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Aug 22 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

IN THE MATTER OF THE CARE AND
TREATMENT OF ANDY EUGENE HYMAN,

APPELLANT.

APPELLATE CASE NO. 2021-000734

Appeal from Florence County

Honorable Roger E. Henderson, Circuit Court Judge

Opinion No. 2024-UP-271 (Filed July 24, 2024)

RETURN TO
PETITION FOR REHEARING

On July 24, 2024, this Court reversed Appellant's involuntary commitment to the Department of Mental Health pursuant to the Sexually Violent Predator Act in an unpublished opinion. Matter of Hyman, 2024-UP-271 (S.C. Ct. App. filed July 24, 2024). Pursuant to Rule 221(a), SCACR, the state filed a petition for rehearing on August 12, 2024. On August 13, 2024, this Court requested Appellant file a return to the petition for rehearing within ten days. This return follows.

Appellant argued on appeal that the trial court abuse its discretion by admitting evidence through the state's expert witness concerning Appellant's results from the penile plethysmograph (PPG) test he underwent as part of his precommitment evaluation since the evidence was

unreliable in violation of Rule 702, SCRE, State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999), and Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010), and the probative value of the evidence was substantially outweighed by the danger of unfair prejudice in violation of Rule 403, SCRE.

This Court correctly held “the PPG is not reliable as required by Rule 702” and “thus, the trial court abused its discretion in admitting the PPG results.” In support of this holding, the Court cited to this Court’s recent published opinion in Matter of Daily, Op. No. 6061 (S.C. Ct. App. filed June 12, 2024 (Howard Adv. Sh. No. 22 at 19)). In Daily, this Court likewise held the trial court abused its discretion by admitting Daily’s PPG test results because “the PPG is not reliable, as required by Rule 702.”

In reversing Appellant’s commitment, this Court also cited to its opinion in Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020). In Bilton, this Court recognized that the PPG is “controversial and has been criticized for a lack of standardization and for being subject to manipulation.” Id. at 162, 851 S.E.2d at 444. The Court further emphasized that “with limited exceptions . . . courts have ‘uniformly’ declared that PPG test results are ‘inadmissible as evidence because there are no accepted standards for this test in the scientific community.’” Id. at 162-63, 851 S.E.2d at 444 (quoting Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir. 2000)).

This Court also correctly held that the error of admitting Appellant’s PPG test results was prejudicial. The Court asserted that “Dr. Gottfried’s testimony regarding the result of the PPG had the appearance of scientific evidence; she described the PPG test as ‘an objective physiological measure of male sexual arousal’ and ‘the gold standard of looking at adult males sexual arousal,’ and she explained that the test was ‘a strong predictor or risk factor for future

sexual offending.”” Additionally, this Court emphasized that the state relied on the results of the PPG when it cross-examined Appellant and during its closing argument when it argued the results were enough to put Appellant in a secured facility.

In its petition for rehearing, the state generally complained this Court failed to apply the correct standard of review, overlooked evidence in the record, and misapprehended the law related to the admissibility of expert opinions. Pet. at 1. The state argued this Court’s “apparent *de novo* determination regarding the reliability and admissibility of the PPG evidence failed to analyze the extensive pretrial evidence regarding the reliability of PPG testing presented.” Pet. at 1. Appellant disagrees. This Court correctly applied the abuse of discretion standard and reversed the trial court based on the overwhelming evidence presented that the PPG is unreliable and should have been excluded pursuant to Rule 702.

During the pretrial hearing, Appellant proffered the testimony of Dr. Gehle. Dr. Gehle is a clinical psychologist with the Department of Mental Health. R. 10, ll. 15-17. She conducts precommitment evaluations pursuant to the SVPA. Throughout her career, she has conducted over two hundred evaluations. R. 10, ll. 18-24. Dr. Gehle explained that she does not use the PPG test as part of her precommitment evaluations nor does any other psychologist at the Department of Mental Health because the test is not standardized, meaning it is “given differently by different people” which “makes the results unreliable.” R. 10, l. 25 – 11, l. 12. She testified that in psychology, experts typically use standardized testing. The “hallmark of standardized testing is the IQ test.” R. 11, ll. 18-22. Dr. Gehle asserted:

