

People v Jones

2014 NY Slip Op 34063(U)

June 12, 2014

Supreme Court, Kings County

Docket Number: Indictment 05146/12

Judge: Martin P. Murphy

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SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY: PART 40

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

Decision and Order

-against-

:
Indictment 05146/12
Amended
DNA Swab Decision and
Discovery Order

LAWRENCE JONES

:
Defendant

-----X
JUSTICE MARTIN P. MURPHY

The defendant is charged *inter alia* murder in the second degree and criminal possession of a weapon in the second degree.

It is alleged that on or about *May 25, 2012* in the vicinity of *847 Hancock Street* in Kings County, the *defendant* shot in the back. later died from his wounds.

Numerous witnesses at the time reported hearing at least five shots fired at the time.

A deformed bullet was recovered at the scene and vouchered.

Defendant was arrested at his home at *77 Schaeffer Street* in Kings County on *June 15, 2012*. A *black revolver*, believed to belong to the *defendant*, was recovered at the time.

Microscopic results of the bullet and firing tests of the revolver concluded that the recovered, deformed bullet had been fired from the revolver recovered at *defendant's* home.

Defendant was later indicted as previously indicated.

The weapon was vouchered and later submitted to the *Office of the Chief Medical Examiner (O.C.M.E.)* lab for testing. Swabs of the firearm were also obtained for possible *DNA* testing.

On *September 14, 2012*, the *O.C. M. E.* issued a report, indicating that swabs taken from

the gun were tested and that the results are suitable for comparison. Specifically, the report in part indicated that:

Human DNA sufficient for PCR DNA testing was found on the following samples:

- swab from “cylinder”
- swab from “grip”
- swab from “trigger and trigger guard”
- swab from “safety”
- swab from “muzzle”

It continued:

PCR DNA testing was done and the results were suitable for comparison. The report also indicated that a mixture of *DNA* from at least three people was found on the grip of the gun and a mixture of *DNA* from at least two people was found on the swabs from the trigger, trigger guard and safety. Furthermore, the mixture of *DNA* on the grip contains a profile of at least one major contributor. The profile of the minor contributors on the grip, trigger and trigger guard could not be determined, but the results are also suitable for comparison.

Pursuant to *CPL 240. 40 (2)(b) (v)*, the People now request an order permitting the taking of oral swab samples from the *defendant* by means of a buccal swab for *DNA* testing and comparison to the stains obtained from the weapon. The People believe that such comparison will establish the identity of the *defendant* as the possessor/owner of the weapon and further their investigation into the charged crimes.

The *defendant* has submitted an affirmation in opposition in which he contests the sufficiency of the People’s arguments in meeting their burden to establish that relevant, material evidence will be found. *Defendant* also contests that the People previously objected to a *Mapp*, stating they did not intend to introduce any physical evidence. *Defendant* therefore

requests that should a swab order be granted, this court order a *Mapp* hearing in this case. Finally, again should this court grant a swab order, *defendant* requests a protective order preventing the *OCME* from sharing the results with other agencies.

After a review of the People's motion papers, filed on *July 8, 2013* and the *defendant's* affirmation in opposition, filed on *August 2, 2013*, the official court file, and all of the prior court proceedings, this court finds *defendant's* arguments to be unavailing and *GRANTS* the People's request for the taking of a buccal swab.

CPL 240.40 (2)(b) (v) provides:

Upon motion of the prosecutor, and subject to constitutional limitation, the court in which an indictment, superior court information, prosecutor's information, information, or simplified information charging a misdemeanor is pending...(b) may order the defendant to provide non-testimonial evidence. Such order may, among other things, require the defendant to:

(v) Permit the taking of samples of blood, hair or other materials from his body in a manner not involving an unreasonable intrusion thereof or a risk of serious physical injury thereto.

In the *Matter of Abe A.*, 56 NY2d 288 [1982], the *Court of Appeals* held that a suspect in a murder investigation could be compelled to provide a blood sample provided the prosecutor established : (1) that there was probable cause to believe the suspect has committed the crime, (2) that there is a "clear indication" that relevant evidence will be found, and (3) that the method used to secure it is safe and reliable. The court continued :

"In addition, the issuing court must weigh the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it, on the one hand, against concern for the suspect's constitutional right to be free from bodily intrusion on the other."

Also People v Cacciabaudo, 153 AD2d 856 [2nd Dept.,1989], *People v Rohl*, 148 AD2d 706 [2nd Dept.,1989], *Matter of Victor Valdes*, 28 AD2d 781 [2nd Dept., 2006] .

In this case, the requirements of *Abe A.* have been met. As previously noted, the *defendant* was indicted by legally sufficient evidence to establish reasonable cause to believe *defendant's* commission of the charged crimes. In addition, this court has determined in a *Decision and Order*, issued earlier, that the grand jury proceeding was not defective and that there was legally sufficient evidence presented to sustain the indictment.

In addition, there is a clear indication that the evidence sought is relevant and material to the crimes with which *defendant* is charged. A swab of *defendant's* inner cheek would be minimally invasive and the method to be used is safe and reliable. Finally, this court finds that the *defendant* is charged with very serious crimes; that the evidence sought is important to the investigation and the minimal intrusiveness of obtaining it outweighs any concern for the *defendant's* constitutional right to be free from bodily intrusion.

