In Perkins, the trial court had refused to submit to the jury certain evidence which the defendant contended went to the issue of the voluntariness of his confession. The Supreme Court, holding as set out above, reversed the conviction. Clearly, there remains a jury issue as to the veracity and voluntariness of the defendant's statement.

Several jurisdictions have addressed this issue. Further, this issue was the subject of an annotation, Admissibility of Polygraph Evidence at Trial on Issue of Voluntariness of Confession Made by Accused, 92 ALR3d 1317.

In that annotation, the author stated, "it would be anachronistic and illogical to exclude from the jury's consideration polygraph evidence on the issue of voluntariness of a confession allegedly induced or obtained through means of a polygraph examination, in view of the basic procedural rule that a jury may consider the totality of the circumstances surrounding a confession in determining voluntariness." The leading case listed in the annotation for such admissibility is an Arkansas Supreme Court decision.

In Tanner v. State, 259 Ark 243, 532 S.W.2d 168 (1976), the Arkansas Supreme Court, in finding no error in admitting evidence of the test, stated, "It was necessary on the question of voluntariness of statements made by Tanner (which

was submitted to the jury as weight and credibility) that there be an explanation of what took place during the period of time appellant was alone with this officer." Other jurisdictions have also ruled on this issue. In State v. Schaeffer, 457 N.W.2d 194 (Minn. 1990), the Minnesota Supreme Court ruled directly on this issue the court held that the trial court properly admitted evidence that defendant made confession after lie detector operator told him that polygraph test results indicated he was not telling the truth. Once the trial court admitted the confession, it was required to permit jury to hear evidence about physical and psychological environment bearing on its credibility.

Several jurisdictions have held that as long as an instruction is given to the jury instructing them to consider the evidence only on the question of whether the confession was voluntary, the evidence was proper to admit. See, Tyler v. United States, 193 F2d 24 (1951), cert den 343 U.S. 908; People v. Triplett, 37 Ill.2d 234, 226 N.E.2d 30 (1967).

In Yates v. State, 303 Ark. 79, 794 S.W.2d 133 (1990), the Arkansas Supreme Court held that the results of a polygraph examination were discoverable by the Defendant. The failure to disclose the results resulted in a reversal. If the test results were not admissible for any purpose, the failure to provide them must have been harmless error.

However, the Court did not find harmless error, but reversed.

C. Use of the Evidence at Trial to Show the Defendant Was Not Guilty.

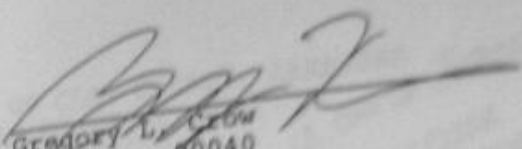
In *Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391 (1988) the Supreme Court of Arkansas was faced with the question as to the admissibility of certain scientific evidence (a portable breathalyzer test) which had been shown to be unreliable, and therefore was not admissible against the defendant. The Court held the evidence was admissible when offered by the defendant. The Court held that evidence which is critical or necessary to the defense is admissible regardless of the fact that the scientific evidence may be somewhat unreliable and would not be admissible by the State against the defendant. See also, Rock v. Arkansas, 107 S.Ct. 2704 (1987).

Clearly this evidence is critical to the defense of the defendant. The fact that the defendant both passed the test and was deceived by the officers is an extremely necessary portion of the defendant's theory of the case. To fail to admit this evidence would be in violation of both Patrick, and Rock.

Respectfully Submitted,

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