IN THE DISTRICT COURT OF SALINE COUNTY, KANSAS

STATE OF KANSAS,
Plaintiff,

vs. Case No. 10 CR 383

ANTWON PIERCE,
Defendant.

ORDER

NOW on this 1st day of Dec., 2011 this matter comes before the court on the Motion in Limine filed by the defendant, Antwon Pierce. A hearing was held on the motion on November 17, 2011. The plaintiff appeared by Ellen Mitchell, Saline County attorney, and the defendant, Antwon Pierce, appeared in person and with his attorney Julie McKenna.

WHEREUPON the court after considering the evidence presented and the parties proposed findings of fact and conclusions of law, FINDS as follows:

1. The State seeks to present at trial the testimony of Zack Carr regarding his examination of 22 caliber and 380 auto caliber cartridge cases found at the scene.

2. The defendant filed a Motion in Limine seeking an order preventing the State's witnesses from testifying regarding ballistics/firearms testimony as the examination does not rise to the level of a scientific examination and the request to have the witness declared an expert puts undue emphasis on the testimony of the witness.

3. In *State v. Shadden,* 290 Kan. 803, 235 P.3d 436 (2010) the Kansas Supreme Court held that if an opinion is based on scientific methods or procedures and is offered for admission, the offering party must satisfy the test enunciated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and adopted in Kansas in State v. Lowry, 163 Kan. 622,

629, 185 P.2d 147 (1947). The *Frye* test requires a showing that the basis of a scientific opinion is generally accepted as reliable within the expert's particular scientific field.

4. James Edward Hamby, Ph.D testified at the hearing. He currently is the Director of the International Forensic Science Laboratory & Training Center in Indianapolis, Indiana. He studied firearms and toolmark identification while in the U.S. Army in Fort Gordon, Georgia from 1970 to 1972. He served as the Chief of the firearms and tool mark division in the US Army Criminal Investigation Laboratories at Camp Zama, Japan from 1972-1977. He served as the Chief of the U.S. Army Criminal Investigation Laboratory in Fort Gordon, Georgia from 1977-1978. After retiring from the army he was employed by the Virginia Bureau of Forensic Sciences as a firearms and tool mark examiner form 1978 to 1980. From 1980 to 1983 he was employed by the Illinois Department of Law Enforcement as the Firearms and Tool marks coordinator. He lectured on firearm and tool mark identification to groups in a number of states and countries. He has examined cases for the Bureau of Alcohol, Tobacco, Firearms and Explosives, FBI, the Drug Enforcement Agencies, US Customs, U.S. postal service, and governments of foreign countries. He is a member of the American Academy of Forensic Sciences, Association of Firearms & Tool mark Examiners and a number of other professional organizations. He has taught and lectured extensively on the topic of firearms and tool mark identifications. His curriculum vitae lists a number of articles he has written and published on the topic. The court found Dr. Hamby qualified to testify as an expert on firearms and tool mark identification based upon his education, training and experience in the area.

5. A toolmark is damage that a hard object inflicts on a soft object during direct physical contact. A tool is any object that leaves one or more toolmarks on another object. The manufacturing process leaves distinct marks inside each firearm and the firing of ammunition results in special marks being imposed onto expended bullets and shell casings.

Firerarm and tool mark examiners examine objects for their class characteristics, subclass characteristics and individual characteristics. The examination for individualization occurs through the use of comparison microscopy. If the quality and character of the toolmark have sufficient detail, an identification can be concluded based on the correspondence of individual characteristics. If the quality and character of the toolmark are lacking, an examiner may not be able to make an identification or elimination. This would result in an inconclusive finding. If significant disagreement in class characteristics exist or a disagreement in individual characteristics of an exceptional nature exists, an elimination conclusion would result.

Toolmark identification is a branch of forensic science in which microscopes are used to study and compare toolmarks for the purpose of characterizing and identifying the tools that produced them. *United States v. Natson,* 469 F.Supp. 2d 1253, 1259 (D.Ga. 2007).

Evidence was presented at the hearing regarding studies that have been performed that demonstrated the reliability of toolmark identification. Evidence was further presented that the toolmark testing methodology has been subjected to peer review and is generally accepted in the scientific community. Evidence was presented that forensic examinations of firearms and toolmark take place within the United States military,