

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

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

**UNITED STATES' SUGGESTIONS IN OPPOSITION TO
DEFENDANT ELDER'S REQUEST FOR A *DAUBERT* HEARING CONCERNING THE
QUALIFICATIONS AND TESTIMONY OF POLICE OFFICER JOHN KOWAL**

The United States of America provides the following suggestions in opposition to defendant Christopher L. Elder's request for a *Daubert* hearing concerning the qualifications and testimony of Officer John Kowal, Houston Police Department:

Suggestions in Opposition

The United States will be offering the testimony of John Kowal a Police Officer with Houston Police Department, as an expert witness in the provision and trafficking of certain drugs, usually available by prescription, as illegally-used drugs of abuse in the Houston, Texas, area. Officer Kowal's testimony is based upon his extensive experience with drug diversion investigations. Contrary to Elder's assertion, his testimony flows entirely from his experience in that field and is not reliant on medical determinations. Moreover, Officer Kowal's testimony is highly relevant to the facts of the case to be presented by the United States at trial and will not be unfairly prejudicial to any defendant.

Officer Kowal has extensive training and experience as a police officer with the Houston Police Department. During his employment as a Police Officer, he was a member of a Drug

Enforcement Administration Task Force in Houston, Texas as a Task Force Officer in the Tactical Diversion Squad for approximately eight years. He is currently a member of a squad of six officers and one sergeant that are dedicated to investigate diversion investigations. Since December 1986, Officer Kowal has specialized in drug diversion investigations. During his experience, he has participated in numerous narcotic investigations. He has debriefed numerous defendants, informants, and witnesses who had personal knowledge regarding major narcotic trafficking organizations. Additionally, he has participated in many aspects of drug investigations including undercover operations, conducting surveillance, and arrests. He is familiar with prescription narcotics traffickers' methods of operation including the distribution, storage, and transportation of prescription narcotics and the collection of money proceeds of narcotics trafficking and methods of money laundering used to conceal the nature of the proceeds.

Officer Kowal will explain that Houston, Texas, has a rampant problem with the abuse of prescription drugs, and in particular hydrocodone (sold under the trade names, such as Lorcet and Lortab), Soma (a sleeping aid), and codeine-containing cough syrup, known together as a "Houston Cocktail." Houston is a source city for these substances, and abusers travel to Houston from Louisiana and other places to acquire these drugs. Medical clinics throughout the city provide these drugs to "patients" after cursory examinations and without regard to the "patient's" medical need for the drugs. Patients pay in cash for their clinic visits, and they typically visit multiple clinics to acquire drugs. On occasion, third parties gather groups of people to visit clinics and acquire drugs, with the third party paying for the office visit and the prescription in exchange for of the drugs acquired. Prescription hydrocodone, soma, and cough syrup are

routinely diverted and sold on the street at a considerable mark-up from the prescription retail price. Officer Kowal will articulate the estimated street value of the prescription drugs.

Federal Rule of Evidence 702 authorizes expert testimony that is not scientific, where that testimony is specialized knowledge gained from training and experience. *United States v. Garza*, 566 F.3d 1194, 1199 (10th Cir. 2009). In such cases, the *Daubert* factors may not all be applicable or helpful, although the district court retains its role as the gatekeeper for such evidence. *Id.* Where a police officer has acquired knowledge of the drug trade through training and experience, and that knowledge is relevant to the case at hand, *Daubert* preclude an officer from testifying as an expert. *Id.*; *see also United States v. Swafford* 385 F.3d 1026, 1030 (6th Cir. 2004).

The Eighth Circuit has explained that the *modus operandi* of drug dealers is not a subject most jurors would be familiar with and is therefore an appropriate area for expert testimony. *United States v. Jeanetta*, 533 F.3d 651, 657-58 (8th Cir. 2008). Consequently, the Eighth Circuit held that expert testimony on the significance of items like Ziploc bags, scanners, monitors, surveillance equipment, along with the presence of large amounts of cash, was properly allowed. *Id.* Indeed, the Eighth Circuit has generally allowed relevant expert testimony concerning both the business of drug trafficking and the *modus operandi* of drug dealers. *United States v. Robertson*, 387 F.3d 702, 704 (8th Cir. 2004); *see also United States v. Spotted Elk*, 548 F.3d 641, 662-63 (8th Cir. 2008).

Officer Kowal's testimony pertains not to medical diagnosis, but to drug dealing. At certain times and places, certain drugs become the predominate drugs of abuse in an area. In the 1990s for many cities, it was crack cocaine. In the 2000s in Kansas City it has been

methamphetamine. In Houston, Texas, currently, hydrocodone, Soma, and codeine-containing cough syrup are the predominant drugs of abuse. That these drugs are prescription drugs in addition to drugs of widespread abuse does not change that fact. Officer Kowal's testimony is grounded on his training and experience as an investigator of diverted prescription drugs. The information he will impart comes from his investigations, his training, and his interviews with people involved in acquiring and selling diverted drugs. Officer Kowal will not be asked to opine on individual doctor-patient interactions, as his testimony is broader in scope.

Officer Kowal's testimony is necessary to allow the jury to understand the business and techniques of the trafficking of prescription drugs in Houston, subjects that jury members would have little or no knowledge of otherwise. Moreover, this testimony will be unquestionably relevant to the case. Contrary to Elder's assertion, very strong circumstantial evidence at trial will establish the drugs acquired from The Medicine Shoppe pharmacy in Belton, Missouri, using prescriptions written by Elder and others, and mailed to Elder at his place of employment in Texas, were diverted. The evidence will show that none of these prescriptions were authorized by the patients to be filled in Missouri and they were unaware that they were being filled in Missouri. These prescriptions were entirely fraudulent; patient information was used (and sometimes changed in small ways) to obtain these drugs without the patient's knowledge. Some of the prescriptions, including prescriptions written by Elder, were duplicate prescriptions, where the original prescriptions were actually filled by the patient at a pharmacy in Houston. The drugs sent by mail from Belton to Houston were taken out of the building shared by South Texas Wellness Center, where Elder worked and where the drugs were addressed, although they had no legitimate destination. Additionally, co-defendant and co-conspirator Troy Solomon

expended tens of thousands of dollars in cash, even though he had no known legitimate source for that cash. In short, the government's case for diversion is very strong, and Officer Kowal's testimony is highly relevant within the context of that case.

Nor will Officer Kowal's testimony be unduly prejudicial. The government will not ask Officer Kowal to opine about the state of mind of any defendant, or even to opine about the facts of this case in specific, but will instead ask more general questions about the business and *modus operandi* of acquisition and trafficking of prescription drugs in Houston for the purposes of abuse. In this way, the United States will insure that Officer Kowal's testimony is properly tailored to the case. *See United States v. Parker*, 364 F.3d 934, 940-41 (8th Cir. 2004) (testimony on FTC's Franchise Rule relevant and admissible to prove intent to defraud; government did not ask expert to opine that the defendant's business was a franchise but relied on other evidence in the case for that point).

No requirement exists that the district court hold a *Daubert* hearing if the court is satisfied with the expert's training, education, and experience and that the expert's testimony is based upon training, education, and experience. *United States v. Kenyon*, 481 F.3d 1054, 1061 (8th Cir. 2007). In this case, Officer Kowal's testimony is based upon his training and experience, and is clearly relevant to help the jury understand the business and techniques of prescription drug trafficking as drugs of abuse in Houston, Texas. As such, no hearing is needed in this case.

CONCLUSION

The United States respectfully urges that Elder's request for a Daubert hearing be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on July 14, 2009, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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