IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0448-17

WILLIAM JOE RHOMER, Appellant

v.

THE STATE OF TEXAS

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH COURT OF APPEALS BEXAR COUNTY

HERVEY, J., filed a concurring opinion in which KEASLER, RICHARDSON, and NEWELL, JJ., joined.

CONCURRING OPINION

Although the issues granted all involve the admission of testimonial evidence, we must stress that our review of the trial court's action is based on an abuse of discretion standard.

Next, by virtue of our own caselaw,

> It is only at the dawn of judicial consideration of a particular type of forensic scientific evidence that trial courts must conduct full-blown "gatekeeping" hearings under *Kelly*. Once a scientific principle is generally

> accepted in the pertinent professional community and has been accepted in a sufficient number of trial courts through adversarial *Daubert*/*Kelly* hearings, subsequent courts may take judicial notice of the scientific validity (or invalidity) of that scientific theory based upon the process, materials, and evidence produced in those prior hearings.

Hernandez v. State, 116 S.W.3d 26, 29 (Tex. Crim. App. 2003).

Thus, before one proffers testimonial evidence to be that of an expert, it should be understood that the process should occur at trial. And then a careful and strategic navigation of statutory mandates, caselaw, and rules of evidence, should be undertaken through the oftentimes difficult, but crucial world of ever-changing forensic science.

I write separately to note some matters to be considered in this arena. We start with the rule that "a forensic analysis of physical evidence . . . and expert testimony relating to the evidence [is] not admissible in a criminal action" if the crime laboratory where the analysis was performed was not accredited under Article 38.01. TEX. CODE CRIM. PROC. art. 38.35(d)(1).

The Texas Forensic Science Commission, Crime Laboratory Accreditation and the Admissibility of Scientific Evidence

The Texas Forensic Science Commission (the Commission) is responsible for accrediting crime laboratories.[1] *Id.* art. 38.01 § 4-d(b)(1) ("The commission by rule: . . . shall establish an accreditation process for crime laboratories and other entities conducting forensic analyses of physical evidence for in criminal proceedings . . . .").

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[1]A "crime laboratory" is any "public or private laboratory *or other entity* that conducts a forensic analysis subject to this article." *Id.* art. 38.35(a)(1) (emphasis added).

Although the word "accredited" is not defined in Texas law, Black's Law Dictionary defines it as "[h]aving official approval to do something, esp[ecially] by reason of having reached an acceptable standard." Thus, the Commission is responsible for ensuring that all crime laboratories meet minimum acceptable standards,[2] or evidence of forensic analyses performed at the laboratory are generally inadmissible. *Id.* at § 38.35(d)(1).

To assist the Commission with its accreditation mandate, the legislature delegated rule-making authority to it to "validate or approve specific forensic methods or methodologies . . . ." *Id.* art. 38.01 § 4-d(b-1). This means that, whether a crime laboratory must be accredited depends on the forensic discipline drawn on. For example, if a crime laboratory was accredited by the Commission for toxicology, but not for firearms/toolmarks, evidence of a forensic analysis of firearms/toolmarks performed at that laboratory is inadmissible, but evidence of a forensic analysis involving toxicology performed at the laboratory is admissible. Thus, by choosing which scientific disciplines require accreditation, and because crime laboratories must be accredited, the Commission

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[2]For example, Texas Department of Public Safety criminal laboratories are accredited by "the ANSI-ASQ National Accreditation Board (ANAB) to the ISO/IEC 17025 Standard and Supplemental Requirements required by the accrediting body." TEX. DEP'T PUB. SAFETY, PEH-MANUAL-2019-0101-43044-5, at 4, *available at* https://www.dps.texas.gov/CrimeLaboratory/Pubs.htm. According to ANAB, "ISO/IEC 17025 specifies the general requirements for competence to carry out tests/ and or calibrations, including sampling." ANAB, ABOUT ANAB, *available at* https://www.anab.org/forensic-accreditation/iso-iec-17025-forensic-labs-process-0.

largely controls the admissibility of forensic evidence in a criminal action.[3] *Id.* art. 38.35(d)(1).

