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CHRISTINE G. KELLY
LAKE CO. CLERK OF COURT

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO)

Plaintiff)

vs.)

JOSEPH L. THOMAS)

Defendant)

CASE NO. 11CR000321

JUDGE EUGENE A. LUCCI

ORDER DENYING MOTION
TO ADMIT POLYGRAPH
RESULTS (MOTION NO. 81)

{¶1} The court has considered the defendant’s motion to admit polygraph results at the trial and mitigation phase (Motion No. 81), filed November 29, 2018, and the evidence and arguments presented at the hearing held on December 10, 2018 and December 11, 2018.

{¶2} The court notes that the state dismissed the death penalty specifications on January 17, 2019. Therefore, the court need not address the admissibility of the polygraph results at the mitigation phase of a death penalty trial.

{¶3} The defendant asks the court to admit the results of a polygraph examination administered by Michael LoPresti of the Ohio Bureau of Criminal Identification and Investigation on January 24, 2011 and the results of an EyeDetect examination administered by Mark Handler on May 2, 2018. The court will refer to the traditional polygraph and the EyeDetect examination collectively as “lie detection examinations.”

{¶4} The Ohio Supreme Court held in *State v. Souel*, 53 Ohio St.2d 123, 372 N.E.2d 1318 (1978), that the results of a polygraph examination are admissible in a criminal trial for purposes of corroboration or impeachment provided four conditions are met. The first condition is that the prosecuting attorney, the defendant, and the defendant’s attorney sign a written stipulation providing for the defendant’s submission to the test and for the admission of the results at trial. Secondly, regardless of the stipulation, the admissibility of the test is subject to the discretion of the trial judge, and the trial judge may refuse to allow the results if the judge is not convinced the examiner is qualified, or that the test was conducted under proper conditions. Third, if the examiner’s opinion is offered as evidence, the opposing party shall have the right to cross-examine the examiner regarding his or her qualifications, the conditions under which the test was administered,

the limitations of and possibilities for error of the test, and any other matter the judge deems pertinent. Finally, if polygraph results are admitted, the judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime and that it is for the jury to determine what weight and effect such evidence should be given.

{¶5} Here, the parties have not entered into a written stipulation regarding either lie detection examination, so that the results are not admissible pursuant to *Souel*. The defendant argues that the lie detection examination results should, nonetheless, be admitted. He argues that *Souel* was decided before *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and the adoption of Evid.R. 702 in 1994. The defendant urges the court to follow the trial court's decision in *State v. Sharma*, 143 Ohio Misc.2d 27, 875 N.E.2d 1002, 2007-Ohio-5404. The defendant also cites the court to two cases from the Third Judicial District of Alaska which permitted polygraph evidence after conducting a joint hearing and issuing a joint opinion finding, in pertinent part, that the polygraph evidence met *Daubert* standards. Those cases are *State of Alaska v. Alexander*, Case No. 3AN-09-11088CR, and *State of Alaska v. Griffith*, Case No. 3SP-11-00103CR. In support of his argument that polygraphs meet *Daubert* standards, the defendant presented the testimony of Dr. David C. Raskin and Mark Handler, both of whom testified that polygraphs generally, and EyeDetect specifically, are valid and reliable science. The court notes that both Dr. Raskin and Mr. Handler admitted to having a significant financial interest in EyeDetect and in the admission of EyeDetect test results in court.

{¶6} In *Sharma*, the Summit County Court of Common Pleas held that the defendant's polygraph test results should be admitted despite the lack of a stipulation. The court acknowledged that it was not following established precedent, holding that "based upon the unique circumstances of this case and the great advancements in the technology of polygraph examinations and greater consensus by the scientific community as to its accuracy, this court will admit the polygraph tests and polygraph testimony over the state's objection to its admissibility without prior stipulation." *Id.* at ¶50. The court limited the admission of polygraph test results to situations where the defendant takes the stand and where the polygraph experts are subject to cross-examination. *Id.* at ¶49. The court noted that "the Ohio Supreme Court has not directly readdressed the issue of the reliability

and relevancy of polygraph tests since ... Ohio's adoption of the *Daubert* test regarding the reliability and relevancy of proffered scientific evidence." *Id.* at ¶32. The court further found that significant advancements have occurred regarding the reliability and relevancy of polygraphs since 1991 and found that the polygraph evidence proffered in the case before it met the standards of Evid.R. 702, and that, given the advancements in the technology, the Sixth Amendment and Fourteenth Amendment warranted the admission of such evidence where the court has determined it is reliable under Evid.R. 702 and the polygraphist is subject to cross-examination. *Id.* at ¶43-46.

