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

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

REPORT AND RECOMMENDATION

This matter is currently before the Court on defendant Elder's Motion to Suppress the Testimony of Witness Hearn as to Her Lay Identification of Defendant's Purported Handwriting on Photo Copies of Previously Faxed Prescriptions on Due Process Grounds That the Procedure Used by the DEA Was Unconstitutionally Suggestive (doc #117). For the reasons set forth below, it is recommended that this motion be denied.

I. INTRODUCTION

On February 6, 2008, the Grand Jury returned a twenty-four count indictment against Mary Lynn Rostie, Cynthia S. Martin, Troy R. Solomon, Christopher L. Elder and Delmon L. Johnson. Defendant Elder is charged in Counts One and Three through Ten of the indictment. Count One of the indictment charges a conspiracy to distribute controlled substances. Counts Three through Ten charge the distribution of controlled substances.

On October 21, 2008, an evidentiary hearing was held on defendant Elder's Motion to Dismiss the Indictment as to Defendant Elder Because of Government Misconduct (doc #93)[1] and on defendant Elder's Motion to Suppress the Testimony of Witness Hearn as to Her Lay Identification of Defendant's Purported Handwriting on Photo Copies of Previously Faxed Prescriptions on Due Process Grounds That the Procedure Used by the DEA Was Unconstitutionally

[1]The undersigned has previously issued a Report and Recommendation with respect to the motion to dismiss. This Report and Recommendation was adopted by the District Court and the motion to dismiss was denied.

Suggestive (doc #117). Defendant Elder was represented by retained counsel John R. Osgood. The Government was represented by Assistant United States Attorneys Rudolph R. Rhodes, IV, and J. Curt Bohling. The Government called Diversion Investigator (DI) Judi Watterson of the Drug Enforcement Administration as a witness. The defense called Mark Reeder, a private investigator, to testify with respect to the motion to dismiss.

II. FINDINGS OF FACT

On the basis of the evidence adduced at the evidentiary hearing which related to the motion to suppress, the undersigned submits the following proposed findings of fact:

1. Judi Watterson has been a diversion investigator for the Drug Enforcement Administration ("DEA") for 22 years. (Tr. at 3) As a diversion investigator, DI Watterson enforces the laws and regulations pertaining to prescription controlled substances. (Tr. at 3) DI Watterson has been assigned to work on a criminal case involving defendant Elder. (Tr. at 3)

2. While working the case involving defendant Elder, DI Watterson made contact with a person named Diane Hearn. (Tr. at 3) Ms. Hearn is the office manager at Westfield Medical Clinic in Houston, Texas. (Tr. at 4) DI Watterson first sent Ms. Hearn a letter in 2006 requesting information as to when defendant Elder worked at Westfield Medical Clinic. (Tr. at 4) Ms. Hearn responded by letter advising that Elder had worked at Westfield Medical Clinic from approximately February 2005 through early March 2006. (Tr. at 4)

3. On July 10, 2008, DI Watterson and Special Agent (SA) Brendan Fitzpatrick traveled to Westfield Medical Clinic to meet with Ms. Hearn and determine whether or not she had an ability to recognize defendant Elder's handwriting. (Tr. at 5) Ms. Hearn already knew that Dr. Elder was under investigation because she had received a grand jury subpoena. (Tr. at 27-28) Ms. Hearn advised that she had seen Elder's handwriting during the course of his employment at the clinic as Elder had to sign time sheets, make notes in patient charts and write prescriptions. (Tr. at 5) Ms. Hearn told DI Watterson and SA Fitzpatrick that she was familiar with Elder's handwriting based on seeing it during their work relationship. (Tr. at 5) Ms. Hearn had seen Elder's handwriting on prescriptions because the office was keeping a duplicate. (Tr. at 30)

