STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable R. Scott Sprouse, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF TIMOTHY GROVES OXENDINE,

APPELLANT

APPELLATE CASE NO. 2015-002241

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether trial counsel's failure to move to exclude any evidence related to a penile plethysmograph because, like a polygraph test, it is unreliable and unscientific, deprived appellant of his statutory and due process rights to the effective assistance of counsel and requires a new trial or a remand to the trial court to supplement the record on this issue?

STATEMENT OF THE CASE

On April 1, 2013, the Attorney General filed a petition seeking the involuntary, indefinite commitment of appellant Timothy Oxendine pursuant to the Sexually Violent Predator Act. R. 147-225. On June 25, 2013, the circuit court appointed Dr. Marie E. Gehle to conduct an examination. R. 226. On January 27, 2015, the court relieved appellant's attorney Mike Hemlepp, Jr. and appointed Aimee J. Zmroczek to represent appellant. R. 232.

On September 28, 2015, appellant was tried before the Honorable R. Scott Sprouse and a jury. R. 1. Christopher Morrow represented the State. R. 1. Ms. Zmroczek represented appellant. R. 1. The jury found appellant is a sexually violent predator. R. 140, l. 12 – 144, l. 1. On September 30, 2015, Judge Sprouse issued a written Order of Commitment. R. 234. This appeal follows.

ARGUMENT

Trial counsel's failure to move to exclude any evidence related to a penile plethysmograph because, like a polygraph test, it is unreliable and unscientific, deprived appellant of his statutory and due process rights to the effective assistance of counsel and requires a new trial or a remand to the trial court to supplement the record on this issue.[1]

The Right to Raise Ineffective Assistance of Counsel on Direct Appeal in SVP Cases

Appellant has a due process right to the effective assistance of counsel in this commitment proceeding under the Sexually Violent Predator Act. U.S. Const. amend. V, XIV. S.C. Const. Art. I, § 3. "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). See also Vitek v. Jones, 445 U.S. 480, 492 (1980) (discussing right to counsel in involuntary commitment proceedings); Addington v. Texas, 441 U.S. 418, 425 (1979) (stating that the loss of liberty from civil commitment "for any purpose" requires due process protections). But see In the Matter of McCoy, 360 S.C. 425, 427, 602 S.E.2d 58, 58 (2004).

The right to the effective assistance of counsel in SVP cases has been recognized in many state courts. See, e.g., In re Detention of Crane, 704 N.W.2d 437, 438 (Iowa 2013) ("As a threshold matter, we note that in this appeal the State concedes that respondents in chapter 229A proceedings have the right to effective assistance of counsel."). Kansas recognizes the right to effective assistance of counsel in SVP cases and will address such claims in the context of a direct appeal, remanding to the trial court as necessary for development of a factual record.

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[1] The issue of the admissibility of penile plethysmograph testing is currently before this Court in another SVP case, In the Matter of the Care and Treatment of Daquan Johnson, Appellate Case No. 2014-001959.

In re Ontiberos, 287 P.3d 855 (Kan. 2012). Appellant urges this Court to adopt the procedure described in Ontiberos and consider his claim in this case.

The issue of the right to effective assistance of counsel in SVP cases and whether these claims may be raised in a direct appeal is currently pending before the South Carolina Supreme Court. In the Matter of the Care and Treatment of Jeffrey Allen Chapman, Appellate Case No. 2014-001181 (argued on May 17, 2016). The Supreme Court's resolution of this issue in Chapman will affect whether appellant may raise his claim before this Court.

Trial Counsel Failed to Object to the Admissibility of Penile Plethysmograph Testing

The court-appointed Dr. Marie E. Gehle from the Department of Mental Health to evaluate appellant pursuant to the SVP Act. R. 226. Dr. Gehle's sole job at DMH is to conduct SVP evaluations. R. 94, l. 15 – 95, l. 4. Dr. Gehle found that appellant did not "meet the criteria" for commitment. R. 106, l. 19 – 107, l. 1. Dr. Gehle wrote her evaluation on February 3, 2014. R. 102, ll. 4 – 9.

The next day, February 4, 2014, the Attorney General signed a "Notice of Retention of Independent Expert," which was filed on February 6, 2014. R. 228. On July 16, 2014, the circuit court issued an Order of Transport, requiring the York County Detention Center to take appellant to MUSC in Charleston on July 24, 2014, for the State's expert's evaluation. R. 231. Dr. William S. Burke ("Burke") evaluated appellant for the Attorney General. R. 41, ll. 3 – 7.

