

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	ID No: 0206007051
)	
BRADFORD JONES)	

Submitted: June 11, 2003
Decided: July 2, 2003

MEMORANDUM OPINION

*Upon Defendant's Motion in Limine to Exclude
Expert Witness Document Analysis Testimony: **DENIED.***

Jennifer-Kate Aaronson, Esquire, Potter, Carmine, Leonard & Aaronson,
Wilmington, Delaware, for Defendant.
Paul Wallace, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, for the State.

Gebelein, J.

Now this 2nd day of July, 2003, upon consideration of Bradford Jones' ("Defendant")
Motion *in Limine* to exclude the expert witness testimony of State witness Georgia Carter, who is
a document analyst, the Court finds the following:

STATEMENT OF FACTS

Defendant was indicted on June 17, 2002, on one count of Criminal Solicitation and three counts of Terroristic Threatening. Defendant is accused of authoring a handwritten note found at the Delaware Correctional Center above a coffee pot on F Tier, Building D on April 19, 2002.¹ In this case, document examiner, Georgia Anna Carter was given eight documents containing the known handwriting of Defendant to compare with the questioned document. The State initially intended to call Ms. Carter, to testify as an expert witness regarding: (1) her examination of the note in question and the known hand printing of the Defendant detailing the similarities and differences between the two types of documents; and, (2) her opinion that Defendant prepared the document in question. The State also indicated an intention to call Mr. Hegman as an expert witness in the field of fingerprint analysis.

NATURE AND STAGE OF THE PROCEEDINGS

Defendant, through his counsel, filed the instant Motion *in Limine* on December 19, 2002 requesting exclusion of testimony concerning the results of both document analysis and fingerprint analysis. An evidentiary hearing was held on April 7, 2003 and decision was reserved until briefing by the parties was complete. In his opening brief, Defendant withdrew his motion to exclude testimony regarding the results of a fingerprint analysis from expert witness, Mr. Hegman. Briefing on the issue of document analysis is complete; however, the State has now indicated that it will not offer Ms. Carter's ultimate opinion that Defendant authored the note in question. Accordingly, the only issue remaining before the Court is whether Ms. Carter's

¹The note stated: "To: All Prisoners of War on Friday, April 19, 02 we as prisoners will start the elimination of all pigs, co's, cops or whatever you want to call them. On top of our list is co Hall, co Allen and co Jones. United we stand divided we fall."

testimony concerning her examination of the known writing samples of the Defendant and the questioned document detailing her findings as to the similarities and dissimilarities in the writings should be excluded as inadmissible.

SUMMARY OF THE ARGUMENTS

Defendant asserts that handwriting identification evidence fails to satisfy the requirements

of D.R.E. 702 and *Daubert v. Merrill Dow Pharmaceuticals, Inc.*² Defendant argues that the expert testimony of Ms. Carter must be excluded at trial because the reliability of the discipline has not been established, and there are no standards in existence within the field of document analysis as to when an examiner can claim a match. Defendant contends that the admissibility of handwriting analysis is a matter of first impression for this Court and cites the holdings of three recent district court opinions to support his motion.³

Since the expert testimony in this case is only being offered to identify and explain the physical mechanics and characteristics of the writings and to identify the similarities and dissimilarities in the writings, the State suggests that it is not “scientific testimony.”⁴ Due to the technical non-scientific nature of the proffered testimony, the State argues that the first three *Daubert* factors relating to testing, peer review, and error rates are not particularly applicable to

²*Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

³See *United States v. Lewis*, 220 F. Supp. 2d 548 (S.D. W. Va. 2002) (holding that the government’s handwriting analyst did not qualify as an expert witness because the Government did not offer sufficient evidence of reliable testing and error rates and failed to meet its burden of establishing by a preponderance of the evidence that the expert testimony was sufficiently reliable to be admissible under Rule 702.); *United States v. Saelee*, 162 F. Supp. 2d 1097 (D. Ala. 2001) (holding that forensic document analyst testimony was not admissible as opinion by a lay witness or as an expert opinion because the government had not established reliability of the theories and methods used by a document examiner); *United States v. Brewer*, 2002 WL 596365 (N.D. Ill. 2002).

⁴State’s Response at 2.

the limited testimony the State plans to offer.⁵ While taking no position as to whether a handwriting expert would be able to testify as to the ultimate authorship of a questioned document, the State postulates that a more exhausting *Daubert* analysis may be necessary in such a case where a conclusory opinion is offered.⁶

DISCUSSION

1. Standard Governing the Admissibility of Expert Opinions.

The admission of expert witness testimony is provided for in Delaware Rule of Evidence 702. In order for expert testimony to be admissible, it must be both relevant and reliable.⁷ DRE 702 provides: “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...”⁸ Since Delaware Rule of Evidence 702 is identical to its federal counterpart, the Delaware Supreme Court has adopted the United States Supreme Court’s authoritative interpretation of Federal Rule of Evidence 702.⁹ In *Daubert*, the Supreme Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to “ensure that any and all scientific testimony... is not only relevant, but reliable.”¹⁰ In *Kuhmo Tire v. Carmichael*,

⁵*Id.* at 4.

