STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP2220-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ADAM W. VICE,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS, ENTERED IN THE CIRCUIT COURT FOR WASHBURN COUNTY, THE HONORABLE JOHN ANDERSON, PRESIDING

REPLY BRIEF OF THE PLAINTIFF-APPELLANT

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The circuit court erred when it suppressed Vice's post-polygraph confession.

As discussed in the State's brief-in-chief, *Davis* established a two-part test for admissibility of post-polygraph confessions. *State v. Davis*, 2008 WI 71, 310 Wis. 2d 583, 751 N.W.2d 332. A post-polygraph confession is admissible when it "is given at an interview that is totally discrete from the [polygraph] test and the statement is voluntarily given." *Id.* ¶ 21.

Because Vice confessed at a separate event (as he conceded), and his confession was voluntary, the circuit court erred when it granted Vice's suppression motion. The State incorporates the arguments made in the brief-and-chief and uses this reply to respond to Vice's arguments.

A. Vice conceded that he confessed at a separate event, and he should be held to that concession.

Vice conceded and therefore expressly waived any argument that he did not confess at a separate event:

- In his motion, he wrote, "In the case at bar the detectives got the right part of the process right, they separated the polygraph test from the interrogation . . . ." (R. 12:5);
- At oral argument, he reiterated, "And I think the defense cited quite accurately that, according to Deputy Fisher's testimony, the police got it half right. You're supposed to take the polygraph exam and interrogation separate. They did that right." (R. 110:3).

This Court held Vice to that concession when he attempted an about-face during his first appeal. (R. 37:9.) Knowing that Vice wanted to renege on his earlier concession,

this Court could have remanded for fact-finding on both *Davis* prongs, but it chose not to. (R. 37:9, 13.) Instead, this Court directed the circuit court to consider only the voluntariness of Vice's confession on remand. (R. 37:13.)

Vice asks this Court to again forget his concession. He gives three reasons why. None are persuasive.

First, he claims "it will be difficult, if not impossible, to admit Vice's confession into evidence while keeping out that Vice had failed a polygraph examination." (Vice's Br. 27.) Even assuming that is true, it does not provide a reason for this Court to overlook Vice's concession, as Vice would have known that information at the time of his concession. That is, Vice knew that the polygraph exam was referenced during the post-polygraph interview and that any recording would need editing, if admitted. He nevertheless decided to concede the separate-event requirement.

Vice also questions whether he "will be able to present a defense at trial that his confession was involuntarily given." (Vice's Br. 27.) Specifically, he says that in order to challenge the voluntariness of his confession before the jury, he would need to present evidence about polygraph tests and examiners. (Vice's Br. 27.) That, he claims, is impossible because "polygraph evidence is one of unconditional inadmissibility." (Vice's Br. 27.)

Not necessarily. As the privilege holder, Vice can choose to waive section 905.065's non-disclose requirement. *See* Wis. Stat. § 905.11 ("A person upon whom this chapter confers a privilege against disclosure of the confidential matter or communication waives the privilege if the person . . . voluntarily discloses or consents to disclosure of any significant part of the matter or communication."). If, as *Davis* says, statements made during a polygraph test are inadmissible because the Legislature made them privileged, then the Legislature can also provide for their inclusion by

allowing the defendant to waive the privilege. *Davis*, 310 Wis. 2d 583, ¶¶ 44, 45.

Second, Vice claims this Court can forgive his concession because it "did not actually decide the issue of whether Vice's polygraph examination and the post-polygraph interview were two totally discrete events." (Vice's Br. 28.) Of course this Court did not decide the issue—Vice conceded and therefore expressly waived it.

And that concession was not just a "forfeiture," as Vice now suggests. (Vice's Br. 28.) "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612 (citation omitted).

Vice further claims that the State opened the door for reconsideration by briefing the issue. (Vice's Br. 28.) Nonsense. The State argued that Vice conceded the separate-event requirement, and it asked this Court to hold Vice to that concession. (State's Br. 2, 29–30.) That the State also anticipated it would be sandbagged does not mean it opened the door for Vice to weasel out of his concession.

