

People v Whetstone
2013 NY Slip Op 34173(U)
June 17, 2013
Supreme Court, New York County
Docket Number: 5728/12
Judge: Renee A. White
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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THE PEOPLE OF THE STATE OF NEW YORK :

- against -

: Indictment No. 5728/12
: Decision and Order

FELIX WHETSTONE,

:

Defendant.

:

-----X

RENEE A. WHITE, J.

The defendant is charged with one count each of Criminal Sexual Act in the First Degree and Sexual Abuse in the First Degree. The charges stem from an incident in which the defendant allegedly grabbed the complainant from behind and across her arms as she entered the subway system. The defendant allegedly put his finger in the complainant's vagina and had contact with his penis and her anus.

The People have gathered DNA evidence from the defendant as well as from the bicep areas of the complainant's coat. The evidence was analyzed by the Office of the Chief Medical Examiner who concluded that defendant's DNA was present on the left bicep of the complainant's coat. DNA evidence on the right bicep of the complainant's coat was found to contain a mixture of DNA. The Office of the Chief Medical Examiner, using the Forensic Statistical Tool, determined that the DNA mixture likely contained DNA from the complainant, the defendant and another, unknown person. The defendant seeks to prevent the People from

introducing into evidence the test results based upon the use of the Forensic Statistical Tool. Alternatively, the defendant requests a *Frye* (*Frye v. United States*, 293 F 1013 [DC Cir 1923]) hearing to determine the general acceptance of the use of the Forensic Statistical Tool in the scientific community. The People oppose the motion arguing that the Forensic Statistical Tool is a type of calculator used to determine a likelihood ratio of whether or not the defendant contributed to the DNA mixture found on the right bicep of the complainant's coat. The People also oppose a *Frye* hearing and include as exhibits, among other things, decisions from other courts denying similar requests.

This Court is in agreement with the other courts that have denied preclusion and, in the alternative, a *Frye* hearing. See, *People v. Garcia*, 39 Misc 3d 482 [Sup Ct, Bronx County 2013]; *People v. Foster-Bey*, Sup Ct. Kings County, May 22, 2013, Goldberg, J. Indictment Number 9239/10; *People v. Bowens*, Sup Ct, Richmond County April 29, 2013, Rooney, J. Indictment Number 336/11; *People v. Caballero*, Sup Ct, Queens County, April 15, 2013, Knopf, J. Indictment Number 10278/11; *People v. Brissett*, Sup Ct, Bronx County, February 25, 2013, Webber, J. Indictment Number 847/10; *People v. Wortham*, Sup Ct, New York County, September 6, 2012, Ward, J. Indictment Number 3148/11.

DNA profiling is generally accepted as reliable in the scientific community. *People v. Wesley*, 83 NY2d 417, 424 [1994].

The Forensic Statistical Tool is a mathematical program that performs calculations on DNA evidence much more rapidly and efficiently than a human analyst can perform. The results are likelihood ratios that determine the probability of whether or not a defendant contributed, or not, to a DNA sample. The results are not a definitive statement that the defendant's profile is or is not in fact part of the mixture. *People v. Brissett*, Sup Ct, Bronx County, February 25, 2013, Webber, J. at 3.

These likelihood ratios have been utilized in the scientific and medical communities for hundreds of years. *People v. Caballero*, Sup Ct, Queens County, April 15, 2013, Knopf, J. at 7. The likelihood or probability ratios are based upon long established principles of probability theory. *People v. Bowens*, Sup Ct, Richmond County April 29, 2013, Rooney, J. at 2. Most importantly, the Forensic Statistical Tool is approved by the New York State Commission on Forensic Science, and its DNA Subcommittee. *People v. Caballero*, Sup Ct, Queens County, April 15, 2013, Knopf, J. at 8. And, scientists not involved in creating the Forensic Statistical Tool have also researched and published articles addressing DNA amplification and allelic drop-

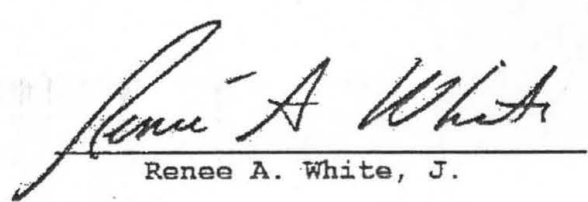
out. *People v. Brissett*, Sup Ct, Bronx County, February 25, 2013, Webber, J. at 5.

Finally, any concerns defendant may have regarding the accuracy or quality of the test are not subject of the *Frye* hearing. Rather, those concerns are addressed on cross-examination of the People's witnesses and proffer by defense witnesses.

Accordingly, the defendant's motion to preclude expert testimony regarding the Forensic Statistical Tool, or, in the alternative, for a *Frye* hearing, is denied in its entirety.

This opinion constitutes the decision and order of the Court.

Dated: June 17, 2013
New York, New York


Renee A. White, J.