[Cite as *State v. Johnson*, 2010-Ohio-4117.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93635

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EUGENE JOHNSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-324431

BEFORE: Celebrezze, J., Kilbane, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: September 2, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Eugene Johnson, appeals the trial court's denial of his second motion for a new trial. Based on the record and the pertinent case law, we affirm.

Prior History

{¶ 2} This represents Johnson's third appeal to this court. The key facts surrounding his conviction can be found in *State v. Johnson* (Jan. 16, 1997), Cuyahoga App. No. 70234 ("*Johnson I*"). In a one-count indictment, Johnson was charged with murder with a firearm specification for the killing

of Clifton Hudson, which occurred on February 10, 1995 at approximately 5:45 p.m. The state's key witness, Tamika Harris, who was 15 at the time, testified that she heard gunshots on the day of the shooting and turned to see a black four-by-four vehicle parked on Strathmore Road in East Cleveland, Ohio. According to Harris, the shooter came from the rear of the vehicle toward the victim. Once the shooting was over, the vehicle sped off and turned right onto Manhattan Avenue, almost colliding with another vehicle.

{¶ 3} Although Harris originally told the police she was unable to see the shooter's face, she later identified Johnson out of a photo array as the man she saw shooting Clifton Hudson on the day in question. Harris testified that once the shooting was over, Johnson ran by her to get to the black vehicle, which had slowed down after turning onto Manhattan Avenue. She did not see Johnson get into the black vehicle, but she did see the vehicle pull off and turn onto Ardenall.

{¶ 4} At approximately 10:00 p.m., after receiving a report that a vehicle matching the description provided by Harris was parked on Knowles Avenue, East Cleveland Police Detective Michael Perry followed the vehicle to Ardenall, where Derrick Wheat and Laurese Glover were arrested in front of Wheat's house. Johnson was arrested at his home.

{¶ 5} According to East Cleveland Detective Vincent Johnstone, he conducted Atomic Absorption tests on Wheat and Johnson at 2:00 or 3:00 a.m.

on February 11, 1995. These swabs, along with those collected from Glover, were sent to the Cuyahoga County Coroner's Office. The police also requested that the Ohio Bureau of Criminal Investigation ("BCI") process the black vehicle for gunshot residue.

{¶ 6} Sharon Rosenberg with the coroner's office testified that she used the Atomic Absorption Spectrometry ("AAS") method of testing for gunshot residue when she analyzed the swabs collected from each of the co-defendants. According to Rosenberg, the samples collected from both of Wheat's hands were consistent with gunshot residue, and she found nitrites on the sleeve of the jacket Wheat was wearing. The hands of the other co-defendants tested negative for gunshot residue. Rosenberg also tested a pair of gloves found in Johnson's jacket pocket. According to the AAS test, the palm of Johnson's left glove tested consistent for gunshot residue. According to an expert with BCI, "he found lead residue on the blotter sheets from the interior of the vehicle and on the blotter sheet from the exterior area below the passenger side window. He testified that the lead residue was consistent with a firearm having been fired." *Johnson I* at 3.

{¶ 7} All three co-defendants provided oral statements. According to their statements, they were driving northbound on Strathmore approaching Manhattan when they saw the shooting; they each provided a description of the shooter.

{¶ 8} Leroy Malone testified on behalf of Johnson. He testified that he had known all three co-defendants since kindergarten because they lived in the same neighborhood. He testified that he was parking his truck on Ardenall when he heard the gunshots. He then saw the black vehicle driving toward him with three men inside. He then saw another man, whom he did not know, running behind the vehicle. He saw the man stop, put something in his pants, and run down Shaw Avenue. According to Malone, the man never got into the vehicle. Malone then testified that the three men in the truck resembled the three co-defendants, and his neighbor told him it was Wheat, Johnson, and Glover inside the truck.

{¶ 9} Eric Reed testified on behalf of Wheat. He said that he lived on Strathmore at the time of the incident and was watching television when he heard the gunshots. He looked out the window and saw an unidentified man standing over the victim and going through his pockets. Reed testified that the man he saw did not resemble any of the co-defendants.

