

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Nov 25 2020
SC Court of Appeals

Appeal from York County
The Honorable Daniel D. Hall, Circuit Court Judge
Appellate Case No. 2017-001345

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

Appellant.

RESPONDENT'S PETITION FOR REHEARING

On October 14, 2020, this Court reversed Appellant's commitment as a sexually violent predator based on the Court's reasoning in In the Matter of the Care and Treatment of Micah Allen Bilton, 2020 WL 6051165 (Ct. App. 2020). The State has filed a Petition for Rehearing in Bilton, and pursuant to Rule 221(a), SCACR, hereby moves for a rehearing in this case on the grounds set forth in the Brief of Respondent, the Respondents Petition for Rehearing in Bilton and below.

1) At trial, Appellant objected to testimony from the court-appointed evaluator, Amy Swan, Ph.D., regarding a penile plethysmograph (PPG) William Burke, Ph.D., performed on Appellant at her request as part of Appellant's psychosexual evaluation and risk assessment. The stated grounds for Appellant's objection were that he was entitled to cross-examine the person who actually administered the PPG (Confrontation Clause), and there were no South Carolina appellate cases holding the PPG is reliable. (R., pp. 13-14). Pre-trial, Dr. Swan testified extensively about

the PPG purpose and methodology, as well as its acceptance in the mental health community as a valuable part of a psychosexual evaluation and risk assessment. (R., pp. 20-35). Appellant made no further arguments regarding the PPG reliability, and presented no witnesses to testify the PPG is unreliable.

Unlike Bilton, it is at least arguable that Appellant stated a general objection regarding the reliability of the PPG on the ground there were no South Carolina cases holding it was reliable, and arguing on appeal the PPG's reliability "had not been proven."¹ While Appellant's general objection in this case may avoid the preservation issue to a certain extent, Appellant's failure to present **any** argument or **evidence** in response to the State's comprehensive argument and testimony regarding the PPG's general acceptance significantly reduces the efficacy of his general objection. In short, the evidence presented to the circuit court on the issue supported the court's finding the PPG was reliable and Dr. Swan's testimony about it was admissible.

2) In Bilton, the Court stated it was dealing with "a narrow question" regarding the admissibility of Dr. Swan's testimony about the PPG test results: specifically whether her testimony was inadmissible because "the test was not performed by Dr. Swan;" and "there was no demonstration that Bilton's test was reliable beyond Dr. Swan's statements that she was familiar with Dr. Burke's work and nothing in Bilton's test results indicated there were problems with his test." Based on those factors, the Court concluded Dr. Swan's testimony regarding the PPG was an inadmissible "conduit" for hearsay. In light of the Court's express reliance on Bilton as the basis for reversal in this case, the "narrow" issue is the same.

3) Rather than limit its analysis in Bilton to the stated "narrow issue," however, the Court broadly analyzed some case law from other jurisdictions regarding the PPG's reliability in general.

¹There is a significant preservation issue in Bilton.

If Dr. Swan's testimony was a "conduit" for hearsay because she was unfamiliar with Dr. Burke's methodology, and had limited knowledge of the administration of PPGs in general, the general reliability of the PPG is irrelevant, and the Court's analysis of that issue was gratuitous in that it exceeded the scope of appellate review. *See Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322, 323 (2001) ("[A]ppellate courts, like well behaved children, do not speak unless spoken to and do not answer questions they are not asked.") (*quoting State v. Austin*, 306 S.C. 9, 409 S.E.2d 811, 817 [Ct. App. 1991]).

