

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

IN THE MATTER OF THE CARE AND
TREATMENT OF BOBBY RUSSELL,

APPELLANT

APPELLATE CASE NO. 2011-204866

Appeal from Dorchester County
George C. James, Jr., Circuit Court Judge

Opinion No. 2013-UP-333

PETITION FOR REHEARING

RECEIVED

AUG 15 2013

SC Court of Appeals

The Court of Appeals affirmed the above named appellant's conviction and sentence on July 31, 2013. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Russell argued on appeal that the trial court erred in denying Appellant's motion to ask Appellant if he took a polygraph and if he passed it because a polygraph was based on the same principle as the penile plethysmograph (PPG) which was admitted into evidence, and the polygraph was not being admitted to prove guilt of a crime as Appellant had already been convicted and served his sentence.

The Court of Appeals held that the admission or exclusion of evidence is within the trial court's discretion and an appellate court may only disturb the trial court's ruling upon a showing of

manifest abuse of discretion. The Court also held that the results of polygraph examinations are generally inadmissible because the reliability of the test is questionable.

The Court misapprehended the issue.

ISSUE: Russell was charged with entering the home of a neighbor between two and three thirty a.m. on November 2, 2008. He entered the bedroom of the four year old girl and performed oral sex on her and placed his penis against her vagina. Russell was discovered in the house, and then told the father he came to apologize for an earlier event. Russell then left. R. 11, ll. 9 – 24; R. 19, ll. 1 – 25; R. 20, ll. 1 – 20.

A few minutes later, the father discovered Russell coming through the girl's bedroom window. The father then shoved Russell off of the property. R. 20, ll. 19 – 25; R. 21, ll. 1 – 12.

While Russell was out on bond on this charge, he had an ankle bracelet and went to live with his uncle. His uncle made him leave due to a disagreement they had. Russell then moved in with a woman, her boyfriend, and the woman's two year old daughter and five year old son. The two year old girl told her mother, in the words of a two year old, that Russell digitally penetrated her vagina. Then the five year old boy said Russell fondled him on at least one occasion. Russell was charged with CSC with a minor but pled guilty to two counts of committing a lewd act on a child. R. 21, ll. 14 – 25; R. 22, ll. 1 – 25; R. 23, ll. 1 – 15.

Dr. Peggy Wadman, the forensic medical director for the Department of Mental health, R. 11, ll. 18 – 24, was appointed by the court on March 7, 2011 to complete an evaluation of Russell pursuant to the SVP Act to determine if he met the legal criteria to be a sexually violent predator. Dr. Wadman testified that Russell had the mental abnormality of pedophilia, non-exclusive type as he had relationships with adult females also. Her opinion was that he was predisposed to commit future sexually violent offenses, and posed a menace to the health and safety of others. She testified

that he met the legal criteria to be a sexually violent predator pursuant to S.C. Code Section 44-48-30 which provides that a sexually violent predator (SVP) is a person who has been convicted of a sexually violent offense, and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care, and treatment. (Order for Evaluation); R. 29, ll. 16 - 25; R. 30, ll. 1 - 12; R. 31, ll. 15 - R. 33, ll. 6.

Dr. Wadman said that she relied on another evaluation completed by Dr. William Burke because Dr. Burke completed a test called the PPG (penile plethysmograph) in June 2009. In this test, a device was attached to Russell's penis and measured his response to images of children and adults. Dr. Burke's report indicated that Russell's highest sexual arousal response on the PPG was to a female child in the persuasive which meant not violent. R. 27, ll. 2 - R. 29, ll. 5; R. 44, ll. 1 - 25.

Dr. Wadman administered the Static 99 to Russell. She scored him in the moderate high risk category. R. 25, ll. 1 - R. 27, ll. 18. She also testified that Russell denied that he did any of these acts to these children. R. 45, ll. 1 - 18.

Dr. Burke testified for Russell that he examined Russell prior to Russell's guilty plea. R. 53, ll. 7 - 25; R. 55, ll. 22 - R. 56, ll. 5. Dr. Burke reported that the PPG he administered to Russell was not favorable so his plea attorney chose not to use the report. R. 56, ll. 1 - 25. Dr. Burke also administered the Static 99 which measured the risk of reoffending in the future. R. 60, ll. 5 - 25. He scored Russell in the medium low range which meant he had a nineteen percent chance of reoffending in the next fifteen years. R. 63, ll. 5 - 25.

Russell testified that he pled guilty to the fifteen years suspended to three in order to avoid a possible forty-five years he could have received with a guilty verdict at trial. When his attorney

asked him if he had taken a polygraph, the state's attorney objected. The judge called for a side bar with the attorneys, and then sustained the objection. R. 81, ll. 1 – 15. After cross examination by the state, the judge excused the jury and told Russell's attorney to continue with the questions they had discussed at side bar. The attorney told the judge he was simply going to ask Russell if he had taken a polygraph and if he passed it. The judge told Russell to answer. Russell said he did pass the polygraph. The state objected to this information being admitted because he said: "Polygraph tests are inadmissible evidence as to the truth or falsity of a particular....". R. 79, ll. 1 – R. 81, ll. 24; R. 83, ll. 24 – R. 84, ll. 13.