⁶The State noted that the exercise of making and opining to a “match” between one handwriting sample and another is much more readily subject to testing, peer review, and error rates. *Id.* at 2 n.1.

⁷*M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 521 (Del. 1999) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)).

⁸DEL. R. EVID. 702.

⁹*M.G. Bancorporation, Inc.*, 737 A.2d 513 at 521.

¹⁰*Id.* (quoting *Daubert*, 509 U.S. at 589).

the Supreme Court expanded the basic gatekeeping function in *Daubert* to apply to all expert testimony, not just scientific evidence.¹¹ The Supreme Court of Delaware adopted the holdings of *Daubert* and *Kumho* as the correct interpretation of Delaware Rule of Evidence 702.¹²

In *Daubert*, the Supreme Court created a gatekeeping role for trial judges concerning the admissibility of scientific expert testimony and identified certain factors for consideration. The following five factors were set forth for assessing the reliability of expert scientific testimony: (1) whether the theory or technique can be or has been tested; (2) whether the theory has been subjected to peer review; (3) whether there is a known or potential rate of error; (4) whether standards exist for the application of the theory; and, (5) whether the theory or technique enjoys general acceptance within a relevant scientific community.¹³ These factors, however, are not exhaustive or applicable in every case. Accordingly, the trial judge enjoys broad latitude to use other factors to evaluate reliability.¹⁴ In *Kumho*, the Supreme Court held that a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.¹⁵ However, whether *Daubert's* specific factors are or are not reasonable measures of reliability in a particular case is an issue that the law grants the trial judge broad latitude to determine.¹⁶ Despite the flexible approach set forth in *Kumho*, trial courts still must ensure that an expert “employs in the courtroom the same level of intellectual rigor that

¹¹*Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

¹²*M.G. Bancorporation, Inc.*, 737 A.2d at 522.

¹³509 U.S. at 593-594.

¹⁴*See Kumho Tire Co.*, 526 U.S. at 153.

¹⁵526 U.S. at 152.

¹⁶*Id.* at 153 (citation omitted).

characterizes the practice of an expert in the relevant field.”¹⁷ The Supreme Court, in *Kumho*, also required the trial court to make a determination as to whether the particular expert had sufficient specialized knowledge to assist the jurors “in deciding the particular issues in the case.”¹⁸

2. Qualification as an Expert.

A proposed expert must possess knowledge, skill, experience, training, or education in the area of his or her testimony greater than the average layperson.¹⁹ At the evidentiary hearing, Ms. Carter testified that she has been employed with the Delaware State Police for thirty years and has been a forensic document examiner for seventeen years. Her formal and specialized training consists of the United States Secret Service School in Glynco, Georgia; a two year apprenticeship under qualified document examiner Lieutenant R. Davis Wilkenson, retired Delaware State Police; courses at the American Institute of Applied Science in Syracuse, New York; Rollins College in Orlando, Florida; and, the Federal Bureau of Investigation International Symposium in Albany, New York.²⁰ Ms. Carter is a member of the International Association for Identification, Chesapeake Bay Division, and an associate member of the Mid-Atlantic Association of Forensic Science.²¹ She has testified as an expert in the area of document examination approximately twenty-two times. Ms. Carter has been previously admitted as an

¹⁷*U.S. v. Prime*, 220 F. Supp. 2d 1203, 1205 (2002) (quoting *Kumho Tire Co.*, 526 U.S. at 152.).

¹⁸526 U.S. at 156.

¹⁹*See Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 114 (3d Cir. 1987).

²⁰Hrg. Tr. at 57.

²¹*Id.* at 58.

expert in the field of handwriting analysis by this Court, the Court of Chancery, Family Court, and the U.S. District Court.²² The Court finds that Ms. Carter possesses the requisite knowledge, skill, experience and training to be qualified as an expert in the field of document analysis. In addition, she has sufficient specialized knowledge to assist the jurors in deciding the particular issues in the instant case as set forth by the *Kumho* decision.²³

3. Analysis.

Prior to *Daubert* and *Kumho*, it was “well established” that a properly qualified handwriting expert could give opinion testimony about the authorship of a questioned document.²⁴ The Third Circuit considered the admissibility of handwriting analysis testimony in *United States v. Velasquez* post-*Daubert*, but prior to *Kumho*.²⁵ While exercising caution, the Third Circuit did review the expert testimony under the premise of *Daubert* and held that the handwriting analysis testimony was properly admitted because it met all three requirements of F.R.E. 702.²⁶ The Court found that the testimony of the handwriting analyst, including her opinion as to authorship, was sufficiently reliable to be submitted to a jury.²⁷

²²Hrg. Tr. at 59. See e.g., *United States v. Edwards*, 816 F. Supp. 272, 277 (D. Del. 1993) (holding that testimony of the government’s handwriting expert, Ms. Carter, was properly admitted).

²³See *Kumho Tire Co.*, 526 U.S. at 156.

