

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from York County

Honorable Daniel D. Hall, Circuit Court Judge

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IN THE MATTER OF THE CARE AND  
TREATMENT OF FRANKLIN MOSIER,

 ORIGINAL

APPELLANT  
**RECEIVED**  
OCT 04 2018  
SC Court of Appeals

APPELLATE CASE NO 2017-001345

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FINAL BRIEF OF APPELLANT

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LANELLE CANTEY DURANT  
Appellate Defender

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

ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial court err in denying Appellant's motion to exclude the penile plethysmograph (PPG) because there had not been a legal finding that it was reliable, and it was a Confrontation Clause violation because Doctor Burke, who administered the PPG to Appellant, was not going to be a witness at trial but had provided the results to Dr. Swan who testified?

## STATEMENT OF THE CASE

On June 16, 2011, the York County Grand Jury indicted Franklin Mosier on the charge of criminal sexual conduct (CSC) with a minor first degree. The offense had occurred around June 20, 2009. See State's Exhibit 1: Indictment 2010-GS-46-01533. On July 26, 2011, Respondent Mosier appeared before the Honorable Lee Alford and entered a guilty plea to the lesser charge of assault and battery of a high and aggravated nature (ABHAN) with indecent liberties. Judge Alford sentenced Mosier to ten years. The judge wrote on the sentencing sheet that Mosier must register as a sex offender and that he be evaluated as a sexually violent predator (SVP). See State's Exhibit 1: sentencing sheet dated July 26, 2011.

Prior to his release from the Department of Corrections (DOC), Appellant Mosier was referred to the Multidisciplinary Team for a determination of probable cause that he met the criteria of the Sexually Violent Predator Act to be a sexually violent predator. See Petition Pursuant to the Sexually Violent Predator Act. On March 14, 2016, Mosier consented to be evaluated pursuant to the SVP Act. Dr. Amy C. Swan of the Department of Mental Health (DMH), was appointed by the court to examine Mosier. See Consent Order for Evaluation pursuant to the SVP Act. Dr. Swan found that Mosier had two mental abnormalities. R. 90, ll. 17 – R. 91, ll. 21.

On June 12 -13, 2017, Mosier proceeded to trial before the Honorable Daniel D. Hall and a jury. Mosier was represented by Anna Rawl Browder, and the state was represented by James G. Bogle, Jr. R. 1. The jury found that Appellant Mosier met the definition of a sexually violent predator. Judge Hall signed the Order of Commitment. Mosier's attorney filed an appeal. This appeal follows.

## ARGUMENT

The trial court erred in denying Appellant's motion to exclude the penile plethysmograph (PPG) because there had not been a legal finding that it was reliable, and it was a confrontation clause violation because Doctor Burke, who administered the PPG to Appellant, was not going to be a witness at trial but had provided the results to Dr. Swan who testified.

### Relevant Facts

In 2009, Appellant Mosier spent some time around his young female cousin S. who was eight years old. Between her ages of eight to ten, the young girl described four incidents where Mosier touched her sexually. The incidents involved mainly touching her nipples, her vagina with his hands, or trying to get her to touch his penis. She described one incident when he penetrated her vagina with his hand. R. 67, ll. 15 - R. 69, ll. 10. Mosier pled guilty in 2011 to the lesser charge of ABHAN for this offense and received ten years. Because the plea judge made the finding that Mosier should be reviewed for a sexually violent predator, Mosier was evaluated for the SVP program and entered the evaluation process. R. 66, ll. 11 – R. 70, ll. 4.

In a pretrial motion, defense counsel made a motion to exclude the penile plethysmograph (PPG), from the trial. Counsel named two reasons. First, counsel argued what was a Confrontation Clause violation. Counsel argued that Dr. William Burke conducted the PPG on Mosier and provided the results to Dr. Swan. Because Dr. Burke was not going to testify, counsel could not cross examine him about how the test was done; what exact standards were used; what pictures were shown; and what percentage Mosier's penis moved during the PPG. Dr. Swan was not at the testing so counsel could not cross-examine her about those concerns. R. 13, ll. 8 – R. 14, ll. 2.

The second reason to exclude the PPG was that it had not been found to be reliable. Counsel argued that there was no case law from the Supreme Court regarding the PPG and its reliability. R. 14, ll. 3 – 9.

Counsel argued that the PPG was significant because Dr. Swan relied on the results of this PPG test as part of her evaluation of Mosier. The results were included in her report. R. 13, ll. 8 – 15.

The state argued that Dr. Burke was one of the “reigning” experts in the nation on the PPG. The state then argued that the underlying guide for all psychiatrists and psychologists was the Diagnostic and Statistical Manual. The current version being DSM-V. The state explained that the DSM-IV the year earlier, provided that the reliability and validity of the PPG had not been well established in clinical assessments. R. 14, ll 11 – R. 15, ll. 23.

