Appeal No. 2006AP285-CR **Cir. Ct. No. 2004CF93**

WISCONSIN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN HARRIS,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Dykman and Vergeront, JJ.

We certify this appeal, involving the decision whether to suppress defendant statements made during or closely related to a polygraph examination, because we believe the law on this topic is in need of re-examination or, at a minimum, clarification. In the present case, the parties' arguments are focused on applying the current rules to the facts. However, after reviewing the line of cases leading to the current rules governing admission of such statements, we are unable to identify the rationale. In our view, as explained below, the lack of an apparent underlying rationale creates a significant problem for judges called upon to apply the rules. We respectfully suggest that the supreme court either clarify the rationale for the current rules or provide a new legal framework for analyzing this kind of evidence.

With exception of the Background section, this certification is identical to the certification being released simultaneously in ***State v. Davis***, No. 2006AP1954-CR.

Background

Shawn Harris moved to suppress inculpatory statements he made while in custody. The circuit court held a hearing and made the following findings. A detective gave Harris a polygraph examination. Harris was informed that the polygraph examination was over, and was taken to a different room, where he sat for approximately thirty minutes. The detective who had administered the polygraph examination returned and said words to the effect that Harris had "flunked" the examination, and that Harris was lying, and asked what Harris was lying about. Harris then made inculpatory statements. The circuit court applied the current law, as reflected in ***State v. Greer***, 2003 WI App 112, 265 Wis. 2d 463, 666 N.W.2d 518, and denied Harris's motion.

Discussion

The current rules regarding admissibility of statements made during or closely related to polygraph examinations were stated most recently in ***State v. Greer***, 2003 WI App 112, 265 Wis. 2d 463, 666 N.W.2d 518. Anything that a defendant said during what is considered to be part of the polygraph examination is not admissible in evidence. ***Id.***, ¶9. This is a blanket prohibition on admission that applies regardless whether a statement is voluntary and otherwise admissible. If statements were made during the actual polygraph examination, they are inadmissible. ***Id.*** If statements were made during a post-polygraph interview that was "'closely related'" to the polygraph examination, both as to "'time and content,'" the statements are inadmissible. ***Id.***, ¶¶ 9-10 (quoting ***State v. Johnson***,

193 Wis. 2d 382, 388-89, 535 N.W.2d 441 (Ct. App. 1995) and ***Schlise***, 86 Wis. 2d at 43). This analysis implies that if the statements were not made during an interview that was concurrent with or closely related to the polygraph examination, the normal rules governing the admission of statements apply.

There is a multi-factor test for determining whether statements are made during an interview that is concurrent with or closely related to a polygraph examination. Among several factors, courts must consider (1) whether the post-polygraph interview was in the examination room or some other place; (2) whether the defendant was told that the polygraph examination is over; and (3) whether the polygraph examiner interrogates the defendant making frequent use of and reference to the charts and tracing just obtained in the examination. ***Greer***, 265 Wis. 2d 463, ¶11. In effect, this multi-factor test asks courts to draw a line, on a case-by-case basis, between statements that are closely related to a polygraph examination and statements that are not. If this rule continues, we believe it would assist courts that must draw this line to understand the underlying rationale for distinguishing such statements.

In the remainder of this certification, we use the short-hand phrase "statements that are closely related to a polygraph examination" as reference to *both* statements made during a polygraph examination, including response to an examiner's questions, *and* statements made during interviews that are "closely related to" such examinations. The key to understanding why we are looking at both together is understanding the distinction between the following:

(1) Excluding polygraph examination *results*, that is, the machine readings and the expert's opinion regarding a defendant's statements.

(2) Excluding a defendant's statements, offered *without* evidence of the machine readings or the expert's opinions regarding those statements.

The reason the supreme court has limited the admission of polygraph examination *results* is based on the lack of reliability of these results. That reasoning is not at issue here. Rather, our focus here is on the reasoning underlying the rules governing when to exclude a defendant's statements, offered without evidence of the polygraph examination results.

An example best explains the distinction. Suppose, in response to a question during a polygraph examination, a defendant gives an answer that is inconsistent with an alibi he later offers at trial. Further suppose that the polygraph expert is prepared to testify about the machine readings and the expert's opinion that the defendant's answer is untruthful. The "results," in this example, refer to the machine readings and expert's opinion. The "statement" is the defendant's answer. While it is true that presenting results at trial necessarily involves telling the jury the statement the expert believes is untruthful, the opposite is not true. The statement can be related to the jury without revealing the polygraph results. The reason for excluding the polygraph results does not apply to the statements a defendant makes. What seems to be missing in the case law is a reason why statements are automatically excluded when they are made during or closely related to a polygraph examination.

With this distinction in mind, we turn our attention to the line of cases leading to our current rules.

Admission of polygraph *results* was prohibited in Wisconsin for a long period before 1974, on the theory that they were insufficiently reliable. In

State v. Stanislawski, 62 Wis. 2d 730, 736-45, 216 N.W.2d 8 (1974), the supreme court loosened that prohibition, concluding that polygraph results could be admitted if certain conditions were satisfied, most notably if there was a pre-examination stipulation between the examinee and the State that the results would be admissible.

