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Evidence - Polygraph Test Results No Longer Admissible in North Carolina - State v. Grier

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INTRODUCTION

Most American courts hold that the results of a polygraph examination are inadmissible as evidence at trial. The overwhelming reason for this holding is the inherent unreliability of the polygraph as a device for measuring deception. A limited number of jurisdictions recognize an exception to this rule when the parties stipulate in writing that the polygraph results shall be admissible. North Carolina was among the second category until March 8, 1983 when the North Carolina Supreme Court re-examined its position on polygraph results and adopted a total exclusionary rule in *State v. Grier*.

In *Frye v. United States*, the United States Court of Appeals for the District of Columbia held the results of a crude deception test inadmissible. This case laid the groundwork for subsequent decisions holding the results of polygraph examinations inadmissible.

North Carolina first considered the problem of deception tests in *State v. Foye*. In that case, the North Carolina Supreme Court refused to admit the results of a polygraph exam as evidence. *State v. Steele* and *State v. Milano* later modified the rule to allow polygraph results to be admitted as evidence in the discretion of the court, provided there was a written stipulation between the parties, and the parties complied with other formalities.

The North Carolina Supreme Court expressly overruled *Steele* and *Milano* by its decision in *State v. Grier*. The Court

1. 29 AM. JUR. 2d, Evidence § 831 (1967).
2. Id.
3. Id.
5. 293 F. 1013 (D.C. Cir. 1923).
7. 27 N.C. App. 496, 219 S.E.2d 540 (1975).
held that polygraph results are no longer admissible as evidence in civil or criminal trials in North Carolina notwithstanding a prior stipulation by the parties.\textsuperscript{12} This note will examine the Court's rationale and the implications of its decision.

**The Case**

A grand jury indicted Grier for first-degree burglary and first-degree rape. The prosecutrix could not identify defendant from a photographic lineup eight days after the crimes, but she later identified him in a physical lineup and also made a positive identification in court. Defendant and several witnesses testified that he was at home when the alleged crimes took place. Prior to trial, the State and defendant entered into a stipulation that the results of a polygraph examination would be admissible into evidence, but results deemed inconclusive by the examiner would not be admissible. A polygraph examiner administered two examinations to defendant five days apart. The polygraph examiner deemed the results of the first test inconclusive, but he concluded the results of the second test indicated the defendant's answers were deceptive. Defendant moved to exclude the examiner's testimony regarding the conclusive results, because he was not permitted to question the examiner about the inconclusive test.\textsuperscript{13}

The trial court interpreted the stipulation to mean that inconclusive results were not admissible under any circumstances.\textsuperscript{14} Therefore, the trial court refused to allow defendant to question the examiner concerning the inconclusive results and also denied defendant's motion to exclude the conclusive results. Reversing the lower court, the North Carolina Supreme Court held that the stipulation between the parties was intended to cover situations where the only results obtained were inconclusive and was not intended to cover a series of tests where the examiner interpreted the results inconsistently.\textsuperscript{15} The Court also examined, *sua sponte*, North Carolina's prior experience with polygraph test results and held that these results are no longer admissible as evidence in civil or criminal trials, even though the parties stipulate that the results shall be admissible.\textsuperscript{16}

\textsuperscript{12} Id. at 645, 300 S.E.2d at 361.

\textsuperscript{13} Id. at 634, 300 S.E.2d at 354.

\textsuperscript{14} Id. at 634, 300 S.E.2d at 355.

\textsuperscript{15} Id.

