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RECENT DEVELOPMENT

ALLEN V. STATE: DNA EVIDENCE OF A THIRD PARTY FOUND AT A CRIME SCENE MUST BE CONFIRMED BY ADDITIONAL TESTING TO PERMIT ADMISSION AT TRIAL; EXTRA TESTING REQUIREMENT DOES NOT VIOLATE THE SIXTH AMENDMENT.

By: George Makris

The Court of Appeals of Maryland held that DNA evidence matching a third party is not admissible at trial unless additional testing is conducted to confirm the match. *Allen v. State*, 440 Md. 643, 676-77, 103 A.3d 700, 719-20 (2014). Additionally, the court held that the testing requirements of Section 2-510 of the Public Safety Article of the Maryland Code (“PS § 2-510”) provide a reasonable restriction on the admission of DNA evidence and, therefore, the potential exclusion of DNA evidence does not infringe upon the Sixth Amendment right to present a fair defense. *Id.*

Petitioners Traimne Martinez Allen (“Allen”) and Howard Bay Diggs (“Diggs”) were involved in a number of crimes stemming from a robbery. Influenced by two former girlfriends of the victims, Allen and Diggs participated in planning the invasion and robbery. The girlfriends facilitated Allen and Diggs’s access to the victims’ apartment. Upon entry, Allen and Diggs bound the victims and searched the home for anything of value. One victim attempted to escape and flee the apartment; seeing the victim flee, Allen and Diggs fired shots and struck the victim in the back. An unrelated investigation by officers of the Montgomery County Police Department was taking place in the same area as the robbery. Officers observed the petitioners’ movements and initiated pursuit when gunfire erupted. The petitioners fled the scene and officers arrested all present but Allen and Diggs.

DNA samples were taken from five items found at the crime scene and sent to the Montgomery County Crime Laboratory for analysis. When none of the DNA samples matched the victims or the suspects, the laboratory uploaded the DNA profiles to the Federal Bureau of Investigation’s (“FBI”) Combined DNA Index System (“CODIS”). One of the samples produced various matching DNA profiles, the main contributor being Allen’s DNA. Two other DNA samples were matched to DNA records of unrelated individuals, including Richard Debreaux.

During a pre-trial hearing, defense counsel proffered that Debreaux was a known gang member who committed a nearly identical robbery. Defense counsel also moved to compel the State to compare all DNA samples acquired from the crime scene to the third party DNA, as well a motion in limine to prevent the introduction that the defendants were gang members. Both of these motions were denied. Defense counsel moved for a mistrial or, in the

alternative, to obtain a continuance to further develop third party evidence. The court denied both requests.

Petitioners were tried and convicted in the Circuit Court for Montgomery County of attempted first degree murder, first degree burglary, and other related crimes. Allen and Diggs appealed to the Court of Special Appeals of Maryland, which affirmed. Allen and Diggs filed a petition for a writ of certiorari, which the Court of Appeals of Maryland granted.

The court began its analysis by reviewing the standard as to which DNA evidence could be admitted into a trial. *Allen*, 440 Md. at 657, 103 A.3d at 708. The court recognized potential strategic value of the information that Debreau had been convicted of a highly similar crime in shifting blame away from the defendants. *Id.* at 663, 103 A.3d at 712. The defense did not address how the mere presence of the third party DNA alone would be relevant. *Id.* The court was concerned that this evidence would have been largely misleading and confusing to the jury. *Id.* at 665, 103 A.3d at 713. In addressing the admissibility of the third party DNA evidence, the court looked to Maryland Rule 5-403, which offers a balancing test. The balancing test dictates that for evidence to be admissible, its probative value must outweigh the danger of unfair prejudice. *Id.* The court found that the admission of Debreau's DNA match would fail the balancing test; such introduction would have led into a "mini trial" regarding Debreau and gang practices, which would confuse and mislead the jury. *Id.* Furthermore, the evidence of Debreau previously committing a nearly identical crime would also be inadmissible as it is "other crimes" evidence. Other crimes evidence is governed by Maryland Rule 5-404(b), which provides that this type of evidence can only be related to acts of the *defendant* in the case; in the case at bar, Debreau was not one of the defendants. *Id.* at 664, 103 A.3d at 712 (citing *Sessoms v. State*, 357 Md. 274, 744 A.2d 9 (2000)).

Issues of relevance and prejudice aside, Maryland law imposes statutory limits as to the admissibility of DNA profile evidence through the Maryland DNA Collection Act—codified in PS § 2-510. *Allen*, 440 Md. at 658, 103 A.3d at 708-09. At issue for the court regarding PS § 2-510 was a regulation providing that "[a] match obtained between an evidence sample and a data base entry may be used *only as probable cause and is not admissible at trial unless confirmed by additional testing.*" *Id.* at 666, 103 A.3d at 713 (emphasis added). The Court of Appeals of Maryland analyzed the intent and meaning of PS § 2-510, primarily focusing on the plain language of the statute. *Id.* at 667, 103 A.3d at 714. First, the court held that "additional testing" must mean something more than the original test that results in the initial "match" between DNA profiles. *Id.* at 670, 103 A.3d at 716. The court opined this would include, at a minimum, a statistical analysis as to the likelihood that a random person would match that sample. *Id.* at 669, 103 A.3d at 715 (citing *Young v. State*, 388 Md. 99, 879 A.2d 44 (2005)). Accordingly, the additional testing would come in the form of a direct comparison test, where the laboratory

gathers a DNA sample from the suspect and directly confirms any DNA match with fresh testing. *Allen*, 440 Md. at 671, 103 A.3d at 716.

The court then addressed Section 2-508 of the Public Safety Article of the Maryland Code (“PS § 2-508”), which expressly provides the defense access to relevant DNA evidence, in response to Allen’s contention that PS § 2-508 and PS § 2-510 are at odds. *Allen*, 440 Md. at 675, 103 A.3d at 718-19. The court dispelled this notion by stating that the guidelines are only intended to assist in developing evidence rather than determining admissibility. *Id.* at 675-76, 103 A.3d at 719.

The court concluded that the plain language of PS § 2-510 puts the burden on a defendant seeking to introduce evidence of a DNA match to procure additional confirmatory testing to permit its admissibility at trial. *Allen*, 440 Md. at 676, 103 A.3d at 719. The court acknowledged that the record revealed that Allen had the opportunity to obtain the requisite testing but did not do so. *Id.* The court determined that in failing to procure the requisite additional testing, the DNA evidence was correctly ruled inadmissible at trial. *Id.*

The court concluded its analysis by addressing whether any Sixth Amendment rights were implicated in excluding the DNA profile matches from evidence. The court found that the restrictions imposed by PS § 2-510 do not constitute any Sixth Amendment violations. PS § 2-510 is simply a reasonable restriction that ensures the reliability of evidence; it does not preclude the admissibility of such evidence. As such, the Sixth Amendment right to present a fair defense at trial is not implicated.

In *Allen*, the Court of Appeals of Maryland held that evidence of a third party DNA match is inadmissible unless additional testing is done to confirm the match. There may be a potential financial issue for defendants unable to cover the cost of this testing, especially indigent defendants being represented by public defenders. This may lead to another battle in the judicial system to determine whether tests, such as these, are entitled to defendants who can prove their indigence and necessity for DNA match evidence. There could be further issues for even non-indigent defendants. Potentially immense levels of testing could flood the existing infrastructure with these DNA tests. Accuracy in testing could be affected, and this is assuming the state would accept the responsibility of running these tests. Citing the anticipated volume, the state-run labs could refuse these tests, which could lead to defendants being unable to procure satisfactory testing of evidence that could potentially exonerate them.