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Polygraphic Evidence: The Case for Admissibility Upon Stipulation of the Parties

Introduction

As early as 1923, Dean Wigmore predicted, ". . . if there ever is devised a psychological test for the evaluation of witnesses, the law will run to meet it. . . ." ¹ If a polygraph test given and evaluated by a competent operator is such a test as would fulfill Wigmore's prediction, not only has the law not run to meet it, but in most instances, the law has turned its back upon it. ² This note will examine the current legal status of polygraphic evidence, and in particular, those cases in which stipulation of the parties was made prior to the examination. Emphasis will be placed upon the probable future of polygraphic evidence in the state of Oklahoma.

The forerunner of the modern polygraph was a machine developed by Cesare Lombroso in 1895, which he used to monitor blood pressure variations of suspected criminals during interrogation. ³ In 1914, Vittorio Benussi, reported that he was able to make a positive correlation between the rate of breathing and deception. ⁴ It was not until 1921, however, that a machine which is the true forerunner of the present polygraph was developed. John Larson and Leonarde Keeler produced a device that was capable of making a continuous recording of blood pressure, pulse rate, and respiration. ⁵ The only major change in recent years has been the addition of electrodes which measure the change in the skin's resistance

¹ 2 J. WIGMORE, EVIDENCE § 875 (2d ed. 1923).

² See generally *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

³ J. REID & F. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH ("LIE DETECTOR") TECHNIQUE 1-2 (1966) (hereinafter cited as REID & INBAU).

⁴ SCIENTIFIC AMERICAN, vol. 216, January 1967, at 25.

⁵ *Id.* at 26.

to the flow of a minute electrical current.⁶ While the exact nature of the phenomenon is unknown, there is substantial evidence to link these changes with attempts at deception.⁷

The basis for the correlation between the physiological changes as recorded by the polygraph and "lying" is said to be due to emotional changes resulting from the subject's consciousness of his attempted deception.⁸ Obviously, the polygraph does not actually detect lies. That function is dependent upon the competence of the operator and upon the thoroughness of his examination.⁹ The efficacy of the polygraph, then, is based upon two factors: The reliability of the device and the ability of the operator to interpret the "polygram."

Historical Background

To date, every appellate court which has ruled upon the question of the admissibility of polygraph evidence, absent a stipulation, has held it inadmissible.¹⁰ Where the parties have made a valid stipulation to have the results of a polygraph test admitted into court, a few jurisdictions have held the parties bound by their agreement and allowed the evidence

⁶ This phenomenon has been variously referred to as Galvanic Skin Response (GSR), Psycogalvanic Skin Response (PSR), and Electrodermal Response (EDR).

⁷ REID & INBAU, *supra*, note 3 at 3-5, 219.

⁸ *Id.* at 196; Skolnick, *Scientific Theory and Scientific Evidence: An analysis of Lie Detection*, 70 YALE L. J. 694 (1961) (hereinafter cited as Skolnick).

⁹ For a thorough examination of the proper procedure to be used by a polygraph examiner, see REID & INBAU, *supra*, note 3, at 10-21; Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 TENN. L. REV. 711-12 (1953).

¹⁰ Appellate courts in Arizona, California, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and Wisconsin, as well as most federal courts have so held. For additional information on this question, see Annot., 23 A.L.R.2d 1306 (1952).

in. The question of admissibility upon a valid stipulation is discussed later in this note.¹¹

The present status of inadmissibility of polygraphic evidence is a result of the decision in *Frye v. United States*,¹² in which the court examined the trial court's refusal to admit evidence of the results of a Marston "systolic blood pressure" test. Dr. Marston, who developed and performed the test was not allowed to testify as to his conclusion.¹³ The appellate court upheld that decision, stating,

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.

We think the systolic blood pressure deception test has not yet gained *such standing and scientific recognition among physiological and psychological authorities* as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made. (Emphasis added)¹⁴

The decision in *Frye* has been attacked on numerous occasions; many authorities believe that it requires a higher degree of acceptability for polygraphic evidence than for other types of scientific evidence.¹⁵

Generally speaking, the standard for admission of scientific

¹¹ See text accompanying notes 39 through 61.

¹² 293 F. 1013 (D.C. Cir. 1923).

¹³ 293 F. at 1014.

¹⁴ 293 F. at 1014.

