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Court of Appeals
Division III
State of Washington
5/3/2019 4:05 PM

No. 36270-1-III

**THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,
Respondent,

v.

SIMON STOTTS,
Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Respondent is the State of Washington (hereinafter the “State”). Appellant is Simon Stotts (hereinafter “Mr. Stotts”).

On December 10, 2017, a little 3-year-old girl was brought to Mount Carmel Hospital, in Colville, Washington. Report of Proceedings 225, lines 5-6. The little girl, A.L.L.D., was examined by medical staff. RP 217. A.L.L.D. complained of a stomach ache and feeling “weird”. RP 219. The on-call emergency room physician, Dr. Sally Sartin, a board-certified family medical doctor, noted that A.L.L.D. was acting abnormally. RP 217, 219-21. Dr. Sartin ordered a lab screen for drugs. RP 221, line 1. Mt. Carmel has the equipment to run rapid urinalysis drug screens (hereinafter “Drug Screens”). RP 182-83.

The Drug Screen was conducted by Medical Technologist Jodie Murrell-Scott (hereinafter “Medical Technologist”). RP 182, lines 11-18. The Medical Technologist testified about the protocols, procedures, and quality control measures that she and other Medical Technologists take at Mt. Carmel, to ensure that doctors, like Dr. Sartin, have rapid and accurate diagnostic tools.

The Drug Screen showed that A.L.L.D. had somehow ingested opiates. RP 222-23. It was the Doctor’s opinion that A.L.L.D. had been

exposed to opioid use. RP 225, line 25. A.L.L.D. had ridden in a car with Mr. Stotts and Ms. Baldwin. RP 158-59. Mr. Stotts and Ms. Baldwin smoked drugs while A.L.L.D. was in the car with them, thereby exposing A.L.L.D. to opioids. RP 139-40.

Mr. Stotts was charged in Stevens County Superior Court with Assault of a Child in the Third Degree-Domestic Violence. Clerk's Papers 1-2. An Amended Information was filed on May 1, 2018, amending the charge of Assault of a Child in the Third Degree-Domestic Violence to Assault of a Child in the Third Degree and adding the charge of Reckless Endangerment, in the alternative. CP 22-23.

Mr. Stotts was represented by counsel at trial. Mr. Stotts' co-defendant, Talonna Baldwin, was also represented by counsel at trial. Trial of both defendants was held on July 9-10, 2018. RP 3-4.

On July 9, 2019, the Superior Court Judge heard Motions in Limine and a Motion to Suppress, brought on behalf of Mr. Stotts. RP 93; CP 4-6. Mr. Stotts' basis for suppression was an objection to the admission of scientific evidence; namely, the drug screen results. RP 105; CP 4-6.

The State's attorney asked Defense Counsel for clarification as the grounds for objecting to the admission of the drug screen results. RP 115, lines 18-25. Defense Counsel provided a little clarification and the Superior Court Judge ruled that the matter would be taken up at a later time. RP 116,

lines 14-22.

Defense Counsel renewed his Motions in the morning session of trial on July 10, 2018. RP 178-179. The Superior Court Judge even entertained presentation and review of Defense Counsel's personal notes when he independently interviewed the treating physician, Dr. Sally Sartin. RP 176, lines 11-22. The Superior Court permitted direct of the Medical Technologist by the State's attorney, for the purpose of laying foundation for the admissibility of the drug screen results, in response to Defense Counsel's evidentiary challenge. RP 180, lines 8-12.

The State presented the testimony of Mt. Carmel Medical Technologist Jodie Murrell-Scott. RP 181-193. The Medical Technologist testified that she had been a technologist since 2003, she has a bachelor's degree in biology, she received training as a medical technologist, and that she received training and passed testing in and for operating the machine she used to generate the drug screen results. RP 181, lines 12-25; RP 182, lines 1-5. The Medical Technologist testified that she had been using the particular machine, the MedTox scan analyzer, for more than a year and it is the only machine she could use to run the type of test she performed on the victim's urine sample. RP RP 182, Lines 14-22.

