

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

'94 JAN 19 P 9 : 1

STATE OF ARKANSAS

PLAINTIFF

VS

NO. CR-93-47

JESSIE LLOYD MISSKELLEY, JR.

DEFENDANT

BT

MOTION AND AMENDED BRIEF ON ADMISSION
OF POLYGRAPH EVIDENCE AT TRIAL

Comes now the Defendant, Jessie Lloyd Misskelley, Jr.,
by and through his Court Appointed Attorneys, Stidham & Crow,
and for his Motion and Amended Brief on the Admission of
Polygraph Evidence at Trial, hereby states and alleges as
follows:

1. That the Defendant is charged with three (3) counts
of Capital Murder, and the State is seeking the Death
Penalty.

2. That the Defendant respectfully requests that the
Jury be allowed to hear evidence concerning the results of
his polygraph examination at trial so as not to interfere
with his rights as guaranteed him under the United States
Constitution and the Arkansas Constitution, and the case law
interpreting same.

WHEREFORE, the Defendant prays that his Motion be
granted and that the Jury be allowed to hear evidence
concerning the results of his polygraph examination at trial.

By: 

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BRIEF IN SUPPORT

This Court conducted a Denno Hearing in this case on January 13, 1994. After reviewing the Hearing Brief submitted by the Defendant on January 14, 1994, the Court issued it's ruling on January 15, 1994, finding that the statements made by the Defendant, to police, on June 3, 1993, were "voluntary."

The Defendant, on October 12, 1993, filed a "Motion in Limine to Exclude Finding of Voluntariness by the Court in the Event Motion to Suppress Statements of Defendant is Denied." The authority relied upon in this Motion to exclude the finding of voluntariness to the jury is the Due Process clause of the United States Constitution, the Sixth Amendment to the United States Constitution, Article 2, 7 of the Arkansas Constitution and Kagebein v. State , 254 Ark. 904, 496 S.W. 2d 435 (1973).

In Kagebein, the Arkansas Supreme Court stated that:

"The purpose of [Arkansas'] Denno hearing statute (A.C.A. 16-89-107) is to prevent a jury from hearing a confession before the Court determines

that it has been voluntarily given. It is not intended to restrict evidence a jury may hear after a Court determination of voluntariness has been made. The Defendant still has the Constitutional right to have his case heard on the merits by a jury, including the weight and credibility the jury might give to the voluntariness of the confession...the factual determination of voluntariness made by a Court in a Denno hearing should not be disclosed to the jury by either the Court or by counsel. " [Kagebein, supra. See also Wigmore on Evidence, Sec. 861a, n.35 (Chadbourn Revision, 1970), United States v. Fayette, 388 F.2d 728 (2d. Cir. 1968)]

The Defendant raised the issue at the Denno hearing on the 13th of January, 1994, and in his hearing brief submitted to the Court, that the polygraph examination administered to the Defendant on June 3rd, 1993, was a "catalyst" in the Police obtaining his statements because they, the Police, informed him that he was "lying his ass off" and that he had flunked the polygraph exam. The Defendant introduced testimony at the Denno hearing from an expert witness qualified by the Court in both the fields of polygraph and police procedures, with thirty-nine (39) years of experience. This witness testified that he had examined the polygraph examination of the Defendant and determined that he was not being deceptive in his responses to the questions regarding the homicides, and as such, was improperly told that he had flunked the examination. The expert witness also testified that the interpretation of the test results would dictate whether or not the defendant should have been further

interrogated by the police or allowed to leave the police station. Further, the witness testified that if the Defendant was not told of the proper test results, this could lead to a false confession by the Defendant, so that he could get the police "off his back." Thus, the test results of the polygraph exam itself, the interpretation of the test results, how the results of the test were relayed to the Defendant, and it's effect on the Defendant, especially in light of his mental handicap, are all related to the issues of credibility of the witnesses against the Defendant, and the issue of voluntariness.

The Defendant submits that the jury should be allowed to judge the issues of witness credibility, and/or the confession, and as such, should be permitted to hear the polygraph evidence, the same polygraph evidence the Court heard 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 preform 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." Evidence about the circumstances of the

polygraph test, and the results of same, are 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.

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, after the Denno hearing.

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."

This same type of issue was addressed by the Arkansas Court of Appeals in 1992, in the case of Leach v. State, 38 Ark. App. 117, 831 S.W. 2d 615 (Ark. App. 1992). In Leach, the Prosecution moved in limine for an Order prohibiting the defendant from making any mention of a plea offer during the jury trial. The Trial Court granted the motion in limine. The Court of Appeals held that the granting of the motion in limine was error, and in its opinion cited the language of Kagebein, supra. The Court also cited several other cases in

reaching it's conclusion, including Crane v. Kentucky, 476 U.S. 683 (1986). In Crane, the United States Supreme Court stated:

"As the Court noted in Jackson, because "questions of credibility, whether of a witness or of a confession, are for the jury," the requirement that the court make a pretrial voluntariness determination does not undercut the defendant's traditional prerogative to challenge the confession's reliability during the course of the trial...

Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?

[W]e have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial. [Citations omitted.]

If the West Memphis Police Department is going to be allowed to use the polygraph as a "tool", as one officer described it in the Denno hearing, to elicit a statement from the Defendant, why can't the Defendant challenge the qualifications of the polygraph examiner who gave him the test, and the results of the test itself, to show that he did not fail the test and show the jury the involuntary nature of the statement.

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 the jury to hear evidence about the physical and psychological environment bearing on its credibility.

Several jurisdictions have held that so 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).

The Defendant submits that under this analysis of the law, the evidence surrounding the polygraph examination is clearly proper evidence for the jury to consider, and failure to allow same would be reversible error.

There is yet another analysis of this issue which supports the contention that the polygraph evidence is admissible for presentation to the jury. 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)

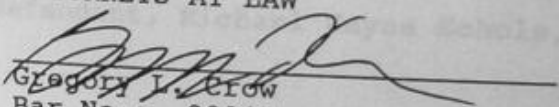
which had been shown to be unreliable, and therefore was not admissible against the defendant. The Court held the evidence was admissible when offered by the defendant. The Court held that evidence which is critical or necessary to the defense is admissible regardless of the fact that the scientific 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 defendants 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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