It has an instruction book. It has a scoring manual. . . . Everybody is trained to give it the exact same way. Everybody is trained to score it the exact same way. There is not a lot of interpretation there. That way I know if I give . . . an IQ test I can compare it to somebody else who gave the same IQ test and I’ll know that they gave it the same way and I’ll know that the results are comparable. When you take away that standardization you don’t know how, how this person

gave the test. And in terms of the PPG . . . everybody uses different stimulus sets. The stimulus sets are the things that they're showing the person to [elicit] sexual arousal. Those vary from site to site. People use different stimulus sets. And there is no research on the stimulus set that is used at MUSC, the real child voices, to show that it's [a] valid, reliable assessment. So we don't know if when they say that they're measuring pedophilic arousal if they're actually measuring pedophilic arousal. We don't know if they, when they say they're measuring exhibitionistic arousal if they're actually measuring that because it's not been proven in research. [There is no] public research on that stimulus set. So it's similar to if I decided to give an IQ test, but I'm gonna make up my [own] words, I'm gonna make up my own, I don't know, portions of the test to give to somebody but then I'm gonna say it's an IQ test because it looks similar to other IQ tests. It's just not the way it works in psychology.

R. 11, l. 22 – 13, l. 8 (emphasis added).

Dr. Gehle further explained that one of the “primary types of reliability is test/retest. So if I give the test on one day, can I come back later and get a similar result with the same test.”

R. 14, ll. 8-13. She asserted that the “test/retest reliability” of the PPG is “very poor.” R. 14, ll. 8-17.

Moreover, Dr. Gehle testified that one of the stimulus sets used by MUSC to measure arousal, called “real child voices,” was developed by Dr. William Burke. R. 15, ll. 3-15. It includes “auditory scenarios followed by some pictures.” The auditory scenario and pictures relate to the category of arousal the psychologist is attempting to measure. For example, if the psychologist is attempting to measure pedophilic arousal, the auditory scenario may be an interaction between an adult male and a real child actor, followed by a picture of a fully clothed female child. R. 15, l. 19 – 16, l. 12. Dr. Gehle asserted that to her knowledge, there have been no peer reviewed studies on the real child voices stimulus set. R. 17, ll. 14-16. Peer reviewed studies are important because such studies would show whether the set is reliable and valid. Dr. Gehle explained that “reliability is how a test is used . . . over time so can you give the same test

and get similar results” while “validity is whether you are measuring what you say you’re measuring, what you think you’re measuring.” R. 17, l. 18 – 18, l. 3.

One of the few books that have been written about conducting sexually violent predator evaluations is *Evaluations of Sexually Violent Predators, Best Practices* by Phillip Whitt and Mary Alice Conroy. The book contains recommendations from experts in the field about how to conduct such evaluations. R. 18, l. 19 – 19, l. 23. Dr. Gehle explained that the authors recommend *against* the use of PPG testing in SVP precommitment evaluations because the reliability and validity of such testing cannot be established given that the test is not standardized. R. 21, ll. 4-16.

Lastly, Dr. Gehle testified that the PPG is often used during treatment for sex offenders. Its purpose in therapy is to “start a conversation with the offender about their arousal.” R. 20, l. 5 – 21, l. 1. Whereas, during an evaluation, the purpose of the PPG is to diagnose an offender or measure risk assessment. R. 19, l. 24 – 20, l. 4. Dr. Gehle asserted that “the stakes are very different” in a therapy setting as opposed to a precommitment evaluation. R. 20, ll. 8-17.

In response to Appellant’s motion, the state proffered the testimony of Dr. Emily Gottfried, the director of the Sexual Behaviors Clinic and Lab at MUSC. Dr. Gottfried manages the contract MUSC has with the Attorney General’s Office to conduct precommitment evaluations pursuant to the SVPA. R. 31, l. 25 – 32, l. 13. At the time of the hearing, she had completed seventeen precommitment evaluations and was in the process of conducting an additional five. R. 35, ll. 13-17. Dr. Gottfried orders a PPG be conducted on all adult men who are referred to the lab for evaluation. R. 34, ll. 5-6.

Dr. Gottfried maintained that the Sexual Behaviors Clinic and Lab is “certified by Limestone Technologies as a clinical and research laboratory” and she is a “Limestone

Technology Certified Clinical Analyst.” R. 36, ll. 10-24. Dr. Gottfried later clarified that Limestone Technologies is merely a company that developed the hardware and software used by some psychologists to conduct PPGs. R. 36, ll. 16-20. The Sexual Behaviors Clinic and Lab is not certified by “any independent agency” nor are any of the analysts, including Dr. Gottfried. R. 59, ll. 6-21.

