



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN RASIN,)	
)	
Defendant-Below,)	
Appellant,)	No. 325, 2012
)	
v.)	On Appeal from the Superior
)	Court of the State of
STATE OF DELAWARE,)	Delaware in and for
)	New Castle County
Plaintiff-Below,)	
Appellee.)	

APPELLANT'S OPENING BRIEF

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Dated: January 14, 2013

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Nature and Stage of Proceedings

1. On April 5, 2010, Alvin Butcher was shot and killed near Third and Harrison Streets in Wilmington, Delaware. A few weeks later, on April 30, 2010, two occupants of a moving vehicle were shot at in Browntown in Wilmington. A few days later, on May 3, 2010, José Charriez was shot and killed while seated in a vehicle stopped at the intersection of Eighth and Adams Streets in Wilmington.

2. On September 17, 2010, appellant Kevin Rasin was arrested in connection with the above-referenced incidents. (A1)

3. On October 7, 2010, an Indictment was filed against Rasin and six co-defendants, charging Rasin with:

a) Gang Participation (for allegedly committing the incidents of April 3, April 30 and May 3, 2010 as a member of a criminal street gang known as the Trapstars);

b) Two counts of Murder First Degree (for the April 5 shooting death of Alvin Butcher and the May 3 shooting death of José Charriez);

c) Two counts of Attempted Murder First Degree (for the April 30 shooting in Browntown); and

d) Conspiracy and firearm felonies associated with the foregoing. (A1, 23 & 28)

4. On January 23, 2012, Rasin filed several motions, including:

a) Motion to Dismiss Count I of the Indictment (Gang Participation); (A39-45)

b) Motion to Sever Gang Participation Charge; (A46-51)

c) Motion to Exclude DNA Analysis Prepared by NMS Labs. (A52-56)

5. On January 27, 2012, Rasin filed an Amended Motion to Dismiss Count I of the Indictment. (A67-78)

6. On February 3, 2102, Court heard argument on Rasin's motions and denied same. (A109-120)

7. On February 3, 2012, the State entered a "nolle prosequi" as to Rasin for the First Degree Murder and firearm charges involving the April 3, 2010 shooting death of Alvin Butcher. (A111)

8. On February 7, 2012, Rasin filed a Motion in Limine Regarding Admissibility of Rasin's Prior Convictions During State's Case In Chief. The Court denied same on February 14, 2012. (A79, A122)

9. On February 14, 2012, trial commenced.

10. On March 6, 2012, Rasin filed a motion to reargue the Court's decision to allow testimony regarding DNA analysis performed by the NMS Lab as disclosed in its report of October 20, 2010. (A94)

11. On March 16, 2012, the Court denied Rasin's Motion for Reargument. (A188-89)

12. On March 19, 2012, after more than four weeks of trial, the jury returned a verdict finding Rasin not guilty of one count of Attempted Murder and one Count of Possession of a Firearm During Commission of a Felony occurring on April 30, 2010, but guilty on all other counts. (A21)

13. On May 23, 2012, Rasin was sentenced to two terms of life imprisonment on the convictions of Murder First Degree and Attempted Murder First Degree and to additional fixed terms of imprisonment on the remaining convictions.

14. On June 15, 2012, Rasin appealed to the Delaware Supreme Court.

STATEMENT OF FACTS

1. Kevin Rasin belonged to a rap group known as the "Trapstars," which group the State also accused of being a criminal street gang. (A130)

2. On April 5, 2010, Alvin Butcher was shot and killed near the intersection of Third and Harrison Streets in Wilmington. Butcher had been a friend of Rasin's since childhood. Later that same week, Rasin was arrested but was not charged in connection with Butcher's shooting. He was released on bail to his mother Sherrie Benn and returned to his apartment on S. Rodney Street in Wilmington. (A262-3)

3. The next day, Rasin relocated to his mother's home at 189 Alton Avenue in Clayton, Delaware. Rasin lived there up until his arrest in September 2010. (A264)

4. Back in Wilmington, shooting continued. On April 30, 2010, in the Browntown neighborhood of Wilmington, a man shot at two occupants of a passing vehicle, missing both individuals. (A131)

5. On the evening of May 3, 2010, a shooting occurred at the intersection of Eighth and Adams Streets in Wilmington. José Charriez, a passenger in the targeted vehicle was struck in the head and killed. (A131)