\textsuperscript{16} Id. at 645, 300 S.E.2d at 361.
The judicial history of devices for detecting deception begins with Frye v. United States. The modern polygraph machine is actually several machines in one and a far cry from the device which was the subject of Frye. However, both devices are based on the theory that a person's body produces measurable reactions when he is consciously trying to deceive. This theory is part of the reason most courts do not admit the results of polygraph examinations as evidence. These courts and some commentators maintain there is no reason to believe that lying produces physiological changes that distinguish it from reactions to other human experiences. Another reason many courts do not admit the results of polygraph tests as evidence is because the Frye court adopted a general acceptance standard for admissibility. That is, a scientific principle or discovery from which an expert opinion is drawn must gain general acceptance in the particular field involved before the opinion is admitted as evidence. Applying this standard to the results of a systolic blood pressure deception test, the Frye court concluded that this type of deception test had not gained sufficient standing and scientific recognition among physiological authorities to admit expert testimony on its results.

The North Carolina Supreme Court applied the Frye rationale to the modern polygraph in State v. Foye. The Court concluded that the results of lie detector tests were inadmissible as evidence either directly or indirectly. The Court gave several reasons for

17. 293 F. 1013 (D.C. Cir. 1923).
18. S. Abrams, A Polygraph Handbook for Attorneys 54 (1977). The polygraph has receptors that measure respiration (pneumograph), galvanic skin response (galvanometer), blood volume and pulse rate (cardiosphymograph). The instrument in Frye measured systolic blood pressure.
19. Id. at 4.
20. Humans experience similar physiological reactions in other situations, such as when falsely accused of a crime or when questioned about a sensitive topic. Kleinmuntz and Szucko, On the Fallibility of Lie Detection, 17 Law and Society Review 85, 87 (1982).
21. 293 F. at 1014.
22. Id. A jury convicted Frye of second-degree murder, but he was released three years later when additional evidence cleared him. S. Abrams, supra note 18, at 19-20.
24. When the State introduced evidence through the deputy sheriff it accomplished indirectly what would have been highly improper if done directly. This testimony was designed to leave the inference that Frye was telling the truth and,
its decision, among them the fact that the lie detector had not attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception; admission of lie detector test detracts the jury; no expert evidence was introduced in that particular case showing a general scientific recognition of the efficacy of the tests; admission of lie detector tests would permit the defendant to have extra-judicial tests made without the necessity of submitting to similar tests by the prosecution; and the lie detecting machine cannot be cross-examined. Finally, the Court noted the research of Fred E. Inbau, an expert polygraphist, which showed that approximately twenty-five percent of the failures in the use of the machine is the result of mental tension, nervousness, psychological abnormalities, mental abnormalities, and unresponsiveness in lying or guilty subjects.

The results of polygraph tests remained completely inadmissible as evidence in North Carolina until 1975. That year, the North Carolina Court of Appeals ruled in State v. Steele that polygraph results are admissible when the parties have stipulated before trial that test results should be admissible on behalf of either the prosecution or defense. Citing the Arizona case of State v. Valdez, the Court enumerated several requirements which must be met before polygraph results could be admitted as evidence. In effect, inform the jury of the test results. Id. at 709, 120 S.E.2d at 173.

25. Id. at 708, 120 S.E.2d at 171-72.
26. Id. at 708, 120 S.E.2d at 172. See also State v. Brunson, 287 N.C. 436, 215 S.E.2d 94 (1975) which reaffirmed Foye, even though defendant attempted to lay a proper foundation for admission of polygraph evidence through the testimony (out of the presence of the jury) of a polygraph examiner.
27. 27 N.C. App. 496, 219 S.E.2d 540 (1975).
28. Id. at 502, 219 S.E.2d at 544.
30. (1) That 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 the right to cross examine the examiner respecting:
   a. the examiner’s qualifications and training;
   b. the conditions under which the test was administered;
Steele, the Court of Appeals determined that the parties sufficiently complied with the requirements in Valdez to assure the reliability of the test results.\(^{31}\)

