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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2629-15T2
A-2643-15T2¹

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSHUA M. GAUDETTE, a/k/a
JOSH RAMIREZ,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARIO VEGA,

Defendant-Appellant.

Submitted December 21, 2017 – Decided January 31, 2018

Before Judges Simonelli and Haas.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
05-05-1295.

¹ These back-to-back cases are consolidated for purposes of opinion only.

Joseph E. Krakora, Public Defender, attorney for appellant Mario Vega (Alison Perrone, Designated Counsel, on the briefs).

Joseph E. Krakora, Public Defender, attorney for appellant Joshua Gaudette (Monique Moyses, Designated Counsel, on the brief).

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Monica do Outeiro, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendants Joshua M. Gaudette and Mario Vega² appeal from the January 8, 2016 Law Division orders denying their post-conviction motions for retesting of forensic DNA evidence. Gaudette also appeals from the denial of his motion to correct an illegal sentence. We affirm.

I.

Tried jointly by a jury, on January 27, 2006, defendants were found guilty of second-degree conspiracy to commit armed robbery, N.J.S.A. 2C:5-2; first-degree armed robbery, N.J.S.A. 2C:15-1; second-degree armed robbery, N.J.S.A. 2C:18-2; third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); third-degree criminal restraint, N.J.S.A. 2C:13-2(a);

² We shall sometimes collectively refer to Gaudette and Vega as defendants.

and certain persons not to have weapons, N.J.S.A. 2C:39-7(b).

Defendants filed motions for a new trial. The trial judge denied the motions, finding the evidence against defendants was overwhelming. The judge sentenced both defendants to an aggregate thirty-year term of imprisonment subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

Defendants appealed their convictions and sentences. We affirmed the convictions, but remanded for resentencing. State v. Gaudette, No. A-6535-05 (App. Div. Feb. 23, 2009) (slip op. at 55). Our Supreme Court denied certification. State v. Vega, 200 N.J. 369 (2009); State v. Gaudette, 199 N.J. 519 (2009). On remand, the trial judge imposed the same sentences, and defendants appealed. We affirmed, and the Court denied certification. State v. Vega, No. A-5008-08 (App. Div. July 27, 2010); State v. Gaudette, No. A-5009-08 (App. Div. May 14, 2010), certif. denied, 203 N.J. 607 (2010). We also affirmed the denial of defendants' motions for post-conviction relief, and the Court denied certification. State v. Vega, No. A-5553-11 (App. Div. Dec. 30, 2013), certif. denied, 218 N.J. 276 (2014); State v. Gaudette, No. A-2790-12 (App. Div. June 23, 2015), certif. denied, 223 N.J. 404 (2015).

II.

The facts underlying the home invasion that was the basis for defendants' convictions are set forth in our February 23, 2009 opinion and need not be repeated here. This appeal concerns DNA testing of a bloodstain found on Vega's right boot that matched the DNA profile of the victim, R.P.³ Defendants presented an identification defense at trial.

The State's expert in DNA explained the DNA process. He first extracts the DNA from cotton swabs submitted for testing, quantifies exactly how much DNA is in a solution in order to determine a target amount, puts the target amount into an amplification, looks at the copies of DNA that were amplified, and then looks for thirteen loci of the DNA to determine the contributor.

The expert tested cotton swabs from R.P. and his daughter, J.P., and obtained full DNA profiles for both of them. He then tested the swab of a bloodstain on Vega's boot, compared it to R.P.'s and J.P.'s DNA profiles, and found a mixture of more than one profile, meaning there was more than one contributor to the mixture. The expert excluded J.P. as a contributor to the mixture,

³ We use initials to identify those involved in this matter in order to protect their privacy.

and concluded R.P. was the major DNA profile on the bloodstain, explaining:

So when you get the analysis, our anneals are read out as peak heights, there's just . . . blips so when you see the mixture, you can see that some [p]eak heights are much higher than others. So you might have some down here and some up here.

And you're able to determine that those start out as a higher ratio than these when the sample was brought in. And from that, you can say that these are associated and this is unassociated so as a major profile, I was able to match [thirteen] out of [thirteen] [loci] with [R.P.]

[(Emphasis added).]

The expert opined within a reasonable degree of scientific certainty that the bloodstain on Vega's boot came from R.P. and "[R.P.] is identified as the source of that stain."

The expert also found the mixture contained a minor DNA profile, which was "faint" and "weaker" than the other peaks he found for the major DNA profile and did not meet the recording threshold. The expert confirmed that R.P. was the source of the major DNA profile and bloodstain on Vega's boot, and an unknown contributor was the source of the minor DNA profile and bloodstain. The expert emphasized that the major DNA profile from the bloodstain matched thirteen out of thirteen loci for R.P., for a match of one in many quadrillion, and opined within a reasonable

degree of scientific certainty that R.P. was the source of the major DNA profile.

II.

Defendants filed post-conviction motions to compel retesting of the DNA evidence. Gaudette argued there was no DNA evidence linking him to the crime, only circumstantial evidence linking him to Vega, and the perpetrators were wearing masks and no identifications were made. Both defendants argued that, although the bloodstain tested positive for the presence of blood matching R.P.'s DNA profile, the relevant DNA sample had a "faint, weak signal" and the comparison of the bloodstain with R.P.'s DNA profile was made on only "one loci to the strand[.]" Defendants posited that advancements in DNA testing since the time of the trial could lead to a more accurate and reliable result that could alter the outcome of the trial.

In a written opinion, citing N.J.S.A. 2A:84A-32a, the motion judge emphasized the court should not grant a motion for DNA testing unless "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." The judge found the substance on Vega's boot showed DNA that matched R.P.'s DNA profile. The judge also found that because the trial judge found "the evidence of

defendants' guilt [was] 'overwhelming[,]' defendants could not meet their burden of demonstrating a new trial should be granted. This appeal followed.

["N.J.S.A.] 2A:84A-32a(a) states that '[a]ny eligible person may make a motion before the trial court that entered the judgment of conviction for the performance of forensic DNA testing.'" State v. Armour, 446 N.J. Super. 295, 310 (App. Div.) (second alteration in original), certif. denied, 228 N.J. 239 (2016). "Both the DNA retesting statute and the regulations specifically contemplate the retesting of DNA recorded and retained pursuant to the DNA [Database and Databank Act of 1994, N.J.S.A. 53:1-20.17 to -20.38]." Ibid. (citations omitted). "The [DNA retesting] statute applies broadly to any individual who was convicted of a crime and is currently serving a sentence." Ibid. (alteration in original) (quoting State v. Reldan, 373 N.J. Super. 396, 402 (App. Div. 2004)). The motion must be supported by an affidavit explaining the importance of the identification issue to the case, and also explaining, "in light of all the evidence," why favorable results from such testing would cause the court to grant a motion for a new trial based on newly discovered evidence. N.J.S.A. 2A:84A-32a(a)(1)(a)-(b).

The court may not grant the motion for DNA testing unless, following a hearing, the defendant establishes the following elements:

(1) the evidence to be tested is available and in a condition that would permit the DNA testing that is requested in the motion;

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect;

(3) the identity of the defendant was a significant issue in the case;

(4) the eligible person has 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;

(5) 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. The court in its discretion may consider any evidence whether or not it was introduced at trial;

(6) the evidence sought to be tested meets either of the following conditions:

(a) it was not tested previously;

(b) it was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the offender or have a reasonable probability of contradicting prior test results;

(7) the testing requested employs a method generally accepted within the relevant scientific community; and

(8) the motion is not made solely for the purpose of delay.

[Armour, 446 N.J. Super. at 310-11 (quoting N.J.S.A. 2A:84-32a(d)).]

"It is defendant's burden to establish that all of the elements necessary for DNA testing have been fulfilled." Id. at 311.

Identity is a significant issue whenever it is contested, regardless of the strength of the State's evidence. State v. Peterson, 364 N.J. Super. 387, 395-96 (App. Div. 2003). If DNA testing were to show that the samples did not come from the defendant, "the evidence of [the] defendant's guilt could appear a lot less overwhelming than it did at the time of trial[,]" and would not be "merely cumulative or impeaching or contradictory[.]" Id. at 396-98 (quoting State v. Carter, 85 N.J. 300, 314 (1981)). "[T]he movant must 'explain why the identity of the defendant was a significant issue in the case' and 'how if the results of the requested DNA testing are favorable to the defendant, a motion for a new trial based upon newly discovered evidence would be granted[.]'" State v. DeMarco, 387 N.J. Super. 506, 514 (App. Div. 2006) (citation omitted).

