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Case Number 520,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAKAI CHAVIS,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 520, 2018
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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I. THE TRIAL COURT DENIED CHAVIS HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM AND VIOLATED DELAWARE'S CHAIN OF CUSTODY LAW WHEN IT ALLOWED THE STATE TO INTRODUCE DNA TEST RESULTS, THE ONLY EVIDENCE LINKING HIM TO THE CRIME OF WHICH HE WAS CONVICTED, WITHOUT THE TESTIMONY OF ALL INDIVIDUALS WHO TOUCHED THE ACTUAL DNA SAMPLE AND WHO PARTICIPATED IN ITS ANALYSIS.

In its claim that Chavis did not have the right to confront all of the analysts who actively participated in testing the samples in his case, the State erroneously relies on *Williams v. Illinois*.[1] In that case, unlike in ours, the State did not enter the DNA report into evidence. The forensic expert from one lab relied on a report generated at another lab. However, when he testified, he did not refer to the report in any significant way, did not discuss the testing procedures that were followed and did not vouch for the quality of the testing. Further, the factfinder, a judge, did not see the report.[2] There, the Court addressed "the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence."[3] The Court noted this issue was left over after *Bullcoming*[4] which concluded that an analyst had to testify when introducing a report into evidence.[5]

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[1] 567 U.S. 50, 56 (2012).
[2] *Id.* at 70-71.
[3] *Id.* at 66.
[4] *Bullcoming v. New Mexico*, 564 U.S. 647, 660 (2011).
[5] *Id.* at 64.

Because the report in our case was introduced as substantive evidence, *Williams* is inapplicable. Here, the report was generated as the result of work by multiple analysts whom Siddons identified. Further, Siddons discussed the functions of the other analysts and vouched for the quality of their work. Additionally, her functions and data were dependent upon the data generated by the other analysts. In other words, the report was not simply referred to as a basis of explaining Siddons opinion. It was introduced into evidence for the "purpose of proving the truth of the matter it asserted."[6] It was the report upon which the State relied in establishing the identification element in this case. Thus, Chavis had a right to confront those who generated this substantive evidence.[7]

Additionally, unlike in our case, the DNA report upon which the testifying expert in *Williams* relied was not generated for the purpose of prosecution:

> [T]he primary purpose of the Cellmark [DNA] report, viewed objectively, was not to accuse [Williams] or to create evidence for use at trial. When the [Illinois State Police] lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against [Williams], who was neither in custody nor under suspicion at that time. Similarly, no one at Cellmark could have possibly known that the profile that it produced would turn out to inculpate [Williams]—or for that matter, anyone else whose DNA profile was in a law enforcement database. Under these circumstances, there was no "prospect of fabrication" and no incentive to produce anything other than a scientifically sound and reliable profile.[8]

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[6] 567 U.S. at 64. *See D.R.E.* 703.

[7] *See United States v. Turner*, 709 F.3d 1187, 1191 (7th Cir. 2013).

[8] 567 U.S. at 84–85.

The *Williams* plurality pointed out that, at Cellmark, "[w]hen lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be."[9] Justice Breyer also noted in a concurring opinion that the Cellmark employees who worked on the report **in that case**, "operated under a veil of ignorance that likely prevented them from knowing the identity of the defendant **in th[at] case**."[10]

Here, unlike in *Williams*, the primary purpose of the work performed at Bode was absolutely for the purpose of obtaining evidence for use at trial. None of the technicians operated under any "veil of ignorance." Indeed, Chavis' biological sample was overtly labeled as "Chavis/Dakai"[11] when it was sent as a reference sample for testing. Further, an evidence sample sent to the lab was overtly labeled "swab of hand print on window (POE)[.]"[12] The technicians knew exactly what they were working on, and thus, unlike the technicians in *Williams*, their work was testimonial for purposes of the Confrontation Clause.