Then the state explained that the PPG is in the DSM-V as being a “valuable tool most widely accepted framework for assessing the strength of paraphilia.” A paraphilia was a deviant sexual interest. The PPG was also mentioned as useful in suggesting a possible pedophilic disorder. R. 15, ll. 24 –R. 16, ll. 25.

The state then argued the issue of hearsay by claiming that under Rules 703, SCRE, and 702, SCRE, if the “testimony was necessary for the expert witness’ diagnosis, then it needed to be admissible into evidence.” The state said that was the situation with Dr. Swan and Dr. Burke. R. 17, ll. 1 -14.

The state argued that based on the “approval” of the DSM-V, case law from other jurisdictions, the mention of PPG findings in appellate South Carolina cases, and the fact that the person who gave the PPG did not have to be present under the hearsay exception for expert witnesses, that it was admissible in this case. R. 17, ll. 15 – 24.

Defense counsel responded that the DSM-V also provided that the PPG varied in sensitivity and standards. Although the state argued that Dr. Burke was a leading expert in this field, counsel could not cross examine him as to his qualifications. As to the hearsay, counsel argued that she believed that the state was trying to get the evidence in under Rule 803.4 which referred to statements made for purposes of medical diagnosis or treatment. The evidence was not statements made by Mosier but consisted of Mosier "watching something and reacting." R. 18, ll. 2 – 21.

Counsel then argued that Dr. Swan was not the one who conducted the PPG test. She obtained the results from Dr. Burke and was "taking them for exactly what he said they were." The results "go straight to the truth of the matter asserted as to whether he has a diagnosis of pedophilia or paraphilia, and as to whether he needs long-term care and control and treatment." R. 18, ll. 22 – R. 19, ll. 8.

The state then called Dr. Swan to testify in the in-camera hearing. Dr. Swan testified in – camera that she was a forensic psychologist. R. 20, ll. 3 – 23. She explained the PPG:

A penile plethysmograph is an instrument that measures sexual arousal by placing a string gauge on a man's penis and then showing them different scenarios. These would include pictures of infants, males and females, preschool males and females, grammar-school males and females. These pictures are all clothed. There's nothing inherently sexual about them but for each of the scenarios is labeled either persuasive which would mean in a more seductive context, and coercive which would be more of a rape context.

When the individual views these pictures his arousal is measured and they do that by establishing a base line of his arousal to a neutral subject such as a house or tree. Then they measure the percentage of increase in that arousal when he views these different scenarios of different age groups.

R. 21, ll. 2 – 20.

Dr. Swan then said that the” Penile Plethysmograph has been around since the 1950s and it is reasonably relied on by individuals who do the kind of work that I do.” R. 21, ll. 20 – 23. She continued to testify that the research on risk assessment of interest in children measured by the PPG was “the greatest indicator of sexual re-offense.” R. 21, ll.24 – R. 22, ll. 2.

Dr. Swan then cited the DSM-V that in measuring the “possible presence of pedophilic disorder,” the “most thoroughly researched and longest was the use of such measures as the PPG although the sensitivity and specificity of diagnoses may vary from one site to another, not from one individual to another.” R. 25, ll. 13 – 21.

When questioned about quality control methods for the PPG, Dr. Swan stated that the gauge was calibrated each time so they “zero out” the gauge so there was no data remaining that could influence the measurements. She continued to explain that there were opportunities to recalibrate if something unforeseen happened. R. 26, ll. 13 – 25.

The doctor testified that the PPG confirmed the sexual crimes that Mosier had committed. The PPG indicated that Mosier’s greatest level of deviant arousal was to preschool and grammar-school females. R. 27, ll. 11 -16.

On cross-examination concerning calibration, when asked if the machine did the calibration, Dr. Swan explained that the examiner “must know how to run the machine and must do certain things in sequence so that the test is administered according to proper procedure.” She stated that calibration was the foremost thing that must occur prior to administering the PPG test. She did not know of anyone who skipped that step because it would be “malpractice” if they did. R. 29, ll. 8 – 24.

Dr. Swan said that Dr. Burke had been doing these for many years and does them every day as that was “pretty much all he did.” However, she admitted that if Mosier had gone to a

different site, it was possible that his results would have been different since the sensitivity and standards could vary. Dr. Swan admitted that she was not at the test when it was administered to Mosier. R. 29, ll. 1 – 17.