"[N.J.S.A.] 2A:84A-32a(d)(5) . . . does not require a defendant to 'prove the DNA results will be favorable, rather it

must only be established that 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 Reldan, 373 N.J. Super. at 402). "Thus, the 'reasonable probability' requirement set forth in subsection (d)(5) 'applies only to the grant of a new trial in the event the results of DNA testing are favorable.'" Id. at 312 (quoting DeMarco, 387 N.J. Super. at 517).

As for whether favorable DNA test results would likely result in the grant of a motion for a new trial, the same standards apply as for any newly discovered evidence. Peterson, 364 N.J. Super. at 398. As we have held:

[W]here a new trial is sought premised on the discovery of "new" evidence, the evidence must be: (1) material to the issue and not merely cumulative, impeaching or contradictory; (2) discovered after the trial and not reasonably discoverable prior thereto; and (3) of a nature as to probably have affected the jury's verdict.

[Armour, 446 N.J. Super. at 312 (citation omitted).]

Here, the dispute only concerns element (4) (that defendants made a prima facie showing that the evidence sought to be tested is material to the issue of their identity as the offender), and element (5) (that the retesting result would raise a reasonable probability that if the results were favorable to defendants, a

motion for a new trial based upon newly discovered evidence would be granted). On appeal, as to element (4), Gaudette reiterates there was no DNA evidence linking him to the crime, only circumstantial evidence linking him to Vega, and the perpetrators were wearing masks and no identifications were made. Vega argues that "if the evidence tested contained DNA of someone other than [his DNA], it would strongly support [his] position that he was not the perpetrator."

As to element (5), defendants reiterate that although the bloodstain tested positive for the presence of blood matching R.P.'s DNA profile, the DNA had a "faint, weak signal" and the comparison of the bloodstain with R.P.'s DNA profile was made on only "one loci to the strand[.]" Defendants again posit that advancements in DNA testing since the time of the trial could lead to a more accurate and reliable result that could alter the outcome of the trial.

These arguments are easily rejected. As to element (4), Gaudette was not convicted based on the DNA evidence. He was convicted because the victims identified him and his clothing; the clothes were later found in his car; he knew R.P. and that R.P. kept his company's payroll in his home; he had no alibi; and the statement he made at the time of his arrest indicated he was aware there was a robbery and another person was involved. Vega was

convicted based on DNA evidence confirming it was the victim's blood on his boot. A retesting result would not exclude Vega as a contributor to either of the DNA profiles found on the bloodstain and exonerate him and inculcate someone else. Thus, even if someone else's DNA was found on the bloodstain, it would not have changed the outcome for either of the defendants.

As to element (5), defendants are incorrect that the relevant DNA sample was a "faint, weak signal" and the comparison of the bloodstain with R.P.'s DNA profile was made on only "one loci to the strand[.]" The unrefuted expert evidence confirmed that, unlike the minor DNA profile obtained from the bloodstain, the major profile from that bloodstain matched thirteen out of thirteen loci with R.P., for a match of one in many quadrillion. There was no dispute that the bloodstain on Vega's boot came from R.P. Thus, there was no reasonable probability that new DNA results would be favorable to defendants. Because defendants failed to establish elements (4) and (5), they were not entitled to DNA retesting.

III.

Prior to the imposition of Gaudette's original sentence, the State filed a motion seeking a discretionary extended-term sentence. The sentencing judge granted the motion, but made clear that the twenty-year sentence he imposed for the first-degree armed robbery conviction was the maximum ordinary term for a first-

degree crime, rather than the minimum twenty-year extended term. On re-sentence, the judge imposed the same, non-extended term sentence.

Gaudette filed a motion to correct an illegal sentence, arguing, as he does on appeal, that the State failed to file a motion for an extended term sentence within fourteen days prior to resentencing. The motion judge denied the motion, finding defendant was re-sentenced in the ordinary range and there was no authority requiring the State to file another motion for an extended term on remand for resentencing.

Rule 3:21-4(e), which governs motions for extended term sentences, does not require the re-filing of a motion on remand for resentencing. The Rule only requires one motion to be filed fourteen days prior to sentencing, which the State did here. Even if the State was required to re-file the motion, defendant suffered no prejudice. Defendant did not receive an extended-term sentence.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION