
May 2014

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Recommended Citation

Jackson, Anton L. (2014) "State v. Pierce: Refining the Standard for the Admission of Polygraph Evidence," *Tennessee Journal of Law and Policy*: Vol. 2 : Iss. 2 , Article 6.

Available at: <https://trace.tennessee.edu/tjlp/vol2/iss2/6>

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**STATE V. PIERCE: REFINING THE STANDARD FOR THE
ADMISSION OF POLYGRAPH EVIDENCE**

Anton L. Jackson

I. Introduction

Although the inadmissibility of polygraph evidence in the course of a criminal trial has been well-established law in Tennessee for almost fifty years, the quandary presented itself two years ago in *State v. Pierce*.¹ This case forced the Tennessee Supreme Court to balance the need to protect state citizens against sexual predators with the well-established rules of evidence which hold that “polygraph evidence is inherently unreliable, and therefore irrelevant and inadmissible.”² In *Pierce*, the issue before the court was whether polygraph test results, which were performed as part of a sex offender risk assessment and encouraged by leading psychosexual analysts and researchers, were admissible in the non-capital sentencing hearing of a convicted sex offender.³

By refusing to admit polygraph evidence in sentencing hearings, the Tennessee Supreme Court has drawn the proverbial line in the sand and refuses to breach well-established rules of evidence in favor of additional proposed safeguards against sexual predators. As our society attempts to combat the seemingly growing occurrence of sex crimes, especially those committed against children, we must not let our fear of this devious behavior circumvent the fair application of our laws. We must recognize that manipulation and perversion of legal

¹ 138 S.W.3d 820 (Tenn. 2004).

² *State v. Pierce*, 138 S.W.3d 820, 826 (Tenn. 2004); *State v. Torres*, 82 S.W.3d 236, 252 (Tenn. 2002); *State v. Irick*, 762 S.W.2d 121, 127 (Tenn. 1988).

³ *Pierce*, 138 S.W.3d at 823.

principles—in this case, the attempt to introduce polygraph evidence in violation of the rules of evidence—lends itself only to the invalidation of these rules, and ultimately, the legal institution itself.

This note provides support for the Tennessee Supreme Court's holding in *Pierce*. First, it evaluates the reliability of polygraph examinations and the rationale for their widespread inadmissibility as evidence. Secondly, it examines the use of polygraphs on sexual offenders and weighs the positive and negative contributions they lend to preventing recidivism. This note concludes by re-enforcing the notion that it is the responsibility of the judiciary to establish and affirm well-established principles, here, the rules of evidence and the inadmissibility of polygraph evidence, even if the goal in violating these principles is to provide assistance in preventing vile and despicable behavior.

II. The Process by Which Pierce was Sentenced

Gregory Pierce was indicted for the rape of a twelve year-old girl after it was discovered that he had impregnated her.⁴ He pled guilty to the lesser charge of attempted rape of a child and received an eight-year sentence.⁵ It remained in the discretion of the trial court to determine the manner in which he would serve the sentence upon the completion of a risk assessment analysis to be performed by the Counseling and Clinical Services (hereinafter "CSS").⁶ The purpose of such an analysis is to evaluate the offender's risk of re-offending, and provide a sentencing recommendation to the court based on the results of the risk assessment.⁷

The subsequent report compiled by Dr. Michael

⁴ *Id.*

⁵ *Id.* at 821.

⁶ *Id.* at 822.

⁷ *Id.*

Adler, clinical director of CCS, detailed Pierce's personal history, including his work history, an assessment of his social and emotional skills, and statements by Pierce detailing his crime and history of sexual offense.⁸ Pierce stated that he had not committed any sexual offenses prior to the offense for which he was being sentenced.⁹ The report also included the results of a Penile Plethysmograph (hereinafter "PPG"), a test administered to measure sexual responsiveness to a variety of stimuli across variables such as gender, age, and sexual activity.¹⁰ Pierce's PPG showed arousal responses to females from infants to age seventeen, male infants, males from age two to five, and males from age twelve to seventeen.¹¹ Dr. Adler's report stated that Pierce's statements and his PPG were inconsistent and suggested that the court administer a polygraph examination to verify Pierce's stated criminal history.¹²

