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S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

January 6, 2014

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SC Court of Appeals

LaNelle Cantey DuRant
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

Re: In the Matter of the Care and Treatment of Bobby Russell
Appellate Case No. 2013-002245

Dear Ms. DuRant:

Enclosed are two (2) copies of the Return to Petition for Writ of Certiorari to the Court of Appeals, with proof of service, in the above-referenced case. If you have any questions concerning this matter, please contact me.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

DRJS/sbe

cc: Honorable Daniel E. Shearouse (original and six enclosed)
Honorable Jenny A. Kitchings
Victim Services (enclosure)

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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JAN - 7 2014

On Petition for Writ of Certiorari to the Court of Appeals
Appeal From Dorchester County
Honorable George C. James, Jr., Circuit Court Judge
Appellate Case No. 2013-002245

S.C. Supreme Court

IN THE MATTER OF THE CARE AND TREATMENT OF
BOBBY RUSSELL

Petitioner.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in affirming the circuit court's exclusion of evidence regarding the purported results of a polygraph test when Petitioner failed to lay a proper foundation, and the proffered evidence was inadmissible hearsay?

STATEMENT OF THE CASE

On November 8, 2010, Petitioner pled guilty to three counts of lewd act on a child under sixteen. The charges arose from Petitioner's 2008 sexual molestation of a four year old female, and his 2009 sexual molestation of a two year old female and her five year old brother. The 2009 molestation occurred while Petitioner was out on bond from the 2008 incident. (Record on Appeal [R.], pp. 125-134).

In accordance with the Sexually Violent Predator Act ("SVP Act"), prior to Petitioner's release from incarceration, Respondent State of South Carolina (the "State") commenced a civil commitment proceeding in the Dorchester County Court of Common Pleas on February 23, 2011. On March 7, 2011, the circuit court found probable cause to believe Petitioner met the criteria for commitment as a sexually violent predator, and appointed Peggy C. Wadman, M.D., to conduct a mental health evaluation of Petitioner. Dr. Wadman diagnosed Petitioner with the mental abnormality of pedophilia, and found he was a high risk to re-offend sexually which met the criteria for commitment under the SVP Act. (R., pp. 29-32).

The case was called for a jury trial on November 1, 2011, before the Honorable George C. James, Jr., Circuit Court Judge. Dr. Wadman testified for the State and was qualified as an expert in forensic psychiatry. (R., pp. 11-14).

As part of the evaluation, Dr. Wadman reviewed all the documentation regarding Petitioner's criminal offenses and sex offender treatment, interviewed Petitioner, and administered psychological tests designed to assess a sex offender's risk of re-offending. (R., pp.15-18). She testified she relied on information regarding Petitioner's sexual

offenses because "a person's past behavior is probably the best predictor of what somebody will do in the future." (R., p. 18).

Dr. Wadman testified that according to the records, between 2:00 a.m. and 3:30 a.m. on November 2, 2008, Petitioner entered a neighbor's home and sexually molested the neighbor's four year old daughter. The child reported Petitioner woke her up by placing his hand over her mouth, and then performed oral sex on her and placed his penis against her vaginal and/or anal area. She stated she told him "no" several times, but he kept doing it until he left her room when she started crying. The child's father found him in the home, and made him leave. While the child was telling her mother what happened, they heard a sound coming from the child's bedroom, and when the father went to investigate, he found Petitioner coming into the room through the window. The father then escorted Petitioner off the property. Petitioner was originally charged with criminal sexual conduct with a minor, but pursuant to a plea agreement, he pled guilty to lewd act on a child. (R., pp. 19-21; 133-134).

Dr. Wadman also testified that while Petitioner was out on bond from the 2008 charge, he sexually molested a two year old female and her five year old brother. The children's mother, who did not know about the pending charges, allowed Petitioner to stay in the home with her, her boyfriend and her two children. The mother questioned the children after she found child pornography on her computer. The two year old disclosed that Petitioner digitally penetrated her vagina, and the five year old son disclosed that Petitioner fondled him on at least one occasion. Petitioner was arrested, and ultimately

pled guilty to two counts of lewd act on a minor in connection with these incidents. (R., pp. 21-23;125-132).

The circumstances of Petitioner's offenses were significant to Dr. Wadman because they exhibited an "incredible level of impulseitveity (sic) and inability to control his behavior." She testified he had other significant risk factors for re-offending, including the fact that one of his victims was male, his lack of a long term relationship, his victims were not related to him, and his age at the time he re-offended against the last two victims. (R., pp. 23-27).

