

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 v.) No. 08-00026-04-CR-W-FJG
)
CHRISTOPHER L. ELDER,)
)
 Defendant.)

DEFENDANT ELDER’S REQUEST FOR A *DAUBERT*
HEARING ON THE ISSUE OF THE QUALIFICATIONS OF
HOUSTON POLICE OFFICE JOHN KOWAL TO TESTIFY
AND OFFER OPINION TESTIMONY AS AN EXPERT ON
ISSUES DEALING WITH “METHODS OF PHARCEUTICAL
DIVERSION, INCLUDING INAPROPRIATE PRESCRIBING,
PRESCRIPTION RINGS, DOCTOR SHOPPING AND ‘CREW
BOSS’ CONSPIRACIES” WITH SUGGESTIONS IN SUPPORT
OF THE MOTION

As anticipated in Defendant’s pending motion *in limine* filed January 2, 2009 (See Doc. #169), the government apparently intends to attempt to introduce evidence in the form of expert and fact based testimony from a Houston police officer, John Kowal as to what is proper treatment for pain management, what drugs are appropriate for a particular medical conditions, who is qualified as a physician to prescribe such medications, levels of dosage, treatment regimes, and

other matters that only practicing licensed physicians are qualified to opine on after a proper showing of specific expertise. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Nothing set forth in the notice pleading filed by the government on June 26, 2009 (see doc. # 231) setting forth this individual's background and qualifications meets the stringent requirements for such expert testimony.

Also, the remainder of his proposed testimony as to Houston drug dealing and his opinion as to what drugs are a problem in Houston and his speculation as to what he believes might have happened to the medications shipped Fedx to Houston in this case is highly prejudicial and cannot be justified, again, under the stringent requirements of *Daubert*. Even if he is arguably an expert on some aspects of illegal drug activity, something we do not concede, there is a serious question of relevancy and the highly prejudicial nature of such testimony outweighing any remote probative value it might have, particularly as it applies to defendant Elder. See Rule 403, FREv. Defendant Elder in his previously filed and pending motion in limine noted:

The indictment in this case contends in Count One that defendants Elder, Rostie, Martin, Solomon and Johnson conspired to dispense and possess with intent to distribute and dispense controlled substances, that is various types of Schedule III, IV and V medications for other than legitimate

medical purpose and not in the usual course of professional practice. The manner and means of the conspiracy allege that these medications were shipped from Missouri to Texas to defendant Solomon, a pharmacy owner.

There are no allegations in the indictment as to what happened to the medication once it was signed for in Texas, that is, whether the medication was sold by Solomon outright, retailed through his pharmacy or wholesaled to other pharmacies, hospitals or other entities or quite simply dispensed to the person whose name appeared on the prescription. The trail simply ends with receipt of the shipments in Houston.

The indictment in this case was returned on February 6, 2008. In an apparent effort to fill in these evidentiary blanks and shortcomings, a full year later during March and April of 2009, the DEA interviewed over 40 patients of Doctor Peter Okose, a physician whose name has figured prominently in this case who is not under indictment. Some of these interviews suggest that Doctor Okose's patients were obtaining prescriptions under questionable circumstances and that the patients and or others hanging around Okose's clinic were attempting to sell or purchase such medications soon after the prescriptions were written.

Defendant, Doctor Christopher Elder, is not mentioned by any one of the 40 plus witnesses. No patients of Doctor Elder have been interviewed and asked similar questions to determine if he or any of his patients are in fact engaged at his

practice location in such activities. Absolutely nothing in the discovery produced in this case to date demonstrates that he has caused any illegal substances to be dispensed on the streets of Houston. The best that can be said is his name appears on mass numbers of photo copied faxed scripts recovered in the Belton Pharmacy which were allegedly transmitted by fax from the residence of a co-defendant, filled and shipped back to Texas and signed for by many different individuals other than Doctor Elder without his knowledge or complicity.

This proposed evidence from this witness is the very type of testimony and tactic that was so strongly condemned by the Eighth Circuit in *United States v. Street*, 548 F.3d 618 (8th Cir. 2008). In *Street* a Kansas City Drug Task Force Officer with qualifications similar to that of the officer the government would use in this case testified about the history and organization of American motorcycle gangs in general and specifically about the criminal tendencies of the motorcycle gang snitches. In reversing Street's murder conviction, the court said "[w]e conclude that Cook's testimony about outlaw motorcycle gangs and El Forasteros was excessive, unduly prejudicial, and in great part completely irrelevant to the charged offenses.

There is little or no credible evidence produced to date connecting Doctor Elder to this conspiracy and the government informed the defense late last week

that all evidence has been disclosed. To offer this testimony against Doctor Elder is simply an effort to poison the minds of the jury against Doctor Elder and suggest through rank speculation and biased opinion that he must have some how done the same thing as Doctor Okose even though there is absolutely no evidence supporting such a claim. Admitting this type of prejudicial evidence to the jury will clearly deprive him of a constitutionally fair trial.

WHEREFORE, defendant moves the Court for hearing pursuant to *Daubert* to determine the basis, if any, to receive expert opinion from this witness.

Respectfully submitted,

/s/
John R. Osgood
Attorney at Law, #23896
Commercial Fed Bnk- Suite 305
740 NW Blue Parkway
Lee's Summit, MO 64086

Office Phone: (816) 525-8200
Fax: 525-7580

CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri and other ECF listed counsel through use of the Electronic Court Document Filing System on Sunday, June 28, 2009.

/s/
JOHN R. OSGOOD