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Case Summaries

CRIMINAL PRACTICE

Police did not coerce defendant's incriminating statements by conducting fake polygraph test in response to defendant's demands for examination (Sims, Acting P.J.)

People v. Mays

C.A. 3rd; May 8, 2009; C057099

The Third Appellate District affirmed a judgment of conviction as modified. The court held in the published portion of its opinion that police did not coerce a defendant's incriminating statements by conducting a fake polygraph test and fabricating documentary graph results after the defendant repeatedly asked for a polygraph examination. The court held further that a trial court properly authorized a conditional examination where a witness's documented acute panic disorder and agoraphobia precluded her testimony in open court before the jury and a public audience.

Darius Mays was questioned by a police detective during an investigation of a killing in which the victim was shot to death in his car after an apparent confrontation with two men in a parking lot in the early morning hours. Mays denied any involvement in the crime, denied being present at the shooting, and denied being the person depicted in a nearby convenience store's security photo taken near the time of the crime.

Mays repeatedly asked the detective for a lie detector test, but no polygraph examiner was available. The detective's supervisor authorized a mock polygraph test, however, in which body patches were wired to Mays, and an officer pretended to administer a lie detector test. After the test, the officer fabricated written results, which were shown to Mays, and told him the results showed he failed the test. The detective then suggested that perhaps Mays failed because he was present during the crime and felt guilty.

At that point, Mays admitted he was present at the shooting and that he was a person in the photograph, but he denied advance knowledge of the shooting and maintained that he did not participate.

Mays was charged with first degree murder. At trial, his videotaped police interview was played for the jury.

The prosecution obtained permission, over Mays's objection, to conduct a conditional examination of Tamara Schallenberg. Schallenberg had phobias that precluded her testimony in open court, as she was prone to panic attacks and passing out. Schallenberg's physician reported that she was not faking her condition.

The conditional examination took place in the courtroom, in the presence of the judge, court staff, counsel for both sides, and Mays. The jury and the public were excluded. Schallenberg testified that Mays was like a son to her, and that the day after the shooting he told her he was with his brother when his brother had shot someone. She denied identifying Mays to a police officer or making certain other statements about him, but

those aspects of her testimony were contradicted by the investigating detective's audiotape of his prior interview of Schallenberg.

The court found that Schallenberg's infirmity made her unavailable to testify in open court. The videotaped conditional examination was played for the jury in open court.

The jury ultimately found Mays guilty of first degree murder with the special circumstance of lying-in-wait, and with a firearm enhancement.

The court of appeal affirmed, holding that Mays demonstrated no reversible error arising from the mock polygraph or the conditional examination of Schallenberg.

Mays argued on appeal that his incriminating statements to police were coerced by the police pretending to conduct a polygraph test and fabricating fake documentary graph results.

It is well established, the court noted, that a confession is involuntary if it results from coercive police activity, the issue being whether the defendant's will was overborne. Thus police deception during an interrogation does not necessarily invalidate incriminating statements. A psychological ploy is prohibited only when, in light of all the circumstances, it is so coercive that it tends to result in a statement that is both involuntary and unreliable.

Here, the deception was a mock polygraph. The use of a mock polygraph, the court of appeal concluded, was not likely to produce a **false confession**. Mays may have believed that polygraphs were perfectly accurate, as he testified, but that was not a belief induced by the police.

Further, the trickery was not particularly coercive because, even after he saw the fake test

results, Mays continued to deny involvement in the crime. Instead, he simply admitted being present at the scene wearing particular clothes. Other evidence gave that admission weight, namely the surveillance photo and other witness testimony identifying the shooter as a male dressed as Mays admitted he was. Therefore, the court said, Mays's ability to admit being present, while steadfastly denying participation, demonstrated that his will was not overcome by the police ruse.

The court emphasized that the police made no representations about the scientific accuracy of polygraphs, and that the officer posing as the examiner merely said the graph 'showed deception.'

The court rejected the notion that the fake polygraph evidence was coercive per se. The evidence was simply graph paper with squiggly lines, together with handwritten notations such as 'intend to lie.' Such materials would be useless as evidence without testimony from a certified polygraph examiner, so that there was no risk its presence in the record could be mistaken for a true polygraph test.

Mays also challenged the conditional examination of Schallenberg. The court rejected his initial argument, which was hinged on the premise that conditional examinations could not be conducted in death penalty cases. Mays was not at risk of the death penalty because that penalty is prohibited as to persons under age 18 at the time of the crime charged, and Mays was 17 when the shooting occurred. The court further found no reason why a conditional examination should be barred where the individual defendant is not subject to the death penalty.

Nor did the trial court err in permitting the conditional examination in light of Schallenberg's condition. To excuse a witness from live testimony, the witness's infirmity must be sufficiently problematic that it makes live testimony at trial 'relatively impossible,' not merely inconvenient. 'Relatively impossible' includes the relative impossibility of eliciting testimony without risk of inflicting substantial trauma on the witness.

Here, Schallenberg's infirmity was testified to by a doctor who had actually treated Schallenberg, and the trial court had the opportunity to view her and observe her demeanor. According to the record, she suffered shaking and apparent distress when she entered the courtroom, although she later became more calm during her testimony. The court deferred to the trial court's observations and conclusion that a conditional examination was appropriate. No reversible error occurred regarding the examination.

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