RECEIVED
Feb 21 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JAMES L. GINTHER,

PETITIONER

APPELLATE CASE NO. 2019-000672

Appeal from Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

Opinion No. 2024-UP-046

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Petitioner, James L. Ginther, respectfully requests that this Court grant rehearing. On February 7, 2024, this Court affirmed Petitioner's conviction for murder and kidnapping. State v. James L. Ginther, No. 2024-UP-046 (S.C. Ct. App. February 7, 2024). Counsel respectfully submits that this Court overlooked the fact that the challenge was to the scope of the expert's testimony not to his qualification as an expert or to the general methodology used. The motion to limit the expert's testimony did not require an objection to qualification or general ballistic methodology. Additionally, counsel respectfully submits that this Court overlooked the fact that once the motion to limit the witness's testimony was made, the

trial judge was required to conduct a hearing and the State, as the proponent of the expert testimony, had the burden to prove that the witness's testimony that a particular firearm fired a particular fired cartridge case was within the scope of the witness's expertise. The trial judge abandoned his duty as gatekeeper pursuant to Rule 702, SCRE, and Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010), when he failed to conduct a hearing and require the State to show that the testimony was within the scope of the witness's expertise. The issue is preserved for appellate review. Petitioner respectfully requests rehearing.

Argument

The jury found Petitioner guilty of the murder of his former wife who died from a single gunshot wound to the head. (R. p. 370, lines 1-8). Her body was found by a hunter in the woods in the Wedgefield area of Sumter County after Ms. Ginther did not arrive at her job that morning at Pet Smart in Columbia. (R. pp. 268-269; p. 148, lines 18-23). One shell casing was found in the woods near her body. (R. p. 177, line 23 – p. 178, lines 1-13). The shell casing was submitted to Agent Chad Smith of SLED's Forensic Services Laboratory. (R. p. 411, line 8 – p. 412, lines 1-2; p. 413, lines 1-7). The shell casing was admitted in evidence, without objection, as State's exhibit #72. (R. p. 413, lines 14-19). The nine-millimeter Luger Glock firearm found when the officers took Petitioner into custody in Kentucky was also submitted to Agent Smith. (R. p. 412, lines 5-8). The firearm was admitted in evidence, over objection, as State's exhibit #68. (R. p. 410, lines 6-13). Agent Smith was offered as an expert in the field of forensic firearms examination without objection. (R. p. 421, lines 8-11).

Prior to Agent Smith's testimony Petitioner made the following objection:

> The other report where Item One - - where basically the forensic examiner tested the cartridge case. He claims that matching an individual identifying characteristic were found and it was concluded that Item One was fired by Item 19.

> My objection would be that - - I've consulted with an expert, my own, Richard Earnest. Through my consultation with him and through my - - now, this is not South Carolina precedent, but there is a case; United States v. Green Federal Case. That kind of language that that firearm fired that cartridge case to the exclusion of other firearms in the world I think - - I don't know if he can actually make that claim.
>
> I think that's beyond the scope of what he can say. He can say that there are things that match up. There are things that are consistent, but I don't think he can say that conclusory language. If that report comes into evidence I will object at that point.

(R. p. 392, line 23 – p. 393, lines 1-15). The State responded telling the judge, "Your Honor I don't think I intend to put in his report, the written report. But I do plan on asking him whether the cartridge found near the body was examined and compared to the gun taken from the Defendant. And my anticipation is he's going to say it was examined microscopically and determined to be fired by that gun." (R. p. 393, lines 17-23). The judge ruled, "I understand. Whatever he says you can cross-examine him on it. I mean based on what information you have. I mean assuming the question is proper and you can object to the question or form of the question, but it's his opinion if he's qualified to give one you can obviously cross examine him on that. Whether it's accurate or not or whatever." (R. p. 394, lines 1-7).

The trial judge erred in refusing to limit the opinion testimony of the expert witness in forensic firearms examination to consistencies in the comparison of the firearm and the shell casing without conducting a hearing and requiring the State to show that the testimony was within the scope of his expertise. In State v. Phillips, 430 S.C. 319, 334–35, 844 S.E.2d 651, 658–59 (2020), the South Carolina Supreme Court wrote:

> We have repeatedly discussed the trial court's "gatekeeping" role regarding the admission of expert testimony. In Council, for example, we framed our discussion around the trial court's responsibility to ensure the expert testimony meets the requirements of Rules 702 and 403. We emphasized "the trial judge must find" the Rule 702 elements are satisfied. 335 S.C. at 20, 515 S.E.2d at 518. We held, "The trial judge should ... determine reliability," and "the trial judge should determine if its probative value is [substantially] outweighed by" the dangers listed in Rule 403.

