

STATE OF NEW JERSEY,

v.

**COREY PICKETT, JONATHAN
FERRARA, and WILLIAM
CONYERS**

Defendant

**SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
LAW DIVISION: CRIMINAL**

**INDICTMENT NO.: 17-07-470
PG NO.: 17-1928**

**MOTION TO COMPEL
OPINION AND ORDER**

DATE OF DECISION: June 23, 2020

JULIE FRY, ESQ.

ATTORNEY FOR DEFENDANT,

KEVIN ROE, ESQ.

ASSISTANT PROSECUTOR
Hudson County Prosecutor's Office
Attorney for the State of New Jersey

THIS MATTER having been brought before this Court upon the Defendant's Motion to Compel; and the Court having considered the Defendant's brief submitted on August 30, 2019; and the Court having considered the State's brief submitted on September 13, 2019; and the Court having considered the Defendant's supplemental brief submitted on April 21, 2020; and the Court having considered the State's supplemental brief submitted on May 5, 2020; and the Court having considered the Defendant's supplemental brief submitted on May 12, 2020; and the Court having heard oral argument on May 12, 2020; and for the reasons stated below the Defendant's motion is **DENIED**.

PROCEDURAL HISTORY AND FACTS

On or about July 13, 2017, defendants Corey Pickett and Jonathan Ferrara were charged in Indictment No. 17-07-0470 by the Hudson County Grand Jury. Defendants Jonathan Ferrara and Corey Pickett are charged with Murder in violation of N.J.S.A. 2C:11-3a (First Degree), conspiracy to commit murder in violation of N.J.S.A. 2C:5-2/2C:11-3a (First Degree), aggravated assault in violation of N.J.S.A. 2C:12-1(b)(1) (Second Degree), aggravated assault by causing bodily injury with a deadly weapon in violation of N.J.S.A. 2C:12-1(b)(2) (Third

Degree), unlawful possession of a weapon in violation of N.J.S.A. 2C:39-5(b)(1) (Second Degree), possession of a weapon for an unlawful purpose in violation of N.J.S.A. 2C:39-4(a)(1) (Second Degree), obstruction of justice by flight in violation of N.J.S.A. 2C:29-2(a)(2) (Third Degree), and obstruction of justice by concealment of evidence in violation of N.J.S.A. 2C:29-3(b)(1). Corey Pickett is additionally charged with resisting arrest by force in violation of N.J.S.A. 2C:29-2(a)(3) (Third Degree). Jonathan Ferrara is additionally charged with being a certain person not to possess a weapon in violation of N.J.S.A. 2C:39-7(b)(1) (Second Degree), hindering apprehension by giving false information in violation of N.J.S.A. 2C:29-3(b)(4) (Third Degree), and certain persons not to possess a weapon following a NERA conviction in violation of N.J.S.A. 2C:39-5j (First Degree). A superseding Indictment charged William Conyers and Jonathan Ferrara with witness tampering in violation of N.J.S.A. 2C:28-5a(1)/(2) (Third Degree), and conspiracy to commit witness tampering in violation of N.J.S.A. 2C:5-2/2C:28-5a(1)/(2).

The State informed the Court and the parties of its intention to admit the Cybergenetics Corp. analysis in the case in chief at trial on March 12, 2019. The State filed a brief in support of the application on February 5, 2019 and provided the defendants with discovery regarding not only the analysis done on the present case, but information relating to the scientific reliability of TrueAllele DNA including court rulings, scientific studies, and related articles.