6. Meanwhile, on the same evening of May 3, Rasin was at his mother's residence in Clayton, celebrating his grandfather's birthday with his mother, grandfather, sister and girlfriend. No one left the house that evening. (A265-6)

7. On September 17, 2010, members of the Wilmington Police Department arrested Rasin at his mother's home in Clayton in connection with the above-referenced incidents. (A268-9)

8. On October 7, 2010, Rasin was indicted in connection with the referenced incidents. The indictment alleged that he had perpetrated the shootings as a member of a criminal street gang known as the "Trapstars." Of the seven indicted co-defendants, five agreed to plea bargains. Rasin and co-defendant Marc Taylor proceeded to trial.

SUMMARY OF ARGUMENT

I. The Court erred when it ruled that Delaware's "gang participation" statute (11 Del. C. § 616) was not unconstitutionally vague, even though that statute failed to define the element of "active participation" in a criminal street gang.

II. The Court erred when it failed to grant Rasin's Motion to Sever the Gang Participation charge.

III. The Court erred when it denied Rasin's motion to limit admissibility of his prior convictions during the State's case-in-chief.

IV. The Court erred when it allowed the State to play a Trapstar rap song about drug dealing and violence.

V. The Court erred when it failed to preclude the State's DNA expert from NMS Labs from testifying regarding the presence of Rasin's DNA on the gun used in the April 30 and May 3 shootings.

ARGUMENT I

A. Question Presented

Did the Court err when it ruled that Delaware's "gang participation" statute (11 Del. C. § 616) was not unconstitutionally vague, even though that statute failed to define the element of "active participation" in a criminal street gang? (A39-45; A67-78)

B. Standard and Scope of Review

The Superior Court denied Rasin's motion to dismiss, which attacked the gang participation statute as unconstitutionally vague. Review of claims alleging infringement of constitutionally protected rights is *de novo*. Smith v. State, 560 A.2d 1004, 1007 (Del. 1989)

C. Merits

In 2003, Delaware established the felony of "illegal gang participation", codified at 11 Del. C. § 616.

Section 616 (b) describes the felony as follows:

(b) Forbidden conduct. -A person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity and who knowingly promotes, furthers or assists in any criminal conduct by members of that gang which would constitute a felony under Delaware law, shall be guilty of illegal gang participation. Illegal gang participation is a class F felony.

Section 616 (a) defines two of the terms appearing in § 616(b): "criminal street gang" and "pattern of criminal gang activity." No definition or rule, though, is specified for determining what behavior constitutes "active participation" in a criminal street gang, as required for a finding of guilt under § 616 (b).

On January 23, 2012, and January 27, 2012, Rasin filed motions to dismiss the gang participation charge (Count I of the Indictment) on grounds that § 616(b) is unconstitutionally vague.

At the outset, it is important to note that §616 restricts freedom of association, a constitutionally protected right specified in the U.S. Constitution, First Amendment, and Article I, Section 17 of the Delaware Constitution.

A vague statute, limiting constitutionally protected rights, cannot stand:

"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. See Kolender v. Lawson, 461 U.S., at 357."

Chicago v. Morales, 527 U.S. 41, 56 (1999)

The Delaware Supreme Court has explained the vagueness doctrine as follows:

"A statute is void for vagueness if it fails to give a person of ordinary

intelligence fair notice that his contemplated behavior is forbidden by the statute, or if it encourages arbitrary or erratic enforcement. Sanders v. State, Del. Supr., 585 A.2d 117, 127 (1990). The test to be applied in determining whether a criminal statute is void for vagueness is:

[t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties ..., and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

State v. J.K., Del. Supr., 383 A.2d 283, 291 (1977), cert. denied, 435 U.S. 1009, 98 S.Ct. 1882, 56 L.Ed.2d 392 (1978), quoting Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). "The underlying principle is that no man [or woman] shall be held criminally responsible for conduct which he [or she] could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954).

Although the void for vagueness doctrine "focuses both on actual notice to citizens and arbitrary enforcement, [the Supreme Court of the United States] has recognized recently that the more important aspect ... 'is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement.'" Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), quoting Smith v. Goguen, 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605

(1974). "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." Kolender, 461 U.S. at 358 n. 7, 103 S.Ct. 1855, quoting United States v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563 (1875). Minimal guidelines for law enforcement are necessary to prevent a "standardless sweep" allowing the pursuit of "personal predilections." Robinson v. State, Del.Supr., 600 A.2d 356, (1991)."

