



IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEVEN PIERCE, )  
 )  
 Defendant-Below, )  
 Appellant, )  
 )  
 v. ) No. 230, 2019  
 )  
 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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DATED: February 13, 2020

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CITATIONS .....	ii
ARGUMENT	
<b>I.    THE TRIAL COURT ABUSED ITS DISCRETION           WHEN IT FAILED TO EXCLUDE EVIDENCE           PERTAINING TO THE GOOGLE WIFI LOCATION           DATA OBTAINED FROM PIERCE’S CELL PHONE           BECAUSE THE STATE FAILED TO ESTABLISH           THAT IT WAS SUFFICIENTLY RELIABLE UNDER           THE <i>DAUBERT</i> STANDARD. ....</b>	1
Conclusion .....	4

## TABLE OF AUTHORITIES

### **Cases:**

<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579 (1993).....	1
<i>Minner v. American Mortg. &amp; Guar., Co.</i> , 791 A.2d 826 (Del.Super. 2000).....	3
<i>Pierce</i> , 2019 WL 1077688 (Del. Super. Ct. Mar. 6, 2019) .....	<i>passim</i>
<i>State v. Mosley</i> , 2019 WL 4248272 (R.I. Super. Ct. Aug. 30, 2019).....	1
<i>United States v. Mitchell</i> , 365 F.3d 215 (3d Cir. 2004).....	3

### **Other Sources:**

<i>F.R.E.</i> 702 advisory committee’s note.....	3
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**I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO EXCLUDE EVIDENCE PERTAINING TO THE GOOGLE WIFI LOCATION DATA OBTAINED FROM PIERCE’S CELL PHONE BECAUSE THE STATE FAILED TO ESTABLISH THAT IT WAS SUFFICIENTLY RELIABLE UNDER THE DAUBERT STANDARD.**

It is no surprise that the State relies heavily on *State v. Mosley* since that case relies heavily on the only reported case that supports its position- *the trial court’s decision on appeal in our case*.<sup>1</sup> In fact, all of the findings in *Mosley* are based on the testimony of one law enforcement officer at a “*Daubert* hearing” in that case which the *Mosley* Court claims “is not an isolated endorsement” because “[s]ources referenced in *Pierce* reached the same conclusion[.]”<sup>2</sup> While *Mosley* correctly identified the “four nonexclusive factors to assess the reliability of the expert’s proposed testimony,” i.e. 1) testability; 2) peer review; 3) potential error rate; and 4) general acceptance, it does not appear to have independently considered each of those factors.<sup>3</sup> Because *Mosley* chose to simply follow the ill-decided ruling on appeal in our case,<sup>4</sup> it is of no value to this Court.

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<sup>1</sup> 2019 WL 4248272\*7 & n.6 (R.I. Super. Ct. Aug. 30, 2019) (*citing State v. Pierce*, 2019 WL 1077688 (Del. Super. Ct. Mar. 6, 2019)).

<sup>2</sup> *Id.* at 7.

<sup>3</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594-595 (1993).

<sup>4</sup> *Pierce*, 2019 WL 1077688 \*4.

The State concedes that neither of its experts were able to explain the methodology about which they were testifying and upon which it was relying to convict Pierce.<sup>5</sup> Instead, the State argues, *Daubert*'s flexible nature allows these witnesses to remain ignorant of that information.<sup>6</sup> Thus, according to the State, Rist was permitted to rely on data obtained from some phantom project conducted at the direction of his employer, not from an independent, verifiable study. He provided no evidence that his method is generally accepted in the scientific community beyond his own *ipse dixit*.<sup>7</sup> Nor did he provide any of the documentation from the tests or of any of the data he purportedly collected. Thus, there was no resulting work product available to examine, assess, test or challenge. Rist then asserted that Google used the type of data that he purportedly collected in his unverifiable test based on Google's business model.<sup>8</sup>

Rist used the methodology he claims to have applied the methodology of his unverifiable project to the "facts" in this case to form the basis of his opinion.<sup>9</sup> The State concedes that testability "assures the opponent of the

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<sup>5</sup> State's Resp.Br. at 33.

<sup>6</sup> *Id.*

<sup>7</sup> A126-133.

<sup>8</sup> A144.

<sup>9</sup> A357-362.

proffered evidence the possibility of meaningful cross-examination[.]”<sup>10</sup> Here, there was nothing available so that Pierce could challenge Rist’s method “in some objective sense” or determine “whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability[.]”<sup>11</sup> The court must not accept an expert opinion that is “based simply on the *ipse dixit* of the expert.”<sup>12</sup> Nonetheless, that is exactly what the trial court did in this case.<sup>13</sup>

The State also claims that other geolocation tools such as GPS data and CSLI data “can verify the accuracy of Wi-Fi location data.”<sup>14</sup> To support this claim, the State cites as an example that Wi-Fi data reliability is heightened because the other two geolocation tools agreed with it that “Pierce near Dolores’s home around 3:00 a.m.”<sup>15</sup> The flaw in this argument is that the Wi-Fi data was introduced to contradict other of the State’s evidence. Thus, it was not consistent with all of the State’s own evidence.

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<sup>10</sup> State’s Resp. at 26 (*quoting United States v. Mitchell*, 365 F.3d 215, 238 (3d Cir. 2004)).

<sup>11</sup> *Mitchell*, 365 F.3d at 235 (*quoting F.R.E.* 702 advisory committee’s note).

<sup>12</sup> *Minner v. American Mortg. & Guar. Co.*, 791 A.2d 826, 851 (Del.Super. 2000).

<sup>13</sup> *Pierce*, 2019 WL 1077688 \*6; A127.

<sup>14</sup> State’s Resp. at 31.

<sup>15</sup> *Id.* at 31-32.

While the trial court may be right that the pace of technology advances at a greater pace within the computer science field,<sup>16</sup> the State is still required to establish that the methodology upon which Rist relied is testable, peer reviewed and widely accepted in the community. Further, this Court must ignore the additional articles the State presents on appeal in a belated attempt to supplement the record with peer review articles. They certainly were not relied upon by Rist.

Finally, the State is incorrect in its claim that introduction of the Google location data obtained from Pierce's cell phone was harmless error. The sole reason the State introduced this evidence was to undercut the testimony of its own witness, King, with respect to the time at which Pierce was purportedly at 231 Adams Street. The State's theory was that Pierce killed Heather after she went to bed. This theory centered around King's testimony. However, King claimed Pierce visited Heather at a time when, as video, call location<sup>17</sup> and other evidence established, Pierce was actually in New Castle. Thus, the State needed to introduce evidence that would place Pierce at 231 Adams Street at a time consistent with the rest of the State's case

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<sup>16</sup> *Pierce*, 2019 WL 1077688 at n.35.

<sup>17</sup> From the cell phone records, the State's expert concluded, among other things, that at 9:55 p.m., Pierce was in a location which included Shirley's apartment and the Manor Park Liquor in New Castle- and not 213 Adams Street as King claimed. A633, 667-668.

and that would make sense with King's testimony. So, it presented the Google location data which, according to the expert, revealed that Pierce was at 231 Adams Street after he was in New Castle and before he went to Port Penn.<sup>18</sup>

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<sup>18</sup> There was no call data placing Pierce in Delaware City that night after he left the waterfront. A 457-462, 640.633-634, 665-666, 669-672.



## CONCLUSION

For the reasons and upon the authorities cited herein, Pierce's convictions must be reversed.

Respectfully submitted,

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