

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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MAY 13 2019

Appeal from Pickens County
Court of General Sessions

S.C. SUPREME COURT

Brian M. Gibbons, Circuit Court Judge

Appellate Case No.: 2019-000500

The State, Respondent,

v.

Suzanna Brown Simpson, Petitioner.

AMENDED PETITION FOR CERTIORARI

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Counsel for Petitioner

Statement of the Case

The Petitioner was indicted for the murder of her two children, and the attempted murder of her husband along with being in possession of a weapon during a violent crime. The Petitioner proceeded to a jury trial in Pickens County on June 20, 2016. At trial the Petitioner was represented by John Mauldin, Public Defender, Teal Johnson, and Jacob Goldstein of the Public Defender's Office. The State was represented by Walter Wilkins, Solicitor and Betty C. Strom, Deputy Solicitor, for the 13th Judicial Circuit. The case was tried before a jury, the Honorable Brian M. Gibbons, presiding. The jury returned a verdict of guilty on all charges and the Petitioner was sentenced to two life sentences, a thirty year sentence, and a five year sentence, all consecutive. The Petitioner timely appealed and J. Falkner Wilkes substituted as counsel for the Petitioner. The court of appeals heard the case and issued an opinion affirming the Petitioner's conviction. The court of appeals denied rehearing and this petition follows:

Questions Presented for Review

- A. Did the trial court err in admitting expert forensic testimony where the state failed to timely disclose the forensic examination or testimony to the defense?
- B. Did the trial court err in admitting expert forensic testimony where the documents underlying the expert's testimony were unlawfully seized?
- C. Did the trial court err in admitting forensic testimony where state expert was not qualified as an forensic expert?
- D. Did the trial court err in excluding comment by defense expert that the treating physician concurred in his analysis?

The decisions of the lower courts are contrary to state and federal law relating to examinations involving expert witnesses, the improper seizure and disclosure of protected health records without proper notice, and related impact on the Petitioner's ability to present an adequate defense as a matter of due process. The unique facts of this case further present additional interesting and novel issues as to the particular procedure used by the state in this case to circumvent notice to the defense of expert testimony as matters of due process and public policy.

Argument

A. The Court Erred in Admitting Forensic Testimony of the State's Expert Witness.

Despite the case pending for over three years it was not until the beginning of trial that the defense discovered that the Petitioner's former treating psychiatrist, Dr. Smith, was a potential state witness. Even then the state refused to disclose the nature of Smith's potential testimony and did not call him in its case-in-chief. Despite admitting that Dr. Smith could not be qualified or offered as a forensic expert on the issue of sanity in the case the state nevertheless called Dr. Smith in rebuttal to present what was unquestionably forensic testimony. Despite not having seen the Petitioner for three months prior to the incident, and then for only eight minutes, Smith opined that at the time of the incident the Petitioner "knew right from wrong but was unable to conform her conduct to the behavior of the law." Dr. Smith's testimony was clearly forensic in nature.

The defense presented three experts in forensic psychiatry. Each opined that at the time of the incident the Petitioner could not distinguish between right and wrong. While able to opine on the sanity issue directly, the defense experts were unaware of Dr. Smith's potential testimony or opinion. This

made it impossible for the defense to have its experts comment on Smith's qualifications, analysis, or opinions. As a result, this combined with the state calling Smith in rebuttal, prevented the defense from effectively challenging Smith's testimony. The state's "hiding" of its expert witness until the day of trial, and even then its refusal to disclose the purpose of Smith's testimony until after the defense had rested, violated the underpinnings of both Rule 5, SCRCrimP and due process. Rule 5, SCRCrimP, provides:

Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any *results* or reports of physical or *mental examinations*, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the prosecution, *the existence of which is known*, or by the exercise of due diligence may become known, to the attorney for the prosecution, and which are *material to the preparation of the defense* or are intended for use by the prosecution as evidence in chief at the trial.

Rule 5(1)(D) Reports of examinations and tests.

