THE STATE OF NEW HAMPSHIRE

COÖS, SS. AUGUST 2022

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-78

STATES MOTION TO EXCLUDE PROPOSED TESTIMONY ON LEGAL STANARDS BY A LAY WITNESS

NOW COMES the State of New Hampshire, by and through the Offices of the Coös County Attorney and the Attorney General, and respectfully moves to exclude introduction of evidence about Trooper Brandon Girardi's opinions and statements regarding legal standards, including his opinion about probable cause in this case. In support of this motion, the State submits the following:

1. The defendant apparently seeks to introduce evidence of Trooper Brandon Girardi opinion about the arrest warrant in this case and his assessment of requisite probable cause. The State objects for the following reasons: (1) the proposed testimony is not relevant; (2) the proposed testimony has no value, as the Honorable Janet Subers concluded there was probable cause and subsequently, a grand jury concluded that there was probable cause by retuning the indictments in this case; (3) the testimony would constitute impermissible commentary on what evidence is trustworthy; and (4) the potential to confuse the jury is enormous.

2. First, this testimony is neither relevant nor probative. Evidence is relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." N.H. Rule of Evid. 401.

Moot. See record.

/s/ Peter H. Bornstein
Honorable Peter H. Bornstein
August 3, 2022

Clerk's Notice of Decision
Document Sent to Parties
on 08/04/2022

"Relevant evidence is admissible unless" it is excluded by the United States Constitution, the New Hampshire Constitution, a statute, the Rules of Evidence, or rules prescribed by the New Hampshire Supreme Court. N.H. R. Evid. 402. Under Rule of Evidence 403, this Court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

3. Trooper Girardi's impressions and opinions about probable cause in general or in this specific case will confuse the issues and mislead the jury. In the first instance, the defendant is not on trial for the arrest warrant at issue, he is on trial for indictments issued by the Grand Jury. Any testimony about Trooper Girardi's opinion about probable cause will call not only confuse the jury about whether a judge found requisite probable cause, but also the charges underlying the current trial. This also would mislead the jury by conflating the original charge, with the current charges that the Jury is assessing now. This Court will instruct the jury on the standard of beyond a reasonable doubt before the jury retires to deliberate. It cannot be helpful to the jury to know that there is a less stringent standard that applies in other stages of a criminal case.

4. Second, the proposed testimony has no value. The arrest warrant and supporting affidavit have not been admitted into evidence and, indeed, whether it established probable cause has been rendered moot by the grand jury's return of indictments. The proper venue for calling into question probable cause is not before this petit jury. The jury is considering whether the facts and evidence presented to them in the courtroom prove the elements of the current offenses beyond a reasonable doubt.

5. Third, defense counsel's anticipated line of questioning regarding the trooper's opinion about probable cause also improperly comments on what evidence is trustworthy. "A witness need not qualify as an expert to give testimony in the form of an opinion." *State v. McDonald*, 163 N.H. 115, 121 (2011). However, a party "may not present evidence to preempt the jury's often difficult job of deciding which [parties and] witnesses are truthful and what evidence is trustworthy." *Id*. at 122, quoting *State v. Huard*, 138 N.H. 256, 259 (1994).

6. Here, asking the trooper his opinion regarding the arrest warrant's probable cause improperly asks the trooper to testify regarding what evidence is trustworthy. Because the arrest warrant was accepted and executed and because defense did not challenge the probable cause in the arrest warrant affidavit in any pretrial litigation, the only purpose for this testimony would be to present the evidence as untrustworthy in that it lacks sufficient probable cause. Or, it improperly comments on the credibility of the trooper who drafted the arrest warrant affidavit and the court that issued the arrest warrant based on the affidavit. As such, the trooper's testimony is improper testimony regarding the trustworthiness of the evidence in the case. Accordingly, this proposed testimony is inadmissible.

