

This matter has come before the court on motion of defendants, Ralph Lee and Eric Kelley, for a new trial based upon newly discovered evidence.

(Recite facts here.)

The standards in New Jersey for what is required for new evidence to entitle the defendants to a new trial are set forth in State vs. Carter 85 NJ 300 (1981). The court ruled that the factors that are to be considered with respect to new evidence entitling a new trial are 3 fold and all must be met:

1. The new evidence must be material to the issue and not merely cumulative or impeaching or contradictory.
2. The new evidence must be discovered since the trial and not discoverable by reasonable diligence beforehand and
3. Is of the sort that would probably change the jury's verdict if a new trial were granted.

The crux of the defense argument is that discovery of Eric Dixon's DNA on the hat is the "new" evidence, and not the fact that the new DNA excludes Lee completely. I agree with defense counsel that the new evidence is the identity of Eric Dixon and the unknown identity of 4 other individuals and not simply the exclusion of Ralph Lee.

Applying the criteria of Carter, this court finds that the new evidence of Eric Dixon's DNA meets all 3 criteria mandated by that case.

Applying the first criteria, the new DNA evidence is clearly material. When identity of a perpetrator is in question, as it is here, the DNA on a hat found so close to the deceased and

identified by an eyewitness, can only lead one to conclude it is material. Applying the 2nd criteria, it is unequivocal that the new DNA testing utilized after my decision in 2010 was not available at the time of both trials and consequently not discoverable by reasonable diligence. Furthermore, the new testing conducted on the hat included 7 more areas of the hat not tested at the time of the initial investigation and thus was more comprehensive, exhaustive and informative. Lastly, this court is of the opinion that the new evidence, ie. DNA of Eric Dixon and he being the primary contributor, is of the nature that would probably change a jury verdict.

Simply stated, and as the Supreme Court of New Jersey concluded in *State. Vs Fortin*, 178 NJ 540 (2004), the constitutional right to present a defense confers on the defendant the right to argue that someone else committed the crime. See also *St vs Jimenez* 175 NJ 475 (2003) , *St vs Koedatich*, 112 NJ 225 (1998). A general denial implicitly raises the defense of 3rd party guilt. However, unlike *Fortin*, the defendants here now have strong evidence of 3rd party guilt, ie., a positive DNA id found on a hat so near to the victim, along with a positive exclusion of both defendants. Further, unlike the facts in the *Fortin* matter, I find that the scientific evidence discovered here is both relevant and reliable. I emphasize that this new DNA evidence is clearly and convincingly capable of raising a reasonable doubt as to the guilt of both defendants and that there is a link between a third party and the crime. As you recall, Mrs. Paredes said the person she saw in the video store had a cap on that was found near the victim and she picked out Ralph Lee in a photo array as the one who she saw wearing it that day. However, his DNA is not on the hat but Eric Dixon's DNA is on it and that cap is found in close proximity to the victim. While I do agree with the State that, to some extent this was not a signature crime, the fact that Eric Dixon committed a similar crime not far from the video store (and parenthetically

had just been released from prison for that crime and was living in Paterson then and his DNA is on the hat) lead me to believe that 3rd party guilt is a natural argument to be made by both defendants. To paraphrase the court in *St. vs. Peterson*, 364 N.J. Super. 387 (App. Div. 2003), "DNA testing which shows that another person was the source of the crime scene evidence that a State's witness attributes to a defendant certainly would be material to the issue of a perpetrator's identity and not merely cumulative or impeaching or contradictory." See also *State vs. DeMarco*, 387 NJ Super. 506 (App. Div. 2006). The Peterson court further suggests there is no question that DNA testing is far more sophisticated now than it was at the time of the investigation of this crime. The DNA testing in the early 1990s could only exculpate a suspect. Today, DNA results that not only tend to exculpate a defendant but also implicate someone else is the type of evidence that would probably change the jury's verdict if a new trial was granted. I also consider the testimony of the DNA expert witness who testified in the new trial hearing. He indicated that given the sensitivities of current technology, if either Kelley or Lee was wearing the hat during the crime, they would have left sufficient DNA on that hat that their DNA would have been found in the testing. He continued to opine that studies have examined how long it takes to transfer one's biology to various substrates and it takes anywhere from only 10 to 15 seconds to deposit anywhere from 6 to 12 nanograms of your DNA to the surface of a cotton garment. Consequently, based on the testimony of Mrs. Paredes, this cap was worn by the man she observed in the video store for a sufficient period of time to transfer and deposit DNA. This testimony could very likely lead a jury to conclude that any statements made by the defendants regarding ownership and or the wearing of the hat earlier that day are false and should not be considered as a truthful portion of the confessions

elicited by the police. It should also be emphasized here that, according to the decision in State v. Ways, 180 NJ 171 (2004), it is a probability, not a certainty, that a jury could find the defendants not guilty.