The State's argument regarding *Milligan v. State*[13] misunderstands Chavis' argument. In *Milligan*, which was a DUI case, the appellant argued that she had the constitutional right to be confronted by all members in chain of custody for a

[9] *Id.* at 85.
[10] *Id.* at 93–94 (Breyer, J., concurring) (emphasis added).
[11] A65.
[12] A63.
[13] 116 A.3d 1232, 1234 (Del. 2015).

blood test "who took possession of [her] blood sample, regardless of whether [the sample] was packaged at the time."[14] This Court rejected such a sweeping argument, holding that the Confrontation Clause did not require that "everyone who laid hands on the evidence need[ed] to testify" at trial.[15] Chavis makes no such argument here. He did not seek the presence of Aponte, Chen and the other forensic technicians because they *laid hands* on *packaged* samples. Rather, those technicians physically manipulated and actively participated in testing the actual samples. In fact, their functions were quite similar to those performed by Siddons.[16]

The State also cites to cases from other jurisdictions for the proposition that only Siddon was required to testify because it was her work that was the product of expertise and independent analysis. Yet, the State repeatedly concedes that Siddon performed "highly automated" functions.[17] And, due to the manner in which it developed (or failed to develop) the record regarding Siddons' opinion, the State's reliance on cases in other jurisdictions is not helpful to its case. For example, the State cites to *United States v. Summers* where an FBI analyst "directed his subordinate analysts to conduct" testing on a jacket believed to be worn and

[14] *Id.* (emphasis added).
[15] *Id.* at 1239–40 (citation omitted) (internal quotation marks omitted).
[16] A110–111.
[17] Ans.Br. at p.11.

discarded by the defendant.[18] The analyst wrote a report on the results of the testing and testified at trial, though the subordinates did not.[19] The court ruled that the absence of the subordinates did not violate the Confrontation Clause "given the predominance . . . of [the analyst's] independent, subjective opinion and judgment relative to the lesser emphasis accorded the objective raw data generated by the [subordinates]."[20] The court noted that the analyst "painstakingly explained the process" by which he "evaluated the data to reach" his conclusion. Here, on the other hand, Siddons provided very little explanation, let alone a "painstaking" one, as to any independent process in which she engaged to reach her conclusion. In fact, she provides no explanation in either her affidavit or her report.[21] At trial, Siddons spent quite a bit of time explaining the processes the other analysts performed and simply reported her findings.[22]

The majority of Siddons' functions included, "plac[ing] the tray [of samples] onto a machine" for measuring, "placing the sample into a machine" for amplification if necessary, placing the sample into a "machine which actually creates the DNA profiles" and entering the profiles "into a local database." Then,

[18] 666 F.3d 192, 195–97 (4th Cir. 2011).
[19] *Id.* at 196.
[20] *Id.* at 201.
[21] A41-45, B1-B3.
[22] A41-45, 110-111.

when the database "reported a 'hit' or a 'match,' she reported it.[23] The other technicians physically manipulated the samples before them, which involved adding agents, cutting swabs, and wearing protective gear.[24] This work, and the protocols involved with it, is precisely the sort of "past events and human actions not revealed in raw, machine-produced data" which is "meet for cross examination."[25]

Here, Chavis sought and had the right to confront the analysts on the tests in which they participated. Siddons' assurances at trial regarding the actions of the other analysts did not satisfy his right to confront and cross-examine those analysts. The trial court was prohibited from dispensing "with confrontation simply because [it] believe[d] that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."[26] Because the trial court denied him that right, his conviction must be reversed.

Despite the State's contention to the contrary, Delaware's chain of custody statute, as codified in 10 *Del. C.* § 4331, does have applicability outside of the "controlled substance" context and can be applied to DNA. The State fails to

[23] A42-44. *See* Ans.Br. at pp.11-12, 14-16.
[24] A110–111.
[25] *Bullcoming,* 564 U.S. at 660.
[26] *Id.* at 662.

understand Chavis' point that *McNally v. State*[27] and *Milligan* support a conclusion that, while Delaware does not have a chain of custody statute specifically applicable to DNA, section 4331 may serve that purpose. Therefore, Chavis' citation to those decisions is not misplaced. Just as in our case, those cases dealt with matters outside of the controlled substances context (*e.g.*, a gun in *McNally* and a DUI in *Milligan*); yet in both instances, this Court applied Section 4331 to those circumstances. Thus, there is precedent that would allow this Court to apply section 4331 in our case.

