SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0512-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSE M. VEGA, a/k/a JOSE VEGA, JOSE MIGUEL VEGA, PABLO, and AVENTURA,

Defendant-Appellant.

Submitted September 12, 2017 – Decided March 22, 2018

Before Judges Yannotti and Leone.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 09-04-0539.

Joseph E. Krakora, Public Defender, attorney for appellant (Steven M. Gilson, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Jeffrey P. Mongiello, Deputy Attorney General, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Jose M. Vega was convicted of first-degree robbery, N.J.S.A. 2C:15-1; second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a); and fourth-degree possession of hollow-point bullets, N.J.S.A. 2C:39-3(f). He was sentenced to fifteen years with an 85% period of parole ineligibility. We affirmed his November 30, 2010 judgment of conviction. State v. Vega, No. A-4146-10 (App. Div. August 13, 2013), certif. denied, 217 N.J. 293 (2017).

Defendant filed a petition for post-conviction relief (PCR) and a motion to compel DNA testing of a hat found in defendant's minivan pursuant to N.J.S.A. 2A:84A-32a. Defendant appeals the July 10, 2015 order denying his DNA motion. We affirm.

I.

The trial testimony supporting defendant's convictions are set forth in detail in our opinion affirming his convictions. We summarize the testimony.

After 3:00 a.m. on February 22, 2009, a minivan pulled up beside a Jaguar owned by George Beltran on the New Jersey Turnpike. The person in the front passenger seat of the minivan fired two gunshots into Beltran's Jaguar and struck the driver, Raymond Dorsey.

Jose Gutierrez pled guilty to conspiracy to commit robbery and testified for the State. Gutierrez testified as follows. Defendant, Gutierrez, and Jeremiah Mauricio went to the All Star Nightclub (the Club) in Elizabeth on the night of the shooting at around 1:25 a.m. Gutierrez was standing outside when he heard "a group of guys talking about somebody's chain." He noticed that one of them was wearing a large gold chain, and pointed it out to "Pablo."[1] Pablo said, "you want to go get the chain" by stealing it.

Gutierrez saw the group of guys go to a Jaguar in the parking lot. He and Pablo got into a white minivan and Pablo drove, following the Jaguar onto the Turnpike, without paying any tolls or stopping for toll tickets. At some point, Pablo asked Gutierrez to switch positions and then Gutierrez drove, with Pablo in the passenger seat. Gutierrez pulled alongside the Jaguar, Pablo lowered the passenger window and fired a gun.

Several occupants of the Jaguar testified they saw the minivan approaching and glimpsed the passenger wave at them, stick out of the window his arm holding a gun, and fire two shots. One shot went through the Jaguar's door and hit the leg of the driver, Dorsey. Dorsey took the next exit off the Turnpike, pulled over,

[1] Several witnesses testified they knew defendant used the nickname "Pablo," and they identified defendant as "Pablo."

and tied a scarf around his leg. Beltran drove Dorsey to a hospital and a hollow-point bullet was later removed from Dorsey's leg.

One of the occupants of the Jaguar was Reginald Watson, who testified as follows. While Dorsey was driving, "a van came out of nowhere" and pulled next to the driver's side of the Jaguar. The passenger of the minivan had the window rolled down and was "waving his hand" to the Jaguar, seeming to signal either to "slow down, or roll the window down." Watson initially could see the face of the passenger, who was light-skinned and wearing a black hat. After three seconds, the man "pulled down the hat to a ski mask." The man stuck his arm with a handgun out of the passenger window and started shooting. Watson later told police the man was wearing "a black ski mask, with only his eyes and mouth exposed."[2]

E-Z Pass data disclosed the license plate of two "run-through" violations that occurred after Beltran's Jaguar entered the Turnpike at Interchange 13 and exited at Interchange 11. A video of the toll lanes at those interchanges showed the white minivan

[2] The other occupants of the Jaguar did not have the same view of the shooter's face as Watson. George Beltran was asleep until the shots were fired. Sherrod Nelson saw the passenger was "a Spanish guy," but Nelson's view of his face was blocked by his arm once he stuck his arm out of the minivan. The minivan was in Dorsey's blind spot and he was concentrating on driving away. None of the occupants could identify the shooter.