4) To the extent the PPG's reliability in general was arguably at issue in this case, as in Bilton, the Court overlooked and/or misapprehended the case law and research articles on that exact issue cited in the Brief of Respondent. Relying almost exclusively on Commonwealth v. Ortiz, 100 N.E.3d 790 (Mass. 2018), the Bilton Court broadly asserted the case law from other jurisdictions was "nearly uniform" in rejecting the PPG.² The Court then went to great lengths to distinguish cases cited by Respondent that **directly** address the **general acceptance and reliability of the PPG**. Further, the Court completely ignored the extensive PPG research and scholarly articles Respondent cited, reducing Respondent's arguments to relying "chiefly" on the Diagnostic and Statistical Manual, Fifth Ed. (DSM-V). Respondent cited the same cases and research articles in this case. *See* Brief of Respondent, pp. 10-15.

5) The inaccuracy of the Bilton Court's analysis is amply demonstrated by its reference to, and reliance on, United States v. Weber, 451 F.3d 552 (2006). The Court cited Weber for the proposition the PPG is "Orwellian when, as here, the State compels the subject to arouse himself sexually and then forces him to view deviant stimulants so the State can get a sense of the person's

²Significantly, neither the Appellant in Bilton nor this Appellant cited Ortiz as authority in their briefs. In addition, the Appellant in Bilton did not submit it as additional or supplemental authority prior to, or during, oral argument.

pre-dispositions and, potentially, use those pre-dispositions against him.” Bilton, 2020 WL 6051165 at *2. Even assuming the Weber opinion may have reflected the general method of administering a PPG at some point, it is no longer an accurate representation. To the contrary, modern PPG procedures **prohibit** the Weber court’s representation of PPG administration procedures.

First, current PPG administration does not require the examinee to masturbate: in fact, it is prohibited to manually manipulate the penis or the device during testing. The sensitive nature of the gauge would immediately signify to the technician if the device is being touched or manipulated. An example of this misunderstanding is illustrated in the following quote: “[...] a prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. There is a line at which the government must stop. Penile plethysmograph testing crosses it.” (US v. Weber, 2006, p. 571). Additionally, the belief that examinees must masturbate for the examination has been repeated in other cases (e.g., US v. McLaurin, 2013).

Murphy, L., Gottfried, E., DiMario, K., Perkins, D., & Fedoroff, J.P., *Use of penile plethysmography in the court: A review of practices in Canada, the United Kingdom, and the United States*, Behavioral Sciences and the Law, 38: 79-99 [93] (2020).

Further, even though the Weber court expressed concerns regarding the invasive nature of the PPG and issues regarding potential manipulation of the test, the court acknowledged the PPG’s recognition as a useful technique in the treatment of sex offenders. 451 F.3d at 555. If the PPG is a valuable tool for sex offender treatment, the only logical conclusion is that it is equally as reliable and valuable as part of a comprehensive psychosexual evaluation and risk assessment, which can then serve as a baseline for subsequent treatment.

6) As cited and discussed at length in the Brief of Respondent, numerous research articles have concluded the PPG is a reliable, objective assessment of sexual arousal, and it is the best

means to objectively measure deviant sexual interests.³ In addition, the United States government and private insurance companies recognize the PPG as a valid medical procedure, and either provide or exclude coverage for it, and the DSM-V acknowledges the PPG is “the most thoroughly researched and longest used of [psychophysiological] measures.” (Brief of Respondent, pp. 10-15).

7) The Bilton Court’s assertion courts have “uniformly” excluded PPG evidence likewise misapprehends or ignores significant case law to the contrary. In its Briefs in Bilton and this case, the State cited In re Detention of Herrick, 393 P.3d 879 (2017), In re Detention of Halgren, 132 P.3d 714 (2006), and In re Commitment of Sandry, 858 N.E.2d 295 (2006), for the courts’ in-depth discussions regarding the general acceptance and reliability of the PPG for diagnostic and recidivism risk assessment purposes.⁴ Rather than address those significant aspects of the Halgren and Sandry opinions, however, as well as the research articles, statutes, regulations and cases cited therein, the Bilton Court “distinguished” those cases on the grounds Illinois courts (Sandry) do not examine reliability before “scientific” evidence is admitted, and the expert in Halgren (Washington) did not testify the PPG results were directly related to a sex offender’s risk to reoffend. Those distinctions are essentially irrelevant **but for** the Court’s broad analysis of the PPG reliability issue, which was outside the “narrow” issue the Court claimed to address.