¹⁵ C. McCORMICK, EVIDENCE § 203 (2d ed. 1971); 2 WIGMORE, EVIDENCE § 663 (3d ed. 1940).

evidence is that it be acceptable to those familiar with its use,¹⁶ and that a scientific device be reasonably accurate.¹⁷ This lesser requirement has been used upon accepting evidence of narcotics in the blood stream.¹⁸

At least one author has suggested that the standard imposed by the court in *Frye* is that which courts should use only in taking judicial notice of a fact.¹⁹ Most courts, however, finding that polygraphic evidence does not measure up to the *Frye* standard fail to apply the usual test for the admissibility of evidence²⁰ and refuse the evidence summarily.

In 1933, ten years after *Frye* had been decided, the Wisconsin Supreme Court considered *State v. Bohner*.²¹ The defendant had attempted to introduce a polygraph examination to substantiate his alibi, but the offer was refused, and the Supreme Court of Wisconsin concurred that it had been properly excluded. Relying at least partially on *Frye*,²² the court

¹⁶ Kaplan, *The Lie Detector: An Analysis of Its Place in the Law of Evidence*, 10 WAYNE L. REV. 386 (1964) (hereinafter cited as Kaplan).

¹⁷ Wigmore would have the courts grant recognition to scientific evidence upon a showing that the instrument or technique has a reasonable measure of precision in its indications, and that it is accepted in the particular profession or field of science to which it belongs. 3 J. WIGMORE, EVIDENCE § 990 (3d ed. 1940).

¹⁸ *People v. Williams*, 164 Cal. App. 858, 331 P.2d 251 (1958) (acceptance of evidence of a reaction to the Nalline Test for narcotics in the blood, even though only a few members of the medical profession were familiar with it at the time).

¹⁹ Kaplan, *supra*, note 16.

²⁰ Evidence is admissible if it would, ". . . render the desired inference more probable than it would be without the evidence. . . ." C. McCORMICK, EVIDENCE § 152 (1954).

²¹ 210 Wis. 651, 246 N.W. 314 (1933).

²² *Id.* at 657-58, 246 N.W. at 317.

stated that the lie detector²³ had not yet progressed to the "demonstrable stage,"²⁴ but failed to clarify that terminology.

The first court to admit the results of a polygraph test²⁵ was a lower court in New York in *People v. Kenny*.²⁶ The court further allowed the examiner²⁷ to testify as to his opinion of the defendant's guilt or innocence. The case was never appealed, and were it not for the practice of New York in reporting lower court cases, it would not have received any notoriety.

The door which *Kenny* opened was slammed by a court of the New York Appellate Division in *People v. Forte*.²⁸ The lower court, being in a different district than the court which decided *Kenny*, refused to allow the results of a pathometer test in evidence. The convicted defendant appealed, leaving the Appellate Division to settle the issue. The court found that, ". . . The record is devoid of evidence tending to show a general scientific recognition that the pathometer possesses efficacy."²⁹ It would seem that the *Forte* court would have required an even greater standard for admissibility than was required in *Frye*. The opinion states that judicial notice of the device's ability to perceive the truth would have had to be shown.³⁰

²³ The test in *Bohner* was conducted at Northwestern University by Prof. Keeler, a noted authority in the field of polygraphy.

²⁴ 210 Wis. at 657, 246 N.W. at 317. The court further stated that it feared, ". . . a too hasty acceptance of it during this state of its development may bring complications and abuses that will overbalance whatever utility it may have. . . ."

²⁵ The test given was on a galvanic skin response (GSR) recorder.

²⁶ 167 Misc. 51, 3 N.Y.S.2d 348 (Queens County Ct. 1938).

²⁷ The examiner in *Kenny* was Father Summers of Fordham University. His testimony was that the galvanometer ("pathometer") was essentially 100% effective.

²⁸ 279 N.Y. 204, 18 N.E.2d 31 (1938).

²⁹ *Id.* at 206, 18 N.E.2d at 32.

³⁰ *Id.* at 206, 18 N.E.2d at 32.

Because *Forte* was appealed and upheld by a higher court, it was assumed that *Kenny* had been overruled. At least one author, however, suggests that *Forte* and *Kenny* are distinguishable.³¹ Nonetheless, it has been *Forte* and the *Frye* rationale which courts have followed to this day. Any question which remained was answered in *People v. Leone*³² which cited *Forte* and subsequently established the New York rule excluding "lie detector" evidence.

