

## Comments

# ADMISSIBILITY OF THE RESULTS OF A LIE-DETECTOR TEST

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The Arizona Supreme Court, in *State v. Valdez*,<sup>1</sup> was confronted for the first time with the problem of whether or not the results of a lie-detector test were admissible in evidence. The defendant in that case, accused of being in possession of narcotics, agreed by written stipulation of his counsel and the prosecution to submit to a polygraph test, the results of which were to be admissible in evidence at trial. A polygraph operator was accordingly allowed to testify at trial over defendant's objection, and gave evidence unfavorable to the defendant. The defendant was convicted and, on a certified question, the Arizona Supreme Court held that lie-detector evidence had developed to a point where its results were probative enough to warrant admissibility on stipulation, at the discretion of the trial judge.

The lie detector is a scientific instrument which records certain physiological phenomena, such as changes in the pulse rate, blood pressure, respiration, and electrodermal response. The test is offered in evidence under the theory that a person telling a lie undergoes definite ascertainable physiological reactions, whereas a person telling the truth will show only normal reactions.<sup>2</sup> The procedure consists of attaching instruments to the subject's body and interrogating the person, commencing with innocuous questions so as to establish the person's normal reactions and then proceeding to question the subject as to a crime of which he is suspected or other matters upon which the interrogator seeks information.<sup>3</sup>

At the outset we face the question, as in other scientific testimony in court, of the extent to which the device, technique or theory must be shown to have won scientific acceptance before results or

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<sup>1</sup> 91 Ariz. 274, 371 P.2d 894 (1962).

<sup>2</sup> Inbau, *The Lie Detector*, 26 B.U.L. REV. 264 (1946).

<sup>3</sup> For a more detailed statement as to the way the lie detector functions, see Cureton, *A Consensus as to the Validity of Polygraph Procedures*, 22 TENN. L. REV. 728 (1953).

conclusions based thereon can be used in evidence.<sup>4</sup> In 1923, a federal court,<sup>5</sup> the first court to rule on the admissibility of the results of a "lie-detector" examination, announced the test as being whether the supporting theory had gained general acceptance among "physiological and psychological authorities." Such results were held not to be admissible in *Frye v. United States*,<sup>6</sup> wherein the court said:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.<sup>7</sup>

Since the *Frye* case, results of lie-detector tests have generally been excluded from evidence for lack of reliability. Although years have since passed and the systolic test has been replaced with the more reliable polygraph test, the courts still doubt the efficacy of the lie detector and claim that it has not gained sufficient scientific recognition to warrant acceptance as competent legal evidence.<sup>8</sup>

Several attempts have been made to convince the courts of the lie detector's reliability. The Supreme Court of Wisconsin, in the 1933 case of *State v. Bohner*,<sup>9</sup> rejected evidence of a polygraph test

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<sup>4</sup>The science of determining the truth or falsity of disputed allegations of fact made rapid strides during the first half of the Twentieth Century. Among the scientific factfinding techniques developed during this era are methods for the identification of firearms by means of the principles of ballistics, the identification of persons by fingerprints, the determination of contested paternity of illegitimate children by bloodgroup tests, and the determination of alcoholic intoxication by "drunkometers." Results obtained through such media are now judicially recognized as being based on scientific principles capable of producing precise and accurate results.

The legal profession should take cognizance of the scientific progress in the field of deception detection. If and when convincing evidence is produced that reasonably reliable scientific methods of exposing falsehoods either in or out of the courtroom are available, these methods should be promptly utilized by the legal profession. See McCormick, *Deception-Tests and the Law of Evidence*, 15 CALIF. L. REV. 484 (1927); Wicher, *The Polygraphic Truth Test and the Law of Evidence*, 22 TENN. L. REV. 711 (1953).

<sup>5</sup>*Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923).

<sup>6</sup>*Ibid.*

<sup>7</sup>*Id.* at 1014; quoted in *State v. Valdez*, 91 Ariz. 274, 277, 371 P.2d 894, 896 (1962).

<sup>8</sup>For a more complete report on these cases, see Annot., 23 A.L.R.2d 1292 (1952).

<sup>9</sup>210 Wis. 651, 246 N.W. 314 (1933).

introduced by defendant, and said that the developments in the lie detector during the 10 years that had elapsed since the *Frye* decision were insufficient to remove it from the experimental to the demonstrable stage. The New York Court of Appeals ruled similarly in *People v. Forte*.<sup>10</sup> The defendant there attempted to lay a sufficient foundation by introducing evidence that the examiner was highly skilled in conducting polygraph tests, that he had for several years been devoting his time exclusively to the development of a lie detector, and that he had made 6,000 tests with 100 per cent accuracy. Nevertheless the court concluded that the lie detector did not possess such general scientific recognition as to justify the admission of expert testimony deduced from such a test.

