

2015 IL App (1st) 132671-U
No. 1-13-2671
December 22, 2015

SECOND DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 10 CR 10308
)	
THEOPHIL ENCALADO,)	The Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held:* In a criminal trial, the lab employee responsible for technical review of DNA analysis may appropriately testify about the lab's analysis of a swab containing DNA, even though the employee did not perform all stages of the analysis, without violating the defendant's right to confront the witnesses against him.

¶ 2 After a bench trial, the trial court found Theophil Encalado guilty of predatory sexual assault of a child. Encalado contends that the trial court denied him his right to confront the witnesses against him when it permitted a DNA specialist to testify about the results of DNA analysis, even though the specialist did not operate the instrument that generated the DNA

profile. We hold that the specialist's role as the person responsible for technical review of the DNA analysis made her an appropriate person to testify about the results of the DNA analysis. We affirm the trial court's judgment.

¶ 3

BACKGROUND

¶ 4

When 12 year old Jessica Henderson came home on November 7, 2002, she told her parents that a man had raped her. Her parents took her to a nearby hospital, where Henderson told a doctor about the rape. The doctor swabbed Henderson's vaginal area. The Illinois State Police sent the swab to Cellmark Diagnostics for DNA analysis. From the swab, Cellmark reconstructed a DNA profile of the male who produced the sperm found in Henderson's vagina. Cellmark sent the DNA profile back to the Illinois State Police.

¶ 5

Charles Hollendoner of the Chicago Police Department tried repeatedly to interview Henderson to obtain further information about the source of the semen. Henderson's father barred the officer from talking to Henderson. On January 30, 2009, Hollendoner directly contacted Henderson, then 19 years old, and she agreed to discuss the case with him. She looked at an array of photographs and identified Encalado as the man who raped her. Chicago police arrested Encalado on February 25, 2009. A grand jury indicted Encalado on multiple counts of predatory criminal sexual assault of a child.

¶ 6

On May 19, 2009, an investigator working for the State obtained a swab of the inside of Encalado's cheek. The police department sent the swab to the Illinois State Police Laboratory for analysis of Encalado's DNA profile.

¶ 7 At the bench trial, a witness who worked at Cellmark identified an exhibit as the DNA profile Cellmark obtained from the semen found in Henderson's vagina.

¶ 8 Nichol Werkheiser of the Illinois State Police testified that Nicholas Richert operated the instrument in the police laboratory that generated the DNA profile based on the swab of Encalado's cheek. Werkheiser performed the technical review of Richert's DNA analysis. She found that Richert followed the established protocol and maintained a proper chain of custody for the swab. Werkheiser testified that Encalado's DNA matched the DNA profile Cellmark produced from the sperm found in Henderson's vagina. Werkheiser added that the evidence effectively ruled out the possibility of a random match.

¶ 9 Encalado objected to Werkheiser's testimony on grounds that she did not perform the procedures that generated Encalado's DNA profile. The trial court overruled the objection.

¶ 10 Henderson testified that after school on November 7, 2002, she went first to her grandmother's home. Around 4:30 p.m., as she walked from her grandmother's home to her parents' home, Encalado blocked her way with his car and started talking to her. She walked around the car, but Encalado reached out of the window and grabbed her arm. Henderson got into the car. Encalado drove to an alley, and then he punched Henderson, pulled his pants down and forced her to have intercourse with him.

¶ 11 Encalado did not testify. The trial court found Encalado guilty of predatory criminal sexual assault of a child and sentenced him to 16 years in prison. Encalado now appeals.

¶ 12

ANALYSIS

¶ 13

Encalado argues on appeal that the trial court violated his right to confront the witnesses against him when it permitted Werkheiser to use Richert's analysis of Encalado's DNA. *People v. Nelson*, 2013 IL App (1st) 102619, guides our resolution of this case. We agree with the parties that the appeal presents an issue of law subject to *de novo* review. *Nelson*, 2013 IL App (1st) 102619, ¶ 47.

¶ 14

In *Nelson*, Matthew Quartaro, a Cellmark employee, testified about the results of DNA analysis of swabs Cellmark received. Quartaro, who supervised a team of DNA analysts, reported that other employees of the lab purified the samples and oversaw the instruments that processed the samples to produce the DNA profile. Quartaro reviewed the raw data generated by the lab's instruments and prepared the report of the DNA profile of the material found on the swab. *Nelson*, 2013 IL App (1st) 102619, ¶¶ 20-24.

