

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARELL RAMON BROWN,

Defendant-Appellant.

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UNPUBLISHED

January 7, 2020

No. 347265

Oakland Circuit Court

LC No. 2018-268144-FC

Before: RONAYNE KRAUSE, P.J., and METER and STEPHENS, JJ.

PER CURIAM.

STEPHENS, J. (*Concurring*).

I write to concur with the directive in the majority opinion that the trial court must accept the defendant’s indigence as proven when it re-examines the prayer for additional funds. Despite conceding that the defendant established a need for an expert, the majority writes that if the defendant on remand has the burden to establish that an expert is needed, that the proffered expert is qualified, and that the sum requested is reasonable. The trial court granted the motion for some expert fees therefore, the first issue was resolved; otherwise, the court had no basis to provide any money from the public treasury. More than 21 days passed prior to the defendant’s prayer for additional funds from which this appeal arises. The prosecution did not file a Motion for Reconsideration of that order for the appointment of an expert at public expense. The prosecution did not ask leave of this Court to re-visit the issue of the initial appointment of an expert in its response to the application for interlocutory relief either before this Court or the Supreme Court. When the Supreme Court remanded the case to this Court, their order did not expand the issues for review beyond those in the prayer for interlocutory relief. Therefore, I contend that the issue of the necessity for an expert is not properly before us. MCR7.205(E)(3).

However, despite the court's authorization of the expenditure of public funds for an expert and its implicit determination that the *Moore*<sup>1</sup> standard has been met, on appeal the prosecution makes an improper collateral attack on that order and argues:

Here, Defendant has consistently failed to show that “a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.” *People v Kennedy*, 502 Mich 206, 227; 917 NW2d 355 (2017) (quoting *Moore v Kemp*, 809 F2d 702, 712 (11th Cir 1987)). Where Defendant does not dispute firing three bullets into the victim's car . . . and only claims self-defense, he fails to show how a ballistics expert would establish he was acting in self-defense.

The defendant's articulation of the due process need for the putative expert was not robust, but as noted in *Kennedy*:

Although *Ake* governs requests by an indigent criminal defendant for the appointment of an expert at government expense, the Supreme Court has not explained how this showing must be made. The question is critical. Until an expert is consulted, a defendant might often be unaware of how, *precisely*, the expert would aid the defense. If in such cases the defendant were required to prove in detail with a high degree of certainty that an expert would benefit the defense, the defendant would essentially be tasked with the impossible...[502 Mich at 225-226.].

At the preliminary examination, the prosecution presented its own ballistic expert, Specialist Steven Hendricks. According to the prosecution's brief,

[Hendricks] testified there was a bullet hole in the interior of Mack's( the victim) door frame above the rear tire. *Id.* at 177. There was also one bullet hole each in the rear driver's-side quarter-panel and the back bumper. *Id.* at 181-82, 187. Hendricks' opinion was that “the vehicle either had been moving or the shooter had been moving[.]” This is because the first shot went into the door in “a left to right kind of angle” while the second shot “looks to be more of a straight on shot and the third one \* \* \* looks to be as the vehicle's to the left or the shooter's to the right and shooting from right to left and on angle.” *Id.* at 185.

The defendant argued that just as the prosecution through sought to prove through its expert that the evidence regarding the trajectory of the bullets demonstrated that the defendant was the aggressor, the defense requested an expert to disprove or discredit that testimony. The record below supports the court's implicit finding that the defendant met the *Moore* standard of reasonable probability prior to the issuance of the court's order authorizing the use of public funds. An independent review of the record below, also supports a finding that the *Moore*

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<sup>1</sup> *Moore v Kemp*, 809 F2d 702, 712 (11th Cir 1987).

standard was met. Thus while the issue of reasonableness of fees is ripe for review, the *Moore* issue has already been determined.

/s/ Cynthia Diane Stephens