

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP1000-CR

Cir. Ct. No. 2002CF2601

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT L. CANADY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Robert Canady appeals his conviction of first-degree intentional homicide claiming that his confession, given shortly after he took a polygraph examination, was either part of the polygraph examination and thus inadmissible, or was involuntary and should have been suppressed. Because we

conclude that the confession occurred after the examination had been concluded, that Canady knew the examination had been concluded, and that the police engaged in no improper conduct that would render the confession involuntary, we affirm.

Background

¶2 Canady was arrested for shooting Tamika Watson. He was initially questioned extensively on three separate occasions over two days by detectives. The first interview occurred between 11:45 a.m. and 4:00 p.m., a little over four hours after Canady's arrest on May 10, 2002. The next interview began that same day at about 10:00 p.m. and ended at 1:52 a.m. the following morning, May 11. The third interview began the same day, at 2:40 p.m. on May 11 and ended at 4:30 p.m. Before each interview, Canady was advised of his *Miranda*¹ rights, acknowledged them in writing, and agreed to talk with the officers. Canady, through his attorney, acknowledged that the *Miranda* warnings were properly given. None of the pre-polygraph examination interviews are challenged in this appeal.

¶3 After these interviews, Canady agreed to a polygraph examination. The examination began at 11:15 a.m. on May 12, approximately eighteen hours after the preceding interview. The polygraph examination was done by Milwaukee Police Detective Ruben Burgos the day following the last of the three interviews. Before beginning the examination, Canady signed a document which explained his rights to not participate, to consult an attorney who would be

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

appointed if necessary before any questioning, to have an attorney present during the examination, to decline to answer any questions he chose, and to stop the interview at any time. In addition, he gave specific permission to the police to disclose the examination results and opinions to the district attorney's office. Canady signed the document at 10:37 a.m.

¶4 The mechanical examination lasted from 11:15 a.m. until 12:16 p.m. Canady again signed and time-identified the conclusion of the examination at 12:16 p.m. Above his signature identifying the termination time, and reaffirming the waivers in the first section of the document, the following text appears:

I also understand that any questions I may be asked after this point in time, and any answers I may give to those questions, are not part of the polygraph examination.

¶5 After being disconnected from the mechanical equipment, and after signing the waiver and release document, Canady was moved from the examination room to a separate interrogation room. Approximately twenty to thirty minutes after concluding the polygraph examination, Burgos interviewed Canady in the interrogation room. Burgos testified that he began the interview, by "advis[ing Canady] that he was not telling me the truth. Then I began to talk to him," but Burgos did not tell Canady that he failed the test. At about 2:00 p.m. to 2:15 p.m., Canady admitted that he shot Ms. Watson. Burgos then stopped the interview and told Canady the homicide detectives would come to talk to him.

¶6 At approximately 3:00 p.m., the two detectives who had interviewed Canady the day before the polygraph examination arrived. At that time, Burgos informed the detectives that Burgos believed Canady had been untruthful, and they knew of the admissions Canady made to Burgos. The detectives again advised Canady of his *Miranda* rights, and Canady again signed the warning document

and waived his rights. Canady denied making the admission to Burgos. The detectives brought Burgos back into the interrogation room, where Burgos demanded of Canady “[W]hat’s going on? Why are you calling me a liar?” Canady soon thereafter admitted making the admission to Burgos. During this interview, Canady was given a soda and two cigarettes. The interrogation continued until 5:20 p.m. during which time Canady confessed that he shot Ms. Watson. This confession was ultimately read to the jury, after Canady’s motion to suppress the statements was denied.

Standard of Review

¶7 A trial court’s factual findings are immune on appeal unless they are “clearly erroneous.” WIS. STAT. § 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)); *State v. Johnson*, 193 Wis. 2d 382, 387, 535 N.W.2d 441 (Ct. App. 1995). In general, we will uphold the trial court’s factual findings unless they are clearly erroneous. *State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). Establishing the circumstances surrounding the making of statements entails the findings of evidentiary and constitutional facts. *State v. Woods*, 117 Wis. 2d 701, 715-16, 345 N.W.2d 457 (1984). The application of constitutional principles to the evidentiary and historical facts is a question of law that we review independently of the trial court’s determinations. *Johnson*, 193 Wis. 2d at 387; *Turner*, 136 Wis. 2d at 344.