In order for Mt. Carmel Hospital to use the MedTox machine, correlation studies had to be done by the Mt. Carmel Hospital technical

specialist and medical director. RP 183. Furthermore, before the machine could be adopted for use, the hospital staff had to perform a “rigorous correlation study,” performed by the hospital technical specialist and the hospital medical director. RP 183, lines 11-14. Additionally, in order to be adopted by the hospital, the machine had to meet quality control review. RP 183, lines 15-17. Only after those tests were performed, the machine passed quality control, and the medical director looked at the data, could the machine be used for medical purposes. RP 183, lines 15-19. The Medical Technologist testified that the hospital does not rely on just one sample, the hospital relies on many samples, in determining reliability. RP 183, lines 20-23. Direct examination by the State continued with the Medical Technologist’s explanation of testing procedures RP 184-185.

Eventually, the testimony focused on how the test results are used. RP 186. “And are these the results, to your knowledge in your experience that the doctors rely on when diagnosing[?]” RP 186, lines 10-11. The Medical Technologist answered in the affirmative. RP 186, line 12. The machine used by the Medical Technologist tests only urine and the Medical Technologist testified that most of the time the call for medical testing stops at urine, rather than going through the added procedure of a serum blood test. RP 191, lines 8-21.

When cross-examined by Defense Counsel, the Medical Technologist explained that the hospital staff conducts quality control procedures every week. RP 188, lines 23-25; 189, lines 1-8. The weekly quality control testing uses samples with known values, so that the hospital staff can make sure the machine is reading correctly. RP 193, lines 6-14.

On re-direct, the Medical Technologist confirmed that the two primary uses of the test results she generated were used for medication compliance and diagnosis and treatment. RP 190, lines 9-19. Finally, the Medical Technologist testified that since she started using the particular machine, she had never seen it fail a quality control test. RP 194, lines 9-20.

After hearing testimony from the Medical Technologist, hearing argument on the issues, and reviewing the documentation, the Superior Court explained that whether or not the test results were subject to error was something that the Defense Counsel could attack on cross-examination. RP 195, 19-21. The Superior Court Judge specifically addressed the Frye challenge: “But it is the method that the doctor relied on, it’s nothing new, nothing novel. It’s the only test they have there.” RP 195, lines 14-16.

Later that day, the jury heard the testimony the Medical Technologist. RP 206. The Medical Technologist expanded on the technical

testimony she provided to the Superior Court Judge in the motion hearing earlier that day. The Medical Technologist testified about the machine she used to analyze victim's urine sample, the kits used to collect the samples, the procedures in collecting the samples, the correlative studies used to vet the machine and the kits, how doctors order tests, how she and other medical technologists perform the tests, and that she performed the test per her usual procedures when A.L.L.D. was brought to the hospital on the night of December 10, 2017. RP 208-13.

After the Medical Technologist testified about the testing she performed, the State called Dr. Sally Sartin, a medical doctor who is board-certified in family medicine. RP 218, lines 13-14. Dr. Sartin was on duty at Mt. Carmel Hospital on the night of December 10, 2017, through the morning of December 11, 2017. RP 218-19.

Dr. Sartin testified that when the victim was presented to her at the hospital, she ordered urine drug screen RP 221, lines 1-3. By design, the drug screen results are expedient and Dr. Sartin received results of urine drug screen during the victim's visit. RP 221, lines 4-5. Dr. Sartin relied on the urine drug screen results—the same drug screen results generated by Medical Technologist Murrell-Scott—to form a final diagnosis when treating the victim during her visit to the hospital. RP 222, lines 13-15.

