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Daubert and Code Interpretation

United States v. Wilson, 484 F.3d 267 (4th Cir. 2007), illustrates very well the gatekeeping function a trial judge must play when expert law enforcement testimony is offered to interpret conversations that the government claims use code words. The case involved tape-recorded conversations that an agent interpreted for the jury.

The facts

On September 13, 2002, Baltimore County police stopped a vehicle driven by a known drug dealer, Dieter Munz, for a minor traffic offense. They searched the vehicle and found plastic bags containing crack cocaine and marijuana, as well as other evidence linking Munz to a particular residence in another county. Officers obtained a search warrant for that residence and found various items that indicated that the occupants of the residence were involved in drug trafficking, including a "drug owe sheet," a .45 caliber pistol, cash, ammunition, and other evidence relating to Munz, Gregory Lamont Wilson, and Edwin Lloyd Murray.

Four days later, while engaged in surveillance of the residence, police saw Wilson and Murray removing furniture from the building. Detectives entered the apartment and found a jacket with $2,500 in the pocket that Wilson claimed belonged to him. Police began to monitor Wilson's movements. They saw him travel with another man, Michael White, and engage in what appeared to be a drug sale. Shortly thereafter, Wilson entered another apartment with White. Police obtained a search warrant for this apartment, found Wilson and White and another person present, and discovered a digital scale with cocaine residue, $1,900 in cash, paperwork in Wilson's name, a loaded .44 caliber handgun, a second digital scale with cocaine residue, and pots and pans with crack cocaine residue.

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Around the time of this second search, police began using a confidential informant to buy drugs from Anderson Hicks, a coconspirator who testified against others involved in the drug trafficking. The police tracked Hicks and learned the supply source for the drugs he sold to the informant. As a result of their surveillance, they raided the apartment building where they had tracked Hicks. They made various arrests and found crack cocaine, powder cocaine, a digital scale, sandwich bags, pots, a spoon, and a knife—all containing drug residue. They also found two handguns.

Shortly thereafter, the Baltimore County police joined with a federal task force to investigate Wilson and his organization. They applied for and received authorization to wiretap telephones used by Wilson, Murray, and others. Ultimately, these individuals were charged with drug and firearms offenses.

The key law enforcement witness

Hicks was a government witness and testified to his role in the conspiracy, as did two other coconspirators. The government also had the physical evidence that it obtained in the searches. But the government witness who provided the most testimony was a detective named Seabolt. He testified as to his role in the investigation of the conspiracy and as an expert to interpret or decipher the intercepted communications recorded via the wiretap. The defendants objected at trial to Seabolt's testimony, claiming he was not an expert "in the field of investigating drug trafficking in the Baltimore metropolitan region." On appeal, they claimed that his methodology was neither sufficiently explained nor reliable.

The role of an expert

It is important to distinguish this case from one in which a coconspirator testifies to an agreed upon use of code in a conspiracy. When a participant in drug trafficking testifies to personal knowledge of a code used by the trafficking group, the participant need not be an expert because he or she has firsthand personal knowledge of what the participant and others agreed to do in an effort to hide their illegal activities from law enforcement. If Hicks had testified to a code used by the traffick-

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ers, he would not have had to qualify as an expert.

But Detective Seabolt was not present during conversations in which conspirators agreed to adopt a code, and he had no personal knowledge as to when and how the conspirators agreed to try to hide the true meaning of their conversations by using code words. Thus, Seabolt had to be an expert, and as an expert he had to satisfy *Daubert*/Fed. R. Evid. 702.

Seabolt's expertise

The Fourth Circuit distinguished Seabolt's expertise from that of a scientist and noted that a trial judge must consider the type of expert testimony that is offered in any given case in order to make a reliability determination:

> A district court's reliability determination does not exist in a vacuum, as there exists meaningful differences in how reliability must be examined with respect to expert testimony that is primarily experiential in nature as opposed to scientific. Purely scientific testimony, for example, is characterized by "its falsifiability, or refutability, or testability." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (quoting K. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th ed. 1989)). Thus, such evidence is "objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication." Fed. R. Evid. 702 advisory committee's note.

