

2005 N.Y. LEXIS 169, *

The People &c., Respondent, v. Bernard Pitts, Appellant. The People &c., Respondent, v. Anthony **Barnwell**, Appellant.

No. 9, No. 10

COURT OF APPEALS OF NEW YORK

2005 N.Y. LEXIS 169

February 15, 2005, Decided

NOTICE: [*1] THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

PRIOR HISTORY: People v. Pitts, 8 A.D.3d 1122, 778 N.Y.S.2d 338, 2004 N.Y. App. Div. LEXIS 8197 (N.Y. App. Div. 4th Dep't, 2004)
People v. **Barnwell**, 6 A.D.3d 1147, 775 N.Y.S.2d 659, 2004 N.Y. App. Div. LEXIS 6146 (N.Y. App. Div. 4th Dep't, 2004)

DISPOSITION: In Pitts case, order of the appellate division affirmed; in **Barnwell** case, order of the appellate division reversed, case remitted to trial court.

CASE SUMMARY:

PROCEDURAL POSTURE: In two different cases, the trial courts denied defendants' post-conviction motions for deoxyribonucleic acid (DNA) testing without a hearing. The Appellate Division (New York) affirmed the trial court's ruling in each case, and each defendant sought further review. The cases were consolidated on appeal.

OVERVIEW: In each case, defendant was convicted of rape. The court of appeals held there was no time limit within which defendants had to seek post-conviction DNA testing, nor did they have to show evidence to be tested existed in enough quantity. The People, as evidence gatekeeper, had to show what evidence existed and whether it was available for testing. In one case, there was no reasonable probability of a verdict more favorable to defendant had DNA testing results been introduced at trial, as the victim showered after the rape, waited two days to report it, no physical evidence was recovered from her, and defendant admitted having sex with her. As to the other defendant, it was error to deny his motion without a hearing as the trial court found a reasonable probability the verdict would have been more favorable to him had DNA testing been introduced. The People had the burden to show with enough specificity if the evidence existed and could be tested. A claim that the evidence no longer existed based on a phone call to a police property clerk's office was insufficient as a matter of law. Reliable information had to be submitted as to whether the evidence existed.


OUTCOME: In one case, the lower court's judgment was affirmed. In the other case, the lower court's judgment was reversed, and the matter was remitted to the trial court for further proceedings.

CORE TERMS: testing, rape, tested, forensic, reasonable probability, diligence, favorable, post-conviction, leave to appeal, third degree, requesting, quantities, convicted, raped, kit, sexual intercourse, favorable verdict, collected, recovered, hair, swabs, feasible, prison, van, identification testimony, burden of establishing, grand larceny, direct appeal, second degree, pro se

LexisNexis(R) Headnotes


Criminal Law & Procedure > Evidence > Scientific Evidence > DNA

Criminal Law & Procedure > Postconviction Proceedings > Postconviction Generally

HN1  The legislature enacted N.Y. Crim. Proc. Law § 440.30(1-a), establishing a new procedure for defendants who were convicted prior to 1996 to secure deoxyribonucleic acid (DNA) testing. The legislature amended § 440.30(1-a) to allow any defendant, regardless of the date of conviction, to move for a DNA testing order. The amendment further empowered courts to direct prosecutors to inform defendants of any information in the prosecutor's possession regarding the current location of the evidence to be tested, whether the evidence still exists, and the last-known physical location of the evidence. These statutory requirements -- setting forth a standard different from that applied in other N.Y. Crim. Proc. Law art. 440 motions to vacate convictions involving newly discovered evidence and expanding the class of defendants to whom testing is available -- reflect the vital importance and potential exonerating power of DNA testing.


Criminal Law & Procedure > Evidence > Scientific Evidence > DNA

Criminal Law & Procedure > Postconviction Proceedings > Postconviction Generally

HN2  Under N.Y. Crim. Proc. Law § 440.30(1-a), as originally enacted, a defendant convicted before January 1, 1996 can move for deoxyribonucleic acid (DNA) testing on specific evidence. The court then determines whether any evidence containing DNA was secured in connection with the trial and the court shall grant the defendant's application if it determines that had a DNA test been conducted on the evidence and had the results of that evidence been admitted at trial, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

Criminal Law & Procedure > Evidence > Scientific Evidence > DNA

Criminal Law & Procedure > Postconviction Proceedings > Postconviction Generally

HN3  See N.Y. Crim. Proc. Law § 440.30(1-a), as enacted on August 2, 1994.

Criminal Law & Procedure > Evidence > Scientific Evidence > DNA

Criminal Law & Procedure > Postconviction Proceedings > Postconviction Generally

HN4 There is no time limit for bringing a post-conviction motion requesting the performance of forensic deoxyribonucleic acid (DNA) testing. A defendant may move for DNA testing pursuant to N.Y. Crim. Proc. Law § 440.30(1-a) at any time. Further, a defendant does not bear the burden of showing that the specified DNA evidence exists and is available in suitable quantities to make testing feasible. To the contrary, it is the People, as the gatekeeper of the evidence, who must show what evidence exists and whether the evidence is available for testing.