Analysis

¶8 Although polygraph test results are inadmissible in criminal proceedings, *State v. Dean*, 103 Wis. 2d 228, 279, 307 N.W.2d 628 (1981), statements made in post-polygraph examination interviews may be admissible, *Barrera v. State*, 99 Wis. 2d 269, 288-89, 298 N.W.2d 820 (1980), *cert. denied*,

451 U.S. 972 (1981). 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. *State v. Schlise*, 86 Wis. 2d 26, 43-44, 271 N.W.2d 619 (1978). On the other hand, post-polygraph interviews may be found to be distinct both as to time and content from the examination which precedes them, and if distinct, then the statements made therein may be admissible. *Id.* at 42. This determination is made after consideration of the totality of the circumstances of the individual case. *Johnson*, 193 Wis. 2d at 388-89; *Barrera*, 99 Wis. 2d at 288.

¶9 The applicable factors to consider in determining whether the post-polygraph statements are so clearly related to the polygraph examination as to be considered one event, *see Johnson*, 193 Wis. 2d at 388-89, include:

[T]he time between the end of the polygraph examination and the interview during which the defendant said something that he or she seeks to suppress; whether the defendant was still attached to the polygraph machine when he or she made the incriminating statements; whether the post-polygraph interview was in the examination room or some other place; whether the defendant was told that the polygraph examination is over; and whether ... the polygraph examiner interrogates the defendant making “frequent use of and reference to the charts and tracing he had just obtained.”

State v. Greer, 2003 WI App 112, ¶11, 265 Wis. 2d 463, 666 N.W.2d 518 (citations omitted).

¶10 However, the core factors are whether, when the defendant made the statements as to which suppression is sought, the polygraph examination was over, and whether the defendant had been told that. *Id.*, ¶12. The presence of these factors is crucial, even when no time has passed between the end of the examination and the beginning of the post-examination interview. *Id.*, ¶11; *see*

also *Schlise*, 86 Wis. 2d at 42 (evidence admissible when no time elapsed between end of polygraph examination and beginning of post-examination interview because core factors met); *McAdoo v. State*, 65 Wis. 2d 596, 603, 223 N.W.2d 521 (1974) (evidence admissible when an almost seamless transition has occurred between the end of the polygraph examination and the beginning of the post-examination interview, but core factors met).

1. *Was the confession part of the polygraph examination?*

¶11 To determine whether Canady's confession occurred as part of the polygraph examination, as argued by Canady, we consider the factors set out in *Greer*. The post-polygraph interview here began approximately thirty minutes after termination of the mechanical examination. Less time has been found to be sufficient between the two interviews to uphold admission of the post-polygraph statements. See *Schlise*, 86 Wis. 2d at 42; *McAdoo*, 65 Wis. 2d at 603. While Canady was still in the examination room, and after he had been disconnected from the mechanical equipment, Canady signed a document in which he acknowledged that any further questions he might answer were not part of the polygraph examination. Thereafter, Canady was moved to a separate interview room, where he was left alone for approximately twenty minutes. The post-polygraph interview occurred in this interview room.

2. *Was post-polygraph interview tainted by disclosure of results to Canady?*

¶12 Disclosure of the results of a polygraph examination to a defendant in order to obtain an incriminating statement may require suppression of the incriminating statement. *Johnson*, 193 Wis. 2d at 388-89. Such conduct would be strong evidence that the polygraph examination and the interview were one continuing event. See *Johnson*, 193 Wis. 2d at 389. However, if the post-

polygraph interview is a completely separate event, even if the examiner questions the defendant's veracity (but does not disclose the results of the test), an incriminating statement obtained in that interview has been held to be admissible. *See Greer*, 265 Wis. 2d 463, ¶16; *Johnson*, 193 Wis. 2d at 389.

¶13 The trial court here made apparently inconsistent findings regarding the disclosure of the results of the polygraph examination. The trial court stated, in the context of discussing the post-polygraph interview of Canady: “[T]here was eventually disclosure of the results of the polygraph examination” and “The results were never given—it’s my understanding—of the polygraph examination.” If, as it appears from the transcript, the trial court was talking about disclosure of the results to Canady, the findings are inconsistent.

