The Supreme Court of Ohio

CASE ANNOUNCEMENTS

July 31, 2024

[Cite as *07/31/2024 Case Announcements #2*, 2024-Ohio-2885.]

APPEALS NOT ACCEPTED FOR REVIEW

2024-0403. State v. Nitso.
Trumbull App. No. 2023-T-0025, 2024-Ohio-790.
Donnelly, J., dissents, with an opinion joined by Brunner, J.
Brunner, J., dissents, with an opinion joined by Donnelly, J.

DONNELLY, J., joined by BRUNNER, J., dissenting.

{¶ 1} I join in full Justice Brunner's dissenting opinion explaining why this court should accept jurisdiction over this case. I write separately to emphasize one point. I cannot believe that in this day and age, juries and courts are being asked to consider polygraph evidence.

{¶ 2} Nearly 40 years ago, Congress enacted a statute prohibiting private employers from using polygraph tests for preemployment screening of prospective employees or during the course of an employee's employment. *See* 29 U.S.C. 2002. Twenty years ago, the American Psychological Association published a backgrounder, in which it counseled "the most practical advice is to remain skeptical about any conclusion wrung from a polygraph." American Psychological Association, *The Truth About Lie Detectors (aka Polygraph Tests)* (Aug. 5, 2004), https://www.apa.org/topics/cognitive-neuroscience/polygraph (accessed on July 24, 2024) [https://perma.cc/S6KG-Y8NK]. And nearly 30 years ago, the United States Supreme Court rejected a constitutional challenge to a rule of evidence that barred the admission of polygraph evidence in military trials because "there is simply no consensus that polygraph evidence is reliable." *United States v. Scheffer*, 523 U.S. 303, 309 (1998). The problems surrounding polygraph evidence are not new. Yet, it remains part of the criminal-justice process. What the

United States Code prohibits in deciding whether to hire someone for a job, courts permit in trials in which a criminal defendant's ultimate liberty interests are at stake.

{¶ 3} Given these considerations, it is all the more important that this court provide guidance to the bench and bar about the use of polygraph evidence and how juries are to consider that evidence. And as Justice Brunner cogently explains, this case gives us that opportunity. Because a majority of this court has decided not to seize that opportunity, I respectfully dissent from the denial of jurisdiction in this case.

BRUNNER, J., joined by DONNELLY, J., dissenting.

{¶ 4} I respectfully dissent from the denial of jurisdiction in this case.

{¶ 5} Over 45 years ago, we held that the results of a polygraph examination are admissible in evidence in a criminal trial, but only for the specific purposes of "corroboration or impeachment" and only if certain requirements are met. *See State v. Souel*, 53 Ohio St.2d 123 (1978), syllabus. One of those requirements is at the center of this case:

> If [polygraph] evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given.

Id.

{¶ 6} The trial court here failed to so instruct the jury when it admitted stipulated polygraph evidence showing that defendant-appellant, Kenneth Nitso, engaged in deception when asked about his conduct in this case. *See* 2024-Ohio-790, ¶ 20, 26 (11th Dist.). Without the necessary *Souel* instruction, the jury convicted Nitso of ten crimes and acquitted him of four. Because Nitso's counsel not only stipulated to the evidence but also failed to object to the trial court's omission of the instruction, the Eleventh District Court of Appeals reviewed the issue for plain error. 2024-Ohio-790 at ¶ 14. Under the plain-error doctrine, Nitso was required to "demonstrate a reasonable probability that the error resulted in prejudice" (emphasis deleted), *State v. Rogers*, 2015-Ohio-2459, ¶ 22. The appellate court agreed that the trial court erred by failing to provide the *Souel* instruction, 2024-Ohio-790 at ¶ 20, but ultimately held that the error

did not result in prejudice, because "there was substantial other evidence of [Nitso's] guilt" and "nothing in the record indicates, nor has [Nitso] demonstrated, that had the jury instruction been given on the weight of the polygraph examination that the outcome would have been any different," *id.* at ¶ 26.

{¶ 7} Nitso asks that we consider whether a trial court's failure to provide the *Souel* instruction amounts to plain error. There are several reasons why I believe our review of this case is important.