In excluding the evidence, some courts have reasoned that its admission would impair the vital function of cross-examination.<sup>11</sup> Another reason given is that the lie detector does not work on some people who have physiological or psychological abnormalities.<sup>12</sup> A few courts have feared that lie-detector evidence, with its many ramifications and variables, imposes too subtle a task of evaluation upon an untrained jury.<sup>13</sup> Some have held that the expert's testimony violates the rule against hearsay evidence,<sup>14</sup> while others have been concerned with the great weight such tests would necessarily carry in the minds of the jury.<sup>15</sup> Finally, the criminal appellate court of Texas<sup>16</sup> found the results of such tests inadmissible because the court had not yet authorized the admission of such evidence on behalf of the state, and until this was done it would not be admitted on behalf of the defendant.

In answer to some of the above objections to the admissibility of the results of the lie-detector tests it should be pointed out that such admission would not impair the right of cross-examination.<sup>17</sup>

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<sup>10</sup> 167 Misc. 868, 4 N.Y.S.2d 913 (Kings County Ct.), *aff'd*, 279 N.Y. 204, 18 N.E.2d 31 (1938).

<sup>11</sup> *United States v. Stromberg*, 179 F. Supp. 278 (S.D.N.Y. 1959); *State v. Lowry*, 163 Kan. 622, 185 P.2d 147 (1947); *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949); *Henderson v. State*, 94 Okla. Crim. 45, 230 P.2d 495 (Crim. App. 1951).

<sup>12</sup> *People v. Davis*, 343 Mich. 348, 72 N.W.2d 269 (1955); *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949). See also INBAU, *LIE DETECTION AND CRIMINAL INTERROGATION* 30 (2d ed. 1948).

<sup>13</sup> *Boeche v. State*, *supra* note 12.

<sup>14</sup> *United States v. Stromberg*, 179 F. Supp. 278 (S.D.N.Y. 1959).

<sup>15</sup> *Commonwealth v. McKinley*, 181 Pa. Super. 610, 123 A.2d 735 (1956).

<sup>16</sup> *Stockwell v. State*, 164 Tex. Crim. 656, 301 S.W.2d 669 (Crim. App. 1957); *Peterson v. State*, 157 Tex. Crim. 355, 247 S.W.2d 110 (Crim. App. 1951).

<sup>17</sup> *Belli & Streeter, The "Fourth Degree": The Lie Detector*, 5 VAND. L. REV. 549 (1953).

The machine records physiological changes and does so correctly. In this respect it is exactly like other machines whose results are admitted in evidence, for example, cameras, x-ray machines, sphygmomanometers and electrocardiographs. The lie detector does not impair the right of cross-examination any more than do these other instruments. The results of the lie-detector test are of no value to the judge or jury until interpreted by the expert. In the same way, the x-rays, electrocardiogram or symptoms of disease are of no value until interpreted by the radiologist, cardiologist or physician. It is at this point that the opposing party is entitled to cross-examination. He may cross-examine the expert on his diagnosis and the reasons therefor. The weight to be given to the examiner's diagnosis is for the jury to determine. They may accept it, disregard it, or give it merely partial consideration. It is just another type of expert testimony to aid the jury in making its determination of the facts, but in no way does the polygraph invade the province of the jury. In order to make the jury aware of exactly how they are to deal with the testimony of an expert who has administered the lie-detector examination, the court must instruct the jury on its exact function.<sup>18</sup>

Since the results of a lie-detector test have been held inadmissible as evidence at a trial of a criminal case,<sup>19</sup> whether offered by the prosecution or the defense, it follows that evidence of a suspect's willingness or refusal to submit to such a test also is inadmissible.<sup>20</sup> The theory is that this testimony, in effect, reveals the probable results of the polygraph test, and a jury might take the defendant's willingness or unwillingness into account in determining innocence or guilt.

The decisions are uniform in holding that the admission of the test results or of the fact that such a test has been taken constitutes

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<sup>18</sup> *Ibid.*

<sup>19</sup> In what appears to be the only decision in which the question of the admissibility of a lie-detector test arose in a civil action, the court in *Stone v. Earp*, 331 Mich. 606, 50 N.W.2d 172 (1951), ruled such evidence inadmissible by reason of the fact that the tests were still in the experimental stage and that neither the consent of the parties to the tests nor the trial court's direction that the parties submit to the tests served to render the evidence competent.

<sup>20</sup> *People v. Carter*, 48 Cal. 2d 737, 312 P.2d 665 (1957); *People v. Parrella*, 158 Cal. App. 2d 140, 322 P.2d 83 (Dist. Ct. App. 1958); *Leeks v. State*, 95 Okla. Crim. 326, 245 P.2d 764 (Crim. App. 1952); *Commonwealth v. Saunders*, 386 Pa. 149, 125 A.2d 442 (1956).

error.<sup>21</sup> There is conflict, however, as to the manner in which the courts view this error. Some courts treat it as reversible error.<sup>22</sup> Some say the admission is error which is overcome by an admonition to the jury.<sup>23</sup> In others, the result has depended upon the effectiveness of the trial court's instruction to disregard such evidence.<sup>24</sup>

A few courts have recognized a notable exception to the general exclusionary rule. This exception arises when the parties have stipulated before the trial that test results should be admissible on behalf of either the prosecution or defense. In 1948 the California court in *People v. Houser*<sup>25</sup> held that where the defendant in a prosecution for a sex crime stipulated in writing that the entire results of the lie-detector tests could be received in evidence on behalf of either the prosecution or the defense, and that the operator of the lie detector was an expert operator and interpreter of results of such tests, the defendant could not object to the admission of such evidence on the ground that the operator of the lie detector was not an expert. In 1960 the Iowa Supreme Court, in *State v. McNamara*,<sup>26</sup> held that the results of the lie-detector examination were admissible by reason of the stipulation to that effect signed by both parties.