4. DI Watterson and SA Fitzpatrick then showed Ms. Hearn copies of ten prescriptions related to the indictment in the instant case. (Tr. at 5-6) DI Watterson testified that if Ms. Hearn had said that she was not familiar with Dr. Elder's handwriting, DI Watterson would not have shown her the prescriptions. (Tr. at 22-23) The prescriptions contained handwriting on them, that is a patient name, the drug, directions for use and a doctor's signature. (Tr. at 6) Ms. Hearn affirmed that all of the prescriptions appeared to have Dr. Elder's handwriting and signature. (Tr. at 6) Ms. Hearn did not equivocate; she was positive. (Tr. at 16) After she had identified Elder's handwriting, DI Watterson told Ms. Hearn that Elder had been indicted. (Tr. at 28)

5. DI Watterson wrote a Report of Investigation regarding the interview of Ms. Hearn on July 10, 2008. (Tr. at 13) The Report of Investigation provided in part:

> On July 10, 2008, Diversion Investigator (DI) Judi Watterson and Special Agent (SA) Brendan Fitzpatrick traveled to Westfield Medical Clinic, 11618 Aldine Westfield, Houston, Texas 77093, and identified themselves with credentials to Diane Hearn, office manager of the clinic. Hearn acknowledged that she worked with ELDER and that ELDER wrote prescriptions while employed at Westfield Medical Clinic. The investigators asked Hearn if she could recognize ELDER's handwriting and Hearn responded that she could. The investigators provided Hearn with copies of ten prescriptions issued by ELDER (obtained from the search of THE MEDICINE SHOPPE #1067 on May 10, 2006) and asked her to review the handwriting and doctor's signature on the prescriptions .... Hearn stated that she recognized the handwriting and signature on the ten prescriptions as ELDER's writing and signature.

(Defendant's Ex. 1)

6. While DI Watterson also had copies of prescriptions written by Dr. Botto and Dr. Okose, DI Watterson did not mask the names on the prescriptions and show Ms. Hearn a sampling of the prescriptions to see if she could recognize the handwriting. (Tr. at 17) DI Watterson testified that the DEA has never done "writing lineups." (Tr. at 23)

7. Ms. Hearn's husband, a doctor, had some issues in the past with the DEA. (Tr. at 12-13) Ms. Hearn's husband's license was pulled as a result of the DEA investigation. (Tr. at 13) Sometime in 2000, he surrendered his DEA registration. (Tr. at 22) Mr. Reeder testified that it was explained to him that Ms. Hearn's husband was taken out of his office in handcuffs in front of his patients and his wife. (Tr. at 39) These issues were not discussed when DI Watterson and SA Fitzpatrick met with Ms. Hearn. (Tr. at 13)

8. DI Watterson testified that Ms. Hearn has never asked her for any kind of accommodation or special treatment as a result of being a witness in this case. (Tr. at 22)

III. DISCUSSION

Defendant Elder requests that the Court suppress the testimony of Diane Hearn as to her lay identification of Elder's handwriting because the "out-of-court procedure" used by the DEA was unconstitutionally suggestive. Defendant Elder argues that the DEA should have shown Ms. Hearn a "'photo spread' of the handwriting such as used in a photo lineup." (Motion to Suppress (doc #117) at 5) Defendant Elder has not provided the Court with any case law to hold that a handwriting lineup is required or that a handwriting lineup has even ever been used. Defendant Elder further argues that Ms. Hearn is a biased witness who will go to extremes to assist the government based

on the past disciplinary action taken against her husband, Ms. Hearn's fear of the DEA and the DEA's perceived power over her. (Id. at 6)

The Government responds that it does not intend to offer the out-of-court procedure at trial. (Tr. at 6) Instead, the Government intends to have an in-court identification of defendant Elder's handwriting by Ms. Hearn. (Id.) The Government argues that Ms. Hearn's identification of defendant Elder's handwriting is admissible testimony pursuant to Rule 901 of the Federal Rules of Evidence. (Government's Suggestions in Opposition to Defendant Elder's Motion to Suppress (doc #131) at 1)