It is therefore *ORDERED*, that for the purpose of taking the oral swab samples, *defendant Lawrence Jones, NYSID #09510589-Z* , must be made available for *New York City Court Officers, Detectives of the New York City Police Department and/or Detective Investigators* from the *Kings County District Attorney's Office*, to take the oral swab samples, which representative will thereafter take custody of said oral swab samples. It is further :

ORDERED, that the *Office of the Chief Medical Examiner* is directed to compare the known *DNA* profile of *Lawrence Jones* strictly to the items of evidence submitted in association with *Forensic Biology # 12-02624* and it is further:

ORDERED, that the *Office of the Chief Medical Examiner* is further directed to refrain from entering the *DNA* profile of *Lawrence Jones* into the *OCME DNA Databank*, unless there

is a conviction in this case and it is further:

ORDERED, that the *Office of the Chief Medical Examiner* is further directed to refrain from entering the *DNA* profile of *Lawrence Jones* into any *State-wide* or *Federal DNA* database.

Finally, should the *DNA* comparison results indicate the presence of *defendant's DNA* on the recovered weapon, and should the People seek to admit the gun into evidence at trial, *defendant* is hereby *GRANTED* a pretrial *Mapp* hearing to determine the weapon's admissibility.

Defendant's Discovery Demand for Raw DNA Data

Numerous items of discovery, including those pertaining to the *DNA* testing conducted in this case, have been requested by the *defendant* and provided by the People.

The sole issue in that regard that remains to date unresolved is what *defendant* refers to as *electronic raw data* and what the People assert instead is known as *raw data* which they maintain is not readily available or exist in a form that is readily collectible; the People also argue that requiring *OCME* to collect it would be unduly and unreasonably burdensome and amount to the creation of material for the sole purpose of discovery.

This court agrees.

To begin, the People have previously provided the *electropherograms*, also termed *electronic raw data*, which are relied upon by the analyst to interpret *DNA* results. The *electropherograms* are contained within the *OCME's* case file and have been previously turned over to the defense. In addition, the People herein consent to also now provide the *electropherograms* of the controls, allelic ladder and size controls, should *defendant* which to have those items.

Raw data on the other hand is data which exists only on the *OCME's* network, is not stored on the *OCME's LIMS* or management system network as individual case information but rather is "batched" together with data from multiple cases and, as such, would have to be culled

or edited *via* an extremely time-consuming and burdensome process.

CPL 240.20 (1) © reads:

- (1) Except to the extent provided by court order, upon a demand to produce by a defendant against whom an indictment, superior court information, prosecutor's information, information or simplified information charging a misdemeanor is pending, the prosecutor shall disclose to the defendant and make available for inspection, photographing, copying or testing, the following property:
 - © Any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the People intend to introduce at trial...

“[T]he Legislature has prescribed a detailed discovery regimen in New York embodied in Article 240 of the Criminal Procedure Law” . *People v Colavito*, 87 NY2d 423[1996]. “Items not enumerated in Article 240 are not discoverable as a matter of right unless constitutionally or otherwise specially mandated.” *Id.* “CPL Article 240.20, which should be strictly construed, codifies the full breadth of criminal discovery, including disclosure of evidence guaranteed by the Constitution, required by fundamental fairness and mandated by legislative policy.” *People v Alvarez*, 38 AD 3d 930 [3rd Dept., 2007], *lv den* 8 NY3d 981 [2007].

In the instant case, the People have complied with the requirements and mandates of CPL Article 240. The *raw data* sought by *defendant* does not constitute either existing reports or existing documents. As such, the discovery requested would have to be created by sifting through large repositories of raw data, thereby consuming an inordinate amount of *OCME's* time and resources. As noted, *eg.*, by the *Third Department* in *Matter of Farrell v LaBuda*, 2012 NY Slip Op 2545 [3rd Dept., 2012], the District Attorney “is not constitutionally or statutorily required to

created discoverable evidence.”

Here, such a request seems particularly unreasonable, given the fact that *OCME* analysts do not base their conclusion upon the raw data, but rather upon the reports generated therefrom, which have previously been provided to *defendant*. Moreover, as earlier indicated, the People do not intend to introduce the raw data as evidence at trial.

It must also be noted that *OCME* is not a law enforcement agency under the People’s control. Accordingly, the *raw data* sought does not constitute *Rosario* material, required to be turned over by the People. *People v Washington*, 86 NY2d 189 [1995]; also see *People v Freycinet*, 11 NY3d 38 [2008].

Finally, *defendant* contends that the *raw data* is needed, since a defense expert may change the parameters of interpretation in order to detect genetic markers ignored by the *OCME*. In thus arguing, *defendant* references data that was interpreted using a threshold of under 75 *Relative Florescent Units (RFU’s)*, the threshold set by *OCME’s* protocol. Such a threshold is utilized by the *OCME analysts* in order that they feel confident that the data they are analyzing can reliably be considered as true alleles and not be artifact, noise or stutter, all of which is not true *DNA*. That analytical threshold, 75 *RFU’s*, is the minimum height requirement at and above which detected peaks can be reliably distinguished from background noise.

Therefore, based upon all of the foregoing, *defendant’s* request for *raw data* is *DENIED*. However, *defendant* is to be provided with all the *electropherograms* of the controls, allelic ladder, size controls as well as any *electronic raw data (reports)*, not previously provided.

The foregoing constitutes the *decision* and *order* of the court.

Dated: Brooklyn, New York
June 12, 2014


MARTIN P. MURPHY, A.J. S. C