In addition to the cases cited by the State, state and federal courts have held the PPG test is admissible. *See* Murphy, L., *et. al.*, *supra* at 90-91 (discussion of state and federal cases

³The PPG has been called the “gold standard” for measuring deviant sexual arousal profiles. Murphy, L., *et. al.*, *supra*, at 94.

⁴The Bilton Court did not even address the Herrick case, in which the Washington court stated: “Although Herrick identified criticisms of PPG testing, he does not establish that it is no longer accepted in the scientific community or authorized in case law.” 393 P.3d at 885. As evidenced by the articles and cases cited in the Brief of Respondent and herein, the scientific community’s recognition, acceptance and use of the PPG has significantly increased.

analyzing the admissibility of PPG test results). The State readily acknowledges experts and courts differ regarding the reliability and admissibility of the PPG, but contrary to the Bilton Court's assertion, courts have **not** "uniformly" rejected admission of the PPG.

8) The impact of the Bilton Court's dicta regarding the PPG is already a reality in the circuit court. Within the last two weeks, a circuit court judge in a SVP commitment trial excluded testimony regarding a PPG test based on the Court's opinion in Bilton. The circuit court judge acknowledged the reliability of the PPG in general was **not** the holding of the case, but opined this Court included dicta regarding the reliability of the PPG in general "for a reason," and the circuit court judge cited directly to this Court's discussion of Ortiz. The circuit court made its ruling in spite of the fact Dr. William Burke, who performed the PPG at issue in the case, testified pre-trial about the PPG reliability generally, and his administration of the specific PPG in the case.


According to the Bilton Court's analysis and **holding**, Dr. Burke was the missing link at trial, and his absence rendered Dr. Swan's testimony about the PPG inadmissible as a "conduit" for hearsay. The circuit court's interpretation of the implicit message conveyed by the Court's dicta starkly reveals the Bilton opinion goes far beyond the "narrow issue" regarding admissibility of "conduit" hearsay testimony. Therefore, at a minimum, the Court should clarify that portion of its Bilton opinion.

Based on the foregoing, the citations and arguments set forth in the Briefs of Respondent in Bilton and this case, and the State's Petition for Rehearing in Bilton, the State respectfully requests the Court grant rehearing and, at a minimum, clarify and limit the scope of its holding in this case to the "narrow issue" regarding "conduit" hearsay as stated in Bilton.

Respectfully submitted,

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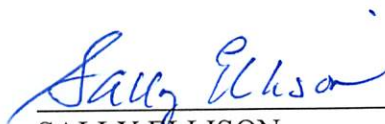
PROOF OF SERVICE

I, Sally Ellison, certify I served the Respondent's Petition for Rehearing on Appellant by depositing copies in the United States mail, postage prepaid, addressed to:

Victor Seeger
Assistant Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.

This 25th day of November, 2020.



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Sally Ellison

From: Sally Ellison
Sent: Wednesday, November 25, 2020 1:17 PM
To: 'vseeger@sccid.sc.gov'; Stock, Chris
Cc: Deborah Shupe; Victim Services; Sally Ellison
Subject: In the Matter of the Care and Treatment of Frankllin Mosier Appellate Case No. 2017-001345
Attachments: Mosier Franklin In the Matter of. Appellate Case No. 2017-001345 Letter serving Petition for Rehearing (02435844xD2C78).pdf; Mosier Franklin Petition for Rehearing Appellant Case No. 2017-001345 (02435842xD2C78).pdf

Good Afternoon:

Attached for service this date is the Respondent's Petition for Rehearing in the above appeal, along with the State's cover letter. This Petition will be filed today with the Court of Appeals through the AID One Drive System. A copy of the Petition will also be served upon you as indicated on the Proof of Service.

Please confirm receipt of this email.

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