

7.13 Expert Testimony in a Drug Case¹

(1) A witness who is qualified pursuant to Guide to New York Evidence rule 7.01 as an expert in illegal drug trafficking may, in the discretion of a trial court, testify in the circumstances set forth in this section; in situations where the illegal substance is not available for analysis, however, drug users who can demonstrate a knowledge of the illegal drug are competent to testify to its identity.

(2) In a prosecution involving the possession or sale of a controlled substance where specialized terminology is used during the criminal transaction, a qualified expert may testify to the meaning of the terminology.

(3) In a prosecution involving the possession or sale of a controlled substance where the People are required to prove the type or the weight of the controlled substance, a qualified expert may testify to its type or weight, including weight based upon an acceptable statistical sampling method.

(4) In a prosecution for possession of a controlled substance with intent to sell, where the defense is that the drugs that were recovered from the defendant were for personal use, a qualified expert may testify that the packaging of the drugs recovered from defendant was inconsistent with personal use and consistent with the packaging that the expert had encountered in previous drug sale arrests.

(5) In a prosecution for the sale of a controlled substance to an undercover officer in a street-level drug transaction involving multiple individuals, a qualified expert may testify about the intricacies of how drugs and money are shuttled about in an effort to prevent their discovery and seizure by the police when the “buy” money and drugs were not recovered, provided: (a) the

expert does not render an opinion that defendant sold drugs to the undercover officer or even that defendant's specific actions or behavior were consistent with participation in a street drug sale, and (b) the trial court instructs the jury that they are free to reject the testimony and that the expert's testimony must in no manner be taken as proof that the defendant was engaged in the sale of narcotics.

Note

Subdivision (1) recognizes the need to qualify a witness before permitting the witness to testify as provided in the ensuing subdivisions (Guide to NY Evid rule 7.01, Opinion of Expert Witness; see *People v Christopher*, 161 AD2d 896, 897 [3d Dept 1990] ["In situations where the illegal substance is not available for analysis, drug users who can demonstrate a knowledge of the (illegal substance) are competent to testify (to its identity). It is for the jury to determine the weight to be given the testimony"]). In *Christopher*, the witness "testified that he had both injected and snorted heroin in the past, that he had taken other substances by injection and that the feeling produced by the substance in question was similar to that of heroin and was different from that of other substances. Thus, he was competent to render an opinion regarding the identity of the substance" (*id.* at 898; accord *People v Fulton*, 28 AD3d 1180, 1181 [4th Dept 2006]).

Subdivision (2) reflects a holding of *People v Brown* (97 NY2d 500, 505 [2002] ["Although the average juror may be familiar with the reality that drugs are sold on neighborhood streets, it cannot be said that the average juror is aware of the specialized terminology used in the course of narcotics street sales"]; accord *People v Smith*, 2 NY3d 8, 12 [2004]; see *People v Garcia*, 83 NY2d 817, 819 [1994] ["there is no merit to the preserved claim that the detective's expert testimony implied defendant's involvement in extensive drug trafficking, especially since the trial court limited the testimony to the definitions of the terms 'hawker', 'hand-to-hand' and 'money man' "]).

People v Anderson (149 AD3d 1407, 1413 [3d Dept 2017]) acknowledged that it is "well established that the meaning of the specialized jargon used in drug transactions is not within the knowledge of a typical juror and is therefore an appropriate subject for expert testimony." *Anderson* further noted that the trial court had provided appropriate limiting instructions to the jury, including that "the

ultimate determination as to the meaning of the language was to be made by the jury” (*id.*).

Subdivision (3) addresses the admissibility of an expert’s testimony as to the nature and/or the weight of a controlled substance.

An expert’s opinion that a substance contains a “controlled substance” is admissible when based upon a chemical analysis and not on a comparison of the substance to a “known” standard “when the accuracy of the known standard is not established” (*People v Burnett*, 245 AD2d 460, 460 [2d Dept 1997]). If the expert’s opinion is “based on the results of certain tests in which the substance was compared with a ‘known’ standard, the People must establish the accuracy of the standard as a reliable norm” for the expert’s opinion to be admissible (*People v Ramis*, 213 AD3d 951, 952 [2d Dept 2023]). If the expert’s opinion “is not based solely upon comparative tests using known standards but also on a series of other tests not involving known standards, a comparison test may then be relied upon by the expert” (*Burnett* at 460).

