the Briefs

A Publication of the Orange County Bar Association

January 2015
Vol. 83 No. 1

Inside this Issue:

Matthews R. Bark, Esq.

Steven D. Kramer, Esq.

From Frye *to* Daubert *and the Effect on Criminal Cases*

In 2013, Florida Statute § 90.702 was amended to transform the standard to admit expert opinion into evidence from the *Frye*[1] standard to the *Daubert*[2] standard. This article will set forth the differences between the *Frye* and *Daubert* standards and examine some types of testimony that may be affected in criminal cases. It is important to note that both versions of section 90.702 are an exception to the general rule that the opinion of a witness at trial is generally not admissible into evidence.[3]

Prior to 2013, section 90.702 read as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however the opinion is admissible only if it can be applied to evidence at trial.[4]

Currently, Section 90.702 reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.[5]

In order to explain how the additions of the subparagraphs to the current version of section 90.702 have affected the admissibility of expert testimony, it is best to first understand what the requirements were under the previous version of section 90.702, i.e. under *Frye*. Under *Frye*, in order to admit opinion testimony based on scientific, technical, or other knowledge, the witness providing such opinion must base the opinion on "knowledge, skill, experience, training, or education." The D.C. Circuit Court of Appeals in *Frye* went on to explain that, "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[6]

This *Frye*-based requirement for admissibility has been called the "counting heads" requirement to admissibility. So long as a group of similarly educated people agree that a scientific principle is reliable, and that it has gained general acceptance and opinion based on such, it should be admissible into evidence. In other words, the only preliminary evaluation to be made by the trial judge is whether the scientific theory the opinion is based on has gained general acceptance in the scientific community.

The newly amended version of section 90.702, known as the *Daubert* standard, gives the trial judge more flexibility by allowing the trial judge to evaluate additional factors in determining whether certain expert testimony should be admitted into evidence. The same language that was in section 90.702 prior to 2013 is still present. Thus, one of the circumstances the trial judge may (and should) evaluate to determine if the opinion proffered is admissible as an expert opinion remains whether the scientific principle applied to reach the opinion has gained general acceptance in the field in which it belongs.[7]

However, the United States Supreme Court explained in *Daubert* that "[t]he inquiry envisioned by Rule 702 is …a flexible one."[8] The trial judge must preliminarily assess "whether the reasoning or methodology underlying the testimony is scientifically valid and …whether that reasoning or methodology properly can be applied to the facts in issue."[9] The Court provided the following inquiries as a guide:

a. Can the theory or technique be tested?[10]

b. Has the theory or technique been subjected to peer review?[11]

c. What is the potential rate of error?[12]

d. And, has the theory or technique gained general acceptance in the scientific community?[13]

The *Daubert* Court stressed that this is not an exhaustive list of inquiries that should be made. The trial judge may find other inquiries appropriate or apply the above inquiries with differing weight in differing scenarios. Further, the *Daubert* Court

continued page 10

continued from page 10

advised trial judges to be mindful of the other rules of evidence that will affect the admissibility of evidence under section 702:

> Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules. Rule 703 provides that expert opinions based on otherwise inadmissible hearsay are to be admitted only if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Rule 706 allows the court at its discretion to procure the assistance of an expert of its own choosing. Finally, Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." Judge Weinstein has explained: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses."[14]

The rules mentioned above and quoted in *Daubert* are based on the Federal Rules of Evidence. Of concern is whether the rules of evidence under Florida Statutes Chapter 90 provide the same and/or adequate protections from allowing the admission of misleading expert opinions at trial.

Florida Statute § 90.403 mirrors Rule 403 of the Federal Rules of Evidence. The discretion to appoint an expert by the trial court in Rule 706 of the Federal Rules of Evidence, however, is not provided in the Florida Statutes.[15] Rule 703 of the Federal Rules of Evidence seems to be reflected in Florida Statute § 90.704 as amended on July 1, 2013.[16] While section 90.704 of the Florida Statutes does not specifically reference inadmissible hearsay, the statute does acknowledge that the fact or data relied upon by the expert witness may or may not be admissible into evidence and provides a framework to use if the situation requires.