Despite being the Petitioner's treating physician Dr. Smith was presented as a surprise forensic expert rather than a fact witness. The record shows that Smith was specifically asked to perform a forensic analysis based in part on the Petitioner's protected health records seized by the state. Dr. Smith's forensic evaluation was known to the state but never disclosed to the defense. The court of appeals opinion fails to address the impact on due

process of the state's failure to disclose Dr. Smith's forensic evaluation, or the state's holding Dr. Smith's testimony for rebuttal to prevent the defense expert witnesses from being called on to challenge Smith's qualifications or opinions. Here the combination of the two prevented the defense the ability to offer a meaningful defense and thus violated the Petitioner's right to due process.

B. The Court Erred in Admitting Testimony of State Expert Based on Evidence Obtained in Violation of State and Federal Privacy Laws as well as the Fourth Amendment.

The opinion of the court of appeals further fails to fully address the impact of the unlawful manner in which the state obtained the Petitioner's records relied on by Dr. Smith. In this case SLED obtained the Petitioner's mental health records from numerous providers in violation of state and federal law. In particular, the manner of obtaining the records without consent or notice to the Petitioner furthered the state's ability to offer Dr. Smith as a surprise forensic expert. Absent the defendant's consent SLED could not lawfully obtain the defendant's mental health records except by court order (or other enumerated means under both state and federal law) which it clearly did not have at the time of the seizure. Obtaining a court

order would have required notice to the defendant. Such notice and hearing would have required the state to disclose the purpose for which it sought the Petitioner's records. This notice would in turn have allowed the defense experts the opportunity to evaluate and criticize the qualifications and opinion of Dr. Smith even though he was not called in the state's case-in-chief.

The state avoided any notice of Smith's testimony through the unlawful seizure of her records. This allowed the state to conceal the purpose for which the records were sought, which clearly was intended to allow Dr. Smith to conduct a forensic mental evaluation. SLED's seizure of the defendant's mental health records therefore violated the defendant's statutory right to privacy under both state and federal law and allowed the state to offer surprise expert testimony in a way in which the defense could not anticipate or challenge. The unlawful seizure therefore caused substantial prejudice to the defense in this case.

The opinion below failed to address the Petitioner's arguments as to the sound reasoning applied by courts of other jurisdictions in dealing with the unlawful seizure of protected health information. In Florida courts have applied the exclusionary rule in response to such violations:

Given the fact that these statutes were passed into law over

a decade ago, and that the State Attorney's Office for the 15th Judicial Circuit has handled similar cases and is well aware of the mandated procedures, it is almost incomprehensible that law enforcement proceeded in the manner as they did herein. Other than one's expectation of privacy in one's personal effects and papers in our homes, Americans next most hold as intensely personal and private the status of their health, medical treatment, medical advice and therapy.

Suppression is the only remedy to sanction this police misconduct and deter similar misconduct. The danger of the law enforcement practices in this case are amply demonstrated by the willingness of medical professionals to surrender private medical records and engage in discussions regarding private and privileged communications concerning their treatment of individuals on the mere naked display of authority by law enforcement. Without court intervention and review as mandated by statute, countless innocent patient records are subject to examination and review by well-meaning but misguided law enforcement officials.

State v. Sun, 82 So. 3d 866, 874 (Fla. Dist. Ct. App. 2011).

The Sun Court went on to reason that the application of the exclusionary rule, where there has not been a good faith effort to comply with subsection 456.057(8), should instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of a patient. State v. White, 660 So.2d 664, 666-67 (Fla.1995) (*quoting United States v. Leon*, 468 U.S. 897, 919, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (*quoting Michigan v. Tucker*, 417 U.S. 433, 447, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974)))” State v. Sun, 82 So. 3d 866, 874 (Fla. Dist. Ct. App. 2011).

Based on the same reasoning as seen in Sun, in another similar case the Florida Court suppressed the testimony of doctors where police had unlawfully obtained protected medical information about the defendant, stating: "Under the circumstances we can neither agree with the State that it acted in good faith nor disagree with the trial court's determination that it failed to so act. The medical records secured from Dr. Shapiro, comprised of both his and Dr. McKnight's records, were properly suppressed." State v. Strickling, 164 So. 3d 727, 734 (Fla. Dist. Ct. App. 2015).

