STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

---



Opinion No. 2018-UP-081 (S.C. Ct. App. Filed February 14, 2018)
Appellate Case No. 2016-000108

THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

PETITIONER

---

# APPENDIX

---

KATHRINE H. HUDGINS
Appellate Defender

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEYS FOR PETITIONER

ALAN WILSON
Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

MARGARET G. BOYKIN
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

# INDEX

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Billy Phillips, Appellant.

Appellate Case No. 2016-000108

---

Appeal From Jasper County
Michael G. Nettles, Circuit Court Judge

---

Unpublished Opinion No. 2018-UP-081
Submitted January 1, 2018 – Filed February 14, 2018

---

**AFFIRMED**

---

Appellate Defender Laura Ruth Baer, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Melody J. Brown, and Assistant Attorney General Margaret G. Boykin, all of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, all for Respondent.

---

**PER CURIAM:** Billy Phillips appeals his convictions for murder and possession of a weapon during the commission of a violent crime. On appeal, Phillips argues

the trial court erred in (1) admitting a recorded interview Phillips had with law enforcement and (2) admitting testimony from an expert in DNA analysis. We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in admitting Phillips's interview with law enforcement: *State v. Navy*, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010) ("On appeal, the trial court's findings as to custody must be upheld where they are supported by the record."); *id.* ("Whether a suspect is in custody is determined by an examination of the totality of the circumstances, such as the location, purpose, and length of interrogation, and whether the suspect was free to leave the place of questioning."); *State v. Silver*, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993) ("[C]ustody is [also] a factor to be considered in determining voluntariness . . . ."); *State v. Miller*, 375 S.C. 370, 378-79, 652 S.E.2d 444, 448 (Ct. App. 2007) ("When reviewing a trial [court's] ruling concerning voluntariness, the appellate court does not re-evaluate the facts based [up]on its own view of the preponderance of the evidence, but simply determines whether the trial [court's] ruling is supported by any evidence."); *id.* at 379, 652 S.E.2d at 449 ("A statement [made to officers] is not admissible unless it was voluntarily made."); *id.* at 382, 652 S.E.2d at 450 ("The trial [court] must determine if under the totality of the circumstances a statement was knowingly, intelligibly, and voluntarily made."); *State v. Saxon*, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973) (noting a defendant's level of intoxication when he made a statement to officers goes to the weight and credibility of the statement but "does not necessarily render him incapable of comprehending the meaning and effect of his words").

2. As to whether the trial court erred in admitting the DNA expert's testimony: *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); *State v. Ramsey*, 345 S.C. 607, 614-15, 550 S.E.2d 294, 298 (2001) ("DNA evidence may be admitted in judicial proceedings in this State in the same manner as other scientific evidence, such as fingerprint analysis and blood tests."); *State v. Primus*, 349 S.C. 576, 588, 564 S.E.2d 103, 109 (2002) ("[W]hile [a one in 174] probability is not nearly as definitive as that which has been offered in other trials, it is nonetheless highly persuasive, especially when combined with other evidence of [defendant's] guilt."), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

---

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

AFFIRMED.

SHORT, KONDUROS, and GEATHERS, JJ., concur.

4

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

APPELLANT

APPELLATE CASE NO 2016-000108

---

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

---

Opinion No. 2018-UP-081

---

PETITION FOR REHEARING

---

On February 14, 2018, this Court affirmed Appellant Billy Phillips' convictions for murder and possession of a weapon during the commission of a violent crime in an unpublished, per curiam opinion. Pursuant to Rule 221(a), SCACR, Capell respectfully petitions this Court for a rehearing of its opinion based upon the following points overlooked or misapprehended by the Court:

There were two issues before this Court: (1) Whether the trial court erred in admitting Appellant's first statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily because the investigators diluted the Miranda warnings, Appellant thought he was required to speak with the police under the terms of his probation, and Appellant was high on marijuana and drunk?; and (2) Whether the trial court erred in admitting

the DNA analyst's expert testimony regarding two items on which Appellant could not be excluded as a contributor where the danger of unfair prejudice, confusion of the issues, and misleading to the jury outweighed any probative value because they results were of such weak statistical significance? Appellant's Br., p. 1.

