

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: CRIMINAL TERM: PART 11

-----x
PEOPLE OF THE STATE OF NEW YORK

-against-

JAMES O'DONNELL,

Defendant.

-----x
Ind. No. 289/97
Trial

April 21, 1998
18 Richmond Terrace
Staten Island, New York 10301

B E F O R E:

HON. JOEL GOLDBERG, Justice

A P P E A R A N C E S:

WILLIAM L. MURPHY, ESQ.
District Attorney - Richmond County
For the People
BY: ANTHONY GIACOBBE, ESQ.,
Assistant District Attorney

ANDREW McGEE, ESQ.
Attorney for Defendant

SUSAN D. BROSS, CSR, RPR-CM,
Official Court Reporter

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MR. GIACOBBE: I have no objection, certainly, Judge.

THE COURT: Would you call him to the stand.

MR. GIACOBBE: Yes, Judge, I would call at this time Dr. Harry Silverstein, D.D.S., to the witness stand.

THE COURT: As you can see, we had a snafu here. It happens in every profession.

H A R R Y S I L V E R S T E I N, D.D.S.,
called as a witness, having been first duly sworn by the Court Clerk, was examined and testified as follows:

COURT CLERK: Tell us your name.

THE WITNESS: Dr. Harry Silverstein.

THE COURT: Let me ask you something, doctor. Based on your examination of the photographs, what is your conclusion after comparing the photographs with, I guess it's a sample of the bite mark taken from the defendant.

THE WITNESS: My conclusion is that it is possible that the defendant made the bite mark. I could not rule him out. But I could also not say that he is the only one that could have done it.

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2 THE COURT: When you say it is possible, how
3 would a jury evaluate that testimony?

4 THE WITNESS: Well, there are marks that
5 were made on the victim that are consistent with
6 the pattern of teeth from the defendant that I
7 could show that possibly made those marks on her
8 skin.

9 THE COURT: What is the procedure that you
10 used, just briefly, in order to do this?

11 To actually get to the point, there were
12 photographs that were not turned over to a doctor
13 who the defense plans to call. But the doctor
14 has made a comparison with photographs taken
15 three weeks later. You are familiar with that,
16 with what is involved?

17 THE WITNESS: Yes.

18 THE COURT: Based on your experience, what
19 would be involved insofar as having the doctor
20 now looking at the photographs he has not seen
21 evaluating those photographs? What would you do
22 if you were in that doctor's position and you
23 were given the photographs that have not been
24 shown to the other doctor?

25 THE WITNESS: What I would do? You asked me

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2 how I made my --

3 THE COURT: How would you go about verifying
4 your prior conclusion? In other words, some
5 steps have already been completed. The other
6 doctor has made his own sample from the
7 defendant's bite. The other doctor, we can
8 presume he looked at photographs taken three
9 weeks later. Now he would get photographs taken
10 on the day the bite was made. What steps would
11 you take if you were in that other doctor's
12 position to confirm your prior finding?

13 THE WITNESS: I would take the overlays that
14 I made from the defendant's model of his
15 dentition and compare them with the new
16 photographs, just as I did with the previous
17 photographs.

18 THE COURT: Would there be any need to
19 process the new photographs in any way?

20 THE WITNESS: No.

21 THE COURT: How long would it take you to
22 update your opinion?

23 THE WITNESS: Well, I did it already. It
24 just took me a few minutes.

25 THE COURT: You updated your opinion

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yourself?

THE WITNESS: Yes.

THE COURT: What needed an update? I thought you had all the photographs.

THE WITNESS: Well, I had all the photographs, but I used the crime scene photographs because I felt that I would rather see what it looked like at the initial stage.

THE COURT: Thank you. I have to make a decision here as to what to do. If defense counsel has based his cross-examination on consultation with his expert, and you are giving an opinion based on photographs his expert has not seen, it just wouldn't be fair to defense counsel to put him in a position of having to cross-examine you until at least his expert has had a chance to look at what you have seen.

THE WITNESS: I understand.

THE COURT: After hearing from the attorneys, I don't think I am going to let you testify today. I don't have any further questions for you. Thank you.

We may have some argument. It might be preferable if you wait outside. Thank you,

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2 doctor.

3 (Witness excused.)