Thereafter, the court ordered Pierce to complete the polygraph before it rendered a sentencing decision.¹³ The results of the exam indicated that Pierce's claims that he had not committed any prior sexual offenses were untruthful. As a consequence, the trial court decided to consider the examination in sentencing Pierce stating, "[T]he Court can only conclude I've got a . . . person that sexually is going to act out with children."¹⁴ Based in part on the results of the polygraph examination, the trial court denied Pierce's request for probation or another alternative form of sentencing.¹⁵

Pierce appealed, and the Tennessee Court of Criminal Appeals ruled that because he had failed to object

⁸ *Id.*

⁹ *Id.*

¹⁰ *In re Care and Treatment of Tucker*, 578 S.E.2d 719, 721 (S.C. 2003).

¹¹ *Pierce*, 138 S.W.3d at 822.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 823.

¹⁵ *Id.*

to consideration of the polygraph results during his sentencing hearing, he had waived his right to appeal that issue.¹⁶ However, the court nonetheless noted Pierce's argument and stated that they could not address this issue because it was not within the scope of their review.¹⁷ Pierce appealed the finding of the Court of Criminal Appeals to the Tennessee Supreme Court, which granted his application for permission to appeal.¹⁸ In considering whether this evidence should have been excluded, the Tennessee Supreme Court held that "the trial court erred by considering the results of Pierce's polygraph examination" in sentencing him.¹⁹

Reaffirming prior decisions which held that polygraph examinations were unreliable, the Tennessee Supreme Court ruled that "polygraph examination results, testimony on such results, [and] testimony on a defendant's willingness or refusal to submit to a polygraph examination" were inadmissible in all sentencing hearings.²⁰

III. The Development of the Admissibility of Polygraph Evidence

In Tennessee, as in most states, long-standing precedent holds that the results of a polygraph are "inherently unreliable" and, as consequence, irrelevant and inadmissible.²¹ The Tennessee Supreme Court's 1958

¹⁶ *Id.* at 823-24.

¹⁷ *Id.* at 824.

¹⁸ *Id.*

¹⁹ *Id.* at 826.

²⁰ *Id.* However, the court did conclude under de novo review that "Pierce was not a suitable candidate for probation," even after excluding the polygraph evidence. *Id.* at 827.

²¹ See *Torres*, 82 S.W.3d at 252 n.20; *State v. Campbell*, 904 S.W.2d 608, 614-15 (Tenn. 2001); *State v. Hartman*, 42 S.W.3d 44, 60 (Tenn. 2001); *Irick*, 762 S.W.2d at 127; *Grant v. State*, 374 S.W.2d 391, 392 (Tenn. 1964); *Marable v. State*, 313 S.W.2d 451, 458 (Tenn. 1958).

decision in *Marable v. State* laid the framework for the inadmissibility of polygraph examinations and lie detector tests in this state.²² In *Marable*, the court held that “[t]he unquestioned and unanimous weight of authority and general rule is that the results of a lie detector test are inadmissible in evidence.”²³ The issue in *Marable* was whether it was reversible error for a witness to testify that a defendant, upon request to take a polygraph examination, asked to speak to a lawyer. After discussion with that lawyer, the defendant refused to take the polygraph.²⁴ The court reiterated the inadmissibility of the polygraph examination, but declined to find reversible error, noting that the objectionable testimony was subject to cross-examination by defendant’s counsel.²⁵ Six years later, the Court expanded the scope of *Marable* in *Grant v. State*.²⁶

Grant involved a contempt of court conviction against an attorney for “suborning perjury.”²⁷ Four men were indicted for illegally possessing, transporting, and selling whiskey.²⁸ The men testified on their own behalf, and the court found they perjured themselves under the instruction of their attorney, Leo Grant.²⁹ In Grant’s trial, defendant Grant attempted to introduce evidence of a polygraph examination he had been given. The trial court held that the results of the polygraph were inadmissible, but did allow evidence of the “circumstances” surrounding the polygraph examination—specifically questions and answers surrounding the examination.³⁰ In finding that the lower court had erred, the Tennessee Supreme Court upheld the established precedent that polygraph

²² 313 S.W.2d 451.