As this Court will recall, Phillips was accused of shooting and killing his friend, Darius Woods ("Decedent"), with Decedent's own gun, a .38 special handgun. R. 174, l. 22 – 176, l. 9; R. 518, l. 8 – 519, l. 4; R. 534, ll. 18-25; R. 650. Decedent was known to sell marijuana from his home in Ridgeland, South Carolina, and carry large amounts of cash. R. 119, ll. 2-7; R. 119, ll. 20-24; R. 259, ll. 1-2; R. 305, ll. 8-25; R. 314, l. 2 – 315, l. 13; R. 320, ll. 14-15. The prosecution theorized that Phillips murdered Decedent because he was upset that Decedent would not return Phillips' PlayStation and Phillips needed money. R. 557, l. 4 – 558, l. 9; R. 572, l. 16 – 575, l. 22. In addition to pointing out the flaws in evidence and logic in the State' case, the defense argued that the police conducted a poor investigation and blindly focused upon Phillips early on. Defense counsel suggested that the murder was committed by an unknown third party, possibly Wrenshad Anderson, whose DNA was left behind on the grip of Decedent's gun and on six swabs taken from various places on Decedent's blue jeans. R. 585, l. 13 – 609, l. 9; see R. 458, l. 8 – 471, l. 5.

**A. The record did not support the trial court's rulings that Appellant was not in custody or that to the extent Phillips was in custody, his statements were made freely and voluntarily where the investigators diluted the Miranda warnings, Appellant thought he was required to speak with the police under the terms of his probation, and Appellant was high on marijuana and drunk.**

With respect to admissibility of the video of Phillips' statement to law enforcement, this Court primarily cited to case law regarding the standard of review. Additionally, this Court cited State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973), for the proposition that "a

defendant's level of intoxication when he made a statement to officers goes to the weight and credibility of the statement but 'does not necessarily render him incapable of comprehending the meaning and effect of his words.'" State v. Phillips, Op. No. 2018-UP-081 (S.C. Ct. App. filed Feb. 14, 2018). This Court's opinion made no mention of the influence of the dilution of the Miranda[1] warnings or the Phillips' probationary status upon the voluntariness of his statement.

As discussed more fully in Appellant's brief, though not under formal arrest, Phillips was the subject of a custodial interrogation when he was questioned by investigators in the wee hours of the morning on April 19, 2013. The Miranda warnings read to Phillips were couched by telling him that he was not in any trouble and that the state "just makes" them read them. Additionally, the investigators were aware that Philips consumed alcohol and marijuana and represented to them that he was drunk and high. Though the investigators began by building a rapport with Phillips and asking him about the timeline of the day, they soon turned to questions about whether Phillips "accidentally" shot Decedent and told him that he would submit to GSR testing and a polygraph examination if he were innocent. Further, the investigators denied Phillips the opportunity to leave when he requested to do so. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). Additionally, Phillips testified that the reason he spoke to investigators is that he thought he was required to do so as a term of his probation. R. 86, ll. 2-5. Phillips repeatedly asked to speak to his probation officer or to go home and get her phone number but was not permitted to do so. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

The trial judge noted that Phillips was not under arrest and was free to leave, as he eventually did later on in the morning. It was on that basis ***only*** that the trial judge found that Phillips was not in custody. R. 93, ll. 12-17; R. 95, ll. 6-8. Thus, the trial judge ignored the body

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

of case law related to the multitude of factors to be considered in determining whether a suspect was in custody, only one of which is whether he was placed under arrest. See, e.g., State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003); State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010). Even so, the trial judge said that "given the facts of this case, if it was inferred that he [Phillips] was in custody, they gave Miranda warnings and he waived them." R. 93, ll. 16-17. Thus, he did ultimately rule upon the validity of the Miranda waiver and voluntariness of Phillips' statements and found that the State meet its burden for the admission of the statement into evidence. R. 93, l. 18 – 95, l. 17. However, this ruling was also error because the trial judge failed to give the proper consideration to the fact that the Miranda warnings were diluted, Phillips thought he was required to speak with investigators under the terms of his parole, and Phillips was under the influence of drugs and alcohol.

