

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-877-2010
:
vs. :
:
ROBERT GRAHAM, :
Defendant :

OPINION AND ORDER

Defendant is charged by Information filed on October 7, 2010 with two counts of Robbery, one count of Theft, one count of Receiving Stolen Property, one count of Terroristic Threats and one count of Possessing Instruments of a Crime.

Based upon the allegations set forth in the Affidavit of Probable Cause, on June 22, 2009, a clerk at the Uni-Mart store on West Fourth Street in Williamsport was robbed by a male brandishing a handgun. The male threatened to shoot the clerk by pointing the handgun at her unless she opened the store's safe.

Upon review of the store's videotape, it was determined that the individual who committed the robbery grasped the store's cash drawer with his left hand and, in doing so, placed his thumb on the underside/back of the drawer.

A latent fingerprint was developed from the underside of the cash drawer and identified through the Pennsylvania State Police Wyoming Regional Laboratory as belonging to the left thumb of the Defendant.

On November 4, 2010, Defendant filed a Motion for Funds for Appointment of an Expert. Defendant specifically requested that the Court grant him funds to procure an expert “to conduct an independent evaluation to determine if the fingerprints belong to Robert Graham.”

On November 23, 2010, Defendant also filed an Omnibus Motion. In this motion, Defendant requested a Frye¹ hearing and preclusion of the testimony of the Commonwealth fingerprint examiner, claiming that latent fingerprint identification evidence is not generally accepted within the forensic identification community.

A hearing was scheduled on both Motions for January 6, 2011. At the hearing, the Commonwealth argued that Defendant is not entitled to a Frye hearing and accordingly not entitled to funds for appointment of an expert to be utilized at a Frye hearing. Defendant noted that he was seeking not only funds for appointment of an expert to testify at a Frye hearing, but also to conduct an independent evaluation to determine if the fingerprint belonged to Defendant.

The Court will first address whether Defendant is entitled to a Frye hearing.

In Pennsylvania, the Frye test governs the admissibility of scientifically-adduced expert evidence. Under Frye, novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community. Grady v. Frito-Lay, Inc., 576 Pa. 546, 839 A.2d 1038, 1044 (2003). In applying

the Frye rule, the Court requires that the proponent of the evidence prove that the methodology an expert used is generally accepted by scientists in the relevant field as a method for arriving at the conclusion the expert will testify to at trial. Grady, 839 A.2d at 1045, citing Commonwealth v. Blasioli, 552 Pa. 149, 713 A.2d 1117, 1119 (1998).

In his request for a Frye hearing, Defendant argues that the National Academy of Sciences published “a watershed report, concluding that latent fingerprint analysis has not been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”

This argument, however, appears to go more to the weight of the evidence rather than the method and theories of latent fingerprint analysis.

Frye does not apply every time science enters the courtroom; it only applies when a party seeks to introduce **novel** scientific evidence. Commonwealth v. Dengler, 586 Pa. 54, 890 A.2d 372, 382 (2005); Trach v. Fellin, 817 A.2d 1102, 1109 (Pa. Super 2003); see also Commonwealth v. Hall, 867 A.2d 619, 633 (2005), appeal denied, 895 A.2d 549 (Pa. 2006). There can be no Frye challenge to scientific evidence which has become common place. See Commonwealth v. Puksar, 597 Pa. 240, 951 A.2d 267, 275 (2008)(nothing novel about a forensic pathologist using physical evidence found at the scene to opine on the cause of death; this sort of evidence has been accepted at trial for years and appellant’s own expert utilized the same methodology); Commonwealth v. Whitacre, 878 A.2d 96 (Pa. Super. 2004)(comparison

¹ The Frye test was first announced in Frye v. United States, 293 F. 1013 (D.C.Cir. 1923). It was adopted in

microscopic examination method had been in use since the 1930s and was an accepted methodology; therefore Commonwealth's ballistic evidence was admissible), appeal denied, 892 A.2d 823 (Pa. 2005).

The attack on the Commonwealth's evidence cannot be the subject of a Frye challenge in that latent fingerprint identification is not a novel methodology and further, the arguments go to the weight of the testimony.

This does not, however, end the inquiry with respect to Defendant's requested expert. A brief background of latent fingerprint identification is necessary.

It has been well established in the scientific community that the patterns of friction ridges on fingertips are unique and permanent to each individual.

"Latent prints are left by substances such as sweat, oil, or blood on the friction ridges and deposited on a surface, such as glass, paper, or the metal surface of a gun. The latent prints provide an image of the friction ridges. Persons skilled in recovery of latent fingerprints can use various techniques to obtain a clear image of the latent prints that can then be used for purposes of comparison to known exemplars. Latent prints are usually prints of only a relatively small portion of the friction ridges on a particular finger. Latent prints can also vary widely in terms of the quality and clarity of the image." U.S. v. Havvard, 117 F. Sup. 2d 848, 852 (S.D.Ind. 2000)

Some courts have gone as far as to take judicial notice of the reliability of

Pennsylvania in Commonwealth v. Topa, 471 Pa. 223, 369 A.2d 1277 (Pa. 1977).

fingerprint identification including the matching of a latent impression with a full fingerprint. Markham v. State of Maryland, 189 Md. App. 140, 984 A.2d 262 (2009). The Markham court, through citation to cases from other jurisdictions noted that the ACE-V (Analysis, Comparison, Evaluation and Verification) method of fingerprint identification is clearly highly accepted in the forensic field and easily satisfies the standard of reliability. 984 A.2d at 275.

On the other hand, the apparent universal acceptance of latent fingerprint identification must not deprive the Defendant of the right to defend himself. The Defendant must not be deprived of the opportunity to not only attack the fingerprint identification conclusions but also the procedures and standards, or lack thereof, utilized to reach those conclusions. This includes, but is not limited to, assertions that the conclusions may be tainted by human interpretation, error or bias. As the Honorable Harry T. Edwards, Senior Circuit Judge and Chief Judge Emeritus of the United States Court of Appeals for the DC Circuit noted in his presentation at the Superior Court of the District of Columbia on May 6, 2010 in Washington, DC: “The work of the forensic science community is critically important in our system of criminal justice...So it matters a great deal .. whether the evidence is sufficiently reliable to merit a fact finder’s reliance on the truth that it purports to support.” Nothing in Frye precludes a defendant from attacking the weight of the scientific evidence deemed admissible under it.

With this in mind, the Court will grant the Defendant’s request for funds for appointment of an expert to not only conduct an independent evaluation to determine whether

the fingerprints belong to the Defendant but also to investigate, assess and testify as needed in connection with the reliability of not only the results of the latent fingerprints analysis done on the Defendant but also the standards and procedures utilized in connection with said analysis.

ORDER

AND NOW, this ____ day of February 2011, following a hearing and argument, the Court **GRANTS** the Defendant's Motion for Appointment of an Expert as set forth in this Opinion. Defense counsel is allocated \$7,500.00 to be utilized in connection with said expert services without prejudice to request additional funds if necessary. The Court **DENIES** Defendant's Omnibus Pretrial Motion.

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney's Office
Public Defender's Office
Gary Weber, Esquire (Lycoming Reporter)
Work File