STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 11, 2007
v	No. 277693 Wayne Circuit Court
WILLIAM EARL BINGLEY, Defendant-Appellee.	LC No. 06-003518

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Defendant is charged with six counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a). He requested that he be given a polygraph examination pursuant to MCL 776.21(5). During the polygraph examination, the examiner informed defendant that he had "failed" the examination. Immediately after defendant was informed that he had "failed" the examination, the examiner asked defendant whether he acted out of curiosity or bad judgment. Defendant replied, "It could have been." Defendant moved to suppress that statement, and the trial court granted the motion. The prosecution, having persuaded this Court to grant leave to appeal,[1] seeks reversal of the trial court's suppression order. For the reasons set forth in this opinion, we reverse the suppression order and remand this matter to the trial court for further proceedings consistent with this opinion.

This case arises out of allegations that defendant used his finger and other objects to penetrate the vagina of his girlfriend's six-year-old daughter. After he was bound over for trial and provided with counsel, defendant requested and was granted a polygraph examination pursuant to MCL 776.21(5).[2] Just prior to the examination, defendant met with defense counsel for about ten minutes and was informed that he would be asked a series of questions, four of which pertained to the charges against him.

[1] *People v Bingley*, unpublished order of the Court of Appeals, entered June 19, 2007 (Docket No. 277693).

[2] MCL 776.21(5) provides that a defendant charged with CSC I shall be given a polygraph examination upon his request.

Before the polygraph examination began, the examiner read a "POLYGRAPH WAIVER" form to defendant providing *Miranda*[3] warnings and indicating that defendant could refuse or halt the examination at any time and refuse to answer any question asked of him.[4] The polygraph waiver form was an extensive statement of defendant's rights, containing twenty-three statements. Before the number assigned to each statement and/or waiver, defendant's initials appear. He also signed and dated the bottom of the polygraph waiver form. Review of the recording made of the polygraph examination reveals that defendant clearly indicated that he understood and could read everything on the form. Under the heading "ACKNOWLEDGEMENT" defendant read and initialed the following statement:

> 3. I understand that the polygraph test and the questioning, before and after, cannot be conducted with a lawyer actually present in the examination room, and I am willing to waive his/her presence. However, I fully understand that I have the right to talk with and have the assistance of a lawyer at any time during the polygraph test or questioning and that I may stop the test or questioning at any time and exercise that right.

During a thorough discussion of the polygraph waiver form, defendant inquired of the examiner whether his attorney could be present during the polygraph examination. The examiner informed defendant that while his attorney could not be present during the examination, pursuant to the terms of the polygraph waiver, he could request his attorney at any time. Defendant clearly indicated that he understood that his attorney would not be present during the polygraph examination and clearly waived his right to have his attorney present both orally and in writing by initialing and signing the polygraph waiver form. Although defense counsel requested admission to the examination, he was not permitted to attend.[5]

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[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] The recording of the examination shows defendant initialing the polygraph waiver form prior to any discussions of the form with the examiner.

[5] Defendant asserts that his counsel had been told that he could be present during the polygraph examination. The trial court was troubled by the fact that defense counsel had been "misinformed" regarding whether he could attend the polygraph examination. However, even assuming that defense counsel had been erroneously informed that he could attend the polygraph examination and then was barred from doing so, this fact does not bear on defendant's right to counsel in this case because irrespective of what defense counsel believed or was told regarding his ability to attend the polygraph examination, defendant had waived his right to the presence of counsel at the polygraph examination. There is no indication from the record that defense counsel's belief that he could be present during the polygraph examination was communicated to defendant or otherwise prompted defendant's decision to waive his right to counsel during the polygraph examination; therefore, defense counsel's mistaken belief did not impact the validity of defendant's waiver of his right to counsel during the polygraph examination. Moreover, because the polygraph waiver form specifically states that a condition of taking a polygraph examination is that defense counsel cannot be present during such an examination, and defendant signed this form, we are not persuaded that defense counsel's mistaken belief regarding whether he would be permitted to be present during the polygraph affected the validity of defendant's

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Following discussion of the polygraph waiver form, defendant and the examiner engaged in a pre-examination interview. During this time, the examiner asked defendant several background questions, including questions about defendant's health, his marital status and a vast array of background information. During this questioning, defendant informed the examiner that he suffered from a variety of physical and psychological ailments, including bi-polar disorder. Defendant further informed the examiner that he had a guardian appointed for him to conduct his affairs. Review of the recording made of the interview reveals that defendant voluntarily and knowingly answered all of the examiner's questions regarding his background.

After the polygraph examiner concluded the pre-examination, defendant was given a polygraph examination. During the examination, defendant was asked whether his finger had touched the victim's vagina, whether he had touched the victim's vagina with an object, whether he had any sexual contact with the victim, and whether he had lied about having sexual contact with the victim. Defendant denied doing any of these things. Upon finishing the polygraph examination, the examiner told defendant that he had failed and asked if he acted out of curiosity or bad judgment. Defendant replied, "It could have been."