**Custodial Interrogation**

Phillips was in custody when he gave his first statement. "The purpose of the *Miranda* warnings is to apprise the defendant of [his or] her constitutional privilege to not incriminate [himself or] herself while in the custody of law enforcement." Evans, 354 S.C. at 583, 582 S.E.2d at 410. "Law enforcement must state the *Miranda* warnings after a person has been taken into custody or otherwise deprived of his freedom of action in any way." Id. at 583, 582 S.E.2d at 410 (internal quotations omitted). Custody occurs either upon formal arrest or under *any other circumstances* where the suspect is deprived of his freedom of action in *any* significant way. See Miranda, 384 U.S. at 444; Berkemer v. McCarty, 468 U.S. 420, 429 (1984). "To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." Evans, 354 S.C. at 583,

582 S.E.2d at 410. "The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody." Id.

In State v. Williams, 405 S.C. 263, 276-77, 747 S.E.2d 194, 201 (Ct. App. 2013), this Court provided a list of thirteen factors that courts have considered in determining whether an interrogation was "custodial," including:

> **(1) whether the contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to interview**; (2) whether the express purpose of the interview was to question the person as a witness or suspect; **(3) where the interview took place**; (4) whether the police informed the person he or she was under arrest or in custody; **(5) whether they informed the person he or she could terminate the interview and leave at any time or whether the person's conduct indicated an awareness of such freedom**; (6) whether there were restrictions on the person's freedom of movement during the interview; **(7) how long the interrogation lasted; (8) how many police officers participated; (9) whether they dominated and controlled the course of the interrogation; (10) whether they manifested a belief that the person was culpable and they had the evidence to prove it; (11) whether the police were aggressive, confrontational, or accusatory; (12) whether the police used interrogation techniques to pressure the suspect**; and (13) whether the person was arrested at the end of the interrogation.

(emphasis added). The formality of arrest is not a prerequisite to a finding of custodial interrogation. United States v. Longbehn, 850 F.2d 450, 452 (8th Cir. 1988).

Here, the trial judge failed to engage in a proper examination of the factors relevant to whether Phillips was in custody. Had he done so, it would not have been "debatable" whether Phillips was in custody. Phillips' contact with law enforcement was initiated by the police, not by Phillips, as Phillips was walking to Waffle House. He was driven to the police department in the backseat of a locked patrol car. The officer let him out the car when they got to the station and escorted him back to Investigator McIntosh's office to meet with the SLED investigators. R. 86, l. 21 – 87, l. 24; State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

While McIntosh told Phillips that he could exercise his rights "at any time," the SLED agents did not honor Phillips' request to leave made at approximately fifty minutes into the interrogation. At that point, McIntosh was no longer in the office where Phillips was being interrogated. Phillips asked if he was under arrest and the officers said "nope." Phillips said that he was going to go to the Waffle House right down the road because he was starving. Rather than let him leave, the SLED investigator responded: "We gonna to go the house first." [2] State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). Thus, while Phillips was ultimately released because law enforcement did not have probable cause for an arrest, they did not honor his right to terminate the questioning.

The SLED agents averred that the total interrogation lasted approximately one and half to two hours. However, it is notable that it was conducted in the middle of the night, starting sometime between 2:30 and 3:00 a.m. R. 70, ll. 8-10; R. 75, l. 23 – 76, l. 1; R. 78, ll. 9-10; R. 80, ll. 6-13; R. 85, l. 5. Further, if the first attempt to conduct a GSR test on Phillips occurred at 2:30 a.m. and the actual GSR test was not taken until 5:40 a.m., then the total interrogation time was over three hours, a significant difference from the investigators' testimony at the pre-trial hearing.[3] R. 351, ll. 12-23; R. 509, ll. 2-12.