²⁴See *Wood v. United States*, 357 F.2d 425, 427-428 (10th Cir. 1966), *cert. denied*, 385 U.S. 866 (1966); *United States v. Ready*, 574 F.2d 1009, 1015 (10th Cir. 1978).

²⁵*United States v. Velasquez*, 64 F.3d 844 (3d Cir. 1995).

²⁶*Id.* at 850.

²⁷*Id.* at 851. Despite the fact that the State no longer intends to offer Ms. Carter’s ultimate opinion that Defendant authored the note in question, there is substantial post-*Kumho* authority that supports the admissibility of such evidence in the appropriate case. See *U.S. v. Paul*, 175 F.3d 906 (11th Cir. 1999) (holding that handwriting examiner’s testimony could assist jury’s understanding of the evidence, as required for his testimony to be admissible as expert testimony); *U.S. v. Jolivet*, 224 F.3d 902, 906 (8th Cir. 2000) (holding that there was no abuse of discretion in admitting handwriting analysis testimony as reliable; characterizing it as offering the jury knowledge beyond their

At first glance, it does appear that the issue regarding document analysis testimony is a matter of first impression for this Court. However, Judge Richard F. Stokes issued a ruling from the bench on July 10, 2001 concerning the admissibility of handwriting analysis testimony. The Court relied upon the Supreme Court's holdings in *Daubert* and *Kumho* and indicated that a trial judge must make a threshold determination about the reliability of testimony offered by an expert, and decide whether by a preponderance of the evidence there are grounds established that a jury is not being offered an opinion that is mere speculation.²⁸ Because of the absence of peer review, publication and its subjective nature, the Court found that handwriting analysis is not a science, but a special skill.²⁹ As a result, the Court concluded that it would be too much to expect that all of the *Daubert* criteria would fit the field of handwriting analysis. For example, peer review is unlikely in a non-scientific area of expertise. The Court held that handwriting analysis testimony would assist the jury to further understand the evidence and found the witness to be "a skilled person by training and experience."³⁰ Ultimately, the Court found handwriting analysis to be relevant and reliable under D.R.E. 401 and 402 and admitted the witness' testimony as specialized knowledge, rather than scientific, that would assist the trier of fact pursuant to D.R.E. 702. Accordingly, the witness was permitted to testify as to: (1) her

own and enhancing their understanding of the evidence before them); *U.S. v. Grizzo*, 2002 WL 746037 (E.D. Pa.) (holding that testimony as to expert's conclusion regarding a match is reliable for *Daubert* and FRE 702 purposes; also finding the subject of handwriting analysis to be based upon valid reasoning and reliable methodology); *U.S. v. Crisp*, 324 F.3d 261, 271 (4th Cir. 2003) (holding that handwriting expert could testify as to his opinion, not simply the similarities in the writings).

²⁸Hrg. Tr. at 16, *State v. Brown*, Del. Super., No. 9904021239, Stokes, J. (July 10, 2001) (Bench ruling) Docket No. 63).

²⁹*See generally id.*

³⁰*Id.* at 25-26.

examination of the known and questioned documents indicating the mechanical similarities and dissimilarities; and, (2) her opinion as to the identity of the author.³¹

4. Conclusion

Defendant will have an opportunity to cross-examine Ms. Carter as to her expertise and methods employed to examine the documents in question at trial. Any issues regarding Ms. Carter's credibility, tested on cross-examination, goes to the weight that the jury should give her testimony, rather than to its admissibility.³² In addition, the court can prevent the jury from drawing impermissible inferences from the evidence through the use of a meaningful limiting instruction.³³ The Court finds Ms. Carter to be a skilled person by training and experience in the field of handwriting analysis and that her proposed testimony is sufficiently relevant and reliable pursuant to D.R.E. 401 and 402 to assist the trier of fact understand the evidence presented in the instant case.³⁴

Based on the foregoing reasons, Defendant's Motion *in Limine* as to testimony concerning handwriting analysis methodology and observations regarding the similarities and differences between the known handwriting of the Defendant and the note in question is **DENIED.**

³¹The ruling limited the witness from referring to handwriting analysis as scientific and indicated that the jurors could give whatever weight as they saw fit. *Id.* at 26-27. It should be noted that Georgia Anna Carter was the expert document analysis witness permitted to testify in *State v. Brown*.

³²*See United States v. Herrera*, 832 F.2d 833, 837 (4th Cir. 1987); *United States v. Van Wyk*, 83 F. Supp. 2d 515, 520 (D. NJ. 2000) (citing *Gisriel v. Uniroyal Inc.*, 517 F.2d 699, 702 (8th Cir. 1975).

³³*See Davis v. Maute*, 770 A.2d 36, 42 (Del. 2001).

³⁴*See DEL. R. EVID. 401 & 402.*

IT IS SO ORDERED.

The Honorable Richard S. Gebelein

Orig: Prothonotary
cc: Jennifer-Kate Aaronson, Wilmington, Delaware.
Paul Wallace, Deputy Attorney General, Wilmington, Delaware.