In support of the State's application, Dr. Mark W. Perlin of Cybergenetics testified at a Frye hearing. The direct examination was concluded on the afternoon of April 8, 2019. Over the course of the two days, Dr. Mark W. Perlin was qualified as an expert in the fields of DNA Evidence, Interpretation, and Likelihood Ratio. Dr. Perlin gave testimony regarding the nature of DNA evidence, the history of same, the development of the TrueAllele method, the testing and validation of same, real world forensic applications which included exonerations of the wrongfully convicted and identification of remains found at Ground Zero following September 11, TrueAllele's acceptance in the scientific community, and its acceptance in approximately twenty-one (21) states. The following materials were marked and introduced into evidence:

S-1 CV of Dr. Mark W. Perlin, MD, PhD

S-2 PowerPoint presentation – Computer Interpretation of Quantitative DNA Evidence

S-3 PowerPoint presentation – Virginia TrueAllele Validation Study: Casework Comparison

S-4 Binder containing materials on Background Reading

S-5 Binder containing materials on Validation Papers

S-6 Binder containing materials on Validation Studies

S-7 Binder containing materials on Forensic Application

S-8 Binder containing materials on Regulatory Approval

S-9 Binder containing materials on Method Reports

S-10 Binder containing materials on General Acceptance

S-11 Binder containing materials on Related Systems

S-12 Binder containing materials on Admissibility Rulings

S-13 Binder containing materials on Legal Commentary

S-14 Binder containing materials on Scientific Development

S-15 Binder containing materials on Other Materials

Following the conclusion of the direct examination, Brian Neary withdrew as counsel for Corey Pickett. Mr. Pickett was then represented by April Petersen, Esq. and Julie Fry, Esq. of the Public Defender's Office. The defense now moves for the production of the TrueAllele proprietary source code.

LAW AND ANALYSIS

Defendant relies on State v. Ghigliotty, A-0938-19T3 (N.J. Super. Ct. App. Div. 2020) and asks the Court to order the disclosure of the requested material. Defendant referred to Ghigliotty in the original brief in support of the Motion to Compel Discovery. In Ghigliotty, the Appellate Division upheld the trial court's decision to grant a Frye hearing to the defense to examine the general acceptance of a novel ballistics software called BULLETTRAX. See Id. at 2. In doing so, the panel distinguished between a well-established and generally accepted scientific field, here ballistics tool mark identification, and a new untested software program that was used within that field. Id.

Defendant specifically submits the Appellate Division vacated the trial court's order for the State to provide the computer algorithms, or source code, to the defense as premature. Id. at 37-38. This was because the demand for source code by the defense was merely that and was not supported by any documentation. Id. at 38. The court explained, "(w)hile it is certainly possible

that this information might be needed by the defense experts to evaluate the new technology, the defense did not present a certification from an expert in support of this claim for disclosure.” Id.

Defendant submits they have submitted a detailed certification from expert Nathan Adams who has a background in computer science, has completed several source code reviews of programs similar to TrueAllele, and has been qualified as an expert in several other courts across the country. Defendant further submits that in Mr. Adam’s certification, he explains in detail why the source code is a necessary part of his review and what standards he will use to conduct said review.

Defendant also notes that the Appellate Division noted the parties should have submitted some proposed language for a Protective Order to resolve the potential proprietary breaches that would have resulted from turning over the requested discovery. Id. at 38. Defendant submits he has already submitted a proposed Protective Order for the Court’s consideration. As the Court is aware, Defendant negotiated with the State about the terms of this Order for some time and could not reach an agreement.

Lastly, Defendant submits that nothing in the Ghigliotty decision disturbs the holding in State v. Chun, 164 N.J. 54 (2008) that source code is discoverable. The court simply and reasonably requested a more detailed demand from the defense. The Appellate Division did not reject the defense demand for source code, but rather vacated the trial court’s order and remanded it for further consideration. Id. at 39. Defendant submits that all of the conditions cited by the court in Ghigliotty have already been satisfied in his pleadings. Moreover, the Court suggests, as the defense has repeatedly argued, that a Protective Order is the proper mechanism to satisfy any proprietary concerns of the software developer.