The interrogation started with three officers – one investigator from the Ridgeland Police Department and two SLED investigators. However, the majority of the interrogation was conducted by the two SLED agents, who dominated and controlled the course of the interrogation. While not a constitutional violation since it was not a request for an attorney, the

---

[2] Phillips was unwilling to submit to a voluntary gunshot residue ("GSR") test until first speaking with his probation agent, whose phone number was in his cell phone at home. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

[3] The GSR kit for Phillips was not analyzed because it was taken outside of the six hour window from the alleged time of the shooting. R. 506, l. 23 – 508, l. 13.

denial of Phillips' requests to contact his probation agent is also relevant to the custody analysis. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

While the investigators began by building a rapport with Phillips, their attitude later turned both aggressive and accusatory and utilized common investigative techniques to pressure Phillips into making inculpatory statements. They invited him to say that he accidentally shot Decedent. Later they told him that he had "something heavy on [his] heart" and that he would submit to the GSR testing and polygraph examination if he was not the shooter. The investigators further pressured Phillips into writing a statement, telling him what to include after deciding what he initially wrote was insufficient. They then asked Phillips if he remembered seeing Decedent lying on the floor and eventually handed him a picture of Decedent's dead body. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). Investigator Harley admitted that Phillips was horrified upon being shown the photograph of Decedent. R. 381, ll. 1-6. Based on these factors, Phillips was the subject of a custodial interrogation. The trial judges' reliance on only the fact that Phillips was not under arrest was error.

**Dilution of *Miranda* Warnings and Involuntariness of Waiver**

*i. Dilution of Miranda Warnings*

The trial judge found that Phillips was advised of his Miranda rights. R. 93, l. 17; R. 95, ll. 2-4; R. 95, ll.10-11. At the beginning of the interrogation, Investigator McIntosh told Phillips that he was going to "read [him] something real quick before we start." McIntosh then told Phillips he had the right to remain silent, but before reading the remainder of his rights said: **"This don't mean you're in trouble or under arrest or anything, okay. But before we talk to anybody about anything, any possible witness, we have to read this. Just, State makes us do it."** It was after that attempt to downplay the seriousness of their interaction and

classification of Miranda as a mere formality that McIntosh read Phillips his Miranda rights. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

"Courts have recognized a number of circumstances under which the police can impermissibly undermine the meaning or significance of the *Miranda* warnings and fail to reasonably convey their meaning, thus negating the validity of a suspect's waiver of his *Miranda* rights." State v. Meyer, 362 P.3d 745, 752 (Wash. 2015). Courts have held confessions inadmissible, for instance, in cases where the police "downplay the relevance of the warnings and their application to the current questioning." Id. (quoting Doody v. Schriro, 548 F.3d 847, 862–63 (9th Cir.2008) (Doody I )). In State v. Powell, 282 P.3d 845, 856 (Or. 2012), the Oregon Supreme Court upheld the suppression of the defendant's statement where "[t]he officer's comments, assuring defendant as she administered the *Miranda* warnings that they were just 'a matter of housekeeping' and just 'a formality' and that 'it's ultimately up to your company how they want to handle this' negated the dispelling effect that the warnings otherwise may have had." Here, the Miranda warning was likewise undermined by the investigator's statements to Phillips that he was not in any trouble and that this was just something that the state required them to do.

*ii. Fifth Amendment Privilege Not Obviated by Probation*

Additionally, Phillips testified that he spoke with the investigators because "[a]ccording to the stipulations of [his] probation, we have to cooperate with law enforcement if we get pulled over or if there is an investigation." R. 86, ll. 3-5. The trial judge found that, rather than intoxication, it was Phillips' condition of probation that caused him to speak to law enforcement. He further noted that Phillips asked to contact his probation officer several times throughout the interrogation. R. 94, ll. 10-18; State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation).

The Fifth Amendment guarantees that no person shall be compelled in any criminal case to be a witness against himself. U.S. CONST. amend. V. In Minnesota v. Murphy, 465 U.S. 420, 425 (1984), the United States Supreme Court made clear that a state's requirement that probationer's appear and discuss matters related to their probation does not forfeit the probationer's right against self-incrimination regarding an unrelated criminal investigation.

