

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 13, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2558-CR

Cir. Ct. No. 2014CF162

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ADAM W. VICE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Washburn County:
JOHN P. ANDERSON, Judge. *Reversed and cause remanded for further proceedings.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. The State appeals an order granting Adam Vice's motion to suppress his confession to sexually assaulting a four-year-old girl. To the extent the circuit court concluded suppression was automatically required

because detectives mentioned a failed polygraph examination when questioning Vice, that conclusion was erroneous and requires reversal. Alternatively, to the extent the court determined Vice's confession was involuntary under the totality of the circumstances, the court did not make sufficient factual findings to allow us to review that conclusion. We therefore reverse the order granting Vice's suppression motion and remand this matter to the circuit court for additional fact-finding regarding the voluntariness of Vice's confession.

BACKGROUND

¶2 A criminal complaint charged Vice with one count of first-degree sexual assault of a child (sexual contact with a child under the age of thirteen). *See* WIS. STAT. § 948.02(1)(e).¹ The complaint alleged Vice licked the four-year-old victim's genitalia and buttocks and inserted his finger into her anus and vagina. The assault was alleged to have occurred in October 2014, at the Rice Lake home where Vice lived with the victim's mother and others.

¶3 On December 11, 2014, Vice voluntarily underwent a polygraph examination regarding the alleged assault, which he failed. Following that examination, Vice confessed to sexually assaulting the victim in a recorded interview with two detectives. Vice later moved to suppress his confession, arguing it should be suppressed “for one simple legal and factual reason; the detectives repeatedly told Mr. Vice he failed the polygraph examination before getting the statement they wanted. That[,] combined with the classic interrogation box isolation, made the environment and tactics coercive.”

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 At the suppression hearing, Washburn County Sheriff's Department investigator William Fisher testified he was assigned to investigate the sexual assault complaint against Vice and interviewed Vice at his workplace in December 2014. Vice denied any wrongdoing during that interview. Fisher asked Vice if he would take a polygraph test, and Vice agreed to do so.²

¶5 Fisher made arrangements for a polygraph examination to be conducted in Eau Claire on December 11, 2014, by detective Ryan Lambeseder of the Eau Claire Police Department. Because Vice had no way of getting to Eau Claire, Fisher drove him there from Rice Lake. When they arrived at the Eau Claire Police Department, Lambeseder escorted Vice into the room where the polygraph examination took place, and Fisher watched from an observation room.

¶6 Lambeseder testified that, before the examination began, he read two forms aloud to Vice: a form waiving Vice's *Miranda*³ rights, and a polygraph examination consent form. Vice did not have any questions and signed both forms. Vice was never informed that the results of a polygraph examination are inadmissible in court.

¶7 Lambeseder then "talk[ed] with [Vice] and learn[ed] a little bit about his background," recording the information he received on a "polygraph examination data sheet." In response to Lambeseder's questions, Vice indicated he had not taken a previous polygraph examination; his physical condition was average; he had not had any major injuries or surgeries in the last six months; he

² Vice testified at the suppression hearing that he asked Fisher if there was anything he could do to clear his name, and Fisher then suggested taking a polygraph test.

³ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

was not in any discomfort; he had eaten during the previous twenty-four hours; he went to bed at 10:30 p.m. the prior evening and woke at 7 a.m.; he “slept fair”; he had never been a patient in a mental hospital or seen a psychologist or psychiatrist; he did not have heart disease, any communicable diseases, high or low blood pressure, seizures, hearing loss, or back issues; and he had not consumed alcohol in the last twenty-four hours or illegal drugs in the last two days. Lambeseder also confirmed that Vice had completed high school. Based on this information, Lambeseder concluded Vice was “fit to test.”

¶8 The polygraph examination took about one hour and forty-five minutes. During the examination, Vice denied any sexual misconduct involving the victim. After the examination was completed, Lambeseder escorted Vice to a separate interview room. Vice was left alone in that room for ten to fifteen minutes while Lambeseder scored the examination and informed Fisher of the results.