In 1978, the supreme court addressed a case involving both the results of a polygraph examination and statements made after the polygraph examination was complete. In ***State v. Schlise***, 86 Wis. 2d 26, 40-41, 271 N.W.2d 619 (1978), the defendant took a polygraph examination and was then questioned by the examiner, at which time he made inculpatory statements. The defendant objected to admission of the examiner's testimony about his statements on two grounds: (1) no ***Stanislawski*** stipulation was entered, which made the polygraph results inadmissible, and the examiner's further interview should be considered part of that examination, and (2) involuntariness due to coercive questioning techniques of the examiner during the post-mechanical interview that produced the statements. ***Id.*** at 39. The supreme court held that it was prejudicial error to receive "the testimony of the polygraph examiner" because a pre-examination stipulation as required by ***Stanislawski*** was not entered. ***Id.*** at 41-42. "Not only the polygraph evidence and the examiner's opinion of the significant conclusions to be drawn therefrom, *but also his testimony concerning the post-mechanical interview* should be excluded." ***Id.*** at 42 (emphasis added).

However, ***Schlise*** does not appear to contain a legal theory explaining why testimony about the post-mechanical interview should be excluded. The rest of the opinion shows that voluntariness was not the basis, as the court said that the voluntariness issue could be taken up on remand because involuntariness of the post-mechanical interview might lead to the exclusion of

additional evidence. *See* ***id.*** at 44 and 49-50. Thus, the only rationale provided was that the "post-mechanical interview was so closely associated with the mechanical or electronic testing, both as to time and content, that it must be considered as one event and because of the lack of a ***Stanislawski*** stipulation excluded from the evidence." ***Id.*** at 43-44. ***Stanislawski*** deals only with the exclusion of polygraph *results*. We find nothing in the opinion explaining a principle supporting the exclusion of *statements* made during polygraph examinations or afterward without polygraph examination results.

So far as we can tell, prior to ***Schlise***, the admissibility of non-results evidence was judged simply by normal standards of admissibility under the rules of evidence. *See, e.g.*, ***Turner v. State***, 76 Wis. 2d 1, 24-25, 250 N.W.2d 706 (1977) ("Thus, while polygraph test results are to be excluded if there is no compliance with ***Stanislawski***, other evidence relating to polygraph tests should be excluded if it is not relevant or if its probative value is outweighed by the danger of unfair prejudice.").

After ***Schlise***, the supreme court decided ***Barrera v. State***, 99 Wis. 2d 269, 298 N.W.2d 820 (1980). There, the defendant was about to take a polygraph examination, and, in a pre-examination interview by the examiner, admitted to murders. ***Id.*** at 283. The court rejected our holding that this interview must be suppressed under ***Schlise*** because there was no ***Stanislawski*** stipulation. ***Id.*** at 283-89. In doing so, it described ***Schlise*** as based not only on ***Stanislawski*** but also on voluntariness concerns: "This court set aside the conviction and remanded the case for a new trial as the test results and Schlise's post-examination statement were admitted into evidence without a written stipulation *and* because we had serious doubts regarding the voluntariness of the defendant's confession due to the psychologically coercive tactics of the examiner as detailed in the

record." ***Id.*** at 285 (emphasis added). "Thus, the written stipulation issue was not the sole concern in ***Schlise*** regarding the decision to exclude the defendant's statement in the post-test interview." ***Id.*** at 286.

Although ***Barrera*** seems to say that ***Schlise*** requires an assessment of voluntariness, our reading of ***Schlise*** is that voluntariness had nothing to do with the polygraph examination itself, and nothing to do with whether the statements were made closely related to the polygraph examination. Rather, the voluntariness concern discussed in ***Schlise*** as a possible issue on remand was whether the questioning technique used during the post-mechanical interview was improperly coercive. That voluntariness issue would exist regardless whether the statements were made during or closely related to a polygraph examination, or, instead, in a completely separate interview.

By describing ***Schlise***'s conclusion as based on voluntariness concerns, ***Barrera*** may leave the impression that statements made during polygraph examinations are always involuntary, and therefore must be excluded under familiar constitutional principles. But ***Barrera*** does not directly say this or explain why statements made during polygraph examinations are *always* involuntary. Furthermore, it would seem that such a *per se* rule would be inconsistent with the usual method of reviewing the voluntariness of statements, in which we apply a totality of the circumstances test that takes into account the characteristics of the accused and the circumstances of the interrogation. *See, e.g.*, ***State v. Hoppe***, 2003 WI 43, ¶¶38-40, 261 Wis. 2d 294, 661 N.W.2d 407.

