

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 149682; 183615
LC No. 91-003795

MARTY GADSON,

Defendant-Appellee.

Before: White, P.J., and Smolenski, and R.R. Lamb, **JJ.

Lamb, J. (concurring).

I concur with the majority opinion in this case, except with this sentence in paragraph A. “We therefore conclude that any error in the admission or consideration of the polygraph evidence was harmless in light of the evidence presented at the evidentiary hearing, and the court’s decision.”

My reason for this concurring opinion is that I do not think a harmless error analysis is appropriate unless there was in fact error. The majority opinion seems to infer that there was error in the admission or consideration of this polygraph evidence, and that such error was harmless.

Recognizing that the facts in *People v Barbara*, 400 Mich 352; 255 NW2d 171 (1977) and *People v Mechura*, 205 Mich App 481; 517 NW2d 797 (1994), are different than the facts presented to the trial judge in this case, I think the trial judge properly exercised her discretion.

Barbara authorized the use of a polygraph to assist a trial judge in determining whether to grant a motion for a new trial. The judge in this case did specifically what is authorized by *Barbara*. The polygraph test of the defendant was used peripherally to buttress the credibility of witnesses who had not testified at the criminal trial. The judge used this evidence only to help her determine whether to grant a post-conviction motion for a new trial.

* Circuit judge, sitting on the Court of Appeals by assignment.

I do not think the judge committed any error in the exercise of her discretion in admitting and using this evidence as it was used in the post-conviction hearing. I therefore conclude that the admission and consideration of the polygraph evidence was proper in light of *Barbara* and *Mechura*.

/s/ Richard R. Lamb