Dr. Gottfried has written twenty-six peer reviewed articles. *One* of those articles concerns the PPG. The article compares the differences and similarities between the use of the PPG in Canada, the United States, and the United Kingdom. It does not address the reliability of the PPG. R. 33, ll. 12-17. Dr. Gottfried is also “working on a couple of studies” concerning the validity and reliability of the real child voices stimulus set, which she used during the PPG test conducted on Appellant. However, none of those studies have been peer reviewed. R. 56, ll. 12-16. Dr. Gottfried maintained that her current study, again which has *not* been peer reviewed, “found that the results of the Marshall [stimulus set] and RCV [real child voices stimulus set] were really consistent with one another. We also found that the RCV were more likely to be valid. So *if somebody is going to have a valid test* it was *more likely* to be the RCV than the Marshall.” R. 56, l. 22 – 58, l. 8 (emphasis added).

Dr. Gottfried admitted **there is no way to verify “false/positives” with the PPG**, which is why she only uses the PPG results “as one data point” in reaching her final conclusion. R. 62, l. 22 – 63, l. 12 (emphasis added). She also uses “a very conservative cut off score.” R. 63, ll. 1-2. She explained, “So the cut score is how you can tell if a test is clinically significant arousal or not. So it is a valid test? So is there millimeter of change from the baseline where they started, flaccid penis. You want it to be over a particular cut score millimeters of change before you say, like, okay that is arousal.” R. 63, ll. 13-19. Dr. Gottfried testified that the “literature”

recommends doing at least ten percent of a full erection which would be 2.5 mm.” Her lab uses 5 mm. Her “colleagues in Canada use 1 mm.” However, Dr. Gottfried emphasized that Canada does not have a sexually violent predator act so psychologists there use the PPG only for treatment. R. 63, ll. 20-25; R. 64, ll. 8-13. This testimony emphasizes again that the PPG lacks standardization.

After the proffer, Appellant’s counsel argued that while there may be studies about the use of the PPG test, there have been no peer reviewed articles about the reliability and validity of the real child voices stimulus set which was used as part of the PPG conducted on Appellant. R. 64, l. 21 – 65, l. 1. He also asserted that being certified by the manufacturer is different than being certified by an independent agency. Specifically, he stated, “I mean, the guy who invented the equipment . . . said yeah you’re using [it] the way I want it used.” R. 65, ll. 5-10. Counsel concluded that any testimony concerning the use of the PPG and its results should be excluded because the evidence is not reliable or valid, particularly when used in a high stakes evaluation like in this case. R. 65, ll. 10-14.

The trial court erroneously found the evidence was admissible. It asserted, “Mr. Falk [Appellant’s counsel], I certainly understand your concern about the results of the test, but in this particular case I’m going to find that the relevance outweighs, the probative value outweighs the prejudice so I’m going to allow the PPG test results to come in by way of your witness, Ms. Shaw [the assistant attorney general].” R. 69, ll. 14-19.

Appellant presented extensive evidence during the pretrial hearing through Dr. Gehle’s testimony and the cross-examination of Dr. Gottfried establishing that the PPG is unreliable. This Court correctly held the trial court abused its discretion by admitting the PPG test results in

violation of Rule 702, SCRE, State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999), and Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

“The admission of expert testimony is governed by Rule 702, SCRE, which provides: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

Expert testimony receives additional scrutiny relative to other evidentiary decisions. As part of this analysis, the trial court must evaluate the substance of the expert testimony and determine whether it is reliable. Id. at 446, 699 S.E.2d at 175. To determine reliability, the trial court should apply the factors outlined by our Supreme Court in State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979), including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). “Further, if the evidence is admissible under Rule 702, SCRE, the trial court should determine if its probative value is outweighed by its prejudicial effect. Id. (citing Rule 403, SCRE).

Recently, in Matter of Daily, Op. No. 6061 (S.C. Ct. App. filed June 12, 2024 (Howard Adv. Sh. No. 22 at 19), this Court likewise correctly held the trial court erred by admitting the PPG test results because the PPG is unreliable.

In Matter of Bilton, 432 S.C. 157, 162, 851 S.E.2d 442, 444 (Ct. App. 2020), this Court addressed a narrow issue regarding the admissibility of PPG test results through an expert who

did not administer or observe the PPG testing nor review the test's raw data. Id. This Court held that "due process does not allow a testifying expert to be a pipeline for someone else's scientific work to be admitted into evidence without a baseline demonstration of reliability." Id. at 167, 851 S.E.2d at 446. It concluded the trial judge abused his discretion by admitting the PPG evidence and, finding the error was not harmless, remanded for a new commitment trial. Id. at 167, 851 S.E.2d at 447.