Although the language in *Frye*, requiring that polygraph techniques have "general scientific acceptance" has often been cited as the reason for excluding polygraph results, it is certainly not the only theory upon which courts have acted. Several attempts to introduce polygraph evidence have been foiled by courts who have reasoned that the results of the tests were too dependent upon the skill of the examiner.³³ The Oklahoma Court of Criminal Appeals, as well as several other courts, has held that the admission of polygraphic evidence would impair the function of the jury.³⁴ Other courts have held that it would be distracting to members of the jury,³⁵ or would lead to the abolition of the jury system.³⁶

³¹ Note, *Admissibility of Lie Detector Tests*, 4 THE JOHN MARSHALL JOURNAL OF PRACTICE AND PROCEDURE 233, 251 (1971) (In *Kenny* a proper foundation was laid for the lie detector evidence, while in *Forte*, none was laid.)

³² 307 N.Y.S.2d 430, 255 N.E.2d 696 (1969).

³³ *People v. Zazzetta*, 27 Ill. 2d 302, 189 N.E.2d 260 (1963); *People v. Davis*, 343 Mich. 348, 72 N.W.2d 269 (1955); see also Skolnick, *supra*, note 8.

³⁴ *United States v. Stromberg*, 179 F. Supp. 278 (S.D.N.Y. 1959); *Henderson v. State*, 94 Okla. Crim. 45, 230 P.2d 495 (1951); *Boeche v. State*, 151 Nebr. 368, 37 N.W.2d 593 (1949).

³⁵ *State v. Foye*, 254 N.C. 704, 120 S.E.2d 169 (1961); *State v. Cole*, 354 Mo. 181, 188 S.W.2d 43 (1945).

³⁶ Note, *The Lie Detector and the Courts*, 16 N.Y.U.L.Q. REV. 202, 221 (1939).

At least two courts have excluded polygraph evidence because the device could not be cross-examined.³⁷

Regardless of the reasoning used, there can be no doubt that the majority of courts still exclude polygraph results. There is, however, some authority which points to a softening in the trial courts' attitudes towards admitting polygraphic evidence.³⁸ In most cases, unfortunately, the defendant is released and the prosecutors fail to appeal the case. As a result, these cases are never reported.

As long as the stringent standards of *Frye* are imposed, there seems to be little hope for any drastic change. While the current rationale persists, it would seem that individual judges have the discretion to determine when judicial notice of the polygraph's efficacy may be made. As yet, none has dared to break with the years of precedent and the rule of *stare decisis*. Perhaps it is time for another evaluation, in view of the fact that considerable refinement has been made in both the machine and the method since 1923.

Admission Upon A Valid Stipulation

During recent years there has existed in several states a mounting trend toward admitting polygraph evidence where a valid stipulation between the parties had been made prior to the examination. The question most consistently asked is, "How does the agreement of the parties lend credibility to a scientific investigation which would not otherwise be given judicial recognition?" At least one authority condones admissibility in spite of any "imperfections" in the method when

³⁷ *State v. Lowery*, 163 Kan. 622, 185 P.2d 147 (1947); *Boeche v. State*, 151 Nebr. 368, 37 N.W.2d 593 (1949); *but cf. State v. Fields*, 434 S.W.2d 507 (Mo. 1968) (Evidence was admitted that a trained dog had "tracked" the defendant. The dog was not cross-examined.)

³⁸ *Ferguson*, TEXAS B.J., June, 1972, 532 (Mr. Ferguson is a polygraph examiner licensed in Texas. In his article he describes a number of trial court cases in which he states that polygraph evidence was admitted.)

the case at bar is such that the evidence is weak, and neither side is desirous of having a decision rendered on that basis.³⁹ As justification for this viewpoint, the following considerations are propounded:

1. Whenever opposing litigants and their respective attorneys are willing to resort to polygraph examinations, it may be taken for granted that the case is a doubtful one—a case in which the evidence on either side is not particularly convincing (e.g., a bastardy accusation and denial). . . Polygraph test results . . . would certainly be more accurate than the guess hunch of the judge or jury in deciding the case in the absence of assistance.
2. Whenever opposing attorneys agree upon the selection of an expert . . . we may safely assume that the person selected is an honest and competent examiner⁴⁰

The same authority has also urged that test results should be admitted *only* upon stipulation of the parties, and as a result neither party should later be heard to complain on appeal.⁴¹

The case of *People v. Houser*⁴² was the first in which polygraph results were admitted into evidence as a result of a stipulation. The agreement, made with the defense attorney's consent and approval, was that the results would be admissible regardless of the outcome. The results proved damaging to the defendant; he was convicted of a sex offense.

