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Supreme Court of New Jersey
Docket No. 62,096

State of New Jersey,

Plaintiff-Petitioner,

v.

A.O.,

Defendant-Respondent.

Criminal action

On Certification to the
Superior Court of New Jersey,
Appellate Division

Sat Below:

Hon. William P. Gilroy,
J.A.D.
Hon. Susan L. Reisner,
J.A.D.
Hon. Harvey Weissbard,
J.A.D.

Honorable Justices:

On behalf of defendant-respondent A.O., we respectfully submit this supplemental letter memorandum in lieu of a more formal brief to clarify our position on the primary issue before the Court: the admissibility of the lie-detector results obtained from defendant before trial.

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Factual Background

Defendant is originally from Nigeria. He has no prior criminal history. But on April 27, 2001, while defendant was living with his girlfriend and her teenage daughter in New Jersey, the daughter, C.I., accused defendant of sexually molesting her several times during the past year.

There was no physical evidence of the assaults, but police confronted defendant with the accusations that C.I. had made earlier that day. Defendant was Mirandized three times and questioned during several hours that night (from around 6 p.m. until 11 p.m.). He denied the accusations and told police they'd treated him "like a liar."

Police then asked defendant, "did we tell you that we are only here to seek the truth?" When defendant responded "yes," he was asked, "do you agree to take a stipulated polygraph examination to determine if you're telling the truth?" Defendant agreed, and the test was administered.

The prosecution claimed that defendant took the test three times and failed each time. (1T29:1-15).¹ Defendant

¹ References to the transcripts are as follows:

1T March 30, 2004 (trial)
2T March 30, 2004 (vol. II)(trial)
3T March 31, 2004 (trial)
4T April 1, 2004 (trial)
5T April 5, 2004 (trial)
6T April 6, 2004 (trial)
7T April 6, 2004 (vol. II)(trial)

claimed that police administered the test "like more than ten times," (1T14:1-10), and that police told him he'd done "good" until the last test, which he "failed." (1T14:10-24). All this occurred the same day that C.I. made the accusations – before any arrest or charge. Defendant did not have assistance of counsel (he waived the right to counsel offered to him via the Miranda warnings).

Only one week later, C.I. recanted her allegations, accusing detectives of drugging her when she'd made them. (1T148:6-20; 2T8:3-9:24; 3T182:1-20). But the case against A.O. proceeded anyway and, as trial neared, C.I. again said that her original accusations were true. (3T182:1-20).

Then, shortly before trial, the State moved to admit the lie-detector results into evidence against defendant, citing for their admission this Court's 1972 decision in State v. McDavitt, 62 N.J. 36, which the State contended (and continues to contend) permits lie-detector results to be admitted whenever a defendant "unequivocally stipulates" to their use. The trial court granted the motion and permitted the polygraph results and expert testimony of the polygraph administrator (Sergeant Kaminskas).

8T April 8, 2004 (trial)
9T February 10, 2005 (sentence).

Sergeant Kaminskis and the prosecutor made sure there was no doubt about what the test results meant to the jury. Kaminskis told the jury that polygraph results were 95% to 97% accurate, (3T48:12-22), and that of 302 tests Kaminskis had conducted on the polygraph machine used on A.O., there had never been any external evidence that contradicted the results, (3T56:12-20), – never a “confirmed mistake,” (3T56:18-25).

The prosecutor told the jury that the State had asked defendant for “his side of the story” and that defendant had lied. “That’s the sum and substance of the State’s case.” (1T49:15-50:4). As the prosecutor summed it up, “[t]his case boils down to one sentence. What does [C.I.] say and what does the defendant have to say about that?” (7T51:15-20).

[Kaminskis] said after 300 exams he did he had 100 percent accuracy. Meaning there was no other time that he had a result somebody proved him wrong later. * * * [Defendant] denies these allegations and he thinks - - fool the machine. Guess what? He can't. The machine said he lied
. . . .

[7T63:1-9 (emphasis added)]

After hearing that evidence, the jury easily concluded that C.I. had told the truth and that defendant – as the polygraph showed – had lied. The court sentenced defendant to 18 years in prison.

On appeal, the Appellate Division ruled that admitting the polygraph evidence against defendant at trial was harmful error warranting a new trial. The correctness of that ruling is now before this Court.

Argument

Point 1

This Court reviews the correctness of the ruling or decision below. The ruling in this case – that the lie-detector results shouldn't have been admitted against defendant at trial and that their admission was harmful error warranting a new trial – is correct and should be affirmed.