{¶7} The *Sharma* court cited to no authority for the proposition that the Sixth and Fourteenth Amendments warrant the admission of polygraph evidence. Indeed, the opinion disregards the Ohio Supreme Court opinion in *State v. Levert*, 58 Ohio St.2d 213, 389 N.E.2d 848 (1979) which held that the exclusion of the defendant's polygraph expert's testimony did not violate his Sixth Amendment rights.

{¶8} *Sharma* was not appealed, and, therefore, not reviewed by the Ninth District Court of Appeals. However, in *In re J.F.*, 9th Dist. Summit No. 24490, 2009-Ohio-1867, 2009WL1067048, the defendant sought admission of the results of a polygraph examination in the absence of a stipulation, relying on *Sharma*. The Ninth District affirmed the trial court's decision to exclude the polygraph. "In light of the express holdings of the Ohio Supreme Court, the polygraph was not admissible." *Id.* at ¶10. Thus, *Sharma* is not good law even in its own appellate district.

{¶9} Further, although the case did not involve the admissibility of polygraph evidence at trial, in an opinion decided after *Daubert* and less than six months before *Sharma*, the Ohio Supreme Court stated, "[w]e have not adopted the unrestrained use of polygraph results at trial, and polygraphs themselves remain controversial. Only if there is a stipulation between the parties do we allow the admission of lie detection examination results at trial, and then for corroboration or impeachment only." *In re D.S.*, 111 Ohio St.3d 361, 856 N.E.2d 921, 2006-Ohio-5851, ¶13.

{¶10} "Until the Ohio Supreme Court holds otherwise, we are bound by the precedent established in *Souel* and *Davis*¹." *State v. Irwin*, 2015-Ohio-195, 2015WL302811, ¶34.

¹ *State v. Davis*, 62 Ohio St.3d 326, 581 N.E.2d 1362 (1991).

{¶11} As *Souel* is still the standard for determining the admissibility of polygraphs in Ohio, it is not necessary to consider *Daubert* or address *State of Alaska v. Alexander*, Case No. 3AN-09-11088CR, and *State of Alaska v. Griffith*, Case No. 3SP-11-00103CR. However, the court notes that while the Alaska Court of Appeals affirmed the decision in *Alexander* because the trial court's decision was not an abuse of discretion, the appellate court noted that "our decision only stands for one narrow proposition: that given the evidence presented in this particular case, it was not clearly unreasonable for the judge to conclude that polygraph testing had sufficient scientific validity to satisfy the *Daubert* test." *State v. Alexander*, 364 P.3d 458, 466 (Alaska 2015). Also of interest is that the court did not address the decision in *Griffith* because, despite having previously passed a polygraph examination, while the appeal was pending "Griffith took a State-administered polygraph examination--and he apparently failed the exam," pled guilty, and withdrew his cross-petition. *Id.* at 461.

{¶12} Even if Evid.R. 702 were applicable here, the proffered evidence would not be admissible.

{¶13} Evid.R. 702 permits a witness to testify as an expert if: (1) the witness's testimony either relates to matter beyond the knowledge or experience of lay persons or dispels a common misconception; (2) the witness is qualified as an expert regarding the subject matter of the testimony; (3) the witness's testimony is based on reliable scientific, technical, or other specialized information. If the testimony reports the results of a procedure, test, or experiment, it is reliable only if: (1) the theory upon which the procedure, test or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles; (2) the design of the procedure, test or experiment reliably implements the theory; and (3) the particular procedure, test, or experiment was conducted in a way that will yield an accurate result. Evid.R. 702(C).

