IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
v.)	
)	
)	Case No. 1109006063
)	
MARY E. ROBINSON,)	
)	
Defendant.)	

Submitted: October 14, 2013 Decided: October 21, 2013

Zachary Rosen, Esquire Deputy Attorney General Delaware Department of Justice 820 N. French Street, 7th Floor Wilmington, DE 19801 Attorney for the State Jonathan Layton, Esquire Layton & Associates, P.A. 1823 W. 16th Street Wilmington, DE 19806 Attorney for Defendant

MEMORANDUM OPINION AND ORDER

Defendant Mary E. Robinson (hereinafter "Robinson") was arrested on September 7, 2011, and charged with Driving Under the Influence of Drugs (DUI), Failure to Stop at a Red Light, and Driving with a Suspended/Revoked License. Laboratory tests performed on her blood sample came back positive for the drug Alprazolam. On July 2, 2013, Ms. Robinson's counsel, Jonathan Layton (hereinafter "Layton"), filed a Motion *in Limine*, alleging that the State failed to comply with a June 4, 2013 Order requiring the State to submit clarifying documents related to toxicologist Jessica Smith's (hereinafter "Smith") report on Ms. Robinson's blood. Mr. Layton also alleged that the State's response did not comply with the Court's June 4, 2013 Order in that

the response provided only two statistics and a definition, rather than an "opinion" from Ms. Smith regarding the significance of the findings from the initial laboratory report. Mr. Layton argues that the State's failure to provide necessary information prevents the defense from properly preparing its case, and requests that the Court preclude any testimony at trial from Ms. Smith or any representative from the Office of the Chief Medical Examiner.

The State countered the Motion by stating that the June 20, 2013 email contains the necessary information to satisfy the requirements under Court of Common Pleas Criminal Rule 16 (hereinafter "Rule 16") and D.R.E. 702, 703, and 705, as the State: 1) identifies the expert witness, and 2) provides the defense with the entirety of Ms. Smith's testimony. The State specifically noted that it would not seek any testimony from Ms. Smith that falls outside of the information provided in the email. On July 16, 2013, the Court held a hearing on the Motion and requested submissions from the parties on the sole issue of whether the email complies with Rule 16(a)(1)(E).

FACTS AND PROCEDURAL BACKGROUND

Defendant Mary E. Robinson was arrested on September 7, 2011, after a traffic accident, and charged with Driving Under the Influence of Drugs (DUI), Failure to Stop at a Red Light, and Driving with a Suspended/Revoked License. Following the accident, Ms. Robinson was transported to Christiana Hospital, where she received treatment for injuries sustained in the accident. While admitted, a member of the hospital staff drew a sample of her blood at the request of Sergeant Daniel Parks of the Delaware State Police. About two months following Ms. Robinson's hospitalization, the results of her blood test came back; Ms. Robinson tested positive for the presence of a Benzodiazepine cross-reactive known as Alprazolam (trade name Xanax).

On May 2, 2012, Mr. Layton requested from Deputy Attorney General Karin M. Volker the identity of all expert witnesses the State intended to call at Ms. Robinson's trial, along with written documentation regarding the substance of each witness' testimony, in accordance with Rule 16(a)(1)(E).

The State responded to Mr. Layton's request by providing a laboratory report indicating the results of the tests performed on Ms. Robinson's blood. According to the report, Ms. Robinson's blood was tested on November 11, 2011 by Jessica Smith, M.S. (hereinafter "Smith"), a toxicologist employed by the Office of the Chief Medical Examiner. The blood tested positive for Alprazolam.

At trial on June 4, 2013, Mr. Layton presented an oral Motion *in Limine*, alleging that the laboratory report provided by the State was insufficient in that it failed to provide the substance of the opinions to be expressed by Ms. Smith at trial, as required by Rule 16(a)(1)(E). The Court ordered the State to provide the substance of the opinions to Mr. Layton by June 18, 2013.

