

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ERICK FISHER, JR.,

Defendant-Appellant.

UNPUBLISHED

July 31, 2001

No. 217558

Ingham Circuit Court

LC No. 97-072938-FC

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of both first-degree premeditated murder, MCL 750.316(1)(a), and felony-murder, MCL 750.316(1)(b), arising out of the death of one victim.¹ Defendant was sentenced to life imprisonment for each conviction and appeals as of right. We affirm, but remand for correction of the judgment of sentence.

The victim, Debbie Blood, was eighteen years old, and suffered from bipolar affective disorder, for which she was taking mood-stabilizing medication. She also consumed alcohol and smoked marijuana. She was also the beneficiary of a trust fund, a fact that was known to her “friends.” In the past, the victim’s “friends,” including codefendant Paul Tomlinson, had taken money from the victim to purchase drugs for her, but never gave her the drugs or returned the money. On October 7, 1997, the victim went to a therapy session and returned home. Her brother saw her walking away from the home with two people. On October 19, 1997, the victim’s body was discovered in a gravel pit area. The police investigated defendant and Tomlinson as a result of statements the men made to friends. However, defendant and Tomlinson gave various statements regarding their respective roles in the killing. Initially, Tomlinson led police to believe that his participation was limited to assisting in the disposal of the victim’s body. Based on those representations, an agreement was negotiated that would allow Tomlinson to plead guilty to the charge of accessory after the fact, if Tomlinson passed a lie detector test. In the pre-polygraph interview session, Tomlinson’s veracity was called into

¹ While the jury verdict form provides that defendant was found guilty of both first-degree premeditated murder and first-degree felony murder, the judgment of sentence provides that defendant was convicted of “murder-short” and second-degree murder.

question. Consequently, Tomlinson asked to speak to his attorney, and the polygraph test was not administered on that date. However, the plea agreement contained an alternate provision. Specifically, the agreement provided that if there was any indication that Tomlinson intended harm to the victim or had struck the victim, Tomlinson could plead guilty to second-degree murder with a sentence cap of twenty-five years.

On December 6, 1997, a polygraph examination was given to Tomlinson. Tomlinson denied being the first man to strike the victim with a pipe. Tomlinson denied knowing that the victim would be killed when he parked his car near the gravel pit. Lastly, Tomlinson denied telling any deliberate lies regarding the events that occurred at the gravel pit. The polygraph examiner concluded that Tomlinson was not being truthful regarding “this issue.” After the polygraph examination, Tomlinson was allowed to plead guilty to second-degree murder. At defendant’s trial, defense counsel objected to allowing Tomlinson to testify against defendant. Defense counsel argued that prosecutorial misconduct would result from placing Tomlinson on the witness stand based on the failed polygraph examination. The trial court denied the motion to exclude Tomlinson’s testimony. The trial court stated that serious questions about the reliability of polygraph results continued to exist, the motion essentially would require the trial court to judge the credibility of the witness based on the technical polygraph process, and the mere fact that Tomlinson had given inconsistent statements did not result in the conclusion that perjured testimony would be given at trial. Accordingly, the trial court held that Tomlinson would be allowed to testify at trial. Defendant was convicted of the murder of the victim.

Defendant first argues that the trial court abused its discretion by admitting Tomlinson’s testimony at trial. We disagree. The decision to admit evidence rests within the trial court’s discretion, and we will reverse such decisions only where there is an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Polygraph results are not admissible at trial because the degree of scientific acceptance does not allow for admission and the trier of fact may give disproportionate weight to the results. *People v Ray*, 431 Mich 260, 265; 430 NW2d 626 (1988). In *People v Barbara*, 400 Mich 352, 412; 255 NW2d 171 (1977), our Supreme Court held that a trial court could consider the results of a polygraph examination in a *post* conviction motion for a new trial based on newly discovered evidence. However, in order to consider the results, certain conditions had to be satisfied. *Id.* Specifically, the polygraph test was taken voluntarily, the qualifications of the examiner were approved, the equipment and procedures were approved, an independent polygraph examination could be given, the tests results would be considered only with regard to the general credibility of the examinee, not as to the truth or falsehood of any particular statement, the testimony of the examiner would be maintained in a separate record, and the trial judge granting a new trial on the basis of a polygraph examination would not act as the trier of fact in the case, but could preside with a jury. *Id.* at 412-413.

Assuming without deciding that polygraph results may be considered in a pre-trial motion to exclude witness testimony, defendant failed to meet the conditions set forth in *Barbara*. There is no evidence in the record to establish the qualifications of the polygraph examiner, the quality of the equipment used, or the procedures employed.² Accordingly, the trial court did not abuse

² Although an evidentiary hearing was held on a separate motion to suppress defendant’s
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its discretion by denying the motion to suppress Tomlinson's testimony. *Lukity, supra*. Furthermore, statements made before, during, or after the administration of a polygraph examination are not excludable per se as evidence at trial. *Ray, supra* at 268. The fact that polygraph tests have not been deemed to be sufficiently reliable to allow admission of the results does not support a logical inference that statements made during or following the test are unreliable. *Id.* at 266.

Defendant next argues that the trial court's sentence violated the prohibition against double jeopardy. The prosecutor agrees. Defendant correctly notes that pursuant to *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998), when a defendant is convicted of both premeditated murder and felony-murder from the death of a single victim, the remedy is to modify the judgment of sentence to specify one sentence for first-degree murder supported by two theories. Accordingly, we remand to the trial court for correction of the judgment of sentence.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Harold Hood
/s/ William C. Whitbeck
/s/ Patrick M. Meter

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statements, defense counsel opted not to have testimony regarding the polygraph process, but instead relied on the polygraph results only.