

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO  
CRIMINAL DIVISION

STATE OF OHIO,

Plaintiff,

-vs-

BRANDON DION MOXLEY,

Defendant.

CASE NO.: 2013 CR 02008

JUDGE STEVEN K. DANKOF

**ORDER OVERRULING STATE'S  
MOTION *IN LIMINE* TO EXCLUDE  
DEFENDANT'S EXPERT WITNESS**

---

This matter is before the Court on the State's December 2, 2013 Motion *in Limine* Regarding Proposed Defense Expert Witness and Request for *Daubert* Hearing ("*Daubert* Motion"). On December 4, 2013, Defendant filed his Response to the *Daubert* Motion ("*Daubert* Response"). On December 13, 2013, the Court conducted a hearing on the *Daubert* Motion ("Hearing") during which Professor Steven Drizin ("Prof. Drizin") testified.<sup>1</sup> For the following reasons, the *Daubert* Motion is **OVERRULED**. Prof. Drizin shall be permitted to testify at trial, subject to the limitations set forth below.

Pursuant to Evid. R. 702, "[a] witness may testify as an expert if . . . [t]he witness' testimony either *relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons*; . . . [t]he witness is qualified as an expert by *specialized knowledge*, skill,

---

<sup>1</sup> The Court found Prof. Drizin entirely credible. On January 13, 2014, pursuant to the Court's December 17, 2013 Order Setting Briefing Schedule, Defendant and the State filed supplemental memoranda on the *Daubert* Motion and Hearing. Admitted as evidence during the Hearing were Defense Exhibits A – D, in order: curriculum vitae of Prof. Drizin, letter from Prof. Drizin to Defense counsel, transcript of Defendant's interrogation, and CD of Defendant's interrogation. Also admitted was State's Exhibit 9, *The Problem of Police-Induced False Confessions in the Post DNA Age*, by Prof. Drizin and Prof. R. Leo, 82 N.C.L.Rev. 891 (March 2004). Initially, the Court held its decision on the *Daubert* Motion pending a hearing on Defendant's Motions to Suppress, filed August 29, 2013 and set for hearing on February 27 and 28. The Motion to Suppress hearing was held open and additional testimony and evidence were offered on March 10, 18 and 19. The Court allowed post-hearing memoranda on the Motions to Suppress, which have now been filed. The Motions to Suppress are now ripe for decision and will be ruled upon by separate order of the Court.

experience, training, or education regarding the subject matter of the testimony; . . . [and] [t]he witness' testimony is based on reliable scientific, technical, or other *specialized information*.”<sup>2</sup>

“A witness qualified as an expert by knowledge, skill, experience, training or education may have [his] testimony presented in the form of an opinion or otherwise and *it need not be just scientific or technical knowledge*.”<sup>3</sup> Rather,

“[t]he rule includes more. The phrase ‘other specialized knowledge’ is found in the rule and, accordingly, if a person has information which has been acquired by experience, training or education which would assist the trier of fact in understanding the evidence or a fact in issue and the information is beyond common experience, such person may testify.”<sup>4</sup>

In considering “whether proposed scientific expert testimony is sufficiently ‘reliable[,]’” a court should consider, among other factors, “‘whether a theory or technique can be and has been tested; . . . whether the theory or technique has been subjected to peer review or publication; . . . the known or potential rate of error; and . . . general acceptance.’”<sup>5</sup>

An expert may offer testimony that is “additional support for the truth of the facts testified to by [a witness] or . . . assists the fact finder in assessing [a witness'] veracity.”<sup>6</sup> Such “testimony does not usurp the role of the jury, but rather gives information to a jury which helps it make an educated determination.”<sup>7</sup> However, an expert may not offer “an opinion as to the truth of a . . . statement[,]” *e.g.* that a confession is false.<sup>8</sup>

As an initial matter, Prof. Drizin’s *curriculum vitae* establishes that he is most certainly qualified to opine on the phenomenon of false confessions. Further, this Court previously held that the phenomenon is real:

“The phenomenon of false confessions, rightfully, is just now receiving increased attention, thanks to the ‘Innocence Revolution’ sparked by the advent of DNA evidence. In fact, in 25% of wrongful conviction cases, ‘the innocent person falsely confessed.’ A number of documented cases of wrongful conviction involve defendants on death row who falsely confessed and who were falsely identified as the perpetrator in photospread lineups and the like, only to be conclusively proven innocent by incontrovertible DNA evidence. *Why* an

<sup>2</sup> Ohio Evid. R. 702(A)-(C) (emphasis added). When expert testimony does not report “the result of a procedure, test, or experiment,” the requirements of Evid. R. 702(C)(1)-(3) are not implicated. *See State v. Stowers*, 81 Ohio St. 3d 260, 261 (1998).