Here, the trial judge found that the probation condition was the determinative factor in Phillips' decision to speak with the investigators. Yet, he failed to properly weigh Phillips' belief that his probation *required* his cooperation against the voluntariness of the statement. In reality, Phillips' probation could not have required him to speak with law enforcement regarding Decedent.

*iii. Intoxication a Relevant Factor to Voluntariness*

The trial judge further erred in finding that Phillips was not intoxicated during his interrogation because he was steady on his feet, his speech was not slurred, and he was able to provide rational answers to the investigators' questions. R. 93, l. 18 – 94, l. 3. Among the factors to consider is the defendant's physical condition. Greenwald v. Wisconsin, 390 U.S. 519 (1968). This Court cited State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973), which held that "proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying." However, even if Phillips' level of intoxication did not alone warrant the suppression of his statement, it was a relevant factor in determining voluntariness. See People v. Dale, 981 N.Y.S.2d 821, 823-24 (App. Div. 3d Dep't 2014) ("A defendant's intoxication at the time that he or she makes a statement while in police custody is one factor to be considered in determining voluntariness").

Here, the trial judge's finding that Phillips was not intoxicated was not supported by the evidence. The video of the interrogation reveals that Phillips told law enforcement several times that he had been smoking marijuana both with Decedent during the day and after he left the Decedent's house and that he drank Paul Wesson. The investigators made statements that the marijuana used by Phillips was "some good mix" and "Paul had you." Perhaps most telling was when one of the investigator told Phillips: **"You ain't drunk. You high."** Phillips corrected him, saying: **"No, I am. It's Saturday."** The investigator laughed while saying **"You puffin' and drinkin' at the same time."** While Phillips said "I'm good though," he had explained that he was a happy drunk and said that he can walk down the street without staggering and keep to himself. State's Ex. 58 (DVD of Phillip's 5/19/13 Interrogation). Thus, the video of the interrogation belied the investigators' testimony that they did not know that Phillips was high and drunk. See R. 74, l. 12-18; R. 81, l. 6 – 83, l. 1.

In summary, the trial judge erred in finding that Phillips was not in custody and that he validly waived his Miranda rights with respect to his first statement. Phillips was prejudiced by the admission of his first statement because, in this entirely circumstantial case, the solicitor was able to argue that his inconsistent statements to police were evidence of guilt. See R. 578, l. 9.

**B. The record did not support the trial court's admission of the DNA analyst's expert testimony regarding two items on which Appellant could not be excluded as a contributor where the danger of unfair prejudice, confusion of the issues, and misleading to the jury outweighed any probative value because they results were of such weak statistical significance.**

Regarding the admission of the DNA evidence, this Court's opinion primarily cited case law regarding the standard review. Additionally, this Court cited the following quote from State v. Primus, 349 S.C. 576, 588, 564 S.E.2d 103, 109 (2002), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005): "[W]hile [a one in 174] probability is not nearly

as definitive as that which has been offered in other trials, it is nonetheless highly persuasive, especially when combined with other evidence of [defendan"s] guilt." Notably, there was no issue raised in Primus regarding the admissibility of DNA evidence. Rather, the issues before the Supreme Court were related to subject matter jurisdiction and the propriety and harmlessness of the solicitor's comment in his closing argument regarding Primus' failure to present an alibi witness. 349 S.C. at 579, 564 S.E.2d at 104. The Primus Court found that the solicitor's comment was improper. Id. at 584, 564 S.E.2d at 107-08. It was in the harmless error analysis that the Court wrote:

> It is undisputed the victim was attacked and beaten. The question was the identity of the perpetrator. Relying solely on the "de minimus" DNA evidence, the Court of Appeals determined there was not overwhelming evidence that Primus was the assailant.
>
> We conclude there was overwhelming evidence of Primus' guilt. His fingerprint was found on the doorknob of the abandoned home. Two days after the assault, he had scratches on his face and chest which were consistent with the victim's assertion she had scratched Primus on the face and chest with a stick. Finally, the victim's blood was positively identified as being on the wooden stick she used to fend off her attacker; DNA tests determined Primus could have left the blood on the other end of the same wooden stick. According to the serologist, examining the population at random, only 1 of 174 people would match the DNA profile of the blood located on the stick. While this probability is not nearly as definitive as that which has been offered in other trials, it is nonetheless highly persuasive, especially when combined with other evidence of Primus' guilt. Accordingly, the assistant solicitor's comment, while improper, was harmless beyond a reasonable doubt.