7. Indeed, it is well established that neither lay nor expert witnesses are permitted to give an opinion as to his or her legal conclusion, *i.e.*, an opinion on an ultimate issue of law. *See Walker v. City of Renton*, 2013 WL 12121084 at *2 (W.D. Wash. July 31, 2013). Any "judicially defined terms," "terms that derived their definitions from judicial interpretations," or "legally specialized terms" constitute expression of opinion as to the ultimate legal conclusion. *Halsted v. City of Portland*, 2012 WL 13054271 at *2 (D. Or. March 7, 2012) citing *United States v. Duncan*, 42 F.3d 97, 101-02 (2d Cir. 1994). "An expert is no more

qualified than the jury to determine whether probable cause exists." *Id.* Accordingly, a police officer's opinion as to whether the officer had "probable cause" to arrest the defendant is an impermissible legal conclusion. *See Walker*, 2013 WL 12121084 at *2; *Halsted*, 2012 WL 13054271 at *2. Indeed, a police officer's subjective belief or motivation plays no role in an ordinary probable cause analysis. *See Walker*, 2013 WL 12121084 at *2; see also *Ochana v. Flores*, 347 F.3d 266, 272 (7th Cir. 2003)1 ("It is well established that an arresting officers personal knowledge of facts sufficient to constitute probable cause is significant, but an arresting officers subjective beliefs are not relevant.") (citing *Whren*, 517 U.S. at 813); cf. *Halsted v. City of Portland*, 2012 WL 13054271 (D. Or. March 7, 2012) (unpublished) ("the court finds that opinion testimony, from an expert or lay witness, as to whether the police officers at the scene used reasonable force or had probable cause to arrest Halsted is not proper for the jurys' consideration.").

8. The United States Court of Appeals for the First Circuit has specifically disapproved of witnesses offering legal opinions. *See Nieves-Villnueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) "(It is black-letter law that [i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge.") (citation omitted). In *Nieves-Villnueva*, the First Circuit noted that at least seven other circuits joined this view. *Id.* The court wrote:

> In our legal system, purely legal questions and instructions to the jury on the law to be applied to the resolution of the dispute before them is exclusively the domain of the judge. Accordingly, expert testimony on such purely legal issues is rarely admissible. As the Second Circuit has noted, "The danger is that the jury may think that the expert in the particular branch of the law knows more than the judge—surely an impermissible inference in our system of law."

Id. (citation omitted). The First Circuit later added:

> Because the jury does not decide such pure questions of law, such testimony is not helpful to the jury and so does not fall within the literal terms of Fed.R.Evid. 702, which allows expert testimony "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue...." As the D.C. Circuit noted, "Expert testimony that consists of legal conclusions cannot properly assist the trier of fact in either respect...." *Burkhart* [*v. Washington,Metro. Area Transit Auth.*] 112 F.3d [1207] at 1212 (D.C. Cir. 1997); *see also Aguilar* [*v. Internl Longshoremans Union Local No. 10*], 966 F.2d [443] at 447 (9 th Cir. 1992) (expert legal opinion does not assist the factfinder under Rule 702). This is because the judge's expert knowledge of the law makes any such assistance at best cumulative, and at worst prejudicial. *See Burkhart,* 112 F.3d at 1213 ("Each courtroom comes equipped with a legal expert, called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards."); 7 *Wigmore on Evidence* § 1952 (Chadbourne rev. 1978) ("It is not the common knowledge of the jury which renders the witness opinion unnecessary, but the special legal knowledge of the judge.")

Id. at 100.

9. For the above reasons, the proposed testimony should be excluded.

WHEREFORE, the State respectfully asks this Court:

A. To exclude any opinion testimony from Trooper Brandon Girardi, including any reference to his opinion about probable cause in this case; and

B. To grant such further relief as may be just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

The Office of the Attorney General
and
The Office of the Coös County Attorney

August 2, 2022

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January 22, 2021
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via e-file to counsel of record.

/s/ Scott D. Chase