On appeal, the defendant urged that the test results were inadmissible and relied on the *Frye* rationale, that there was not yet any "general scientific approval" of the technique. The court took notice of the stipulation, and in its often cited opinion stated,

³⁹ REID & INBAU, *supra*, note 2, at 247.

⁴⁰ *Id.* at 247-48.

⁴¹ Inbau, *The Lie Detector*, 26 B.U.L.REV. 264.

⁴² 85 Cal. App. 2d 686, 193 P.2d 937 (1948).

It would be difficult to hold that defendant should now be permitted on this appeal to take advantage of any claim that such operator was not an expert and that as to the results of the test such evidence was inadmissible, merely because it happened to indicate that he was not telling the truth. . . .⁴³

The Michigan Supreme Court had an opportunity to decide this issue in *Stone v. Earp*,⁴⁴ a civil case involving the determination of title to a certain automobile. The trial judge "instructed" the parties to take "lie detector" tests prior to his determination of the issue. The parties, with consent of counsel, executed a stipulation and submitted to examinations. The results were introduced through the testimony of the examiner, who gave as his expert opinion the conclusion that the plaintiff was lying.

The plaintiff contended, on appeal, that the trial judge had erred in giving weight to the test results. The Michigan Supreme Court concurred, but upheld the decision due to a preponderance of additional evidence. It would appear that the court gave the stipulation no consideration, but in any case the opinion shows that an insufficient foundation was laid at the trial court.

In *State v. McNamara*,⁴⁵ "lie detector" results were introduced in a murder trial upon the stipulation that the evidence would be admissible by either side. At the trial, the defendant insisted that the damaging evidence should be excluded. The court, relying on *Houser*, and reviewing the several authorities against admission, held that the defendant was bound by her stipulation.⁴⁶

Four years later the Iowa Supreme Court made it clear in *State v. Freeland*⁴⁷ that the decision in *McNamara* did not

⁴³ *Id.* at 695, 193 P.2d at 942.

⁴⁴ 331 Mich. 606, 50 N.W.2d 172 (1951).

⁴⁵ 252 Iowa 19, 104 N.W.2d 568 (1960).

⁴⁶ *Id.* at 29, 104 N.W.2d at 574.

⁴⁷ 255 Iowa 1334, 125 N.W.2d 825 (1964).

apply to unstipulated polygraph tests. The court further declared that a lower court could not compel parties to take a polygraph test, or direct them to stipulate to one.

Without any doubt, one of the most important cases deciding this question is *State v. Valdez*.⁴⁸ The defendant, charged with possession of narcotics, stipulated to a polygraph examination which proved to be unfavorable to his case. Over his counsel's objection the evidence was admitted. Upon appeal to the Arizona Supreme Court the question was decided in favor of the admissibility of the test. The court indicated in its opinion that the ". . . lie detector . . . has developed to a state in which its results are probative enough to warrant admissibility upon stipulation."⁴⁹

It is not for the decision alone, however, that *Valdez* is important. In its opinion the court set forth the first judicially determined guidelines to be followed in future cases involving stipulation. It, in essence, declared that stipulated polygraph evidence would be admissible if:

1. 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 a 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

⁴⁸ 91 Ariz. 274, 371 P.2d 894 (1962).

⁴⁹ *Id.* at 371, 371 P.2d at 900.

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 which a defendant is charged but at most tends only to indicate that at the time of the examination the 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.⁵⁰

Following the *Valdez* opinion came two Illinois cases in

which a stipulation was challenged. The first case, *People v. Zazzetta*,⁵¹ has been cited both for,⁵² and against⁵³ the proposition that polygraph results are admissible in Illinois courts. The court in *Zazzetta* did refuse to admit the test results, but on close examination of the opinion it is clearly evident that it was the stipulation which the court condemned, not the test results. The court reported four pertinent errors which caused the agreement to be defective.⁵⁴ In effect, each of these could have been easily cured had the parties been aware beforehand of what the court would require.

⁵⁰ *Id.* at 283-84, 371 P.2d at 900-01. A proposed stipulation form may be found in *RED & INBAU, supra*, note 3, at 251.

⁵¹ 27 Ill. 2d 302, 189 N.E.2d 260 (1963).

⁵² *Blackmon v. Brent*, 97 Ill. App. 2d 438, 240 N.E.2d 255 (1968).