"making a beeline" for the Jaguar. Police used the E-Z Pass data to identify the minivan, and used past parking tickets to locate it on Danforth Avenue. Officers arrested Gutierrez when he got into the minivan on February 24, 2009.

Gutierrez told the officers that Pablo was letting him use the van, and that he had just come from a nearby apartment on Danforth Avenue. The landlord went to the apartment, which belonged to defendant, and alerted defendant that "the police were outside, about the van." Defendant immediately left, arriving at Amando Gonzalez's house without a coat, saying he had twisted his ankle "jumping from the fire escape." Defendant borrowed money and took a cab to New York, where he was eventually arrested.

The police searched the minivan, initially finding only a nine-millimeter shell casing, sneakers, and "a black knit hat." Later, Gonzalez told the police there was a gun "in the side of the door" of the minivan, which he said belonged to defendant. Police searched the minivan again, and found a nine-millimeter Glock 17 handgun, loaded with six hollow-point rounds, with one in the chamber, in a secret compartment in the minivan. Expert testimony showed the bullet in Dorsey's leg and the shell casing recovered from the minivan had been discharged from the Glock. Gonzalez testified defendant had recently shown him the Glock at the apartment.

After he was arrested, Gutierrez identified and signed a photograph of defendant, identifying him as Pablo. As part of his guilty plea to conspiracy to commit robbery, Gutierrez admitted that "Jose Vega was the person who [he] committed this robbery with." However, at trial, Gutierrez claimed that he did not recall identifying defendant; he did not say "Pablo" was defendant; the photograph he identified of the person who shot out the window was not defendant; and he "probably just lied about it." Gutierrez testified defendant did not commit the shooting.

Defendant testified as follows. He drove to the Club in his blue Acura, following Gutierrez and Mauricio who drove the minivan. He left the Club in the Acura with a girl around 2:00 a.m. He has never been called "Pablo." He "keeps" the minivan, but said he did so for all of his friends, and that he did not use it because he had the Acura. The gun retrieved from the minivan belonged to Gonzalez, and the bat belonged to Gutierrez. Defendant left the apartment while the police arrested Gutierrez and they went to New York "because [he] was scared."

At trial, defendant's counsel questioned the police detectives why the police never tested the black hat found in the minivan. A detective answered that the shooter was described as wearing a ski mask, not a hat. Nonetheless, trial counsel in summation cited the failure to test the hat. The prosecutor in

summation responded that the shooter wore a ski mask and that there was no ski mask in the van.

On June 4, 2015, the PCR court orally denied defendant's motion to compel DNA testing of the black hat, but ordered an evidentiary hearing regarding defendant's allegation of ineffective assistance of counsel. At the evidentiary hearing, defendant's trial counsel testified:

> Q: With regards to the black hat that was found in the van, was that hat ever tested for DNA?
>
> [TRIAL COUNSEL]: No.
>
> Q: Did the defendant ask you to have the hat tested for DNA?
>
> [TRIAL COUNSEL]: No.[3]
>
> Q: As part of your trial strategy, which is that [the shooter] wasn't the defendant, would you have had the hat tested?
>
> [TRIAL COUNSEL]: No, because the evidence showed that there was a ski mask used, and it wasn't a ski mask.
>
> THE COURT: You mean the hat that we were talking about was not a ski mask.
>
> [TRIAL COUNSEL]: Correct. The — the victim [sic] testified that the person that jumped — you know, that shot out of the car was wearing a ski mask, and that was . . . it was a regular hat.

[3] Defendant testified he did ask trial counsel to test for DNA on the black hat, but the PCR court found trial counsel more credible than defendant.

On cross-examination, trial counsel reiterated that at "trial, there was no conflicting testimony. It was a ski mask." On July 10, 2015, the PCR court entered an order denying defendant's PCR petition, and his motion to compel DNA testing.

Defendant appeals the denial of his DNA motion.[4] He argues:

> THE PCR COURT ERRED IN DENYING DNA TESTING ON THE BLACK HAT/SKI MASK THAT WAS FOUND IN THE MINIVAN INVOLVED IN THE SHOOTING.

