ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable William H. Seals, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF MICAH A. BILTON,

APPELLANT

APPELLATE CASE NO. 2017-001464

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this SVP case, whether the trial judge erred in allowing the Attorney General's expert to testify about the results of a penile plethysmograph test that she did not give, did not observe, had not seen the raw data, and admitted that the test had not been peer-reviewed, where appellant did not have the ability to confront the psychologist who may have administered the test, in violation of due process?

STATEMENT OF THE CASE

The Attorney General initiated sexually violent predator commitment proceedings against appellant Micah Allen Bilton in Horry County and on June 15, 2017, a trial was held before the Honorable William H. Seals and a jury. Tr. 1. Christopher Andrew Morrow represented the State. Tr. 1. James Kristian Falk represented appellant. Tr. 1. The jury found appellant was a sexually violent predator and Judge Seals ordered him committed. Tr. 167, l. 23 – 169, l. 9. This appeal follows.

ARGUMENT

In this SVP case, the trial judge erred in allowing the Attorney General's expert to testify about the results of a penile plethysmograph test that she did not give, did not observe, had not seen the raw data, and admitted that the test had not been peer-reviewed, where appellant did not have the ability to confront the psychologist who may have administered the test, in violation of due process.

The State's only witness in this sexually violent predator case was Dr. Amy Swan, from Florida. Tr. 53, ll. 4 – 13. Before trial, appellant moved in limine to prohibit Dr. Swan from testifying about the results of a penile plethysmograph ("PPG") test that she did not give to appellant. Tr. 17, l. 9 – 21, l. 12. Appellant argued that he would suffer "a loss of liberty," implicating the due process clause, if he could not confront and cross-examine the psychologist who administered the PPG test. Tr. 19, l. 7 – 20, l. 13. Neither appellant's attorney nor Dr. Swan had access to the raw data underlying the PPG administration. Tr. 20, ll. 4 – 13.

The trial judge allowed the State to proffer Dr. Swan's testimony so that he could rule on its admissibility. Tr. 21, ll. 14 – 25. Dr. Swan explained generally how a PPG works. Tr. 25, ll. 5 – 23. A man is seated in a chair with a gauge around his penis to measure arousal while he is forced to look at a variety of suggestive images and listen to audio. Tr. 25, ll. 5 – 23.

She said the "biggest obstacle" to the test's reliability is a subject's attempts to deceive the test. Tr. 26, ll. 5 – 11. She said the DSM-V mentioned the PPG, but admitted that the prior version stated that the test "lacked scientific reliability and validity." Tr. 28, l. 11 – 29, l. 19. The DSM-V said that the PPG had been researched, but "there may be some variations from site to site." Tr. 27, ll. 11 – 17.

The PPG may have been administered to appellant by Dr. William Burke. Tr. 31, l. 23 – 32, l. 3. On cross-examination, Dr. Swan admitted she had no training on the type of PPG used on appellant. Tr. 31, ll. 20 – 22. She had never seen the specific data set used in this PPG. App. 31, ll. 23 – 25. She was not aware of any peer-reviewed studies regarding Dr. Burke's "Real Child Voices Stimulus set." Tr. 32, ll. 4 – 6. Dr. Swan contended the test was valid because "Dr. Burke uses the same one every time, so that's an internal reliability." Tr. 32, l. 7 – 33, l. 1.

Dr. Swan had no access to any quality control procedures. Tr. 33, ll. 5 – 8. The PPG test gives charts and printed material, but she was unable to review these documents. Tr. 33, ll. 14 – 21. She had never witnessed a PPG test performed by Dr. Burke's group. Tr. 33, ll. 22 – 24. **She had no idea if Dr. Burke even conducted or was present during the PPG's administration or whether he delegated it to an underling.** Tr. 34, ll. 3 – 11. She ultimately admitted the only information she had about the PPG test was on a written report. Tr. 34, ll. 12 – 19. She assumed that PPG testing had become more reliable because of improvements in computer technology, but when pressed, admitted she did not know why the opinion of PPG tests changed between the DSM-IV and the DSM-V. Tr. 36, l. 20 – 38, l. 4. She did not apply her own analysis to any of the results provided. Tr. 40, ll. 6 – 11. The trial judge ruled the PPG testing would be admitted. Tr. 40, l. 17 – 41, l. 24. Appellant lodged a contemporaneous objection when Dr. Swan testified before the jury. Tr. 74, ll. 1 – 4.

Dr. Swan told the jury that the results of appellant's PPG testing showed "deviant arousal" to: (1) "teen female coercive or rape scenario with a female teenager"; (2) infant females; (3) "preschool female coercive or rape scenario"; (4) "preschool male persuasive"; (5) "grammar school female persuasive"; (6) "teen female persuasive"; and (7) "teen male coercive." Tr. 75, ll. 6 – 16. She diagnosed appellant with pedophilia. Tr. 77, ll. 19 – 24. She

also told the jury appellant had depression and anxiety but clarified that these diagnoses did not affect his sexual diagnosis. Tr. 80, l. 11 – 81, l. 16.