Dr. Burke had performed "thereabouts" five prior evaluations for the Attorney General. R. 80, ll. 16 – 18. He recommended commitment in every case. R. 80, ll. 23 – 24. Dr. Burke also recommended committing appellant. R. 62, l. 15 – 64, l. 6. Dr. Burke was the State's only witness.

Trial counsel did not move *in camera* for the exclusion of any evidence related to penile plethysmograph ("PPG") testing. R. 16, l. 2 – 24, l. 20. Nor did trial counsel object during Dr. Burke's direct-examination when he testified repeatedly regarding PPG testing. R. 34, l. 1 – 64, l. 8. Trial counsel conducted no *voir dire* of Dr. Burke when the State asked the trial judge to qualify him as an expert "in the field of the assessment and evaluation of sex offenders pursuant to the Sexually Violent Predator Act" and did not object to his qualification by the court. R. 37, ll. 2 – 21.

Trial Counsel's Deficient Performance Prejudiced Appellant

Trial counsel's failure to move to exclude any evidence of PPG testing was constitutionally deficient performance.[2] The admissibility of PPG testing has not been decided by a South Carolina appellate court. Many other jurisdictions hold that PPG testing is inadmissible. "Courts generally have held [the PPG] inadmissible to show the presence or absence of pedophilia." David H. Kaye, David E. Bernstein, and Jennifer L. Mnookin, The New Wigmore: Expert Evidence, § 8.8.2 at n.21. Because the admissibility of PPG is a novel issue in South Carolina, trial counsel's failure to object despite the overwhelming authority from other jurisdictions rejecting such evidence constitutes deficient performance.

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2 Also before the South Carolina Supreme Court in the Chapman case is whether to apply the familiar Sixth Amendment analysis of ineffective assistance of counsel claims from Strickland v. Washington, 466 U.S. 668 (1984), or a higher standard for involuntary commitment cases as recognized by the Montana Supreme Court in In the Matter of the Mental Health of K.G.F., 29 P.3d 485 (2001). Appellant will address the Strickland standard in this case because if he can prevail under Strickland, he would necessarily prevail under the more favorable K.G.F. standard.

Much as evidence regarding lie-detectors is routinely excluded, evidence regarding the PPG is also inadmissible.[3] State v. Pressley, 290 S.C. 251, 349 S.E.2d 403 (1986). "Evidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is inadmissible." Id. at 252, 349 S.E.2d at 404. Trial counsel should have objected that the PPG does not satisfy South Carolina's requirements for the admission of scientific evidence and is inadmissible just like polygraph results. In re Robert R., 340 S.C. 242, 531 S.E.2d 301 (Ct. App. 2000). See also Rule 702, SCRE; State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).

Under Rule 702, Council, and Jones, 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. Trial counsel performed deficiently in not objecting to PPG evidence as junk science under these well-established rules.

Appellant can also demonstrate prejudice. Had trial counsel objected, the trial judge likely would have excluded this evidence. Even if the trial judge had admitted PPG evidence over objection, the issue would have been preserved for appeal and appellant would not have to seek review of this issue through the lens of ineffective assistance of counsel. See McHam v.

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[3] For a full history of the PPG and its many problems, 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 (Fall 2004) (hereinafter "Odeshoo"). The author notes that evidence from PPG tests have "generally not been found admissible at trial." Id. at 3.

State, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013) (holding that the failure to preserve an issue for appeal was deficient performance).

PPG tests do not meet the standards for admissibility and this evidence should have been excluded. The Fourth Circuit held the PPG did not meet the scientific standards for admissibility in United States v. Powers, 59 F.3d 1460, 1470-71 (4th Cir. 1995). The court noted the "extensive, unanswered evidence weighing against the scientific validity of the penile plethysmograph test." Id. at 1471.

The Virginia Supreme Court held that an expert's report that relied on PPG testing was inadmissible, even at a sentencing hearing. Billips v. Commonwealth, 652 S.E.2d 99, 101-02 (2007). The Billips court approached PPG testing with a critical eye:

> Advancements in the sciences continually outpace the education of laymen, a category that includes judges, jurors and lawyers not schooled in the particular field under consideration. Consequently, there is a risk that those essential components of the judicial system may gravitate toward uncritical acceptance of any pronouncement that appears to be "scientific," **and the more esoteric the field, the more difficult it becomes for laymen to greet it with skepticism.** That tendency has given rise to frequent complaints of "junk science" in the courts. To guard against that risk, we continue to require a "threshold finding of fact with respect to reliability of the scientific method offered. . . ."