4 THE COURT: Mr. Giacobbe, I don't think, in
5 fairness, I can have this witness testify today.
6 I know theoretically we can do the direct and
7 save the cross-examination. But I have to wait
8 until I am sure that Mr. McGee's expert has had a
9 chance to look at these photographs and has had a
10 chance to consult with Mr. McGee. So I am afraid
11 this witness will not be able to testify today.

12 As far as this witness testifying tomorrow,
13 or testifying at all, or precluding the People, I
14 have to assess the prejudice to the defendant's
15 case. I can't assess the prejudice to the
16 defendant's case until I know what Mr. McGee's
17 expert has to say insofar as how much more time
18 he would need to bring his opinion up to date
19 with the evidence that is in the prosecutor's
20 possession.

21 There is also a question of whether or not
22 just the delay in the discovery alone is
23 deserving attention.

24 Do you want to be heard on that?

25 MR. GIACOBBE: Judge, I just want --

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2 THE COURT: There is another thing, too.
3 This is all a tempest in a teapot because what is
4 the probative value of these photographs? If all
5 they can do is say it doesn't rule out the
6 defendant as the perpetrator, it doesn't rule out
7 a lot of people as the perpetrator. It is not as
8 if your case hinges on these photographs and this
9 dental testimony. So that is also a factor for
10 me to consider.

11 Is there anything else? Let me hear you.

12 MR. GIACOBBE: I only want to inform the
13 Court that if the Court so ruled, the dentist
14 could testify to the same identical opinion based
15 upon the exact photographs that were turned over
16 to Mr. McGee, without reference to the
17 photographs that were not turned over.

18 THE COURT: The problem is we don't know if
19 his opinion is based solely on three-week old
20 photographs. Furthermore, these photographs
21 might very well, in the hands of a defense expert
22 who has had enough time to look at them, rule out
23 the defendant as the person who made the bite
24 marks.

25 MR. GIACOBBE: As far as your other

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2 question, Judge, the particular scientific area
3 of expertise normally yields three results. It
4 is definitely him, it is definitely not him, or,
5 it is commonly the result, especially when you
6 have a limited number of teeth, as in this case,
7 where the result is that it is consistent with
8 him as well as with potential other people. So
9 that is a common result of this particular
10 science, especially where the individual being
11 tested, in this case the defendant, has no
12 distinguishing or identifying features on the
13 teeth that are examined.

14 THE COURT: Mr. McGee.

15 MR. McGEE: To begin with, your Honor, if I
16 might have a moment, I would like to look at one
17 of the photographs again.

18 MR. GIACOBBE: I am handing all five to Mr.
19 McGee.

20 MR. McGEE: I am a layman --

21 THE COURT: Why don't you hold the opinion
22 until you have your expert look at it. I will
23 not make a ruling on your layman's opinion on
24 this.

25 MR. McGEE: I understand. I would like an

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2 opportunity to look at it while I am waiting to
3 talk to my expert.

4 With respect to this matter, your Honor, I
5 would like something clarified with respect to
6 Dr. Silverstein about whether or not he in fact
7 gained any information from the newer photographs
8 and whether or not his opinion was changed by the
9 newer photographs. I don't know that. I think
10 he implied that. But I am not certain yet that
11 is his position.

12 THE COURT: He is not testifying today.

13 MR. McGEE: I understand that, your Honor.

14 THE COURT: He is not going to testify until
15 after I answer everybody's questions, okay?

16 Right now, though, do you have anything? I
17 would like to make arrangements to have your
18 doctor look at these photographs at the earliest
19 possible opportunity. It is now almost 20 after
20 2. I want to proceed with the witnesses who are
21 here. When will your doctor be back in the
22 office?

23 MR. McGEE: I am told he will be back at 3
24 o'clock.

25 THE COURT: We will call the next witness.

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2 We will take a break around 3 o'clock. We will
3 give you a chance to make a phone call.

4 MR. GIACOBBE: If the Court wishes, I will
5 arrange delivery of those items immediately.

6 THE COURT: We will see if the doctor has a
7 chance to look at them.

8 MR. GIACOBBE: So I should wait until we
9 hear further before doing that?

10 THE COURT: He may not be home tonight. He
11 may have other plans. We are asking the
12 defendant to pay overtime so evidence could
13 possibly be introduced against him. It is kind
14 of an awkward position to place him in.