State v. Baker, 720 A.2d 1139, 1147-48 (Del. 1998).

Turning to Delaware's "gang participation" statute, Section 616 proscribes "active participation" in a criminal street gang, but fails to provide any rule for determining what conduct constitutes "active participation." Assuming that there is a set of activities which constitute "participation" in a criminal street gang, then the exact limits of that particular subset of activities which constitute "active participation" is undefined. In other words, the rule for determining when one passes from "inactive" or "passive" participation to "active" participation is unspecified, offering no clear guidance to persons for limiting the exercise of their freedom of association. In effect, the statute authorizes law enforcement to apply the statute as it sees fit, on a we'll-know-"active participation"-when-we-see-it basis.

By way of example, if a "participant" commits acts which are defined in other sections of the Delaware Criminal Code as

criminal acts, that might logically make that participant an "active participant" in a "criminal street gang." But if the participant commits acts that are otherwise lawful, but which have the effect of promoting, furthering or assisting in the gang's activity, such as wearing gang slogans to help increase the gang's influence in the community, no rule appears in the statute for establishing whether that is, or is not, active participation in a criminal street gang.

By failing to define the "active participation" element of illegal gang participation, § 616 fails "the requirement that a legislature establish minimal guidelines to govern law enforcement." Kolender at 357-8. As such, § 616(b) is unconstitutionally vague and cannot serve as the basis for a criminal charge against Rasin.

Because "gang participation" was the fundamental framework in which the State presented its evidence against Rasin, admitting otherwise inadmissible evidence regarding his and his purported cohorts' years of drug dealing, Rasin's right to a fair trial was prejudiced by the Court's failure to dismiss the unconstitutional charge of gang participation, warranting a new trial.

ARGUMENT II

A. Question Presented

Did the Court err when it failed to grant Rasin's Motion to Sever the Gang Participation charge? (A46-51)

B. Standard and Scope of Review

The Supreme Court reviews Superior Court's denial of a motion to sever for abuse of discretion. Drummond v. State, 2012 WL 5906602 (Del. Supr.)

C. Merits

On January 23, 2012, Rasin filed a Motion to Sever the Gang Participation charge. On February 3, 2012, the Court denied Rasin's motion.

Inclusion of the gang participation charge at Rasin's murder trial was unfairly prejudicial to him because it allowed the State to offer witnesses who portrayed Rasin as a frequent drug dealer in the area surrounding Third and Harrison Streets in Wilmington during the years prior to April and May 2010 when the shootings, which constituted the most serious charges against Rasin, occurred. No such testimony was specific enough, though, for the State to actually charge Rasin with any particular possession, or trafficking, offenses over that time period. Rasin's prior drug convictions, though, were introduced during the State's case-in-chief to paint him as a drug-dealing "Trapstar".

Without the gang participation charge, the State would not have been able to portray Rasin as a longstanding drug dealer during its case-in-chief, and would not have been allowed to admit evidence of Rasin's prior drug convictions, which would have significantly moderated the jury's view of Rasin as it considered the Murder First Degree count and the two Attempted Murder First Degree counts.

Given the drastic consequence of a First Degree Murder conviction—mandatory life in prison—the trial court abused its discretion when it allowed the "gang participation" charge (a class F felony) to be tried with the Murder First Degree and Attempted Murder First Degree charges. Portraying Rasin as a long standing drug dealer ("Trapstar Junior Black") became "the tail that wagged the dog" of the Murder First Degree and Attempted Murder First Degree charges, rendering for naught Delaware Rules of Evidence 404 (b) and 403(b), which would otherwise have discouraged evidence aimed at Rasin's character.

As such, the Court abused its discretion by failing to grant Rasin's motion to sever the gang participation charge, prejudicing Rasin's right to a fair trial on the most serious felonies and warranting grant of a new trial.

ARGUMENT III

A. Question Presented

Did the trial court err when it denied Rasin's motion to limit admissibility of his prior convictions during the State's case-in-chief? (A79-93)

B. Standard and Scope of Review

This Court reviews Superior Court evidentiary rulings for abuse of discretion. Williamson v. State, 707 A. 2d 350, 354 (Del. 1998)

C. Merits

On February 7, 2012, Rasin filed a motion to limit admissibility of his prior convictions during the State's case-in-chief. The Court denied Rasin's motion.