The State sent Mr. Layton an email on June 20, 2013. The email was a forward from an email sent by Jessica Smith to the State. Within the email, Ms. Smith included a description of the substance found in Ms. Robinson's blood and the drug's common effects when ingested, along with two statistics from a toxicology textbook regarding the blood concentrations of individuals found to be driving under the influence of Alprazolam. Ms. Smith also stated the concentration of the drug found in Ms. Robinson's blood, and applied that concentration to the statistics provided in the prior section of her email.

Ms. Robinson, through her counsel Mr. Layton, filed a written Motion *in Limine* on July 2, 2013, stating that Ms. Smith should be precluded from testifying at trial because the State responded to the Court's Order two days after the deadline, and the response provided did not

comport with the standards and requirements imposed by Rule 16(a)(1)(E) and D.R.E. 702, 703, and 705. Ms. Robinson alleges that the information provided prevents her and her counsel from properly preparing for trial.

The Court held a hearing on the Motion on July 16, 2013, and as a result, requested briefing from the State and a response from the defense on the issue of the email and its compliance with Rule 16(a)(1)(E). The Court then continued the trial scheduled for July 23, 2013 to a date to be determined at a later time.

The State filed a response to the Motion on August 16, 2013. The State argued that its email does satisfy the requirements set forth in Rule 16, as it identifies the State's expert witness and includes the entirety of Ms. Smith's testimony regarding Ms. Robinson's blood test, along with statistics associated with the connection between the consumption of Xanax and DUIs. The State insists that the email does contain "an opinion as to how the data in this case are consistent with the studies consulted."

Ms. Robinson, via Mr. Layton, filed a reply in support of its Motion, in which she argues that the raw numbers and data provided do not qualify as the substance of an expert's opinions, and that at no point in her email did Ms. Smith use the term "opinion" to qualify her findings. Additionally, Ms. Robinson states that because the email does not contain the phrase, "the opinions set forth above are stated within a reasonable degree of medical (or scientific) probability," that the email cannot qualify as expert testimony.²

The State responded to Ms. Robinson's reply, again arguing that the only testimony that Ms. Smith will present is that which is contained in its entirety in the email. The State opines

¹ State's letter response to Defendant's Motion in Limine, dated Aug. 16, 2013, at p. 3.

² Reply in Support of Defendant's Motion in Limine, dated Sept. 3, 2013, paragraphs 14-18.

that Ms. Robinson and her counsel can prepare an adequate defense using the contents of the email, and therefore Ms. Smith should be able to testify at trial.³

Finally, Ms. Robinson, through Mr. Layton, filed a response to the State's second response to the Motion, stating that the State has repeatedly asserted that the only testimony it seeks from Ms. Smith is that which is contained in the email and lab report, but that this assertion still lacks sufficient detail to be considered an opinion, and therefore the Court should preclude Ms. Smith from testifying.⁴

LEGAL STANDARD

Under D.R.E. 702, a party may call an expert witness to testify "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence to determine a fact in issue." This testimony may be in the form of an opinion or an inference. The expert may testify to scientific statistics related to groups in which a party may be classified.

Delaware law requires the State to provide, upon request, the identity of any expert witness the state expects to call during trial, along with the substance of the opinions to which each expert will testify at trial.⁷ The disclosure applies to evidence presented under D.R.E. 702, 703, and 705. The State may not provide a general summary of possible testimony, but must disclose the actual substance, along with all materials relevant to the testimony, including "documents, materials and information underlying expert reports...if they were provided by a

³ State's letter response to Defendant's Reply in Support of Defendant's Motion in Limine, dated Oct. 10, 2013.

⁴ Letter to Judge Danberg dated Oct. 14, 2013.

² D.R.E 705

⁶ Lee v. A.C. & S. Co., 524 A.2d 352 (Del. Super. 1987).

⁷ Rule 16(a)(1)(E).

⁸ State v. Wien, 2004 WL 2830892 at *9 (Del. Super, May 19, 2004).

party to the expert and were reasonably relied upon in reaching the expert's decision." Information reasonably relied upon includes any documentation "contain[ing] any facts or data that the expert utilized." If the State's expert intends to testify to the contents of a report, the written disclosure must include "what opinion will be provided to the Court based on [the] lab results."