⁵³ *People v. Nichols*, 42 Ill. 2d 91, 245 N.E.2d 771 (1969).

⁵⁴ 1. No foundation was laid as to the examiner's qualifications.
2. The stipulation allowed that the examiner need not appear and testify.
3. The stipulation was oral rather than written (even though it had been made in open court.)
4. The gravity of the agreement may have been beyond the defendant's comprehension who had only an eighth grade education.

See also *Colbert v. Commonwealth*, 306 S.W.2d 825 (Ky. 1957).

In a second current Illinois case, *People v. Potts*,⁵⁵ the court denied admission to the evidence because no foundation as to the test method or qualifications of the operator was made. Furthermore, the examiner did not testify; his written report was merely submitted as evidence of his conclusions. The court quoted the requirements set down in *Valdez* without specific approval, but it would appear that in future instances, stipulations complying with those requirements would be acceptable to Illinois courts.⁵⁶

At the present time, polygraph results are admissible in six states when a valid stipulation has been executed.⁵⁷ As a general rule, it is a safe practice to follow the stipulation requirements of *Valdez*, and avoid the pitfalls found in *Potts*.

With regard to the necessity of establishing the foundation required for the admission of polygraph evidence, the case of *State v. Fields*⁵⁸ represents an excellent example. The examiner should testify:

1. As to his training and experience in the operation of his polygraph, and to the technique used in interpreting the results.

2. Regarding the mechanical operation of the polygraph, including the manner in which it recorded blood pressure, pulse, respiration, and G.S.R.

3. As to the questioning technique, giving the questions asked and the significance of each. (Includ-

⁵⁵ 74 Ill. App. 2d 301, 220 N.E.2d 251 (1966).

⁵⁶ *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962).

⁵⁷ Alaska: *Pulakis v. State*, 476 P.2d 474 (Alaska 1970); Arizona: *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962); California: *People v. Houser*, 85 Cal. App. 2d 686, 193 P.2d 937 (1948); Florida: *State v. Brown*, 177 So. 2d 532 (Fla. Dist. Ct. App. 1964); Iowa: *State v. McNamara*, 252 Iowa 19, 104 N.W.2d 568 (1964); Missouri: *State v. Fields*, 434 S.W.2d 507 (Mo. 1968).

⁵⁸ 434 S.W.2d 507 (Mo. 1968).

ing a distinction between those questions designated as "norms," "controls," or "critical").

4. That the subject showed abnormal or normal responses when the "critical" questions were posed to him.

5. That the graphic display on the "polygram" corresponds to the reactions which the subject had to specific questions.

6. That in the opinion of the examiner, the subject was or was not attempting deception in response to specific questions.⁵⁹

Certain difficulties must still be overcome. The examiner's testimony must not be such that it completely usurps the role of the jury⁶⁰ and, under no circumstances should the witness express an opinion as to the defendant's guilt or innocence.⁶¹

THE CURRENT STATUS OF POLYGRAPHIC EVIDENCE IN OKLAHOMA

In the past twenty years several cases involving the acceptability of polygraph evidence have been heard by the Oklahoma appellate courts. It has been the standard practice of those courts to declare such evidence ". . . inadmissible for any purposes."⁶²

The first case to come before the Criminal Court of Appeals was *Henderson v. State*.⁶³ The defendant, accused of

⁵⁹ *Id.* A discussion of the questioning technique can be found in RED & INBAU, *supra*, note 3, at 26-64.

⁶⁰ *State v. Cole*, 354 Mo. 181, 188 S.W.2d 43 (1945) (The court expressed the concern that the introduction of polygraph evidence would unduly influence the jury.)

⁶¹ *State v. Galloway*, 167 N.W.2d 725 (Iowa 1971).

⁶² *See, e.g., Hayes v. State*, 292 P.2d 442 (Okla. Crim. App. 1956).

⁶³ 94 Okla. Crim. 45, 230 P.2d 495 (1951), *cert. denied*, 342 U.S. 898 (1951).

rape, offered to introduce a polygraph test to prove his innocence and to verify an alibi. The trial court refused its admission and the defense appealed, asserting that it constituted new evidence of the defendant's innocence.

