

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 97-2139-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JAY B. STEPHANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Door County:
JOHN D. KOEHN, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. The State appeals an order suppressing a statement Jay Stephany gave to the Sturgeon Bay Police Chief Michael Nordin shortly after Nordin concluded evaluating the results of a polygraph test that he had earlier administered to Stephany. In Wisconsin, statements made after a polygraph test are admissible only if made in an interview that is distinctly separate from the

polygraph examination process. The State contends that Nordin's post-polygraph interview of Stephany was sufficiently discrete from the polygraph process to render Stephany's inculpatory statement admissible. We agree with the trial court's conclusion that the interview was part of the polygraph examination process and therefore affirm the suppression order.¹

Only those facts immediately pertinent to the issue in question will be recited. Stephany was a suspect in an alleged sexual assault of a child. He was taken to the police station and interviewed about the allegation. Stephany denied involvement. At the end of the one-half-hour interview, he was arrested and incarcerated. The next day another officer contacted Stephany in jail, indicated that the assault investigation was continuing and inquired whether he would agree to discuss the matter with Nordin. Stephany consented to the meeting, and thereafter Nordin questioned him in an interview room. At some point Nordin asked Stephany if he would be willing to submit to a polygraph examination. Eventually Stephany acquiesced and Nordin, a certified polygraph examiner, took Stephany to a nearby room where the polygraph machine was located and administered the test. Approximately one and one-half hours passed between the

¹ The trial court also suppressed Stephany's statement because it was obtained after he had asserted his right to counsel, in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). *Edwards* requires that all custodial interrogation cease once a suspect unequivocally requests an attorney, unless the accused initiates further communication. *Id.* at 484-85. In the present case, Stephany told Nordin that he did not wish to submit to a polygraph without consulting with an attorney. Nordin acknowledged Stephany's right to speak with an attorney. Stephany then explained, in substance, that he was concerned his emotional state might affect the accuracy of the polygraph test. Nordin advised Stephany that it would not, whereupon he agreed to take the test.

In light of our affirmance on the first issue, it is unnecessary for us to determine whether Stephany's explanation for asserting his right to counsel avoids the cessation rule in *Edwards*. A court will not reach constitutional issues where the resolution of other issues disposes of an appeal. See *Grogan v. PSC*, 109 Wis.2d 75, 77, 325 N.W.2d 82, 83 (Ct. App. 1982).

time Stephany agreed to the test and when the mechanical portion of the polygraph procedure was completed. Stephany was then returned to the interview room while Nordin evaluated the test chart. After approximately fifteen to twenty minutes, Nordin returned to the interview room and informed Stephany “that the test was over and that [Stephany] had difficulty with the questions relating to the sexual assault.”² Stephany did not respond. Nordin told Stephany he was leaving but would return. Nordin left and then came back approximately five minutes later, whereupon he urged Stephany to tell the truth about any involvement he might have had with the victim. Soon thereafter, Stephany admitted that he had touched the victim inappropriately.

The issue before us presents a question of law, as the facts underpinning the case are undisputed. See *State v. Big John*, 146 Wis.2d 741, 748, 432 N.W.2d 576, 579 (1988). As Stephany correctly points out, however, where the trial court’s legal conclusion is substantially intertwined with the factual findings³ supporting that conclusion, the appellate court should give weight to the trial court’s decision. See *Wassenaar v. Panos*, 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983).

While polygraph test results are inadmissible in criminal proceedings,⁴ this rule does not necessarily extend to statements made during interviews distinct in time and content from the polygraph examination procedure. *State v. Schlise*, 86 Wis.2d 26, 42, 271 N.W.2d 619, 626 (1978). If the post-

² This is the only reference Nordin ever made to the polygraph test.

³ Here the court found that Nordin’s statement to Stephany that he had difficulty with the questions relating to the assault constituted a reference to the test and its result.