When a party presents its opponent with a written statement of the expert's testimony and the sources he or she relied upon in coming to his or her conclusions, that party must rely only upon the information contained within the four corners of the discovery document.¹²

DISCUSSION

Delaware Court of Common Pleas Criminal Rule 16(a)(1)(E) requires only that the State provide disclosure in the form of a writing that 1) identifies the expert witness, and 2) includes the "substance of the opinions to be expressed" by the expert at trial. The defense argues that the proposed testimony does not fulfill the requirements set forth in the Court's Order requiring the State to provide the substance of the opinions to be presented, because "raw data and numerical values set forth in the Laboratory Report are just that, data and numbers, but with no further context, explanation or relevance." In *State v. Wien*, the Court found that a general summary of prospective testimony, without any disclosure of the facts and data relied upon, including "documents, materials and information underlying expert reports," does not satisfy the disclosure requirement of Rule 16. It can therefore be determined that the substance of the opinions to be expressed includes any and all documents and informational sources that are used

⁹ State v. Patterson, 1997 WL 720719 at *2 (Del. Super. Oct. 3, 1997) (citing State v. Sailer, 1995 Del. Super. LEXIS 518, at *47).

¹⁰ Patterson at *3.

¹¹ Transcript of Judge's Ruling at page 4.

¹² Transcript p. 2

¹³ Reply in Support of Defendant's Motion in Limine, paragraph 15.

¹⁴ Patterson at *2 (citing Sailer).

¹⁵ State v. Wien, at *9-10 (quoting Sailer).

to interpret expert reports, and which provide bases for an expert's opinions and decisions regarding a particular case.

In State v. Clifton, the Court asked the State whether it planned to rely solely upon the information contained "within the four corners of the discovery [it] provided to the defendant" as its complete expert testimony at trial. When the State indicated that its expert would likely testify to the data in the report in addition to the inferences able to be drawn from the report, the Court required the State to provide supplemental documentation to the defense that would describe that additional testimony. Here, like in Clifton, the State initially provided the defense with only a laboratory report. As a result, the Court ordered the State to provide additional documents that would contain the entirety of Ms. Smith's testimony. The State therefore provided the defense with the email from Ms. Smith, and confirmed that the only testimony the State would seek from Ms. Smith was the information contained in the email and laboratory report. By providing the Court with written documentation of its intent to present only the testimony contained within the four corners of the documents provided, the State has fulfilled the Court's requirement for satisfactory evidence under the Clifton ruling.

According to D.R.E. 702, expert testimony, whether "opinion or otherwise," is used to help the trier of fact in understanding the more complex facts and issues in a case that are not ordinarily known by a lay person. Expert testimony enables the trier of fact to make a fair and informed decision regarding the outcome of a particular matter. Here, Ms. Smith's testimony regarding the laboratory report and contents of the email is likely to assist the trier of fact in this matter in understanding the effects that result from the consumption of Xanax. The State seeks to present data from a study of individuals found to be under the influence of drugs, and then compare the data from that study to the data contained in Ms. Smith's laboratory report. The

¹⁶ State v. Clifton, Transcript of Judge's Ruling at p. 2, No. 0909018845, Feb. 22, 2010.

State, according to its filings, will not present an opinion on Ms. Robinson's alleged impairment based upon that information, but will instead present the necessary information and data to assist the trier in fact in rendering an opinion on that issue.

Therefore, to the extent the State limits Ms. Smith's testimony only to the data set forth in the email and the laboratory report, and elicits no testimony from Ms. Smith as to her opinion on whether Ms. Robinson was impaired at the time of her accident and arrest, the Court will allow Ms. Smith to testify at trial.

<u>ORDER</u>

For the foregoing reasons, the Court **DENIES** the Defendant's Motion in Limine.

IT IS SO ORDERED.

The Honorable Carl C. Danberg,