The ruling or decision below – not the rationale the Appellate Division employed in reaching it – is primarily what's at issue before the Court. We submit that the ruling in this case – that the lie-detector results shouldn't have been admitted against A.O. at trial and that their admission was harmful error warranting a new trial – is correct and should be affirmed, even if the Court reaches this conclusion on different grounds than the Appellate Division did (as we argue below the Court should). See Marchitto v. Central R. Co. of N.J., 9 N.J. 456, 463 (1952) (the ruling of the lower court, not its rationale, is what higher court reviews and determines

whether to affirm or reverse), overruled on other grounds,
Donnelly v. United Fruit Co., 40 N.J. 61 (1963).

Point 2

The Court should affirm the ruling below on the ground that admitting the lie-detector results into evidence was improper under the Rules of Evidence and precedent governing the admission of polygraph evidence; whether admitting the evidence violated A.O.'s constitutional right to counsel need not be decided.

"Constitutional questions should be addressed only when necessary to resolve a pending controversy." State v. Crawley, 187 N.J. 440, 451 (2006) (citing Donadio v. Cunningham, 58 N.J. 309, 325-26 (1971) ("[A] court should not reach and determine a constitutional issue unless absolutely imperative in the disposition of the litigation.")). The Court has consistently followed this important principle, Tarus v. Borough of Pine Hill, 189 N.J. 497 (2007), as has the United States Supreme Court. Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 157-158, 104 S.Ct. 2267, 2279, 81 L.Ed.2d 113 (1984)(a fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them); Ashwander v. TVA, 297 U.S.

288, 346-348, 56 S.Ct. 466, 482-483, 80 L.Ed. 688 (1936)
(Brandeis, J., concurring).

This principle applies here. The prosecution and Attorney General (appearing as *amicus curiae*) focus on part of the Appellate Division's rationale below that admitting the polygraph results violated A.O.'s constitutional right to counsel. But the Court need not decide that thorny constitutional question because the Court can – and should – affirm the decision below on more narrow, state-law grounds by holding that admitting the polygraph evidence was improper under the Rules of Evidence and this Court's common-law precedent governing the admission of polygraph evidence at trial. The Court's rationale, we respectfully submit, can be fairly straightforward:

1. Our Rules of Evidence don't permit scientific evidence or expert testimony unless it's reliable enough to go before the jury and it concerns a subject beyond the ken of the average juror. N.J.R.E. 702; State v. Torres, 183 N.J. 554, 567-68 (2005). The trial judge is the gatekeeper in this regard. State v. Nesbitt, 185 N.J. 504, 514 (2006).

2. For more than 30 years, polygraph results have been deemed scientifically unreliable. The general rule in this State (and nearly every other) is that lie-detector

results are not admissible at trial. (The State has submitted nothing to dispute the continued validity of this general rule).²

3. There is only one "very narrow" exception to this general rule barring polygraph evidence at trial. In the 1972 decision of State v. McDavitt, the Court refused to overturn the defendant's burglary conviction on the ground that the trial court had admitted polygraph results into evidence where the defendant signed a "clear, unequivocal, and complete stipulation" – obtained mid-trial while the defendant was represented by counsel – to take the test and admit the results. The Court emphasized that the stipulation was provoked by defendant's own improper trial testimony and cross-examination by his counsel, which had wedged the otherwise inadmissible polygraph evidence before the jury in the first place. 62 N.J. 36, 46 (1972).

4. Here, the trial court erred in applying the "very narrow" McDavitt exception rather than the general, presumptive rule barring the evidence. Even if McDavitt

² As the Court noted two years ago in State v. Domicz, 188 N.J. 285, 312 (2006), polygraph examinations have "not achieved significantly greater acceptance in the scientific and legal community" over the past 30 years, with "thirty-one states ban[ning] polygraph evidence altogether" and state and federal courts "continu[ing] to express doubt about whether [polygraph] evidence is reliable." (citing United States v. Scheffer, 523 U.S. 303, 312, 118 S.Ct. 1261, 1266, 140 L.Ed.2d 413, 420 (1998)).

continues to be valid, the circumstances of this case don't fall within the narrow circumstances that sanctioned admission there. In McDavitt, the stipulation was clear, unequivocal and complete in part because it was obtained in the middle of trial while defendant was fully represented by counsel (and under the supervision of the trial judge himself). In this case, conversely, A.O. hadn't even been charged with a crime and he did not have the benefit of counsel (let alone a supervising trial judge). The prosecution in McDavitt resorted to the polygraph evidence *defensively*, moreover, only after the defendant had "opened the door" to the improper evidence in the first place (by telling the jury, over the prosecutor's objections, that he'd offered to take a polygraph test). Here, conversely, the prosecutor sought the evidence before defendant was even charged; *offensively* – to help establish its case against defendant in the first place. These important differences remove this case from the very narrow McDavitt exception and mandated application of the general rule barring polygraph evidence instead, as the Appellate Division properly ruled.