The judge stated that "polygraph tests are undoubtedly scientifically unreliable." R. 84, ll. 14 – 25. Russell's attorney argued that admitting a polygraph was the same as admitting the PPG because they both measure basically the same thing. They both measured a response to a stimulus by measuring breaths or blood flow. R. 85, ll. 1 – 23. The judge said that the PPG was recognized by science to be a reliable test. He said there was a case that the PPG could not be used in court to determine whether or not he was actually guilty of what he did, but it was admissible in the SVP setting. The judge said the law was that polygraphs were not reliable and were not admissible. He sustained the state's objection. R. 85, ll. 24 – R. 86, ll. 23.

In State v. Mitchell, 731 S.E.2d 889 (Ct. App. 2012), the Court of Appeals held that the admission or exclusion of evidence was a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.

In State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), the South Carolina Supreme Court held that the results of polygraph examinations were generally inadmissible because the reliability of the test was questionable.

In State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001), the Supreme Court also wrote: “However, in light of the adoption of the SCRE, we held in Council that the admissibility of polygraph evidence should be analyzed pursuant to Rules 702 and 402, SCRE, and the factors outlined in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).

In the Washington case of In re the Detention of Michael Allen Halgren, 124 Wash.App. 206, 98 P.3d 1206 (Ct. App., Division 1, 2004), the appellate court held that the expert testimony concerning the result of a penile plethysmograph (PPG) test was admissible without a *Frye* hearing a the civil commitment proceeding under the Sexually Violent Predator Act (SVPA), although the state’s expert agreed that the PPG was not generally accepted in the scientific community as a tool to predict the sex offender’s likelihood to reoffend.

Under the *Frye* test, novel scientific evidence was admissible only if it is generally accepted in the relevant scientific community. In re the Detention of Michael Allen Halgren, Id.

The trial judge in Russell’s case said the PPG was scientifically reliable, but then said it was not admissible in court to determine guilt. R. 85, ll. 24 – R. 86, ll. 9. This was contradictory. If the judge was going to prohibit the admission of the polygraph question and allow the PPG based on the belief that the PPG was scientifically reliable, he should have performed the gatekeeping role of proving the scientific reliability of the PPG which is a novel issue in South Carolina.

In State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), the Supreme Court held that pursuant to Rule 702, SCRE, the reliability of non-scientific expert testimony was part of the gatekeeping function of the trial court and should be determined prior to its admission into evidence.

In United States v. Powers, 59 F.3d 1460 (Fourth Circuit Ct App. 1995), Powers was appealing his conviction for aggravated sexual abuse of a minor in violation of 18 U.S.C. Section 2241 (c) (1988). The Fourth Circuit held that the results of the penile plethysmograph (PPG) were

inadmissible as it failed to meet scientific validity prong of test for admission of expert evidence as the government proffered evidence which indicated that the test was not scientifically valid, and the defendant failed to rebut that evidence. The defendant's expert would have testified that the results of the PPG did not indicate Powers exhibited pedophilic characteristics.

Dr. Wadman admitted that there was no DNA, nor fingerprints on the window from the first incident with the four year old girl. The only evidence from the other two cases were the word of the two year old and five year old. She testified that Russell told her he took a polygraph but she did not have the results. R. 34, ll. 10 – 66, ll. 15.

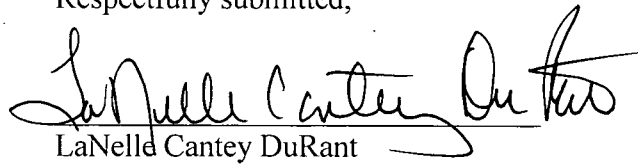
The Court of Appeals held that polygraphs are **generally** [emphasis added] inadmissible because the reliability of the test is questionable. Sexually violent predator cases have been the exception in many cases since it is a hybrid of civil and criminal law. This was seen in the case of Michael Allen Halgren, *supra*, referenced above where the appellate court in Washington held the PPG was admissible in the SVP case although it was not accepted in the scientific community.

The trial judge in Russell's case said the PPG was not admitted to determine guilt. This was in error because the jury heard about the PPG. The PPG and polygraph are similar tools because they are both used to determine truth and the results are based on the same physiological responses.

Russell was prejudiced because the state was allowed to admit the results of the PPG, so Russell should have been allowed to at least ask the question concerning the polygraph and admit Russell's answer. The jury would have weighed the credibility. If neither the PPG nor the polygraph are sufficiently scientifically reliable to be used in court to determine guilt, then the polygraph result should be admitted as long as the PPG is admitted in SVP cases.

WHEREFORE, we respectfully request the Court of Appeals to reconsider its decision that the polygraph was not admissible in Russell's SVP case.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name.

LaNelle Cantey DuRant
Appellate Defender

This 15th day of August, 2013.

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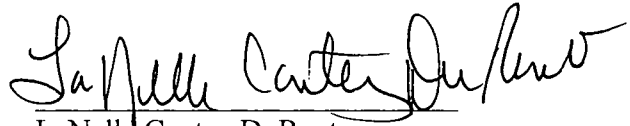
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CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, and Mr. Bobby Russell at Sexual Violent Predator Program, 7901 Farrow Road, Columbia, SC 29203, this 15th day of August, 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 15th day
of August, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.