{¶ 8} First, federal and state courts—including this court—have long expressed skepticism of polygraph evidence. *See, e.g.*, *In re D.S.*, 2006-Ohio-5851, ¶ 13 ("We have not adopted the unrestrained use of polygraph results at trial, and polygraphs themselves remain controversial."); *Wolfel v. Holbrook*, 823 F.2d 970, 974 (6th Cir. 1987) (noting the "general skepticism that pervades the scientific community concerning the reliability of polygraph examination"). As the United States Supreme Court has acknowledged, "doubts and uncertainties plague even the best polygraph exams." *United States v. Scheffer*, 523 U.S. 303, 312 (1998). Such examinations may not be reliable. *See id.* ("Whatever their approach, state and federal courts continue to express doubt about whether such evidence is reliable."). They may also cause unfair prejudice. *See, e.g.*, *State v. Porter*, 241 Conn. 57, 93 (1997) ("After reviewing the case law and the current, extensive literature on the polygraph test, . . . we are convinced that the prejudicial impact of polygraph evidence greatly exceeds its probative value.").

{¶ 9} Second, the *Souel* instruction and the plain-error doctrine are both focused on the same concern: prejudice. Specifically, we included the jury-instruction requirement in *Souel* for the precise reason that the instruction would protect against the potential of a jury's giving undue weight to the polygraph evidence, which would affect the outcome of trial. *See Souel*, 53 Ohio St.2d at 133 ("[T]he delivery of a limiting instruction by the trial court will help to prevent encroachment upon the jury function by undue reliance on this expert testimony."). The trial court's error here deprived Nitso of this protection against prejudice and created a heightened risk that the polygraph evidence would be given undue weight by the jury and affect the outcome of his trial, which is directly relevant to the prejudice prong of the plain-error standard.

{¶ 10} Additionally, the trial court compounded its error when it provided the jury with a general instruction on expert evidence. According to the appellate court, the trial court instructed the jury as follows:

> Now, generally, a witness may not express an opinion. However, one who follows a profession or special line of work may express his or her opinion because of his or her education, knowledge and experience. Such testimony is admitted for whatever assistance it may provide to help you arrive at a just verdict.
>
> However, as with other witnesses, upon you alone rests the duty of deciding what weight to give—should be given to the testimony of the experts. In determining its weight, you will make—you will take into consideration their skill, experience, knowledge, veracity, familiarity with the facts of this case, and the usual rules for testing credibility and determining the weight to be given to the testimony.

2024-Ohio-790 at ¶ 20 (11th Dist.). This general instruction told the jury that it could use the polygraph evidence "for whatever assistance it [could] provide to help [it] arrive at a just verdict." When this general instruction is juxtaposed with our clear holding in *Souel*, the polygraph evidence—which can be admitted only "for purposes of corroboration or impeachment," *Souel* at syllabus—takes on greater weight or importance than it legally should be accorded. As one of the judges on the appellate panel pointed out, the trial court's general instruction "expressly made the purposes for which the evidence could be considered unlimited" and "affirmatively condoned the jury's use of the evidence to prove an element of the crime charged." (Emphasis deleted.) 2024-Ohio-790 at ¶ 45 (Eklund, J., concurring). The concurring appellate judge then questioned how such an error may be reviewed for plain error:

> Without the instruction, how can a reviewing court, with any assurance, accurately judge whether or not a jury was unduly influenced? Especially when they essentially were instructed to do with the evidence whatever they wanted to. Law and judgment ought not to be left to unknowable chances and probabilities.

Id. at ¶ 47 (Eklund, J., concurring).

{¶ 11} Finally, the application of the plain-error standard to a failure to provide the *Souel* instruction appears to be creating a divide among the appellate districts in this state. At least two districts have reached conclusions similar to the appellate court here. *See State v. Rutherford*, 2002 WL 398704, *2 (2d Dist. Mar. 15, 2002); *State v. Vielma*, 2012-Ohio-875, ¶ 40 (3d Dist.). The Tenth District, by contrast, has concluded that the "failure to give the [*Souel* instruction] constitutes plain error." *State v. Lascola*, 61 Ohio App.3d 228, 238 (10th Dist. 1988).

{¶ 12} We should accept jurisdiction of this case to clarify the law in this area and to provide appellate courts with an important north star about the nature and potential impact of polygraph evidence and its effects on a jury in the context of plain error. Because the majority does not, I respectfully dissent.