J-A26022-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
KENNETH J. MAPP,	:	
	:	
Appellant	:	No. 2862 EDA 2012

Appeal from the Judgment of Sentence June 14, 2012,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-0011422-2009

BEFORE: BOWES, DONOHUE and OTT, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED NOVEMBER 08, 2013**

Kenneth J. Mapp ("Mapp") appeals from the June 14, 2012 judgment of sentence entered by the Court of Common Pleas, Philadelphia County. On appeal, Mapp raises several arguments questioning the propriety of the testimony given regarding the analysis of fingerprints found at the scene of the crime. Upon review, we affirm.

The facts relevant to this appeal are as follows. On July 16, 2009, two masked men brandishing firearms entered a Pizza Hut restaurant in Philadelphia. They demanded the employees open the safe. A female employee stated that the safe was locked, *i.e.*, she could not open it. The employee opened the two cash registers, and one of the robbers grabbed the cash drawer and took the money therein.

The employees summoned the police. Detective William Fiala arrived at the scene and began looking for fingerprints, finding two sets of latent fingerprints[1] on the bottom of one of the cash drawers. He placed the latent prints on two fingerprint cards, which he submitted to the latent fingerprint section of the Philadelphia Police Department. Patrick Raytik ("Raytik"), a forensic fingerprint examiner with that section, found one usable latent print – a right pinky finger – which he submitted to the Automated Fingerprint Identification System ("AFIS"). AFIS returned 20 potential matches (of which Mapp was one of the top two results). Raytik conducted a comparison of the latent fingerprint to each of the known prints returned. Using the ACE-V method,[2] Raytik determined that the latent fingerprint he examined matched Mapp's known print. Another analyst and a supervisor verified his results and agreed that the latent print matched Mapp's known print.

On September 14, 2009, the Commonwealth charged Mapp by criminal information with 30 counts related to the robbery. On January 20, 2010, Mapp filed a pretrial motion seeking to limit the Raytik's testimony and

[1] Patrick Raytik, the Commonwealth's fingerprint identification and comparison expert, defined a "latent print" as "a print usually unseen by the human eye made visible through the use of chemicals and powder." N.T., 3/22/12, at 39. He further defined a "known print" as "a print roll taken for identification purpose or recordkeeping." ***Id.***

[2] ACE-V in an acronym for the steps of the fingerprint identification process – analysis, comparison, evaluation, and verification.

requesting a ***Frye***[3] hearing on the admissibility of the forensic fingerprint analysis and opinion evidence. He filed an amended motion on March 30, 2010. In support of his request, Mapp relied upon a report published by the National Research Council entitled: *Strengthening Forensic Science in the United States: A Path Forward*, which, according to Mapp, concluded, "there is no existing research that demonstrates that latent fingerprint identification evidence is valid." Memorandum in Support of Motion to Limit Testimony of Forensic Fingerprint Examiner and Request for a Frye Hearing, 1/20/10, at 2. The trial court held argument on the motion on May 5, 2010, and denied the motion the same day.

The case proceeded for trial before a jury in March 2012. On March 23, 2012, the jury found Mapp guilty of three counts of robbery and one count each of criminal conspiracy, carrying a firearm without a license, carrying a firearm on public streets in Philadelphia, and possessing an instrument of crime.[4] Mapp filed a timely post-verdict motion on March 27, 2012, and an amended motion on May 21, 2012. The trial court denied the motion at the sentencing hearing on June 14, 2012. The trial court then sentenced Mapp to a series of concurrent terms of imprisonment, resulting in

[3] ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923).

[4] 18 Pa.C.S.A. §§ 3701(a)(1)(ii), 903, 6106(a)(1), 6108, 907(a). The remaining charges were either withdrawn or *nol prossed*.

a total term of six to 12 years of incarceration. Mapp filed a post-sentence motion, which the trial court denied.

On appeal before this Court, Mapp raises the following issues for our review:

> 1. Did not the lower court err in denying [Mapp]'s request for a hearing on [Mapp]'s motion to limit the testimony of the forensic fingerprint examiner and request for a ***Frye*** hearing as the lower court prevented [Mapp] from establishing that the discipline of fingerprint examination was not accepted in the relevant scientific community and thus the forensic fingerprint examiner should not have been allowed to testify that the fingerprint recovered at the crime scene must have belonged to [Mapp] and to no other person?
>
> 2. Did not the lower court err in denying [Mapp]'s request for a hearing on [Mapp]'s amended request for relief for motion to limit testimony of the forensic fingerprint examiner and request for a ***Frye*** hearing as the lower court prevented [Mapp] from establishing that the discipline of fingerprint examination was not accepted in the relevant scientific community at least as to the ability to individualize and attribute the print to one source to the exclusion of all others, and, given that, the examiner should only be permitted to state his or her opinion as to identified similarities between the fingerprint recovered at the crime scene and [Mapp]'s fingerprint, and as to the absence of any noticed differences between the two, without reaching a conclusion that that crime scene print must have belonged to [Mapp] and no other person?
>
> 3. Did not the lower court err in denying [Mapp]'s request for a hearing on [Mapp]'s amended request for relief for motion to limit testimony of the forensic fingerprint examiner and request for a ***Frye*** hearing as the lower court prevented [Mapp] from

establishing that the discipline of fingerprint examination was not accepted in the relevant scientific community and that the examiner should not be permitted to state that [*sic*] his opinion that the fingerprint recovered from the crime scene must have belonged to [Mapp] and no other person is to a reasonable degree of scientific certainty and/or to a reasonable degree of latent print examiner certainty?

