No. 21708 -- Glenn M. Wilt and Sandra B. Wilt v. Robert Buracker

Neely, J., concurring:

I concur in the judgment. I cannot join the opinion of the Court, however, because I believe that W.Va.R.Evid., Rule 702 should be applied differently in civil and criminal cases.

In the case before us -- a civil case -- the majority applied W.Va.R.Evid., Rule 702 in determining whether the specialized knowledge of the plaintiffs' expert, economist Michael Brookshire, Ph.D., was relevant to the calculation of damages for the plaintiffs' loss of enjoyment of life resulting from a car collision. Because Dr. Brookshire's analysis lacked a detailed explanation of the underlying methodology on which it was based

and, moreover, relied in large part on assumptions that "appear[ed] to controvert logic and good sense," the majority correctly excluded the testimony as irrelevant. Basically the majority is saying that the proffered expert is a witch doctor. So far, so good and I agree.

The majority, however, failed to make a critical distinction between civil and criminal cases. This is not surprising. In the real world, far more attention is paid to civil, as opposed to criminal, cases. Judges, few of whom lack political agendas, commonly come from the plaintiffs' bar because the plaintiffs' bar is more politically active than the defendants' bar and plaintiffs' lawyers have human friends and not just corporate clients. But even former defendants' lawyers grow more pro-plaintiff the longer they serve on the bench because they understand the extraordinary advantages that the litigation process itself accords to defendants.

Judges try to make general rules to give an impartial and objective appearance even when the problem they are trying to solve does not really admit to solution through a "general" rule. The mistake in all civil plaintiff-driven Rule 702 jurisprudence is the failure to recognize that there are different imperatives in civil and criminal law and that these imperatives must be accommodated if law is to avoid being a tale told by an idiot. Thus, civil law imperatives should not render an irrational result in criminal laws simply because it is difficult to explain or unpleasant to recognize how the real world works.[1] To explain and accommodate the real world requires nothing more than a willingness to discard cant.

---

[1]In reality, general rules created by judges to achieve political ends are far more damaging than the average Third World dictator who simply says, as he places the noose around some political enemy's neck, "I really don't like you." At least the dictator does not end up killing a bunch of his friends or even a bunch of strangers he has never met.

W.Va.R.Evid., Rule 702 adopts a liberal stance on admitting expert testimony and favors admissibility by investing trial judges -- to wit, predominantly pro-plaintiff trial judges -- with broad discretion to admit expert testimony. Indeed, the United States Supreme Court in Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. __, 113 S.Ct. 2786, 125 L.Ed. 469 (1993) found that the Rules of Evidence superseded the comparatively stringent Frye "general acceptance" test for the admission of expert scientific evidence.[2] However, the Daubert majority also seemed to expand further the gatekeeping role of trial judges by requiring them to assess the evidentiary reliability of proffered scientific evidence. In other words, no

[2]Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923). In neither the language of Rule 702 nor in the Advisory Committee notes that accompany it is the Frye rule mentioned, much less explicitly overturned. Indeed, the rule itself, requiring only that expert testimony assist the trier of fact in order to be admissible, is so vague as to be amenable to both pro-plaintiff and pro-defendant interpretations.

Frye test, but no guys with bones through their noses casting colored stones either.

The ordinary civil defendant -- typically an insurance company -- commonly has at its disposal far more funds and resources than the ordinary civil plaintiff. More important, defense counsel favor prolonging litigation year after year to settling because defense counsel are paid to vomit mindless paperwork and discover 'til the cows come home, not to win. At trial, the defense can afford a national expert whose testimony is a shoo-in for admissibility, while the plaintiff may need to settle for a total hack whose techniques will raise Daubert-type objections, but who is local, cheap and not unduly sicklied o'er with the pale cast of thought.

