



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN BRISCO, APPELLANT

DEFENDANT BELOW

v.

NO: 307, 2017

STATE OF DELAWARE,

APPELLEE,

APPELLANT'S AMENDED OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT

Michael C. Heyden, Esq. (2040)
1201 North King St.
Wilmington, DE 19801
302-654-0789
Attorney for appellant/defendant
below

TABLE OF CONTENTS

	Page
Table of citations	1
Nature of proceedings	2
Summary of Argument	3
Statement of Facts	4
Argument I	7
Trial court's judgment and rationale	14

TABLE OF CITATIONS

Cases cited	Page
<u>Cabrera vs. State</u> , 840 A 2d 1256 (De 2004)	7
<u>Dauber v. Merrell Dow Pharmaceuticals, Inc.</u> 509 US 579 (Sup Court 1993)	10
<u>United States v. Smith</u> , 869 F 2d 348 (Ca, 1989)	10
<u>United States v. Williams</u> , 583 F2 1194 (Ca, 1978)	10
Rule of Evidence 701	9

NATURE OF PROCEEDINGS

Brisco was indicted and charged with committing three murders, gang participation, numerous firearms, conspiracy, and robbery charges. The case was tried before a jury in New Castle County. The victim of the first murder was Ioannis Kostitidos. Brisco was found not guilty of intentional murder, but guilty of felony murder in connection with those charges. The victim in the second murder was Devon Lindsey. Brisco was acquitted of both intentional murder and felony murder in connection with those charges. The victim in the third murder case was William Rollins. Brisco was convicted of both intentional murder and felony murder in connection with those charges. Brisco was found guilty of gang participation and multiple firearms and conspiracy charges.

Brisco filed an appeal to this court. This is his opening brief.

SUMMARY OF ARGUMENT

The trial court erred when it permitted a non-expert to testify and give an opinion regarding the degree of accuracy, measured in meters, of a GPS tracking device worn by the defendant. His opinion conflicted with the plain reading of the report, which established the defendant at a different location when the crime occurred.

STATEMENT OF FACTS

On February 6, 2013 at 8:42 PM, Ioannis Kostikidis was shot and killed while standing outside his car in a parking lot in Wilmington, Delaware. He suffered one gunshot wound to his upper body. A single 9 mm shell casing was found near his body at the crime scene. (A- 82) A witness saw two men running from the crime scene. (A- 23)

One witness, Kina Madric, said that two (2) young men came to her house, which was on the same block prior to the murder. She identified John Brisco as one of those men (A- 27). She also said that he went by the name "John" (A-118); however, she admitted that she didn't see him with a gun nor did she see him commit a robbery or commit a shooting. (A- 122)

Another witness said he was with Brisco and Wisher the day of the shooting. He said he went into a house, leaving the other two men outside, Shortly thereafter he heard a shot. Later that night, the witness telephoned Brisco who told him that he and Wisher tried to rob someone, but the victim resisted and that Brisco shot him. This witness also told the police that Brisco and Wisher were armed with guns that night.

On January 18, 2015 at approximately 12:10 AM, Devon Lindsey was shot and killed in the 700 block of East 26 Street (A- 30). He was found in a van that had been shot multiple times. There was a security video at a nearby building that captured the shooting. The video showed three men running towards the van and shooting at it.(A- 32) Police found a 357 caliber bullet inside the van that was subsequently matched to a handgun found at co-defendant Mccoy's house. (A-32) Brisco was found not guilty of this murder.

On January 24, 2015 at 8:03 PM., William Rollins was shot in the area of 21st and Washington streets. He suffered multiple gunshot wounds to his head and upper body. (A- 34). The medical examiner collected a bullet from Rollins' head. It was a 357 caliber. They also found 9 mm shell casings at the crime scene. The shell casings matched a gun that was found on co-defendant McCoy when he was arrested. Prior to Brisco's arrest, McCoy attempted to send Brisco a letter instructing Brisco to get rid of the gun that was in McCoy's house. That letter was intercepted by the prison authorities. The police searched McCoy's house and found the gun. That gun was connected to the murder.

The police conducted a search of social media postings of the various defendants. On the computers, they found postings containing photographs of the various defendants in possession of firearms and weapons accompanied by comments concerning gang activity and violence.

The social media search regarding Brisco revealed a photograph of Brisco holding a handgun and making a gang sign. They searched his house and found the same clothing he was wearing in the photograph and a 9 mm bullet clip (A-40)

One witness, Blaylock, testified that he had conversations with Brisco and co-defendant McCoy while they were in jail. He related that Brisco and McCoy admitted to him that they committed the murders and gave details concerning the commission of the crimes. The details provided in those conversations were corroborated by the evidence gathered by the police and presented at trial. (A-36)

There were no eyewitnesses who testified that they saw Brisco commit any of the murders. The guns used in the murders were not found on his person or premises. The gun found in his house was not connected to any of the murderers.

ARGUMENT I

Question presented - Did the court commit an error of law when it permitted a non-expert to give an opinion concerning the range of accuracy of a GPS device which purportedly put the defendant at the scene of a crime? The question presented for appeal was preserved by an objection, see page A-168. The question presented for appeal was preserved by objection, see page A-168.