Federal Rules of Evidence 701 and 901 govern the admission of nonexpert opinion on handwriting at trial. See United States v. Samet, 466 F.3d 251, 254 (2nd Cir. 2006); United States v. Aguirre, 155 Fed. Appx. 145, 149 (5th Cir. 2005). Rule 901 allows handwriting identification by nonexpert opinion "based upon familiarity not acquired for purposes of the litigation." Fed. R. Evid. 901(b)(2). Rule 701 permits lay opinion testimony when the opinion is "(a) rationally based on the perception of the witness, (b) helpful to ... the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed R. Evid. 701. Courts have allowed the admission of lay witnesses' handwriting testimony. See United States v. Aguirre, 155 Fed. Appx. 145, 149 (5th Cir. 2005)(where co-workers testified they had extensive experience viewing Aguirre's handwriting, their testimony identifying Aguirre's handwriting on altered or falsified audit reports squarely falls within permissible lay opinion under Rules 701 and 901); United States v. Tipton, 964 F.2d 650, 655 (7th Cir. 1992)("Because [a co-worker] was familiar with Tipton's handwriting and signature as a result of observing many of the ... documents Tipton prepared, we are of the opinion that [the co-worker] was qualified to testify regarding Tipton's signature and handwriting.")

Even if the Court were to determine that the procedure by which Ms. Hearn was shown the out-of-court handwriting samples (presumably the same procedure that will be used in trial) was suggestive, the identification does not necessarily need to be excluded from evidence. Given that

there does not appear to be any case law relating to an overly suggestive handwriting identification (which may indicate that one cannot exist), it would seem appropriate to look to case law dealing with identifications of persons where suggestive procedures were used. In Neil v. Biggers, 409 U.S. 188 (1972), the defendant argued that a "showup" where he was the only person brought before the victim of a rape was an impermissibly suggestive identification procedure. The United States Supreme Court found that even though the showup technique may have been suggestive, the court must look at the totality of the circumstances to determine whether the victim's identification was nevertheless reliable. The Court stated:

> We turn, then, to the central question, whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199-200. See also United States v. Thomas, 128 Fed. Appx. 986, 991 (4th Cir. 2005)("if a witness knows the defendant personally, the chance of misidentification from a suggestive photo display is virtually non-existent").

The evidence presented by the government is that Ms. Hearn had worked with defendant Elder for approximately a year and that Ms. Hearn had extensive experience viewing Elder's handwriting, on prescriptions as well as other documents. Further, prior to being shown the prescriptions, Ms. Hearn told the agents that she was familiar with Elder's handwriting and that she would be able to recognize it. Finally, Ms. Hearn did not equivocate on her identification of Elder's handwriting and signature on the ten prescriptions shown to her; she was positive. Given this evidence, the Court finds that even if the procedure used by the agents was suggestive, the identification appears to be reliable. There is no reason to suppress the testimony of Ms. Hearn as to her lay identification of Elder's handwriting.

With respect to defendant Elder's argument that Ms. Hearn is a biased witness who will go to extremes to assist the government, defense counsel is perfectly entitled to argue to the jury that

Hearn's interest in assisting the government colored her perception of Elder's handwriting. That possibility, however, does not require the court to exclude the evidence. See United States v. Scott, 270 F.3d 30, 50 (1st Cir. 2001)(defense counsel free to argue to jury that witness' interest in securing a conviction colored his perception of handwriting).

IV. CONCLUSION

Based on the foregoing, it is

RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order denying Defendant Elder's Motion to Suppress the Testimony of Witness Hearn as to Her Lay Identification of Defendant's Purported Handwriting on Photo Copies of Previously Faxed Prescriptions on Due Process Grounds That the Procedure Used By the DEA was Unconstitutionally Suggestive (doc #117).

Counsel are reminded they have ten days from the date of receipt of a copy of this Report and Recommendation within which to file and serve objections to same. A failure to file and serve objections by this date shall bar an attack on appeal of the factual findings in this Report and Recommendation which are accepted or adopted by the district judge, except on the grounds of plain error or manifest injustice.

/s/ Sarah W. Hays
SARAH W. HAYS
UNITED STATES MAGISTRATE JUDGE