The State responds and submits that the defendant in Ghigliotty sought algorithms and not source code, which is the material requested in this case. The State submits that an “algorithm” is a set of instructions for carrying out a particular task. “Source code” is a computer program written in computer language. Cybergenetics has disclosed its TrueAllele algorithms. See Declaration of Dr. Mark W. Perlin, September 2019; Perlin MW, TrueAllele methods: statistical model. Cybergenetics, March 2016; Perlin MW, Legler MM, Spencer C., Smith JL, Allan WP, Belrose JL, and Duceman BW. Validating TrueAllele® DNA mixture interpretation. Journal of Forensic Sciences, 56(6):1430-47, 2011.

Defendant responds that although there may be a scientific distinction between these two terms, it is not relevant to the court's decision here. First, although the Appellate Division used the term "algorithm" in their opinion, they were referencing the lower court's opinion and order to provide discovery. In that opinion, the trial judge used the terms "algorithm" and "source code" interchangeably: "The review and testing of algorithms and/or source coding utilized in a new or untested technology is required in order to determine its reliability" and "...when the data BULLETRACKS creates is used by an expert in forming an opinion, as was here, the reliability of the algorithms/source code becomes equally important." See Defense Brief Exhibit B, p. 30.

The State further submits that one key distinction between the BULLETRAX/Matchpoint material in the Ghigliotty case from the TrueAllele in the present case is that BULLETRAX/Matchpoint is truly a novel approach to ballistics analysis. It is wholly untested: as the Appellate Division notes, it has not been the subject of any validation study and there are no legal rulings from other jurisdictions to provide guidance with regard to its reliability or any related issues. The Court finds this distinction compelling.

TrueAllele is different: it has been thoroughly tested and validated. The record before the Court is replete with validation studies, legal opinions, peer review and other scientific and scholarly articles which demonstrate that TrueAllele is reliable because it has withstood the test of legal and scientific scrutiny. The State's position with regard to the Defendant's motion to compel discovery of the source code is that the source code is not required because it is unrelated to validation. All of the authoritative materials on the record demonstrate that the source code is not required in discovery because TrueAllele has been validated. Indeed, crime laboratories that use TrueAllele or other commercial software do not have access to the source code: the reliability of TrueAllele is demonstrated through testing, not source code review. This is an important distinction from BULLETRAX/Matchpoint.

Lastly, the State disagrees with Defendant's submission that Defendant has set forth terms of a protective order which is appropriate under the circumstances and corrects the deficiency identified in Ghigliotty. As set forth in previous filings, the State is willing to make the source code available for expert review. In consultation with its expert, the State removed many of the requirements typical of TrueAllele source code review, including cost, travel, and expert pre-qualification. The State submits the defense expert is welcome to come to the prosecutor's office, view the source code on a provided device, and take notes. The State objects

to any photographs, copying, or any procedure which amounts to taking the source code. What the defense has proposed is unfettered access, copying, and sharing of proprietary information with no meaningful consequence, and in doing so has dismissed legitimate concerns about trade secret protection. The State submits that to this date, the defense has failed to provide a reasonable explanation of why this is unacceptable. Equally as important, they have failed to provide a reasonable explanation as to why their expert refuses to test TrueAllele in the manner set forth in previous filings.

This Court has reviewed Ghigliotty and holds that the facts in the present case are distinguishable from those present Ghigliotty. One point the Court finds compelling is the difference in the source code of the TrueAllele in this case from the BULLETRAX. BULLETRAX/Matchpoint is truly a novel approach to ballistics analysis. It is wholly untested: as the Appellate Division notes, it has not been the subject of any validation study and there are no legal rulings from other jurisdictions to provide guidance with regard to its reliability or any related issues. As the State submits, TrueAllele has been tested and validated. Moreover, this Court finds the algorithms in Ghigliotty are different from the source code of TrueAllele, as the State submits.

The State is willing to make the source code available for defense expert review. The State submits the defense expert is welcome to come to the prosecutor's office, view the source code on a provided device, and take notes. For those reasons, Defendant's motion is denied.

CONCLUSION

Therefore, the Defendant's motion to compel production of the TrueAllele source code is **DENIED**.

SO ORDERED.


PATRICK J. ARRE, J.S.C.