(484 F.3d at 247.)

The court added that, even though expert testimony does not rely on a scientific method, "this does not lead to a conclusion that 'experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience.' " (*Id*.) (quoting advisory committee's note).)

Seabolt's experience

Seabolt was a nine-year veteran of the Baltimore County Police Department. He spent the bulk of his time participating in hundreds of drug investigations and arrests. At the time of his testimony he was a detective in the central narcotics unit, had attended seminars and classes offered by the Drug Enforcement Agency, had training in dealing with coded language**,** and was familiar with the vernacular used by drug traffickers.

The Fourth Circuit found that this experience qualified Seabolt to testify as an expert based on his specialized knowledge of drug traffickers' coded vernacular. Then it turned to the methodology that he used.

Applying *Daubert*/Rule 702 to experiential expert testimony

The court first addressed what a trial judge must do to ensure that an experiential expert's testimony is sufficiently reliable: "[T]he district court must . . . require an experiential witness to 'explain how [his] experience leads to the conclusion reached, why [his] experience is a sufficient basis for the opinion, and how [his] experience is reliably applied to the facts.'" (*Id*.) (quoting advisory committee's note).)

The court quoted from Seabolt's testimony to explain his methodology:

> It all depends on the situation. I mean, there's, obviously, there's a lot of words to mean one thing. So like I say, you take it into the context of what you're talking about. That's how you determine. . . . It all depends on the context of the call. You know, drug dealers use coded language. And the reason that they do that is because they don't want police involvement or police to know what they're talking about. . . . I take the person who's talking, the conversation. I take what has this person, what's the routine pattern of this person before and the pattern after. And that's how I make my determination. . . . [W]hen you hear [a] word time and time again . . . then there's a pattern that develops. And when that pattern develops, that ultimately shows you what they're talking about.

(*Id*. at 275.)

The court concluded that "Seabolt's general method and principles in applying his experience and specialized knowledge to decipher the conspiracy's drug vernacular were sufficiently reliable," and emphasized that "he relied primarily on his experience in looking to the context of the jargon used in relation to the language surrounding the jargon and the speaker's use of such language in the past and future, as opposed to starting with an

assumption that any uncertain word must be referring to drugs because he was listening to the conversations of drug dealers." (*Id*. at 276 and n.3.)

Unhelpful testimony

Although the court found that Seabolt used a reliable methodology and was a qualified expert, it found two types of flaws in his opinion. The first flaw that the court identified involved instances in which Seabolt offered assistance that the jury did not need. The court offered an example of unhelpful testimony:

> For example, after playing a recording in which Murray stated, "he take too long, I'm going to go see my other man, yo," Seabolt stated that he understood that expression to mean that if he "keeps on taking forever to supply him, that he's going to go to another supplier." This type of testimony, however, was unhelpful to the jury. *See United States v. Dicker*, 853 F.2d 1103, 1108 (3d Cir. 1988) ("Although courts have construed the helpfulness requirement of Fed. R. Evid. 701 and 702 to allow the interpretation by a witness of coded or 'code-like' conversations, they have held that the interpretation of clear conversations is not helpful to the jury, and thus is not admissible under either rule.") Seabolt was not so much interpreting the meaning of Murray's quoted language as he was adding language to it. The actual language used by Murray needed no translation; Murray was explaining that because someone was taking too long, Murray may be forced to go elsewhere.

(484 F.3d at 276-77) (joint appendix citations omitted).)

Unexplained testimony

The second flaw that the court identified involved instances in which Seabolt offered his interpretation of the meaning of a conversation without offering any reliable explanation as to why he opined that the conversation meant what it did. The court offered the following illustration, which built upon the previous one:

> It may have been the case that Murray's next sentence—"I'm trying to wait on him, cause I don't want him to get the shit and then don't get it" (J.A. at 1725)—made it clear to Seabolt that Murray was using the code "shit" to refer to drugs and that the word "man" referred to a supplier. But the Government never asked Seabolt about the next sentence and he never explained its meaning, and without some further explanation about the importance of the context provided by that next sentence, Seabolt's translation of "man" to "supplier" was unreliable.