I also note that the State did not produce any expert to testify how Lee (and Kelley for that matter who claimed the hat belonged to him) could not have contributed an iota of DNA to that hat.

Based upon my conclusion that the DNA evidence of Eric Dixon falls squarely within the criteria of Carter, I conclude that the following arguments by defense counsel in their briefs filed with the court, while in and of themselves, may not individually meet the criteria for a new trial, nevertheless, I must consider those arguments in the totality of the circumstances and in the shadow of the new DNA evidence:

I will now address those circumstances that I find most compelling:

3 independent witnesses in video store that day only testified as to one black individual in the store and no white male or second black male outside the store. Further, Ms. Paredes only had a momentary glance at the man in the hat and had no reason to commit his face to memory, in addition to saying that she was in a hurry while she was in the video store. And I cannot ignore how the photo array identification was conducted when I compare it to the manner in which State vs Henderson, 208 NJ 208 (2011) has now changed the jury charge on how identification procedures should be considered by jurors. (Blind or double blind administration, particular instructions to the witness viewing an array, etc.) In this case, detective Reyes was the main

investigator who indicated to Paredes the suspects had been caught, suggesting, in my opinion, that the witness should pick out a photo.

I also find great significance in the testimony of James Trainum, an expert in Police Practices who testified as to police practices and the confessions by Lee and Kelley. Specifically I refer to his testimony regarding contamination, tunnel vision and noble cause corruption. Initially, I was not considering this to be of import in my decision. However, portions of Reyes' testimony fall spot on into those theories. He testified, in essence, even if he had the same quality of evidence regarding the latest DNA of Eric Dixon that was found on a hat described by Paredes as being worn by Lee, he still would not have considered investigating Mr. Dixon. This is probably the best example of tunnel vision that one can imagine. One also must look to the confession of Kelly who said the hat was his. While we do not know how long he possessed that hat, Reyes believed it was his. But Kelley's DNA is not on that hat. Under these circumstances, shouldn't a new jury consider that the main contributor of the DNA is Eric Dixon and not Kelley who said he *owned* the hat and wore it earlier that day?

The court is further concerned about the double hearsay of the two informants. Both indicated that they "heard" there were 2 black males and one white male who acted as a look out. One even claimed the he or she knew members of the defendant's families. Prior to this "information" being given to Paterson Police, it was thought that there was only one individual involved. However, this informant hearsay apparently became a major component part of the police theory of the case. This is clearly obvious as it appears law enforcement did not reconsider how 3 independent witnesses spoke of seeing only one individual at the scene. Had the police not been convinced that there were 3 suspects, the possibility that there was only

one perpetrator was never reconsidered. This then leads to my opinion that one, this portion of the investigation may be a product of tunnel vision and noble cause corruption and, number 2, I am concerned about defense counsel's decision to allow the jury to hear this hearsay evidence.

Defense counsel should never have decided to allow the jury to hear it. It is a classic example where the probative value of the evidence (whatever defense counsel's strategy) is outweighed by the prejudice to his client. I cannot conceive of any legitimate reason for defense counsel to permit this especially in light of the new DNA evidence.

The state takes the position that prong three is not met when considering that the new evidence of Dixon's DNA and similar crime are not admissible and therefore a new jury will not hear that testimony. I disagree. There are at least 2 ways this evidence can be admitted. First, there is a judgement of conviction available and it would be admissible under our rules of evidence. Second, the victim and/or the investigating officers can testify as to the facts of that case.

There are other portions of testimony that must now be given more significance in light of the new evidence of possible 3RD party guilt:

- There are no witnesses who see the defendants soon after the homicide who observe blood on the defendants clothes;
- The confessions of the defendants are clearly inconsistent with the testimony of the crime scene expert who testified how the blood stains observed in the video store suggest a different scenario of where and how the victim was murdered;

- None of Kelley's clothes that he described as wearing during the crime were ever recovered with blood stains on them;
- The manner in which the potential testimony of James Thompson was handled by law enforcement investigating this case at the time of the murder and the significance given to it or lack thereof.

I wish to emphasize that this decision in no way, shape or form, is to be considered that my opinion is that the defendants are not guilty. That is a clearly a jury question. It is a decision based on the case law cited and the manner in which the new DNA evidence has a probability of casting a different light on all of the evidence. I recognize the difficulties of retrying these cases years later, if that should occur, but the mere passage of time is not a reason to deny this motion. During the trials and this motion, the State has relied heavily on the statements given by the defendants when they were initially arrested. However, history has shown many instances where false confessions are given and DNA has proven the defendant or defendants not guilty notwithstanding a confession.

Therefore, in light of the foregoing reasons, the motion for a new trial as to both defendants, Ralph Lee and Eric Kelley, is hereby granted.