¶9 Fisher and Lambeseder then interviewed Vice in the room where he had been waiting. The interview was video-recorded, and the circuit court viewed the recording before ruling on Vice’s suppression motion. The video shows that, immediately after the detectives entered the interview room, Lambeseder asked Vice how he thought he did on the polygraph examination. Vice responded he did not know, but he knew he was telling the truth. Lambeseder then informed Vice he “didn’t pass the exam” and further stated, “On the questions regarding [the victim], it’s very clear that you weren’t telling the truth.” In response, Vice stated:

I’ll be honest, a hundred percent honest, and I’ll take that test again. I do not remember doing this. I honestly do, and I will take the test. But, obviously I failed the test. Something’s wrong. Is there a way, or is it any possibility that I ... somehow I blacked out and did not remember this?

Lambeseder answered, “No,” and told Vice, “You do remember doing it, otherwise you wouldn’t react the way you did on the exam.”

¶10 Vice continued to maintain that he did not remember assaulting the victim. The detectives again asserted that Vice must have a memory of the assault because he would not have reacted the way he did on the polygraph examination if he did not remember it. About eight minutes after the interview began, Vice made his first admission to sexually assaulting the victim, stating, “This is going to sound really [inaudible] to say this right now, but I sexually assaulted [the victim].” However, even after making that statement, Vice continued to assert he could not remember any details or circumstances of the assault. Vice told the detectives he felt like he was going to throw up, and he questioned whether he did not remember sexually assaulting the victim because he was drunk when it happened. When pressed for details regarding the assault, he responded, “I would tell you if I knew. I’ll admit that I must have did it, because obviously the test says I did it. But I don’t physically remember. I’m trying to.”

¶11 For approximately the next six and one-half minutes, Vice continued vehemently denying that he had any memory of sexually assaulting the victim. Lambeseder ultimately asked, “Would it be easier if we just asked you certain direct questions, whether or not you did something?” Vice responded, “Possibly.” Fisher then asked whether Vice “[took] his fingers and place[d] them ... underneath [the victim’s] underwear, directly on her vagina?” After pausing for about seven seconds, Vice responded, “Yes.” He elaborated, “I see myself going like [gesturing], with just one finger, going through her front and going like this [gesturing].” Fisher asked, “You remember that?” and Vice responded, “I think, yes.”

¶12 When asked when the assault occurred, Vice responded he did not remember, but “it had to be in October.” When asked where it happened, he stated, “I must ... downstairs in the big living room, when she was on the bed. She was on the right-hand side.” He then appeared to question that memory, however, stating, “I don’t know where [the victim’s] sister was I can’t see that side ... Was she by herself? No Did she stay the night? I don’t know where her sister was, where was she?”

¶13 Fisher next asked whether Vice tried to lick the victim’s vagina, and Vice responded, “I don’t know, I don’t think so.” Lambeseder asked, “Did you try to pull down her pants to do that?” Vice responded, “I think I tried to pull down her pants so I could get my hand down her pants easier—oh God, I am sick.” Vice stated he did not remember “if [he] tried to lick her crotch first or after.” When asked later on if he remembered licking the victim’s crotch, he responded, “Yes, I tried to, but I couldn’t through her pants, and then I just took off her pants, and I didn’t try to lick it over her underwear, I just put my hand in her underwear and that’s it.” He denied anything other than incidental contact with the victim’s buttocks. He also stated he “knew for a fact” he did not pull down his pants or take out his penis.

¶14 At the suppression hearing, Vice confirmed he took the polygraph test voluntarily. He confirmed he had a high school diploma, but stated he was in special education classes throughout high school. He also testified he had longstanding diagnoses of attention deficit hyperactivity disorder, depression, and anxiety. When asked about his state of mind during the polygraph examination, Vice stated, “I felt really nervous. I was told that I couldn’t move, and when I’m told I’m not supposed to do something, like hold still, I can’t help but shake and try to control ... my breathing, and I just tense up and freak out.” Describing his

state of mind during the subsequent interview with Fisher and Lambeseder, Vice testified, “I was freaking out. I just couldn’t handle what was going on in my head, being accused of what I was being accused of and just constantly being drilled in my head saying that I failed the polygraph test, and I just couldn’t handle it anymore.” Vice stated he only admitted assaulting the victim because the detectives “ke[pt] repeating” that he did it and “impl[ied] ... that things would go better if [he] confessed.”