{¶ 10} The three co-defendants were tried together and each was found guilty of murder. Johnson's conviction was affirmed in *Johnson I*. On January 23, 2004, Johnson filed a motion for a new trial based on newly discovered evidence. He claimed that Harris came forward and stated that she erroneously identified Johnson as the shooter. She said she identified Johnson out of the photo array simply because his clothing resembled that

worn by the shooter on the night of the incident. She also indicated that she was young and felt compelled to identify someone as the shooter. According to Harris, she did not recognize any of the faces in the photo array, and she "did not really recognize Eugene Johnson as the shooter at all." *State v. Johnson*, Cuyahoga App. No. 85416, 2005-Ohio-3724 ("*Johnson II*").

{¶ 11} The trial court granted Johnson's motion for a new trial. The state appealed. This court reversed, finding that Johnson was not unavoidably prevented from discovering this evidence and that Harris's recantation was not likely to change the outcome of the trial due to the forensic evidence against all three co-defendants. *Johnson II* at ¶72, 76.

Present Appeal

{¶ 12} On March 4, 2009, Johnson filed another motion for a new trial based on newly discovered evidence. In this motion, Johnson argued that the AAS method of testing for gunshot residue is no longer accepted in the scientific community and thus the forensic evidence admitted in his trial is no longer reliable. This, coupled with the delay between when Johnson was arrested and when the samples were collected to be tested, would completely ameliorate any scientific conclusions reached as a result of these tests. Johnson also presented evidence of new studies showing the strong likelihood of contamination when gunshot residue samples are collected after a suspect is in police custody or in a police station. According to Johnson, this newly

discovered evidence, considered in light of Harris's recantation of her prior testimony, is sufficient to warrant a new trial.

{¶ 13} The trial court held a hearing on Johnson's motion for a new trial. At this hearing, Dr. Jon Nordby, a consultant in forensic science and forensic medicine, testified that new theories have emerged with regard to the proper tests to be utilized when determining the presence of gunshot residue ("GSR"). Dr. Nordby's testimony centered on the high possibility of contamination when a suspect is in custody before his hands are swabbed for GSR and the tests that are now considered scientifically acceptable for determining the presence of GSR.

{¶ 14} When asked why the delay between when the co-defendants were arrested and when the samples were taken was relevant, Dr. Nordby testified that "it's relevant because there are so many sources of contamination in the environment in which these individuals were held that there's no probative value that results, and certainly no scientific hay to be made, so to speak, from finding the presence or absence of these particles on them."

{¶ 15} Dr. Nordby also discussed his findings with regard to the new testing used to determine the presence of GSR in comparison to Rosenberg's findings. He stated, "I found that bulk or batch analysis is not going to tell us anything particularly useful about gunshot residue, or provide any evidence that's going to take us closer toward confirming that the residue is a result of

particular discharge of a firearm or discharge of a firearm directly related to the proximity of a source."[1]

{¶ 16} According to Dr. Nordby, AAS, or bulk or batch analysis, will only indicate whether certain elements are present. He stated, "[t]he difficulty is that it doesn't tell you anything about their shape, their size or — and then potentially their source." Dr. Nordby testified that the Association of Testing and Materials ("ASTM") produces standards for analytical work in natural sciences. When asked whether the ASTM standards were met in this case, Dr. Nordby testified:

{¶ 17} "No. Because those standards involve the use of a scanning electron microscope, and that was not done in this case.

{¶ 18} "The basic difference between a bulk or batch analysis and the scanning electron microscope approach is that the bulk or batch analysis is destructive, so it precludes any subsequent testing or look at the materials to see if the antimony, barium, and lead are fused together in a spheroidal particle of appropriate morphology, meaning size and shape, and whether that would be typical of gunshot residue, which is thought to be required, that is a fused particle of antimony, barium, and lead in one spheroidal shape[.]"

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[1]Dr. Nordby often referred to the method used by Rosenberg as "bulk or batch analysis."

{¶ 19} According to Dr. Nordby, the AAS test used by Rosenberg only determined the presence of antimony and barium, two of the elements found in GSR. Although the AAS method was scientifically accepted at the time of trial, the method now utilized is the Scanning Electron Microscope ("SEM") approach. The SEM approach will not only determine the presence of barium, antimony, and lead, the three elements found in GSR, but it will also determine if those elements are fused into one particle, which is necessary in order to reach the conclusion that the sample is consistent with GSR.

{¶ 20} The trial court denied Johnson's motion for a new trial, and this appeal followed wherein Johnson argues that the trial court abused its discretion.

