

STATE OF OHIO
CUYAHOGA COUNTY

FILED

IN THE COURT OF COMMON PLEAS

CASE NO. CR-470694

2010 FEB -8 A 9:45

STATE OF OHIO,

Plaintiff,

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

- vs -

FRANCISCO DAVIS,

Defendant(s).

JOURNAL ENTRY AND OPINION

JOAN SYNENBERG, JUDGE:

This matter came on for hearing on January 21, 2010 upon the *Motion of Defendant for a Daubert Hearing Concerning the Purported Testimony of Detective Ferrini (Oral Hearing Requested)*; and the *State's Motion for Reconsideration on Court Granting Defendant's Motion for Daubert Hearing*. The court denied the State's motion and granted the defendant's request for hearing. Having considered the defendant's motion, which the court treats as a motion to suppress, and the testimony, exhibits, and arguments presented at the hearing, the court concludes that Officer Ferrini's testimony is admissible and denies defendant's motion.

Statement of the Case

On September 22, 2005, defendant Francisco Davis was indicted in a two-count indictment. On May 8, 2008, he pled guilty to aggravated vehicular assault in violation of R.C. § 2903.08, a felony of the fourth degree. Count II was nolle.

On May 8, 2006, the court imposed a sentence of five years in prison and a lifetime suspension of defendant's driver's license, according to the docket.¹ Defendant filed a notice of appeal on June 30, 2006.

^{1/} According to the court of appeals' decision, defendant had been sentenced to eight years.

CR05470694-A

61517801



On July 11, 2007, the court of appeals held that the sentence was void, finding that defendant was subject to a prison term of six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months only; and that defendant was subject to a definite period of suspension of one to five years only. The court of appeals vacated the sentence and remanded the cause for resentencing.

Upon remand, on August 7, 2007, the court granted defendant's motion to withdraw his previously entered guilty plea and ordered the defendant be on electronically monitored house arrest with no driving under any circumstances. On March 14, 2008, the court revoked defendant's home detention and home monitoring conditions and ordered that defendant not be permitted to drive under any circumstances.

On July 31, 2008, defendant filed his *Motion of Defendant for a Daubert Hearing Concerning the Purported Testimony of Detective Ferrini (Oral Hearing Requested)*. The State filed *State's Motion for Reconsideration on Court Granting Defendant's Motion for Daubert Hearing* on April 10, 2009.

The Hearing

Only one witness testified at the hearing: Officer Frank Ferrini. Although Officer Ferrini's qualifications as an expert were not raised as an issue, he testified as to his qualifications: He testified that he had been with the Brooklyn Police Department for nine years, and that he had been a police officer with the City of Middleburg Heights before that; that he had had specialized training in crash reconstruction, including a one-week "Basic Crash" course with the Ohio State Highway Patrol, and a more in-depth course with the Institute of Police Technology in Jacksonville, Florida; that he had taught classes at community college for twelve years, and that those classes included

patrol procedures, traffic law, investigation, reconstruction, and procedures. Officer Ferrini testified also that he had been qualified, and had testified, as an expert in in approximately a dozen trials as a crash reconstructionist.

As to the subject matter of this case, Officer Ferrini testified that on June 25, 2005, the date of the offense, he responded from home to a call for an injury accident on Interstate 480. He arrived at the scene, observed an SUV that had flipped over and a Honda down the road, and investigated. His investigation included searching for tire marks, taking measurements, and determining the area of impact and speed.

Among other things, Officer Ferrini observed and photographed a yaw mark on the road. A yaw mark, according to Officer Ferrini, is left as a vehicle makes a lane change or turns at a high rate of speed. Officer Ferrini noted that the yaw mark was made by the left front tire of the defendant's Honda. The next day, Officer Ferrini returned to the accident scene and measured the yaw mark.

Officer Ferrini testified that the speed of a turning vehicle can be calculated by determining the coefficient of friction, taking the square root of the yaw mark's radius multiplied by the coefficient of friction, and multiplying that result by 3.87. Officer Ferrini testified further that the radius of the yaw mark can be calculated by formula using the cord and mid-cord measurements.

Defense counsel argued that the methodology used by Officer Ferrini was not scientifically valid under *Daubert* or its progeny, and therefore should be suppressed. Specifically, defense counsel argued that the court could not be certain that Officer Ferrini used the correct formula for determining speed because he did not observe where there were striations in the yaw marks.

The State countered, arguing that the methodology used by Officer Ferrini – i.e., taking and applying measurements and other scientific data (such as co-efficient of friction) to scientifically

established formulas – was valid. The State further argued that it is the validity of the science, and not the substance or correctness of its expert's conclusions, that determine whether Officer Ferrini should be permitted to testify as an expert at trial. The State also pointed out that the defense had presented no evidence or testimony to establish the invalidity of the formula – even if there had been striations in the yaw marks.

Law and Analysis

Evid. R. Rule 702 provides:

A witness may testify as an expert if all of the following apply:

- (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
- (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
- (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
 - (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
 - (2) The design of the procedure, test, or experiment reliably implements the theory;
 - (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Only matters under divisions (C)(2) and (C)(3) of the Rule are before the court. Neither the necessity of expert opinion testimony under division (A) of the rule, nor the qualifications of Officer Ferrini as an expert under division (B) of the rule, has been raised as an issue in these proceedings.

In *Valentine v. Conrad* (2006), 110 Ohio St.3d 42, 2006, the Ohio Supreme Court held that a *Daubert* type standard for admissibility of causation testimony is required. Importantly, though, the focus of a court's analysis is not on substance or correctness of the expert's opinion or testimony; the focus is on the principles and methodology that underlie the expert's opinion or testimony.

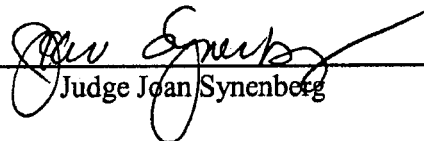
Applied to the case at bar, whether Officer Ferrini observed or noted striations in the yaw marks, or whether he was mistaken in his measurements, is not relevant. Those are matters of credibility to be addressed on cross-examination at trial. Evidence should not be excluded merely because it is questionable or confusing. *Gilmore v. Vill. Green Mgmt. Co.*, 2008-Ohio-4566 (Cuy. App., 9/11/2008).

The issue before the court is whether the principles and methodology underlying Officer Ferrini's opinions or testimony were properly based on reliable scientific, technical, or other specialized information. The only testimony and evidence on this issue came from the State. The defense presented no evidence and no testimony to rebut Officer Ferrini's qualifications as an expert, and no evidence or testimony to refute the validity of the method and formulas he used to calculate defendant's speed.

Conclusion

Therefore, for the foregoing reasons, the court finds no merit in defendant's motion to suppress. The defendant's motion to suppress based on *Daubert* is denied.

IT IS SO ORDERED.



Judge Joan Synenbeg