In the present case Dr. Smith performed a forensic psychiatric examination based on medical records obtained by SLED in violation of the defendant's right to privacy. The court of appeals failed to consider that included in the right to privacy is the right to notice. Regardless of whether the right to privacy must yield to the interests of justice in any particular case, it may not do so without proper notice. Inherent in the right to proper notice is full disclosure of the purpose for which the records are sought. Violation of the statutory provisions protecting the right to privacy, as well as protections provided under the Fourth Amendment, allowed the state to use protected information in a way that prevented the Petitioner from challenging key testimony and thus presenting a full defense.

The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: “(T)he ruptured privacy of the victims’ homes and effects cannot be restored. Reparation comes too late.” Linkletter v. Walker, 381 U.S. 618, 637, 85 S.Ct. 1731, 1742, 14 L.Ed.2d 601 (1965). Instead, the rule’s prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures: “The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” Elkins v. United States, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960). *Accord*, Mapp v. Ohio, *supra*, 367 U.S., at 656, 81 S.Ct., at 1692; Tehan v. United States ex rel. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453 (1966); Terry v. Ohio, 392 U.S. 1, 29, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968). In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. In this case the application of the exclusionary rule serves the interests of justice.

C. The Trial Court Erred in Allowing the State Witness to Give Forensic Testimony and Offer Opinion on Sanity Where the Witness Was Not Qualified as a Forensic Expert.

The trial court erred in allowing the testimony of an expert witness to exceed the scope of his qualifications. Although not offered as a forensic expert, nor qualified as one, the defendant's treating psychiatrist was allowed to give forensic opinion testimony.

The issue of sanity at the time of the offense is, by its nature, a forensic question. Forensic psychiatry is a specific area of psychiatry for which there is a board certification. Dr. Smith was not board certified in forensic psychiatry, nor did he practice forensic psychiatry. The state admitted that he could not be qualified as an expert in forensic psychiatry. A. 653-654. After extensive *voir dire* Dr. Smith was qualified only as an expert in general psychiatry. A. 725. Although not qualified in forensic psychiatry, Smith was allowed to render a forensic opinion as to the Petitioner's sanity as of the time of the incident. This exceeded the scope of the court's qualification of Dr. Smith.

Once a witness is qualified as an expert, continued objections to the amount or quality of the expert's knowledge, skill, experience, training, or education go to weight of the expert's testimony, not its admissibility. *Id.* State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011). But the

court must first address whether an expert is qualified on the topic for which he is testifying or opining. “Before a witness is qualified as an expert, the trial court must find (1) the expert's testimony will assist the trier of fact, (2) the expert possesses the requisite knowledge, skill, experience, training, or education, and (3) and the expert's testimony is reliable. State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009).” State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011). Here the trial court did not make the requisite findings as to Dr. Smith’s qualifications in forensic psychiatry. Nor did the trial court qualify Smith as an expert in forensic psychiatry. Rule 702, SCRE, provides that a witness *qualified as an expert* may testify when scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. Without the requisite findings and qualification of Dr. Smith as an expert on the issue of forensic psychiatry, he could not testify as to the issue of sanity at the time of the incident, many months after he last saw the Appellant as a patient.

The opinion below rests on a determination that Dr. Smith is qualified to testify as an expert in forensic psychiatry. This however is contrary to the scope of Smith’s qualifications as found by the trial court. The qualification of a witness as an expert is within the sound discretion of the trial court and will

not be reversed absent an abuse of discretion. State v. Caldwell, 283 S.C. 350, 352, 322 S.E.2d 662, 663 (1984); State v. Goode, 305 S.C. 176, 177–78, 406 S.E.2d 391, 392–93 (Ct.App.1991). Here the Court of Appeals opinion overlooks the scope of Dr. Smith’s area of expertise. In effect the court of appeals’ decision overrules the scope of Smith’s qualification as determined by the trial court where no error as to the scope of Smith’s qualification was raised by the State at trial.

D. Trial Court Erred in Excluding Critical Testimony by Defense Expert as to Statements by State Expert.

The defense offered testimony by Dr. Price that Dr. Smith, Petitioner’s treating physician, had previously indicated his agreement with Dr. Price’s analysis and opinion. The trial court excluded this testimony. The Court of Appeals affirmed, holding that the testimony constituted improper bolstering. In doing so the lower courts have overlooked the fact that Dr. Smith testified at trial, was subject to cross-examination, and the statement offered through Dr. Price was inconsistent with Dr. Smith’s subsequent testimony in rebuttal on the issue of the defendant’s sanity. Dr. Price’s testimony as to Dr. Smith’s previous concurrence was admissible under Rule 801(d)(1) which provides in pertinent part: “The declarant testifies at the trial or hearing and is subject

to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony." Rule 801, SCRE. Dr. Smith was present to testify and would be subject to examination concerning his prior statement. Dr. Smith's prior statement that he was in agreement with Dr. Price's analysis therefore does not constitute heresy.