> Id. We have repeatedly enforced the requirement that trial courts exercise their gatekeeping responsibility in admitting expert testimony. See, e.g., Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 75, 735 S.E.2d 650, 656 (2012) (affirming the trial court's exclusion of the plaintiff's experts' opinions and stating "the court must ... exercise its role as gatekeeper"); Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010) (reversing the trial court's failure to exercise its role as gatekeeper and stating "the trial court serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law").

The trial judge erred in not conducting a hearing when Petitioner challenged testimony linking a particular firearm to a particular casing as outside the scope of the expert's testimony. The trial judge erred in not requiring the State to try and prove that the testimony was within the scope of the expert's testimony. As the Court wrote in Phillips:

> The proponent of scientific evidence has a corresponding responsibility to provide the trial court the factual and scientific information the court needs to carry out its gatekeeping duty. In Council, Graves, and Watson, the proponent went to great lengths in a hearing outside of the jury's presence to provide a sufficient factual and scientific basis for the court to consider as gatekeeper. In Council, the State presented live, detailed testimony from the FBI expert explaining the history of the mitochondrial DNA analysis method, his training in the method, and precisely how the method is used. 335 S.C. at 17-18, 515 S.E.2d at 516-17. Similarly, in Graves and Watson, the civil plaintiffs who sought to introduce the opinion testimony presented deposition testimony of their experts and/or live testimony outside the presence of a jury,[7] and each expert explained in detail the factual and scientific basis for their opinions. Graves, 401 S.C. at 70-72, 735 S.E.2d at 653-54; Watson, 389 S.C. at 447-48, 699 S.E.2d at 176.

430 S.C. at 334–35, 844 S.E.2d at 658–59. While the Phillips case involved DNA evidence, the same analysis is applicable to the forensic firearm examination testimony in the present case. The State in the present case failed to provide the trial court with the factual and scientific information the court needed to carry out its gatekeeping duty. The agent's qualification as an expert was not challenged and he was only asked about the number of times he had testified in court. The trial

court was not provided with any information about the scope of his expertise. (R. p. 421, lines 1-13).

During the direct examination of Agent Smith the State asked, "All right. Did you come up with a conclusion as to whether that fired casing was fired by that Luger?" (R. p. 422, lines 4-5). Agent Smith testified that he had made a conclusion and when asked about his conclusion, Petitioner objected. (R. p. 422, lines 6-9). The judge overruled the objection. (R. p. 422, line 10). Agent Smith then testified, "Yes, sir I was able to conclude that the fired cartridge case submitted as State's Exhibit 72 was fired by this particular firearm, State's Exhibit 68." (R. p. 422, lines 11-13).

On re-direct examination the State asked, "Agent Smith, just to be clear cause that was a lot of technical information. Your expert opinion is that that Glock firearm fired the casing and made the impressions on the back of the casing?" (R. p. 433, lines 11-14). Petitioner again objected and the objection was overruled. (R. p. 433, lines 15-16). Agent Smith answered, "Correct. That would be my conclusion that State's Exhibit 72, that would be the fired cartridge case I received was fired by this particular gun." (R. p. 433, lines 17-19). The Solicitor then referenced the match in closing argument. (R. p. 623, line 25 – p. 624, lines 1-8). The trial judge erred in allowing the agent to testify that the Glock fired the shell casing found near the body without requiring the State to show that this testimony was within the scope of the witness's testimony. Agent Smith's testimony should have been limited to the consistencies in the comparison of the firearm and the shell casing.