An expert’s opinion as to weight, and in particular the use of an acceptable “statistical sampling method” to determine weight, is derived from *People v Hill* (85 NY2d 256, 261 [1995]). In *Hill*, an expert used a “statistical sampling method” to “estimate and conclude” the weight of the controlled substance (*id.* at 259). The Court held that the expert’s testimony was admissible and “ ‘it was for the jury to decide whether the expert had adequately analyzed and weighed the contents and whether his opinion was entitled to be credited’ ” (*id.* at 261 [citation omitted]; *see People v Nelson*, 156 AD3d 1112, 1116 [3d Dept 2017] [“The forensic scientist who testified used an acceptable statistical sampling method to establish the aggregate weight of the heroin”]; *People v Caba*, 23 AD3d 291, 292-293 [1st Dept 2005] [“The court properly received the testimony of the People’s chemist concerning the total weight of the drugs. The chemist was fully qualified, and she adequately explained the statistical sampling method of evaluating the weight of the heroin and the tests she conducted”]).

Subdivision (4) is derived from *People v Hicks* (2 NY3d 750 [2004]). In that case, the Court concluded that the “trial court did not abuse its discretion in allowing the arresting officer [who qualified as a narcotics expert] to testify that the packaging of the drugs recovered from defendant was inconsistent with personal use and consistent with the packaging that the officer had encountered in previous drug sale arrests. . . . [T]he defense was that defendant possessed the 14 glassine envelopes of heroin for his personal use. Based on day-to-day experience, common

observation and knowledge, the average juror may not be aware of the quantity and packaging of heroin carried by someone who sells drugs, as opposed to someone who merely uses them. Since the expert testimony was beyond the ken of the average juror, it matters not whether the testimony related to the ultimate issue in the case.” (*Hicks* at 751 [citations omitted].)

Subdivision (5) is derived from *People v Brown* (97 NY2d 500 [2002]) and *People v Smith* (2 NY3d 8 [2004]). In *Brown*, an undercover officer testified that he had purchased drugs from the defendant and that during the transaction he, as well as the defendant, interacted with several individuals. The defense “suggested that because no drugs or marked money were found on defendant, her arrest was a ‘mistake.’ ” (*Brown* at 503.) The trial court permitted a narcotics expert, who did not participate in the transaction, to testify to “the intricacies of how drugs and money are shuttled about in an effort to prevent their discovery and seizure by the police.” (*Brown* at 504-505.) On appellate review, *Brown* held that the trial court acted within the scope of its discretion in permitting the expert testimony. (*See People v Jamison*, 8 AD3d 189, 190 [1st Dept 2004] [“The court properly exercised its discretion in allowing a detective to testify as an expert to the roles typically played by various participants in a drug transaction. This was specialized information not ordinarily within the knowledge of the average juror, and it was helpful to the jury in understanding how defendant and the other alleged participants in the transaction acted together”].)

Smith emphasized that, while the expert may be relevant and helpful in a street sale involving multiple individuals, it is error to allow an expert to testify “as to the money handling aspects of street-level, multi-member narcotics operations” in a one-on-one sale allegedly between an undercover officer and the defendant. (*Smith* at 9.)

The expert who testified in *Brown* did not participate in the transaction and was “properly precluded” from “opining that defendant sold drugs to the undercover officer or even that defendant’s specific actions or behavior were consistent with participation in a street drug sale.” (*Brown* at 506.) In *People v Richardson* (17 AD3d 196, 197 [1st Dept 2005]), however, the Court held that there was “sufficient factual basis to conclude that defendant was not operating alone” in the alleged drug sale and the trial court “properly exercised its discretion when it permitted the undercover officer to give limited testimony regarding street-level drug operations, since this evidence was relevant to an issue raised by defendant concerning the failure of the police to recover the buy money.”

Brown especially directed that “[b]ased on our concern that expert testimony be admitted only for a permissible purpose, we hold that this type of testimony must be paired with appropriate limiting instructions. If and when the trial court allows such testimony, it should inform the jury that it is free to reject it and that the testimony being admitted should in no manner be taken as proof that the defendant was engaged in the sale of narcotics. These crucial instructions should be reemphasized in the concluding charge to the jury” (*Brown* at 506).

¹ In December, 2023, subdivision two was amended to add the reference to the “type” of controlled substance.