15 MR. GIACOBBE: I want to be clear on what
16 the Court is directing me to do at this time.

17 THE COURT: Wait until Mr. McGee speaks to
18 his dentist. We will hear from Mr. McGee. The
19 ball is in Mr. McGee's court as to when he would
20 like his expert to look at these photographs.

21 MR. GIACOBBE: Yes, Judge. My witnesses are
22 back at my office. I would ask for five minutes
23 just to get the witnesses and bring them over.
24 We are ready to proceed.

25 THE COURT: Fine. We will start at 2:30.

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2 Tell the jury we will start at 2:30.

3 THE COURT: The other possibility -- what is
4 your witness to say based on the photographs he
5 sees, Mr. McGee?

6 MR. MCGEE: Well, your Honor, based on the
7 photographs he has seen --

8 THE COURT: If you don't mind revealing it
9 at this point.

10 MR. MCGEE: Well, as I understand it, the
11 witness has been interviewed by Mr. Giacobbe. So
12 I certainly don't mind revealing the part Mr.
13 Giacobbe knows already because he did call him.

14 THE COURT: And he didn't have to send him
15 to Harry Morse. Go ahead.

16 MR. MCGEE: I made efforts to reach Dr.
17 Silverstein. I admit to that, too.
18 Unsuccessfully. I am saying for the sake of the
19 record why I am not reluctant to disclose this.
20 Drawing on a comparison, he is able to establish
21 that the defendant cannot be established as the
22 person who has made the bite marks on either part
23 of the hand. I did say --

24 THE COURT: Isn't that what Dr. Silverstein
25 says?

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2 MR. McGEE: There is more to it. I mean,
3 going on the photographs alone, he was not able
4 to establish who did it. While it might be
5 possible for the defendant to have done it, it
6 might be possible for almost anyone to have done
7 it. As long as it is not someone who has missing
8 teeth. The only one he ruled out was someone
9 with teeth missing in certain places.

10 THE COURT: This could be a lot of trouble
11 over nothing. It seems both doctors are in
12 agreement that it is possible for the defendant
13 to have done it, but it is also possible for many
14 people to have done it. It doesn't rule him in
15 or out.

16 If that is both doctors' opinions? Where
17 are we here?

18 MR. McGEE: I believe there are things,
19 though, further in Dr. Silverstein's opinion
20 which I think are probative, from what I read of
21 the testimony in the grand jury.

22 THE COURT: What does Dr. Silverstein say
23 that your witness disagrees with?

24 MR. McGEE: He disagrees profoundly with the
25 probative value of the photographs that were

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2 taken.

3 THE COURT: Apparently it is just a matter
4 of semantics.

5 MR. MCGEE: No, the newer photographs, from
6 what I can tell, one of them may well be the
7 photograph that is of scientific value for the
8 purpose of making comparisons. The older ones,
9 the ones Dr. Reisner was able to see -- no, the
10 newer ones.

11 THE COURT: We just heard Dr. Silverstein's
12 opinion about the newer ones. It doesn't prove
13 it is the defendant. He just said it. I asked
14 him.

15 MR. MCGEE: I understand that, your Honor.

16 THE COURT: Mr. Giacobbe, what is the
17 probative value of Dr. Silverstein, quite
18 frankly?

19 MR. GIACOBBE: Only what he said, Judge,
20 that the jury could conclude that this is
21 consistent with the defendant's mouth; the mouth
22 that bit Emma Patton has a bite pattern
23 consistent with the defendant's mouth.

24 THE COURT: But he cannot tell you how many
25 other people in the world have the same bite

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2 mark.

3 MR. GIACOBBE: No, he cannot. I have
4 explored that issue. He cannot.

5 THE COURT: Mr. McGee, if we tell the jury
6 that all the experts are in agreement that the
7 bite mark is consistent with the defendant, but
8 the dentist can't say how many other people in
9 this world could have had the same bite mark,
10 would that be satisfactory?

11 MR. MCGEE: My dentist does not say
12 consistent. He says based upon the photographs
13 he has, there is no basis for making any kind of
14 ruling in or ruling out.

15 THE COURT: In other words, there is no
16 basis to say it is inconsistent?

17 MR. MCGEE: That's right.

18 THE COURT: Does he rule them out?

19 MR. MCGEE: No. He says the photographs are
20 worthless.

21 THE COURT: And Mr. Giacobbe's expert says
22 it is not worthless because it points to so many
23 other people who could make the same bite mark.
24 In other words -- but there is a difference, I
25 guess. Mr. Giacobbe's expert says it is

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possible. His expert says it is possible the defendant did it. Your expert says you cannot say it is possible.

MR. MCGEE: That's right.

THE COURT: So that is the difference.

What if you just stipulate to that and move on. Would you be prepared to do that?

MR. MCGEE: I might be after 3 o'clock, after I talk to the dentist one more time.

THE COURT: Get your witness, Mr. Giacobbe. Think about that.

MR. GIACOBBE: Yes, I will be right back.

(Pause.)

THE COURT: Mr. Giacobbe, are your witnesses here?

MR. GIACOBBE: Yes, Judge.

THE COURT: Get the jury.

MR. GIACOBBE: Will the Court want the videotape while the witnesses are present, or would the Court prefer that the tape be authenticated afterwards, played afterwards? It is about 25 minutes.

THE COURT: You have to play it while the witness is present. There may be

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2 cross-examination about the tape. It would be a
3 nice opportunity to give the witness a chance to
4 see it before they are cross-examined on it. The
5 tape is already in evidence.

6 MR. GIACOBBE: Yes, Judge.

7 THE COURT: Is there any objection to
8 playing the videotape during the direct
9 examination of the witness, Mr. McGee?

10 MR. MCGEE: Your Honor, does Mr. Giacobbe
11 represent that the witness has ever seen this
12 tape?

13 MR. GIACOBBE: Yes, Judge.

14 THE COURT: Even if the witness has not seen
15 it, it is already in evidence. I just didn't
16 want the tape to -- since it has the witnesses
17 speaking about certain things, it has an audio.
18 It is different than a piece of physical
19 evidence. It has an audio. I didn't want to
20 have the jury hear the witnesses speaking until
21 after the witness testified.

22 MR. MCGEE: If that is the only problem,
23 your Honor, I have no objection.

24 THE COURT: Fine. Bring in the jury.

25 Mr. McGee, when you call your witness, I

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2 guess the option is to have him look at the
3 photos tonight with someone from the DA's office
4 there, or come in before court starts tomorrow
5 and go to the DA's office to look at the
6 photographs there. I don't know. Unless he has
7 to look at the photographs where he has his
8 office in order to do this, which he probably
9 does, I guess.

10 MR. MCGEE: Actually, your Honor, he
11 doesn't. He travels around the country
12 testifying. He can pack up his equipment in a
13 single case.

14 THE COURT: So if he would like an
15 opportunity to look at them this evening, I think
16 the DA's office is prepared to have someone go up
17 there with them this evening. If not, he should
18 go to the DA's office tomorrow. Ask him how long
19 he will need to look at it. He should go to the
20 office sufficiently before 1 o'clock, the time we
21 start, so he will have a chance to look at it.

22 Ready for the jury.

23 (Jury enters.)

24 COURT CLERK: Case on trial. Is there a
25 stipulation from both sides that the complete

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jury panel is properly seated?

MR. MCGEE: So stipulated.

MR. GIACOBBE: So stipulated.

THE COURT: Good afternoon, ladies and gentlemen. I am sorry for the delay. Thank you for your patience. Just remember when things like this happen, it is always the judge's fault. I'm sorry. We are ready to proceed now.

Mr. Giacobbe.

MR. GIACOBBE: The People will call as our next witness Miss Angela Bertolino.

THE COURT: Actually the delay may wind up saving us some time at the end of the case. I cannot promise you that. But right now you have my apologies.

A N G E L A B E R T O L I N O,

called as a witness, having been first duly sworn by the Court Clerk, was examined and testified as follows:

COURT CLERK: Tell us your name.

THE WITNESS: Angela Bertolino.

B-e-r-t-o-l-i-n-o.

THE COURT: Mr. Giacobbe.

MR. GIACOBBE: Thank you, your Honor.