⁴ *State v. Dean*, 103 Wis.2d 228, 279, 307 N.W.2d 628, 653 (1981).

polygraph interview is so closely related to the mechanical portion of the polygraph examination that it is considered one event, the statements are inadmissible, *id.* at 43-44, 271 N.W.2d at 627, consistent with the general rule that polygraph evidence is inadmissible. *State v. Johnson*, 193 Wis.2d 382, 388 n.3, 535 N.W.2d 441, 443 n.3 (Ct. App. 1995). Whether a statement was made as part of or discrete from the polygraph process is determined upon consideration of the totality of the particular circumstances. *Barrera v. State*, 99 Wis.2d 269, 288-89, 298 N.W.2d 820, 828-29 (1980). Both parties acknowledge the foregoing as the applicable law.

The State argues that the circumstances cumulatively demonstrate that the interview during which Stephany made his incriminating admission was separate from the polygraph examination procedure. The actual mechanical portion of the examination had been completed, Stephany was not attached to the machine and was interviewed in a separate room some fifteen to twenty minutes after the mechanical portion of the test was over. The State argues that Nordin's statement to Stephany that the test was over is a significant factor. It also implies either that the five-minute break between the two post-polygraph interviews is itself sufficient to distance the last interview from the test, or perhaps that Nordin's reference to the test results was not a significant factor in inducing Stephany's admission because of this hiatus.

The State draws a favorable comparison between the foregoing facts and those in *Johnson* and urges that the latter thus serves as guiding precedent. There are factual similarities between the two cases. In both instances the inculpatory statements were made in an adjoining but separate room shortly after the mechanical portion of the procedure was completed and the suspect had been disengaged from the polygraph apparatus. However, the difference the State

concedes between *Johnson* and the present case is Nordin’s reference to the test and the results.⁵ As we did in *Johnson*, we deem this a substantial distinction. In *Johnson* we noted that “the police officer questioning Johnson after the polygraph examination did not refer to polygraph charts or tell Johnson he had failed the polygraph test to elicit inculpatory statements.” *Id.* at 389, 535 N.W.2d at 443. We went on to hold that a statement may be admissible “where there is a distinct break between the two events *and the post-polygraph interview does not specifically relate back to the actual mechanical polygraph test.*”⁶ *Id.* (emphasis added).

We are not persuaded that the other factors upon which the State relies sufficiently overcome the association in content and time which renders the last interview part of the overall polygraph procedure. While the State proposes that Nordin’s statement to Stephany that the polygraph was over could by itself disjoin the test from the subsequent interview, we view the statement as ambiguous and of no legal consequence. We do not know whether Nordin believed that merely the mechanical portion of the test or the entire test process was over. In either event, his subjective opinion is irrelevant to the determination at issue. Whether the polygraph process and the interview were part of the same event as a matter of law is a determination reserved for this court and not the

⁵ Nordin’s reference to Stephany having difficulty with the questions relating to the sexual assault could perhaps be viewed as somewhat ambiguous, but we view it as implying to Stephany that he was lying regarding his involvement in the assault.

⁶ The supreme court in *Barrera v. State*, 99 Wis.2d 269, 286, 298 N.W.2d 820, 828 (1980), also considered this distinction significant:

In this case, contrary to *Schlise*, there was no interpretation and use of concurrent test results as no mechanical test was given to Barrera on the date of the confession, April 4, 1977. Thus, this case lacks the close association between the content of both the mechanical test and the interview in *Schlise*.

polygraph examiner. Similarly, we cannot consider the passage of a mere five minutes sufficient to outweigh the significance of Nordin's reliance on the test results to precipitate a confession. This is especially true when he provided continuity between the two post-polygraph interviews by advising Stephany he was leaving but would return.

In summary, the close association between the content or focus of the polygraph examination and the interview, together with their temporal proximity, compel our conclusion that the two were parts of a single event. We therefore affirm the trial court's order suppressing the use of Stephany's May 13, 1996 statements in the State's case-in-chief.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