(*Id*. at 277.)

Reliable testimony

The court offered an example of a conversation that Seabolt interpreted and thereby assisted the jury. This was the conversation:

> **White:** You already get into the, um, get your shop back on.
> **Wilson:** Na, I don't . . . I don't even got no way to get into the kitchen at.
> **White:** Oh all right.
> **Wilson:** Hold on yo . . . What you on easy? You on easy hah.
> **White:** Hah?
> **Wilson:** You on easy hah. . . .
> **White:** Yeah, . . . I just gave Kenneth another two hundred dollars, so I need to get good.
> **Wilson:** All right I got some change, like, I think it's like two, two of them, two, like two out of a ball, you know what I mean?

(*Id*.)

The court summarized Seabolt's explanation and explained why it was reliable:

> When questioned about this conversation, Seabolt explained that he believed that White was asking Wilson if he had a supply of drugs when he asked about getting his "shop back on." Seabolt then explained that "kitchen" is a word that would be heard in other conversations, and that it referred to a place where powder cocaine would be converted into crack cocaine. A brief discussion ensued concerning the need of a heat source to convert powder cocaine into crack cocaine. The Government then asked Seabolt what the phrase "what you on easy" meant. Seabolt responded, "Easy is a term used, you'll hear that again, as meaning that you're out of drugs." Seabolt likewise explained that the phrase "get good" would be heard again, and that it meant that White

needed resupplying. Seabolt then explained that he was uncertain over the meaning of the phrase "another $200" and could not say that it was drug-related. He also explained that although "a ball" referred to an eight ball, or 3.5 grams of cocaine, he could not say what specific amount was being discussed when Wilson stated he had some "change" or "like two out of a ball."

This example details how Seabolt's methodology was reliably applied in the vast majority of instances. In explaining his methodology, Seabolt stated that "when you hear [a] word time and time again . . . then there's a pattern that develops. And when that pattern develops, that ultimately shows you what they're talking about." When reviewing the recorded conversations, Seabolt repeatedly heard the terms "kitchen," "on easy," and "get good." By studying the context in which these phrases were used and the pattern of their use, Seabolt was able to decipher the words' meaning, as understood by the coconspirators. But when he was unable to say whether a word or phrase had a nondictionary drug meaning, he candidly admitted as much.

(*Id*. at 277-78) (joint appendix citations omitted).)

Overall reliability

Although the court identified the two problems with Seabolt's testimony, it concluded that,

> [the] net effect was harmless because the overwhelming majority of Seabolt's testimony was properly admitted, that properly admitted testimony was alone sufficient to show Appellants' guilt with respect to the conspiracy charges, and any prejudice that flowed from the limited amount of improper testimony was outweighed by Seabolt's properly admitted expert testimony and the corroborative testimony of coconspirators.

(*Id*. at 278.)

The court added that the defendants deserved some of the blame for the Seabolt testimony that should not have been admitted, since they failed to raise specific objections to portions of the testimony at trial. Absent specific objections, the defendants could only obtain plain error review, and the court concluded that, "even assuming that the district court's error was plain, the error did not affect Appellants' substantial rights." (*Id*.)

Lessons

There are five lessons to learn from this case:

1. *Daubert*/Rule 702 applies to all expert testimony, including expert testimony based on experience.
2. The analysis that a trial judge uses in assessing experiential expert testimony will differ from the analysis used to assess scientific evidence, but the basic gatekeeping responsibility remains constant.
3. It is not sufficient for an expert to be qualified. The opinion offered must be reliable in all respects.
4. The fact that portions of an expert's testimony are helpful does not mean that all of the testimony is helpful.
5. Absent a specific objection, expert testimony will be reviewed on appeal only for plain error. ■