Dr. Sartin testified that the purpose of the drug screen is to "...screen

for any possibility of my patient that I'm seeing to be under the influence." RP 223, lines 24-25. Dr. Sartin confirmed to the jury that the drug screen results are used for diagnosis purposes. RP 224, lines 15-16. When asked whether it is routine for Dr. Sartin to send out a urine drug screen for more confirmation, Dr. Sartin said "[n]o, I have never sent out a urine drug screen, a positive urine drug screen for a---more sensitive tests for confirmatory purposes." RP 224, lines 20-24. When asked why not, Dr. Sartin replied, "[a]t that point I'm---usually not dealing with a---a legal circumstance. So, like I said, it was mainly for diagnosis purposes. I don't feel at that point that I need to send it out for confirmatory testing." RP 225, lines 1-4.

The cross-examinations of Dr. Sartin were minimal. RP 227-29. Neither cross-examination managed to dislodge Dr. Sartin's belief in the drug screen results and neither cross-examination presented a direct challenge to either the general acceptance of the methodology or the potential accuracy of the drug screen results. Defense Counsel presented no expert witnesses to contradict the testimony of Dr. Sartin and the Medical Technologist. RP 4.

The jury was instructed on the alternative charges and was given both verdict forms. RP 282; CP 70-96. After deliberation, the jury returned a verdict of guilty on the charge of Assault of a Child in the Third Degree. RP 326; CP 97.

The Superior Court held sentencing on July 17, 2018. RP 339. This appeal followed Mr. Stotts' conviction and sentencing.

II. STANDARDS OF REVIEW

1. “Review of admissibility under Frye is *de novo* and involves a mixed question of law and fact.” State v. Copeland, 130 Wash.2d 244, 256, 922 P.2d 1304, 1312 (1996). “The reviewing court will undertake a searching review which may extend beyond the record and involve consideration of scientific literature as well as secondary legal authority.” Id. at 255–56.
2. A trial court’s admission of evidence under Evidence Rule 702 is reviewed for abuse of discretion. State v. Sisouvanh, 175 Wash.2d 607, 623, 290 P.3d 942, 950 (2012); see also State v. Roberts, 142 Wash.2d 471, 520, 14 P.3d 713 (2000).

III. SUMMARY OF THE ARGUMENT

Mr. Stotts presents two arguments condensed into one argument. Mr. Stotts argues that the Superior Court erred because it admitted Drug Screen results obtained from a urinalysis of the victim. The argument raised by Mr. Stotts should be bisected. First, Frye analysis is subject to a different standard of review. Second, ER 702 analysis is subject to a different standard of review. Neither argument should cause this Court to reverse the decision of the Superior Court Judge.

IV. ARGUMENT

As a general rule, “[t]he trial court must exclude expert testimony involving scientific evidence unless the testimony satisfies both Frye and ER 702.” Lakey v. Puget Sound Energy, Inc., 176 Wash.2d 909, 918, 296 P.3d 860 (2013). “To admit evidence under Frye, the trial court must find

that the underlying scientific theory and the techniques, experiments, or studies utilizing that theory are generally accepted in the relevant scientific community and capable of producing reliable results.” Id. (internal quotations omitted). “Frye and ER 702 work together to regulate expert testimony: Frye excludes testimony based on novel scientific methodology until a scientific consensus decides the methodology is reliable; ER 702 excludes testimony where the expert fails to adhere to that reliable methodology.” Id. 918–19.

Under both standards of review, this Court should uphold the Superior Court Judge’s admission of the Drug Screen results.

1. **The Superior Court properly admitted the Drug Screen results under Frye analysis.**

“Frye is implicated only where either the theory and technique or method of arriving at the data relied upon is so novel that it is not generally accepted by the relevant scientific community.” Lakey, 176 Wash.2d at 919 (internal quotations omitted). “While Frye governs the admissibility of novel scientific testimony, the application of accepted techniques to reach novel conclusions does not raise Frye concerns. Id. “Evidence that does not involve new methods of proof or new scientific principles is not subject to examination under Frye.” State v. Roberts, 142

Wash.2d 471, 520, 14 P.3d 713, 740 (2000), as amended on denial of reconsideration (Mar. 2, 2001) (internal quotations omitted).

