[J-61-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 104 MAP 2004
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered February 20, 2004 at 1314
	:	MDA 2002, affirming the Judgment of
v.	:	Sentence of the Court of Common Pleas
	:	of Berks County entered July 17, 2002 at
	:	Criminal Section No. 2680/01.
HARRY DENGLER,	:	
	:	843 A.2d 1241 (Pa. Super. 2004)
Appellant	:	
	:	ARGUED: May 17, 2005

CONCURRING OPINION

MR. JUSTICE BAER **Decided: December 30, 2005**

I agree with the Majority that the expert testimony adduced in this case does not derive from a novel theoretical or methodological foundation under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and our decisions thereunder. See, e.g., Grady v. Frito-Lay, Inc., 839 A.2d 1038, 1045 (Pa. 2003). Thus, the trial court did not abuse its discretion in admitting the evidence. Accordingly, I agree with the Majority's conclusion. I write separately, however, because I cannot subscribe to those aspects of the Majority Opinion that suggest that a statute setting forth factors to gird a particular scientific inquiry in itself relieves a court from conducting an independent analysis under Frye of the novelty of a given theory or method used to address those factors.

As the Majority notes, in United States v. Addison, 498 F.2d 741 (D.C. Cir. 1974), the United States Court of Appeals for the District of Columbia Circuit observed that "[t]he requirement of general acceptance in the scientific community assures that those most qualified to assess the general validity of a scientific method will have the determinative voice." Id. at 744-45; see Maj. Slip Op. at 14. In Addison, the court of appeals observed that the Frye test protects the "essential" ability of the opponent of challenged testimony "to produce rebuttal experts, equally conversant with the mechanics and methods of a particular technique" deployed by the proffered expert. 498 F.2d at 744. Evidence derived from truly novel theories or methodologies, of course, militates against this aim, insofar as the opponent may find a dearth of available experts prepared to meet such a proffer. Accordingly, we have held that it is not novel conclusions that are subject to scrutiny under Frye, but only conclusions based upon novel theories or methodologies. See Grady, 839 A.2d at 1045 (clarifying that, while the proponent must prove the general acceptance in the relevant scientific community of the methodology used, the proponent need not also prove "that the scientific community has also generally accepted the expert's conclusion"); see also Commonwealth v. Blasioli, 713 A.2d 1117, 1119 (Pa. 1998) ("This Court has generally required that both the theory and technique underlying novel scientific evidence must be generally accepted.")

In sanctifying as conclusive of the Frye inquiry the Megan's Law criteria for assessing whether an offender is a Sexually Violent Predator (SVP), see 42 Pa.C.S. § 9795.4(b), the Majority proves far more than its ruling requires. The Majority finds Addison's "determinative voice" not in the relevant scientific community but in the legislature. The Majority writes:

> Because this case involves a legislative construct and not a matter of common law, appellant simply misses the mark in criticizing Dr. Valliere's

> testimony on grounds that it does not square with prevailing standards and methodology in the psychological and psychiatric diagnostic communities. The statute does not require proof of a standard of diagnosis that is commonly found and/or accepted in a mental health diagnostic paradigm. As Dr. Valliere testified, the opinion she renders in a sex offender assessment is not strictly diagnostic in the psychological sense; rather, her opinion must account for statutory factors, such as 'the research, his behavior, his past records, his previous diagnoses," all of which affect the opinion she then forms and renders on the statutory question of SVP status. In seeking to protect society against certain sexual offenders, the General Assembly was not obliged to adopt a certain diagnostic construct, and it is the construct that was actually adopted which must control this Court's analysis of the relevance and admissibility of evidence offered to prove the statutory standard.

Maj. Slip Op. at 18-19. The Majority concludes, in a similar vein, that "[b]ecause the legislature provided the framework for assessing whether an offender is an SVP, expert testimony tracking that framework, **by definition**, should be deemed generally accepted in the community of professionals who conduct SVP assessments." Id. at 19 (emphasis added); see also id. at 20 ("Since [the expert's] findings follow the factors set forth in § 9795.4, there is no novel science requiring screening pursuant to the Frye test.").

Regardless of whether the expert opinion called for under the statute is "not strictly diagnostic in the psychological sense," it is his or her singularly scientific expertise that qualifies a witness to furnish such an assessment. Whatever diagnostic or non-diagnostic construct the legislature set forth, nothing in the statute denies the trial court its traditional prerogative to determine the legitimacy of the science underlying testimony proffered in support of a statutory assessment. Insofar as this determination falls under Pa.R.E. 702, Frye is, in the first instance, an aspect of that inquiry, notwithstanding the basis or contour of the statutory factors. Grady, 839 A.2d at 1045 (holding that "the Frye requirement is one of several criteria" that must be satisfied

under Rule 702).[1] That the legislature institutes a governing standard, whether diagnostic or statutory, offers no assurance that there will be a body of experts equipped to testify under the legislative standard from the same theoretical or methodological framework, the very situation Frye and progeny sought to remedy.[2]

