

People v Drumgoole
2012 NY Slip Op 33954(U)
April 19, 2012
Supreme Court, Kings County
Docket Number: 6492/2011
Judge: Miriam Cyrulnik
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 20

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

Ind. No. 6492/2011

JERROD DRUMGOOLE,
HUMPHRIES QUAYE,

Defendants

-----X

Miriam Cyrulnik, J.S.C.:

The People move to renew their CPL §240.40 (2) (b) (v) motion for an order directing the defendants to submit to the taking of DNA samples by means of oral swabs. Defendant Drumgoole opposes and cross-moves for a Protective Order precluding the Office of the Chief Medical Examiner (“OCME”) from adding his DNA sample to any DNA database or comparing his DNA to any additional profiles, but permitting OCME to compare his DNA solely to DNA obtained in connection with the instant matter. Defendant Quaye consents to the taking of an DNA sample from his person and makes no motion for a Protective Order. For the reasons set forth below, the People’s motion to renew is granted and defendants are ordered to submit to the taking of DNA samples by means of oral swabs.

The People contend that they are authorized, under CPL §240.40 (2) (b) (v), to seek a court order compelling an indicted defendant to furnish the prosecution with non-testimonial evidence such as saliva and blood samples. The People claim they have met the three prong standard set out in *Matter of Abe A.* (56 NY2d 288, 291 [1982]):

“(1) that there exists probable cause to believe that the individual from whom non-testimonial evidence is sought has committed the crime under investigation,

(2) that there exists a clear indication that relevant material evidence will be found as a result of the disclosure of the non-testimonial evidence sought, and
(3) that the method used to obtain the non-testimonial evidence sought is safe and reliable.”

Here, the People argue that probable cause has been established by the identification by the complaining witness of defendants and the vehicle in which a handgun was recovered. The People base their argument for renewal upon newly obtained OCME Laboratory Report FB11-04982, which concludes that a mixture of DNA was found on the handgun recovered upon defendants’ arrest and that further interpretation of the results can be performed upon comparison to defendants’ DNA samples. Finally, the People contend that taking an oral swab from the defendants is the least intrusive means to perform DNA testing.

Defendant Drumgoole argues that the People still have not met the standard necessary to order an oral swab. Specifically, he points out that the People have failed to demonstrate that the swab for DNA referred to by the People yielded DNA of sufficient quantity or quality to compare to his own. It follows, defendant concludes, that there is no clear indication that relevant material evidence will be discovered establishing his possession of the handgun in question. In the alternative, defendant moves for a Protective Order prohibiting OCME from entering his DNA into any database, or disclosing it for any purpose beyond the instant matter.

Defendant Quaye does not oppose the taking of an oral swab or move for a Protective Order.

The Court finds that the People have demonstrated sufficient probable cause to believe that defendants committed the crimes charged and that an oral swab is a safe and reliable method to secure defendants’ DNA. They have also provided a clear indication that relevant material evidence will be found upon obtaining defendants’ DNA.

The application comes after the defendants have been indicted, thus providing statutory authority and probable cause (*see People v. Pryor*, 14 AD3d 723, 725 [3rd Dept 2005], *lv denied* 6 NY3d 779 [2006] [citations omitted]). By reference to the OCME Laboratory Report, the People have provided new evidence that the swabs of the recovered handgun underwent testing that establishes the existence of viable DNA for comparison to that of the defendants. The People have demonstrated the requisite clear indication that “relevant material evidence” will be found upon taking an oral swab from defendants (*see Valdez v. Rosa*, 28 AD3d 781 [2d Dept 2006] [failure of the People to establish that hairs recovered from a crime scene were tested for DNA required denial of their motion for a DNA sample from defendant]).

Finally, as directed by the Court of Appeals decision in *Matter of Abe A.*, (56 NY2d 288, 291 [1982], *supra*) this court has considered the seriousness of the crime under investigation, the significance of the evidence sought and the availability of less intrusive means of obtaining it, balancing these concerns against the individuals’ constitutional right to be free from bodily intrusion. The court finds that the People are entitled to procure oral swab samples from the defendants.

Defendant Drumgoole’s request for a protective order prohibiting his DNA from being entered into any database or used beyond this case, is denied. Under Executive Law §49 (b), while the OCME may not publish the DNA profile in any federal or state database, there is nothing barring them from entering it into a local database if they see fit. Furthermore, the DNA test results remain under the exclusive control of OCME, and under Executive Law §995(d), those results are only prohibited from being disclosed or re-disclosed outside of the agency without the consent of the subject.

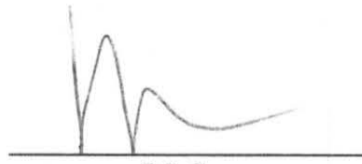
Furthermore, the court notes that the Appellate Division, Second Department in *People v. King* (232 AD2d 111, 118 [2d Dept 1997], *lv denied* 91 NY2d 875 [1997]) and a number of lower courts have limited a defendant's possessory and privacy interests once a blood sample has left his body. (*see People v. Torres*, Sup Ct, Kings County, Jan. 18, 2011, Walsh, J., Indictment No. 2407/2010; *see also People v. Zelaya*, Sup Ct, Kings County, Jan. 14, 2008, Mullen, J., Indictment No. 7992/2007.) This Court finds the reasoning in those cases persuasive.

Once a sample of defendant's DNA has "lawfully been removed" from his body, he no longer maintains any privacy interest in that DNA sample. (*see People v. King*, 232 AD2d 111, *supra*, dismissing defendant's privacy concerns and unreasonable search and seizure claims after a properly issued blood order for defendant's blood sample; *see People v. Midgley*, 196 Misc2d 19 [Sup Ct, Kings County 2003], adhering to *People v. King*, 232 AD2d 111, *supra*, holding that a defendant relinquishes privacy rights when a blood sample is lawfully obtained). Therefore, concerns regarding further use of the defendant's DNA are without merit.

Accordingly, the People's motion is granted as to both defendants, and defendant Drumgoole's cross-motion for a Protective Order is denied. The District Attorney shall provide notice to defense counsels and an opportunity for them to be present when the samples are taken.

This constitutes the Decision and Order of the Court.

Dated: April 19, 2012



J.S.C.