The Arizona Supreme Court, in *State v. Valdez*,<sup>27</sup> in following the precedent set forth in the *Houser* and *McNamara* decisions, held that, subject to the qualifications announced therein, polygraph results and expert testimony relating thereto are admissible upon stipulation in criminal cases. It was further stated that in such cases the lie-detector evidence is admissible to corroborate other evidence of a defendant's participation in the crime charged, and if he takes the stand such evidence is admissible to corroborate or impeach his own testimony.

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<sup>21</sup> In the only reported decision in which the results of a lie detector test were ruled admissible, absent stipulation, the court in *People v. Kenny*, 167 Misc. 51, 3 N.Y.S.2d 348 (Queens County Ct. 1938), held that a defendant should be permitted to introduce evidence as to the findings made as a result of a lie-detector test where the person who conducted the test testified that the instrument was thoroughly reliable and had been used with a great degree of accuracy in more than 6,000 individual tests. This decision should be considered, however, in the light of that in *People v. Forte*, 279 N.Y. 204, 18 N.E.2d 31, *affirming* 167 Misc. 868, 4 N.Y.S.2d 913 (Kings County Ct. 1938), wherein the court declared that it would not give judicial recognition to the contention that a lie detector was an effective method of determining truth.

<sup>22</sup> *People v. Aragon*, 154 Cal. App. 2d 646, 316 P.2d 370 (Dist. Ct. App. 1958).

<sup>23</sup> *People v. Schiers*, 160 Cal. App. 2d 364, 324 P.2d 981 (Dist. Ct. App. 1958); *Lusby v. State*, 217 Md. 191, 141 A.2d 893 (1958).

<sup>24</sup> *Marable v. State*, 203 Tenn. 440, 313 S.W.2d 451 (1958).

<sup>25</sup> 85 Cal. App. 2d 686, 193 P.2d 937 (1948).

<sup>26</sup> 252 Iowa 19, 104 N.W.2d 568 (1960).

<sup>27</sup> 91 Ariz. 274, 371 P.2d 894 (1962).

Other courts have refused to admit such results even though the parties thereto had stipulated prior to the test that the results thereof would be admissible. In *Stone v. Earp*,<sup>28</sup> the Michigan Supreme Court ruled such evidence inadmissible by reason of the fact that the tests were still in the experimental stage and that neither the consent of the parties to the tests nor the trial court's direction that the parties submit to the tests served to render the evidence competent. In 1961, the New Mexico Supreme Court reversed defendant's conviction for incest on the ground that the "signing of a waiver did not alter the rule with regard to the admissibility of . . . (lie detector) evidence."<sup>29</sup>

The Arizona Supreme Court cautiously provided numerous built-in safeguards in the qualifications announced for the admissibility of this type of evidence. Since it appears that these qualifications must be fully met before the results will be admitted in Arizona, the practicing attorney in this state should have knowledge of these requirements, which are as follows:

(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;
- c. the limitations of and possibilities for error in the technique or 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.<sup>30</sup>

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<sup>28</sup> 331 Mich. 606, 50 N.W.2d 172 (1951).

<sup>29</sup> *State v. Trimble*, 68 N.M. 406, 408, 362 P.2d 788, 789 (1961).

<sup>30</sup> *State v. Valdez*, 91 Ariz. 274, 283, 371 P.2d 894, 900 (1962).

Although the courts are not ready to accept polygraph evidence without stipulation, it seems reasonable that most jurisdictions will follow the exception which was established in the *Houser* case and followed in the *McNamara* and *Valdez* cases, and admit such testimony if the parties concerned have agreed upon a polygraph examiner and have agreed that the results should be fully admissible at the trial. The stipulation should be in writing and shown to be the free and voluntary act of the accused. If this is done, presumably there is no question as to the examiner's integrity or qualifications and the defendant should not be allowed to controvert such fact.

Whether the lie detector evidence should be admissible in all cases or only upon stipulation of the parties is open to question. From a theoretical point of view, once the validity of such tests is accepted, they should be required and admitted in all cases. This would expedite the detection of deception and eliminate much of the guesswork in the factfinding process. At this juncture, to suggest that lie detectors be employed in all civil cases would be to suggest that we revolutionize the entire trial procedure. It might be wiser, therefore, to take the small step first and to allow the tests only when both parties agree.<sup>31</sup>

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<sup>31</sup> Belli & Streeter, *supra* note 17.