COUNSEL: James Eckert, for appellants.

Nancy A. Gilligan, for respondent.

JUDGES: Opinion by Judge G.B. Smith. Chief Judge Kaye and Judges Ciparick, Rosenblatt, Graffeo, Read and R.S. Smith concur.

OPINIONBY: G.B. SMITH

OPINION:

G.B. SMITH, J.:

These appeals present two questions: (1) does CPL 440.30(1-a) impose a due diligence requirement, limiting the time by which a defendant must bring a post-conviction motion requesting DNA testing and (2) does a defendant who brings such a motion bear the burden of establishing that the specified DNA evidence exists and is available in quantities sufficient to be tested?

The courts below denied defendants' post-conviction motions without a hearing, ruling that defendants did not bring timely motions for relief and therefore did not exercise the requisite due diligence and, further, that they did not demonstrate that the specified DNA evidence existed and was available for testing. For the reasons that follow, we conclude that there is no time limit for bringing a post-conviction motion requesting the performance of forensic DNA testing, [***2**] and the defendant does not bear the burden of showing that the specified DNA evidence exists and is available for testing.

FACTS

People v Bernard Pitts

On October 15, 1994, a 14-year-old female was raped at the Rundel Library in Rochester by a male acquaintance. Two days later, the victim disclosed the rape to her mother, sought medical attention at an area hospital and reported the rape to the police. By the time doctors completed the rape kit, the victim had showered and cleaned herself.

Pitts was arrested when the 14-year-old saw him on the street and alerted her

mother. Pitts originally entered a plea of guilty to a Superior Court Information charging him with rape in the third degree. However, because the court determined that it could not comply with the promised sentence of 1 to 3 years, Pitts was allowed to withdraw his guilty plea. Pitts was subsequently indicted on the charges of rape in the first degree (Penal Law § 130.35[1]) and rape in the third degree (Penal Law § 130.25[2]) and proceeded to trial. At trial, the People did not introduce any forensic evidence of sexual intercourse. Defendant's expert [*3] witness testified that the victim's efforts to clean herself explained the absence of forensic evidence.

On November 3, 1995, the jury convicted Pitts of one count of rape in the first degree and one count of rape in the third degree. At sentencing, the trial court referred to the original plea agreement and noted that Pitts "does admit having sexual intercourse with the victim." The court then sentenced Pitts to concurrent prison terms of 8 1/3-to-25 years and 1 to 3 years. n1

- - - - - Footnotes - - - - -

n1 These convictions were affirmed by the Appellate Division, (People v Pitts, 231 A. D.2d 901, 648 N.Y.S.2d 406 [4th Dep't 1996]), and leave to appeal to this Court was denied (89 N.Y.2d 928, 677 N.E.2d 302, 654 N.Y.S.2d 730 [1996]).

- - - - - End Footnotes- - - - -

On June 20, 2001, more than five years after his direct appeal was final, Pitts, while in prison, filed, a pro se motion pursuant to CPL 440.30 (1-a) seeking an order directing the performance of forensic DNA testing on certain evidence. In particular, he requested DNA testing of vaginal swabs, oral [*4] swabs, the victim's underpants, all fibers and debris retrieved from clothing, hairs, and any other material tested by the Monroe County Public Safety Laboratory. Pitts argued that DNA material was collected in connection with his prosecution, and that a more favorable verdict would have resulted if evidence that DNA material did not come from him had been introduced at trial. The People responded that Pitts did not establish that the material he wanted contained DNA. n2 The People also argued that Pitts' application was untimely and should be dismissed on that ground.

- - - - - Footnotes - - - - -

n2 According to the laboratory report concerning the victim's rape kit, no spermatozoa were observed on the slides, nor was there any seminal material detected on the swabs examined or the victim's underpants. Further, there is no indication that hair samples collected from the victim contained DNA.

- - - - - End Footnotes- - - - -

On August 27, 2001, Monroe County Court denied Pitt's motion without a hearing, finding that he did not exercise the requisite due diligence in making [*5] the

application more than five years after his direct appeals were exhausted and almost three years after a previous CPL 440 motion. Further, the court ruled that defendant failed to show that any of the items sought to be tested contained DNA. Because the jury was informed that no forensic evidence linked Pitts to the crime, the court found that even had DNA evidence been recovered in connection with the trial, there was no reasonable probability that the verdict would have been more favorable to defendant.