The North Carolina Supreme Court subsequently recognized the admissibility of polygraph results pursuant to a written stipulation in State v. Milano.\(^{32}\) In that case, defendant, his attorney and the assistant district attorney entered into a stipulation in which the defendant voluntarily agreed to submit to a polygraph test. If the polygraph examiner deemed the results conclusive, either the state or the defendant could offer the results as evidence at trial.\(^{33}\) At trial, the polygraph examiner testified that defendant's answers to three relevant questions indicated deception.\(^{34}\) The trial court instructed the jury not to consider the test results in determining guilt, but to consider the results along with all other facts and circumstances in determining whether defendant was telling the truth when the test was administered.\(^{35}\) On appeal, defendant argued that the polygraph results should not have been admitted regardless of the stipulation. Citing Steele,\(^{36}\) the Court held that a trial court has the discretion to admit polygraph results into evidence when a defendant voluntarily and knowingly enters into a valid stipulation concerning the admissibility of those re-

c. the limitations of and possibilities for error in the 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 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.

27 N.C. App. at 500, 219 S.E.2d at 543.

31. Id. at 501, 219 S.E.2d at 544. See also State v. Thompson, 37 N.C. App. 651, 247 S.E.2d 235 (1978).


33. Id. at 498, 256 S.E.2d at 162.

34. The polygraph examiner testified that polygraph results are deemed conclusive if rated plus six or above (indicates truthfulness) or minus six or below (indicates deception) and inconclusive if rated between plus six and minus six. Defendant's rating for the three relevant questions was minus twenty-seven; indicating deception. Id. at 493, 256 S.E.2d at 159.

35. Id. at 499-500, 256 S.E.2d at 162.

36. 27 N.C. App. 496, 219 S.E.2d 540 (1975).
In this case, the parties followed all of the safeguards enumerated by the Court of Appeals in Steele, and the Supreme Court ruled that the polygraph results were properly admitted as evidence. The Court, however, refused to admit as evidence the results of a psychological stress evaluator test because there was no written stipulation concerning the admissibility of that test.

In State v. Meadows the Court reaffirmed its position in Milano. The Court held that strict compliance with the provisions of a stipulation governing the admissibility of polygraph evidence was required. In that case, the parties stipulated that defendant would submit to a polygraph exam and the results would be admitted into evidence provided the prosecutrix also submitted to a "similar polygraph examination under the same terms, conditions and stipulations governing the defendant's examination." These results would also be admitted into evidence. The parties also agreed that the polygraphist would have sole discretion in determining the specific polygraph to be used, the wording of relevant questions, exam conditions, and all other aspects of the exam. The defendant encountered the prosecutrix in the polygraphist's office and, according to the polygraphist's testimony, the prosecutrix was so visibly shaken by the meeting that the results of her test were deemed inconclusive. The polygraphist testified that defendant appeared calm and was also tested, but the results of his test indicated deception. Approximately two weeks later, the polygraphist administered another test to the prosecutrix and the results indicated no deception. On appeal, the Court held that the parties did not comply with the stipulation authorizing the polygraph exam because that stipulation required both parties to be given similar tests under the same terms and conditions. Therefore, if one party was given two completed tests which were reliably administered on a reliable machine (i.e., "two chances to 'pass'")

37. 297 N.C. at 499, 256 S.E.2d at 162.
38. The trial court in Milano found the polygraph examiner was an expert in conducting polygraph tests and interpreting test results, the test was administered under proper conditions, and the test results were reliable. Id.
39. Id. at 500, 256 S.E.2d at 162-63.
41. Id. at 686-87, 295 S.E.2d at 396.
42. Id. at 685, 295 S.E.2d at 396.
43. Id. at 686, 295 S.E.2d at 396.
44. Id. at 687, 295 S.E.2d at 397.
45. Id.
the other party must also be given two tests at approximately the same time and place on the same machine by the same operator. The Court also ruled that the first stipulation giving the polygraphist sole discretion in the manner in which the tests were to be conducted did not override the stipulation that the tests be similar and given under the same terms and conditions.48

ANALYSIS

State v. Grier47 appears to mark an abrupt change in North Carolina's law regarding the admissibility of polygraph evidence. The results of polygraph examinations are no longer admissible as evidence in any civil or criminal trial in North Carolina, even though the parties stipulate to its admissibility. However, this rule does not affect the use of the polygraph for investigatory purposes.48 A closer examination of this case reveals that the change might not be as abrupt as it first appears.