The State was thus allowed to introduce evidence of Rasin's prior drug convictions of 1) possession of schedule I controlled substance on April 3, 2008 (Superior Court, No. 004039093) and 2) maintaining of controlled substances on October 3, 2008 (Superior Court, No. 0907000948), both convictions showing Rasin had committed criminal acts constituting an alleged pattern of "criminal gang activity," allegedly under the banner of the Trapstars. The State's theory was that the two 2008 drug convictions, in and of themselves, supported a new conviction against Rasin for illegal gang participation from the period of January 1, 2008 through May 2010.

Ultimately, Rasin's April 2008 possession conviction was shown to be for simple possession of marijuana, not felony possession, and could not be considered as a predicate offense for a pattern of criminal gang activity under § 616.

Nevertheless, the evidence of Rasin's prior convictions must have informed the jury's view of Rasin as an established drug dealer, unfairly prejudicing the presumption of innocence to which Rasin was entitled, and warranting grant of a new trial.

ARGUMENT IV

A. Question Presented

Did the Court err when it allowed the State to play a Trapstar rap song about drug dealing and violence? (A280-85)

B. Standard and Scope of Review

This Court reviews Superior Court evidentiary rulings for abuse of discretion. Williamson v. State, 707 A. 2d 350, 354 (Del. 1998)

C. Merits

During its case-in-chief, and over Rasin's objection, the State admitted evidence of a Trapstar rap song performed by co-defendant Terrence Mills (a/k/a "Trapstar Mills"). The rap's lyric, below, was submitted to members of the jury for their reading as the music played:

"TRANSCRIPT

The following is a transcription of a Youtube.com video titled "T. Mills Trapstars Back In My Bag" performed by Terrence Mills, also known as Trapstar Mills.

Trapstar Mills, man.

Mills - Westside is what I rap, 3 and H is my set. We're up on Franklin now thou but I'm alright with it. Back in my back, back "roadsty" pussy. Simple as this look. I tell him to do this.

Mills- Tell him bring me on your radio.
Ride me through your trap laid back.
Blow smoke in the air but stay strapped.
Because those jack boyse plottin.
Those vice boys watchin.
808 is knockin.

Let me tell you where I've been.
Westside.
Home of heroin and rock choppin.
A lot of pill poppin.
And shots bangin like Stocktin.
Niggers dialing 911, ball a blockin.
But we be study clockin, trappin, not stoppin.
Beef pop off those niggers gettin boxed in.
Joe Black is strapped with Macs and we call him whop man.
You can call me numero uno because I'm the top man.
Infrared dottin your head now you're the spot man.
I'm pottin.
I don't see no competition.
(Unknown)
Got these lames dissin him.
You don't understand, its fame wasn't part of my plan.
I came up in this game with intentions the same.
And "Tone" is my right hand.
Look, he be gamen bitches, they be tell'em they got
a man.
He fuck them like they at sayin.
And na I aint trickin those bitches.
We aint payin.
We be hittin and ditchin those bitches, what is you
sayin.
We be where the breads at.
And coming out your mouth you get your wig cracked.
I kick that street shit because I lead out.
Trappin all day and all night we done did that.
Fatboy play the block like he don't know where he live
at.
All these rappers worrying about Mills is getting
sickening.
I've been on my chill, licking fingers counting
Benjamin's.
Niggers sweet at Entenmanns, they're cake boys.
I'm going to slice them up.
Drop money on his head, I'm going to price him up.
Trapstar boys going to light things up.
Kill these beats, drop my cd.
Now kill these streets.
Murda said chill.
I'm going to kill these freaks.
(Unknown)
Probably going to cross 3rd Street with a (Unknown).
Westside where I'm at don't deal with the fake.

Hey nigger or rap, little diz, everything, got it cut in
my chest.
I'm the best at this.
Burn it, movement, session quick, (Mills stops for a
second due to a mistake)
(Unknown) fresh as this.
I got "Gs" on my feet.
I got "Gs" on my belt.
Show religions on my jeans call a doctor I need some
help.
I be killing these niggers.
Spittin fire, body paralyzing, rap is weak and I aint
feelin these niggers.
No not at all.

