[Cite as *State v. Nunley*, 2009-Ohio-4597.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio — Court of Appeals No. H-08-018

Appellee — Trial Court No. CRI-2007-1055

v.

John E. Nunley, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: September 4, 2009

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, for appellee.

James W. VanDeilen, for appellant.

* * * * *

HANDWORK, P.J.

{¶ 1} In this appeal from a judgment of the Huron County Court of Common Pleas, appellant, John E. Nunley, Jr., asserts that the following error occurred in the trial court proceedings:

{¶ 2} "The court below committed error in not striking the testimony of Earl Gliem presented as a fingerprint expert by the state."

{¶ 3} On September 18, 2007, Gary DeHart, who works for R & L Carriers ("R & L") as a security investigations manager, was contacted by the safety department for R & L's terminal in Phoenix, Arizona. DeHart was informed that a "suspicious shipment" was dropped off at that location. This shipment consisted of four crates that allegedly contained computer components and weighed a total of 486 pounds. When a K-9 dog owned by the Phoenix Police Department was walked around the crates, he alerted to the presence of a controlled substance. The shipment was to be delivered to Carlos Torres at the R & L terminal in Norwalk, Ohio.

{¶ 4} Based upon the information provided by the Phoenix Police Department, DeHart then went to the Norwalk Terminal to facilitate a controlled delivery of the crates. In addition, the Norwalk Police Department was informed of the suspicious crates. That police department called Captain Robert McLaughlin of the Huron County Sheriff's Office. McLaughlin is a member of a multi-county drug task force. Because it appeared that this might be a large drug delivery, Captain McLaughlin contacted Mark Apple, an officer working for the Ohio Attorney General's Office, Bureau of Criminal Investigation, in Toledo, Ohio.

{¶ 5} Because Carlos Torres was known by Apple to be a drug dealer in the Toledo area, Apple assembled a group of people who worked in the Drug Enforcement Administration Office ("DEA") in Toledo.

{¶ 6} On September 20, 2007, the day that the crates arrived at the Norwalk terminal, DeHart received a telephone call from an individual who identified himself as

John Nunley. The call was made on a telephone with a Phoenix area code. The caller wanted to know when Torres could pick up the four crates. According to DeHart, Nunley indicated that he was the person who shipped the crates from Phoenix, Arizona.

{¶ 7} Upon their arrival, the crates were transported to the regional airport, where a K-9 dog sniffed the crates and "alerted," thereby signifying that the crates contained drugs. Based upon the alert, Apple obtained a search warrant and opened one of the crates. The crate contained large, black, plastic bags. When Apple slit open one of the bags, he could see "green vegetation" and smelled "the odor of marijuana." The bags and crates were then resealed and returned to the R & L terminal in Norwalk.

{¶ 8} James R. Fulton, an officer in the Norwalk Police Department, was stationed at the R & L terminal waiting for the individual who was receiving the shipment to arrive. Two men in a black Chevrolet pickup truck came to the terminal to take the crates. The passenger in the truck was Carlos Torres. John Nunley was driving the truck, which was registered in the name of Nunley's uncle, Thomas Nunley. Torres got out of the truck, completed the necessary paperwork and paid DeHart the shipping charges. Nunley climbed out of the pickup and stood next to the driver's side of the vehicle during this process. After the crates were loaded into the bed of the pickup truck and the truck pulled away from the terminal, Officer Fulton called Captain McLaughlin.

{¶ 9} As Fulton was waiting for McLaughlin to pick him up, he saw a Dodge Durango pull up and drive behind the black truck. At one point, both the Durango and the truck stopped. Torres got out of the pickup and got into the Durango. Fulton and

McLaughlin stopped the Durango, while Mark Apple and other DEA agents stopped the black pickup. Appellant, Torres, and Marcos Jaso, who was driving the Durango, were arrested. Appellant was indicted on one count of possession of marijuana in an amount of more than 20,000 grams, a violation of R.C. 2925.11(A) and (C)(3)(f), a felony of the second degree.

{¶ 10} At appellant's jury trial, Kevin Ross, who works in the chemistry section of the Ohio Bureau of Criminal Identification and Investigation ("BCI"), testified that the seized crates contained four large black garbage bags, with two "bricks" of vegetable matter inside each bag, adding up to eight bricks of vegetable matter. Ross examined the bricks and determined that they weighed a total of 72,871.03 grams or approximately 160 pounds. Chemical testing revealed, to a reasonable degree of scientific certainty, that the bricks were marijuana.

{¶ 11} Earl Gliem, a fingerprint expert working at the BCI also testified. He stated that, in using fingerprint cards for comparison purposes, he was able to identify, to a reasonable degree of scientific certainty, that one of appellant's fingerprints, specifically, the print of his right middle finger, was on one of the black plastic bags.