Because I believe the appropriate answer to the Frye predicate inquiry concerning novelty can be reached without resort to deference to the enactments of the General Assembly, which collectively has no peculiar expertise in the relevant disciplines, I would not reach so far. Courts' long-standing and undisputed reliance on psychological and psychiatric testimony and evidence[3] illustrates beyond cavil that the standard theories and methods employed in those practices are pervasive and anything

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[1] Although this Court has, in the past, deferred in the Frye context to legislative standards as evincing a given scientific method's non-novelty, see generally Commonwealth v. McGinnis, 515 A.2d 847 (Pa. 1986), the Majority offers no authority for the broader proposition that legislative enactments, as such, deny trial courts the prerogative to assess the novelty of the science that underlies expert testimony applying a statutory framework in a particular case.

[2] If the legislature, for example, passed an act enshrining phrenology as the discipline best suited to an SVP assessment, such assessments might grind to a halt indefinitely for want of practitioners. Were the Commonwealth then to locate one expert in that archaic pseudo-science to testify on its behalf in all such cases, defendants likely would be hard-pressed to find witnesses versed in the theories and methods of phrenology to rebut the Commonwealth's evidence. That the statute might require adherence to such a standard does not in itself free litigants or the courts from the problems identified in Addison regarding either side's ability to furnish rebuttal testimony.

[3] *Amicus Curiae* Defender Association of Philadelphia observes that SVP assessments sometimes are conducted by trained counselors without credentials in the disciplines of psychology or psychiatry. Brief of *Amicus Curiae* at 15-16 & n.7. The instance or prevalence of this practice does not materially affect my position on this issue.

but novel to practitioners or the courts.[4] The instant challenge distilled to its essence goes not to the novelty of the expert's methods but to the legitimacy of the expert's conclusions, which in turn goes not to admissibility but to weight. See, e.g., In re Thorell, 72 P.3d 708, 725 (Wash. 2003).

The testimony of the Commonwealth's expert in this case, taken as a whole, clearly indicates that the methodology she employed in reaching her conclusions was consistent with generally accepted practices in clinical psychology, practices the courts have long-since determined are sufficiently valid to lead to admissible testimony and evidence. Of course, where novel or suspect conclusions are reached from generally accepted postulates, there may be ample room to impeach the expert testimony in question. Because Frye applies only to the principles underlying the conclusions; as noted, such inquiries go not to admissibility but to weight. It appears that the expert in this case was cross-examined extensively but, in view of the factfinder, unavailingly. It is not our place to reach the factfinder's determinations of weight and credibility absent an abuse of discretion.

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[4] See, e.g., Barefoot v. Estelle, 463 U.S. 880, 896 (1983) ("The suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel."); id. at 898 ("Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists."); In re Thorell, 72 P.3d 708 (Wash. 2003), and cases cited therein; Westerheide v. Florida, 767 So.2d 637, 656-57 (Fl. Dist. Ct. App. 2000), aff'd, 831 So.2d 93 (Fl. 2002) (noting, vis-à-vis the necessity of a full Frye analysis of expert psychological testimony under Florida's Megan's Law-equivalent statute, that "the record clearly shows that in formulating their opinions, neither expert used any psychological profile or syndrome designed to identify violent sexual predators;" rather, the experts "rendered their opinions in this case based on their training and experience").

In sum, I believe the theory and methodology underlying the SVP assessment conducted pursuant to statute *in this case*[5] is wholly non-novel, notwithstanding its demonstrable flaws and predictive limitations. The same methods and techniques have for many years been held admissible in related contexts here and elsewhere. Because the trial court's determination to that effect in the instant case does not amount to an abuse of discretion, I would affirm. Accordingly, I respectfully offer this Concurring Opinion.[6]

Mr. Justice Nigro did not participate in the decision of this case.

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[5] Although we need not reinvent the wheel each time a party raises a Frye challenge to the sort of scientific method previously approved by a binding appellate court ruling, trial courts still should evaluate each challenge based on the putative novelty of the theory and methodology underlying proffered expert evidence or testimony. Indeed, the overarching source of my concerns articulated herein is the prospect that courts might deem the Majority analysis to reflect a *per se* preclusion of an analysis for novelty in the first instance of any proffered methodology in the context of SVP assessments.

[6] I recognize that the Majority Opinion pays more than lip service to those propositions that animate my Concurring Opinion. See, e.g., Maj. Slip Op. at 17 (finding no abuse of discretion "primarily because [the Court] is satisfied that Dr. Valliere's testimony did not involve science which could properly be deemed novel under Frye"). Because I view the Majority's analysis as amenable of several interpretations, however, I respectfully disagree with just those aspects of the Majority's analysis that are inconsistent with the foregoing discussion.