Mills- These niggers got it twisted and pissin me off.
Like we don't ride out.
Bring those Smith and Wessons, Berretas and baby 9's out.
As soon as these niggers know it's only they're going to
hide out.
We all black strapped with gags scoping your moms house."
(A271-72)

Although the rap song may have been possibly relevant to
the charge of gang participation by showing a Trapstar who
presented himself as participating in illegal drug dealing and
violence, admission of the rap song was unfairly prejudicial to
Rasin in light of his pending charges for Murder First Degree
and Attempted Murder First Degree.

The rap lyrics left the jury to infer that Rasin, and his
fellow Trapstars, were essentially drug-dealing, gun-toting
thugs, possessing the kind of character that would enable them
to perpetrate attempted murder on April 30 and murder first
degree on May 3.

The rap song evidence was minimally probative--additional evidence of the rapper's life, real or imagined, in Wilmington--but said probative value was outweighed by the unfair prejudice of diminishing the presumption of innocence accorded Rasin and inviting easy judgment about his character (i.e. "People who live in that environment and sing about crime probably find it easier to do such things"). As such, admission of the rap song evidence prejudiced Rasin's right to a fair trial, warranting grant of a new trial.

ARGUMENT V

A. Question Presented

Did the Court err when it failed to preclude the States' DNA expert from NMS Labs from testifying regarding the presence of Rasin's DNA on the gun used in the April 30 and May 3 shootings? (A52-66; A94-108)

B. Standard and Scope of Review

This Court reviews Superior Court evidentiary rulings for abuse of discretion. Williamson v. State, 707 A. 2d 350, 354 (Del. 1998)

C. Merits

Through investigation, the Wilmington Police recovered the gun alleged to have been used in the April 30 shooting in Browntown and the May 3 shooting at Eighth and Adams. Said gun was swabbed for DNA, which samples were then sent to NMS Labs for testing against the DNA profiles of Kevin Rasin, Marc Taylor, Robert Valentine, Kevin Fayson and Jason Ortiz.

The results of the NMS testing were reported back to the Wilmington Police by way a report dated October 20, 2010.

The forensic biologists at NMS Labs concluded their October 20 report as follows:

"Closing Remarks

Six DNA profiles were detected that are inconsistent with Kevin Rasin, Marc Taylor,

Robert Valentine, Kevin Fayson, and Jason Ortiz. These DNA profiles were designated:

- "Unknown Male #1"
- "Unknown Male #2"
- "Unknown Male #3"
- "Unknown Male #4"
- "Unknown Male #5"
- "Unknown Individual #1"

Due to the varying amount of data present in each of these DNA profiles, these designations are not necessarily an indication of six different individuals. Some of these DNA profiles overlap and it is possible that all six unknown DNA profiles could have originated from as few as three people. In order to perform further comparisons, either reference samples from suspected individuals or their DNA profiles should be submitted.

Two DNA profiles were detected and deemed inconclusive in regards to the inclusion or exclusion of Kevin Rasin, Marc Taylor, Robert Valentine, Kevin Fayson, and Jason Ortiz. These were deemed inconclusive due to shared alleles between the individuals, low sample concentration, and multiple contributors. These inconclusive results were used in the samples designated as EXKB#10.1-2 and EXKB#10.1-3. The inconclusive results are due to the possibility that the contributors to these samples are any one of the suspects plus at least one unknown individual. Due to the multiple possibilities, all of which are equally plausible, no single conclusion or even limited range of conclusions is possible. Additionally, alleles foreign to the suspects were detected in each of these samples, which are also consistent with those of the unknown contributors listed above." (A62-3)

On January 23, 2012, Rasin filed a Motion to Exclude the DNA Analysis Prepared by NMS Labs on the grounds that the

inconclusive results rendered the DNA analysis irrelevant. The Court denied Rasin's motion.

On March 5, 2012, Rasin renewed his request for exclusion by way of a Motion for Reargument, relying on the case of Nelson v. State, 628 A.2d 69 (Del. 1993). The Court again denied Rasin's motion.

At trial, the NMS Labs forensic biologist Catherine Cross testified as follows:

BY MR. HALEY:

Q. When you say the words "possibly a contributor," what does that mean?

A. When I say "possibly a contributor," that means that--in the report where "possibly" is used, it means that less than the full profile was detected.