“In examining the Frye question, we look to see: (1) whether the underlying theory is generally accepted in the scientific community and (2) whether there are techniques, experiments, or studies utilizing that theory which are capable of producing reliable results and are generally accepted in the scientific community.” State v. Riker, 123 Wash.2d 351, 359–60, 869 P.2d 43, 47–48 (1994). “Under the Frye standard, our task is not to determine if the scientific theory underlying the proposed testimony is correct; rather, we look to see whether it has achieved general acceptance in the appropriate scientific community.” Id. at 359–60. “The core concern of Frye is only whether the evidence being offered is based on established scientific methodology. This involves both an accepted theory and a valid technique to implement that theory.” Id. at 360. “Further, under Frye we look only generally at whether a theory has accepted and reliable mechanisms for implementing it.” Lakey, 176 Wash.2d at 920.

The Medical Technologist testified that before the machine can be used at Mt. Carmel Hospital, the hospital’s technical specialist and the medical director have to go through “...a rigorous correlation study, where they study...known samples and verify that this instrument is producing valid results....” RP 184, lines 11-14. In addition, the medical

technologists at Mt. Carmel “...have to perform QC, quality control...and so once that happens and the medical director looks at the data then they would sign off...he signs off on it...Then we can start using it for medical purposes.” RP 183, lines 15-17.

The uncontroverted testimony was that the test results generated in this case were of those generally relied upon by medical professionals. RP 186, lines 10-12. The Superior Court Judge addressed the issue with precision: “But it is the method that the doctor relied on, it’s nothing new, nothing novel. It’s the only test they have there.” RP 195, lines 14-16. The Superior Court Judge correctly pointed out that the matter was couched more as a question of weight, rather than admissibility. RP 195, line 20.

The Superior Court Judge was correct when she ruled that Frye was not implicated; admission under Frye was appropriate. This Court should find that the Superior Court Judge’s admission of the Drug Screen results was proper.

2. The Superior Court did not abuse its discretion when it admitted scientific evidence under Evidence Rule 702.

The second step in the two-step admission of scientific evidence is Washington Evidence Rule 702. “If the Frye test is satisfied, the trial court must then determine whether expert testimony should be admitted under the two-part test of ER 702, i.e., whether the expert qualifies as an

expert, and whether the expert's testimony would be helpful to the trier of fact.” State v. Copeland, 130 Wash.2d 244, 256, 922 P.2d 1304, 1313 (1996).

“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.” WA ER 702. “To admit expert testimony under ER 702, the trial court must determine that the witness qualifies as an expert and the testimony will assist the trier of fact.” Lakey, 176 Wash.2d at 918.

A reviewing court “...may simply affirm the challenged decision if the incomplete record before [it] is sufficient to support the decision...or at least fails to affirmatively establish an abuse of discretion...” State v. Sisouvanh, 175 Wash.2d 607, 619, 290 P.3d 942, 948 (2012) (internal citations and quotations omitted). “Affording discretion to a trial court allows the trial court to operate within a range of acceptable choices.” Id. at 623 (internal quotations omitted). “Under an abuse of discretion standard, the reviewing court will find error only when the trial court's decision (1) adopts a view that no reasonable person would take and is thus manifestly unreasonable, (2) rests on facts unsupported in the record

and is thus based on untenable grounds, or (3) was reached by applying the wrong legal standard and is thus made for untenable reasons.” Id.

The evidence presented to the Superior Court and, really the core of Mr. Stotts’ argument, goes to weight under ER 702, not admissibility under Frye. “When a scientific theory has protocols for assuring reliability, an expert’s errors in applying proper procedures go to the weight, not the admissibility, of the evidence, unless the error renders the evidence unreliable. In such cases, the trial court may use other rules, such as ER 702, to exclude the testimony.” Lakey, 176 Wash.2d at 920 (internal citations omitted); see also State v. Copeland, 130 Wash.2d at 270 (“[w]e have already held, however, that laboratory error is a matter of weight and not admissibility under Frye.”).