¶14 We review the trial court's findings of fact under the “clearly erroneous” standard of review. *Turner*, 136 Wis. 2d at 343-44 (generally, we will uphold the trial court's factual findings unless they are clearly erroneous). We consider whether the evidence in the record supports either of the trial court's findings. WIS. STAT. § 805.17(2). Burgos was the only officer present when the post-polygraph interview began. He acknowledged that he told Canady that Canady was “not telling me the truth,” but specifically denied telling Canady that he failed the test. Burgos testified that he knew the law prohibited confronting a suspect with the results of a polygraph in order to get a statement. Burgos testified that he did not tell Canady the results of the examination, and that he did not answer Canady when Canady continued to ask Burgos which questions he (Canady) had failed. Burgos readily acknowledges that before they began their interview at 3:00 p.m., he disclosed to the detectives who returned to interview Canady both the results of the polygraph examination and Canady's subsequent

admission to him. That disclosure is confirmed by Detective Wesolowski, the recipient of the information.

¶15 Based upon our independent review of the record, we conclude that the trial court either misspoke or erroneously recalled the record when making the conflicting findings. The record contains no evidence that anyone disclosed the results of the polygraph examination to Canady, although it does support the finding that Canady asked which questions he had failed and that Burgos refused to answer. We conclude, therefore, that the record does not support a finding that the polygraph examination results were disclosed to Canady, but instead, supports the trial court's finding that the polygraph examination results were never disclosed to Canady.

¶16 Considering all of the surrounding circumstances, we conclude that the post-polygraph interview was not "one event" with the mechanical examination. Rather, it was separated physically and temporally from the mechanical examination. As further evidenced by the document he signed, and with no evidence to the contrary in the record, Canady knew the polygraph examination had ended before he made statements in the post-polygraph interviews. His post-polygraph statements are, therefore, subject to the usual rules of admissibility, which "should be determined by fundamental voluntariness concepts." *Schlise*, 86 Wis. 2d at 46.

3. *Was the confession voluntary?*

¶17 Where a defendant claims that his admissions were compelled, the government bears the burden of proving voluntariness by a preponderance of the evidence. *State v. Hoppe*, 2003 WI 43, ¶40, 261 Wis. 2d 294, 661 N.W.2d 407. In determining whether a confession was voluntarily made, the essential inquiry is

whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police. *Barrera*, 99 Wis. 2d at 291; *Grennier v. State*, 70 Wis. 2d 204, 211, 234 N.W.2d 316 (1975). The presence or absence of actual coercion or improper police practices is the focus of the inquiry because it is determinative on the issue of whether the inculpatory statement was the product of a “free and unconstrained will, reflecting deliberateness of choice.” *State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987) (citation omitted). Determination that a confession is involuntary requires “some affirmative evidence of improper police practices deliberately used to procure a confession.” *Id.* at 239.

¶18 The record here is replete with evidence of proper police procedure. Before each interview, Canady was advised orally and in writing of his right to remain silent, his right to assistance of counsel, and his right to stop answering questions. Canady exercised none of these rights before he made the inculpatory statements. There is evidence of substantial rest periods between multiple interviews and that during long breaks Canady was placed in a cell with a bed and toilet, refuting any inference that the police engaged in “relay questioning.” *See State v. Agnello*, 2004 WI App 2, ¶21, 269 Wis. 2d 260, 674 N.W.2d 594 (“‘Relay’ questioning implies that different interrogators relieve each other in an effort to put unremitting pressure on a suspect.”). There is no evidence of police threats, coercion or promises to Canady, and no evidence that officers involved in the interviews were armed. There is no evidence of any refusal to accommodate Canady’s needs for creature comforts. The record demonstrates no improper police practices.

¶19 We conclude that the post-polygraph interview was sufficiently separated in time and location from the mechanical examination, and that Canady

knew the mechanical examination had been concluded. Consequently, his post-polygraph examination statements are subject to the usual tests of admissibility. The record demonstrates that the State has met its burden to establish that Canady's post-polygraph confession was voluntary. Consequently, we affirm the conviction.

By the Court.—Judgment affirmed.

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