4. Did not the lower court err in denying [Mapp]'s request [for] a hearing on [Mapp]'s amended request for relief for motion to limit testimony of the forensic fingerprint examiner and request for a ***Frye*** hearing as the lower court prevented [Mapp] from establishing that the discipline of fingerprint examination was not accepted in the relevant scientific community at least as to the ability to individualize and attribute the print to one source to the exclusion of all others, and due to that the examiner should be permitted only to state that it is 'probable' that the fingerprint recovered from the crime scene belonged to [Mapp].

5. Did not the lower court err in permitting the forensic fingerprint examiner to testify that the fingerprint recovered from the crime scene was a match to [Mapp] and could not have belonged to any other individual for the reasons cited in [Mapp]'s motion to limit testimony of fingerprint examiner and request for a ***Frye*** hearing.

6. Did not the lower court err in denying [Mapp]'s request for a hearing on [Mapp]'s motion to limit the testimony of the forensic fingerprint examiner and request for a ***Frye*** hearing as the lower court prevented [Mapp] from establishing that the testimony of the forensic fingerprint examiner's testimony that the fingerprint recovered at the crime scene must have belonged to [Mapp] and to no other person was more prejudicial than probative and thus inadmissible under Pennsylvania Rule of Evidence 403?

> 7. Did not the lower court err in permitting Latent Print Examiner Patrick Raytik to testify that a second technician had 'verified' his conclusion that the fingerprint recovered from the crime scene belonged to [Mapp] and could not have belonged to any other individual as such testimony was in violation of the prohibition against hearsay contained in the Pennsylvania Rules of Evidence and [Mapp]'s confrontation right under the Pennsylvania and United States Constitutions to confront witnesses against him?
>
> 8. Did not the lower court err in permitting Latent Print Examiner Patrick Raytik to testify that a supervisor had 'verified' his conclusion that the fingerprint recovered from the crime scene belonged to [Mapp] and could not have belonged to any other individual as such testimony was in violation of the prohibition against hearsay contained in the Pennsylvania Rules of Evidence and [Mapp]'s right under the Pennsylvania and United States Constitutions to confront witnesses against him?

Mapp's Brief at 3-6 (footnotes and record citations omitted).[5]

The first five issues Mapp raises on appeal challenge the trial court's failure to hold a ***Frye*** hearing on the issue of the admissibility of testimony by Raytik, the Commonwealth's fingerprint identification and comparison expert. As Mapp addresses all of these issues in a single argument (with sub-arguments) in his appellate brief, we likewise consider them together. ***See id.*** at 21-53.

We review a trial court's evidentiary ruling, including its determination of whether scientific evidence withstands a ***Frye*** challenge, for an abuse of

[5] We reordered the issues for ease of disposition.

discretion. ***Commonwealth v. Dengler*,** 586 Pa. 54, 65, 890 A.2d 372, 379 (2005). In ***Commonwealth v. Topa***, 471 Pa. 223, 369 A.2d 1277 (1977), our Supreme Court adopted the standards for the admissibility of expert testimony in ***Frye v. United States***. Under ***Frye***, scientific evidence is admissible so long as scientists in the relevant field generally accept the methodology the expert used in reaching his or her conclusions. ***Commonwealth v. Puksar***, 597 Pa. 240, 253, 951 A.2d 267, 276 (2008). However, "***Frye*** is not implicated every time science comes into the courtroom[.]" ***Dengler***, 586 Pa. at 69, 890 A.2d at 382. Rather, "***Frye*** only applies when a party seeks to introduce **novel** scientific evidence." ***Trach v. Fellin***, 817 A.2d 1102, 1109 (Pa. Super. 2003) (*en banc*) (emphasis in the original) (citing ***Commonwealth v. Blasioli***, 552 Pa. 149, 153, 713 A.2d 1117, 1119 (1998)); ***see also Dengler***, 586 Pa. at 69, 890 A.2d at 382.

