202 POLYGRAPH EVIDENCE

[INSTRUCTION WITHDRAWN]

COMMENT

Originally published in 1976, Wis JI-Criminal 202 was withdrawn by the Committee in 1981. It was republished without change in 1991. The comment was updated in 1999. This revision updated the comment and was approved by the Committee in October 2008.

Polygraph results are not admissible.

The instruction was withdrawn due to the decision of the Wisconsin Supreme Court in State v. Dean, 103 Wis.2d 228, 307 N.W.2d 628 (1981). In Dean, the court reviewed the admission-by-stipulation rule announced in State v. Stanislawski, 62 Wis.2d 730, 216 N.W.2d 8 (1974), and concluded that the rule should no longer be followed.

> To conclude, we have not undertaken to evaluate the reliability of the polygraph. We recognize today, as we did in Stanislawski, that the science and art of polygraphy have advanced and that the polygraph has a degree of validity and reliability. We are, nevertheless, not persuaded that the reliability of the polygraph is such as to permit unconditional admission of the evidence. Our analysis of and our experience with the Stanislawski rule lead us instead to conclude that the Stanislawski conditions are not operating satisfactorily to enhance the reliability of the polygraph evidence and to protect the integrity of the trial process as they were intended to do.
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> The Stanislawski rule which appeared in 1974 to be a reasonable compromise between unconditional admission of and unconditional rejection of polygraph evidence does not appear at this time to be the satisfactory compromise, and we decline to continue to permit the admission of polygraph evidence pursuant to the rule set forth in Stanislawski.
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> We also reject the alternative of awaiting continued refinement of the Stanislawski rule on a case-by-case method. Adequate standards have not developed in the seven years since Stanislawski to guide the trial courts in exercising their discretion in the admission of polygraph evidence. The lack of such standards heightens our concern that the burden on the trial court to assess the reliability of stipulated polygraph evidence may outweigh any probative value the evidence may have.
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> For the reasons we have set forth, we hold that hereafter it is error for the trial court to admit polygraph evidence unless a Stanislawski stipulation was executed on or before September 1, 1981.

103 Wis.2d 228, 278-279.

In State v. Ramey, 121 Wis.2d 177, 359 N.W.2d 177 (Ct. App. 1984), the court affirmed that Dean established a rule of blanket exclusion of polygraph evidence on public policy grounds, regardless of the possibility that a stronger showing of polygraph accuracy might be made than was made in the Dean case.

In United States v. Scheffer, 118 S. Ct. 1261 (1998), the United States Supreme Court upheld Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court martial proceedings. The defendant's claim that the flat rule of exclusion deprived him of his constitutional right to present a defense was rejected. The court found that the lack of scientific consensus concerning the reliability of polygraphs means that individual jurisdictions "may reasonably reach differing conclusions as to whether polygraph evidence should be admitted" and therefore, Rule 707's rule of per se exclusion "is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence." Wisconsin has, by virtue of the Dean decision, the equivalent of the rule reviewed in Scheffer.

Offers to take a polygraph test may be admissible.

Appellate decisions recognize a distinction between evidence of polygraph test results and evidence of an offer to take or a refusal to take a polygraph test. The cases suggest that evidence of the latter may be admissible as relevant to credibility despite the Dean rule. The distinction was first noted in State v. Hoffman, 106 Wis.2d 185, 316 N.W.2d 143 (Ct. App. 1982), but the court found that even if the distinction existed, the defendant had failed to make a sufficient showing to justify cross-examining a witness about whether he had offered to take a polygraph test. The issue was revisited in State v. Wofford, 202 Wis.2d 523, 551 N.W.2d 46 (Ct. App. 1996), where the court held that allowing a witness to refer to a polygraph test and the test results was error. The court concluded that the testimony was not within the potential exception mentioned in Hoffman.

In State v. Santana-Lopez, 2000 WI App 122, 237 Wis. 2d 332, 613 N.W.2d 918, the defendant told the police that he would take a polygraph and DNA tests. The trial court excluded this evidence. The court of appeals reversed and remanded for the trial court to reconsider the ruling under the following guidelines:

> [A]n offer to take a polygraph test and an offer to undergo a DNA analysis are relevant to the state of mind of the person making the offer B so long as the person making the offer believes that the test or analysis is possible, accurate, and admissible. Simply put, an offer to undergo DNA testing, like an offer to take a polygraph examination, may reflect a consciousness of innocence.
> 2004 WI App 122 ¶4.

In State v. Pfaff, 2004 WI App 31, 269 Wis. 2d 786, 676 N.W.2d 562, the court acknowledged the potential admissibility of an offer to take a polygraph test, but found that the defendant's agreement to submit to a polygraph test at the request of his attorney did not constitute an "offer:"

> ¶30 . . . We hold that when the defense attorney plants the seed for the idea of offering to take a polygraph test, the probative value of such an offer as "consciousness of innocence" is diminished to a level where it no longer assists on the question of guilt or innocence. Instead, it takes the jury into the realm of speculation and likely confusion.

Principles applicable to polygraph testing are equally applicable to voice stress analysis.

> "Principles applicable to polygraph testing are equally applicable to voice stress analysis. See Wis. Stat. § 905.065(1); 7 Daniel D. Blinka, Wisconsin Evidence § 5065.1 (2d ed. 2001) (concluding that there is little reason to treat the forms of honesty testing mentioned in § 905.065 differently, 'at least under the present state of the scientific art). We see no reason at this time to treat these two methods of "honesty testing" differently.'"

State v. Davis, 2008 WI 71, &20.

Voluntary statements that are not "closely associated" with voice stress analysis may be admissible.

"When a statement is so closely associated with the voice stress analysis that the analysis and statement are one event rather than two events, the statement must be suppressed." State v. Davis, 2008 WI 71, ¶2, citing State v. Greer, 2003 WI App 112, ¶¶9-12, 265 Wis.2d 463, 666 N.W.2d 518.

In Davis, the certification from the Court of Appeals and the state urged the court to consider why all statements should not be admissible [if voluntary] regardless of any connection to a voice stress analysis test. Test results, and expert opinion interpreting those results, would be inadmissible. But any statement of the defendant would be admissible subject to regular voluntariness and Miranda analysis. The Davis decision concluded the answer was simple: Rule 905.065 precludes it. The rule was created by Chapter 319, Laws of 1979 [effective date: May 18, 1980] but had not been a major factor in the polygraph decisions that preceded Davis.

905.065 Honesty Testing Devices

This statute creates a privilege for persons subject to an honesty test:

(2) GENERAL RULE OF THE PRIVILEGE. A person has a privilege to refuse to disclose and to prevent another from disclosing any oral or written communications during or any results of an examination using an honesty testing device in which the person was the test subject.