Law and Analysis

{¶ 21} A motion for a new trial is governed by Crim.R. 33, and the decision to grant or deny such a motion is within the sound discretion of the trial judge. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶82. As such, we review the judge's decision for an abuse of discretion. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. "'The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations.'" *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d

264, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W.2d 810. In order to have an abuse of that choice, the result must be "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." Id.

{¶ 22} A trial court may grant a motion for a new trial based on newly discovered evidence when such evidence is material and "could not with reasonable diligence have [been] discovered and produced at the trial." Crim.R. 33(A)(6). In order to warrant a new trial based on newly discovered evidence, the defendant must show "that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues,[2] (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, at syllabus. While the parties do not dispute that the evidence at issue is material, they eagerly dispute all other prongs of the *Petro* test.

Strong Probability of a Different Result

[2]This element is not in dispute and thus will not be analyzed.

{¶ 23} The first prong of the *Petro* test requires Johnson to show that the newly discovered evidence gives rise to a strong probability that he would be acquitted.[3] Johnson argues that Dr. Nordby's testimony, coupled with Harris's recantation of her identification of Johnson as the shooter, would lead to a different result at trial. In contrast, the state argues that a jury would still find Johnson guilty of murder based on Harris's identification, the fact that Johnson admitted to being at the scene of the shooting, Rosenberg's testimony that nitrites were found on the sleeve of Wheat's jacket, and the

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[3]Johnson argues that the proper test to be applied to a motion for a new trial was set forth in *State v. Siller*, Cuyahoga App. No. 90865, 2009-Ohio-2874. In *Siller*, the court said, "We find consistent with *Petro* that there is a strong probability that if the above-omitted evidence were presented to a jury, there would be a different result. However, we also believe that the correct test is whether the evidence proffered above 'undermines our confidence in the outcome of the trial.' *Kyles* [*v. Whitley* (1995), 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490,] at paragraph one of the syllabus." In *Siller* the court seemed to suggest that it felt the *Petro* standard should be amended to require a reasonable probability, rather than a strong probability, that the outcome would be different. While we acknowledge Johnson's argument, *Siller* did not expressly overrule the *Petro* test, which has been consistently applied in this district as the proper test to be applied in this situation. See, e.g., *State v. Greene*, Cuyahoga App. No. 92638, 2009-Ohio-6307, ¶7 (decided after *Siller* and requiring the defendant to prove a strong probability of a different result). We also note that the court in *Siller* relied on *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, and *Kyles*, supra, to argue that the reasonable probability standard is the appropriate test. *Brady* was a petition for postconviction relief and *Kyles* was a potential *Brady* violation. *Brady* held that the suppression by the prosecution of evidence that is material to the case is a violation of an offender's constitutional rights. Id. at 87. *Kyles* held that evidence must create a reasonable probability of a different result in order to be material. *Kyles* at paragraph one of the syllabus. Neither of these cases involved a motion for a new trial based on newly discovered evidence, nor did they overrule the Ohio Supreme Court's holding in *Petro*. As such, the *Petro* test remains in effect in Ohio and will be applied by this court until the Ohio Supreme Court indicates otherwise.

testimony of the BCI expert that lead was found in the front seats and outdoor passenger side of the vehicle. We find the state's argument persuasive.

{¶ 24} Johnson argues that the AAS method is no longer scientifically accepted and would not meet the *Daubert* test for admissibility of scientific evidence. He relies on this to argue that the testimony of Dr. Nordby would raise a question in the jurors' minds with regard to his guilt, and thus he would be acquitted.

{¶ 25} This is not a case where advancements in scientific research allow evidence to be disproved. Dr. Nordby can only testify that the method employed by Rosenberg is not necessarily indicative of GSR and that without the presence of a fused particle, Rosenberg cannot affirmatively prove that GSR was present on Johnson's glove. All parties admit that once the AAS method is conducted on a sample, that sample is destroyed and cannot be retested for the presence of GSR. As such, Johnson has no newly discovered evidence upon which to request a new trial; he merely has a newly discovered theory upon which he wishes to impeach a prior witness. If Johnson were able to affirmatively demonstrate that the glove he was wearing did not contain GSR, the outcome might be different. In this instance, however, Johnson is unable to establish a strong probability that the outcome of his trial would have been different, and thus the first prong of the *Petro* test is not met.