The following are among the types of testimony that may be affected by the amendment of section 90.702. Will an officer be allowed to testify without a chemical test that a substance is a controlled dangerous substance under chapter 893, Florida Statutes?[17] Will testimony in DUI cases, such as to the administration of the horizontal gaze nystagmous[18] or the admissibility of a breath test[19] be affected? Will the admissibility of fingerprints and DNA be revisited? What impact the amendment to section 90.702 will have on these types of testimony and others will be determined in the coming years through litigation and the appellate process.

Matthews R. Bark, Esq., The Law Offices of Matthews R. Bark, has been a member of the OCBA since 2008. **Steven D. Kramer, Esq.**, is an attorney with The Kramer Law Firm.

---

[1] *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

[2] *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

[3] *See* Fla. Stat. § 90.701 (2013).

[4] Fla. Stat. § 90.702 (1976).

[5] Fla. Stat. § 90.702 (2013).

[6] *Frye*, 293 F. at 1014.

[7] *See Daubert*, 509 U.S. at 594.

[8] *Id.*

[9] *Id.* at 592–93.

[10] *Id.* at 593 ("Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.") (citation omitted); *see also* C. Hempel, *Philosophy of Natural Science* 49 (1966) ("[T]he statements constituting a scientific explanation must be capable of empirical test."); K. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability").

[11] *Id.* at 593–94 ("Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability, *see* S. Jasanoff, *The Fifth Branch: Science Advisors as Policymakers* 61–76 (1990), and in some instances well-grounded but innovative theories will not have been published, *see* Horrobin, *The Philosophical Basis of Peer Review and the Suppression of Innovation* 263 JAMA 1438 (1990). Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected. *See* J. Ziman, *Reliable Knowledge: An Exploration of the Grounds for Belief in Science* 130–133 (1978); Relman & Angell, *How Good Is Peer Review?* 321 New Eng.J.Med. 827 (1989). The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.").

[12] *Id.* at 594 (citing, as examples, *United States v. Smith*, 869 F.2d 348, 353–54 (7th Cir. 1989) (surveying studies of the error rate of spectrographic voice identification technique) and *United States v. Williams*, 583 F.2d 1194, 1198 (2d Cir. 1978) (noting professional organizations' standard governing spectrographic analysis).

[13] *Id.*

[14] *Id.* at 595 (citing Weinstein, 138 F.R.D. at 632).

[15] *But see*, Florida Statute § 916.115. (The court may appoint its own expert to determine the mental condition of a defendant in a criminal case); and Fla.R.Crim.P. 3.211, 3.212, and 3.216.

[16] Florida Statute § 90.704 as amended on July 1, 2013 provides: "The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Prior to July 1, 2013, section 90.704 provided: "The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence."

[17] *Cf. Sinclair v. State*, 995 So. 2d 552, 557 (Fla. 3d DCA 2008) ("[I]n the context of non-chemical identification of other controlled substances by qualified law enforcement personnel, 'the credence and weight to be given [such] testimony remain[s] in the final analysis with the judge in its (sic) role as a finder of fact.'") (alteration in original) (citation omitted).

[18] In *Williams v. State*, 710 So. 2d 24 (Fla. 3d DCA 1998), the court stated, "We see no reason to reject evidence derived from a testing procedure simply because it is subject to error, since the burden is still on the State to provide a proper foundation by demonstrating the test was reliably administered by a qualified technician." *Id.* at 34. This analysis fails to weigh the rate of error in the initial determination of admissibility.

[19] *See* Fla. Statute § 316.1934(5) (2013). The breath test affidavit is not subject to Florida Statute § 90.803(8), but the statute is silent as to whether the breath test affidavit is subject to Florida Statute § 90.702.

"Many people look forward to the new year for a new start on old habits."

—Author Unknown