The Pennsylvania Supreme Court recently discussed and defined "novelty" in the context of ***Frye*** in ***Betz v. Pneumo Abex, LLC***, 615 Pa. 504, 44 A.3d 27 (2012). In ***Betz***, our Supreme Court recognized that attacks on the admissibility of expert testimony "generally are vetted through the ***Frye*** litmus, which winnows the field of the attacks by application of the threshold requirement of novelty." ***Id.*** at 545, 44 A.3d at 52 (citation omitted). The Court found tension, however, between the ability for a trial court to deny a defendant his or her day in court based upon the trial court's acceptance or rejection of scientific theories on the one hand,

and the concern that "influential […] expert testimony on complex subjects" could potentially mislead laypersons on the other. ***Id.*** at 545, 44 A.3d at 53. The ***Betz*** Court therefore ascribed a "reasonably broad" definition to the term "novel," and further held that a ***Frye*** hearing is warranted in cases wherein a trial court "has articulable grounds to believe that an expert witness has not applied accepted scientific methodology in a conventional fashion in reaching his or her conclusions." ***Id.***

In this case, Mapp points to no aspect of the fingerprint analysis conducted by the Commonwealth's expert that is new or novel. To the contrary, relying upon a footnote contained in a 1988 case out of the District of Columbia's court of appeals, Mapp contends, "there is no 'novelty' requirement for challenging scientific evidence." Mapp's Brief at 25 (citing ***Jones v. United States***, 548 A.2d 35, 46 n.9 (D.C. 1988)).[6] This statement finds no support under Pennsylvania law, is in direct contradiction to the aforementioned precedential decisions from this Court and our Supreme Court, and has no impact on our decision in this case. Under existing Pennsylvania case law, the scientific evidence at issue and/or the manner of its application must be novel to warrant the convening of a ***Frye*** hearing. ***Betz***, 615 Pa. 545, 44 A.3d at 52; ***Dengler***, 586 Pa. at 69, 890 A.2d at 382; ***Trach***, 817 A.2d at 1109. As Mapp presented no argument

[6] We note that the arguments raised in support of the first five issues raised on appeal rely almost exclusively upon non-precedential cases from other jurisdictions.

that the science at issue or the manner in which the science was applied was novel or unconventional, he failed to establish the "threshold requirement" for warranting a ***Frye*** hearing on the admissibility of the forensic fingerprint analysis and opinion evidence. We therefore find no abuse of discretion in the trial court's denial of his motion for a ***Frye*** hearing.

As his next issue on appeal, Mapp asserts that the trial court erred by denying his request to limit Raytik's testimony, as his testimony was more prejudicial than probative, and thus should have been "limited" pursuant to Pennsylvania Rule of Evidence 403. Mapp's Brief at 53-55. The basis for his argument is that the jury would likely attribute great weight to the fingerprint evidence, as an expert proffered it as science. ***Id.*** at 54-55. In support of his argument, Mapp once again relies almost exclusively upon non-precedential cases from other jurisdictions. He cites no law explaining how, pursuant to Pa.R.E. 403, this evidence was excludable or even set forth the standard for the exclusion of evidence pursuant to Pa.R.E. 403. Nor does he explain how and to what extent the trial court should have limited Raytik's testimony. We therefore find this argument waived. ***See Commonwealth v. Lewis***, 63 A.3d 1274, 1279 (Pa. Super. 2013) ("[T]he Rules of Appellate Procedure require that an appellant properly develop his arguments on appeal."); ***Eckman v. Erie Ins. Exch.***, 21 A.3d 1203, 1207-08 (Pa. Super. 2011) (failure to cite "pertinent authority" results in waiver of issue raised on appeal).

As his final two issues on appeal, Mapp asserts that the trial court erred by permitting Raytik to testify that another technician and a supervisor verified his conclusions regarding the fingerprint analysis. Mapp's Brief at 57-58.[7] Mapp states that the testimony was inadmissible hearsay and a violation of his Sixth Amendment right to confront witnesses against him. ***Id.*** The record reflects, however, that Mapp stipulated to the following evidence at trial:

> [I]f Scott Copeland[, a technician] from the latent print section of the Records and Identification Unit[,] were called to testify, he would testify that on March the 7th of 2012, he verified the analysis of Patrick Raytik, the individual that just testified, that Latent Print No. 1 matched the right little finger of the defendant, Kenneth Mapp.

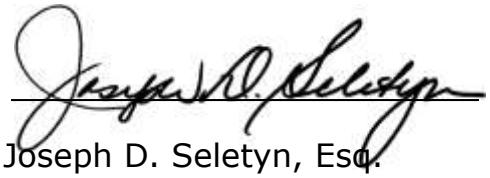
N.T., 3/22/12, at 106. Therefore, assuming for the sake of this argument that the trial court erred by admitting Raytik's testimony regarding others verifying the results of his fingerprint analysis and agreeing that Mapp's known print matched the latent print from the cash drawer, any such error would be harmless since Mapp stipulated that the analysis was verified by a third party. ***See Commonwealth v. Hutchinson***, 571 Pa. 45, 52-53, 811 A.2d 556, 561 (2002) ("Harmless error exists where […] the erroneously admitted evidence was merely cumulative of other untainted evidence which

[7] Mapp combines these issues in a single argument, so we again likewise consider them together.

was substantially similar to the erroneously admitted evidence[.]"). As such, no relief is due.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/8/2013