The lower courts are in error in finding that Price's testimony was an attempt to bolster the testimony of another witness (himself) under State v. McKerley. In McKerley one witness testified that she found another witness' testimony to be credible. See State v. McKerley, 397 S.C. 461, 463, 725 S.E.2d 139, 141 (Ct. App. 2012). In this case Dr. Price, as a forensic expert, was commenting on Dr. Smith's prior statement that he was in agreement with Dr. Price's analysis.

As an independent expert, Price's testimony about Dr. Smith's prior opinion did not constitute improper bolstering: "In Brown, however, this court clearly 'distinguished improper bolstering in cases involving experts who themselves conducted the forensic interview from cases involving independent mental health experts who addressed general behavioral characteristics.' State v. Barrett, 416 S.C. 124, 129, 785 S.E.2d 387, 389 (Ct. App. 2016) (*citing* Brown, 411 S.C. at 343-45, 768 S.E.2d at 252-53)." State v.

Jones, 417 S.C. 319, 335, 790 S.E.2d 17, 25 (Ct. App. 2016), *aff'd as modified*, 423 S.C. 631, 817 S.E.2d 268 (2018). Exclusion of Dr. Price's testimony based on the grounds of hearsay or bolstering was therefore error.

The opinion of the Court of Appeals further overlooks the fact that while Dr. Price may have formed a preliminary opinion prior to speaking with Dr. Smith, he appears to have subsequently considered his discussion with Dr. Smith in formulating his own opinion as given at trial . R. 443, l. 8-12. Even though his opinion on sanity at trial may have been the same as his opinion prior to talking to Dr. Smith, Smith's comments were nevertheless relevant to the opinion he expressed at trial. Excluding that prior statement by Dr. Smith prevented Dr. Price from testifying to a part of the underlying basis for his opinion at trial. It also closed the door to any possible means by which the defense could offer evidence through its experts to challenge the testimony of Dr. Smith.

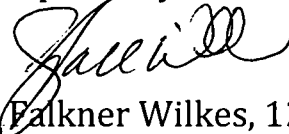
An expert may testify as to matters of hearsay for the purpose of showing what information he or she relied on in giving an opinion of value. In re Manigo (S.C.App. 2010) 389 S.C. 96, 697 S.E.2d 629, *rehearing denied*, *certiorari granted*, *affirmed* 398 S.C. 149, 728 S.E.2d 32. Here Dr. Smith was the defendant's treating physician. The hearsay rule does not preclude a

forensic psychiatrist from testifying as to what was learned from a defendant's treatment provider. This would include Dr. Smith's prior agreement with Dr. Price's analysis. In the present case Dr. Price's testimony, as to what he had been told by Dr. Smith, both as the defendant's treating physician and the State's surprise forensic expert, was admissible and its exclusion prevented the Petitioner from being able to present a meaningful defense.

CONCLUSION

Based on the foregoing the Petitioner moves this Court to grant the petition, reverse the decision of the lower courts, and grant the Petitioner a new trial.

Respectfully submitted,



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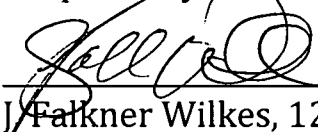
Suzanna Brown Simpson, Appellant.

CERTIFICATE OF COUNSEL

I certify that a petition for rehearing or reinstatement was made and finally ruled on by the Court of Appeals.

I further certify that the Appendix has been redacted in accordance with the Rules of Appellate Procedure, this Court's prior Orders, and other relevant rules.

Respectfully submitted,



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CERTIFICATE OF SERVICE


I certify that I have, on the 7th day of May, 2019, served the Amended Petition for Writ of Certiorari and Volume II of the Appendix on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record (and others if so indicated) as follows:

Susannah R. Cole, Asst. Atty. Gen.
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Respectfully submitted,



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