The appellate court, recognizing the case as one of first impression,⁶⁴ thoroughly reviewed the available information and cases both for and against the admission of polygraph results.⁶⁵

As had been typical in all the recent cases discussed, the court based its decision on precedent many years old. All of the cases the court viewed were in some part based on the *Frye* decision.⁶⁶ Furthermore, the court looked favorably upon a statement in Wigmore that ". . . the record of psychometric achievement with testimony is still meager. . .," even though it was over twenty years old at the time.⁶⁷ The court also looked at the figures reported in Inbau's book⁶⁸ and emphasized the fact that the lie detector had been shown to be only 75% effective.⁶⁹ In the end, the court summarized by saying,

. . . neither the lie-detector nor the truth-serum tests have gained that standing and scientific recognition nor demonstrated that degree of dependability to justify the courts in approving their use in the trial of criminal cases.⁷⁰

⁶⁴ 94 Okla. Crim. at 50, 230 P.2d at 500.

⁶⁵ The court took into consideration the fact that only in *Kenny* had polygraph evidence been admitted, but considered *Forte* as repudiating the former decision. The court further reviewed both *Frye* and *Bohner* as well as J. INBAU, LIE DETECTION AND CRIMINAL INVESTIGATION and J. WIGMORE, PRINCIPALS OF JUDICIAL PROOF (2d ed. 1931).

⁶⁶ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

⁶⁷ 94 Okla. Crim. at 52, 230 P.2d at 503.

⁶⁸ The book in this instance was J. INBAU, LIE DETECTION AND CRIMINAL INVESTIGATION.

⁶⁹ 94 Okla. Crim. at 51, 230 P.2d at 501.

⁷⁰ 94 Okla. Crim. at 55, 230 P.2d at 506.

All subsequent cases on this question followed *Henderson*⁷² in refusing polygraph results in evidence. In no case, however, has the question of admissibility pursuant to a stipulation been considered. Only in *Looper v. State*⁷³ did the court make any reference to the stipulation situation. The court quoted without further comment from an annotation⁷⁴ that,

It would appear, at least absent a stipulation, that courts almost uniformly reject the results of lie detector tests. . . .⁷⁵

Perhaps it could be inferred that the court would at least seriously consider the admission of test results obtained under a stipulation. To do so would require that the court overrule in part its prior decision that such evidence was inadmissible "for any purpose."⁷⁶

THE OKLAHOMA POLYGRAPH EXAMINERS ACT

Both courts and noted legal scholars agree that the efficacy of the polygraph depends almost entirely upon the qualifications of the operator.⁷⁷ It is unfortunate, however, that many examiners are not well trained.⁷⁸ This is no doubt a

⁷¹ 239 P.2d 812 (Okla. Crim. App. 1952).

⁷² *Leeks v. State*, 245 P.2d 764 (Okla. Crim. App. 1952) (in which the defendant confessed to the examiner during the test); *Hayes v. State*, 292 P.2d 442 (Okla. Crim. App. 1956); *Looper v. State*, 381 P.2d 1018 (Okla. Crim. App. 1963); *Mullins v. State*, 443 P.2d 773 (Okla. Crim. App. 1968) (Polygraph evidence was held inadmissible for any purpose.)

⁷³ 381 P.2d 1018 (Okla. Crim. App. 1963).

⁷⁴ 23 A.L.R.2d 1308.

⁷⁵ 381 P.2d at 1022.

⁷⁶ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

⁷⁷ See, e.g., Skolnick, *supra*, note 8; Inbau & Reid, *The Lie Detector Technique: A Reliable and Valuable Investigative Aid*, 50 A.B.A.J. 470 (1964) (hereinafter cited as Inbau & Reid); Wicker, *The Polygraph Truth Test*, 22 TENN. L. REV. 711-12 (1953); *People v. Zazzetta*, 27 Ill. 2d 302, 189 N.E.2d 260 (1963); *State v. Gregoire*, 148 A.2d 751 (R.I. 1959); *People v. Davis*, 343 Mich. 348, 72 N.W.2d 269 (1955).

⁷⁸ Inbau & Reid, *supra*, note 77, at 473 (stating that only 20% of the examiners practicing in 1964 were qualified.)

result of the fact that polygraph schools generally attempt to fully train examiners in a period as short as six weeks, with no school currently offering a course longer than six months.⁷⁹

While it may be said that a high degree of examiner incompetence exists, it is also true that the use of the polygraph in private business and government is becoming increasingly widespread.⁸⁰ To prevent the inequities likely to occur under these circumstances, several state legislatures have stepped in to either prohibit the use of polygraph exams for employment purposes,⁸¹ or, in the alternative, to establish standards for the licensing of the examiners.⁸² There can be no question that the quality of examiners must be raised and standardized if the polygraph test is ever to gain judicial recognition.