²³ *Id.* at 458.

²⁴ *Id.*

²⁵ *Id.* at 455-56, 458-59.

²⁶ 374 S.W.2d at 392.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

examinations are inadmissible.³¹ Moreover, by excluding the circumstances surrounding the examination and the willingness of the defendant to take or refuse the test, the court further broadened the scope of *Marable*.³²

While most cases involving the introduction of polygraph evidence involve the examination of a defense witness, the Tennessee Supreme Court has also ruled on the admissibility of polygraph evidence as it relates to witnesses who testify for the state.³³ In *State v. Irick*, the court found no distinction between the polygraph evidence of a state's witness and polygraph evidence of a defendant's witness, holding both inadmissible.³⁴

In *Irick*, Billy Ray Irick was indicted for common law murder, felony murder, aggravated rape by vaginal penetration, and aggravated rape by anal penetration of a seven-year-old child.³⁵ The jury found Irick guilty of first degree murder during the perpetration of a felony and two counts of aggravated rape.³⁶ The relevant issue in *Irick* was whether a defendant can introduce polygraph examination evidence of a state's witness.³⁷

Prior to *Irick*, most cases involving polygraph evidence dealt with the state attempting to introduce evidence gathered during a polygraph examination of the defendant himself or of a defense witness. In *Irick*, however, the defense wished to introduce the polygraph examination of the victim's step-father, whose polygraph revealed "deception to a relevant question" regarding his answer to whether he had anything to do with the death of

³¹ *Id.*

³² *Id.*

³³ See *Irick*, 762 S.W.2d at 127 (preventing capital defendant from impeaching the state's witness with a polygraph examination which stated that the witness exhibited signs of deception during the exam).

³⁴ *Id.* at 127.

³⁵ *Id.* at 124.

³⁶ *Id.*

³⁷ *Id.* at 127.

his step-daughter.³⁸ The court found no distinction between the admissibility of a polygraph examination for a state's witness compared to that of a defense witness and further stated that no existing precedent distinguished the two.³⁹

The new sphere of litigation in the area of the admissibility polygraph evidence is the issue of whether to allow the introduction of polygraph evidence during sentencing proceedings. The Tennessee Supreme Court first addressed this issue in *State v. Hartman*.⁴⁰ In *Hartman*, the court upheld the lower court's refusal to allow the introduction of the defendant's polygraph examination results as mitigating evidence in his capital sentencing hearing.⁴¹ The defendant argued that the rules of evidence should not be strictly applied "as to infringe a defendant's constitutional right to present mitigating evidence at a capital sentencing procedure."⁴² While the court agreed with the defendant's assertion that the rules of evidence should not be strictly applied in capital sentencing hearings as to preclude relevant, mitigating evidence, the court stated that the inherent unreliability of the polygraph rendered the examination irrelevant.⁴³ As a result, the court ruled that polygraph examinations are inadmissible in capital sentencing hearings.⁴⁴

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 42 S.W.3d 44 (Tenn. 2001).

⁴¹ *Id.* at 60.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

IV. *State v. Pierce* Refines the Standard for the Admissibility of Polygraph Evidence

A. Applying the Rules of Evidence to Non-Capital Sentencing Hearings

The issue now presented in *Pierce* is whether the rules of evidence should be strictly applied in a non-capital sentencing hearing, or more specifically, whether polygraph examinations are admissible in such hearings.⁴⁵ This issue has become increasingly important as our society wrestles with combating the seemingly endless stream of sexual offenses and re-offenses. It has become virtually impossible to identify first-time sexual offenders prior to their initial acts. Therefore, the focus has shifted to identifying those convicted offenders who demonstrate a high probability of recidivism.⁴⁶

Tennessee has adopted legislation intended to identify sexual offenders who may have a high risk of re-offending.⁴⁷ Under this legislation, a convicted sex offender who is seeking probation or an alternative sentence must submit to an assessment to determine the offender's risk of recidivism.⁴⁸ Polygraph examinations are encouraged as useful tools in identifying and evaluating those offenders who have a high risk of re-offending.⁴⁹

⁴⁵ *Pierce*, 138 S.W.3d at 826.