{¶14} "[T]o be admissible, the expert testimony must assist the trier of fact in determining a fact issue or understanding the evidence." *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 611, 687 N.E.2d 735, 1998-Ohio-178. The phrase "assist the trier of fact" incorporates two distinct admissibility requirements. 1994 Staff Note, Evid.R. 702. First, expert testimony only assists the trier of fact if it relates to matters beyond the knowledge of the jury. *Id.* Second, the expert's testimony only assists the trier of fact if it meets a threshold standard of reliability. *Id.*

{¶15} Jurors are presumed competent on matters pertaining to the ordinary and common knowledge of mankind. *State v. Buell*, 22 Ohio St.3d 124, 129, 489 N.E.2d 795 (1986). However, because jurors are often deciding matters relating to services, trades, and professions that require training or study that the jurors may not be familiar with, jurors may be aided by experts with knowledge or skills in that particular area. *Id.* Thus, Evid.R. 702 permits an expert to “give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.” *Id.* at 132, quoting Advisory Committee Notes, Fed.R. Evid. 702. The jury determines the correctness of the expert’s opinions by weighing the testimony, assessing credibility, “finding the presence or absence of facts constituting the hypothesis, and by drawing its own inferences and conclusions from the principles explained.” *Id.*, quoting Staff Note, Evid.R. 702.

{¶16} To determine reliability, the court must assess whether the reasoning or methodology underlying the testimony is scientifically valid. *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 611, 687 N.E.2d 735, 1998-Ohio-178. To make this determination, courts look at the factors established in *Daubert*, including whether the theory or technique has been tested, subjected to peer review, has gained general acceptance, and whether there is a known or potential rate of error. *Id.* “Although these factors may aid in determining reliability, the inquiry is flexible.” *Id.*

{¶17} Testimony regarding the results of a polygraph examination does not assist the trier of fact in determining a fact issue or understanding the evidence because it does not relate to matters beyond the knowledge of the jury. The expert’s testimony essentially gives the jury the examiner’s opinion of the examinee’s credibility. “Unlike other expert witnesses who testify about factual matters outside the jurors’ knowledge, ... a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth.” *U.S v. Scheffer*, 523 U.S. 303, 313, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). The credibility of a particular witness is not a matter beyond the knowledge of the jury. Determining the weight and credibility of witness testimony “has long been held to be the ‘part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.’” *Id.*, quoting *Aetna Life Ins. v. Ward*, 140 U.S. 76, 88, 11 S.Ct. 720, 35 L.Ed. 371 (1891).

{¶18} The defendant argues that polygraph evidence is like evidence regarding the reasons a child may delay reporting sexual assault, and other such “soft” science testimony. These situations are not similar. Expert testimony in cases involving “soft” science gives the jury general information, beyond common knowledge, about things such as the effects certain events may have on someone or the psychological reasons a person with a particular background or life experiences may act a particular way. In such cases, the expert explains the issue allegedly relevant to the particular case before them, and the jury decides whether they believe the issue is, in fact, present and how that affects the credibility of witnesses. Lie detection examination evidence does not give the jury information about a science or field beyond common knowledge that the jury can apply to the case before them to determine if the facts of the case before them are consistent with the hypothesis and then draw their own inferences and conclusions from the principles explained to them. Lie detection examination testimony would explain things such as how a polygraph works, how it was administered, the results, and what those results mean. These matters are likely beyond the knowledge of the jury. However, this information is not relevant to explain evidence in the particular trial. It does not give the jury information that helps them analyze a particular piece of evidence. Rather, such testimony opines that a person’s responses to the questions on the lie detection examination are truthful or untruthful. While the jury would be free to believe or disbelieve the examiner’s testimony, such testimony adds nothing the jury’s assessment of the evidence before it. It only tells the jury someone else’s opinion of the truthfulness of a particular person.

{¶19} Testimony regarding the results of a lie detection examination also does not assist the trier of fact in determining a fact issue or understanding the evidence because it is not reliable.

{¶20} “A 2004 position paper by the American Psychological Association stated, ‘Polygraph testing has generated considerable scientific and public controversy. Most psychologists and other scientists agree that there is little basis for the validity of polygraph tests.’” *In re Jordan R.*, 205 Cal.App.4th 111, 129, 140 Cal.Rptr.3d 222 (2012), quoting American Psychological Association, *The Truth About Lie Detectors (aka Polygraph Tests)*, www.apa.org/research/action/polygraph.aspx.

