



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-72,328-03

EX PARTE CLIFTON DEWAYNE HARVIN, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 95-08-0076M-CR-B IN THE 97TH DISTRICT COURT
FROM MONTAGUE COUNTY**

ALCALA, J., filed a concurring opinion.

CONCURRING OPINION

Although this case presents a close call for me, I respectfully concur in this Court's majority opinion that denies relief to Clifton Dewayne Harvin, applicant, who seeks post-conviction habeas relief from his conviction for aggravated sexual assault. Applicant, who had a prior felony conviction, received an extremely favorable plea bargain of deferred adjudication for aggravated sexual assault. The primary evidence on which he relies in this habeas application is the recent recantation of the complainant, but he entered into the agreed plea bargain even after he knew about her former recantation. The existence of the current

recantation, therefore, fails to show that applicant would not have likely pleaded to the offense had he known of the complainant's recantation at that time. Applicant's claim of actual innocence similarly fails because the habeas court's determination that the complainant's more recent recantation was not credible is supported by the record. Applicant also complains of the representation he received by his attorneys, but he has failed to show how he was prejudiced by that representation, which resulted in the very favorable plea bargain in this case for deferred adjudication. Furthermore, applicant relies on the favorable polygraph results as other evidence to show his innocence, but even if that evidence is considered probative, the weight of that evidence is less persuasive in light of his earlier conduct during polygraph testing that appeared to be inconsistent with his innocence, and in light of the absence of any expert testimony to discuss the implications of the polygraph testing as it relates to his credibility as a whole.

With specific regard to the polygraph evidence in this case, I note that the majority opinion appears to conclude that applicant's favorable polygraph results were inadmissible and should be disregarded in their entirety. Although I agree with the general proposition under this Court's established precedent that polygraph results are not admissible standing alone, as they were offered here, I disagree that polygraph-testing results may never be considered in any form in a post-conviction habeas proceeding because, in my view, that evidence might appropriately be introduced to the limited extent that it is part of the underlying foundation for an expert's opinion, and to the limited degree that it might assist

the habeas court in assessing the credibility and weight of an expert's testimony in a given case. Because it is my view that polygraph evidence might be admissible for such limited purposes in a post-conviction proceeding, I make several observations related to that point.

As used in sexual-assault cases, the criminal-justice system has a love-hate relationship with polygraph evidence. On the one hand, community supervision for sexual-assault cases generally includes a condition that a defendant take and pass polygraph examinations that inquire about his sexual history, the offense for which he was placed on community supervision, and his compliance with community-supervision conditions. The Texas Administrative Code provides for the use of polygraph tests in the assessment and treatment standards for adult sex offenders. 22 TEX. ADMIN. CODE § 810.64(c)(18) ("polygraph examinations shall be used as a part of a comprehensive treatment program"). The criminal-justice system, therefore, apparently considers polygraph testing sufficiently reliable for the purposes of treating sex offenders.

On the other hand, this Court has held that polygraph results are inadmissible in trial-court proceedings under the Texas Rules of Evidence. Quoting *Leonard v. State*, this Court's majority opinion states, "For more than sixty years, we have not once wavered from the proposition that the results of polygraph examinations are inadmissible over proper objection because the tests are unreliable." *Leonard v. State*, 385 S.W.3d 570, 577 (Tex. Crim. App. 2012). In *Leonard*, this Court held that a defendant's community supervision may not be revoked based solely on the results of polygraph examinations. *Id.* at 583. In discussing

whether the results of polygraph testing conducted pursuant to a condition of community supervision could be admitted through an expert's opinion, the *Leonard* Court's holding disallowed that evidence when "the sole basis of [the expert's] opinion was the results of a test that we have held inadmissible *because it is not reliable.*" *Id.* at 582. This Court's discussion explained that, given that the failed polygraphs were the "sole basis" for the expert's opinion, this "[t]otal reliance on inadmissible and untrustworthy facts cannot be reasonable." *Id.* (citations and quotations omitted). Similarly, the Code of Criminal Procedure prohibits a trial court from revoking a defendant's community supervision based solely on the uncorroborated results of a polygraph examination. TEX. CODE CRIM. PROC. art. 42.12, §§ 5(b), 21(c) (disallowing an adjudication of guilt or revocation of community supervision if "the only evidence supporting the alleged violation of a condition of community supervision is the uncorroborated results of a polygraph examination").

In view of these statutes and this Court's *Leonard* decision, it is clear that polygraph evidence standing alone is inadmissible under the rules of evidence, but it is also clear that polygraph evidence is considered reliable in the treatment of sex offenders. Even though it is inadmissible on its own, in my view, given its apparent reliability as a tool for sex-offender treatment, such evidence might be properly considered as part of an expert's more global opinion in a particular case in the post-conviction habeas context before a judge, particularly with respect to testimony regarding characteristics of sex offenders, so long as it is not the sole basis for the expert's opinion. *See Leonard*, 385 S.W.3d at 577.

In this case, applicant introduced the results of three polygraph examinations for the purpose of showing that he was innocent of the offense for which he was convicted. As *Leonard* pointed out, that evidence is unreliable for that purpose because polygraph evidence may not be admitted as standalone evidence on a disputed matter, nor may it serve as the sole basis for an expert's opinion on a disputed matter. *Id.* at 581-83. Furthermore, in this case, as this Court's majority opinion observes, applicant's conduct during polygraph testing that occurred at a different time than the three tests that he has supplied suggested that he was willing only to selectively answer certain questions and may have admitted to inappropriate conduct with an underage child. Given that evidence, his favorable polygraph results would appear to be even less reliable.

With these comments, I concur in the judgment of the Court.

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