Appellant had two sexual convictions—an ABHAN when he was sixteen years old and criminal solicitation of a minor when he was nineteen years old. Tr. 62, ll. 8 – 16. Tr. 95, ll. 13 – 22. He was only twenty-two years old on the day of his SVP trial. Tr. 135, ll. 15 – 16. If released, he planned to live with his grandfather and work for his father-in-law's business. Tr. 130, l. 4 – 131, l. 20. Dr. Swan admitted that the actuarial table she used to predict appellant's recidivism rate gave him **a seven percent chance of reoffending**. Tr. 92, ll. 2 – 14.

The trial judge erred in allowing Dr. Swan to testify about the highly prejudicial results of the PPG test. Defendants in SVP trials are entitled to protection under the due process clause. Matter of Chapman, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017). "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, 397 U.S. 254, 269 (1970). Therefore, appellant had a due process right to confrontation and cross-examination regarding the adverse results of the PPG. Appellant correctly likened the preparation of the PPG report upon which Dr. Swan relied to testimonial hearsay produced by police examiners in Crawford v. Washington, 541 U.S. 36 (2004). Tr. 19, ll. 7 – 13. The PPG test and report were prepared by Dr. Burke (or his underling) in anticipation of using it against appellant in an SVP trial.

Appellant's proffer demonstrated Dr. Swan only read and regurgitated a report and that appellant had no access or ability to cross-examine the maker of the report. The report was hearsay and offered for the truth of the matter asserted—that appellant had multiple deviant arousals to children. Rule 801(c), SCRE. In a DUI case, the United States Supreme Court examined a confrontation clause challenge to the admission of a laboratory report through an

analyst "who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on [the defendant]'s blood sample." Bullcoming v. New Mexico, 564 U.S. 647, 651-52 (2011). "We hold that surrogate testimony of that order does not meet the constitutional requirement." Id. at 652.

Dr. Swan was even less qualified than the witness rejected by the United States Supreme Court in Bullcoming because she was not familiar with Dr. Burke's procedures. She admitted she had never seen or observed a test nor did she have access to the raw data. Dr. Swan also admitted that Dr. Burke's PPG test had not been peer-reviewed. She was not even sure whether Dr. Burke performed appellant's test.

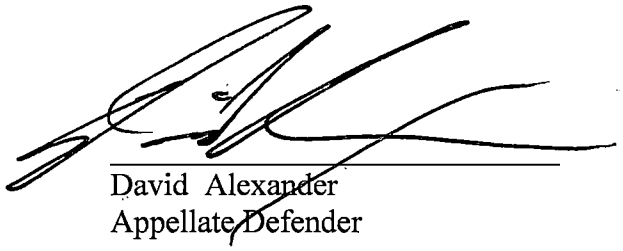
Appellant had no ability to cross-examine Dr. Burke (or the giver of the test). He had no access to the raw data or other documents generated by the testing. Nor could appellant rely on any peer-review of Dr. Burke's PPG test because none existed. In State v. McCray, 413 S.C. 76, 89-90, 773 S.E.2d 914, 921-22 (Ct. App. 2015), this Court ruled an expert's testimony violated the confrontation clause because she had no independent basis for her testimony. The DNA analyst in McCray "merely served as a conduit for introducing the results of DNA tests that were performed by an expert who did not testify." Id. The error here is more grave than McCray because DNA testing has achieved scientific reliability, while many experts consider PPG testing to be junk science and many courts prohibit its admissibility. See Jason R. Odeshoo, Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 Temp. Pol. & Civ. Rts. L. Rev. 1, 3 (Fall 2004) (noting that evidence from PPG tests have "generally not been found admissible at trial"); David H. Kaye, David E. Bernstein, and Jennifer L. Mnookin, The New Wigmore: Expert Evidence, § 8.8.2 at n.21. United States v. Powers, 59 F.3d 1460, 1470-71 (4th Cir. 1995); United States v. Medina, 779 F.3d 55, 65 (1st Cir.

2015) (discussing the problems with the reliability of PPG testing where such testing was imposed as a condition of supervised release).

Admission of the PPG testing allowed the State to paint appellant as a deviant who could not control his sexual urges. It allowed Dr. Swan to suggest to the jury that appellant was even sexually attracted to infants. In this case where appellant's underlying convictions were committed at a very young age, he received no substantial sentence from the trial judge for his most recent conviction, and he had a plan not to reoffend, the admission of these results cannot be harmless error. In cases such as these, without the ability to expose the PPG test as junk science or address any flaws in the examination procedure, the error cannot be harmless. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's commitment and grant him a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of March, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Micah A. Bilton at Correct Care, 1700 St. Andrews Terrace, Bdlg A, Columbia, SC 29210, this 19th day of March, 2018.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of March, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023