Vice also suggests that his U-turn is acceptable because the "respondent may advance any argument that will sustain the circuit court's ruling, regardless of whether the respondent made that argument in the circuit court." (Vice's Br. 28–29.) Raising an argument for the first time on appeal is patently different from conceding an issue and then attempting to un-concede the same issue.

Third, Vice claims he can walk back his concession because "this issue will not go away." (Vice's Br. 29.) Vice speculates that if his confession is admitted at some later trial and he is convicted, then "surely" he will raise an ineffective assistance of counsel claim. (Vice's Br. 29.)

That argument could be made by every defendant to evade the ineffective assistance of counsel rubric. Because Vice conceded the point, any future argument on the separate-event prong properly falls under the ineffective assistance of counsel rubric, where Vice must demonstrate both deficient performance and prejudice. Vice should not be allowed to retract his concession and escape that more demanding rubric.

The bottom line is there is no good reason for this Court to now expand the order it gave on remand. And the integrity of the judicial process demands Vice be prevented from "playing 'fast and loose'" by asserting inconsistent positions. *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996) (citation omitted).

B. Vice's arguments for why he did not confess at a separate interview are not persuasive.

To refresh: *Davis* set forth five factors courts should consider when determining whether a suspect confessed at an interview separate from the polygraph test: *Davis*, 310 Wis. 2d 583, ¶ 23. Each is discussed below.

Vice seems to agree that the first factor weighs in favor of the State. Vice twice acknowledges that he knew the polygraph test was over. (Vice's Br. 30 ("Now Vice certainly signed a form containing boilerplate language to the effect that the test was over."), 32 (commenting that Vice "did sign a form that the polygraph examination was over").)

On the second factor, Vice argues only that "there was very little temporal separation between the two events." (Vice's Br. 32.) In *Davis*, "very little time passed" between the test and the interview, yet the Court concluded that the events were separate. *Davis*, 310 Wis. 2d 583, ¶ 31. The ten to fifteen minutes that passed here was sufficient to attenuate Vice's test from his interview. (R. 109:10, 32.)

Vice argues that the third factor weighs in his favor because the polygraph examiner, Detective Ryan Lambeseder, participated in the post-polygraph interview. (Vice's Br. 31–32.) But Detective Lambeseder's participation does not automatically render the events connected. As *Davis* recognized, "[P]recedent clearly holds that the same officer may conduct both the examination and the interview so long as the two events are separate." *Davis*, 310 Wis. 2d 583, ¶ 33. Indeed, in *Davis*, like here, it was the polygraph examiner who relayed that the suspect failed. *Id.*

And that makes sense. The polygraph examiner is the person who conducts and scores the test. Even if he relays the results to another officer, it makes sense for him to be present in case the suspect has questions about the test, like Vice did. (R. 128:4.) That the person most familiar with polygraph tests informed Vice of his results and answered his questions does not transform two distinct events, separated by space and time, into one.

Regarding the fourth factor, Vice acknowledges the test and interview occurred in separate rooms, "[s]o there was some proximal separation." (Vice's Br. 32.)

Vice mainly argues the fifth factor. (Vice's Br. 32.) He claims the officers "eleven references" to polygraph test "results" during the interview "blur[red] the distinction between the polygraph examination and the post-polygraph interview." (Vice's Br. 31.)

This Court has explained that as long as "there is both a sufficient temporal separation and a sufficient spatial demarcation" between the test and the interview, "and the defendant is told that the test is over, letting the defendant know that he or she did not pass the examination, or letting the defendant so conclude, does not negate that the examination and the post-examination interview" are totally discrete events. *State v. Greer*, 2003 WI App 112, ¶ 16, 265

Wis. 2d 463, 666 N.W.2d 518. In other words, "a truthful comment to a suspect, either volunteered by the officer or in response to the suspect's question, does not override the other factors" used "consistently to determine whether a defendant's post-examination statements should be suppressed." *Id.* ¶ 17.

Furthermore, Vice ignores the context in which the references to the polygraph test were made. For example, after Detective Lambeseder informed Vice that he did not pass the test, Vice expressed that he would be honest and asked to take the test again. (R. 128:4.) By asking to take the test "again," Vice demonstrated that he knew the first test was over. And most of the subsequent references to the test were made in response to a question or statement by Vice. (*See, e.g.*, R. 128:4.)

