

STATE OF INDIANA)
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 2

STATE OF INDIANA)
v.)
DESMOND TURNER)

FILED

125 JUN 17 2009

Charles R. White
CLERK OF THE MARION CIRCUIT COURT

**COURT'S ORDER REGARDING DEFENDANT'S MOTION TO EXCLUDE
EXPERT TESTIMONY PURSUANT TO INDIANA RULE OF
EVIDENCE 702 (b)**

Defendant Desmond Turner, by counsel, Brent Westerfeld and Lorinda Meier-Youngcourt, filed a Motion For Evidentiary Hearing on the Admissibility of the State's Expert Opinion Testimony pursuant to Evide. R. 702(b). Those hearings were conducted with all parties present on December 11, 2008 and January 9, 2009 (hereafter referred to as Tr. and Tr. II, respectively). At the evidentiary hearing, the Defendant James Stewart joined in Defendant Turner's Motion. Both Defendant Turner and the State filed Proposed Findings of Fact and Conclusions of Law.

Defendant Turner makes challenges to the use of the toolmark identification on item number fifty-six (56), an unfired bullet, to four (4) of the discharged casings found at the crime scene and the identification of twenty-three (23) discharged casings as being fired from the same gun. Having considered the motions, the evidence, arguments from counsel, and expert testimony, the court concludes that the firearm toolmark identification is reliable for expert testimony. Moreover, expert witnesses may testify that the shell casings match the relevant firearm to the point of the exclusion of all other firearms.

Defendant's arguments speak to the weight the evidence should be given. Such a determination is one for the jury; defendant may contest the certainty of the conclusions through presentation of evidence or cross-examination at trial.

A. Firearm Toolmark Identifications is a Reliable Basis for Scientific Expert Testimony

At the evidentiary hearings, the state presented the expert testimony of Michael Putzek, a Forensic Scientist and the Firearms Section Supervisor for the Indianapolis Marion County Forensic Services Agency. Putzek testified about his own qualifications, the qualifications of his former supervisor and the first examiner David Brundage, the reliability of various identifications methods, and the toolmark method used in the instant case. Putzek boasts an impressive record of continued education and extensive experience. Defense countered by presenting the expert testimony of Ronald Scott, a self-employed forensic consultant. Both expert witnesses underwent thorough cross-examination.

Indiana Evidence Rule 702(b) states that "expert testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable." The state, as the proponent of the evidence bears the burden of proof. Ollis v. Knecht, 751 N.E.2d 825, 829-830 (Ind. App. Ct. 2001). As the gatekeeper, the trial court must determine whether the reasoning and methodology regarding the expert's opinion are scientifically valid. *Id.* At 309.

The U.S. Supreme Court provided factors for review in the Daubert decision. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The state of Indiana has interpreted these factors as a non-binding yet helpful rubric for adjudicating such

questions. The “concerns driving Daubert coincide with the express requirement of Indiana Rule of Evidence 702b.” Stewart v. State, 652 N.E.2d 490 (Ind. 1995). As such, the Daubert factors are a vehicle of interpretation used to apply Evid. R. 702(b).¹ The court has stated that, although Evid. R. 702(b) allows for the exclusion of unreliable evidence, the statute intends to “liberalize, rather than constrict, the admission of reliable scientific evidence.” Sears Roebuck and Co. v. Manuilov, 742 N.E.2d 453, 460 (Ind. 2001). Accordingly, the court’s use of Daubert, as the controlling test for interpretation of Evid. R. 702(b), must respect this intent and reflect it during interpretation.

The key considerations, as interpreted by the Indiana Appellate Court are: “(1) whether the theory or technique at issue can and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique’s operation; and (5) whether the technique is generally accepted within the relevant scientific community.” Lytle v. Ford Motor Co., 814 N.E.2d 301, 307 (Ind. App. Ct. 2004). Although not dispositive, these factors are considered in application of the particular factual circumstance.

First, the court finds that the toolmark identification method is a scientific technique that can and has been tested. Both expert witnesses testified that the Association of Firearm and Toolmark Examiners (AFTE) is a recognized organization providing guidelines for identification. Scientists in the AFTE share knowledge regarding toolmark identification.

¹ Defense relays the court’s caution in applying Daubert as controlling authority on the interpretation of Evid. R. 702(b). However, the court’s caution applies only in circumstances when the expert testimony does not stand on scientific principles. As this opinion discusses later, this does not apply in the instant case.