II.

We must hew to our standard of review. "A trial court's decision regarding N.J.S.A. 2A:84A-32a is premised upon the court's judgment and discretion." State v. Armour, 446 N.J. Super. 295, 306 n.4 (App. Div.), certif. denied, 228 N.J. 239 (2016) (citing N.J.S.A. 2A:84A-32a(d)(5)). The court's ruling is reviewed for an "abuse of discretion." Ibid. However, "our review of a trial court's legal determinations . . . is de novo." Ibid.

N.J.S.A. 2A:84A-32a "permits '[a]ny person who was convicted of a crime and is currently serving a term of imprisonment' to make a motion for DNA testing." State v. Hogue, 175 N.J. 578, 584 (2003) (quoting N.J.S.A. 2A:84A-32a(a)). However, the court "shall not grant the motion for DNA testing unless" the defendant has established eight requirements. N.J.S.A. 2A:84A-32a(d).

[4] Defendant has not appealed the denial of his PCR petition.

The arguments of the parties focus on the requirement that "the requested DNA testing result would raise a reasonable probability that if the results were favorable to the defendant, a motion for a new trial based upon newly discovered evidence would be granted." N.J.S.A. 2A:84A-32a(d)(5). "[B]ecause it is difficult to anticipate what results DNA testing may produce in advance of actual testing, the trial court should postulate whatever realistically possible test results would be most favorable to defendant." State v. Peterson, 364 N.J. Super. 387, 397 (App. Div. 2003). Although the defendant does not have "to prove the DNA results will be favorable," he must prove "there is a reasonable probability that a new trial would be granted if the DNA results are favorable to the defendant." Armour, 446 N.J. Super. at 311 (quoting State v. Reldan, 373 N.J. Super. 396, 402 (2004)).

"To be entitled to a new trial based on newly discovered evidence, a defendant must demonstrate that the new evidence is: '(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted.'" State v. DeMarco, 387 N.J. Super. 506, 516 (App. Div. 2006) (quoting State v. Carter, 85 N.J. 300, 314 (1981)).

"[T]he test to be satisfied under a newly discovered evidence approach is . . . stringent." Carter, 85 N.J. at 314. "[A]ll three prongs of that test must be satisfied before a defendant will gain the relief of a new trial." State v. Ways, 180 N.J. 171, 187 (2004).

The PCR court concluded that DNA testing of the hat would not raise a reasonable probability that a motion for a new trial would be granted because there was no evidence "that this is the hat that was worn by the alleged shooter." The court cited Watson's testimony that the shooter was wearing "a ski mask that . . . had eye holes and mouth holes." By contrast, the hat found in the minivan "clearly doesn't have holes," and that there was "no indication . . . that it had anything to do with this particular shooting."

Based on Watson's testimony, the PCR court's decision was plainly correct. Without evidence the shooter was wearing the hat found in the minivan, "the requested DNA testing result" of the hat would not "raise a reasonable probability that . . . a motion for a new trial based upon newly discovered evidence would be granted." N.J.S.A. 2A:84A-32a(d)(5). Whether testing showed the hat bore the DNA of defendant, Gutierrez, Mauricio, or some third party, it would not show who the shooter was.

There was no evidence the shooter had ever worn the black knit hat found in the minivan.[5] At trial and at the PCR evidentiary hearing, defendant's counsel cross-examined witnesses by asserting Dorsey stated to Detective Noble that the shooter was wearing "a black hat." However, Dorsey denied making such a statement. Defendant did not seek to admit the statement or call Noble as a witness either at trial or in the PCR evidentiary hearing. In any event, defendant has not argued in this appeal that the alleged statement provided evidence the shooter was wearing the black knit hat found in the minivan.

Moreover, as the PCR court stressed, there was no evidence where in the minivan the black knit hat was found.[6] It could have been worn by a driver or a passenger in the minivan. At most, the DNA result would show someone once touched a hat that was left somewhere in the minivan in the months before the shooting or in the days after the shooting.