On June 14, 2004, the Appellate Division affirmed "for reasons stated in decision at Monroe County Court" (People v Pitts, 8 AD3d 1122, 778 N.Y.S.2d 338 [4th Dep't 2004]). A Judge of this Court granted the defendant leave to appeal. We now affirm because no reasonable probability exists that the verdict would have been more favorable to Pitts had the results of DNA testing been introduced at trial.

People v Anthony **Barnwell**

On June 15, 1985, at about 2:00 a.m., a man who sneaked into an unlocked and unoccupied van accosted a 38-year-old female as she was driving. The man assaulted, sodomized and repeatedly raped the victim in the back of the van. After assaulting her, [*6] he left the victim in the van. She returned home and called the police. When the police arrived, the victim recounted the ordeal and described her attacker. After making her report to the police, the victim went to an area hospital for treatment. A rape kit was prepared during the hospital visit.

On or about July 15, 1985, the police stopped **Barnwell** in the area where the rape occurred. On July 16, 1985, the police placed **Barnwell's** photograph in a photo array and showed the array to the victim. She identified **Barnwell** as the man who had raped her. On February 24, 1986, the victim, almost eight months after his arrest, identified **Barnwell** in a police-arranged lineup as the man who raped her.

At trial, the People's case consisted primarily of identification testimony by the victim, who was the only witness to the crime. **Barnwell** relied on misidentification as his defense. On February 20, 1987, a jury convicted **Barnwell** of rape in the first degree (two counts) (Penal Law § 130.35[1]), sodomy in the first degree (Penal Law § 130.50 [1]), robbery in the second degree (Penal Law § 160.10[2][a]), assault in [*7] the second degree (Penal Law § 120.05[6]) and grand larceny in the third degree (Penal Law § 155.30[5]). He was sentenced to concurrent terms of 7 1/2 to 15 years for rape and sodomy; 3 1/2 to 7 years for robbery and assault and 2 to 4 years for grand larceny. The Appellate Division affirmed (People v **Barnwell**, 155 A.D.2d 886, 549 N.Y.S.2d 609 [4th Dep't 1989]) and a Judge of this Court denied leave to appeal (75 N.Y.2d 810, 551 N.E.2d 1238, 552 N.Y.S.2d 560 [1990]).

On September 20, 2000, approximately 10 years after **Barnwell's** direct appeal was final, and more than six years after the enactment of CPL 440.30 (1-a), **Barnwell**, while in prison, filed, a pro se motion pursuant to CPL 440.30 (1-a) for DNA testing on hairs, semen and a cigarette butt recovered in connection with his prosecution. **Barnwell** alleged in his motion that the evidence established that he and the victim were unknown to each other before the crime, that a question of identity was raised at trial, and that there was a reasonable probability that had DNA evidence been admitted at trial, the verdict would have been more favorable [*8] to him. In

response, the People argued that a due diligence standard applied, and that **Barnwell** failed to meet it by filing an untimely motion -- six years after the enactment of CPL 440.30 (1-a) and 13 years after his conviction. The People also claimed that DNA testing was impossible, relying on a hearsay affidavit stating that "according to" an employee of the Property Clerk's Office, the rape kit had been destroyed "in accordance with the [Police] Department's policy."

On December 20, 2000, Supreme Court denied **Barnwell's** motion for an order directing DNA testing without a hearing. Given that the prosecution's case at trial consisted primarily of identification testimony by the victim, the fact that there were no other witnesses to the crime, and the fact that **Barnwell** and the victim were unknown to each other before the incident, the court indicated that this case presents the type of case where DNA testing would make a difference if conducted at this point in time. However, the court noted that "the problem in this case is that the evidence originally obtained and containing the potential DNA evidence to be tested no longer exists."

On April 30, 2004, the [***9**] Appellate Division affirmed, holding that under Appellate Division precedent "it is incumbent upon a defendant to show that the evidence to be tested still exists and is available in quantities sufficient to make testing feasible at this late date." The court stated, "further, there is no need for a hearing to inquire into the destruction of the evidence because the People were under no obligation to preserve the evidence after defendant's direct appeals were exhausted in 1990, more than 10 years prior to the instant motion." A Judge of this Court granted the defendant leave to appeal. We now reverse and remit this case to Supreme Court for further proceedings as set forth below.

DISCUSSION

Over the last ten years, forensic DNA testing has become an accurate and reliable means of analyzing physical evidence collected at crime scenes and has played an increasingly important role in conclusively connecting individuals to crimes and exonerating prisoners who were wrongfully convicted.

In 1994 **HN1** the Legislature enacted CPL 440.30 (1-a), establishing a new procedure for defendants who were convicted prior to 1996 to secure DNA testing. In 2004 the Legislature [***10**] amended CPL 440.30 (1-a) to allow any defendant, regardless of the date of conviction, to move for a DNA testing order. The amendment further empowered courts to direct prosecutors to inform defendants of any information in the prosecutor's possession regarding the current location of the evidence to be tested, whether the evidence still exists, and the last-known physical location of the evidence. These statutory requirements -- setting forth a standard different from that applied in other CPL 440 motions to vacate convictions involving newly discovered evidence and expanding the class of defendants to whom testing is available -- reflect the vital importance and potential exonerating power of DNA testing.

HN2 Under CPL 440.30 (1-a), as originally enacted, a defendant convicted before January 1, 1996 can move for DNA testing on specific evidence. n3 The court then determines whether any evidence containing DNA was secured in connection with the

trial and "the court shall grant" the defendant's application if it determines that had a DNA test been conducted on the evidence and had the results of that evidence been admitted at trial, "there [*11] exists a reasonable probability that the verdict would have been more favorable to the defendant." n4

- - - - - Footnotes - - - - -

n3 Both defendants were convicted before January 1, 1996; they made and the courts determined their motions under the prior version of the statute. Accordingly, the 2004 amendment does not affect the outcome of these cases.

n4 440.30(1-a), as enacted on August 2, 1994 provided:

HN3 In cases of convictions occurring before January first, nineteen hundred ninety-six, where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

- - - - - End Footnotes- - - - - [*12]

In each of the cases before us, the Appellate Division concluded that defendant failed to exercise due diligence in bringing his respective motion requesting the performance of forensic DNA testing and did not "show that the evidence to be tested still exists and is available in quantities to make testing feasible" (People v Ahlers, 285 A.D.2d 664, 728 N.Y.S.2d 246 [3d Dep't 2001], *lv denied* 97 N.Y.2d 701, 765 N.E.2d 304, 739 N.Y.S.2d 101 [2002]).

We conclude that these courts erred in interpreting CPL 440.30 (1-a) to impose upon defendants a due diligence requirement limiting the time within which to make a CPL 440.30 (1-a) motion, and to place on defendants the burden to establish the location and status of the evidence they seek to be tested.

We hold that **HN4** there is no time limit for bringing a post-conviction motion requesting the performance of forensic DNA testing. A defendant may move for DNA testing pursuant to CPL 440.30 (1-a) at any time. We further hold that the defendant does not bear the burden of showing that the specified DNA evidence exists and is available in suitable quantities to make testing feasible. [*13] To the contrary, it is the People, as the gatekeeper of the evidence, who must show what evidence exists and whether the evidence is available for testing.

We now consider whether the lower courts properly denied the instant post-conviction motions without a hearing or further proceedings into whether the evidence sought to

be tested still exists.

As to Pitts, we conclude that the trial court correctly denied the motion without a hearing on the ground that no reasonable probability existed that Pitts would have received a more favorable verdict had a DNA test been conducted and had the results of the test been introduced at trial.

Given the victim's two-day wait before reporting the rape and receiving medical attention, and the testimony of defendant's expert that no physical evidence was recovered from the victim, there is no reasonable probability that DNA testing could have led to a more favorable verdict. n5

- - - - - Footnotes - - - - -

n5 We also note that, at sentencing, defendant Pitts admitted to having sexual intercourse with the victim and claimed that it was consensual.

- - - - - End Footnotes- - - - - [*14]

In **Barnwell**, on the other hand, the court improperly denied the motion without a hearing or further proceedings. Though **Barnwell** requested testing of specified evidence containing DNA and the motion court found that defendant met the CPL 440.30 (1-a) reasonable probability requirement, the motion court denied **Barnwell's** application, relying merely on the People's conclusory assertion that the evidence in question no longer exists. The motion court also held that defendant did not exercise due diligence in pursuing his CPL 440.30 (1-a) motion. This was reversible error. As stated above, CPL 440.30 (1-a) does not impose a time limitation on a defendant moving for DNA testing.

Further, upon **Barnwell's** motion, and the motion court's determination that, had the evidence been tested and the results admitted at trial, the result would have been more favorable to defendant, the People, and not defendant, had the burden of establishing with sufficient specificity whether the evidence existed and could be tested. The mere assertion that the evidence no longer exists based on a phone call to a police property clerk's [*15] office is insufficient as a matter of law under CPL 440.30 (1-a). We thus reverse the Appellate Division's order and remit to Supreme Court, Monroe County for further proceedings to establish whether the DNA evidence in question exists. Supreme Court should take steps to obtain from the People reliable information as to whether or not the sought evidence exists and the source of such information. Adequate information from the People might include, for example, an affidavit from an individual with direct knowledge of the status of the evidence or an official record indicating its existence or nonexistence.

Accordingly, with regard to Pitts, the order of the Appellate Division should be affirmed. With regard to **Barnwell**, the order of the Appellate Division should be reversed and the case remitted to Supreme Court for further proceedings in accordance with this opinion.

Case No. 9: Order affirmed.

Case No. 10: Order reversed and case remitted to Supreme Court, Monroe County, for further proceedings in accordance with the opinion herein.







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