By liberalizing the admissibility standard for expert testimony, Rule 702 in effect, then, achieves three ends: (1) it pushes the boundary

of admissibility back to embrace comparatively more "junk science" testimony and thus validates a trial judges' admission of testimony by almost any hack; (2) it counterbalances the drag-the-case-out, hourly billing, pro-litigation bias on the defendants' side; and (3) it makes it easier for plaintiffs to produce enough evidence, courtesy of hacks, to get past the dam of summary judgment and nit-picking, lengthy scientific arguments to the safe harbor of plaintiff-sympathetic juries. This in turn impels defendants to settle, rather than to face such juries, which allows judges long lunches and frequent golf outings.

Criminal cases under Rule 702, however, are governed by a different set of political, sociological, and structural imperatives. Currently, the criminal defense bar is populated in general by (1) high-quality young people who are overworked, underpaid and suffer from a high burnout rate; (2) good lawyers who take cases only because they're

appointed and forced to do so; and (3) a plethora of marginally competent, bottom-of-the-class nincompoops who volunteer for criminal appointments in order to eke out a meager living in a highly competitive world. In effect, Rule 702 places the burden of rebuttal on the party opposing admissibility, typically the defendant in a criminal case who, in contrast to a civil defendant, lacks the economic muscle or even the creative lawyering necessary to marshal scientific witnesses for a battle of the experts.

Notwithstanding the broad boundaries of Rule 702, there are, at least theoretically, limits to the admissibility of expert scientific testimony: as the case before us now illustrates, courts at least have the sense to toss out egregious rubbish like that of Dr. Brookshire's. The problem in criminal cases, however, is that the prosecution, unlike the defendant, has ready access to expert witnesses and fabulous laboratory facilities. Thus, a surprising number of novel techniques gain admissibility

without the presentation of defense expert testimony because a criminal defendant often cannot afford to hire even a good Zulu witch doctor, whose fees and travel costs would exceed guidelines for such things.

What tends to obfuscate this phenomenally pervasive problem in the criminal system is the fact that an ordinary street criminal with a little money can usually grind the whole criminal prosecution process to a halt by hiring one of the few members of the private bar who specializes in paid criminal cases and is competent. A prosecutor can't afford to waste lots of valuable resources fiddling around with a knowledgeable and competent middle-aged lawyer, so he cuts a deal and moves on. But those dynamics apply only to ordinary crime-- crime, in other words, where the visibility and publicity won't get the prosecutor appointed federal judge, or elected governor or United States senator.

Once, however, a crime of fashion such as rape, child diddling or low-level political corruption is publicized, the prosecutor will devote every single resource in his or her office to the case because that prosecution advances the personal agenda of the prosecutor. After all, the truly great corruption is not the penny ante peculations of two-bit politicians, but the surpassing corruption that occurs when a whole bureaucracy prostitutes itself through trading for its own account. Bigger budgets, greater staff, more computers, higher government salaries, increased prestige and improved job longevity will take all the self-proclaimed righteous, anti-corruption, good government enthusiasts and, in the space of one nanosecond, turn them into salivating whores.[3]

---

[3]Bureaucratic self-dealing involves every bit as much indifference to duty and to the most elementary obligations of honesty and humane conduct as regular bribery, but because bureaucratic self-dealing is so difficult to prove, it has never been made illegal. The corrupt bureaucratic self-dealer (i.e., thief) can always trot out the defense "I was only doing my job," or better yet, "I was simply following orders." For greater elaboration

on courts' obligations to ferret out this type of corruption, see Neely, How Courts Govern America 79-114 (1980).

Therefore, to say that the State is actually at a disadvantage in the prosecution of run-of-the-mine felonies is true; but to say that the prosecution can spend millions of dollars to get one poor, politically unpopular, impoverished and friendless defendant is equally true and that is as it was in the beginning, is now and ever shall be world without end. Which is why judges must protect the public from bureaucracies that are corrupt and will trade for their own accounts.[4]

