

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO)	
)	Case No. CR 561754
Plaintiff,)	
)	
-vs-)	
)	<u>JOURNAL ENTRY AND</u>
)	<u>OPINION</u>
MAHIR SILMI)	
MOHAMMED SALEM)	
)	
Defendants.)	

Judge John J. Russo:

This matter is before the Court on Defendants' Joint Motion to Exclude Report of Analysis of Alleged Controlled Substance Analogs and Testimony of State Witness Pursuant to Ohio Evidence Rules 702(B) and 702(C) filed on November 9, 2012. For the reasons that follow, Defendants' Motion is GRANTED.

FACTS

On April 26, 2012, Defendants Mahir Silmi and Mohammed Salem were indicted on a six count indictment. The issue before the Court involves Counts One and Two, the Trafficking and Possession of Controlled Substance Analogs, both felonies of the first degree.

Defendants are seeking to exclude the lab reports and/or testimony of the Cuyahoga County Regional Forensic Science Laboratory (hereinafter "CCRFSL") regarding the controlled substance analogs in this case. It is their position the testimony and/or report are based purely on subjective observations and should not be admissible.

On December 17-18, 2012, the Court held a Daubert hearing to evaluate the admissibility of the State offered lab report and testimony. Two members of the CCRFSL drug chemistry

section testified: Paul Boggs, the supervisor of the lab's chemistry drug section, and Gagandeep Sran, the chemist who analyzed the potential analogs in this case.

Paul Boggs testified that following the enactment of the 2011 drug analog statute, they began testing not only for controlled substances, but to see if a substance had a chemical structure "substantially similar" to a controlled substance. These drugs would be considered analog drugs. (T. 27-28). If a determination was made by one of the chemists at the CCRFSL of substantial similarity, it would be presented during a staff meeting to the other 6 chemists at the CCRFSL. Only upon 100% agreement would the CCRFSL make the scientific opinion that the standard of substantial similarity had been met. (T. 28). There were no specific guidelines set by the lab when this method of determination began. (T. 30). However, over time two guidelines developed. In regards to synthetic cannabinoids, the chemists developed a guideline that an analog drug "had to be within the same chemical family." as the controlled substance (T. 31). The other guideline that developed was the original structural backbone of the scheduled substance had to be unchanged. (T. 32). This comparison was done by engaging in a side by side comparison of the stick and letter chemical structures of the potential analog and scheduled drug. (T. 27-32). There have been some limited consultations with other labs in Ohio regarding specific questions on certain potential analogs. (T. 55). But no statewide database, protocols, or any formal organization or mechanism of standardization regarding the testing of potential analogs exists. (T. 60-63).

The above process was applied in this case. Based upon their tests, CCRFSL found two potential analog drugs. The first was AM-2201, which was compared to JWH-018, a controlled substance. AM-2201 has an additional fluorine atom. (T. 34-40). The other drug was

determined to be 4-MEC, which was compared to the controlled substance methcathinone. The difference here occurred between the nitrogen rings of the two substances. (T. 98).

LEGAL OPINION

The Defendants' are seeking to exclude the State offered lab reports and/or testimony from CCRFSL. The admissibility of expert testimony is based on compliance with Evid.R. 702 and *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993).

Evid. R. 702(C) states:

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.

In *Daubert*, the U.S. Supreme Court found under Fed.R.Evid. 702, expert scientific testimony is admissible if it is reliable and relevant to the task at hand. *Miller v. Bike Athletic Co.*, 80 Ohio St. 3d 607, 687 N.E.2d 735 (1998), citing *Daubert* 509 U.S. at 589. To determine reliability, the *Daubert* court stated that a court must assess whether the reasoning or methodology underlying the testimony is scientifically valid. *Miller* at 611, citing *Daubert* 509 U.S. at 592-293. In evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance. *Id.* Although these factors may aid in

determining reliability, the inquiry is flexible. *Id.*, citing *Daubert* 509 U.S. at 594. The focus is "solely on principles and methodology, not on the conclusions that they generate." *Id.*

Upon considering all of the relevant testimony and briefs of both the State of Ohio and the Defendants, the Court finds the testimony and lab report from the CCRFSL must be excluded. This Court has to focus on evaluating the theory, not the conclusion. Looking at the theory, this Court finds no objective, reliable test in the current testing of potential analogs by the CCRFSL. The vague and undefined term of "substantially similar" left the CCRFSL to devise an unguided subjective testing procedure.

Based upon *Daubert* and Evid.R. 702, the theory upon which the test is based is supposed to be objectively verifiable or derived from widely accepted knowledge, facts, or principles. Both of the State's witnesses, Mr. Boggs and Mr. Sran, admit the CCRFSL test is a subjective test. Paul Boggs explained the subjective nature of their lab's testing of potential analogs, describing "[I]t is based on something. It is just not based on something the way we would like it to be based on." (T.56). There is no statewide or nationwide resource or protocol for this lab to draw from and no formal organization or guidance regarding the testing of potential analogs. This leads the Court to the conclusion the current testing of the CCRFSL is not objective or derived from well-known facts and principles. It has never been formally peer-reviewed and no error rate has been determined. This was a test developed through trial and error of one department in one laboratory with no formal studies or established methodology to rely upon.

Whether the test reliably implements the theory is the next criterion from Evid. R. 702. The theory of "substantially similar" is too vague to be properly implemented. The lab has been left guessing if it is doing the right thing because there is no definition provided to it by any

Federal or local government agency as to what “substantially similar” means. CCRFSL was left to develop a test they hoped met this vague standard with no definition.

Lastly, the particular procedure, test, or experiment should be conducted in a way that will yield an accurate result. As is the case, with the previous two criterion, it is hard to determine what would be an accurate result when there has been no peer review, no error rates determined, and no real comparison or common protocol even between counties in Ohio. This Court has no way to determine if there is general acceptance to this methodology because it has never been compared to any other lab’s methodology.

The Court is aware the requirements of *Daubert* are meant to be flexible. It is also aware the intent behind the “substantially similar” language was to stay one step ahead of a chemist with a criminal intent. However, the lack of any objective standard or formal guidelines for the CCRFSL to follow regarding the testing of potential analogs leaves this Court with no other option but to Grant the Defendants’ Motion to exclude the lab report and/or expert testimony regarding the lab in this case.

The ruling of this Court is confined to the issue of “substantially similar” and the Court will not opine regarding the effects on the central nervous system for two reasons: (1) it does not believe that was the issue raised by Defendants’ original motion, and (2) it is no longer a relevant issue following the Court’s ruling.

CONCLUSION

Defendants' Joint Motion to Exclude Report of Analysis of Alleged Controlled Substance
Analogues and Testimony of State Witness Pursuant to Ohio Evidence Rules 702(B) and 702(C) is
GRANTED.

IT IS SO ORDERED.

Date

Judge John J. Russo