5. Though many courts have read McDavitt broadly during the past 35 years, they have improperly extended McDavitt beyond its "unique" facts. McDavitt's rationale,

read sensibly, is rooted not in wholesale admission of unreliable polygraph evidence anytime a "stipulation" is obtained but, rather, in balancing the fairness of the "unique" trial proceedings of that case – which in essence was an "opening the door" circumstance. Applying the defensive, mid-trial, counseled stipulation approved in McDavitt to sanction the offensive, pre-charge (let alone pre-trial), uncounseled stipulation obtained from A.O. here makes little sense and extends the limited McDavitt holding beyond its proper application.

6. This conclusion is consistent with our general Rules of Evidence too. Sergeant Kaminkas' expert testimony should have been excluded because it failed at least two of the three requirements of N.J.R.E. 702. Even if Kaminkas was sufficiently qualified to discuss the polygraph test and results, telling the jury that defendant failed the test didn't concern a subject beyond the average juror's ken. Lie-detector tests concern only one thing: credibility. Our courts have repeatedly recognized that credibility is a question for the jury that is not a proper subject of expert testimony. State v. Frisby, 174 N.J. 583, 594-95 (2002). This rule has particular force here, where defendant's guilt hinged entirely on resolving the credibility contest between the teenage accuser and

defendant. Telling the jury that defendant was lying was no different than telling the jury that he was guilty of the crimes charged, which is "wholly improper." State v. Odom, 116 N.J. 65, 77 (1989).

7. Admitting the polygraph results against defendant was harmful error because the prosecution's case hinged entirely on credibility (with no physical proofs as noted above). The testimony of Sergeant Kaminskas that defendant had "lied," and the summation of the prosecutor that defendant couldn't "fool" the machine, improperly buttressed C.I.'s otherwise questionable credibility (she'd recanted her allegations only one week after making them). The evidence completely tilted the credibility scales in favor of the State's principal witness and effectively sealed the defendant's fate. A new trial untainted by this unreliable yet powerful evidence is therefore warranted.

Point 3

The conclusion we urge the Court to adopt would clarify that unreliable polygraph evidence is not admissible as evidence of guilt against a criminal defendant, underscoring several important principles of our justice system.

We respectfully urge the Court to overrule McDavitt and confirm that because polygraph results aren't scientifically reliable (even the prosecutor and Attorney

General don't argue that they are), they aren't admissible against a defendant at trial no matter the circumstances – even where they're "stipulated" to.

We understand that McDavitt was an "unusual" case that, to be frank, presented a difficult procedural posture. The Court may have been trying to avoid reversing an otherwise sound conviction based on a trial problem that the defendant had caused in the first place. But, unfortunately, many courts have read McDavitt too broadly, we think, applying the case to sanction the admission of otherwise inadmissible and unreliable evidence under circumstances that bear no resemblance to the 1972 case. Courts have applied McDavitt's "clear, unequivocal and complete" language while tearing it from its "unique" facts. To prevent this from happening in future cases, the Court should declare that the McDavitt exception is no longer valid and that admittedly unreliable polygraph results cannot be used to prove a defendant's guilt at trial under any circumstances.

Even if the Court declines to overrule McDavitt (which the Court could, we acknowledge, since this case is distinguishable from McDavitt's facts), the Court can confirm that McDavitt is limited to its unusual facts and emphasize that polygraph results are at least not

admissible (i.e., that the general rule applies) where the prosecutor obtains a stipulation from an unrepresented suspect before charges have even been lodged and without the benefit of any legal counsel (in this case, a stipulation obtained near midnight after hours of questioning at police headquarters). This rationale is consistent with the Court's pronouncement two years ago in Domicz, 188 N.J. at 312-14 (emphasizing McDavitt's "narrow holding" based on its "unusual facts"), and State v. Baskerville, 73 N.J. 230, 236 (1977), where the stipulation was obtained from a fully-represented defendant.³

Though the Court need not decide the difficult Sixth Amendment question (as we suggest above), the principles behind the right to counsel, and related fundamental rights of our justice system, are still important to deciding this

³ State v. Powell, 98 N.J. 63 (1984), rev'g on dissent, 197 N.J. Super. 191, 194 (App. Div. 1983) did uphold the admissibility of a polygraph stipulation obtained from an unrepresented defendant. But the Court did so in a *per curiam* decision adopting the dissenting opinion below. And the decision does not discuss the absence of counsel issue in any manner. Rather, the Court simply held that where the record demonstrates that the defendant fully understood the stipulation and polygraph admissibility and agreed to it, the polygraph results need not be suppressed because the defendant might not have "believed" the results would actually be admitted against him at trial (as the Appellate Division majority had concluded). Powell simply holds that a defendant's subjective "belief" is not relevant to determining whether there has been a knowing, voluntary, and intelligent waiver. That holding is not inconsistent with the ruling we urge here. And to the extent it is, we respectfully submit that this aspect of Powell be overruled.

case, because these rights illustrate why this case differs so much from the situation in McDavitt and why admitting polygraph results under the circumstances here was improper. We respectfully submit that affirming the decision below, and confirming that the polygraph evidence was not admissible under these circumstances, would promote at least three fundamental principles that courts should strive to uphold, while adopting the State's position would undercut these principles.