¶15 During oral argument following the suppression hearing, Vice’s counsel argued that two prior Wisconsin cases, *State v. Davis*, 2008 WI 71, 310 Wis. 2d 583, 751 N.W.2d 332, and *State v. Johnson*, 193 Wis. 2d 382, 535 N.W.2d 441 (Ct. App. 1995), “emphasize the importance of the police not referencing failed results of polygraph examinations in order to gain admissions. ... [Y]ou are not supposed to use failed polygraph results to obtain an admission.” Counsel therefore contended suppression of Vice’s confession was required because “the repeated use of the failed test, referring to the failed test during the interrogation process, ma[de] the admissions under a circumstance [coercive].”

¶16 The circuit court granted Vice’s suppression motion in an oral ruling. The entirety of the court’s reasoning is as follows:

All right. Well, the one area that I agree with the State is the video somewhat contradicts the defense’s description of the physical location and parameters of the interrogation. However, the record is absolutely clear in this case that the State made a number of references to a failed polygraph at both times, and under certain circumstances, they created a coercive environment. The case law I think cited by [the defense] appears to be controlling here, and that that becomes the fatal flaw in the totality of the circumstances of this confession, therefore the motion to suppress that confession is granted.

The court subsequently reduced its oral ruling to a written order, from which the State now appeals. *See* WIS. STAT. § 974.05(1)(d)3. (allowing the State to appeal from an order suppressing a confession or admission).

DISCUSSION

¶17 Our review of an order granting a motion to suppress presents a mixed question of fact and law. *State v. Casarez*, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We uphold the circuit court’s findings of historical fact unless they are clearly erroneous, but the application of the law to those facts is a question of law subject to independent appellate review. *Id.*

¶18 Here, the circuit court concluded suppression of Vice’s confession was warranted because Fisher and Lambeseder made multiple references to Vice’s failed polygraph examination while questioning him. It is well-established that the results of polygraph examinations are inadmissible in criminal proceedings, as are any statements a defendant makes during a polygraph examination. *State v. Greer*, 2003 WI App 112, ¶9, 265 Wis. 2d 463, 666 N.W.2d 518. Statements made after the examination is over, however, are admissible provided certain requirements are met. *Id.*

¶19 We apply a two-step test to determine the admissibility of statements made following a polygraph examination. *See Davis*, 310 Wis. 2d 583, ¶2.⁴ First, we consider whether the defendant’s statement is so closely associated with the polygraph examination that the examination and statement are one event, rather

⁴ *State v. Davis*, 2008 WI 71, 310 Wis. 2d 583, 751 N.W.2d 332, dealt with a voice stress analysis, rather than a polygraph examination. *See id.*, ¶2. However, the court stated, “We see no reason at this time to treat these two methods of ‘honesty testing’ differently.” *Id.*, ¶20.

than two discrete events. *Id.*, ¶¶2-3. If we conclude the examination and statement are two discrete events, we then consider whether the statement “survive[s] constitutional due process considerations of voluntariness.” *Id.*, ¶2.

I. Discrete events test

¶20 In the circuit court, Vice conceded the polygraph examination and his subsequent statements to Lambeseder and Fisher were discrete events. He expressly stated in the brief supporting his suppression motion, “[T]he detectives got the first part of the process right, they separated the polygraph test from the interrogation.” His attorney similarly stated during oral argument before the circuit court, “[T]he police got it half right. You’re supposed to take the polygraph exam and interrogation separate. They did that right.” Based on Vice’s concession, the circuit court did not address the discrete events test and considered only whether Vice’s post-polygraph statements were voluntary.

¶21 On appeal, Vice attempts to change course, arguing for the first time that the polygraph examination and his subsequent statements were not discrete events. However, because Vice conceded in the circuit court that the examination and statements were discrete events, he is judicially estopped from arguing to the contrary on appeal. *See Rusk Cty. Dep’t of Health & Human Servs. v. Thorson*, 2005 WI App 37, ¶5 n.4, 278 Wis. 2d 638, 693 N.W.2d 318. We therefore decline to consider Vice’s appellate argument regarding the discrete events test.

II. Constitutional voluntariness test

¶22 Turning to the second step of the analysis—the constitutional voluntariness test—we observe that a statement is voluntary if it is “the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the

result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." *Davis*, 310 Wis. 2d 583, ¶36 (quoting *State v. Hoppe*, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407). To determine whether a statement was voluntary, we apply a totality of the circumstances analysis, in which we balance the defendant's personal characteristics against the pressures imposed on the defendant by law enforcement officers. *Hoppe*, 261 Wis. 2d 294, ¶38. Factors relevant to this analysis include: the defendant's age, education, intelligence, physical and emotional condition, and prior experience with law enforcement; the length of questioning; any delay in arraignment; the general conditions under which the statements were made; any excessive physical or psychological pressure brought to bear on the defendant; any inducements, threats, methods, or strategies used by the police to compel a response; and whether the defendant was informed of the right to counsel and the right against self-incrimination. *Id.*, ¶39.