Thus, even though the officers referenced the polygraph results, the remaining factors demonstrate that Vice's polygraph test and his post-polygraph interview were separate events.

C. Vice's arguments for why his confession was not voluntary are not persuasive.

Davis also requires the confession to be voluntary. Vice confessed voluntarily, and his arguments otherwise are not persuasive.

Vice mainly relies on cases from outside Wisconsin to support his argument. (Vice's Br. 16, 18, 20–24.) These cases are not binding on this Court. *State v. Muckerheide*, 2007 WI 5, ¶ 38, 298 Wis. 2d 553, 725 N.W.2d 930.[1]

[1] These cases are also factually distinguishable. Due to word count restrictions, the State is unable to distinguish each case individually. The State would gladly distinguish each case, if asked by this Court to do so.

Vice also assumes that *Davis* instructed courts to consider whether an officer referred to the polygraph test to determine whether the post-polygraph confession was voluntary. (Vice's Br. 16.) Sure, *Davis* said:

> Merely because one is administered a voice stress analysis or polygraph test does not render a statement per se coercive. The proper inquiry is not only whether a test was taken, but rather, whether a subsequent statement was given at a distinct event and whether law enforcement used coercive means to obtain the statement. An important inquiry continues to be whether the test result was referred to in order to elicit an incriminating statement.

Davis, 310 Wis. 2d 583, ¶ 42. But *Davis* cited to *Johnson* as support, and voluntariness was not at issue in *Johnson*. *State v. Johnson*, 193 Wis. 2d 382, 386, 535 N.W.2d 441 (Ct. App. 1995) ("On appeal, the voluntariness of Johnson's statements is not disputed.").

Davis also instructed courts to use "ordinary principles of voluntariness" to analyze the admissibility of a confession, including a post-polygraph confession. *Davis*, 310 Wis. 2d 583, ¶¶ 21, 35. So, to the extent a court would consider a reference to the polygraph test as part of its voluntary analysis, it would be to determine whether the reference was so coercive it overbore the defendant's will. Vice has not demonstrated how the officers' references were coercive enough to overbear his will. *Davis*, 310 Wis. 2d 583, ¶ 36.

Vice repeatedly suggests that the officers went into the interview with a plan to "convince Vice that his memory could not be trusted." (*See, e.g.*,Vice's Br. 17.)

Context matters. The officers did not reference the polygraph test in order to elicit an incriminating response, and they certainly could not have gone into the interview with a plan to challenge Vice's memory, given that they did not know Vice would claim memory loss. Vice initiated the conversation about memory loss, asking if it was possible that

he blacked out and did not remember the assault. (R. 128:4.) Detective Lambeseder answered Vice's question, telling him that he remembered the assault, or he would not have reacted the way he did on the test. (R. 128:4–5.) Vice's questions and subsequent statements set the tone of the interview, and the officers responded to the environment Vice created by relaying that he remembered the assault.

Vice now insinuates that Detective Lambeseder lied when he answered Vice's question about memory loss. (Vice's Br. 18.) But Vice never previously claimed that Detective Lambeseder lied or misrepresented when he answered Vice. (R. 47.) And if Vice thought Detective Lambeseder had lied, he had the opportunity to question the detective about it at the motion hearing. He did not. Importantly, nothing in the record suggests that Detective Lambeseder's answer to Vice's question was false.

Vice also criticizes the State for "ignor[ing] the testimony and report of Ms. [Hollida] Wakefield." (Vice's Br. 19.) Wakefield did not testify at the suppression hearing; she gave an offer of proof at a later *Daubert* hearing. (R. 122:3.) Furthermore, because the circuit court suppressed Vice's confession, it never ruled on Wakefield's ability to testify about Vice's confession at trial. (R. 122:93.)