First, affirming the decision below promotes at least the purpose behind the right to counsel: to assist a defendant with the legal knowledge needed to defend against the State's charges:

[These] guarantees recognize the obvious but important truth that "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty...." Without the guiding hand of counsel, an innocent defendant may lose his freedom because he does not know how to establish his innocence. Trained counsel is also necessary to vindicate fundamental rights that receive protection from rules of procedure and exclusionary principles. Where the doctrine supporting those rights "has any complexities the untrained defendant is in no position to defend himself...."

[State v. Sugar, 84 N.J. 1, 16 (1980)]

Even if the prosecutor avoided the technical reach of the Sixth Amendment (a difficult question the Court need

not determine here), the practice the State supports stamped over at least the spirit of the right and related rights. The stipulation obtained from A.O. was, in essence, a decision not to object to otherwise inadmissible evidence at any future trial. This is normally a decision made at or near trial itself, by a lawyer (not an unrepresented suspect). Indeed, in McDavitt – on which the State relies – the defendant was fully represented by counsel during the midst of trial; his Sixth Amendment right was fully preserved. Extending McDavitt to sanction the admission here, far from preserving such important rights, would encourage prosecutors to make end runs around them. This shows why polygraph results obtained under the circumstances at issue should not be admissible in our State as matter of even evidence law.

Second, our conclusion discourages prosecutors from pursuing unreliable polygraph evidence as the central focus of criminal charges. McDavitt did not promote any such thing because in that case, the prosecution had already garnered traditional evidence against the defendant, had him indicted, and had proceeded to trial on the breaking and entering charge armed with this evidence (the prosecution resorted to the evidence defensively as noted above). Here, in contrast, the prosecution obtained the

stipulation from A.O. before he was even charged to help establish the charges in the first place. Adopting the State's position would improperly encourage prosecutors to resort to this type of unreliable evidence in lieu of traditional testimony and physical proofs (in effect to cure cases with evidential shortcomings).

Finally, the conclusion we urge promotes jury verdicts based on reliable evidence; the State's position the opposite value. The State defends its position solely on A.O.'s "consent." But as Judge Weissbard noted in concurring below, consenting to admit unreliable evidence does not make the evidence any more reliable. McDavitt is not based on that rationale and should not be applied as if it was.

The State's reliance on consent fails for a more fundamental reason too. If courts were concerned only with the parties and their particular dispute, then perhaps consent would be enough to admit polygraph results or evidence of any kind. As long as the parties agreed to admit the evidence in the contest between them, courts wouldn't care whether the evidence was reliable or not.

But our justice system does not rest on that single premise. Rather, we have an overriding interest in the fairness and integrity of criminal proceedings generally.

Judges must preserve fundamental fairness even where the parties themselves do not recognize it. And verdicts must be tethered to some measure of substantive justice – based on evidence that the parties haven't simply consented to admit but which appears reliable and trustworthy. See, e.g., State v. Michaels, 136 N.J. 299, 316 (1994) (“This Court has a responsibility to ensure that evidence admitted at trial is sufficiently reliable so that it may be of use to the finder of fact who will draw the ultimate conclusions of guilt or innocence. That concern implicates principles of constitutional due process. . . . Competent and reliable evidence remains at the foundation of a fair trial, which seeks ultimately to determine the truth about criminal culpability.”)

These are bedrock principles reflected in numerous evidentiary and procedural rules designed to ensure procedural fairness *and* substantive results in which society can have confidence. Yet the State's central position in this case – that the Court should approve the admission of otherwise inadmissible and unreliable evidence in a criminal case based solely on the consent of an unrepresented suspect to admit it (and uphold a jury verdict based greatly on the evidence) – runs roughshod over all these fundamental principles. These principles,

ultimately, compel rejection of the State's position, affirmance of the ruling below, and a declaration that jury verdicts in our State can no longer stand on scientifically unreliable lie-detector results.

Conclusion

For these reasons, and those expressed in our briefs below, the Court should affirm the ruling of the Appellate Division vacating defendant's convictions and remanding this matter for a new trial.

Respectfully submitted,

By:

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Dated: August 7, 2008