---

[5] On direct at trial, defendant agreed with his counsel's question that the hat found in the minivan was "the hat we heard about from the shooting." However, on cross defendant admitted that he was just "assuming" and that he did not "know if it was used by the guy in the shooting." In the PCR proceedings, defendant has not claimed to know what was worn during the shooting at which he asserts he was not present.

[6] Defendant's pro se brief asserts the black knit hat was found on the floor behind the driver's seat.

What little probative value that might have was dissipated by defendant's own trial testimony. He testified that a friend who went abroad left the minivan with him, and that he "lent it to all my friends." Defendant also testified that Gutierrez normally drove the minivan, but that all "the other guys" drove the minivan as well. Defendant's friend Gonzalez similarly testified that "we've all been in the van." This testimony made clear that innumerable friends (and possibly friends of friends) could have left a hat in the minivan. Thus, finding a third person's DNA on the hat would not have been indicated the third person was the shooter.

It would have been even less probative if Mauricio's DNA was on the hat. Not only was he one of defendant's friends, but also he was admittedly in the minivan on the ride to the Club.

Defendant argued it would have been highly probative if Gutierrez's DNA was found on the hat, which defendant testified was "Gutierrez's hat." However, that would have proved nothing. Gutierrez was admittedly in the van before, after, and during the shooting.

Therefore, a DNA test result of the black knit hat "would neither exculpate defendant nor inculpate another person." Armour, 446 N.J. Super. at 315. As a result, this case is unlike DeMarco, where semen was found in the deceased victim's mouth, and

"identification of the semen donor could well exculpate defendant" and "potentially implicate another suspect." 387 N.J. Super. at 521.

This case is similarly unlike Peterson, where the sexually-assaulted murder victim had semen on her pants and blood under her fingernails, as well as hairs on her pubic hair combings and near her body. Peterson, 364 N.J. Super. at 391-92. We have repeatedly distinguished Peterson because there "the identity of the murderer was likely (and almost certainly) the person whose DNA was found at the crime scene," Armour, 446 N.J. Super. at 315, so DNA testing "could not only exculpate the defendant, but implicate another," Reldan, 373 N.J. Super. at 404. Moreover, in Peterson the State's expert testified the hairs "had the same characteristics as defendant's hair," and so a DNA test could also discredit the State's expert and case. 364 N.J. Super. at 392, 396-98.

Here, the State never claimed the black knit hat was worn by defendant or involved in the shooting. Rather, the black knit cap was unconnected to the shooter, and its testing "would not be exculpatory" or inculpatory. See Reldan, 373 N.J. Super. at 404 (citing State v. White, 260 N.J. Super. 531, 539 (App. Div. 1992) (finding, before N.J.S.A. 2A:84A-32a, that DNA testing of semen found on the defendant's clothing "would not have any logical tendency to establish" his innocence)).

Therefore, defendant failed to meet N.J.S.A. 2A:84A-32a(d)(5)'s requirement that he show a reasonable probability a DNA test result from the black knit hat was evidence "of the sort that would probably change the jury's verdict if a new trial were granted." Reldan, 373 N.J. Super. at 402 (quoting Carter, 85 N.J. at 314). This was basis enough to deny his motion for DNA testing. "It is defendant's burden to establish that all of the elements necessary for DNA testing have been fulfilled." Armour, 446 N.J. Super. at 311.[7]

Moreover, at the evidentiary hearing, both trial counsel and defendant testified it was "part of [counsel's] trial strategy" not to request testing of the black knit hat. Instead, in cross-examination and in his closing argument, trial counsel faulted the State for not performing any scientific tests on the hat. Under the Carter test, "[a] defendant is not entitled to benefit from a strategic decision to withhold evidence." Ways, 180 N.J. at 192; see White, 260 N.J. Super. at 539 (refusing to compel DNA testing because "defense counsel had the means to pursue that inquiry at trial, and refused to do so for tactical reasons").

[7] Therefore, we need not address the parties' contentions on whether the PCR court found defendant "made a prima facie showing that the evidence sought to be tested is material to the issue of the eligible person's identity as the offender." N.J.S.A. 2A:84A-32a(d)(4).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION