



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TROY DIXON, )  
)  
Defendant Below- ) No. 319, 2020  
Appellant, )  
)  
v. ) Court Below---Superior Court  
) of the State of Delaware in and for  
STATE OF DELAWARE, ) New Castle County  
)  
Plaintiff Below- ) ID No. 1211005646A  
Appellee. )

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
DELAWARE

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**APPELLANT'S CORRECTED REPLY BRIEF**

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## I. THERE IS NO PROCEDURAL BAR TO RELIEF

The State argues that Dixon's claim is procedurally barred. Answering Brief (AB) at 11-3. The State's argument fails. First, the Superior Court acknowledged that the Rone criminality evidence was newly discovered. Second, the Rone testimony was the central evidence connecting Dixon to the crime, and thus is evidence so fundamentally undermining the reliability of his testimony that it "creates a strong inference" of innocence pursuant to 61(d)(2)(i).

While the Superior Court acknowledged that "evidence of Rone's misconduct is 'newly discovered' under Rule 61(d)(2)(i)" it nonetheless held that Dixon failed to meet that exception because, according to the Superior Court and the State, Rone's testimony "was not crucial to the State's case against Dixon." *State v. Dixon*, 2020 WL 5289927, at \*4 (Del. Super. Ct. Sept. 4, 2020). Specifically, the Superior Court held that Rone's testimony was not crucial because

*eye witness testimony identified Defendant as the shooter.* Defendant was seen fleeing a vehicle that matched the description of the shooter's vehicle, and Defendant tossed a 9mm handgun away while he attempted to flee from police. Any credibility issues on Rone's part would no[t] [a]ffect the reliability of these key pieces of evidence.

*Id.* (emphasis added).

Thus, the Superior Court's opinion is based on a critically inaccurate reading of the record that Dixon was identified as the shooter. The State does not bother to address this patently erroneous finding. The Superior Court (in contrasting *Fowler*),

held that “eye witness testimony identified [Dixon] as the shooter.” *State v. Dixon*, 2020 WL 5289927, at \*4 (Del. Super. Ct. Sept. 4, 2020). There was never any such testimony. *See* N.T. 09/24/13 at 20 (the prosecutor admitting: “So as far as an ironclad identification, I don’t think we are ever going to get to that point”); *see also Dixon v. State*, 2014 WL 4952360 (Del. Oct. 1, 2014) (this Court stated in its opinion denying Dixon’s direct appeal: “neither witness positively identified Dixon as the shooter...”). The lack of eye witness testimony shows that the Superior Court’s opinion is seriously flawed, and an examination of the remaining evidence proves that Rone’s testimony was critical to Dixon’s conviction.

The second piece of evidence the Superior Court points to is that “Defendant was seen fleeing a vehicle that matched the description of the shooter’s vehicle.” *State v. Dixon*, 2020 WL 5289927, at \*4 (Del. Super. Ct. Sept. 4, 2020). However, as the State recounts in its brief, on the day of the shooting “[o]fficers had previously run a license plate on a suspicious Crown Victoria and included that license plate number in the broadcast.” AB at 7. This other suspicious black Crown Victoria was *not* the black Crown Victoria that Dixon was in; it was a different model year and had a different license plate. A115, A150-151. Thus, it is known that there were multiple black Crown Victorias near the scene of the crime on the date in question—one of them “suspicious” looking and not the one that Dixon was in. Therefore, the fact that Dixon was in a black Crown Victoria does not prove that he committed this

shooting. It is certainly not the sort of evidence of guilt that would preclude relief under 61(d)(2)(i) in light of Carl Rone's after-discovered crimes. The same can be said about the fact that Dixon tossed a 9mm handgun. Rone himself testified that there are "bazillions" of P95 Rugers produced every year and that there are an "awful lot" of 9mm Luger guns. A281; A283. Dixon was a Person Prohibited, so he had an independent reason to flee from the police and discard the gun.<sup>1</sup>

In short, the fact that Dixon was in one of several black Crown Victorias in the area and he possessed a 9mm handgun is not even sufficient evidence for conviction of the shooting, let alone the sort of evidence of guilt that makes the newly discovered evidence of Rone's crimes inadequate to trigger the 61(d)(2)(i) jurisdiction.<sup>2</sup> Indeed, the Superior Court properly granted Dixon's co-defendant's motion for judgment of acquittal based on the weakness of the State's case, but the judge explicitly denied Dixon's motion due to Carl Rone's testimony that the gun recovered from Dixon was the gun used in the crime. *See* A311 (Superior Court

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<sup>1</sup> Dixon was ultimately convicted of simple possession by a person prohibited ("Simple PFBPP") at his severed trial in April of 2014, a conviction that is not under attack in this appeal.

<sup>2</sup> Beyond the facts the Superior Court enumerated, the State additionally argues that witness Brown testified that the shooter had the same complexion as Dixon and the shooter also had a beard. AB 8. However, many hundreds, if not thousands, of men in the area would have had a similar complexion to Dixon with facial hair. This does not establish that Dixon was the shooter, especially when Brown repeatedly emphasized that he could not say that Dixon was the shooter. A92.

denied Dixon's request based upon "the tying of the gun"). Thus, the trial judge's own rulings establish that the Carl Rone testimony was the linchpin to Dixon's conviction.<sup>3</sup>

Additionally, Dixon was tried on the severed PFBPP charges in April of 2014. *See Dixon v. State*, 113 A.3d 1080 (Del. 2015). Dixon was charged with 11 Del. C. §1448(e)(1) ("Simple PFBPP"), which only requires proof of status as a person prohibited (which Dixon stipulated to being) and possession of a gun (Dixon had admitted in a recorded statement to possessing the gun). Dixon was also charged with 11 Del. C. §1448(e)(2) ("Serious Injury PFBPP"), which additionally includes the element of negligent causing of serious physical injury or death through the use of the firearm.

Thus, the same evidence of Dixon's supposed involvement in the shooting needed to be re-presented to the second jury to prove this additional element. The jury in the second trial found Dixon not guilty of Serious Injury PFBPP; thus, the second jury could not find beyond a reasonable doubt that Dixon was involved in

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<sup>3</sup> In attempting to dispute this fact, the State cites to the trial court's language that only confirms Dixon's position that, but for Rone's testimony tying Dixon to the shooting, the evidence warranting dismissal was no less applicable to Dixon than the co-defendant. Indeed, absent the Rone testimony, the evidence against the co-defendant was arguably stronger, since he was the driver who led police on a high-speed chase. *See* AB at 19 ("[t]he altercation at the Rebel is not particularly motive-generating;" "[u]ncertainty what the time period is, anywhere from 30 minutes to two-and-a-half or three hours, or so.").

the shooting incident. This second trial shows that even *with* the testimony of Carl Rone, who testified similarly at both trials, the State's case was thin. Surely, then, if Rone's testimony that Dixon possessed the gun used in the shooting were seriously undermined, it is unlikely that the first jury would have arrived at the verdict it did.

Since the newly discovered evidence of Rone's criminal conduct seriously undermines the only evidence in this case that connected Dixon with the crime, Dixon satisfies Rule 61(d)(2)(i)'s jurisdictional requirement. Moreover, Dixon's conviction should be reversed, or at a minimum the case should be remanded for an evidentiary hearing to determine what impact the newly discovered evidence would have had on the jury's verdict.

**II. THE STATE’S CONTENTION THAT DIXON’S CASE IS DISSIMILAR FROM FOWLER IS BASED UPON A MISREADING OF FOWLER.**

In its brief, the State argued that “[i]n *Fowler*, all of the key testimony used to convict the Defendant was called into serious doubt for different reasons.” AB 16. The State argued that unlike in *Fowler*, here there was independent, overwhelming evidence of guilt supporting Dixon’s conviction. For all of the reasons articulated above and in Dixon’s Opening Brief, this is simply incorrect—there was *far* from overwhelming evidence of guilt in this case; Dixon’s acquittal of Serious Injury PFBPP in a separate trial proves it.

It is true, as the State contends, that in *Fowler*, unlike here, the key testimony used to convict the Defendant came from two separate sources, eyewitnesses and Rone. The “unusual confluence of events” the State cites were its conflicting positions before the Superior Court (in which the State encouraged the Superior Court to rely on the Rone testimony in the face of a *Jencks* challenge) and this Court (in which the State encouraged this Court to rely on the *Jencks* testimony in the face of a Rone challenge). But those “unusual confluence of events” were nothing more than artifacts of the procedural history of *Fowler*. Ultimately, this Court’s focus was on the question of prejudice. *See Fowler*, 194 A.3d at 27 (“Having determined that we cannot conclude that the *Jencks* violations and Rone's indictment were harmless beyond a reasonable doubt . . .”). And, in the absence of any reliable evidence that

it could reasonably vest confidence in, it was required to vacate Fowler's conviction.