The Superior Court Judge’s ruling in this case was in line with Lakey and State v. Copeland. The Superior Court Judge ruled, “I’m going to find that you can -- the lab results are -- admissible. And it is certainly fair play, like I said, because it goes to the weight of the evidence for that to be attacked by defense counsel as to -- its status as an initial screen....” RP 195, lines 17-21. See State v. Copeland, 130 Wash.2d at 270 (“[f]urther, issues of laboratory error and lack of proficiency testing can be and were the subject of cross-examination and defense expert testimony at Copeland’s trial.”).

Defense Counsel apparently chose not to offer contrary testimony. Defense Counsel could have called medical experts to challenge the testimony of the Medical Technologist, but the Report of Proceedings is barren of any such challenge.

Mr. Stotts' argument seems to be that the test results were unreliable because the test results contained a warning, which stated, "[t]he entire battery is for screening purposes only. They are not -- results are not confirmed, and results from any unconfirmed drug in a screening battery should not be used for legal purposes." RP 185, lines 8-11. "If the testing before the trial court shows that the testing procedure as performed was so flawed as to be unreliable, the results may be inadmissible because they are not helpful to the trier of fact." State v. Russell, 125 Wash.2d 24, 51, 882 P.2d 747 (1994). When asked, the Medical Technologist stated that the warning label does not enter into her analysis:

Q So, this -- and on the results it says -- And I don't know if this is something you see, but it says not to be used for -- let me--. "The entire battery is for screening purposes only. They are not -- results are not confirmed, and results from any unconfirmed drug in a screening battery should not be used for legal purposes." Are you familiar with that at all, or is that not something you see.

A I have seen that, yes. That's a canned comment that goes on every patient result like that. So, I don't -- But I don't pay attention to that because that's -- that was built as part of the test.

RP 185, lines 5-17. Simply pointing to a warning label from a company does not indicate an abuse of discretion, especially in light of the mountain of testimony presented by the State. The testimony and evidence the Superior Court Judge had before her was uncontroverted and apparently reliable Drug Screen results. There was no testimony that the results were unreliable. In fact, both Dr. Sartin and the Medical Technologist affirmed their belief in the accuracy of the test results. Even when asked about the possibility of false-positives, Dr. Sartin testified:

Q Okay. Did you have concerns -- On that -- on that little disclaimer it talks about medications or anything like that that could -- trigger such a positive test. Did you have concerns that maybe this was a medicational reaction.

A Not at the time, no.

Q Okay. And -- we've heard about potentially, like a poppy seed muffin can result in a positive drug screen. What was your medical professional opinion of this little girl[?]

A Given that poppy seed consumption can definitely produce a positive opiate result on a urine drug screen, given the history and her presentation, I would have to say that along with the urine drug screen that came positive for opiates that all -- that whole picture that -- the totality of her presentation, the history and the results, I -- I -- felt that it was -- conclusive to me that -- this was -- this child was more likely exposed than to have -- screen positive for a -- from a poppy seed muffin.

Q And so, was that your diagnosis?

A My diagnosis was, yes, that she most likely was exposed.

RP 225, lines 7-25. Regardless of the warning label, Dr. Sartin believed the test results were sufficient for medical diagnostic purposes.

The Superior Court Judge did not abuse her discretion when she

admitted the Drug Screen results because the results were the same as relied upon by medical professionals, such as Dr. Sartin.

V. CONCLUSION

For the reasons stated above, this Court should affirm the trial court's admission of the scientific evidence in this case.

Dated this 3rd day of May, 2019.



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Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I electronically filed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, e-mailed a true and correct copy to Marie J. Tombley, Attorney for Appellant at marietrombley@comcast.net and mailed to Simon Stotts, 17326 N. Highway 21, Malo, WA 99150 on May 3, 2019.



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May 03, 2019 - 4:05 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Simon Carl Stotts
Superior Court Case Number: 17-1-00399-3

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