{¶ 12} Captain McLaughlin, who inventoried all of the items found in the black pickup truck was then recalled to testify. He indicated that he found the following pertinent items in the truck: (1) a carpenter's union card in appellant's name; (2) the address of R & L Carriers in Phoenix Arizona; and (3) a slip of paper bearing some measurements. Captain McLaughlin then testified that he measured the crates. These

measurements matched the measurements on the slip of paper. In addition, a federal express air bill, dated September 14, 2007, for a package weighing approximately one-half pound was sent from a woman in Toledo to a Best Western motel/hotel in Phoenix Arizona in care of John Nunley. Finally, it is undisputed that John Nunley was driving the black pickup truck with the crates of marijuana in that truck at the time that he was arrested.

{¶ 13} Based upon the evidence offered at trial, the jury found appellant guilty of possession of marijuana. The trial judge sentenced him to a mandatory eight years in prison. The court further ordered Nunley either to pay a mandatory $7,500 fine or, in lieu of paying the fine, to forfeit the Chevrolet truck.

{¶ 14} In his sole assignment of error, appellant contends that the trial court erred in overruling his motions to strike Gliem's testimony because: (1) the state purportedly failed to establish that Gliem was an expert; and (2) Gliem "was incapable of providing a foundation to support his conclusion and opinion testimony."

{¶ 15} A trial court has broad discretion in the admission and exclusion of evidence. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. An appellate court will not disturb evidentiary rulings absent an abuse of that discretion. Id. An abuse of discretion signifies more than merely an error in judgment; instead, it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169. This standard also applies to the determination of whether or not an individual is an expert. *State v. Hartman*, 93 Ohio St.3d 274, 285, 2001-Ohio-1580 (Citations omitted.).

{¶ 16} Evid.R. 702 governs the qualification of a witness as an expert and reads, in material part:

{¶ 17} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons * * *;

{¶ 18} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶ 19} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information."

{¶ 20} A person does not need a special education or a certain type of certification in order to be qualified as an expert witness. *Hartman*, supra. Moreover, the person presented as an expert does not need to "have complete knowledge of the field in question, as long as the knowledge he or she possesses will aid the trier of fact in performing its fact-finding function." Id.

{¶ 21} At appellant's trial, the state elicited the following information related to Gliem's qualifications. Gliem has a Bachelor of Science degree in Forensic and Investigative Science from West Virginia University, where he first learned to identify latent fingerprints. He was required by the BCI to engage in nine months of training that included, inter alia, the identification of latent fingerprints, prior to performing any field work. Gliem's sole work at the BCI is to collect, test, and identify fingerprints. At the time of Nunley's trial, he had performed that duty for almost two years and examined "tens or hundreds of thousands fingerprints," making positive identifications in 150 to

200 cases. Gliem testified that if he fails to identify a fingerprint or any doubt exists as to the identification of a fingerprint, a second forensic scientist must verify that finding. Finally, it is well known and accepted that latent fingerprint identification satisfies the standard of reliability. See *State v. Payne*, 10th Dist. Nos. 02AP-723, 02AP-725, 2003-Ohio-4891, ¶ 53-54 (Citations omitted.) Based upon the foregoing, we cannot say that the trial court's attitude in allowing Gliem to testify as an expert was unreasonable, arbitrary, or unconscionable.

{¶ 22} Appellant maintains, however, that Gliem's opinion as to the latent fingerprint on the black plastic trash bag was inadmissible because he failed to provide a proper foundation for his testimony. Evid.R. 705 provides:

{¶ 23} "The expert may testify in terms of opinion or inference and give his reasons therefore after disclosing the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise."

{¶ 24} At trial, Gliem testified that the BCI uses the fingerprint cards of defendants in order to compare and determine whether a latent fingerprint is that of a particular individual. He stated that in making comparisons in this case, he had the fingerprint cards of Marcos Jaso, John Nunley, and Carlos Torres. He put an enhanced copy of the latent fingerprint on the plastic bag and Nunley's fingerprint card side by side on a "comparator," which magnifies the fingerprints, and compared the relevant points on each. When asked whether there were a specific number of points that had to match for a positive finding, he replied: "There is no specific number to make an identification." He

opined that, after making his comparison, he was absolutely positive, to a reasonable scientific certainty, that the latent fingerprint on the plastic bag was John Nunley's fingerprint. He further averred that this finding was independently verified by another forensic scientist.

{¶ 25} Appellant's trial counsel challenged this testimony by asking Gliem the number of points that matched between Nunley's fingerprint card and the latent fingerprint on the plastic bag. Gliem answered by saying that he could not remember and that he did not bring his "lab notes" to court. Counsel also asked whether Gliem observed the second forensic scientist during her verification of his findings, and he answered, "No."

{¶ 26} We conclude, based upon his testimony offered at trial, that a sufficient foundation was set forth for Gliem's opinion and that appellant's arguments merely go to the weight and credibility of Gliem's testimony, not to that foundation. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Here, the jury gave greater credence and weight to Gliem's testimony. Accordingly, appellant's sole assignment of error is found not well-taken.

{¶ 27} The judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE