STATE OF MICHIGAN

IN THE 30TH DISTRICT COURT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN,

vs

Case No. 962740FY
C.C. 97-8841

JOSE G. HIGUERA

Defendant

PRELIMINARY EXAMINATION

BEFORE THE HONORABLE L. KIM HOAGLAND - DISTRICT JUDGE

Highland Park, Michigan - Tuesday, October 28, 1997

APPEARANCES:

For the People:

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training requirements and ethical responsibilities of forensic scientist performing ink dating examinations?

A Yes, I am.

Q To your knowledge, is that the format which was used to guide your residency?

A Yes. It was written by the person who did my, or was in charge of my residency. Yes. That was the format and also the goal of the training.

MR. KRAUS: Your Honor, based on that record, I have argument to present on the admissibility of the relative aging of ink.

MR. BLUMER: Before counsel makes his argument, your Honor, I'd like some follow up questions, because I wasn't prepared for what's turned into a Frye Hearing on this issue.

THE COURT: All right.

MR. BLUMER: Mr. Speckin, limiting this discussion to the concept of relative ink dating by extraction, did you in the performance of that test follow chemical procedures which are used and recognized outside of the field of chemical ink dating as appropriate procedures for analytical chemical testing?

THE WITNESS: Yes. I mean the chemical methods for determining it, the people that developed these techniques just simply used techniques that were

already existing for other fields of expertise and applied them to the dating of inks.

MR. BLUMER: All right, so you didn't invent any new techniques that are utterly unique to ink testing as you described, is that correct?

THE WITNESS: No.

MR. BLUMER: Neither did your mentors?

THE WITNESS: I would say that the idea of how to apply it was new, but they didn't just come up with it out of thin air and say, gee, if we did this and this we could date inks.

MR. BLUMER: All right. So then, is it correct that the techniques used are otherwise standard in the field of analytical chemistry, aside from any forensic application?

THE WITNESS: Oh yes.

MR. BLUMER: And used in multiple applications?

THE WITNESS: For instance, the dye analysis could be used by anything that has color in it. Paints, or anything like that.

MR. BLUMER: All right. So then, what is different about your field is simply the application of the results of these testing techniques to forensic concept, is that correct?

THE WITNESS: Yes.

MR. BLUMER: Thank you. Nothing further, your Honor.

THE COURT: All right. At this time, you're moving to have this witness declared an expert?

MR. BLUMER: Yes, your Honor, in two separate, but related fields; forensic document examination and the field of forensic ink dating by extraction.

THE COURT: All right, and Mr. Kraus, you have an argument to that.

MR. KRAUS: Yes, your Honor. My argument is based on the leading case dealing with qualification of, or the admissibility of expert testimony about new scientific techniques, it's People versus Young, 425 Mich 470. It's recently been applied by the Court of Appeals in People versus Haywood, 209 Mich Appeals 217, 1995.

What those cases hold is that when a particular scientific technique has not been previously recognized in any appellate decisions, it's incumbent upon the proponent of the evidence to establish that the technique has achieved general acceptance within the relevant scientific community. More specifically, the Supreme Court in Young held that because the reliability of the testing depends on application of scientific principles, proof must be derived from

scientist with an understanding of the theoretical basis and direct and peer review experience with the procedure.

It must constitute a group large enough to make a fair determination of whether or not the test is generally accepted by experts in the scientific community. And more specifically, proof of reliability may not be based on the testimony of technicians who perform and apply the test. Specifically, and the Supreme Court held in Young, and the Court of Appeals held in Haywood, proof must come from disinterested and impartial witnesses whose livelihood is not in intimately connected to the new technique. In Young in footnote 24, the Supreme Court held that a court cannot rely on the testimony of the person who developed the technique and his or her disciples to establish the admissibility of the scientific technique. Such testimony, according to the Supreme Court, cannot substitute for the scrutiny of the marketplace of general scientific opinion.

On voir dire, this witness testified that there is a very small group of persons engaged in this technique. Approximately seven in the United States. He testified that Dr. Burnell or Mr. Burnell and Dr. Cantu are developers of the technique. He was trained

by Mr. Burnell and it's his job and he's entitled to be paid for his job, but is a person whose livelihood depends on this technique. Simply stated, this witness, under People versus Young, does not meet the standard for establishing the general acceptance of this technique within the scientific community.

I specifically asked had there been any published scientific literature confirming - confirming the reliability of this technique outside of papers presented by the people who developed it. None were identified. In fact, the only papers which we showed by Mr. Burnell in 1989 and by the witness in 1995, or '96, indicate that there is not wide acceptance of this technique and that scientist differ on the reliability. So based on the total lack of qualified and appropriate testimony presented by the Attorney General, I ask the Court to rule that the relative aging of ink through the percent extraction test does not constitute recognized scientific knowledge within MRE 702.

MR. BLUMER: Your Honor, I have several responses to counsel's argument. The first is this Court is not required to reinvent the wheel every time a scientist comes before it. There have been a number of recent cases starting with a case in which I was prosecution counsel. People versus David Davis 199 Mich App 502.

1993, where the Supreme Court denied leave to appeal which held, specifically, and I think they used the phrase, the court is not required to reinvent the wheel every time a scientific test is presented. The reason why I asked Mr. Speckin the follow up questions that I did, were very specific based on the holding in David Davis; and that is, the techniques he is using in reaching his scientific here are otherwise usable in the broad scientific chemistry community. They are completely accepted and literally in everyday use in multiple scientific fields. All he has done is reinterpreted the data from those tests for forensic purposes and applied them in perhaps a unique way, but the test itself is not unique. It is simply an accumulation of testing and then reapplying it to forensic purposes. That is specifically what the David Davis case stands for.

In addition, your Honor, for instance, I cite the Court the case of People versus Adams, 195 Mich App 267, 1992 case where the Court said enough is enough, we don't have to retest DNA testing for Frye purposes, it's been done. It has been accepted.

Now, number one, I propose to the Court that Mr. Speckin's techniques are in everyday chemistry use around the country for a multitude of purposes and all

he's done is applied them to forensic conclusions. And in addition, I suggest that similar to the DNA concept, enough is enough. He has been accepted in the last 18 months, as an expert by two different circuit judges within this county. A circuit judge in Genesee county and at least one federal judge in another state, and in addition, by the administrative law judge in this case. And your court - this court is well aware, I'm sure by now, that there was an administrative law hearing in Lansing dealing with the same facts and the same issues as the case that is before this court and Mr. Speckin's testimony was accepted after a Frye Hearing in this case before the administrative law judge in Lansing.

MR. HOFFMAN: I'm sorry, I just have to indicate I'm counsel in that case and Mr. Blumer isn't and I want to save him the embarrassment of a misstatement. It's true that - that - that Mr. Speckin has testified in that case. The judge has however, reserved findings in that case and has not rendered any opinions. While Mr. Blumer may sometimes be correct, he may also not be.

MR. BLUMER: I'll withdraw that assertion, your Honor. However, there's my understanding that Mr. Speckin was allowed to give testimony in that case which is now being considered along with the Frye

issues by the administrative law judge. But Mr. Speckin was allowed to give testimony in that case which is now being considered along with the Frye issues by the administrative law judge. But Mr. Speckin's testimony stands unchallenged that he has been accepted at least twice within this very county, by circuit judges on the issues of relative extraction, ink dating -- relative dating by extraction, I'm sorry. Therefore, your Honor, based upon both the case of The People versus David Davis and this witnesses testimony that he has already been accepted on multiple occasions by many different judges as experts in this field, I ask the Court to accept him as an expert in these two fields and allow his testimony to continue.

MR. KRAUS: Just very briefly, your Honor. My understanding of voir dire is that Mr. Speckin has been accepted by one circuit judge in this county dealing with the relative aging of ink. However, that's irrelevant.

Under People versus Young, it's a question of whether Appellate Courts have ruled that a scientific technique is reliable. In the Davis case and in the Adams case, they specifically cited other opinions accepting a specific scientific technique. Absent such appellate guidance, People versus Young and People

versus Haywood, indicates that a trial court or any court at which evidence is offered is required to compel the proponent to present disinterested and impartial testimony that it's generally accepted within the scientific community.

It may -- certainly in the Davis -- dealing with DNA for example, enough is certainly enough. DNA has been around, it's been accepted by the State Supreme Court, it's been accepted by numerous appellate courts throughout the country. Through west law searches, lexis searches, and Internet searches, I was unable to find any appellate decisions accepting the validity of percent extraction testing for the relative aging of inks. So under People versus Young, the burden of proof is under Mr. Blumer.

THE COURT: The Court has had the opportunity to listen to the oral argument presented with regards to the defendant's objection that Mr. Speckin be admitted as an expert witness. I would have to agree with Mr. Blumer, and that is that Mr. Speckin has already indicated that he has been -- he has testified as an expert witness on a number of cases, including at least two to three in Wayne County Circuit Court, and one in Genesee County as well as in Federal Court.

Further, it is my understanding that Mr. Speckin

has also testified in the Licensing Board action against this defendant. However, it is my understanding from Mr. Hoffman, that that decision is still pending.

Based on the - the testimony Mr. Speckin, in terms of his educational background, as well as his experience and extensive training, the Court is satisfied that Mr. Speckin is an expert witness in the area of forensic document examination, as well as forensic ink dating.

MR. BLUMER: Thank you, your Honor. May I proceed?

THE COURT: You may proceed.

MR. BLUMER: Thank you.

DIRECT EXAMINATION

MR. BLUMER: (Continuing)

Q Mr. Speckin, to clarify for the Court please, let's distinguish between your two fields of expertise. That of general document examination and that of forensic ink dating, all right?

A Okay.

Q Now, when you - when you were first asked to become a consultant in this case, is it correct that that was done at the request of an attorney on the staff of the Attorney General's office name Mary Rosenburg?

A Yes.