

Dec 14 2020

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

APPELLANT.

APPELLATE CASE NO 2017-001345

Appeal from York County

Honorable Daniel D. Hall, Circuit Court Judge

APPELLANT'S RETURN TO PETITION FOR REHEARING

The Court's Opinion in this case was correct and a rehearing is unwarranted. The issue was properly preserved by trial counsel during Appellant's trial, and this Court's opinion in Matter of Bilton, 2020 WL 6051165 (2020), and as well as this case, was properly tailored to address the question presented before the Court.

Respondent conceded trial counsel properly objected to admission of the penile plethysmograph (PPG) test evidence in Appellant's trial. Trial counsel was not required to expound on his objection to admitting the results of Appellant's PPG test at his trial beyond the justification for the objection, namely that the defense was not able to cross-examine the doctor who performed the test and that the PPG test had not been found reliable in South Carolina. See State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (finding a party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has

been presented on that ground); see also Chastain v. Hiltabidle, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009) (noting the rules of error preservation will not be applied so rigidly as to bar an otherwise properly presented issue). Accordingly, the issue was properly preserved for review.

This Court's decision in Bilton was narrowly tailored to the issues raised on appeal. The defense argued that due process prevented the admission of the PPG testimony because the defense had no opportunity to cross-examine the doctor who conducted the test. Furthermore, the general reliability of the PPG test was not irrelevant, as the state now claims in its petition for rehearing, because the state argued on appeal the PPG evidence was properly admitted because the tests were recognized as "generally reliable." Therefore, this Court properly expounded on both the impropriety of doctors who did not perform the PPG test testifying to the results at trial and the PPG test's general reliability, or lack thereof.

This Court not mentioning the "extensive" research by the state on the PPG tests alleged reliability in the opinion does not mean that the state's research was not considered. The courts "retai[n] an independent constitutional duty to review factual findings where constitutional rights are at stake." June Med. Servs. L. L. C. v. Russo, 140 S. Ct. 2103, 2120 (2020) (citing Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016), as revised (June 27, 2016) (quoting Gonzales v. Carhart, 127 S. Ct. 1610 (2007))). Unless the state can show this Court failed in its duty to consider all of the evidence and arguments in the record, the state's argument for rehearing on this ground was unfounded.

This Court's reliance on Weber was not misplaced. The test did not meaningfully change from the Weber decision to the present case, and Bilton, because the state still compels arousal in the current PPG process. The entire purported premise and value of the test is to show that a person has predilections toward children they cannot control. The means to that end is the state

forcing the subject to view illicit images to get them aroused. Accordingly, the state still compels arousal from subjects of the test and the state's argument for rehearing on this ground was unfounded.

The distinctions this Court drew from Bilton and this case with In Re Detention in Halgren, 393 P.3d 879 (2019) and In re Commitment of Sandry, 858 N.E.2d 295 (2006) presented meaningful differences that necessitated disparate treatment. In Halgren, the state's expert did not testify at trial that the PPG results indicated a sex offender's likelihood to reoffend. That distinction cut to the heart of the present case because the state's justification for using the PPG in the SVP context is the PPG test *is* reliable to determine a sex offender's likelihood to reoffend. The entire purpose of the SVP program is to permanently incarcerate subjects who are likely to reoffend. Accordingly, the state's use of the PPG as an indicator on the subject's likelihood to reoffend in this case and in Bilton sets them apart from Halgren.

The distinction from Sandry was proper as well. The avenue by which this case arose was from a preliminary reliability finding by the lower court before the PPG evidence was admitted to trial. Since Illinois does not conduct a reliability finding prior to admitting PPG evidence at trial, the issue on appeal in this case could not have been heard had it been raised in Illinois. Thus, there was a meaningful difference between our process of admitting scientific evidence and Illinois' process such that the distinction drawn from Sandry was properly made.

Lastly, that the attorneys general are not properly arguing to the circuit courts the effect of this Court's decisions in Bilton and the present case is not a reason for rehearing. This Court's decision was clear- conduit testimony from a doctor regarding the results of a PPG test that a different doctor conducted is improper. Accordingly, this case should not be reheard on this ground either.

Based on the foregoing arguments, the state's petition for rehearing should be denied.

Respectfully Submitted,

s/ Victor R. Seeger
Victor R. Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of December, 2020.

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Appeal from York County

Honorable Daniel D. Hall, Circuit Court Judge

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Appellant's Return to Petition for Rehearing in the above-entitled case has been served upon Deborah R. J. Shupe, Esquire, Senior Assistant Deputy Attorney General at the primary e-mail address listed in the Attorney Information System (AIS); and Franklin Mosier, at Sexual Violent Predator Program, 4546 Broad River Road, Columbia, SC 29210, this 14th day of December, 2020.

s/ Victor R. Seeger
Victor R. Seeger
ATTORNEY FOR APPELLANT



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

December 14, 2020

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SC Court of Appeals

Deborah R. J. Shupe, Esquire
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street
Columbia, SC 29201

VIA EMAIL ONLY

Re: Deborah R. J. Shupe v. The State

Dear Ms. Shupe:

Enclosed is an electronic copy of Appellant's Return to Petition for Rehearing in the above-entitled case, which I have filed today with the South Carolina Supreme Court.

Please call me if you have any questions.

Sincerely,

s/ Victor R. Seeger
Victor R. Seeger
Appellate Defender

VRS/cws

Enclosure

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

December 14, 2020

Mr. Franklin Mosier
Sexual Violent Predator Program
4546 Broad River Road
Columbia, SC 29210

Re: Your appeal

Dear Mr. Mosier:

Enclosed is a copy of the Appellant's Return to Petition for Rehearing that I filed today on your behalf in the South Carolina Supreme Court. Feel free to contact me if you have any questions.

Please contact me if you have any questions.

Sincerely,

s/ Victor R. Seeger
Victor R. Seeger
Appellate Defender

VRS/cws

Enclosure