Dr. Wadman testified, without objection, she also reviewed and relied on an evaluation performed by William Burke, PhD., including the results of a penile plethysmograph ("PPG") Dr. Burke performed on Petitioner. She reviewed Dr. Burke's draft report, and spoke with him via telephone about the evaluation. According to Dr. Burke, Petitioner's highest reaction on the PPG was to "a female child in the persuasive." Dr. Burke also found Petitioner "had a high level of inattention and impulseitvity (sic)." (R., pp. 27-29).

Based on all the information available to her, Dr. Wadman diagnosed Petitioner with the mental abnormality of pedophilia, non-exclusive type. She stated to a reasonable degree of medical certainty that Petitioner's pedophilia pre-disposed him to commit future sexually violent offenses. She further found to a reasonable degree of medical certainty that Petitioner had serious difficulty controlling his behavior, and he was likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care and treatment. (R., pp. 29-33).

In response to questions on cross-examination, Dr. Wadman testified Petitioner told her he had taken a polygraph in connection with his criminal offenses, but she did not have the results of that test. When asked if it would affect her evaluation if the polygraph came out in Petitioner's favor, Dr. Wadman stated the fact he confessed and pled guilty to the offenses weighed more heavily in her evaluation. (R., pp. 34-36). Petitioner also questioned Dr. Wadman extensively about her reliance on Dr. Burke's evaluation, including the PPG Dr. Burke conduct on Petitioner. (R., pp. 36-51).

After the State rested its case-in-chief, Petitioner called Dr. Burke, who was qualified as an expert in the assessment and treatment of individuals with sexual disorders. Dr. Burke testified he assessed Petitioner prior to his guilty pleas on the lewd act charges. He stated he only prepared a draft report, and after Petitioner's criminal defense attorney chose not to use his report, he did not prepare a final report. (R., pp. 53-57).

Dr. Burke testified about various assessment tools he utilized in his evaluation of Petitioner, including the PPG, which he discussed in great detail. (R., pp. 58-68). He also testified he was not aware of any polygraph examination of Petitioner, and he could not give an opinion regarding whether Petitioner met the criteria for commitment as a sexually violent predator because he had no current information regarding Petitioner. (R., pp. 69-72).

Petitioner then testified about his guilty pleas, and when counsel asked him if he took a polygraph, the State objected, arguing polygraphs were not admissible on the issue of guilt or innocence. Petitioner argued the PPG essentially measured the same things as a polygraph, but admitted he did not have an expert to testify regarding the polygraph. The circuit court sustained the State's objection, finding polygraphs were not reliable, and therefore, Petitioner's testimony regarding the polygraph results was not admissible. (R., pp. 81; 84-86).

The jury found Petitioner is a sexually violent predator beyond a reasonable doubt. (R., pp. 121, 138). Based on the jury's verdict, the circuit court committed Petitioner to the South Carolina Department of Mental Health for long term control, care and treatment. (R., pp. 137). This appeal followed.

By unpublished opinion filed July 31, 2013, a panel of the South Carolina Court of Appeals affirmed the circuit court's ruling and the jury verdict. (Appendix, pp. 1-2). On September 19, 2013, the Court of Appeals panel denied Petitioner's Petition for Rehearing. (Appendix, p. 11). On December 10, 2013, Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals seeking review of the panel decision.

ARGUMENT

The Court of Appeals properly affirmed the circuit court's exclusion of evidence regarding the purported results of a polygraph test, because Petitioner failed to lay a proper foundation, and the proffered evidence was inadmissible hearsay.

Petitioner contends the circuit court erred in excluding his testimony that he passed a polygraph examination regarding the criminal charges because the State was allowed to present testimony regarding his PPG results, and the polygraph results were admissible because the polygraph measures the same thing the PPG measures. The Court of Appeals correctly affirmed the circuit court ruling on this issue.