Q. Okay.

A. And when I'm saying here that the person is not excluded as a possible contributor, that means that the--the person is not excluded based on the testing that I performed.

Q. Based on the testing. But, theoretically, that person could still never have touched the gun, but they just have a

profile, given the portion that's available to you, that looks possibly like his DNA; correct?

A. That's correct.

Q. It's also possible that it's not his DNA?

A. That's possible.

Q. Okay. And you can't scientifically say whether it is or it isn't?

A. All I can say is it was matching between the reference and the question and, when there is a mixture, it becomes more difficult to determine if those alleles are paired together appropriately or not.

Q. And, so, "possibly a contributor" means the whole American population, at least male population, could possibly still be a contributor on those alleles; correct?

A. It means a portion of the population could be.

Q. But we can't narrow it down to a number?

A. Not statistically, no.

Q. And that's the bottom line as to your analysis as to Mr. Rasin's DNA on this gun; is that correct?

A. That's correct.

MR. HALEY: Okay, thank you.

THE COURT: Anything, Miss Medford?

BY MS. MEDFORD:

Q. Just to make sure we understand this, referring your attention to the page on your report, Page 7, it says on there that Kevin Rasin is a contributor. It says--it also says on there that Robert Valentine is a possible contributor.

A. Yes.

Q. Okay. What's the difference between the two?

A. Okay. In this instance, the difference between these two is, all of the alleles that we see in Kevin Rasin's reference profile are also seen in the questioned sample. Robert Valentine, one of his alleles that we see in his reference is not seen in the questioned profile, which is why he gets called "possibly."

Q. Okay. So, you swab the gun and, then, you test it for DNA, and you got a mixture of DNA profiles.

A. Yes.

Q. Did you have a reference sample for Kevin Rasin?

A. Yes, I did.

Q. And when you compared what you had from Kevin Rasin, it paralleled what you had in the mixture?

A. Yes. Everything that was seen in his reference was also seen in the questioned sample.

(Ms. Medford conferring with Mr. Downs.)

BY MS. MEDFORD:

Q. So, with that, the two--the reference paralleling what's in the mixture, does that mean Kevin Rasin is a contributor to that sample of DNA?

A. It means he is a possible contributor, in the fact that it could be anyone in his family line or it could be coincidence that his alleles happened to hit in there. I just cannot exclude him because everything

that I see in his reference is also seen in that questioned sample.

MS. MEDFORD: Okay.

THE COURT: Mr. Haley.

FURTHER RECROSS-EXAMINATION

BY MR. HALEY:

Q. So, you can't say with scientific confidence that his DNA is on that gun?

A. His exclusively, no, I cannot say that.

Q. Okay. And as far as the folks that could be included, we've agreed that could be the whole American male population, at least based on what we have here as possibilities, correct?

A. Well, certainly not the whole population, but a significant portion probably could be included in this sample.

Q. And your result doesn't rule out the possibility that Kevin Rasin never touched this gun; you just don't have conclusive enough results to say it with any kind of definitiveness?

A. Right. With the YSTRs, we can never say the specific person. The best we can say is a family line.

The NMS report was then admitted into evidence.

In sum, the DNA testing could not offer any probability that Kevin Rasin's DNA was on the gun used in the April 30 and May 3 shootings.

Nevertheless, the State submitted the relevancy that Rasin's DNA could not be excluded as appearing on the gun, lending a false aura of scientific corroboration for the State's identification of Rasin as the May 3 shooter. The fact that the testing showed that Rasin could not be excluded (along with a sizeable portion of the American male population) was not probative under Rule 401. By admitting said scientific, but non-probative evidence against Rasin, though, the Court allowed the jury to be confused that the DNA evidence must actually mean something against Rasin.

In sum, admission of the irrelevant NMS Lab report fostered confusion about the appearance of Rasin's DNA on the gun used in the April 30 and May 3 shootings, when, in fact, no such scientific likelihood appeared. The Court's allowance of such confusion prejudiced Rasin's right to a fair trial, warranting grant of a new one.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, this matter should be reversed and remanded for a new trial.

