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Aug 23 2024

SC Court of Appeals

.STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JAMES L. WILLIFORD,

APPELLANT.

APPELLATE CASE NO. 2021-000733

Opinion No. 2024-UP-270

RETURN TO THE PETITION FOR REHEARING

On July 24, 2024, this Court issued an opinion reversing the decision of the lower court in the above captioned case. *Matter of Williford*, Op. No. 2024-UP-270 (S.C. Ct. App. Filed July 24, 2024). The state filed a petition for rehearing pursuant to Rule 221(a), SCACR on August 12, 2024. Petitioner is now filing this return to the state's petition for rehearing.

This Court's well-reasoned opinion did not overlook or misapprehend any points where the Court found the lower court abused its discretion in admitting PPG results. Specifically, this Court held "the PPG is not reliable as required by Rule 702, SCRE" and the lower court's error in admitting PPG results contributed to the result of the bench trial. *Matter of Williford*, Op. No. 2024-UP-270 (S.C. Ct. App. Filed July 24, 2024).

"When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the

evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” *State v. Council*, 335 S.C. 1, 20–21, 515 S.E.2d 508, 518 (1999). The trial court should apply the *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979), factors to determine reliability. *Id.*

The state argues the Court failed to apply the correct standard of review and instead reviewed the issue *de novo*. This Court cited *In re Gonzalez*, which stated “[a]n abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” 409 S.C. 621, 628, 763 S.E.2d 210, 213 (2014) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). To warrant reversal, an appealing party must demonstrate not only error, but also prejudice. *Id.*

This Court properly found the lower court abused its discretion in admitting Dr. Gottfried’s testimony about the PPG test and results from the test given to Williford because the PPG evidence lacked scientific reliability and validity. *See generally Matter of Bilton*, 432 S.C. 157, 162, 851 S.E.2d 442, 444 (2020) (Stating “[t]he test is controversial and has been criticized for a lack of standardization and for being subject to manipulation.”). In support of the Court’s finding the lower court abused its discretion the Court cited its recent opinion, *Matter of Daily*, in that case this Court held the PPG test was not a reliable method of determining whether the offender was a sexually violent predator, and the admission was not harmless. Op. No. 6061 (S.C. Ct. App. June 12, 2024) (Howard Adv. Sh. No. 22 at 19).

Here, the Court stated the factors that the trial court should consider when determining the reliability: (1) publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) quality control procedures used to ensure reliability; and (4) consistency of the method with recognized scientific laws and procedures.

State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

The lower court erred finding Gottfried's testimony about the PPG test was admissible pursuant to the factors above. While the PPG test has long been written about, at least one publication that Gottfried mentioned specifically was not relevant to its use in this case.¹ R. 37-38. Additionally, much of Gottfried's testimony regarding this factor was that *she* had written about the test and had given presentations about the test at different conferences. However, her testimony lacked any detail about specifically what her presentations and publications discussed about the PPG test.

The lower court erred finding there was standard application based on Gottfried's testimony. While Gottfried testified that PPG testing was being used in over fifty labs across the country, she specifically admitted standardization was a problem that had not been resolved. Her testimony regarding Williford's test reflected those problems with standardization. Gottfried admitted Williford was given the entire real child voices (RCV) set although his offending pattern did not include children. Gottfried testified she started tailoring the tests for each examinee, which demonstrated that, even her lab, lacked sufficient standardization regarding how the test was administered.

The lower court erred finding that the standard for quality control procedures was met. Gottfried's testimony about quality control procedures was sparse and mainly revolved around the procedures used at the MUSC lab. Gottfried was unable to testify regarding how the test is administered in other labs around the country.

Lastly, this Court properly found the error was not harmless where Dr. Gottfried relied

¹ Gottfried mentioned a peer reviewed paper published in *Nature* on June 8, 2021. She stated that the paper "noted that the PPG may be useful as a non-invasive potential technique to evaluate penile erection in men's health." R. 37, ll. 1-11.

heavily on the PPG and her testimony emphasized its importance in her conclusions. This Court noted Gottfried's admission that she could not conduct an evaluation without the PPG. Gottfried clearly disregarded evidence that Williford remitted and focused heavily on the results from the PPG. Accordingly, this Court should deny the state's petition for rehearing where there were no points overlooked or misapprehended by this Court.

Respectfully submitted,



Sarah E. Shipe
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ATTORNEY FOR APPELLANT

This 23rd day of August, 2024.

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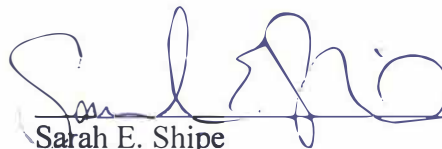
APPELLANT.

APPELLATE CASE NO. 2021-000733

Opinion No. 2024-UP-270

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Return to the Petition for Rehearing in the above-referenced case has been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on James L. Williford, at Well Path, 4546 Broad River Road, Columbia, SC 29210, this 23rd day of August, 2024.



Sarah E. Shipe
Appellate Defender

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ATTORNEY FOR APPELLANT

From: [Mcinnis, Sara](#)
To: [Deborah Shupe](#)
Cc: [Abigail Hawley-Browder](#); [Shipe, Sarah](#)
Subject: 2021-000733 In the Matter of the Care and Treatment of James L. Williford Return to Petition for Rehearing
Date: Friday, August 23, 2024 10:38:00 AM
Attachments: [2021-000733 In the Matter of the Care and Treatment of James L. Williford Return to Petition for Rehearing.pdf](#)

Good Morning Ms. Shupe,

Please find attached for service in the above-referenced case the return to the petition for rehearing, which will be filed with the Court of Appeals today, August 23, 2024, via email filing.

Thank you,

Sara McInnis

Administrative Assistant
South Carolina Commission on Indigent Defense
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