In 1981, the supreme court overruled ***Stanislawski*** and reverted to the pre-1974 rule that polygraph results are never admissible. ***State v. Dean***, 103 Wis. 2d 228, 307 N.W.2d 628 (1981). The ***Dean*** opinion cited cases, including

Turner, ***Schlise***, and ***Barrera***, as evidence of the practical problems caused by the ***Stanislawski*** stipulation rule. ***Dean***, 103 Wis. 2d at 257-58. In summarizing the case law, ***Dean*** acknowledged that an exclusionary rule based on ***Stanislawski*** had been created, and that this rule extended to evidence beyond polygraph results themselves, but it did not identify the legal source of that extension:

> These cases raised the issue of what constitutes the polygraph examination. *If the defendant's statement was part of the polygraph examination it was not admissible because there was no stipulation*; if the defendant's statement was part of an interrogation and not part of the polygraph examination, the admissibility of the statement is governed by the usual rules governing admissibility of confessions.
>
> The difficulty in making a logical separation between polygraph testing and custodial interrogation will continue to arise as long as the court prohibits or restricts the admission of polygraph evidence. Viewed together, however, these cases show the application of the ***Stanislawski*** stipulation requirement as an exclusionary rule which may be asserted by a defendant or the state to prevent admission of polygraph evidence *or evidence obtained in conjunction with the polygraph test*.

Dean, 103 Wis. 2d at 258 (emphasis added).

In our view, this passage in ***Dean*** further confuses the analysis. ***Barrera*** described the exclusion of a statement during a polygraph examination as being based on constitutional voluntariness concerns. However, ***Dean*** appeared to describe the exclusion of such statements as arising from the prohibition on admission of polygraph results. This is significant because the prohibition on results is *not* founded on a voluntariness theory, or on any constitutional theory at all. Rather, it appears from ***Stanislawski*** and ***Dean*** that this prohibition is founded on policy concerns about whether the polygraph method is sufficiently reliable to satisfy the general standards for admission of evidence. It appears to us that the

reliability of polygraph examination results is a different issue from whether statements made during or after an examination are voluntary. Thus, it would seem logical that the overruling of ***Stanislawski*** in ***Dean*** would have refocused attention on the underlying rationale for excluding statements made during a polygraph examination. However, subsequent cases have not done so.

In ***State v. Johnson***, 193 Wis. 2d 382, 388, 535 N.W.2d 441 (Ct. App. 1995), we made the following statement of law, and applied it to the facts before us: "If the post-polygraph interview is so closely related to the mechanical portion of the polygraph examination that it is considered one event, the post-polygraph statements are inadmissible." For this proposition we cited ***Schlise***, even though ***Schlise*** does not hold this in such concrete terms. We did not try to explain the underlying legal concept. In describing the standard of review in ***Johnson*** we said we were applying "constitutional principles," but we did not identify any such principles. ***Johnson***, 193 Wis. 2d at 387.

Then, in 2003, in ***Greer***, we relied on the statements of law from ***Johnson*** and applied them to the facts in ***Greer***. This opinion added nothing new to an understanding of the underlying legal theory or history.

The Tennessee Supreme Court has considered some of the issues discussed in this certification and has expressly rejected our ***Greer*** decision. The Tennessee court concluded:

> Although polygraph test results, testimony concerning such test results, and offers or refusals to submit to polygraph tests are not admissible into evidence, voluntary statements made before, during, or after a polygraph test may be admitted into evidence, provided that the statements also are consistent with other applicable constitutional and evidentiary rules.

State v. Damron, 151 S.W.3d 510, 512 (Tenn. 2004). When rejecting ***Greer***, the court concluded that voluntariness is "the proper test" for admitting statements made during polygraph examinations. ***Damron***, 151 S.W.3d at 517.

In summary, a broad exclusionary rule has developed from ***Schlise*** that does not appear to have a supporting rationale. Because we are bound by existing law, we believe this is a topic that must be addressed by the supreme court.

We bring one more point to the supreme court's attention for its consideration in deciding whether to grant certification. In the course of preparing this certification, we discovered a statute that was neither addressed by the parties nor mentioned in any of the cases we have discussed. WISCONSIN STAT. § 905.065 gives a polygraph test subject a privilege to refuse to disclose and prevent others from disclosing both statements made during a polygraph examination and the results of the examination. The statute also provides that a test subject may waive the privilege by entering into an agreement. The full statute reads:

> (1) In this section, "honesty testing device" means a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test honesty.
>
> (2) A person has a privilege to refuse to disclose and to prevent another from disclosing any oral or written communications during or any results of an examination using an honesty testing device in which the person was the test subject.
>
> (3) The privilege may be claimed by the person, by the person's guardian or conservator or by the person's personal representative, if the person is deceased.

> (4) There is no privilege under this section if there is a valid and voluntary written agreement between the test subject and the person administering the test.

Section 905.065.

This statute was created by the legislature during the ***Stanislawski*** era, at a time when polygraph examination results were admissible if an agreement had been made between the examinee and the examiner. It may be that the statute was, at least in part, intended to codify the existing common law. To the extent that this statute still has applicability in the post-***Stanislawski*** era, it may provide defendants with a method, not based in the constitutional or case law we discuss above, of suppressing statements they made during examinations. We note that, unlike the case law we have discussed, the statute appears limited to statements made during the actual administration of a polygraph examination. Thus, even if the statute provides an independent basis upon which to suppress statements made *during* the actual administration of a polygraph examination, the issues regarding the suppression of statements *closely related to* polygraph examinations remain. And, indeed, the two cases we certify today both involve statements made after the actual administration of a polygraph examination.