

DISTRICT OF COLUMBIA COURT OF APPEALS

Tavon Barber v. United States

179 A.3d 883 (D.C. 2018) · No. 16-CF-16 · Decided March 1, 2018

SUMMARY

The District of Columbia Court of Appeals affirmed the denial of Tavon Barber’s motion for a new trial based on post-trial disclosures concerning systematic problems in the District of Columbia Department of Forensic Sciences’ statistical interpretations of DNA evidence. The court held that the disclosures were cumulative or impeaching, did not undermine the reliability of the DNA testing in Barber’s case, and would not probably have produced an acquittal in light of the other evidence. The court also held that Barber’s third-degree sexual abuse and possession-of-a-firearm-during-a-crime-of-violence convictions did not merge because each conviction was based on a distinct act.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | District of Columbia Court of Appeals                                                                                                                                                                                                                                                                                                                                                                                                                      |
| WRITING FOR THE COURT | Chief Judge Blackburne-Rigsby; Associate Judge Glickman; Senior Judge Pryor                                                                                                                                                                                                                                                                                                                                                                                |
| JURISDICTION          | District of Columbia                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| DECIDED               | March 1, 2018                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| DOCKET                | 16-CF-16                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| PROCEDURAL POSTURE    | After a jury convicted Barber of numerous offenses arising from two burglaries and a sexual assault, the Superior Court denied his Super. Ct. Crim. R. 33 motion for a new trial based on post-trial disclosures concerning systematic problems in the District of Columbia Department of Forensic Sciences' statistical interpretations of DNA evidence. Barber also challenged the refusal to merge his sexual-abuse and firearm-possession convictions. |
| STANDARD OF REVIEW    | Abuse of discretion for denial of a Rule 33 motion for a new trial; de novo review for the merger issue.                                                                                                                                                                                                                                                                                                                                                   |
| PRECEDENTIAL VALUE    | Published opinion; precedential                                                                                                                                                                                                                                                                                                                                                                                                                            |
| PARTIES               | Tavon Barber v. United States                                                                                                                                                                                                                                                                                                                                                                                                                              |

TOPICS

evidence

appellate procedure

double jeopardy

criminal procedure

standard of review

## PRACTICE AREAS

criminal procedure

evidence

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constitutional law

## QUESTIONS PRESENTED

1. Whether post-trial disclosure of systematic concerns in DFS's statistical interpretations of DNA-mixture evidence required a new trial under Super. Ct. Crim. R. 33.
2. Whether Barber's three third-degree sexual-abuse convictions based on separate acts against one victim merged into a single conviction under the Double Jeopardy Clause.
3. Whether Barber's eight convictions for possession of a firearm during a crime of violence merged into fewer convictions.

## HOLDINGS

1. The trial court did not abuse its discretion in denying Barber's Rule 33 motion because the newly disclosed evidence was, at most, additional impeachment or cumulative evidence and would not probably have produced an acquittal.
2. The three third-degree sexual-abuse convictions did not merge because Barber's acts involved separate impulses and distinct invasions of the victim's protected interests.
3. The eight convictions for possession of a firearm during a crime of violence did not merge because each was predicated on a distinct criminal act, and the predicate offenses themselves did not merge.

## KEY QUOTATIONS

*“A Rule 33 motion based upon a claim of newly discovered evidence requires appellant to show that: “(1) the evidence is newly discovered; (2) the moving party was diligent in seeking to obtain the evidence; (3) the evidence is material to the issues involved and not merely cumulative or impeaching; and (4) it is of a nature that it would probably produce an acquittal.”” (at 18)*

*“But our case law is clear that new “[e]vidence which is merely impeaching or cumulative . . . cannot be the basis of a new trial based on newly discovered evidence.”” (at 20)*

*“The “Double Jeopardy Clause of the Fifth Amendment prohibits a second prosecution for a single crime, and it protects the defendant against multiple punishments for the same offense.”” (at 22)*

*“In situations like this, the key consideration in determining whether multiple crimes for acts committed against one victim merge is whether “the defendant can be said to have realized that he [or she] has come to a fork in the road, and [still] decides to invade a different interest[.]”” (at 23)*

## FACTUAL BACKGROUND

Barber and DeAundre Williams committed two home-invasion burglaries in Washington, D.C. Fingerprint evidence, DNA evidence, victim testimony, documentary evidence, and testimony concerning Barber's

confession linked Barber to the crimes. Although a forensic DNA expert identified statistical problems in some DFS interpretations, the DNA testing itself was considered reliable, and an independent expert testified at trial regarding his own calculations and concerns.

## PROCEDURAL HISTORY

Barber was convicted following a jury trial in the Superior Court of the District of Columbia. Before sentencing, the government disclosed systematic concerns regarding DFS DNA-mixture interpretations, and Barber moved for a new trial. The trial court denied the motion, and the Court of Appeals affirmed both that ruling and the separate convictions.

## DISPOSITION

affirmed

## CASES CITED

- Ingram v. United States, 40 A.3d 887, 901-02 (D.C. 2012)
- Porter v. United States, 826 A.2d 398, 414 (D.C. 2003)
- Godfrey v. United States, 454 A.2d 293, 299 (D.C. 1982)
- Huggins v. United States, 333 A.2d 385, 387 (D.C. 1975)
- Rose v. United States, 629 A.2d 526, 535 (D.C. 1993)
- Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)
- Ellison v. United States, 919 A.2d 612, 614-17 (D.C. 2007)
- Sanchez-Rengifo v. United States, 815 A.2d 351, 354-57 (D.C. 2002)
- Jenkins v. United States, 980 A.2d 421, 426 (D.C. 2009)
- Cullen v. United States, 886 A.2d 870, 872-73 (D.C. 2005)
- Stevenson v. United States, 760 A.2d 1034, 1035, 1037-38 (D.C. 2000)
- Spain v. United States, 665 A.2d 658, 661 (D.C. 1995)