Secondly, the court finds that the toolmark identification method can and has been subjected to peer review and scholarly publication. AFTE's organization, as a community of accredited forensics scientists, provides constant peer review through knowledge sharing. Moreover, during the evidentiary hearings, both expert witnesses provided cursory references to several books and articles of scholarly discourse on the subject. The court is not convinced by the defense's recent submission of supplemental authorities. The articles provide considerations indicating the potential fallibility and shortcomings of forensic science, however, there is not express contradiction to Putzek's testimony. Putzek admitted the absence of a quantifiable mechanism for review necessitates a subjective prong in the analysis, which requires deference to the qualifications of the examiner. Moreover, defense admitted at the hearing and in its own Proposed Findings of Fact and Conclusions of Law that their challenge does not regard the general forensic science of firearms or the toolmark identification.

Regarding the third Daubert consideration, the court is convinced that the known or potential rate of error is reasonably low thus allowing admissibility. Again, quantifying the nuances of the procedure and assigning a numerical value is problematic. The standard of review therefore rests on the authority of the AFTE, which requires a "sufficient agreement" between the toolmarks in order to make identification. An accredited examiner's assessment must control. Putzek conducted a side by side comparison using a ballistic comparison microscope. He examined the individual characteristics, striations and the consecutiveness of those marks. In doing so, he was able to make an identification based on the pattern and reproducibility of those individual characteristics.

Fourth, the court finds that the mechanisms and personnel controlling the analysis have consistently met the industry standards. The American Society of Crime Lab Detectors accredited The Indianapolis Marion County Forensic Services Agency; a process which requires maintenance of quality and competency for random, scrutinizing review. On top of extensive training and experience, Putzek undergoes annual proficiency testing in each discipline he practices, including passing the firearm identification proficiency test in 2008.

Lastly, the court must find that the toolmark identification method is generally accepted within the scientific community. Dissenters of the toolmark method complain of the need for codification in the implementation of the technique—such a call for standardization or procedural refinement does not necessarily indicate rejection of the scientific principles.

The court is not convinced by Scott's testimony that the multiple requests for reexamination constitute subtle coercion thus skewing the reliability of the results. The AFTE Code of Ethics allows for one examiner to reexamine the evidence of previously reviewed work of another examiner. A lapse of time between examinations does not alter the markings on the evidence. Putzek and David Brundage both adhered to proper laboratory procedural guidelines.

B. Expert Witness May Testify that the Discharged Cartridge Casings were Fired from the same Firearm

Secondly, the Defendant claims that the identifications of twenty-three (23) discharged cartridge casings as having been fired from the same firearm is unreliable and invalid under the science of firearm identification. Both Putzek and Brundage identified

the twenty-three (23) cartridge casings as being fired from the same gun. Their identifications were made independently with a side by side comparison under a ballistic comparison microscope based on the fire-formed chamber marks, finding that the characteristics were reproducible. Their work on this specific case passed one another's peer review.

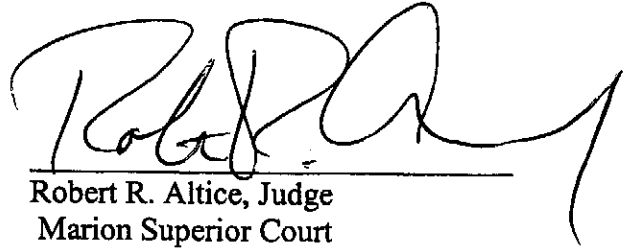
Without having examined any of the actual casings, Scott's testimony regarding the findings bears little to no weight.

The methodology comparing the fire-formed chamber marks on cartridge casings is testable, has maintained standards controlling the technique, and is generally accepted within the scientific community—its general acceptance was put on judicial notice in this case. The use of subjectivity in the identification process is generally accepted within the forensic science community. The certainty of the subjective judgment is therefore reliant on the abilities of the examiner. The annual testing that the examiner undergoes is the necessary oversight on the procedure. Absence of a quantifiable standard for testing is immaterial in light of the examiner's continued training and annual proficiency testing. Arguments to the contrary regard the weight of the evidence rather than its admissibility, and may be raised at trial. Sears, 742 N.E2d at 461.

CONCLUSIONS

For these reasons and other considerations, the court will allow David Brundage and Michael Putzek to testify regarding their examinations and opinions with respect to the firearms and toolmark evidence in this case.

SO ORDERED, this 17th day of June, 2009.

A handwritten signature in black ink, appearing to read "Robert R. Altice", written over a horizontal line.

Robert R. Altice, Judge
Marion Superior Court
Criminal Division, Room II

Distribution:

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