⁴⁶ *Risk Assessment*, ¶ 4 (2005), Association for the Treatment of Sexual Abuse, available at <http://www.atsa.com/ppAssessment.html> (last visited July 8, 2006).

⁴⁷ See TENN. CODE ANN. § 39-13-705 (2003).

⁴⁸ See TENN. CODE ANN. § 39-13-704(d)(2) (2003) (establishing standardized procedures for evaluating sexual offenders as developed and prescribed by the Sex Offender Treatment Board).

⁴⁹ *Pierce*, 138 S.W.2d at 825 (noting the Sex Offender Treatment Board's use of the publication, PRE-SENTENCE PSYCHOSEXUAL EVALUATION: ADULT SEXUAL OFFENDERS during its annual training). The manual encourages the use of "polygraph and physiological measures within [the] report." *Id.* at 825 n.9 (citing PSYCHOSEXUAL EVALUATION MANUAL, PRE-SENTENCE PSYCHOSEXUAL EVALUATION: ADULT SEXUAL OFFENDERS 6).

The psychology community has wholly accepted polygraph examinations as a reliable resource in its assessment of sexual offenders.⁵⁰ The *Pierce* court decided, however, that these examinations were not sufficiently reliable to be introduced in the court proceedings.⁵¹

The Tennessee Supreme Court ruled that the trial court erred by considering the *Pierce*'s polygraph examination in determining his sentence.⁵² In so ruling, the court followed Tennessee's well-established precedent and relied on the *Marable*, *Grant*, and *Irick* decisions.⁵³ Citing *Hartman*, the court reasoned that since the introduction of polygraph evidence to mitigate a sentence in favor of the defense was impermissible, the introduction of polygraph evidence to enhance a sentence in favor of the state was also impermissible.⁵⁴

As previously mentioned, the Tennessee Court of Criminal Appeals ruled *Pierce* had failed to object to the consideration of the polygraph results in his sentencing, and therefore, had waived his right to appeal the issue.⁵⁵ The intermediate court found that there was still sufficient evidence in the risk assessment report without the polygraph examination to deny *Pierce*'s request for probation.⁵⁶ The Supreme Court, while holding that the trial court was clearly in error in admitting the polygraph evidence, agreed with the Court of Appeals and upheld the denial of probation because of the other information contained in the risk assessment report.⁵⁷

⁵⁰ *Id.*

⁵¹ *Id.* at 828.

⁵² *Id.* at 826.

⁵³ *Id.*

⁵⁴ *Id.* at 826.

⁵⁵ *Id.* at 823-24.

⁵⁶ *Id.*

⁵⁷ *Id.*

B. The Relevance Standard as Applied to Polygraph Evidence

Tennessee Rule of Evidence 402 provides evidence that is not relevant is not admissible.⁵⁸ Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁵⁹ The unreliable nature of the polygraph is due to the “extreme polarization” within the scientific community about polygraph techniques.⁶⁰ Therefore, the potential unreliability of polygraph evidence is often cited as the reason for its exclusion.

A number of factors have been presented as possibly having an affect on polygraph results, including fatigue, amnesia, pathological lying, and the lack of fear of being caught in a lie.⁶¹ Herein lies the inherent problem of polygraph examinations; they are simply scientifically imperfect. The “lack of any indicia of reliability [of polygraph evidence] means it is not probative.”⁶² It is the probative factor that renders polygraph evidence inadmissible as a matter of law.⁶³ “Probative” is defined as “serving to establish or prove the truth.”⁶⁴ The very essence of state and federal rules of evidence is to establish this truth. Because polygraph evidence can neither establish nor prove truth, there is no justification in using

⁵⁸ TENN. R. EVID. 402.