In South Carolina, it is well established that the admissibility of evidence is within the trial court's sound discretion, and the appellate court is limited to determining whether the trial court abused its discretion. State v. Commander, 396 S.C. 254, 721 S.E.2d 413, 417 (2011) (admission of evidence is a matter within the trial court's sound discretion, and appellate court may only disturb the trial court's ruling upon a showing of abuse of discretion and probable prejudice); State v. White, 382 S.C. 265, 676 S.E.2d 684, 686 (2009) (same); State v. Price, 368 S.C. 494, 629 S.E.2d 363, 365 (2006) (same); State v. Rice, 375 S.C. 302, 652 S.E.2d 409, 415 (Ct. App. 2007) (same). An abuse of discretion occurs when the ruling is based on an error of law, or a factual conclusion without evidentiary support. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506, 509 (2005); Rice, 652 S.E.2d at 415.

As a threshold matter, Petitioner did not object to any testimony regarding the PPG. On the contrary, during his cross-examination of Dr. Wadman, and his direct examination of Dr. Burke, Petitioner elicited substantial testimony regarding how the PPG

is performed, and the results of his PPG. Therefore, Petitioner should not now be heard to use the admission of evidence he elicited as a basis for purported error by the circuit court in precluding evidence regarding a completely different test.¹

South Carolina's appellate courts have consistently held results of polygraph examinations are generally inadmissible because the reliability of the test is questionable. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30, 35 (2001). Although there is no *per se* rule against admission of polygraph evidence, "admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the Jones factors." State v. Council, 335 S.C. 1, 515 S.E.2d 508, 519-520 (1999), *cert. denied*, 528 U.S. 1050 (1999); *see also* State v. Samuel, 400 S.C. 593, 735 S.E.2d 541 (Ct. App. 2012) (same); Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771, 778 (Ct. App. 2008). The admissibility of scientific evidence depends on "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom," and whether experts applied scientifically and professionally established techniques to the solution of a particular problem, rather than relying on "untested methods, unproven hypotheses, intuition or revelation." State v. Ford, 301 S.C. 485, 392 S.E.2d 781, 783 (1990) (*citing* State v. Jones, 273 S.C. 723, 259 S.E.2d 120 [1979]).

At trial, Petitioner conceded he did not have an expert to testify regarding the scientific reliability of polygraph examinations. (TT, p. 120; R., p. 85). Further, he did

¹Petitioner's contentions the PPG and polygraph are both used "to determine truth," and the results are based on the "same physiological responses," are fundamentally inaccurate in their simplicity. There are very distinctive differences between the two tests, what they are designed to reveal, and how they measure the person's responses. In any event, Petitioner did not produce any evidence to support his contentions.

not even offer evidence from the person who performed Petitioner's purported polygraph examination. Thus, he failed to lay any foundation for the admission of polygraph evidence, in general, or Petitioner's purported polygraph examination specifically, under Rules 702 and 403, SCRE, or the Jones factors.

The only evidence proffered regarding the purported polygraph examination was Petitioner's own testimony he took a polygraph and passed it. (TT, pp. 118-119; R., pp. 83-84). The proffered testimony was self-serving, and since Petitioner could not have administered the test to himself, his testimony regarding any results was necessarily based on an out of court statement of a third party - the polygraph examiner. Petitioner offered the testimony for the truth of the matter asserted - that he passed a polygraph relating to the criminal charges - and as such, it was inadmissible hearsay. Rule 801(e), SCRE; Rule 802, SCRE.

Petitioner failed to lay a sufficient foundation for the admissibility of polygraph exam results in general, or the specific examination purportedly administered to him. The testimony he did proffer regarding his purported polygraph examination results was nothing more than self-serving, inadmissible hearsay. Evidence regarding Petitioner's PPG results was admitted without objection, and explored in depth by Petitioner himself. Therefore, admission of the PPG evidence has no bearing on the admissibility of polygraph evidence, and the circuit court properly excluded Petitioner's testimony regarding the results of a purported polygraph examination. The Court of Appeals properly affirmed the circuit court's ruling, and the Petition for a Writ of Certiorari to the Court of Appeals should be denied.

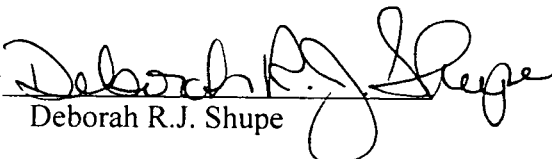
CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

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BY: 
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ATTORNEYS FOR RESPONDENT

January 6, 2014

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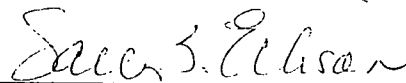
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant
Assistant Appellate Defender
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Division of Appellate Defense
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I further certify all parties required by Rule to be served have been served.

This 6th day of January, 2014.



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