

People v Rodriguez

2012 NY Slip Op 33933(U)

May 1, 2012

Supreme Court, New York County

Docket Number: 5471/2009

Judge: Richard D. Carruthers

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 81
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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

WILLIAM RODRIGUEZ,

Defendant.

Ind. No.
5471/2009
Decision
and
Order

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RICHARD D. CARRUTHERS, J.:

Counsel for William Rodriguez, the defendant, has moved that the Court conduct a hearing, pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), on the issue of whether DNA evidence that the People intend to introduce into evidence is admissible. The defense also requests that the Court issue a *subpoena duces tecum* that would require the Office of the Chief Medical Examiner (OCME) to produce records and other materials for use by the defense at such a hearing. Having considered the submissions of the defense and the District Attorney, the Court finds that a hearing should be held as to whether principles and methodology underlying OCME's Forensic Statistical Tool (FST) software program have gained general acceptance within the relevant scientific community so as to permit its use in the analysis of DNA test results. On the other hand, the application that the Court issue a *subpoena duces tecum* is denied at this

time in that the proposed subpoena is overly broad.

The defendant is alleged to have committed several push-in burglaries and robberies during the months of October and November 2009. He was arrested shortly after the filing of the last alleged incident, and the instant indictment was filed on December 7, 2009. Motion practice was held, and on February 24, 2010, a suppression hearing was ordered. On September 29, 2010, after the case already had been adjourned several times for trial, the People for the first time requested a buccal swab of the defendant so that OCME could compare his DNA with DNA found on evidence present at several of the crime scenes that had been in the possession of the prosecution. It was not until March 2011 that the District Attorney provided defense counsel with a copy of OCME's initial DNA report, which contained no indication that the defendant's DNA was found on any of the physical evidence tested. By order dated May 25, 2011, the Court found that the People had been dilatory in proceeding with DNA testing, and, upon motion of the defense, ordered that he be released from incarceration on this case.¹ Thereafter, during the midst of the suppression hearing that the Court had ordered in February 2010,

¹The Court's finding was that the People were chargeable with 161 days of the 181 that they are permitted under New York's speedy trial statute, CPL 30.30, to be ready for trial. Although released on the present case, the defendant was taken into custody for allegedly violating parole on a previous case. He remains incarcerated upon the latter.

the District Attorney provided defense counsel with supplemental reports from OCME. Unlike the initial reports, the supplemental reports indicated that there was a likelihood that the defendant's DNA was contained in a mixture of DNA found at certain of the crime scenes. The OCME arrived at this conclusion by using FST.

Defense counsel contends that FST was devised by OCME and that it has not been subjected to peer review. The District Attorney, on the other hand, asserts that FST's use of likelihood ratios is not novel, but is based upon a theorem dating from the eighteenth century, and that FST's software provides simply a way of performing calculations necessary for likelihood ratios in a fast and practical way. OCME apparently has been employing FST only for the last several months, although DNA evidence has been admitted in courts in New York State for more than twenty years. There are no reported cases that discuss FST. A hearing is required to resolve the issue of whether FST software program and the results it generates comport with principles that are generally accepted so as to permit the likelihood ratios that have been generated into evidence.

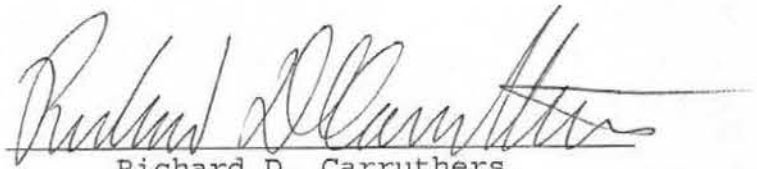
The proposed subpoena for OCME appears to the Court to be overly broad. Indeed, as OCME reports, it would take thousands of hours for its staff to amass the records that fall within its sweep. The Court notes that counsel for OCME states that defense

counsel and experts may come to OCME's offices to inspect the requested documents. The Court suggests that the defense accept this invitation. The Court further suggests that OCME demonstrate the FST software in operation. Such cooperation might render a subpoena unnecessary. However, if a good faith effort at cooperation fails, defense counsel may submit a subpoena together with a detailed explanation of the need for each class of documentation.

The foregoing constitutes the decision and order of the Court. The clerk is directed to provide copies hereof to counsel for each of the parties and to counsel for OCME.

Dated: New York, N.Y.
 May 1, 2012

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Richard D. Carruthers,
 Acting Justice

NOV. RICHARD D. CARRUTHERS