¶ 15

Nelson argued on appeal that the trial court denied him his right to confront the witnesses against him when it allowed Quartaro to rely on the report from the technicians who personally oversaw the instruments that processed the samples. The *Nelson* court found that Quartaro's testimony did not violate the right to confront witnesses because "Quartaro independently reviewed the data and documentation in this case, performed the analysis on the data, and authored the report for Cellmark. Furthermore, Quartaro described the controls Cellmark used and testified the proper controls were run in this case to ensure the instruments were functioning properly. Indeed, in this case Quartaro testified the chain of custody was maintained as to all of the samples." *Nelson*, 2013 IL App (1st) 102619, ¶ 68.

¶ 16 The *Nelson* court noted that courts from other jurisdictions "similarly reject the argument that the confrontation clause requires testimony from every person involved in performing a forensic DNA analysis. *E.g.*, *Aguilar v. Commonwealth*, 280 Va. 322, 699 S.E.2d 215, 222 (2010); *Vann v. State*, 229 P.3d 197, 210-11 (Alaska Ct. App. 2010); *United States v. Boyd*, 686 F. Supp. 2d 382, 385 (S.D.N.Y. 2010), *aff'd* 401 Fed. Appx. 565 (2d Cir. 2010)." *Nelson*, 2013 IL App (1st) 102619, ¶ 67.

¶ 17 The *Nelson* court particularly relied on *State v. Lopez*, 45 A.3d 1 (R.I. 2012). In *Lopez*, "Quartaro testified that he did not personally observe the analysts who conducted the cutting, extraction, or quantification, nor did he perform those steps. In fact, Quartaro indicated that he never physically touched the evidence in this case. *** The only portion of Quartaro's report admitted into evidence was an allele table ***. Quartaro testified that he prepared this chart based on his analysis of computer-generated graphs, which consisted of 'raw data' obtained from the PCR-testing stage." *Lopez*, 45 A.3d at 10-11, *quoted in Nelson*, 2013 IL App (1st) 102619, ¶ 66.

¶ 18 Lopez also argued that Quartaro's testimony violated his right to confront witnesses, and the *Lopez* court said:

"Acting as a supervisor at Cellmark, Quartaro directed specific analysts to perform each stage of the DNA testing on each of the seven samples. After the first three stages of the DNA testing were completed, he then reviewed the entire case file and confirmed that all protocols were followed properly by examining

the other analysts' notes, their affirmations that protocols were followed, as well as their conclusions. Most importantly, Quartaro personally reviewed and independently analyzed all the raw data, formulated the allele table, and then articulated his own final conclusions concerning the DNA profiles and their corresponding matches." *Lopez*, 45 A.3d at 13.

¶ 19 The *Lopez* court held that Quartaro's role in the construction of the DNA profile and the comparison of the two profiles made him an appropriate witness for confrontation purposes. *Lopez*, 45 A.3d at 14-15. The court added:

"That is not to say that cross-examination of Quartaro could have addressed every risk of bias or error in the forensic testing. It is true that all stages of DNA testing and analysis are susceptible to error and falsification, and that a defendant must be given a reasonable opportunity to reveal any such errors or falsifications through cross-examination. ***

*** [Q]uestions as to how prior analysts' handling or preparation of the DNA samples may have affected Quartaro's independent, scientific opinions are evidentiary, and not of a constitutional dimension." *Lopez*, 45 A.3d at 16.

¶ 20 We find that Werkheiser, as the lab employee responsible for technical review of Richert's report, could testify to the contents of the report and to her conclusions from her comparison of Richert's analysis of Encalado's DNA profile with Cellmark's analysis of the swab of Henderson's vagina. *Nelson*, 2013 IL App (1st) 102619, ¶ 64-68; *Lopez*, 45 A.3d at 10-13.

¶ 21 In *Nelson*, Justice Gordon, in a special concurrence, noted that "defendant does not suggest any questions that he would have asked the nontestifying DNA analysts and that he could not have asked their supervisor." *Nelson*, 2013 IL App (1st) 102619, ¶ 84 (Gordon, J., specially concurring). The same observation applies here. We trust the discovery process to protect the defendant's right to learn of any problems in handling samples or operation of the machinery that might lead to a false match.

¶ 22 CONCLUSION

¶ 23 The trial court correctly permitted Werkheiser to testify about the results of the DNA analysis for which she performed the technical review, and her comparison of that DNA analysis with the DNA analysis reported by Cellmark. Accordingly, we affirm the trial court's judgment.

¶ 24 Affirmed.