{¶21} Lie detection examinations measure certain physiological changes exhibited by the person taking the test. Traditional polygraphs measure things such as breathing, galvanic skin response, and blood pressure, while the EyeDetect test measures ocular motor changes such as pupil dilation. The court will assume for purposes of this order that polygraphs accurately detect and measure the physiological changes that the particular tests purport to measure. Regardless of the physiological change being observed, the theory behind such tests is that these changes occur in response to the questions asked, and that these responses are more pronounced when a person is lying.

{¶22} Lie detection examinations assume that the particular physiological reaction being measured is caused by lying. Thus, polygraphs “do not directly measure deception, but rather measure indirect observable phenomena thought to *correlate with* deception.” (Emphasis sic.) Leonetti, *Abracadabra, Hocus Pocus, Same Song, Different Chorus: The Newest Iteration of the “Science” of Lie Detection*, 24 Rich. J.L. & Tech. 2, 10 (2017). So that, polygraphs assume that “measured differences in the observed physiological reflex (the target variables) between two behavioral conditions (truth telling and lying) are identical except for the controlled variable (truth versus lie).” *Id.* at 11.

{¶23} A lie detection examination is fundamentally a psychological test which the scientific community evaluates “by the same standards required of all scientific tests, the most important being reliability and validity.” Vigluicci, *Calculating Credibility: State v. Sharma and the Future of Polygraph Admissibility in Ohio and Beyond*, 42 Akron L. Rev. 319, 342 (2009). Validity evaluates the extent to which a test actually measures what it claims to measure. *Id.* “Thus, while a test may be reliable because it produces similar scores when given on different occasions or by different examiners, these scores will not be valid if they are not actually associated with the behavior in question.” *Id.*

{¶24} The problem with lie detection examinations is that the underlying assumption, that lying causes the measured physiological response, i.e., that the physiological change only occurs when the person is lying, has not and cannot be tested. Leonetti at 11-19. “[T]here are no known physiological responses that directly correspond with deception.” Gupta, *A Polygraph Test Wouldn’t Know the Truth if it Hit it with a Brick: Perpetuation of the Normalization of Violence Against Women*, 34 Women’s Rts. L. Rep. 282, 286-287, (2013), citing American Psychological Association, *The Truth About Lie Detectors (aka Polygraph Tests)* <https://www.apa.org/research/action/polygraph>. The physiological

responses believed to correlate with deception may also be the product of various other conditions unrelated to truth or deception. *U.S. v. Pavlenko*, 845 F.Supp.2d 1321, 1326 (2012).

Although psychological states often associated with deception (e.g., fear of being judged deceptive) do tend to affect the physiological responses that the polygraph measures, these same states can arise in the absence of deception. Moreover, many other psychological and physiological factors (e.g., anxiety about being tested) also affect those responses. Such phenomena make polygraph testing intrinsically susceptible to producing erroneous results.... Polygraph research has not developed and tested theories of the underlying factors that produce observed responses. Factors other than truthfulness that affect the physiological responses being measured can vary substantially across settings in which polygraph tests are used. There is little knowledge about how much these factors influence the outcomes of polygraph tests in field settings.... The lack of understanding of the processes that underlie polygraph responses makes it very difficult to generalize from the results obtained in specific research settings or with particular subject populations to other settings or populations, or from laboratory research studies to real-world applications.

United States v. Loaiza-Clavijo, N.D. Georgia No. 1:08-CR-356-18-WSD-ECS, 2012 WL 529981, quoting Committee to Review the Scientific Evidence on Polygraph, *The Polygraph and Lie Detection*, National Academy of Sciences (2003).

{¶25} Indeed, “[i]n 2003, the National Academy of Sciences released its landmark report, ‘The Polygraph and Lie Detection,’ which focused largely on the question of polygraph validity. The report raised serious doubts about both the criterion and construct validity of polygraph testing.” Vigluicci at 344. The report found that “[a]lmost a century of research in scientific psychology and physiology provides little basis for the expectation that a polygraph test could have extremely high accuracy.” *Loaiza-Clavijo*, quoting Committee to Review the Scientific Evidence on Polygraph, *The Polygraph and Lie Detection*, National Academy of Sciences (2003).