*Id.*

The legal analysis is no different here. That there are not two strains of evidence that have been independently compromised is immaterial. Here, the *only* evidence to connect Dixon to the shooting was Rone's testimony. There was no other forensic evidence that placed Dixon at the scene. And unlike in *Fowler*, there were never any eyewitnesses connecting Dixon to the crime to begin with, only perhaps to an incident days before which the Superior Court rightly deemed "not particularly motive-generating." B49-50. Thus, without Rone's testimony tying Dixon's gun to the shooting, the State's evidence could not have even withstood a motion for judgment of acquittal. *See* A311.

Thus, as in *Fowler*, since all of the critical evidence linking Dixon to the crime has been put into doubt, namely the testimony of Carl Rone, Dixon's conviction should be reversed and he be granted a new trial.

**III. THE STATE’S CONTENTION THAT RONE’S CRIMINAL CONDUCT HAS NO BEARING ON DIXON’S CASE IS NOT SUPPORTED BY THIS COURT’S PRECEDENT.**

As explained in Dixon’s Opening Brief, Dixon’s trial was closer in time to Rone’s conviction than Fowler’s was. Fowler was tried in May of 2013 whereas Dixon was tried in September of 2013. *See* OB 21-22; *State v. Fowler*, 2017 WL 4381384, at \*1 (Del. Super. Ct. Sept. 29, 2017), rev’d, 194 A.3d 16 (Del. 2018). Since this Court reversed Fowler’s conviction based upon the discovery of Rone’s crimes, the timing of Dixon’s trial should pose no obstacle to relief. Thus, based upon the precedent in *Fowler*, Dixon’s conviction should be reversed.

Nonetheless, the State argues that “Rone’s criminal conduct did not impinge on his work as a toolmark examiner.” AB at 19. The State cites *State v. Pierce*, 2018 WL 4771787, at \*5 (Del. Super. Ct. Oct. 1, 2018) and *Phillips v. State*, 2020 WL 1487787, at \*5 (Del. Mar. 25, 2020) for this proposition. But both of those cases are critically different from Dixon’s case because in both of those cases the Court found that Rone’s testimony was not central to the defendant’s conviction.

Moreover, in *Pierce*, Rone did not even conduct the ballistics analysis at issue—the State hired a different examiner after Rone’s crimes came to light. *Pierce* at \*2. Rone’s testimony, then, was only relevant to chain of custody. *Id.* After a full hearing on the issue, the Superior Court held that even if Rone represented a break in the chain of custody due to his weakened credibility, even breaks in the chain of

custody usually go to the weight of the evidence, not its admissibility. *Id.* at \*3. Nonetheless, the Superior Court warned that “[g]iven the significant issues raised by Mr. Pierce in this motion, this Order should not be read as an opinion regarding what weight will be due this evidence at trial....” *Id.* at \*5. That is, while the Superior Court allowed the admission of Rone’s testimony regarding the ballistics evidence’s chain of custody, Rone’s admitted criminality would necessarily reduce the weight of anything he said.

The jury in Dixon’s case, conversely, had no clue that they were being asked to accept the testimony of a fraudster. Had the jury known, just like the Superior Court in *Pierce*, it would have given Rone’s testimony less weight. Since Dixon’s conviction rested squarely on Rone’s testimony, if his testimony had been given less weight, the jury would have likely found Dixon not guilty. Thus, the Superior Court’s holding regarding the weight it would accord Rone’s testimony supports Dixon’s claim; it does not undermine it as the State suggests.

Similarly, in *Phillips* this Court found that the Superior Court did not abuse its discretion in refusing to reverse the defendant’s conviction when “as the Commissioner found, there were multiple witnesses who testified about identification and this Court found it was not a close case.” *Phillips v. State*, 2020 WL 1487787, at \*5 (Del. Mar. 25, 2020). That is very different than Dixon’s case where Rone’s testimony formed the entirety of Dixon’s supposed connection to the

shooting. Given how subjective toolmark analysis is, had the jury known that the only testimony that connected Dixon to the crime was being delivered by someone who falsified business records in his work for the State, the jury would have come to a different verdict. *See also* Part IV *infra*.