So what types of forensic disciplines require a laboratory to be accredited? The Commission has determined that crime laboratories must be accredited in the following scientific disciplines:

> (a) Forensic analysis/recognized accreditation. This section describes a discipline or category of analysis that involves forensic analysis for use in a criminal proceeding and for which accreditation is available from a recognized accrediting body.
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> (b) By discipline or category of analysis. A crime laboratory may apply for Commission accreditation for one or more of the following disciplines:
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> > (1) Seized Drugs. Categories of analysis may include one or more of the following categories: qualitative determination, quantitative measurement, weight measurement, and volume measurement;
> >
> > (2) Toxicology. Categories of analysis may include one or more of the following categories: qualitative determination and quantitative measurement;
> >
> > (3) Forensic Biology. Categories of analysis may include one or more of the following categories: collection, DNA-STR, DNA-YSTR, DNA-Mitochondrial, DNA-SNP, body fluid identification, relationship testing, microbiology, individual characteristic database, and nucleic acids other than human DNA;
> >
> > (4) Firearms/Toolmarks. Categories of analysis may include one or more of the following categories: physical comparison, determination of functionality, length measurement, serial number restoration, trigger pull force measurement, qualitative chemical determination, distance

[3]There are some statutory exceptions, which the Commission has no rule-making control over. For example, latent fingerprint examinations are not considered a forensic analysis as that term is defined in Article 38.35. TEX. CODE CRIM. PROC. art. 38.35(a)(4)(A).

> determination, ejection pattern determination, product (make/model) determination, and individual characteristic database;
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> (5) Document Examination. Categories of analysis may include one or more of the following categories: document authentication, physical comparison, and product determination;
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> (6) Materials (Trace). Categories of analysis may include one or more of the following categories: physical determination, chemical determination, physical/chemical comparison, product (make/model) determination, gunshot residue (collection and qualitative determination), footwear and tire tread (collection, enhancement, physical comparison and product (make/model) determination), and fire debris and explosives (qualitative determination); or
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> (7) Other discipline and its related categories of analysis if accredited by a recognized accrediting body and approved by the Commission.

37 TEX. ADMIN. CODE § 651.5(b) (Tex. Forensic Sci. Comm'n, Forensic Disciplines and Procedures Subject to Commission Accreditation).

On the other hand, the Commission presently has exempted a number of disciplines from the accreditation requirement, meaning that the laboratory where the forensic analysis was performed need not be accredited for evidence of that analysis to be admissible in a criminal action,

> (1) sexual assault examination of a person;
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> (2) forensic anthropology, entomology, or botany;
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> (3) environmental testing;
>
> (4) facial or traffic accident reconstruction [*the subject of this case*];
>
> (5) serial number restoration;

> (6) polygraph examination;
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> (7) voice stress, voiceprint, or similar voice analysis;
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> (8) statement analysis;
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> (9) forensic odontology for purposes of human identification or age assessment, not to include bite mark comparison related to patterned injuries;
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> (10) testing and/or screening conducted for sexually transmitted diseases; or
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> (11) fire scene investigation, including but not limited to cause and origin determinations.

Id. § 651.7(a) (Tex. Forensic Sci. Cmm'n, Forensic Disciplines and Procedures Exempt from Accreditation Requirements by Administrative Rule). Further, certain types of analyses are excluded from the definition of "forensic analysis," so the analysis is not covered by the accreditation requirement. Examples of excluded analyses include (1) latent fingerprint examinations, (2) tests of breath specimens obtained through implied consent, (3) analyses of digital evidence, (4) examinations or tests excluded by rule under Article 38.01, (5) a presumptive blood test to determine compliance with probation and parole restrictions, and (6) "an expert examination or test conducted principally for the purpose of scientific research, medical practice, civil or administrative litigation, or other purpose unrelated to determining the connection of physical evidence to a criminal action." *Id.*

Based on the foregoing, the first question a practitioner should ask when dealing with forensic science evidence is whether the laboratory where the analysis was

performed was properly accredited.[4] If not, evidence of that analysis is likely inadmissible. *Id.*

Forensic Analyst Licensing

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[4]Although a crime laboratory is not accredited to perform forensic analyses based on one of the identified forensic disciplines at the time of the analysis, evidence about that analysis is nonetheless admissible if the laboratory was eligible for accreditation at the time of the analysis or test, and the laboratory becomes accredited before evidence is given about the examination or test. *Id.* art. 38.35(e). On the other hand, the Commission can exempt certain crime laboratories from the accreditation requirement:

> (c) The commission by rule may exempt from the accreditation process established under Subsection (b) a crime laboratory conducting a forensic analysis or a type of analysis, examination, or test if the commission determines that:
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> (1) independent accreditation is unavailable or inappropriate for the laboratory or the type of analysis, examination, or test performed by the laboratory;
>
> (2) the type of analysis, examination, or test performed by the laboratory is admissible under a well-established rule of evidence or a statute other than Article 38.35;
>
> (3) the type of analysis, examination, or test performed by the laboratory is routinely conducted outside of a crime laboratory by a person other than an employee of the crime laboratory; or
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> (4) the laboratory:
>
> (A) is located outside this state or, if located in this state, is operated by a governmental entity other than the state or a political subdivision of the state; and
>
> (B) was accredited at the time of the analysis under an accreditation process with standards that meet or exceed the relevant standards of the process established under Subsection (b).