While firearm identification testimony has generally been found admissible, the reliability of this kind of expert testimony has come under scrutiny. See David H. Kaye, Firearm-Mark

Evidence: Looking Back and Looking Ahead, 68 Case W. Res. L. Rev. 723, 724 (2018). As the United States District Court for the District of Massachusetts wrote:

> Courts have understandably been gun shy about questioning the reliability of firearm identification evidence. See Santiago, 199 F.Supp.2d at 111–12 ("The Court ... can only imagine the number of convictions that have been based, in part, on expert testimony regarding the match of a particular bullet to a gun seized from a defendant or his apartment."). Accord United States v. Foster, 300 F.Supp.2d 375, 377 n. 1 (D.Md.2004) (noting that "[b]allistics evidence has been accepted in criminal cases for many years"); United States v. O'Driscoll, 2003 WL 1402040 at *1, 2003 U.S. Dist. LEXIS 3370 at *4 (M.D.Pa. Feb. 10, 2003). Storm clouds, however, are gathering. See Sexton v. State, 93 S.W.3d 96 (Tex.Cr.App.2002) (rejecting matching of cartridge cases based on magazine marks alone without recovery of underlying magazine); Ramirez v. State, 810 So.2d 836 (Fla.2001) (rejecting toolmark analysis matching knife to fatal stab wounds).

United States v. Monteiro, 407 F. Supp. 2d 351, 364 (D. Mass. 2006)(n. 1 citing United States v. Green, 405 F. Supp. 2d 104 (D. Mass. 2005) omitted).

In limiting the firearm identification testimony in United States v. Green, 405 F. Supp. 2d 104, 124 (D. Mass. 2005), the United States District Court for the District of Massachusetts wrote:

> Putting together this precedent with the evidence I have heard, suggests admission but with limitations, limitations identical to those I adopted in *Hines*. O'Shea is a seasoned observer of firearms and toolmarks; he may be able to identify marks that a lay observer would not. But while I will allow O'Shea to testify as to his observations, I will not allow him to conclude that the match he found by dint of the specific methodology he used permits "the exclusion of all other guns" as the source of the shell casings. Defense will be permitted full and fair cross-examination.

Agent Smith's qualification as an expert in forensic firearms examination was not challenged. As an expert the agent could testify about consistencies observed. As in Green, however, Agent Smith should not have been allowed to testify, as he did, that the match was to the exclusion of all other guns when the State failed to prove that this testimony was within the scope of the witness's expertise.

In limiting the firearm identification testimony in Monteiro the Massachusetts District Court explained that, "[b]ecause an examiner's bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty[,]" and "[a]llowing the firearms examiner to testify to a reasonable degree of ballistic certainty permits the expert to offer her findings, but does not allow her to say more than is currently justified by the prevailing methodology." 407 F. Supp. 2d at 372. The agent's testimony in the present case should have been limited to a reasonable degree of ballistic certainty.

The Massachusetts courts are not alone in limiting firearm identification testimony. In United States v. Ashburn, 88 F. Supp. 3d 239, 248 (E.D.N.Y. 2015), the United States District Court for Eastern District of New York wrote:

> Based on the court's review of the field of toolmark and firearms identification, including the NAS Report upon which Laurent relies, and on this court's review of *Daubert* proceedings performed in other cases, an instruction limiting LaCova's testimony is appropriate. See, e.g., Willock, 696 F.Supp.2d at 549 (precluding expert from stating opinions and conclusions with any degree of certainty and precluding expert from stating that it was a "practical impossibility" that any other firearm fired the cartridges in question); Taylor, 663 F.Supp.2d at 1179 (limiting expert to an opinion that his conclusion was "to a reasonable degree of ballistic certainty"); Glynn, 578 F.Supp.2d at 574 (limiting expert ballistics opinion to statement that match was "more likely than not"); Diaz, 2007 WL 485967, at *14 (precluding experts from testifying that their conclusions were "to the exclusion of all other firearms in the world" and limiting description of certainty to a "reasonable degree of certainty in the ballistics field"); Monteiro, 407 F.Supp.2d at 372 (limiting testimony to a "reasonable degree of ballistic certainty"); Green, 405 F.Supp.2d at 124 (precluding expert from testifying that his methodology permitted "the exclusion of all other guns").

The court in Ashburn cited Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under both Daubert and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), Agent Smith's testimony should have been limited to consistencies he observed. Petitioner

did not challenge the general methodology used to make the comparison. Instead, Petitioner challenged the witness's testimony that a particular firearm fired a particular shell casing as outside the scope of the witness's expertise. The request to limit the testimony and the citation to United States v. Green triggered the trial judge's duty as gatekeeper pursuant to Rule 702, SCRE, and Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010), to conduct a hearing to allow the State to try and show that the testimony was within the scope of the witness's expertise. While the expert was qualified to testify, without objection, generally about forensic firearms examination and consistencies observed, the State failed to prove that his testimony that a particular firearm fired a particular casing was within the scope of his expertise. The trial judge abused his discretion in allowing the testimony without a hearing. The error is not harmless.