The State additionally argues that Rone's criminality is "mere" impeachment evidence that is insufficient to satisfy Rule 61(d)(2)(i). However, the fact that Rone falsified records is far more than "mere" impeachment. Given that Rone's testimony was the central basis for the verdict in this case and that Dixon has consistently maintained his innocence, this Court should be deeply concerned that Dixon was wrongly convicted based upon the testimony of a discredited fraudster. Indeed, in *Brown v. State*, 108 A.3d 1201, 1206 n.30 (Del. 2015), cited by the State, this Court discussed the difference between "mere" impeachment evidence and evidence that goes to innocence. This Court held that the impeachment evidence that came to light *in that case* "did not go to [the defendant's] actual innocence...." *Id.* However, this Court emphasized that "our decision is limited to the case before it and fact patterns like it" since this Court could contemplate factual scenarios in which impeachment evidence would go to a defendant's innocence. *Id.*

Such a case is surely exemplified when the evidence goes to the heart of the reliability and integrity of a government expert, who otherwise comes before the jury with the imprimatur of authority. In *Commonwealth v. Rivera*, 939 A.2d 355 (Pa.

Super. 2007), the Pennsylvania Superior Court (Pennsylvania’s intermediate appellate court), dealt with a similar credibility issue involving a government expert in an after-discovered-evidence context.<sup>4</sup> The *Rivera* Court held that evidence of a government drug-analysis expert’s misconduct, there, skimming drugs for personal use, constitutes far more than mere impeachment. *Id.* 357, 359. There was no evidence that the expert had “skimmed” drugs in Rivera’s case; and indeed, if she had, it would have inured to Rivera’s benefit, not detriment. Yet the court granted Rivera relief, based on evidence of misconduct that fundamentally undermined the witness’s reliability as a government expert. *See id.* At 359 (“Who knows whether [her testimony] was or was not a truthful rendition of her ‘so-called’ expert testimony.”). The court held that these accusations of misconduct did “much more than simply impeach the testimony” of the witness, and called into “serious question” the substance of her testimony. *Id.*

Thus, pursuant to the plain language of Rule 61 itself (which never excludes impeachment evidence), and in the absence of any compelling evidence of guilt other than the Rone evidence, Dixon satisfies both the jurisdictional and substantive requirements of Rule 61(d)(2)(i). His conviction should be reversed and he should be granted a new trial.

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<sup>4</sup> Of course, Pennsylvania precedent is not binding on a Delaware Court. In light, however, of the similarity of the issue, Dixon cites *Rivera* for its persuasive value.

**IV. THE STATE FUNDAMENTALLY MISUNDERSTANDS THE IMPORT OF DIXON'S CONTENTION THAT CARL RONE'S TESTIMONY WAS FALSE AND MISLEADING.**

Finally, the State argues that "Dixon's claim that Rone's Testimony was False or Misleading is Procedurally Barred." AB 24. However, the State fundamentally misunderstands the import of Dixon's arguments. Dixon did not raise the issue that Carl Rone's testimony was false and misleading as a separate claim, as the State suggests. Moreover, Dixon never argued that scientifically accurate testimony regarding toolmark analysis is not admissible. Instead, Dixon argues that because toolmark analysis is such a subjective inquiry, the credibility of the forensic expert is of paramount importance. The State recognizes that the theory of toolmark comparison "acknowledges that there is a subjective component to the determination of 'sufficient agreement,' which must necessarily be based on the examiner's training and experience." AB 25.

Given how subjective toolmark analysis is then, evidence that Rone committed fraud places in doubt not only how vigorous his analysis may have been, but also whether he ever conducted any meaningful analysis at all. Subjective "match" testimony is not only dependent upon the ballistics expert's expertise, but it is also dependent upon his or her integrity. There is reason to doubt Rone's veracity both because he was willing to commit fraud against the State, and because his

criminal exposure heightened the importance of him demonstrating his value to the State by testifying consistent with the State's theory. *Fowler*, 194 A.3d at 26.

Dixon's trial attorney attempted to impeach Rone, both on the prevalence of 9mm weapons and on the fact that pictures of the markings on the bullets from the scene did not appear to be all that similar to pictures of markings on the test bullets. Such impeachment was unsuccessful in the face of definitive, declarative testimony by an expert who was portrayed as a trusted ballistics expert with 25 years of experience. The trial attorney's impeachment would have been far more effective, and likely deadly, had evidence of Rone's criminal misdeeds been available at trial.

Thus, Dixon should be granted a new trial, or at the very least, be granted a remand so that the Superior Court can conduct an evidentiary hearing to determine what impact the newly discovered evidence would have had on the jury's verdict.

## CONCLUSION

For all of the foregoing reasons, Appellant Troy Dixon respectfully requests that the Court reverse the judgment of the Superior Court, vacate his convictions and sentence, and remand this matter for a new trial.

Respectfully Submitted:

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