{¶26} At best, the research and tests regarding lie detection examinations suggest that there may be a correlation between the measured physiological reactions and deception.

They cannot, however, establish that the observed reactions are caused by deception. There is no way to control for other variables that could also correlate with the polygraph results, such as stress, embarrassment, caution, deliberation, autobiographical memory, and circumspection. Leonetti at ¶¶17-19. Indeed, it may well be that the observed physiological reactions are actually caused by things such as stress, anxiety, and fear, and that those feelings are simply increased for some people when they are lying. Polygraph tests are based on a theory that is not objectively verifiable or validly derived from widely accepted knowledge, facts, or principles and are therefore not admissible under Evid.R. 702.

{¶27} Further, the lie detection examination evidence the defendant seeks to admit is inadmissible hearsay. The defendant proffers his out-of-court statement of innocence contained within the admission of the testing results to prove the truth of the matter asserted. Evid.R. 802, Evid.R. 801. The exceptions in Evid.R. 803 and Evid.R. 804 do not apply here. Defense counsel has represented to the court that if the polygraph evidence is permitted, the defendant will testify at trial. Evid.R. 801(D)(1) provides that a witness's prior statement is not hearsay if the witness testifies at trial and is subject to cross-examination, but only if the prior statement is (1) inconsistent with the witness's testimony, (2) consistent with the witness's testimony and offered to rebut an allegation of recent fabrication or improper influence or motive, or (3) the prior statement is one of identification of a person soon after perceiving the person if the circumstances demonstrate the reliability of that identification. None of these circumstances are present in this case.

{¶28} Additionally, even if the lie detection examination evidence the defendant seeks to admit was not barred by *Souel*, met the Evid.R. 702 standards, and was not inadmissible hearsay, the evidence must be excluded as its probative value is minimal and is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. Evid.R. 403(A).

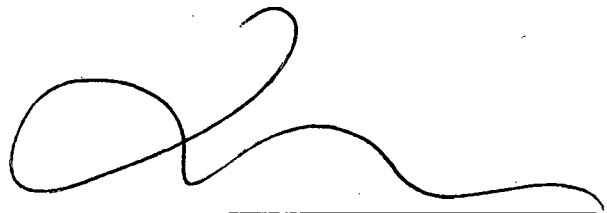
{¶29} The defendant essentially argues that the court should ignore *Souel*. As discussed above, *Souel* provides for limited admissibility of the results of a defendant's polygraph examination. However, the court notes that if it were to disregard *Souel* and determine that polygraphs were reliable and admissible, none of the *Souel* requirements would be applicable. Therefore, polygraphs results of complaining or other witnesses would

presumably also be admissible, and the state could presumably admit polygraph results where the examiner opines that the defendant was deceptive even in the absence of a stipulation. Without the requirement of a stipulation, the opponent of the polygraph evidence would need to investigate those results, including possibly requiring medical, or psychiatric or psychological examinations, to determine whether the examinee has an underlying condition that could affect the results of the lie detection examination. The opponent of the lie detection examination evidence may also be entitled to compel the examinee to submit to subsequent or repeated lie detection examinations by an expert of its own choosing, similar to a Civ.R. 35 examination. Thus, in upholding a per se rule excluding lie detection examinations and finding that the rule did not violate the defendant's right to present a defense, the United States Supreme Court held that "[a] third legitimate interest served by [the per se exclusion] is avoiding litigation over issues other than the guilt or innocence of the accused." *U.S. v. Scheffer*, 523 U.S. 303, 314, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998).

{¶30} For these reasons, the defendant's motion to admit polygraph results at the trial and mitigation phase (Motion No. 81) is not well-taken and is hereby denied.

{¶31} No attorney, party, or witness at the trial herein shall state, make reference to, mention, or intimate that the defendant or any other person offered to take a polygraph or other lie detection examination, or failed or passed any lie detection examination. Counsel shall admonish all of their witnesses, and the court may hold counsel responsible for a violation of this order by a witness.

{¶32} IT IS SO ORDERED.



EUGENE A. LUCCI, JUDGE

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