{¶ 26} Science is an ever-evolving field, and criminal defendants should not be afforded a new trial every time the scientific testing methods for forensic evidence change. In this case, the presence of GSR on Johnson's glove cannot be discredited. We are not persuaded that the testimony of Dr. Nordby would be enough to raise a reasonable doubt in the minds of the jurors with regard to Johnson's guilt.

Timing of Discovery

{¶ 27} Johnson must also demonstrate that this evidence was discovered since trial and could not, with the exercise of reasonable diligence, have been discovered before the trial. Johnson relies on a 2005 FBI symposium discussing the various issues with AAS testing and contamination of GSR samples, Dr. Nordby's report, and the Cuyahoga County Coroner's Office manual relating to GSR, to argue that the evidence is newly discovered. The state, however, points to the cross-examination of Rosenberg and Dr. Nordby to argue that the evidence could have been found at an earlier date. Specifically, the state points to Rosenberg's testimony that the presence of antimony and barium could result from sources other than GSR and a list she provided at trial of alternative sources of those elements. The state also points to testimony elicited from Dr. Nordby where he said that he has conducted SEM testing since 1989 and that he could have testified about it back in 1995 when Johnson was first tried. This argument is misguided.

{¶ 28} Although the state is correct that Dr. Nordby was conducting SEM testing in 1989, it ignores Dr. Nordby's testimony that SEM testing did not become scientifically accepted as the best method for testing for GSR until much later. In fact, Johnson produced a copy of the Cuyahoga County Coroner's Office manual on Gunshot Primer Residue Analysis that became effective on March 12, 2007, which provides instructions on how to conduct SEM testing.[4] Assuming the county coroner's office did not employ the SEM method until March 2007, Johnson's presentation of this newly discovered evidence was timely; he did not receive Dr. Nordby's final report containing his scientific findings until November 13, 2008, and his motion for leave to file a motion for a new trial was filed on January 12, 2009.[5]

Cumulative or Impeachment Evidence

{¶ 29} Johnson is also required to prove that the evidence presented is not merely cumulative or impeachment evidence. In making this argument, Johnson states, "[r]ecent scientific research has shown that the mere presence

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[4]Johnson also presented evidence that the FBI and ASTM now require SEM testing to find the presence of GSR.

[5]The state gives great weight to the fact that Johnson had a report from an expert named Dr. Kilty in 2007 and that report is similar to Dr. Nordby's. While a copy of Dr. Kilty's report is not part of the record before us on appeal, it is referenced in Dr. Nordby's report. Dr. Nordby indicated, however, that although he agreed with Dr. Kilty's findings, he did not agree with some of the pre-1995 science relied upon by Dr. Kilty. As such, we do not find that it was unreasonable for Johnson to wait until he received Dr. Nordby's report and conducted the necessary research before filing his motion for a new trial.

of antimony and barium is simply not enough to support the conclusion that ammunition primer was the source of the material taken from the defendants' hands. The Coroner's Office no longer permits its employees to testify unequivocally regarding the results obtained in this case as Rosenberg did at trial. The Coroner's Office will no longer report positive gunshot-residue findings without evidence of fused gunshot-residue particles.

{¶ 30} "Rosenberg's conclusions are further undermined by the issue of police environment contamination. She could no longer testify to a positive gunshot-residue finding, nor would she be able to testify to the source of the elements found. The newly discovered evidence does more than impeach or contradict; it presents an entirely new view of the physical evidence presented at trial and completely undermines its value to the prosecution."

{¶ 31} We disagree with Johnson's analysis. As stated above, all parties agree that the samples taken in this case cannot be retested for the presence of GSR. Because the samples cannot be retested, Dr. Nordby cannot testify that the samples taken from Johnson's glove were inconsistent for the presence of GSR. In the same vein, Dr. Nordby's testimony with regard to the contamination issues will do nothing more than impeach Rosenberg's trial testimony, and therefore the *Petro* test is not met in this case.

Conclusion

{¶ 32} Criminal defendants are not entitled to a new trial every time there is an advance in scientific testing methods. Because the new test that Johnson argues is "newly discovered evidence" cannot be used to disprove the presence of GSR, and because Dr. Nordby's testimony will do nothing more than impeach Rosenberg's testimony, Johnson has not proven that he is entitled to a new trial based on newly discovered evidence.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR