People v. Guthrie

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NOT TO BE PUBLISHED

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The Tehama County Superior Court sustained a petition to extend the commitment of defendant Jimmy Ray Guthrie as a sexually violent predator under the Sexually Violent Predators Act (SVPA or Act). (Welf. & Inst. Code, § 6600 et seq.) His commitment to Atascadero State Hospital (ASH) was extended for two years.

On appeal, defendant contends his trial counsel furnished ineffective assistance by failing to challenge the admissibility of penile plethysmograph evidence. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In September 1997, a petition was filed alleging that defendant was a sexually violent predator within the meaning of the SVPA. The petition alleged that defendant had previously been convicted of one count of lewd and lascivious acts with a child (Pen. Code, § 288, subd. (a)) and three counts of oral copulation (Pen. Code, § 288a), and that at least two practicing psychiatrists or psychologists determined that defendant has a diagnosed mental disorder such that he is likely to engage in acts of sexual violence.

In January 1998, the trial court sustained the petition. In February 1998, defendant was committed to Atascadero State Hospital for two years.

In January 2000, a petition for recommitment as a sexually violent predator was filed. The petition included evaluations by psychologists Beryl Davis, Ph.D., and Robert Owen, Ph.D.

Defendant waived trial by jury and the case was tried to the court.

At trial, Dr. Davis testified that in conducting her evaluation, she reviewed information including prior evaluations, police reports, probation officers' reports and defendant's treatment chart from ASH, and conducted an interview with defendant.

Dr. Davis performed a rapid risk assessment for sexual offense recidivism (RRASOR) test and a static '99 risk assessment test. Dr. Davis also considered the results of a penile plethysmographic test, which is a measure of sexual arousal.

Dr. Davis explained that the penile plethysmographic test registered a 42 percent arousal to two- to five-year-old females, which is considered to be significant arousal. Defendant's greatest arousal was to adult males, approximately 70 percent.

Dr. Davis diagnosed defendant with pedophilia and schizotypal personality disorder. She concluded it was more likely than not that he would reoffend. Significant factors in Dr. Davis's conclusions were defendant's denial that he had a problem and his inability to recognize that his sexual molestations of children resulted in harm to the children. It was also significant that defendant would state that he is not interested in children sexually, and then immediately thereafter describe the sexual arousal he received from children. His reticence to form adult relationships, following a series of rejections by young women in his formative years, increased the probability that he would engage in sexual activity with children who are more receptive and vulnerable.

Dr. Owen testified that in conducting his evaluation, he reviewed defendant's probation reports, his file from ASH, and prior evaluations, and conducted an interview with defendant. Dr. Owen also considered the results of the penile plethysmographic test of sexual arousal from photographs.

Dr. Owen diagnosed defendant with pedophilia and schizotypal personality disorder. Significant factors in the diagnoses included the lack of meaningful adult relationships in defendant's life, the molestation of multiple prepubescent victims over a period of several years, and defendant's portrayal of himself as a victim rather than a perpetrator. Dr. Owen concluded it is more likely than not that defendant will reoffend.

Dr. Owen testified that the penile plethysmographic test showed defendant "still has a continued sexual interest in children," which Dr. Owen found to be "somewhat alarming." In his view, the penile plethysmographic test "carries the most weight" and is "really the most powerful predictor" of reoffending.

Defendant testified on his own behalf that he is benefiting "tremendously" from his treatment, even though he does not believe that "there is something so wrong that [he] really need[s] it." He denied having an attraction to young females. He admitted that he was a pedophile at the time he committed the offenses, but he claimed he was "now . . . past that." He understands that his behavior at the time of the offenses was wrong. Regarding the penile plethysmographic test, defendant testified that he was aroused only by one photograph.

In sustaining the petition, the trial court explained, "Here is the real rub for me, is that -- and why I find the defendant to be a danger pursuant to the code -- is that he in his mind, right or wrong, he

thought the kids that he became involved with, the victims in these cases, he thought he was helping them, and that is a scary thing to put somebody out in the community, because he doesn't . . . know he is doing a molest[ation], and until today where he finally confesses to his conduct."

Regarding the penile plethysmographic test, the trial court commented, "I have never gone through one of these things, but you put me nude in a room and put a machine on me and I -- if I would be aroused at anything you would show me I would think there would be something wrong with me. You should not be having thinking or having a response to something sexually like that, but I don't know. This man is a molester of several counts, in a cold room nude with a machine on him and he still gets an arousal by looking at a child, that is a scary thing, at least to me, and I am the one making the finding."

DISCUSSION

Defendant contends his trial counsel rendered ineffective assistance by failing to challenge the "admissibility of the penile plethysmograph test" on the ground that it is not generally accepted as reliable in the relevant scientific community. (People v. John W. (1986) 185 Cal.App.3d 801, 803-809, disapproved on other grounds, People v. Stoll (1989) 49 Cal.3d 1136, 1153, fn. 18; see People v. Kelly (1976) 17 Cal.3d 24, 30.)

"`"[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was `deficient' because his `representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a `reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" [Citation.]'" (People v. Avena (1996) 13 Cal.4th 394, 418.)

Although he has the burden to show deficient performance, defendant has not shown that the penile plethysmographic test was not generally accepted at the time of trial in June 2000. Neither John W.'s finding of nonacceptance in 1986, nor the bare citation of John W. in a 1992 case (In re Mark C. (1992) 7 Cal.App.4th 433), sheds much light on the state of scientific acceptance in June 2000. (People v. John W., supra, 185 Cal.App.3d at pp. 804-806; In re Mark C., supra, at pp. 444-445.)

Greater light is shed by other jurisdictions that have considered the plethysmograph and found it wanting. In Doe Ex. Rel. Rudy-Glanzer v. Glanzer (9th Cir. 2000) 232 F.3d 1258, decided after the trial in this case, the court stated that "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. See United States v. Powers, 59 F.3d 1460, 1471 (4th Cir. 1995) (affirming district court's ruling that penile plethysmographs fail the `scientific validity' prong of the Daubert

test which provides the standard for the admissibility of such scientific evidence) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). Therefore, even though courts have accepted that penile plethysmographs can help in the treatment and monitoring of sex offenders, these tests have no indicia of reliability as evidence at trial. See, e.g., State v. Spencer, 119 N.C. App. 662, 459 S.E.2d 812, 814-816 (1995) (excluding evidence of such test results); State v. Emery, 156 Vt. 364, 593 A.2d 77, 78-79 (1991) (noting validity of such test as part of treatment of sex offenders)." (Doe, supra, 232 F.3d at p. 1266.)

"[A]ny material that forms the basis of an expert's opinion testimony must be reliable. (1 Witkin, Cal. Evidence (3d ed. 1986) The Opinion Rule, § 477, p. 448.)" (People v. Gardeley (1996) 14 Cal.4th 605, 618.) Armed with the authorities cited in Doe, supra, 232 F.3d 1258, trial counsel could have objected to the opinions of Drs. Davis and Owen on the ground that, to the extent they rely on penile plethysmographic evidence, they do not meet "the requirements of Evidence Code section 801, subdivision (b), `that the matter underlying an expert's opinion be "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates."'" (In re Mark C., supra, 7 Cal.App.4th at pp. 444-445.) Counsel could have objected that there was no "`showing that the material on which the expert bases his or her opinion . . . is reliable.' [Citation.]" (Id. at p. 445.) The record reveals no rational tactical purpose for failing to make such an objection.

The People respond that trial counsel's performance was not deficient because the experts' consideration of penile plethysmographic evidence was "not improper in the SVP proceeding." However, the People's only authority, People v. Hatfield (formerly 68 Cal.App.4th 1998), was depublished on direction of the Supreme Court by order dated March 17, 1999, more than two years before the People filed their brief.

The People next respond that it is not reasonably probable that a different result would have occurred had counsel challenged the penile plethysmographic test. (People v. Avena, supra, 13 Cal.4th at p. 418.) Their argument has two parts.

The People first contend that the reports of Drs. Davis and Owen make plain that "their opinions were based on numerous significant factors and that the plethysmographic test results were not significant." (Italics added.) This contention has no merit.

We need not consider whether Dr. Owen's report implies that the test results were not significant, because his trial testimony expresses precisely the opposite conclusion. Dr. Owen testified that defendant's tested arousal toward girls ages 6 through 11 was "probably the most important risk factor . . . ." He later testified that the penile plethysmographic test "carries the most weight, that is really the most powerful predictor of any of these factors."

However, as the People also suggest, both experts believed that an essential factor in predicting the likelihood of reoffending was defendant's inability to recognize the harm caused to the victims of his

sexual activity. Drs. Davis and Owen believed that defendant's portrayal of himself as a victim rather than a perpetrator, his denials of sexual interest in children followed by his descriptions of arousal he derived from them, his inability to recognize the harm he caused to children, and his reticence to form adult relationships, all made it more probable than not that he would reoffend.

In its ruling, the trial court placed more weight on defendant's "personal feelings," as set forth above, "as opposed to the [statistical] projection provided . . . by the expert witnesses." The court explained: "Here is the real rub for me, is that -- and why I find the defendant to be a danger pursuant to the code -- is that he in his mind, right or wrong, he thought the kids that he became involved with, the victims in these cases, he thought he was helping them, and that is a scary thing to put somebody out in the community, because he doesn't . . . know he is doing a molest[ation], and until today where he finally confesses to his conduct."

The trial court evidently found that defendant's "confession" during his testimony was too little, too late. The court explained that "both doctors thought that the defendant could make progress and get out," but "the ball is in [defendant's] court, he has got to, I guess, face up to it." The court stated that, if defendant "generally believes as he has testified to in this court today" (apparently his admissions that he had been a pedophile and that his behavior was wrong), "he should go back and tell the doctors that and if he tells the doctors that, he is going to probably be moving up to Phase Three" of the treatment process.

At that point, the trial court added, "I have never gone through one of these things, but you put me nude in a room and put a machine on me and I -- if I would be aroused at anything you would show me I would think there would be something wrong with me. You should [not be having a response] to something sexually like that, but I don't know. This man is a molester of several counts, in a cold room nude with a machine on him and he still gets an arousal by looking at a child, that is a scary thing, at least to me, and I am the one making the finding."

These comments demonstrate that the trial court believed the penile plethysmographic test results supported its ruling. Had trial counsel obtained exclusion of the test or countered it with scientific data showing that, contrary to the court's assumption, even "normal" control subjects have shown arousal to "deviant" stimuli, the court may not have relied on the test to support its ruling.

Nevertheless, it is unlikely that the trial court would have denied the petition after having found that defendant's belief that he was helping his victims was "scary," and that his acceptance of responsibility was too little, too late. (People v. Avena, supra, 13 Cal.4th at p. 418.) Neither of those findings was dependent upon the penile plethysmographic test, and it is improbable that exclusion of the test could have altered the findings or prevented them from being made. Thus, it is not reasonably probable that exclusion of the test would have produced a more favorable result. (Ibid.)

DISPOSITION

The judgment is affirmed.

We concur:

SCOTLAND, P.J.

HULL, J.