The trial judge denied defense counsel's motion to exclude the PPG results. The judge ruled that the PPG results would be admitted because the facts or data that this expert "contends is in that report from the other doctor is of a type that's reasonably relied upon by experts in her particular field." R. 35, ll. 13 – 21. Regarding the Confrontation Clause, the judge ruled that Rule 703 addressed the admissibility of evidence relied upon by experts. He said that included the Confrontation Clause. R. 35, ll. 25 – R. 36, ll. 4.

Dr. Swan was the only witness presented at trial. R. 2. During her testimony, she described the qualifying offense for the Sexually Violent Predator Act. In 2009, Appellant Mosier spent some time around his young female cousin S. who was eight years old. Between her ages of eight to ten, the young girl described four incidents where Mosier touched her sexually. The incidents involved mainly touching her nipples, her vagina with his hands, or trying to get her to touch his penis. She described one incident when he penetrated her vagina with his hand. R. 67, ll. 15 – R. 69, ll. 10. Mosier pled guilty in 2011 to the lesser charge of ABHAN for this offense and received ten years. Because the plea judge made the finding that Mosier should be reviewed for a sexually violent predator, Mosier was evaluated for the SVP program and entered the evaluation system. R. 66, ll. 11 – R. 70, ll. 4.

Prior to that offense, the doctor described another offense that occurred in 1998. That offense involved a ten year old neighbor girl who claimed that Mosier was playing outside with her and her sister. Mosier allegedly ran into an old trailer with her and penetrated her "private part." The evaluation showed that the girl did suffer penile penetration. R. 63, ll. 17 – R. 65, ll. 2.

Mosier was indicted for CSC with a minor first degree but pled guilty to ABHAN in 2000. He was sentenced to seven years suspended to five years probation. R. 62, ll. 1 – 25.

Dr. Swan had Dr. Burke conduct the PPG test on Mosier as part of Dr. Swan's comprehensive evaluation. Dr. Swan reported that Mosier's PPG matched with what he told her in his interview. He had told her that about sixty percent of his arousal was to adult females and forty percent to children between the ages of five to seventeen. The PPG showed that his greatest arousal was to adult females but he also had a significant arousal to pre-school and grammar-school females. R. 73, ll. 13 – R. 103, ll. 7.

Dr. Swan also administered the Static 99-R risk assessment test to measure Mosier's risk of reoffending. Mosier had a high risk of reoffending as his risk was in the 94<sup>th</sup> percentile. R. 83, ll. 1- R. 86, ll. 3.

Dr. Swan diagnosed Mosier with two mental abnormalities. The first one was pedophilic disorder, and the second one was specified paraphilic disorder which was an attraction to teenage girls. These diagnoses were based on all of the documents she reviewed; her interview with Mosier; the PPG done by Dr. Burke; and the Static 99 score. R. 90, ll. 1 – R. 91, ll. 1. In addition, she diagnosed Mosier with an anti-social personality disorder. R. 91, ll. 4 – 7.

Dr. Swan rendered her opinion that Mosier met the criteria pursuant to the Sexually Violent Predator Act to be a sexually violent predator. She believed that he was likely to engage in acts of sexual violence unless he was confined in a secure facility for long-term control, care and treatment. R. 92, ll. 1 – 20.

On cross-examination, Dr. Swan admitted before the jury that she did not know if Dr. Burke calibrated the PPG gauge before the test. However, she said again that that was the first thing a PPG examiner did. She also admitted that she did not know if the gauge had to be

recalibrated during the test. R. 106, ll. 4 – R. 107, ll. 18. Dr. Swan stated that the PPG may be inconsistent with a person’s history of behavior but that did not necessarily mean that the test was not reliable. R. 108, ll. 2 – 24.

At the close of the state’s case, defense counsel renewed all pretrial motions and specifically the one regarding the admissibility of the PPG. Then Appellant’s counsel made a motion for a directed verdict which the judge denied. R. 129, ll. 15 – 25.

The jury found that Appellant Mosier was a sexually violent predator pursuant to the Sexually Violent Predator Act. R. 174, ll. 5 – 23.

Mosier’s counsel renewed all motions and asked for a new trial following the jury’s which the judge denied. R. 175, ll. 25 – R. 176, ll. 8.

**Discussion**

The SVP Act at Section 44-48-30 provides that a sexually violent predator has been convicted of a sexually violent offense and “suffers” from a mental abnormality that makes a person likely to engage in sexually violent offenses if not confined in a secure facility for long term control, care and treatment.

The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant to confront witnesses against him, and this includes the right to cross-examine witnesses. State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009); U.S.C.A. Const. Amends 6, 14.

In Holder, id., the Supreme Court held that the admission of the police investigator’s testimony as to what Holder’s co-defendant told the investigator during his interrogation violated Holder’s Confrontation Clause rights. The court wrote that in Bruton v. United States, 391 U.S. 123 (1968), in a joint trial, the admission of a non-testifying co-defendant’s statement that

expressly inculpated the defendant violated the defendant's rights under the Confrontation Clause.