The Court's rationale indicates the Court has not changed its opinion about polygraph evidence since the Foye decision twenty-two years ago. Cases admitting evidence on stipulation do not implicitly recognize the reliability of the polygraph technique.49 In short, the Court says it has never retreated from its basic position that polygraph evidence is inherently unreliable.50 At one point in its opinion, the Court notes that there is a significant division of authority over the effectiveness of the polygraph as a device for detecting deception.51 The Court then proceeds through the remainder of the decision assuming that polygraph evidence is unreliable without discussing how it reached that conclusion. Studies conducted during the past twenty years indicate the increasing reliability of the polygraph as a means for detecting deception.52

46. Id. The Court also held that the trial court gave an improper instruction to the jury when jurors were told they could consider the test results along with all the other facts and circumstances in determining the defendant's guilt or innocence. Id. at 689, 295 S.E.2d at 398.
48. Id. at 645, 300 S.E.2d at 361.
49. Id. at 640, 300 S.E.2d at 358.
50. Id. at 642, 300 S.E.2d at 359.
51. Id. at 635, 300 S.E.2d at 355.
52. Frank Horvath and John Reid conducted a study to determine if polygraph examiners are able to successfully diagnose deception solely from an analysis of polygraph records. The study involved both experienced (i.e. engaged in polygraph testing for more than one year) and inexperienced (i.e. engaged in poly-
Other studies purportedly show that the polygraph is highly fallible as a means of detecting deception. With conflicting results on both sides of the reliability issue, it is difficult to determine precisely why the Court concluded polygraph evidence is inherently unreliable.

One clue to this decision is the Court's reference to the role of the examiner as the most important factor in the polygraph process. Unfortunately, many examiners lack the necessary qualifications or are poorly trained as polygraphists. Some states have attempted to eliminate this problem and thereby enhance the reliability of the polygraph by adopting training and licensing requirements for polygraph examiners. North Carolina, however, has no such legislation. In essence, there is no assurance that the reliability of the polygraph process has advanced further today than it had twenty-two years ago. Polygraph equipment is more sophisticated, but this fact does not insure that the results of the test will be interpreted more accurately. A system of uniform licensing and training standards would aid reliability and insure that all polygraph examiners meet a minimum level of proficiency. Therefore, the Court may have decided that as long as polygraph examiners in this state are not governed by uniform licensing and training requirements, polygraph results will always be unreliable and inappropriate for expert testimony. In addition to a general

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graph testing for six months or less) examiners who were asked to analyze the polygraph records from previously solved cases. The group achieved an average 87.75 percent accuracy in solving the cases (i.e. correctly detecting the guilty parties and correctly identifying innocent parties). Experienced examiners achieved a higher degree of accuracy than their more inexperienced counterparts. The authors concluded that the results of this study attest to the polygraph examiner's ability to diagnose truth and deception and the value of practical experience in qualifying examiners as experts. J. Reid and F. Inbau, Truth and Deception, The Polygraph ("Lie Detector") Technique, 395-98 (2d ed. 1977).

53. Kleinmuntz and Szucko, supra note 20, at 95. It is interesting to note that this particular study involved six polygraph trainees (i.e. relatively inexperienced examiners) at the end of their internship. In contrast, the Horvath-Reid study involved both experienced and inexperienced examiners.

54. "All courts and commentators concede that the most important factor to be considered when evaluating the reliability and utility of the polygraph is the role of the examiner." 307 N.C. at 636, 300 S.E.2d at 355.