Id. at 587-88, 564 S.E.2d at 109. There is no indication that Primus' attorney objected to the admissibility of the serology results, such that this case has little, if any, bearing on the issue before this Court.

In the present case, defense counsel argued for the exclusion of the DNA evidence with respect to two samples where Phillips could allegedly not be excluded as a contributor because, due to their weak statistical significance, their probative value was outweighed by danger of

unfair prejudice, confusion of the issues, and misleading to the jury. He further argued that the evidence improperly shifted the burden of proof to the defendant to prove himself innocent. According to the State's DNA expert, Phillips' DNA could not be excluded as a contributor to the mixtures of DNA from the swab of the handgun grip or the swab of Decedent's right front pants pocket. With respect to the gun, the probability of randomly selecting an unrelated individual who could have contributed to the mixture was one in two hundred. With respect to the pants pocket, the probability of randomly selecting an unrelated individual who could have contributed to the mixture was one in two. R. 450, l. 22 – 451, l. 9; R. 459, ll. 2-8; R. 464, l. 4 – 471, l. 5; R. 475, l. 5 – R. 476, l. 8.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. In United State v. Graves, 465 F.Supp. 2d 450 (E.D. Pa. 2006), the defendant moved to exclude DNA evidence from his trial for armed bank robbery. The government sought to introduce DNA analysis from an umbrella allegedly used and discarded by the robber and a pair of sneakers taken from Grave's girlfriend's residence that purportedly matched shoe prints from the teller counter. 465 F.Supp. 2d at 452-53. Grave's argued "because of the low statistical significance of the DNA evidence, its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues under Rule 403, FRE." Id. at 457.

The government argued in Graves that the statistical significance went the weight of the evidence rather than its admissibility. Id. The DNA report regarding the sneakers indicated the presence of DNA from three or more individuals. Id. at 453-545. The probability of selecting an

unrelated individual at random from the African American population who could be a potential contributor ("random match probability") to the mixture of DNA detected was 1 in 2,900 for the left sneaker and 1 in 3,600 for the right sneaker. Id. at 454. For the umbrella, the DNA report indicated the presence of DNA of more than one individual and listed a random match probability of approximately 1 in 2. Id.

In ruling that the DNA evidence related to the sneakers was admissible but that the DNA evidence regarding the umbrella was inadmissible, the Graves Court noted the Third Circuit Court of Appeals' recognition that "overtly probabilistic evidence is no less probative of legally material facts than other types of evidence." Id. at 457 (quoting United States v. Hannigan, 27 F.3d 890, 893 n. 3 (3rd Cir. 1994). While the Graves Court recognized that some courts have admitted DNA evidence even when the statistical significance of the data was relatively low and the probability of a random match in the relevant population was rather high, it recognized the potential danger "for the jury to misconstrue the statistical significance of the DNA evidence." Id. at 458-59. The Graves court ruled that the sneaker DNA evidence was admissible because it had a far greater random match probability and in light of the safeguards of cross-examination, proper explanations, and clarifying jury instructions. Id. at 459. However, the Court ruled that the umbrella evidence was inadmissible, writing: "In contrast, **even with appropriate safeguards, the minimal probative value of the umbrella DNA evidence-in which half of the relevant population cannot be excluded as a contributor to the DNA sample-is substantially outweighed by the danger of unfair prejudice and confusion of the issues.**" Id. (emphasis added).