Although Mosier's case did not involve the Bruton situation as a co-defendant was not involved, the Bruton decision showed the importance of the Confrontation Clause and a defendant being able to cross-examine a witness.

In State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), the Supreme Court held that the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under the Rule 702, whether the evidence is scientific or nonscientific. The Court went on to hold that in the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The Court ruled that the familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

Rule 702, SCRE, 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.

State v. White, *supra*.

In State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) and State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979), the trial court must determine whether the "underlying science is reliable." Council at 20, 515 S.E.2d at 518. In making this determination, the court should examine "(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." Id.

In State v. Spencer, 459 S.E.2d 812, 815 (N.C. Ct. App. 1995), the North Carolina Court of Appeals ruled that “We agree with the trial court that the evidence before it by no means established the reliability of the plethysmograph; there is a substantial difference of opinion within the scientific community regarding the plethysmograph’s reliability to measure sexual deviancy.” The Georgia Court of Appeals ruled in Gentry v. State, 443 S.E.2d 667, 669 (Ga. Ct. App. 1994) that “Given the rejection of penile plethysmograph evidence by other states, and particularly the uncertainty within the scientific community of its reliability, we hold that it is inadmissible in Georgia.”

In Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9<sup>th</sup> Cir. 2000), the Ninth Circuit held: “In fact, courts are uniform in their assertion that the results of penile plethysmographs are inadmissible as evidence because there are no accepted standards for this test in the scientific community.”

In the case In the Matter of the Care and Treatment of Christopher Taft, 413 S.C. 16, 774 S.E.2d 462 (2015), the trial court had appointed one expert, Dr. Rebecca Jackson, to evaluate Taft to determine if he met the criteria for the Sexually Violent Predator Program. When Dr. Jackson determined that Taft did not, the state obtained another expert, Dr. Gregg Dwyer. The state asked for a continuance claiming that Dr. Dwyer did not have time to complete the evaluation due to his move. Prior to the trial beginning, the trial court granted Taft’s motion to exclude the evaluation report because it was authored by Dr. Dwyer and Dr. William Mulbry who had been retained by the state due to the “continued difficulties” with Dr. Dwyer’s schedule. The trial court also excluded any testimony about the evaluation from anyone except Dr. Dwyer who the state acknowledged was not prepared to testify at trial. The Supreme Court granted a directed verdict to Taft because there was insufficient evidence to establish that Taft had a

present risk of reoffending. The evidence the state had since Dr. Dwyer did not testify, was the report of an expert from two years earlier.

Mosier's case is similar in that the expert who conducted the PPG test did not testify at the trial. The court in this case had appointed Dr. Swan to do the evaluation. She obtained Dr. Burke to perform the very significant PPG test. Dr. Burke did not testify but his findings were presented by Dr. Swan just as the state tried to do in Taft's case. Drg. Swan did not know the details of the testing such as if recalibration of the gauge was needed during testing.

Rule 702 specifically provided that the expert who performed the test "may testify." No evidence was presented to the court as to Dr. Burke's qualifications as an expert. Respondent's counsel could not question Dr. Burke as to his qualifications to administer the PPG.

Dr. Swan testified that the results of the PPG could vary from site to site depending upon the qualifications of the examiner. R. 28, ll. 11 – R. 29, ll. 24. Thus the examiner was most important in having reliable and meaningful results. As the examiner, Dr. Burke needed to testify and present the results he found in addition to his qualifications as an expert in PPG.

The PPG should not have been admitted because its reliability has not been proven. Sufficient evidence was not submitted to the court concerning the reliability of the PPG for the trial judge to satisfy his gatekeeping role to determine the reliability of evidence before it goes to the jury.

**CONCLUSION**

Based on the above, the order of the trial court committing Appellant Mosier to the SVP Program should be vacated.

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant".

LaNelle Cantey DuRant  
Appellate Defender

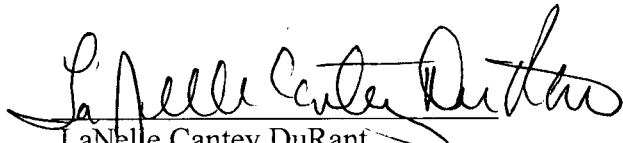
ATTORNEY FOR APPELLANT

This 4th day of October, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 4, 2018

  
LaNelle Cantey DuRant  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
P.O. Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Final Brief of Appellant 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, this 4th day of October, 2018.

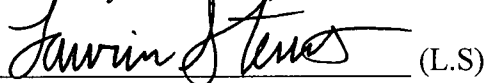


LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 4<sup>th</sup> day of October, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 5, 2027.