RECEIVED

Apr 02 2024

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Sumter County
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 2024-UP-046 (S.C. Ct. App. Filed February 7, 2024)

Lower Court Case No. 2018-GS-43-00206

THE STATE,

RESPONDENT,

V.

JAMES L. GINTHER,

PETITIONER

APPELLATE CASE NO. 2019-000672

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on March 18, 2024.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the trial judge's refusal to limit the opinion testimony of the expert witness in forensic firearm examination to consistencies in the comparison of the firearm and the shell casing?

STATEMENT OF THE CASE

In March of 2018, the Sumer County Grand Jury indicted Petitioner, James Lee Ginther, for murder and kidnapping, indictment #2018-GS-43-0206. On April 8, 2019, Petitioner proceeded to jury trial before the Honorable R. Ferrell Cothran. Jason E. Bridges and Allen J. Barnes represented Petitioner at trial. Solicitor Ernest A. Finney, III prosecuted the case. The jury returned verdicts of guilty. Judge Cothran sentenced Petitioner to life imprisonment without parole. A timely notice of intent to appeal was served on April 16, 2019.

On May 12, 2020, counsel for Petitioner moved for an order to remand the case for a hearing to attempt to reconstruct the record as to missing witness testimony. (Supp. R. p. 1). The trial transcript reflects that a portion of the first cross examination of State's witness Investigator Randall Stewart, the entire direct and cross-examination of State's witnesses Investigator Randall Hilliard and Agent Kristina Gainey and the direct examination of State's witness Rachael Salak are not included in the record due to an equipment malfunction. (R. p. 325, lines 20-21; p. 326, lines 1-9; p. 327, lines 2-3). On June 4, 2020, this Court granted the motion to remand for reconstruction of the record. (Supp. R. p. 52). On May 4, 2022, the parties submitted to the Court a proposed stipulation as to the content of the missing testimony to take the place of the missing testimony without the need for a reconstruction hearing. (R. p. 677). In a letter dated May 11, 2022, this Court advised the parties that the case was no longer held in abeyance and directed the parties to file the initial brief of Petitioner and designation of matter within thirty (30) days. (Supp. R. p. 53). The direct appeal was perfected. On February 7, 2024, the South Carolina Court of Appeals affirmed the convictions in an unpublished *per curiam* opinion. State v. Ginther, Op. No. 2024-UP-046 (S.C.Ct.App. filed February 7, 2024).

A timely petition for rehearing was filed on February 21, 2024. The Court of Appeals denied the petition for rehearing on March 18, 2024. This petition for writ of certiorari follows.

STANDARD OF REVIEW

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the Petitioner must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

STATEMENT OF FACTS

On Thursday, November 16, 2017, the body of Suzette Ginther, Petitioner's former wife and mother of their two young children, 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). The forensic pathologist testified that she died from a single gunshot wound to the head. (R. p. 370, lines 1-8). At the time of her death Suzette Ginther was living in Cherryvale in Sumter County with her boyfriend, William Parker, and the two children. (R. p. 61, lines 13-15; p. 64, lines 3-6). Parker testified that Suzette Ginther left for work on the morning of November 16, 2017, at 4:00 AM. (R. p. 73, lines 19-25). The van Suzette Ginther drove was found abandoned on a rural road in Cherryvale. (R. p. 111, lines 6-11). The van was still registered to Petitioner. (R. p. 113, lines 2-7).

At the time of Suzette Ginther's death Petitioner was living in Columbia with his fiancé, Rachael Salak, and their infant son. (R. p. 305, lines 6-12). On Saturday, November 18, 2017, Investigator Randall Stewart, Investigator Randall Hilliard, both of the Sumter County Sheriff's Office and Agent Kristina Gainey with the South Carolina Law Enforcement Division [SLED] met with Petitioner at his home in Columbia. (R. p. 27, lines 4-14). The meeting was recorded on the investigator's body camera and introduced in evidence, over objection, as State's exhibit #62. (R. p. 302, line 10 – p. 303, lines 1-25). The fiancé, Rachael Salak, was present for most of the meeting but at one point she and Agent Gainey stepped outside. (See State's #62). Petitioner told the officers that he owned several firearms, including a Glock, and showed the officers the firearms. (See State's #62). Petitioner provided the officer with a DNA sample by a buccal swab. (R. p. 314, line 6 – p. 315, lines 1-21). Investigator Stewart testified that he also collected DNA samples from Rachael Salak and an individual named Warren Dundero. (R. p.

316, lines 3-5). Dundero lived across the street from where the van was found abandoned. (R. p. 321, line 24 – p. 322, 323, lines 1-10). Investigator Stewart admitted that Dundero had been a suspect in the murder of Suzette Ginther. (R. p. 322, line 13 – p. 323, lines 1-10).

According to Rachael Salak, Petitioner was agitated the Saturday night after the investigators left. (R. p. 681). Rachael Salak claimed that she confronted Petitioner the next day on Sunday and he suggested that Rachael tell the police she murdered Suzette Ginther as the police would be easy on her because she was a woman with bipolar disease. (R. p. 681). According to Rachael Salak, she became afraid of Petitioner and told him to leave. (R. p. 681).

Investigator Stewart testified that on Sunday, November 18, 2017, 2:10 PM, he received a phone call from Rachael Salak. (R. p.397, lines 2-5). As a result, Agent Gainey met with Rachael Salak in Columbia. Based on the interview with Salak, Investigator Stewart obtained an arrest warrant for Petitioner and entered his name, the make and model of his vehicle and the serial number of his gun into the NCIC system. (R. p. 398, lines 1-24). Petitioner was taken into custody in Louisville, Kentucky after the car he was driving, a Nissan Cube, drifted off the road. (R. p. 517, lines 12-14; p. 543, lines 4-6). Petitioner was brought back to South Carolina, along with his personal belongings. (R. p. 399, line 6 – p. 400, lines 1-3). Included with the personal belongings was the Glock firearm Petitioner showed the officers on Saturday.

ARGUMENT

The Court of Appeals erred in affirming the trial judge's refusal to limit the opinion testimony of the expert witness in forensic firearm examination to consistencies in the comparison of the firearm and the shell casing.

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). The Court of Appeals erred.

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. The 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 the Court of Appeals 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).

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. 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 Court of Appeals erred in affirming the trial judge's refusal 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.

CONCLUSION

Based on the argument above, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of April, 2024.