Unlike the ordinary case where a lab custodian is unnecessary to testify in court under § 4331,[28] Aponte and Chen unsealed the packages sent to Bode by the police and physically manipulated the DNA samples that were inside. They cut the swabs and placed them in test tubes. Several other analysts played active roles in the testing process by adding chemicals to the samples at various points. These functions are not the same as merely transporting a sealed package from one party to another. Rather, these are the type of functions precisely contemplated by § 4331. Thus, the State was required to produce them in accordance with their

[27] *McNally v. State*, 980 A.2d 364 (Del. 2009).
[28] *See McNally*, 980 A.2d at 370–72 (ruling that a laboratory employee who placed gunshot residue samples in a machine for analysis and turned the machine on was not required to appear); *Demby v. State*, 695 A.2d 1127, 1132 (Del. 1997) (ruling that a currier transporting a sealed envelope was not required to appear).

requirement to establish a proper chain of custody. Because the trial court abused its discretion in ruling to the contrary, Chavis' conviction must be reversed.

II. NO RATIONAL TRIER OF FACT, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, COULD FIND CHAVIS GUILTY BEYOND A REASONABLE DOUBT OF BURGLARY AS THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT HE WAS PRESENT WHEN THE CRIME OCCURRED OR THAT HE ENTERED THE PURPORTEDLY BURGLARIZED APARTMENT.

Contrary to what the State would have this Court conclude, the holding in *Monroe v. State*[29] is not limited to commercial facilities. It applies to private residences under circumstances such as ours where the State fails to present any evidence that the defendant entered the purportedly burglarized residence or that he was even in the area when the alleged burglary was committed. Here, the only evidence identifying Chavis as having been at the location where the crime took place was his DNA "handprint," and it was found outside the structure alleged to have been burglarized.[30]

The DNA was found on a bedroom window believed by police to be the point of entry into a ground-level apartment. That particular window was relatively accessible to the public as it faced the sidewalk and parking lot.[31] There was no evidence that the DNA sample found on the window was located where it would be expected to be left by someone who had opened the window. There was no evidence as to when that sample was left behind. No other evidence was found

[29] 652 A.2d 560.
[30] A99-100.
[31] A97.

on the window, the removed screen, or any of the items alleged to have been knocked off the window sill.

Significantly, no fingerprints or DNA were found inside the apartment; no fingerprints or DNA were located on the purse; neither occupant identified a possible trespasser;[32] there was no surveillance footage;[33] and the State produced no witnesses identifying a possible trespasser. Thus, something more than the DNA evidence was required for the State to prove that Chavis was at the scene at the time the crime was committed and that he actually went inside the residence. Yet, there was none. In fact, two witnesses testified that they actually saw someone in the area around the relevant time who did not even match Chavis' description.[34]

It is telling that the State does not address the cases that follow the *Monroe* rationale cited by Chavis in his Opening Brief. Of note, is the analogous case of *Barber v. State*[35] where the evidence identifying the defendant as the perpetrator of burglary of a residence was his palm print on the outside of the bathroom window. Just as in our case, the occupants did not know the defendant and there was no reason for his print to be there. In that case, property was stolen but nothing linked the defendant to that property. Further, there was no evidence to prove that the defendant entered the residence. While there was either dirt or marks inside the

[32] A104.
[33] A103.
[34] A104.
[35] 363 P.3d 459, 464 (Nev. 2015).

tub below the window, nothing revealed that it was the defendant who left the dirt or marks. There, the court concluded that, "[a]lthough circumstantial evidence alone may support a verdict," the evidence was just too "limited" to support the defendant's conviction.

Here, there is insufficient evidence of Chavis' guilt absent further circumstances tending to bolster an inference that the DNA could only have been made during the alleged burglary. Accordingly, the mere existence of Chavis' DNA in this case, without any additional supporting circumstantial evidence, does not support a reasonable inference that the print could only have been made when the crimes were committed. Therefore, this Court must reverse Chavis' conviction.

CONCLUSION

For the reasons and upon the authorities cited herein, Chavis' conviction must be reversed.

Respectfully submitted,

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