Id. art. 38.01. Also, a forensic analysis of physical evidence and expert testimony related thereto is admissible—despite that fact that the laboratory is not accredited—if the laboratory was eligible for accreditation at the time of the analysis or test, and the laboratory becomes accredited before testimony is given about the examination or test. *Id.* art. 38.35(e).

Effective January 1, 2019, "[a] person may not act or offer to act as a forensic analyst unless the person holds a forensic analyst license." Act of May 31, 2015, 84th Leg., R.S., ch. 1276, §§ 4, 17(b), art. 38.01, 2015 Tex. Gen. Law 4315, 4317–18 (codified at TEX. CODE CRIM. PROC. art 38.01 § 4-a(b)). A "forensic analyst" means "a person who on behalf of a crime laboratory accredited under this article technically reviews or performs a forensic analysis or draws conclusions from or interprets a forensic analysis for a court or crime laboratory," but the term "does not include a medical examiner or other forensic pathologist who is a licensed physician." TEX. CODE CRIM. PROC. art. 38.01 § 4-a(2). This will provide another avenue for parties to litigate in court: whether the analyst who performed the forensic analysis was licensed.

Preemption of the Rules of Evidence?

Articles 38.01 and 38.35 also have another effect. Rule 702 of the Texas Rules of Evidence states that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702. This rule of evidence has been a stalwart and guiding light for the admittance of expert testimony in a criminal action. However, by virtue of its rule-making authority authorized by statute, the TFSC might be able to abrogate Rule 702. For example, if a laboratory technician performs a toxicology analysis at a unaccredited laboratory, expert testimony about that

analysis is likely inadmissible regardless of the qualifications of the analyst and the accuracy of the analysis. The issue should not be litigated, and the trial judge should not determine "whether a witness is qualified . . . or evidence is admissible" under those circumstances, notwithstanding whether Rule 702 seems to have been satisfied and the testimony might have assisted the trier of fact. *Id.* R. 104(a), 702; *see* TEX. CODE CRIM. PROC. arts. 38.01 and 38.35. Finally, the evidence should be categorized pursuant to *Kelly*/*Nenno* so that either of those tests/standards can be met.[5]

CONCLUSION

How these questions will be resolved remains to be seen, but I believe that the issues are important, and the bench and bar should be aware of them. It is for these reasons that I write separately. With these comments, I join the opnion of the majority.

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[5]The threshold issue for a trial court when dealing with the admission of expert testimony is whether the proponent has shown by clear and convincing proof that the testimony will assist the trier of fact to understand the evidence or determine a factual issue. *Kelly v. State*, 824 S.W.2d 568, 572–73 (Tex. Crim. App. 1992). To meet that burden, we have held that, under Rule 104(a) and 702, the proponent of scientific evidence must establish the relevancy (104(a)) and the reliability (702) of the testimony to "help the jury reach an accurate result." *Id.* To prove reliability, we have said that the evidence must satisfy three criteria: (1) the underlying scientific theory must be valid, (2) the technique applying the theory must be valid, and (3) the technique must have been properly applied on the occasion in question. *Id.* at 573. But even if the reliability and relevancy are established, we have explained, the testimony might still be excluded if the trial judge determines that it should not be admitted under Rule 403 of the Texas Rules of Evidence. *Id.*; *see* TEX. R. EVID. 403 (stating when relevant evidence should nonetheless be excluded).

In *Kelly*, we addressed DNA "fingerprint" evidence and later explained that our holdings in *Kelly* apply to Newtonian and some medical sciences. *Coble v. State*, 330 S.W.3d 253, 274 (Tex. Crim. App. 2010). Later, in *Nenno v. State*, 970 S.W.2d 549, 560–61 (Tex. Crim. App. 1998), we explained that the principles of *Kelly* also apply to "soft sciences," like the expert testimony about future dangerousness in *Nenno*. But, we noted that application of the *Kelly* factors depends on context when dealing with "soft sciences." *Id.*

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