

by Michelle Lore Associate Editor - May 22, 2009 10:10 AM CDT

Photo: Bill Klotz

The Minnesota Supreme Court articulated a per se rule

that the results of polygraph tests, as well as evidence that a defendant took or refused to take such a test, are not admissible in either criminal or civil trials,

in State v. Opsahl, 513 N.W.2d 249 (Minn. 1994).

When should you advise your client in a criminal matter to take a police-administered polygraph test?

Never, say knowledgeable criminal defense lawyers.

Lie detector results are not admissible in criminal trials under Minnesota caselaw finding that their reliability has not been established.

However, suspects may say potentially incriminating things during a police-administered test and those statements may come back to haunt them.

A case in point is State v. Dressel, a Court of Appeals decision issued last week.

The court reversed a Scott County judge's decision to suppress statements a defendant made shortly after taking a polygraph examination.

Although the results of a polygraph are not admissible in a Minnesota courtroom,

statements made in connection with the test can be allowed into evidence, so long as the evidence is introduced without any express references to the test, the court said in Dressel.

"Anything you say to officers or the polygraph examiner can and will be used against you," said Minneapolis criminal defense attorney Faison Sessoms. "All they have to do is excise any reference to how that statement was obtained."

Post-polygraph activity

The Dressel case involved a man who had brought his daughter to the emergency room due to an injury to her vagina.

At the hospital, the defendant denied any knowledge of how his daughter's injury had occurred and agreed to take a lie detector test.

During the examination a few days later, the defendant denied doing anything to injure his daughter.

Afterwards, he met with two law enforcement officers who told him that he had failed the examination in a "pretty significant" way.

The defendant again denied hurting the girl but then provided information indicating that he did cause her injuries.

The post-polygraph interview lasted 1 ½ hours.

The defendant was charged with four felonies including criminal sexual assault and malicious punishment of a child.

Before trial, however, the judge ruled the defendant's post-polygraph statements were inadmissible because they could not be separated from identifiable references to the polygraph examination.

(The transcript had a number of such references.)

The state appealed the ruling.

Truly concerned

The Court of Appeals made it clear that statements are not automatically inadmissible just because they are obtained in connection with a polygraph examination.

Instead, the question is whether the statements are voluntarily given.

The court determined that if the state wishes to offer oral testimony concerning a defendant's polygraph-related statements, its witnesses may not refer to the examination.

Similarly, if the state wants to offer documentary evidence concerning a defendant's polygraph-related statements, such as a transcript of a post-polygraph interview, its exhibits should be prepared so that they do not refer to the polygraph exam.

For example, the state should redact any part of the transcript mentioning the test.

"Assuming that a district court observes these safeguards,

statements given in connection with a polygraph examination may be introduced without implicating any of the concerns arising from express references to polygraph examinations,” wrote Judge Matthew Johnson.

The court remanded the matter for consideration of whether the defendant’s statements were voluntary or obtained in violation of his Miranda rights.

Minneapolis criminal defense attorney Daniel Gerdts, who represents the defendant in the case, said that while the court tried to gather precedent on this issue and put it in one comprehensive opinion, it missed some important cases. He told Minnesota Lawyer that there is also conflict among jurisdictions as to what is and is not admissible in this situation.

“Unfortunately, there’s still some ambiguity out there . . . on what precisely you can use when [the polygraph exam] is done by the police in this context,” he said.

(A decision on whether to seek Supreme Court review had not been made at press time.)

Assistant Scott County attorney Todd Zettler, who handled the case for the state, said that the decision tracks perfectly with Minnesota and U.S. Supreme Court caselaw and changes nothing.

It doesn’t mean that police have any wider latitude than before in conducting polygraphs, he said.

“Nothing more can come in than previously could come in and nothing is going to be kept out that has previously been ruled could come in.”

Nonetheless, Burnsville criminal defense attorney Richard Ohlenberg, chair of the Minnesota State Bar Association’s Criminal Law Section, is concerned that the decision allows polygraph examiners to continue to “question and badger an examinee” even after he has completed the test in an attempt to obtain a confession.

“Using the machine in this manner will discourage innocent people from submitting to polygraph examinations,” he said. “The machine’s supposed infallibility is being used to extract a confession.”

Gerdts is concerned about police playing “dirty tricks” as well, pointing out that while the defendant in Dressel voluntarily took the polygraph exam, the police went into a long interrogation afterwards that the defendant had not volunteered for.

Danger ahead

In addition to the potential use of post-polygraph statements, defense attorneys see several other dangers in taking a police-administered polygraph.

For example, if an innocent suspect fails the test, the police will be convinced they have the right person to the exclusion of everybody else, Sessoms said.

“Even though the test result is not admissible, it just hardens their opinion that he’s the perpetrator if he fails it,” he said.

Minneapolis criminal defense attorney Joseph Tamburino said it’s also possible that
.....an examinee could make an honest mistake during the polygraph
examination.

“Even an innocent person could give statements to police that aren’t accurate,” he said.
“It’s not that they intentionally lied or tried to deceive anyone, but we are not computers.”

Some attorneys don’t like polygraphs simply because they don’t trust the results.

“I think what the polygraph measures is just nervousness and anxiety levels, not guilt or innocence,” said Ohlenberg. “It’s just not reliable.”

Tamburino is convinced that the reliability of the test may depend at least in part on the
examiner.

Some examiners say everyone passes, while others say everyone fails, he said. Some examiners also say that anxiety and nerves shouldn’t affect the outcome, while others say it can lead to an inconclusive result.

“When someone is really nervous, a good examiner will say the results are inconclusive,” he said. “I’m no scientist, but I think a lot depends upon the examiner.”

Private polygraphs

While defense attorneys on the whole are skeptical of polygraphs, they stopped short of saying
they are never appropriate.

In fact, some say there are occasions when submitting to a polygraph examination outside the
presence of the police is potentially helpful to a defendant’s case.

While even the successful results of a polygraph don’t have any evidentiary value in the
courtroom, they can aid in getting a case resolved, according to Gerdt.

If a respected, licensed and approved polygraph examiner concludes that a client is being
truthful about a specific allegation, it can carry a lot of weight with a prosecutor or a police officer who believes in the test, he explained.

“That could be what’s necessary to give them the basis, the security of mind, to either offer something reasonable or to dismiss outright,” said Gerdts. “It can be useful in that context.”

Sessoms agreed, noting that in a few cases where clients were under investigation but charges had not yet been filed, he advised them to submit to a private polygraph test.

If the client passed, he submitted the results to law enforcement.

“I’ve found that it’s been effective in dissuading the police from actually proceeding with a case, particularly where it was a ‘he said-she said’ thing,” he said.

<http://www.minnlawyer.com/article.cfm/2009/05/25/Polygraphs-Nothing-but-the-truth>

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