Vice suggests that the officers' references to the polygraph test were "particularly insidious" because "they caused Vice to question his own memories." (Vice's Br. 18.) But relaying—or even inflating—evidence of a suspect's guilt interferes "little, if at all," with his free will and deliberate choice of whether to confess, as it does not "lead him to consider anything beyond his own beliefs regarding his actual guilt or innocence." *State v. Lemoine*, 2013 WI 5, ¶ 32, 345 Wis. 2d 171, 827 N.W.2d 589 (citation omitted).

Vice knew whether he assaulted EJ, and he knew whether he remembered assaulting her. Accordingly, Vice

could check the officers' statement that he failed the polygraph test and their statements that he remembered the assault against his own memory.

Indeed, throughout the post-polygraph interview, Vice demonstrated that he knew how to check information and respond accordingly. Vice admitted and demonstrated how he touched EJ's vagina, (R. 128:19), he admitted to pulling on her pants so he could get his hand in easier, (R. 128:20), and he admitted to trying to lick her crotch (R. 128:21–22). But he remained firm that he did not take his pants off, expose his penis, or have penis-to-vagina intercourse with EJ. (R. 128:21–22.)

Vice compares his case to those where officers told the suspect that the polygraph test proved the suspect was lying. (Vice's Br. 20.) Neither officer here told Vice that. Plus, Vice knew and acknowledged he lied during the test. (R. 128:2 ("I know for a fact that I'm telling the truth when I was telling the truth."), 4 ("I'll be honest. . . . 100 percent honest and I'll take that test again.").)

In addition, Vice compares his case to those where officers encouraged suspects to confess based on drunken blackout theories. (Vice's Br. 21.) But it was Vice who suggested he could not remember the assaults because he was drunk or had blacked out, not the officers. (R. 128:4, 11–12, 28, 31.)

Vice argues that his confession was coerced because the officers "convinced [him] that he had to confess in order to get help." (Vice's Br. 23.) Officers can encourage cooperation as long as they do not promise leniency. *State v. Deets*, 187 Wis. 2d 630, 636, 523 N.W.2d 180 (Ct. App. 1994). Vice does not claim the officers promised leniency.

Vice also argues that the officers fed him answers by asking leading questions. (Vice's Br. 23.) Again, context matters. The officers asked Vice if "direct" questions might

help him remember, and Vice indicated they might. (R. 128:18.) So the officers asked Vice if he touched EJ, and Vice said he did. (R. 128:19.) Without any additional prompting, Vice then demonstrated how he touched her. (R. 128:19.) Vice's demonstrating how he touched EJ's vagina undercuts his suggestion that the officers fed him answers.

Vice highlights that he was not told the polygraph test would be inadmissible and was instead informed that it would be admissible. (Vice's Br. 22.) Admittedly, the form could have been clearer about which statements could and could not be used against Vice in court. That said, Vice points to no Wisconsin case that requires an officer to so inform a suspect. And Vice has not illustrated how that information coerced him into confessing. Indeed, Vice did not discuss that fact at all when he testified at the suppression hearing.

Vice chides the State for pointing out that *Miranda* warnings were not required because Vice was not in custody. (Vice's Br. 24.) Relying on a non-Wisconsin case, Vice says *Miranda* warnings must be renewed after an officer informs a suspect that he failed a polygraph test. (Vice's Br. 24.) In *Davis*, no *Miranda* warnings were given, and the Court upheld the confession. *Davis*, 310 Wis. 2d 583, ¶ 14. Vice, meanwhile, received the warnings twice. (R. 10:1–2.)

Vice also chastises the State for describing Vice's demeanor as calm but nervous. (Vice's Br. 25.) This Court can watch the video and see that Vice was calm, he did not cry, he was not shaking, and he did not throw up, though he expressed feeling sick the moment he admitted to molesting the little girl. To the extent the circuit court disagreed with those facts, its findings are clearly erroneous.

Finally, Vice submits that he was susceptible to confessing because he was "a twenty-five-year-old virgin." (Vice's Br. 25.) Vice offers no support for his pioneering hypothesis that virginity is somehow linked to susceptibility.

CONCLUSION

This Court should reverse the circuit court's order granting Vice's suppression motion.

Dated this 3rd day of September, 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,999 words.

Dated this 3rd day of September, 2019.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of September, 2019.

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