⁵⁹ TENN. R. EVID. 401.

⁶⁰ *United States v. Scheffer*, 523 U.S. 303, 309 (1998).

⁶¹ *People v. Anderson*, 637 P.2d 354, 359 (Colo. 1981) (noting other factors such as emotional upset of the subject, drunkenness, subjection to drugs, bad physical or emotional condition, high blood pressure, hardening of the arteries, obesity, feeble-mindedness, psychotic condition, high blood pressure, use of antiperspirant, etc.).

⁶² *Hartman*, 42 S.W.3d at 60.

⁶³ TENN. R. EVID. 402.

⁶⁴ GILBERT’S LAW SUMMARIES: POCKET SIZE LAW DICTIONARY 258 (West Group 1997).

such technology to determine the fate of an individual, regardless of the gravity of the crime.

C. Tennessee Supreme Court Acknowledges Societal Concerns in Reaching Its Decision

Our society has become increasingly concerned with addressing sexual offenders, particularly those who prey upon children. Legislatures have established Sex Offender Registries, and courts have upheld their constitutionality.⁶⁵ Society has enacted stronger legislation for the punishment of sex crimes. In our haste to combat this terror, however, we must be certain that we do not abridge the protections that the judicial system seeks to afford all citizens.

The Tennessee Supreme Court upheld the established protections of the judicial system despite pressures from a fearful society. The easy remedy would have been to allow polygraph examinations in sentencing hearings for sex offenders and to dispense sentences based on the results of such tests. Then, if a polygraph examination indicated that a convicted sex offender was lying, a court would institute a harsher sentence, thus ensuring that the system works. Utilizing such a system would allow the masses to express a collective sigh of relief knowing that the world is a safer place.

However, consider a second alternative to this scenario in which a convicted sex offender is to be sentenced for his transgression. He claims that he no longer has deviant tendencies, after which he is administered a polygraph examination. The test determines that he is telling the truth. The court then gives the convicted sex offender a reduced sentence, and he is

⁶⁵ See, e.g., *Young v. State*, 806 A.2d 233 (Md. 2002); *Jane Doe I v. Phillips*, 194 S.W.3d 833 (Mo. 2006); *Commonwealth v. Howe*, 842 A.2d 436 (Pa. 2004).

reintroduced to society after serving less time in prison. Unfortunately, the offender deceived the lie detector and quickly re-offends. Had the court relied upon human evaluation and reliable evidence, then the offender would have been subjected to more intense scrutiny.

Finally, consider a third alternative. In this scenario, an offender is falsely assessed by the polygraph, and his freedom is stripped due to his nervousness or a change in his body temperature. He serves a longer sentence despite a lower actual risk of recidivism than the offender in the second scenario.

In all three scenarios, the polygraph, which assesses the offender's alleged credibility, fails due to the offender's psychological or physical makeup.⁶⁶ The rules of evidence are established to prevent such discrepancies and exclude evidence which is not completely reliable. By excluding evidence that is known to be unreliable, such as polygraph evidence, we can more confidently ensure the release of those who are least likely to re-offend while separating those with a greater chance of recidivism from their potential victims. In *Pierce*, the Tennessee Supreme Court refused to submit to the pressure of societal fears and adhered to well-established evidentiary principles.

V. Conclusion

Polygraph examinations carry no evidentiary weight in Tennessee. They are inherently unreliable and, therefore, inadmissible.⁶⁷ The court is charged with protecting the integrity of its decisions. Therefore, only relevant and reliable evidence can be introduced to support or impeach the credibility of a witness. The Tennessee Supreme Court took a stand in *Pierce v. State* to ensure that

⁶⁶ David C. Raskin & Charles R. Hones, *The Comparison Question Test*, in HANDBOOK OF POLYGRAPH TESTING 1 (Murray Kleiner ed., Academic Press 2002).

⁶⁷ *Pierce*, 138 S.W.2d at 826.

only the most reliable evidence would be considered in all sentencing hearings, whether for capital or non-capital offenses, and to ensure that courts would render fair and equal decisions based on that evidence.