In affirming the conviction this Court wrote:

> With no challenge to the expert's qualification or methodology, there was no reason to limit the expert's testimony to "consistencies" between the fired shell cartridge found at the crime scene and the test-fired shell cartridges from Ginther's gun. See State v. Hackett, 215 S.C. 434, 445, 55 S.E.2d 696, 701 (1949) (explaining that courts "allow the introduction of expert testimony to show that the bullet which killed the deceased was fired from a particular pistol or rifle ... [if] the witness ... is, by experience and training, qualified to give an expert opinion in the field of ballistics.").[1]

State v. Ginther, No. 2019-000672, 2024 WL 470821, at *1 (S.C. Ct. App. Feb. 7, 2024). Petitioner respectfully submits that this Court overlooked the fact that the challenge was to the scope of the expert's testimony not to his qualification as an expert or to the general methodology used. The motion to limit the expert's testimony did not require an objection to qualification or general ballistic methodology. The motion did require a hearing with the State bearing the burden of proving that the proposed testimony – that a particular firearm fired a particular casing - was within the scope of the witness's testimony. Respectfully, reliance on State v. Hackett is

misplaced because, ". . . the sole question raised by this appeal is whether the evidence adduced at the trial meets the requirements of law as to the sufficiency of circumstantial evidence necessary for conviction." Hackett 215 S.C. at 436, 55 S.E.2d at 697. The Hackett case, decided in 1949, was a directed verdict case and did not involve a challenge to the scope of the expert's testimony as in this case. Additionally, the persuasive authority from other jurisdictions cited above supports that the science of forensic firearms examination has developed significantly since 1949.

In a footnote this Court wrote:

> To the extent Ginther argues the trial court erred by failing to conduct a hearing on the reliability of the methodology used by the expert pursuant to Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), and by failing to limit the expert's testimony to "a reasonable degree of ballistic certainty," we hold these issues are not preserved for appellate review. See State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007) ("To properly preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court[.]"); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector.").

State v. Ginther, No. 2019-000672, 2024 WL 470821, at *1 (S.C. Ct. App. Feb. 7, 2024).

Petitioner respectfully submits that this Court overlooked the fact that once the motion to limit the expert witness's testimony was made, the judge was required to hold a hearing to allow the State, as the proponent of the expert testimony, to try to prove that the witness's testimony that a particular firearm fired a particular fired cartridge case was within the scope of the witness's expertise. The trial judge abandoned his duty as gatekeeper pursuant to Rule 702, SCRE, and Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010), when he failed to conduct a hearing and require the State to show that the testimony was within the scope of the witness's expertise. Respectfully, the trial judge's failure to conduct a hearing is preserved for appellate review.

Additionally, the "reasonable degree of ballistic certainty" is simply an example of how the witness's testimony could have been limited to within the scope of his unchallenged expertise as opposed to testifying that a particular firearm fired a particular casing. Again, the challenge was to the scope of the expert's testimony. The trial judge erred in allowing the expert to testify without requiring the State to prove that the testimony was within the scope of his expertise.

The trial judge erred in refusing to limit the opinion testimony of the expert witness in forensic firearms examination to consistencies in the comparison of the firearm and the shell casing without conducting a hearing and requiring the State to show that the testimony was within the scope of his expertise. The error was not harmless. Petitioner respectfully requests rehearing.

Respectfully Submitted,

KATHRINE H. HUDGINS
Appellate Defender

This 21st day of February, 2024.

RECEIVED
Feb 21 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES L. GINTHER,

PETITIONER

APPELLATE CASE NO. 2019-000672

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Anthony Mabry, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and James Lee Ginther, #379791, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 21st day of February, 2024.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

From: Stock, Chris
To: "amabry@scag.gov"; SC - D"ALESSIO DONNA
Cc: Hudgins, Kathrine
Subject: Ginther, J. - Petition for Rehearing - 2019-000672
Date: Wednesday, February 21, 2024 11:10:12 AM
Attachments: Ginther, J. - Petition for Rehearing - 2019-000672.pdf
Ginther, J. - Petition for Rehearing - 2019-000672 - AG Cover Letter.pdf

---

Mr. Mabry,

Please find attached for service the Petition for Rehearing for James L. Ginther's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330