---

[4]Take, for example, the trials and tribulations endured by Glen Dale Woodall (the fabulously well-publicized, alleged Barboursville Mall rapist), all caused by the unscrupulous workings of the State. In 1987, Mr. Woodall was convicted of multiple felonies, including two counts of sexual assault, and sentenced to a prison term of 203 to 335 years. Mr. Woodall was convicted on the basis of Trooper Fred Zain's scientific analysis of semen recovered from the victims as identical to that of Mr. Woodall's. Although Mr. Woodall's conviction was affirmed on appeal, DNA testing ordered by this Court conclusively established that he could not have been the perpetrator. In 1992, Mr. Woodall's conviction was overturned by the trial court, and Mr. Woodall was awarded his freedom. State v. Woodall, 182 W. Va. 15, 385 S.E.2d 253 (1989). In Matter of W. Va. State Police Crime Lab, _ W. Va. _, 438 S.E.2d 501 (1993), this Court chronicled Trooper Zain's long history of falsifying evidence as a serology

expert in criminal cases to obtain convictions for the prosecution. We further noted that Trooper Zain's false testimony was the result of systematic practice rather than an occasional inadvertent error.

Expert witness Pam Rockwell epitomizes all the problems that a plaintiffs' bar-driven interpretation of Rule 702 presents in criminal cases. In a recent high-profile criminal case, Ms. Rockwell, a sexual assault counselor with a bachelor's degree and a self-proclaimed "advocate for victims," testified from her meetings with sexual assault victims that their behavior was consistent with having been sexually assaulted. State v. Delaney, 187 W. Va. 212, 218, 417 S.E.2d 903, 909 (1992) (Neely, J., dissenting).[5] Ms. Rockwell delivered her testimony for the prosecution without inquiring into the children's backgrounds concerning other possible causes for abnormal behavior and without talking to anyone who knew them before the assaults. That Ms. Rockwell admitted she was not neutral, that she was not a trained psychologist or psychiatrist, that she

---

[5]See also State ex rel. Spaulding v. Watt, 188 W. Va. 124, 128, 423 S.E.2d 217, 221 (1992) (Neely, J., dissenting); State v. Walter, 188 W. Va. 129, 132-35, 423 S.E.2d 222, 225-28 (1992) (Neely, J., concurring).

failed to ask the most basic questions that one would think any competent person (not just an expert) would ask if that person really were interested in finding the truth instead of advancing a cause did not faze the lower court or this Court on appeal. Ms. Rockwell's testimony was not only admitted, but proved to be damning. This Court then affirmed, citing Rule 702.

In Galileo's Revenge: Junk Science in the Courtroom, 16 (1991), Peter Huber elaborates on the pamrockwellization of expert testimony precipitated by Rule 702:

> Today, virtually any doctor armed with a medical degree is qualified to testify. Sometimes he will be expected to assert that his opinion has a "reasonable basis," that it does not originate in chicken entrails or phases of the moon, but this is not much of a standard. He need not be a recognized authority or specialist. He need not reconcile his opinions with public-health statistics of epidemiology. He

> need not establish that his diagnostic methods or logical leaps enjoy "general acceptance" among other doctors. Quite the contrary: he may insist that he alone among doctors understands the importance or origins of certain symptoms. He may claim, in short, to be a new Galileo, a lonely, misunderstood genius who can see wonders that others neither discern or understand. The standards are almost equally loose for other, nonmedical experts.

Plainly, the fate of a criminal defendant should not hang on his ability to rebut scientific evidence when the expert may be testifying on the basis of an unproved hypothesis arrived at in an isolated experiment. Yet unlike the days when my grandfather and uncle were at the bar, there is no longer a politically active, responsible group of lawyers who understand the gross inequities wrought by the application of Rule 702 as interpreted in civil cases to criminal cases and who are willing to make the necessary political noise and expend the necessary political capital to draw

attention to them. Still, if it is no longer the work of the organized bar to protect criminal defendants, it is still the work of the courts.

Accordingly, I would advocate a return to the more stringent Frye standard as a gloss on Rule 702 in criminal cases. Under the Frye standard, a hearing is required to determine scientific acceptance of new tests before the evidence can be admitted; the burden thus is cast upon the proponent of the test to demonstrate its scientific reliability. In placing a special burden on the prosecution rather than the outresourced, outfunded defendant, the Frye test will assure that a minimal reserve of experts exists who can critically examine the validity of a scientific determination in a particular case and will eliminate at least the most egregious pamrockwellesque experts.