Respectfully submitted,

/s/ James J. Haley, Jr.
James J. Haley, Jr., Esquire
I.D. No. 2997
FERRARA & HALEY
1716 Wawaset Street
Wilmington, DE 19806-2131
(302) 656-7247
Attorney for Appellant

Dated: January 14, 2013

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

136

STATE OF DELAWARE

VS.

KEVIN RASIN

Alias: No Aliases

DOB: 03/02/1988

SBI: 00596084

CASE NUMBER:

1009014476

CRIMINAL ACTION NUMBER:

IN10-12-1736

MURDER 1ST(F)

IN10-12-1737

PFDCE(F)

IN10-12-1731

ATT MURDER 1ST(F)

IN10-12-1735

PFBPP DRUG CONV(F)

IN10-12-1738

PFBPP DRUG CONV(F)

IN10-12-1728

GANG PARTICP.(F)

IN10-12-1729

CONSP. 2ND(F)

IN10-12-1734

CONSP. 2ND(F)

COMMITMENT

Nolle Prosequi on all remaining charges in this case

SENTENCE ORDER

NOW THIS 23RD DAY OF MAY, 2012, IT IS THE ORDER OF THE
COURT THAT:

The defendant is adjudged guilty of the offense(s) charged.
The defendant is to pay the costs of prosecution and all
statutory surcharges.

AS TO IN10-12-1736- : TIS
MURDER 1ST

Effective September 17, 2010 the defendant is sentenced
as follows:

- The defendant is placed in the custody of the Department
of Correction for the balance of his/her natural life at
supervision level 5

APPROVED ORDER

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May 29, 2012 12:05

STATE OF DELAWARE
VS.
KEVIN RASIN
DOB: 03/02/1988
SBI: 00596084

AS TO IN10-12-1737- : TIS
PFDCF

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

Probation is consecutive to criminal action number
IN10-12-1736

AS TO IN10-12-1731- : TIS
ATT MURDER 1ST

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

Probation is consecutive to criminal action number
IN10-12-1737

AS TO IN10-12-1735- : TIS
PFBPP DRUG CONV

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

Probation is consecutive to criminal action number
IN10-12-1731

AS TO IN10-12-1738- : TIS
PFBPP DRUG CONV

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

Probation is consecutive to criminal action number
IN10-12-1735

AS TO IN10-12-1728- : TIS
GANG PARTICP.

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

Probation is consecutive to criminal action number
IN10-12-1738

AS TO IN10-12-1729- : TIS
CONSP. 2ND

- The defendant is placed in the custody of the Department

STATE OF DELAWARE

VS.

KEVIN RASIN

DOB: 03/02/1988

SBI: 00596084

of Correction for 1 year(s) at supervision level 5

Probation is consecutive to criminal action number
IN10-12-1728

AS TO IN10-12-1734- : TIS
CONSP. 2ND

- The defendant is placed in the custody of the Department
of Correction for 1 year(s) at supervision level 5

Probation is consecutive to criminal action number
IN10-12-1729

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
KEVIN RASIN
DOB: 03/02/1988
SBI: 00596084

CASE NUMBER:
1009014476

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

The defendant shall have no contact with the victim(s) residence, workplace and/or victim(s) family members.

Have no direct or indirect contact with victims.



JUDGE RICHARD R COOCH

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
KEVIN RASIN
DOB: 03/02/1988
SBI: 00596084

CASE NUMBER:
1009014476

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	1065.00
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	100.00
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	8.00
DELJIS FEE ORDERED	8.00
SECURITY FEE ORDERED	80.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	
<hr/>	
TOTAL	1,361.00

APPROVED ORDER

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May 29, 2012 12:05

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN RASIN,)	
)	
Defendant-Below,)	
Appellant,)	No. 325, 2012
)	
v.)	On Appeal from the
)	Superior Court of
STATE OF DELAWARE,)	the State of Delaware
)	in and for New Castle
Plaintiff-Below,)	County
Appellee.)	

CERTIFICATE OF SERVICE

I, James J. Haley, Jr., Esquire, hereby certify that the attached Appellant's Opening Brief was served by LexisNexis E-file on January 14, 2013 upon:

John Downs, Esquire
Deputy Attorney General
Department of Justice
Carvel State Office Building
Seventh Floor
820 North French Street
Wilmington, DE 19801
Attorney for State of Delaware

/s/ James J. Haley, Jr.
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(302) 656-7247
Attorney for Appellant