Standard and scope of review - The decision to admit evidence is reviewed for an abuse of discretion. Cabrera vs. State, 840 A 2d 1256 (De

MERITS OF ARGUMENT

Ioannis Kostitidis was murdered at 8:42 PM at 603 North Tatnall Street. (A-16, photo) There was one bullet hole in the body. The police found one shell casing at the crime scene near the body which showed that he was shot at short range.

The area where the crime occurred was a busy area with nearby school and businesses and a lot of foot traffic. Brisco was identified as one of at least four young men who had been at a household on the block earlier that night.

The homicide detectives determined the shooting to have occurred at 8:42 PM at 603 North Tatnall Street.

At the time of the murder, Brisco, was wearing a GPS ankle bracelet issued by the probation department. The ankle bracelet records showed him to be at 641 North Tatnall Street at the time of the shooting. (A-167)

Therefore, those records showed that he was not present at the shooting at the time of the shooting and could be argued to be an alibi.

The prosecution offered the GPS records through the testimony of a probation officer that showed Brisco's specific location at specific times. The officer was not an expert in cell tower analysis, radio waves, engineering and had no scientific background. His training and experience was limited to a two-hour session with the sales representative from the company that provided the device. Over counsels objection, the witness gave an opinion that the degree of accuracy regarding the location of the person wearing the device was 30 meters in any direction and therefore he could be at 603 North Tatnall Street, despite the report stating that he was at 641 North Tatnall Street. There was nothing in the report that gave or supported the opinion of that witness. The witness cited

no learned treatises, studies, records, reports, or even manufacturer's statements that supported his opinion that the device was accurate to within 30 meters in any direction of the person wearing the device. The strict reading of the report put Brisco at the other end of the block, houses away from the shooting when the shooting occurred. The strict reading of the report exculpated Brisco rather than incriminated him. Without any supporting data, the expert gave the opinion that the degree of accuracy was 30 meters which would thus permit Brisco to be present at the crime scene at the exact time of the shooting. This testimony placed Brisco at the crime scene rather than placing him away from the crime scene at the other end of the block. This evidence was extremely prejudicial as it could be viewed by the jury as specifically placing him at the crime scene when the document specifically did not place him at the crime scene. Furthermore, since the opinion was presented by an expert, it could be viewed as having an additional indicia of reliability since it was being proposed by an expert rather than a simple layman.

A lay witness is not permitted to provide opinion evidence when the opinion requires scientific, technical, or specialized knowledge. Rule of

evidence 701. An expert may provide opinion evidence if:

1. They are qualified by knowledge, skill, experience, training or education;
2. The testimony must be based upon sufficient facts or data;
3. It must be the product of reliable principles and methods: and
4. The witness has applied the principles and methods in a reliable manner to the facts in the case.

Expert opinion evidence is controlled by Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 US 579 (Sup Court 1993). The expert's knowledge must be grounded in accepted methods and procedures and not just subjective belief or unsupported speculation. The expert must testify with specific scientific knowledge and reasoning and methodology that is scientifically valid. In addition, the theory or technique has to have been subjected to peer review and publication. Also, the court should know the known potential rate of error. United States v. Smith, 869 F 2d 348 (Ca, 1989), and there should be existence and maintenance of standards controlling the techniques operation, United States v. Williams, 583 F2 1194 (Ca, 1978). Expert opinion

based upon otherwise inadmissible hearsay is to be admitted only if the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject.

Here, the proposed expert testified that the location of a person wearing a GPS ankle bracelet was determined by the triangulation of nearby cell phone towers (A- 164) and that the records showed that at 8:42 PM, the defendant was at 641 N. Tatnall Street, Wilmington, DE. (A-168).The witness; however, also gave an opinion that the defendant's GPS bracelet was accurate to within 30 meters in any direction. That opinion fact or conclusion that was not in the report. Counsel objected (A- 168). On cross examination. the witness testified that his training was in law enforcement, probation and parole and he did not have any training as an engineer, cell phone analysis, or cell phone tower analysis. In addition, the company that provided the report no longer provided those reports to the State. (A- 172) Furthermore, that he did not prepare the report nor was involved in the preparation of the report and simply received it via email from the outside company. His only contact with the provider was requesting the report via

email. The witness did not know which cell towers were used to determine the triangulation, the location of the cell phone towers or the frequency of the readings. In addition, that these cell phone towers were being used simultaneously by other phone companies. (A-174) Furthermore, the witness testified that radio waves from a GPS ankle bracelet do not necessarily go to the closest cell phone tower and that they may skip or bounce to different cell phone towers (A- 176) though, arguably affecting the triangulation. The witness' training in cell phone technology was limited to a few of hours of training and education in the probation department office.

Here it is clear that the witnesses' background, experience, education and training did not provide the necessary foundation for him to provide expert testimony concerning the range of accuracy of the GPS device. Furthermore, he did not quote any studies or publications or peer review articles that supported his opinion.

The court should not have allowed the opinion. The report specifically located the defendant away from the scene of the crime at the time of the shooting. The witnesses's unsupported opinion that the range of accuracy of

the device showed that the defendant could be at the scene of the crime was grossly unfair, prejudicial, incriminated the defendant unfairly and eviscerated his alibi.

This crime occurred in an area of the city that is a high crime area and traveled by many people at night. To improperly allow this testimony to suggest that the defendant was somewhere other than the location stated in the report was wrong and improper.

Therefore, Brisco's conviction should be reversed and he should be granted a new trial.