55. J. Reid and F. Inbau, supra note 52, at 305.


57. It is interesting to note that the polygraph examiner in Grier, W.O. Holmberg, also examined subjects several years earlier in Milano and Steele.
feeling that the polygraph technique is inherently unreliable, the Court concluded that the conditions placed on admissibility pursuant to stipulation are not sufficient to guard against the prejudicial factors inherent in polygraph evidence. Specifically, stipulation does not enhance reliability, but is based on principles of consent and waiver. The Court was not convinced that the discretionary power of the trial judge is a sufficient safeguard to ensure reliability of the polygraph test results in a particular case. The Court was saying too much time would be involved to adequately police the reliability of the stipulated results, and that the administration of justice should not have to bear this burden.

The Court also examined the effects of polygraph evidence on the jury and reached two conclusions. First, if all the possibilities for error in the polygraph technique were explored during the introduction and rebuttal of evidence, the jury's attention could be diverted from the question of the defendant's guilt or innocence to a judgment of the validity and limitations of the polygraph. Second, the jury may be unduly persuaded by the polygraph evidence; jurors may regard the polygraph evidence as infallible based on the expert's testimony. An instruction that polygraph evidence is not intended to prove or disprove any element of the crime may not be a sufficient safeguard, because if the expert's testimony is believed by the jury, a guilty verdict is usually mandated.

The most obvious effect of Grier on existing case law is to no longer allow admission of polygraph evidence by agreement of the parties. In short, the case marks a return to the pre-Steele era. However, the rule does not necessarily eliminate all references to the polygraph during a trial.

For example, the North Carolina Supreme Court has permitted questions by the prosecution concerning a polygraph examination when the defendant himself elicits evidence, while on direct examination, that he agreed to take an examination which was not

58. 307 N.C. at 642, 300 S.E.2d at 359.
59. Id.
60. Id.
61. Possibilities for error cited by the Court include the subject's motivation, the subject's physical and mental condition, the competence and attitude of the examiner, wording of the relevant questions, and interpretation of the test results. 307 N.C. at 643, 300 S.E.2d at 359.
62. 307 N.C. at 643, 300 S.E.2d at 360.
63. Id. at 644, 300 S.E.2d at 360.
the subject of a pretrial stipulation. The reason behind this rule is that the defendant has injected this testimony in a manner designed to mislead the jury, and, if unexplained, it could lead the jury to believe that the police refused to give him a polygraph test, or that the defendant had taken an exam with favorable results which the prosecution suppressed. The defendant, in essence, opens the door with this misleading testimony and the law allows the prosecution to introduce evidence to explain or rebut that testimony, even though the evidence would have been otherwise incompetent. By analogy, a defendant who takes or agrees to take a polygraph examination today is in a similar position to one who took or agreed to take an examination, not subject to stipulation, before the Grier decision. The results of the examinations are inadmissible in either case, but if the defendant himself elicits testimony concerning the examination, he has opened the door and the prosecution should be permitted to question him to avoid misleading the jury. Similarly, if a witness testifies about his own willingness to consent to a polygraph examination, the Court has said no prejudicial error results, especially when the results of the test are not made known to the jury.

However, testimony concerning the defendant’s willingness to submit to a polygraph exam is inadmissible according to both the North Carolina Supreme Court and the North Carolina Court of Appeals. The reason for this rule is that this testimony would

65. Id. at 177, 277 S.E.2d at 441.
66. Id. The trial court sustained defendant’s objection to further questioning by the prosecution concerning the polygraph. Therefore, the Court held there was no prejudice to defendant.