In the present case, the random match probability for the handgun swab was 1 in 200 and for the pants pocket swab was 1 in 2. R. 449, ll. 1-17; R. 452, l. 22 – 453, l. 1; R. 453, ll. 13-24;

R. 470, l. 6 – 471, l. 5. Thus, the random match probability for the handgun swab was far greater than the sneakers in Graves of 1 in 2,900 and 1 in 3,600. The random match probability for the pants pocket swab was the same as the umbrella excluded in Graves. As such, the DNA evidence was likewise of low statistical significance and minimal probative value, though the jury could hardly have realized that from the solicitor's heavy reliance upon it in her closing argument. Its value did not outweigh the danger of unfair prejudice, confusion of the issues and its admission improperly shifted the burden to the defense. The jury was ultimately misled.

Additionally, it is notable that there was DNA of an unknown person on both of those swabs as well as on six other swabs from Decedent's pants. R. 462, l. 25 – R. 471, l. 5. With respect to the handgun, Gallman testified that she could not exclude Decedent, who owned the gun; officer Jason Blessing, who admitted to picking the gun up with an inside-out pair or used gloves; or Phillips from the mixture. However, there was also DNA not attributable to any of the standards. R. 446, l. 20 – 448, l. 25; R. 462, l. 25 – 463, l. 5. Gallman testified that she determined based on the evidence submitted that there were three contributors to DNA mixture. She specifically testified that her determination of the number of contributors was not based on the number of standards that she could exclude. R. 460, l. 10 – 462, l. 7. Thus, it would stand to reason that, if the mixture was of only three people and includes unknown DNA, that only two of the three persons who could not be excluded could have actually contributed to the mixture on the handgun. This seems inconsistent with Gallman's testimony: "In order for me to say that someone is not excluded, the vast majority of their information has to be in that sample." R. 478, ll. 1-3.

With the DNA evidence admitted, the solicitor relied heavily upon it in her closing, arguing to the jury that, while Gallman's testimony was "confusing," if Phillips had not touched

Decedent's gun and pockets, his DNA would have been excluded. R. 561, ll. 5-13; R. 571, ll. 10-13; R. 575, l. 23 – 576, l. 16; R. 578, ll. 1-8. On the contrary, the expert explicitly testified that she could not say that Phillips' DNA was on the handgun or pocket. R. 462, ll. 20-24. Rather, she could not exclude Phillips from the DNA mixtures on two of the swabs and provided random match probability statistics, which in this case were extraordinarily high. Notably, however, the solicitor made no mention of the statistics.

The trial judge erred in failing to exclude the DNA evidence with respect to the gun and the pants pocket. Defense counsel predicted that the evidence would be confusing and misleading to the jury, and it was. No counter-expert testimony was necessary for the judge to rule on the Rule 403 objection. Further, even if the evidentiary rules only required exclusion of the pants pocket swab with a one in two random match probability, the error in its admission was prejudicial to Phillips. He had provided the investigators with an explanation of why his DNA could have been on Decedent's gun but there was no innocent explanation for how his DNA would have gotten on the pocket of Decedent's pants.

## CONCLUSION

For the reasons set forth herein, Appellant Billy Phillips respectfully requests that the Opinion of the Court of Appeals be withdrawn, that his convictions and sentences be reversed, and that his case be remanded for a new trial.

Respectfully Submitted,

LAURA R. BAER
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

THE STATE,

RESPONDENT,

V.

BILLY PHILLIPS,

APPELLANT

APPELLATE CASE NO 2016-000108

---

Appeal from Jasper County

Honorable Michael G. Nettles, Circuit Court Judge

---

Opinion No. 2018-UP-081

---

CERTIFICATE OF SERVICE

---

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Margaret Graham Boykin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Billy Phillips, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 1st day of March, 2018.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 1st day of March, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.

# The South Carolina Court of Appeals

The State, Respondent,

v.

Billy Phillips, Appellant.

Appellate Case No. 2016-000108

---

ORDER

---

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Carol E. Short, J. J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Laura Ruth Baer, Esquire
Margaret Graham Boykin, Esquire
Isaac McDuffie Stone, III, Esquire
Melody Jane Brown, Esquire
The Honorable Michael G. Nettles

FILED

April 26, 2018