Obviously, if the examiners will not establish standards on their own through professional societies, then the impetus must fall upon the legislatures. It is unfortunate that the statutes already passed are relatively weak and ineffective in doing what is necessary. A case directly in point is the Oklahoma Polygraph Examiners Act.⁸³ It is generally inadequate in setting standards which would eliminate incompetent examiners.

It cannot be said that the Oklahoma Legislature passed an insubstantial act, for, in its scope, it is quite comprehensive. The Act establishes the Polygraph Examiners Board con-

⁷⁹ Skolnick, *supra*, note 8, at 707.

⁸⁰ The question of use in private sectors is beyond the scope of this article, but for an excellent statement on this subject, see Menocal & Williams, *Lie Detectors in Private Employment: A Proposal for Balancing Interests*, 33 GEO. WASH. L. REV. 932 (1965).

⁸¹ To date, Alaska, California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Rhode Island, and Washington have enacted such statutes.

⁸² Arkansas, Florida, Georgia, Illinois, Kentucky, Mississippi, Nevada, New Mexico, North Dakota, Oklahoma, Texas, and Virginia have enacted such statutes.

⁸³ OKLA. STAT. tit. 59, §§ 1451-76 (1971).

sisting of five members, all of whom must be qualified polygraph operators.⁸⁴ Several other states, on the other hand, have set up similar boards without a requirement that members be polygraph examiners themselves.⁸⁵ Surely, other examiners are better qualified to issue licenses than those having no knowledge or experience of the device or its technique.

The initial transgression, however, is found where the need for high standards is most acute—in the section setting the minimum qualifications for licensing.⁸⁶ Rather than set a high educational requirement specifying at least some psychology training, the section permits licensing of anyone who:

1. Attained the age of twenty-one;
2. Is a United States citizen;
3. Is a person of honesty, truthfulness, integrity, and moral fitness;
4. Has never been convicted of a felony or a misdemeanor involving moral turpitude; and
5. a Holds a baccalaureate degree from a college accredited by the American Association of Collegiate Registrars and Admission Officers, or, in lieu thereof, be a graduate of an accredited high school and have five (5) consecutive years of active investigative experience of a character satisfactory to the board immediately preceding his application; or
 - b. be a graduate of an accredited high school and a graduate of a polygraph examiners course approved by the board and have satisfactorily completed not less than six (6) months of internship training; or
 - c. have passed an examination conducted by and to the satisfaction of the board, or under its super-

⁸⁴ OKLA. STAT. tit. 59, § 1455 (1971).

⁸⁵ Arkansas, Georgia, Mississippi and Texas.

⁸⁶ OKLA. STAT. tit. 59, § 1458 (1971).

vision, to determine his competency to obtain a license to practice as an examiner.⁸⁷

The above standards should be strengthened by requiring graduation from a polygraph course at least six months in length for *all* applicants. Furthermore, a minimum of two years of college education should be a mandatory prerequisite for licensing. While the minimum requirements established under this act are followed, no significant changes in the quality of examiners can be expected.

CONCLUSION

There can be no doubt that in cases where the parties have not executed a valid stipulation, polygraph evidence will not be admitted into evidence. No court at the appellate level has as yet been able to break with the precedent set in 1923 by *Frye*.⁸⁸ The admission of similar results where a stipulation was executed, while defying reason, does present an opportunity for courts to slowly bend away from the strict rule of exclusion. In the near future, however, an attorney wishing to offer polygraph evidence must comply with the stipulation requirements in *Valdez*.⁸⁹ (While these are not *res judicata* in jurisdictions other than Arizona, at least one other state has found them to be an adequate guideline, and the likelihood is that other states will, also.)

For the Oklahoma attorney the question is still an open one. It is likely, though, that this issue will arise in the near future. When it does, it will be most important that the dichotomy in the existing cases be distinctly pointed out to the court. Those cases involving stipulations have almost uniformly been handled differently than those without.

In addition, more stringent licensing requirements should be demanded of the legislature. Until the quality of examiners can be standardized at a higher level, there can be no hope that polygraph evidence will be better regarded by the courts.

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⁸⁷ OKLA. STAT. tit. 59, § 1458 (1971).

⁸⁸ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

⁸⁹ *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962).