See also State v. Williams, 279 N.C. 515, 184 S.E.2d 282 (1971) where a police officer testified, without objection, that defendant agreed to take a polygraph test. The Court refused to award defendant a new trial because there was no evidence, before the jury, concerning the nature of the test, the questions asked, or the results.
68. 293 N.C. at 459, 238 S.E.2d at 463.
69. State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983). The Court held that a defendant’s willingness to submit to a polygraph test was not evidence of a mitigating circumstance and could not be submitted to the jury during a capital felony sentencing hearing. The Court also noted that its decision in Grier “makes polygraph test results incompetent for all purposes at trial.” Id. at 461, 302 S.E.2d at 749. See also Justice Exum’s dissent, Id. at 469-70, 302 S.E.2d at 753-54.
70. State v. Makerson, 52 N.C. App. 149, 277 S.E.2d 869 (1981); State v. Du-
create an inference that the defendant took and passed a polygraph examination. Since the results of a polygraph test are not admissible, the fact that the defendant was willing to take a polygraph exam is not competent evidence and is properly excluded.

The Grier case does not change the law regarding the introduction of a polygraph induced confession at trial. In State v. Stephens, the Supreme Court held that incriminating statements made by a defendant to police in a polygraph room after a polygraph test are admissible as evidence. Such incriminating statements are admissible if not the result of a polygraph test and are otherwise competent. The Court said the test of admissibility is whether the defendant's statements were made voluntarily and understandably. "If the totality of circumstances indicates that defendant was threatened, tricked or cajoled into a waiver of his rights, his statements are rendered involuntary as a matter of law." Applying this test, the Court determined that Stephens had been tricked into waiving his right to counsel and his privilege against self-incrimination when police failed to inform him that a polygraph test was over and interrogation had begun. Therefore, defendant's incriminating statements made during the interrogation were held inadmissible as evidence. The fact that the statements were made in the polygraph testing room was not relevant to the question of admissibility.

On its face, the Grier decision does not affect the use of the polygraph for investigatory purposes. However, there may be a subtle effect caused by the inadmissibility of polygraph evidence. The polygraph is often helpful in obtaining confessions during investigations. Test results indicating deception are generally fol-


71. 50 N.C. App. at 697, 275 S.E.2d at 853.
72. 52 N.C. App. at 153, 277 S.E.2d at 872.
73. 300 N.C. 321, 266 S.E.2d 588 (1980).
74. Id. at 326, 266 S.E.2d at 591.
75. Id.
76. Id.
77. Id. at 327, 266 S.E.2d at 592.
78. Id.
80. S. Abrams, supra note 18, at 90-91.
lowed by interrogation.81 The examiner shows the subject his reaction on certain control questions and then the examiner shows the subject the same or similar response on questions related to the crime under investigation.82 Thus, the polygraph acts as an effective wedge in obtaining an admission of guilt.83 The Grier rule might make it more difficult for police to obtain confessions from a suspect. While some defendants’ attorneys might argue that this result is desirable because the polygraph examiner is biased in favor of the authorities, it seems that the overall affect could be detrimental. Investigations that could have ended early as a result of a suspect’s confession might be dragged out indefinitely—wasting both time and money. Moreover, if the investigation led to an endless series of dead-ends, the criminal would be released. Although most suspects do not know the rules of evidence, presumably their attorneys do and will inform their clients that the polygraph results cannot be introduced as evidence. If polygraph results cannot be introduced as evidence, a suspect has no incentive to take a polygraph examination.

The Grier decision also forbids introduction of polygraph test results in civil proceedings. This extension of the new rule is consistent with the Court’s overall rationale, given the lack of polygraph legislation in North Carolina. That is, polygraph test results are inherently unreliable and may unduly persuade the jury.

CONCLUSION

State v. Grier84 holds that polygraph results are inadmissible as evidence in both criminal and civil cases in North Carolina. The decision is based on the inherent unreliability of the polygraph, and in this respect, the Court merely falls back on its earlier decision in Foye.85 If the state legislature ever passes a comprehensive training and licensing statute for polygraph examiners, the Court should reexamine its rationale. The ruling does not completely eliminate all references to the polygraph at trial and does not affect the admissibility of polygraph induced confessions. These con-

81. Id.
82. Id.
83. Id.
sessions may be more difficult to obtain, even though the Court sanctions the use of the polygraph for investigatory purposes.

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