In so holding, this Court emphasized that the PPG "test is controversial and has been criticized for a lack of standardization and for being subject to manipulation." Id. at 162, 851 S.E.2d at 444 (citing United States v. Rhodes, 552 F.3d 624, 626-627 (7th Cir. 2009) and United States v. Weber, 451 F.3d 552, 565 (9th Cir. 2006)). It noted that "with limited exceptions . . . courts have 'uniformly' declared that PPG test results are 'inadmissible as evidence because there are no accepted standards for this test in the scientific community.'" Id. at 162-163, 851 S.E.2d at 444 (quoting Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir. 2000)). This Court further emphasized that "some authorities take the position that the PPG has value in treating sex offenders but that concerns about reliability and a lack of uniform standards preclude its admission as evidence at trial." Id. at 164, 851 S.E.2d at 445 (citing Commonwealth v. Ortiz, 93 Mass.App.Ct. 381, 100 N.E.3d 790, 796-797 (2018) (collecting cases)). Other "jurisdictions have held that an expert may rely on a PPG as a basis for the expert's opinion but have expressly declined to consider whether the test results should be disclosed to the jury given the special weight the jury is likely to afford things that have the appearance of scientific evidence." Id. at 164-165, 851 S.E.2d at 445 (citing In re Commitment of Sandry, 367 Ill.App.3d 949, 306 Ill.Dec. 202, 857 N.E.2d 295, 317 (2006)).

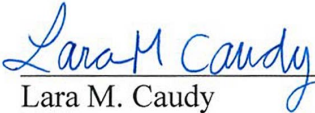
Dr. Gehle's *in camera* testimony aligns with what other jurisdictions and courts have concluded. She maintained that the PPG test is not standardized, meaning it is "given differently by different people" which "makes the results unreliable." R. 10, l. 25 – 11, l. 12. Dr. Gehle further testified that to her knowledge, there have been no peer reviewed studies on the real child voices stimulus set. R. 17, ll. 14-16. She emphasized that peer reviewed studies are important because such studies would show whether the set is reliable and valid. R. 17, l. 18 – 18, l. 3. Moreover, Dr. Gottfried even admitted there were no peer reviewed studies showing the real child voices stimulus set, which she used during the PPG test conducted on Appellant, is valid and reliable. She is merely "working on a couple of studies" in an attempt to show the validity and reliability of the RCV stimulus set. R. 56, ll. 12-16. Additionally, Dr. Gottfried admitted there is no way to verify "false/positives" with the PPG. R. 62, l. 22 – 63, l. 12. Consequently, under the framework outlined by our Supreme Court in Jones, the state failed to establish that the PPG test was reliable.

Because the PPG test and Appellant's results from the test are unreliable, Dr. Gottfried's corresponding testimony had no probative value. Assuming the evidence had probative value, it was outweighed by the danger of unfair prejudice to Appellant. Because the PPG test and its results had the appearance of scientific evidence, it is likely the jury afforded the evidence "special weight." See Bilton, 432 S.C. at 164-165, 851 S.E.2d at 445. Moreover, the state relied heavily on the results during its closing argument going so far as to argue that the result alone were "*enough to put him in a secured facility for long term care, control, and treatment.*" R. 263, ll. 21-23 (emphasis added).

Based upon the above argument, Appellant respectfully requests this Court deny the state's petition for rehearing. This Court correctly held the trial court abused its discretion by

admitting evidence of Appellant's results from the PPG he underwent as part of his precommitment evaluation in violation of Rule 702 since the PPG is unreliable and that the error prejudiced Appellant.

Respectfully Submitted,



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ATTORNEY FOR APPELLANT

This 22nd day of August, 2024.

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Aug 22 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

IN THE MATTER OF THE CARE AND
TREATMENT OF ANDY EUGENE HYMAN,

APPELLANT.

APPELLATE CASE NO. 2021-000734

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies that a true copy of the Return to Petition for Rehearing in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at her primary email address listed in the Attorney Information System (AIS), this 22nd day of August, 2024.



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

From: [Mcinnis, Sara](#)
To: [Deborah Shupe](#)
Cc: [Abigail Hawley-Browder](#); [Caudy, Lara](#)
Subject: 2021-000734 In the Matter of the Care and Treatment of Andy Eugene Hyman Return to Petition for Rehearing
Date: Thursday, August 22, 2024 10:08:00 AM
Attachments: [2021-000734 - In the Matter of the Care and Treatment of Andy Eugene Hyman - 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 22, 2024, via email filing.

Thank you,

Sara McInnis

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