Defendant subsequently moved to suppress his statement made after the polygraph examination. In granting defendant's motion, the trial court ruled that defendant did not freely, knowingly, and voluntarily waive his Sixth Amendment right to counsel because he was "misinformed" that defense counsel could not be present at the examination. The court stated in its opinion that it was "disturbed" that defendant was asked inappropriate questions before the examination commenced and "concerned" that defendant had disclosed his bi-polar disorder to the examiner.

On appeal, the prosecution argues that the trial court erred in granting defendant's suppression motion because defendant validly waived his Sixth Amendment right to counsel. We review a trial court's factual findings on a motion to suppress evidence for clear error, but review a trial court's conclusions of law and ultimate decision on a motion to suppress evidence de novo. *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999); *People v Garvin*, 235 Mich App 90, 96-97; 597 NW2d 194 (1999). "The Sixth Amendment safeguards the right to counsel at all critical stages of the criminal process for an accused who faces incarceration."[6] *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004). After the accused asserts his Sixth Amendment right to counsel, interrogation must cease unless the accused initiates further communication with police. *People v McRae*, 469 Mich 704, 715-716; 678 NW2d 425 (2004). However, a defendant may waive his right to counsel if the waiver is made voluntarily, knowingly, and intelligently. *Williams*, *supra* at 641. Whether a defendant voluntarily, knowingly, and intelligently waives his Sixth Amendment right to counsel "depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *People v McElhaney*, 215 Mich App 269, 274, 277; 545 NW2d 18

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waiver of his Sixth Amendment right to counsel during the polygraph examination.

[6] "The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004), citing *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

(1996). *Miranda* warnings may be sufficient to ensure that a waiver is voluntary, knowing, and intelligent. *Id*. at 277.

In *McElhaney*, the defendant requested a polygraph examination after he was arrested and counsel had been appointed. *Id*. at 272-273. Although the defendant's attorney was not allowed to attend the examination, the defendant was permitted to stop the examination at any time, was advised of his *Miranda* warnings, and executed a written waiver of his right to counsel. *Id*. Following the examination, the polygraph examiner informed the defendant that he had failed and asked the defendant what really happened. *Id*. The defendant provided incriminating statements and was subsequently convicted. *Id*. In affirming the defendant's convictions on appeal, this Court reasoned that the incriminating statements were properly admitted because the role of a defendant's attorney is limited during police interrogations and because the defendant was provided with *Miranda* warnings. *Id*. at 274-276. This Court elaborated that the defendant's waiver was effective given his prior criminal history and experience with the criminal justice system, his awareness of the gravity of his situation, and his opportunity to confer with counsel before the examination. *Id*. at 275.

The facts of the instant case are almost identical to the facts in *McElhaney*. Like *McElhaney*, it was defendant who requested a polygraph examination after he was arrested and provided counsel. Like *McElhaney*, prior to the polygraph examination, defendant was advised of his *Miranda* rights and executed a written waiver of his rights before the test was administered and was informed that counsel's presence was not allowed at the examination. Further, similar to *McElhaney*, defendant was familiar with the criminal justice system[7] and also had the opportunity to confer with counsel before the examination was administered. Lastly, similar to *McElhaney*, defendant was aware that he was facing life sentences for the charges against him.

In light of the similarity between the facts of this case and the facts in *McElhaney*, the trial court erred in concluding that defendant was "misinformed" when he was told that his attorney could not attend the polygraph examination. Further, although the trial court ruled that defendant's waiver was invalid because he claimed to be bi-polar and suffered from shortness of breath during the polygraph examination, defendant failed to explain how this condition precluded him from understanding his rights and providing a valid waiver of his Sixth Amendment rights. Finally, we note that despite the trial court's finding that the examiner engaged in improper dialogue with defendant before the examination, the waiver form defendant executed expressly provided that the polygraph examination consisted of "a testing phase and questioning, before and after [the examination]" and indicated that defendant could stop the proceeding at any time. Thus, the trial court clearly erred in granting defendant's suppression motion.

In claiming the trial court's order was proper, defendant cites *People v Leonard*, 421 Mich 207; 364 NW2d 625 (1984), *People v Harrington*, 258 Mich App 703; 672 NW2d 344 (2003), and *People v Potruff*, 116 Mich App 367; 323 NW2d 402 (1982). In each of these cases,

[7] Defendant admitted during the pre-examination that his license had previously been revoked for drunk driving and that he had been arrested four times for drunk driving.

the defendants' statements following their polygraph examinations were found to be inadmissible. *Leonard*, *supra* at 209; *Harrington*, *supra* at 606; *Potruff*, *supra* at 373. However, each is distinguishable from the instant case. In *Leonard*, the Supreme Court based its ruling on an agreement between the prosecutor and the defendant that "the results of the polygraph examination and opinions drawn therefrom would not be admissible in evidence" rather than a Sixth Amendment violation. *Leonard*, *supra* at 210.[8] In both *Harrington* and *Potruff*, this Court found the defendants' statements inadmissible because, unlike the instant case, the police rather than the defendants initiated the interrogation. *Harrington*, *supra* at 704-707; *Potruff*, *supra* at 371-373. Consequently, defendant's argument fails.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T.Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering

[8] In citing *Leonard*, defendant relies on the concurring opinion. However, that opinion has no precedential value.