Id. at 101-02 (emphasis added). It is hard to imagine any field more "esoteric" than PPG testing. The court concluded that the PPG "evidence, lacking foundation, was inadmissible in the sentencing proceeding." Id. at 102. See also 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); Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir. 2000) ("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."); United States v. White Horse, 177 F.Supp.2d 973, 975-76 (D.S.D. 2001) (citing the DSM-IV for the proposition that the PPG "is not accepted as a reliable or valid diagnostic tool"); State v. Spencer, 459 S.E.2d 812, 815 (N.C. Ct. App. 1995) ("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."); Gentry v. State, 443 S.E.2d 667, 669 (Ga. Ct. App. 1994) ("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.").

Dr. Gehle, the court-appointed evaluator from DMH, did not use the PPG in her evaluation. R. 92, l. 19 – 113, l. 21. She testified that no court had ever ordered her or asked her to do any PPG testing. R. 101, ll. 15 – 16.

The State's hired expert, Dr. Burke, had a financial interest in using the PPG test. R. 69, l. 11 – 71, l. He had business involvements with two corporations who manufacture and sell PPGs, Limestone and Monarch. R. 69, l. 11 – 71, l. Dr. Burke trained other "clinicians" in using PPGs and received $900.00 per training. R. 69, l. 15 – 70, l. 5. He responded to cross-examination about his financial interest by saying "It's not about the money. It's about safety, protecting children." R. 71, ll. 1 – 8.

Dr. Burke testified that the "main" test he uses in the PPG. R. 39, ll. 16 – 17. He claimed that PPGs were approved by the FDA. R. 39, ll. 16 – 19. Dr. Burke's statement regarding FDA approval went unchallenged. Trial counsel did not ask whether FDA approval is required or what FDA approval actually means.

Dr. Burke testified that the PPG measures blood flow to the penis.[4] The person is shown video "vignettes of sexual behavior." R. 39, l. 20 – 40, l. 21. Neither Dr. Burke nor his staff places the PPG gauge on the subject's penis, but allows the subject to do this himself. R. 79, ll. 2 – 7. Dr. Burke said, "I don't touch their junk." R. 79, ll. 2 – 7. He called the PPG gauge "a rubber band thingy." R. 79, ll. 2 – 10. He said "it's not rocket science." R. 79, ll. 2 – 8.

Calling the PPG "an objective measure," Dr. Burke testified that appellant "responded significantly to prepubescent and adolescent females." R. 56, ll. 19 – 25. This testimony was particularly prejudicial because Dr. Burke and Dr. Gehle gave appellant a diagnosis of pedophilia. R. 58, l. 16 – 59, l. 4. Dr. Burke claimed that an expert had said that the correlation between PPG results and child molestation was greater than the correlation between smoking and lung cancer. R. 59, ll. 5 – 24. He told the jury his belief that the PPG had "no false positives" and that "zero normals" had responded to children in the laboratory. R. 76, l. 9 – 77, l. 10.

Dr. Gehle relied on an actuarial assessment of recidivism, the Static 99-R, to conclude that appellant did not meet the criteria for commitment. R. 101, ll. 6 – 14. At the time of trial, appellant was 60 years old, which gave him a score of two on this test. R. 101, ll. 4 – 9. The percentage of individuals with a score of two on the Static 99-R who reoffend within five years is 5.6%. R. 101, ll. 18 – 24.

Despite Dr. Gehle's testimony that appellant's 5.6% chance to reoffend did not place him in the category of the "extremely dangerous group of sex offenders" intended to be committed under the SVP Act, the jury obviously relied on Dr. Burke's testimony in recommending commitment. Dr. Burke, in turn, relied on the PPG to differentiate his paid opinion from Dr. Gehle's. Had the PPG evidence been excluded, Dr. Burke's testimony would have been without

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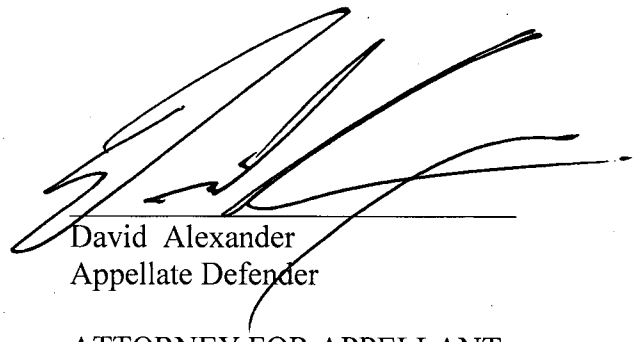
[4] A device also exists used in testing women. Odeshoo at n.9.

support and the result of the trial would have been different. This Court should reverse. In the event this Court determines that it cannot reverse on the record as it currently stands, the Court should remand this case to further develop the record on the admissibility of PPG evidence.

CONCLUSION

For the foregoing reasons, this Court should reverse, or, in the alternative, remand for further development of the record.



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This 1st day of March, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

March 1, 2017

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