¶23 The circuit court concluded Vice's confession to sexually assaulting the victim was involuntary. However, the basis for the court's conclusion is unclear. On one hand, the court's oral ruling can be read as holding that the detectives' references to the polygraph examination while questioning Vice automatically rendered his confession involuntary. On the other hand, the court's ruling can be read as concluding the confession was involuntary based on the totality of the circumstances, including the references to the polygraph examination.

¶24 To the extent the circuit court concluded references to a failed polygraph examination, in and of themselves, render a confession involuntary, neither of the cases the court relied on support that proposition. In *Davis*, the supreme court stated, "An important inquiry [in determining voluntariness]

continues to be whether the test result was referred to in order to elicit an incriminating statement.” *Davis*, 310 Wis. 2d 583, ¶42. The court also noted that the detective who interviewed the defendant did not mention the test or its results during the interview. *See id.* However, the court did not hold, or even suggest, that the defendant’s confession would automatically have been involuntary had the detective referred to the test.

¶25 In *Johnson*, the voluntariness of the defendant’s confession was not in dispute. *See Johnson*, 193 Wis. 2d at 390. Rather, the issue on appeal was whether the polygraph examination and the defendant’s post-polygraph interview were discrete events. *See id.* at 389. In concluding the examination and interview were discrete events, we noted that the officer who questioned the defendant “did not refer to polygraph charts or tell [the defendant] he had failed the polygraph test to elicit inculpatory statements.” *Id.* Again, though, we did not hold that such references would have rendered the defendant’s confession per se involuntary.

¶26 The circuit court did not cite any other case in support of the proposition that an interviewer’s reference to a failed polygraph examination automatically renders a defendant’s confession involuntary. Our own research has not revealed any case supporting that proposition. Moreover, Vice does not argue on appeal that references to a failed polygraph examination, in and of themselves, are sufficient to make a defendant’s confession involuntary. We therefore hold that, to the extent the circuit court concluded suppression of Vice’s confession was required solely because the detectives referred to his failed polygraph examination when questioning him, that conclusion was erroneous.

¶27 In the alternative, the circuit court may have concluded Vice’s confession was involuntary under the totality of the circumstances, which included

the detectives' references to the failed polygraph test. However, even assuming that is what the court concluded, the problem is that the court did not make any factual findings in support of its conclusion. The court did not, for instance, make any findings regarding Vice's personal characteristics. As for the pressures imposed by law enforcement, the only factor the court cited in support of its decision was that the detectives had referred to the polygraph examination. As noted above, that factor, in and of itself, is insufficient to support a conclusion that a confession was involuntary.

¶28 It is the role of circuit courts, not the court of appeals, to find facts.

The court of appeals is by the Constitution limited to appellate jurisdiction. Art. VII, sec. 5 (3), Wis. Const. This precludes it from making any factual determinations where the evidence is in dispute. This is a power reserved to trial courts or to the supreme court under appropriate procedures in the exercise of its constitutional grant of original jurisdiction. The court of appeals has, of course, additional constitutional jurisdiction in respect to its supervisory authority over actions and proceedings in the trial court. This grant of jurisdiction does not confer the right to make findings of fact where the evidence is controverted.

Wurtz v. Fleischman, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980).

¶29 Vice cites *State v. Martwick*, 2000 WI 5, ¶31, 231 Wis. 2d 801, 604 N.W.2d 552, for the proposition that “if a circuit court fails to make a finding that exists in the record, an appellate court can assume that the circuit court determined the fact in a manner that supports the circuit court’s ultimate decision.” Here, however, we cannot discern from the circuit court’s oral ruling which facts the court considered important in concluding Vice’s confession was involuntary. Thus, we cannot look to evidence in the record to support an ultimate factual determination or reasonable inference made by the circuit court, because we

simply have no idea which of many potential findings of fact the court may have made. Under these circumstances, a remand is necessary for the circuit court to engage in additional fact-finding and to determine, based on those facts, whether Vice's confession was voluntary.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

