

Rule 702 (Testimony By Experts)



Expert witness could testify as both a fact and expert witness, although the practice is discouraged

United States v. Barrow (2d Cir.)

Evidence Rule – Identifies the Rule or issue under review

Case Link - Read the full case without searching with this clickable link to the PDF or HTML opinion

The Case

Commentary

In a drug prosecution, a detective testified as an expert about the methods of operation in the narcotics trade and as a fact witness, based on his participation in the investigation. The defense objected that expert testimony should be excluded because the witness was not an expert and expert witness.

Evidence Principle - Summarizes the case's holding

The circuit court found no error in allowing the detective to testify as both a fact and expert witness. While the dual role of an expert as a fact and expert witness is discouraged, this case is not unusual. The circuit court noted that a law enforcement expert can assist the jury in understanding the issues at trial. [124 (citing United States v. Dukagjini, 326 F.3d 45, 52 (2d Cir. 2003); United States v. Boissoneault, 926 F.2d 230, 232-33 (2d Cir. 1991) (collecting cases))]. As the circuit summarized: "Although the transactions here at issue may seem straightforward, even commonplace, to those who routinely deal with drug cases, we are not yet convinced that every person sworn to serve on a federal jury understands the relationship between crack and powder cocaine, or the different methods employed by drug dealers operating at various levels of the distribution chain." [124]

Evidence Facts - Summarizes the evidence at trial and the lower court ruling

The circuit also found no error in allowing the detective to testify as both a fact and expert witness. While the dual role of an expert as a fact and expert witness is discouraged, this case is not unusual. The circuit court noted that a law enforcement expert can assist the jury in understanding the issues at trial. [124 (citing United States v. Dukagjini, 326 F.3d 45, 52 (2d Cir. 2003); United States v. Boissoneault, 926 F.2d 230, 232-33 (2d Cir. 1991) (collecting cases))]. As the circuit summarized: "Although the transactions here at issue may seem straightforward, even commonplace, to those who routinely deal with drug cases, we are not yet convinced that every person sworn to serve on a federal jury understands the relationship between crack and powder cocaine, or the different methods employed by drug dealers operating at various levels of the distribution chain." [124] Additionally, her expert and fact testimony pertained to distinct matters. The detective was also cross-examined about the accuracy of a name in her report, which was unrelated to her expert testimony.

Circuit Decision - Discusses the circuit's ruling and its analysis

Comment - Cautioning Against Dual Witness Role: The circuit cited to other cases where it had warned of "the risks presented by allowing a law enforcement officer to testify as both a fact and an expert witness," but did not categorically prohibit such testimony. (United States v. Barrow, 2004-1-0000 (2d Cir. 2004); United States v. Barrow, 2004-1-0000 (2d Cir. 2003))

Comment - Provides insight, analysis and application of principles in the case

("Although we decline to prohibit categorically the use of case agents as experts, we note that the Federal Rules of Evidence and the Supreme Court place the responsibility upon the district courts to avoid falling into error by being vigilant gatekeepers of such expert testimony to ensure that it is reliable, and not substantially more unfairly prejudicial than probative" and the pretrial disclosure requirement for expert testimony "creates an incentive for the government to limit its use of experts to proper subject matters of expert testimony, lest broader expert testimony require broader pre-trial disclosure.") (citations omitted); United States v. Feliciano, 233 F.3d 102, 121 (2d Cir. 2000) ("Such dual testimony is not objectionable in principle"); see also United States v. Young, 745 F.2d 733, 760 (2d Cir. 1984) (noting "it was not improper for the government to elicit . . . expert testimony from law enforcement officers who also testified as fact witnesses").

Practice Point – Dual Witness Checklist: The Second Circuit in Barrow noted areas of concern in admitting a law enforcement witness as an expert and fact witness:

- ❖ First, an "aura of special reliability and trustworthiness" surrounds an expert which increases the risk of prejudice that the jury will conclude the expert's opinions are based upon facts obtained in the case.

❖ Second, since impeaching an expert is more difficult given the impressive credentials, “expert testimony by a fact witness or case agent can inhibit cross-examination thereby impairing the

**Citation** – Provides key information for case reference

agent as an expert, there is an increased danger that the expert testimony will stray from applying reliable methodology and convey to the jury the witness’s ‘sweeping conclusions’ about appellants’ activities, deviating from the strictures of Rules 403 and 702.”

**Practice Point** - Highlights practical strategies and approaches to the evidence

**Comment – Similar Case:** In March, the Seventh Circuit confronted similar concerns about the dual role of a witness as an expert and fact witness in *United States v. Parra*, which is considered as the next case (p. 293).

**Practice Point - Defense Strategies:** If the court permits a prosecution witness to serve both as an expert and fact witness over the objection of the defense, several options might be taken by defense counsel to limit the damage such testimony might cause to the defense. For example, some courts have suggested that the defense request the court not permit the government to refer to its expert/fact witness as an “expert” witness. *See, e.g., United States v. Thomas, 797 F.Supp. 19, 24 (D.D.C. 1992)* (“This Court believes that using the term ‘expert’ may encourage a jury to give the witness’ testimony more weight than it is fairly entitled to receive” and directing that referring to the witness as an “opinion witness” explained the purpose of the testimony to the jury in a manner more consistent with the interests of justice); *see also Richey, Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Civil and Criminal Jury Trials, 154 F.R.D. 537 (1994)* (federal judge’s observations on preventing the jury from being too impressed with expert testimony).

**Practice Point – Limiting Instructions:** *United States v. Thomas, 797 F.Supp. 19 (D.D.C. 1992)* suggests that it might be helpful for counsel to seek from the trial court a limiting instruction for the jury on how the jury

may consider the testimony of the opinion/fact witness. *Thomas, 797 F.Supp. at 24-25* (“Moreover, before Agent Grubbs rendered his opinions, the Court gave the jury the limiting instruction as to how it should consider the testimony of opinion witnesses. This instruction was repeated in the final jury instructions. In light of the limiting instruction and careful avoidance of the term ‘expert’ designed to dispel any possible prejudice Officer Grubbs’ testimony might have engendered, this Court


**Cross-Reference** - Identifies other evidence issues arising in the case

these procedural e case, at least e procedure would have been inclined to follow the Second Circuit’s approach and allow the testimony.”) (citations omitted).

 **Case Reference**

**Cross-Reference:** For discussion of other evidence issues in the case, *see* FRE 410 (p. 278) and *Open Issues: Rule 410 – Inadmissibility of Plea, Plea Discussions, And Related Statements* (p. 250).

**Citation:** *United States v. Barrow, 400 F.3d 109 (2d Cir. March 2, 2005) (No. 03-1074) (Sack, Raggi, Hall).*

**Type of Action/Claim or Charge:** Criminal; 21 U.S.C. §§ 841(a)(1), (b)(1)(C) (distributing or possessing with intent to distribute cocaine base (“crack cocaine”) and 846 (conspiring to distribute or possess with intent to distribute heroin). 

**Type Of Action** - Notes the basis of the case

**Procedural Background** - Procedural Background - Had there been related proceedings in this case, information about it would have appeared here