<sup>3</sup> *Stowers*, 81 Ohio St. 3d at 262 (emphasis sic)(quotation omitted).

<sup>4</sup> *Id.* (quotation omitted).

<sup>5</sup> *State v. Ross*, 2002 Ohio 6084 at ¶ 16 (2<sup>nd</sup> Dist. Ohio Ct. App. Montgomery County November 8, 2002)(quoting *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-594 (1993)).

<sup>6</sup> *Stowers*, 81 Ohio St. 3d at 263.

<sup>7</sup> *Id.* (quotation omitted).

<sup>8</sup> *Id.* at 262

innocent person would falsely confess remains a baffling question. Godsey contends that “[t]he perceived low risk that the false confession would stand the test of time, coupled with the overwhelming desire to say anything to end the barrage of intense questioning and pressure, [gives] way and [results] in . . . false confession[s].”<sup>9</sup>

But it is not this Court alone that is thus convinced. The American Psychological Association published as a White Paper an article co-authored by Prof. Drizin entitled *Police-Induced Confessions: Risk Factors and Recommendations*.<sup>10</sup> And, most importantly, the United States Supreme Court, referring expressly and favorably to Prof. Drizin’s work, has noted:

“Custodial police interrogation, by its very nature, isolates and pressures the individual, . . . and there is *mounting empirical evidence* that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed[.]”<sup>11</sup>

Significantly, the phenomenon of false confessions is not something generally known by the average juror. Indeed, most instinctively reject the notion that anyone would falsely confess, especially to a crime as serious as homicide. Thus, expert testimony explaining the phenomenon will be helpful to the jury in weighing the reliability of Defendant’s statements and confession here.

For the foregoing reasons, the *Daubert* Motion is **OVERRULED**. Prof. Drizin shall be permitted to testify at trial; however, his testimony *shall be limited* to that regarding the phenomenon of false confessions generally. Prof. Drizin *shall not* be permitted to point to specific incidents or facts related to Defendant’s interrogation or statements and confession in response thereto, nor shall he testify on the ultimate issue of the truth or falsity of Defendant’s confession<sup>12</sup>.

SO ORDERED:

---

JUDGE STEVEN K. DANKOF

---

<sup>9</sup> *State v. Rodgers*, Montgomery C.P. No. 2013 CR 00572/2 (November 12, 2013 Order Sustaining in Part and Overruling in Part Defendant’s Motion to Suppress)(emphasis sic)(quoting Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 Chap. L. Rev. 623, 628 - 629 (2006-2007)(citing Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 484-485)).

<sup>10</sup> Kassir, Drizin, Grisso, Gudjonsson, Leo, and Redlich, 34 Law and Human Behavior 3-38 (2010)

<sup>11</sup> *Corley v. United States*, 556 U.S. 303, 320-321 (internal quotation omitted; emphasis added)(citing Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.Rev. 891, 906-907 (2004)). Indeed, the law is ever evolving on evidentiary issues. The Court can remember when Battered-Spouse Syndrome was sneered at by prosecutors and judges alike as voodoo science. Similarly, not long ago, the phenomenon of delayed reporting in child sexual abuse cases was not deemed reliable. And how about the former “gold standards” of criminology – eyewitness testimony, finger print analysis, and voice comparison analysis – now commonly attacked as flawed.

<sup>12</sup> Prof. Drizin testified forthrightly that he was quite unable to opine whether Defendant’s confession here was false because only Defendant knew the answer to that question.

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

TRACEY BALLARD TANGEMAN  
LYNDA DODD  
ASSISTANT PROSECUTING ATTORNEY  
301 WEST THIRD STREET, 5TH FLOOR  
P.O. BOX 972  
DAYTON, OH 45422  
(937) 225-5757

ANDREA OLADI  
TINA MCFALL  
ATTORNEYS AT LAW  
MONTGOMERY COUNTY PUBLIC DEFENDER OFFICE  
117 SOUTH MAIN STREET, SUITE 400  
DAYTON, OH 45422  
(937) 225-4652  
Attorney for Defendant, Brandon Dion Moxley

Elizabeth Hall, Bailiff (937) 225-4409 [halle@montcourt.org](mailto:halle@montcourt.org)



General Division  
Montgomery County Common Pleas Court  
41 N. Perry Street, Dayton, Ohio 45422

**Type:** Order:  
**Case Number:** 2013 CR 02008  
**Case Title:** STATE OF OHIO vs BRANDON DION MOXLEY

So Ordered

A handwritten signature in black ink, appearing to read "Steven L. Dankof". The signature is stylized and written in a cursive script.