



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**STATE v. JOSEPH WESLEY GOMEZ**  
CR-09-0339-PR

**PARTIES:**

*Petitioner:* Joseph Wesley Gomez

*Respondent:* State of Arizona

**FACTS:**

Five men invaded a home in Phoenix pretending to be police officers. The men stormed the house, yelling “police” and demanding drugs and money. During the invasion, the intruders threatened and physically assaulted some of the occupants. They found no drugs but took jewelry, money and a cell phone. When police arrived, the intruders fled on foot and left their car parked in front of the house with doors open and the engine running.

Gomez was arrested after two of the victims identified him from a photographic lineup. The police obtained a recording of a telephone call from the jail in which Gomez made statements that arguably implicated him in the home invasion. There was also DNA recovered from a shirt sleeve an intruder used as a mask and from other items in the car that matched Gomez’s DNA. Gomez was indicted on one count of first degree burglary, seven counts of aggravated assault, one count of assisting a criminal street gang, and one count of impersonating an officer. Later, Gomez was charged with additional counts relating to threatening and intimidating witnesses.

A jury found Gomez guilty on all counts. The trial court found that Gomez had seven prior historical felony convictions and sentenced him as a repetitive offender to concurrent and consecutive terms of imprisonment totaling 85 years.

On appeal, Gomez argued that his right of confrontation was violated when the trial court allowed the State to present testimony on DNA evidence through a lab analyst who did not perform the testing. At the lab used by police in this case, the DNA testing process involved five steps. For efficiency purposes, the lab divided the work up among the technicians and the sample was passed from person to person during processing. When the testing process on the evidence samples was complete, the lab analyst interpreted and compared the subject’s profile to the profiles generated from the evidence samples. Gomez argued that the admission of the lab analyst’s testimony about the DNA testing process conducted by others, and her conclusions, violated his right of confrontation.

The court of appeals found no error in the admission of this testimony. The U.S. Supreme Court in *Crawford v. Washington*, 124 S.Ct. 1354 (2004), held that the Confrontation Clause forbids

the admission of testimonial statements of a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. The Confrontation Clause does not bar, however, the use of testimonial statements for purposes other than establishing the truth of the matter asserted. 124 S.Ct. at 1369 n.9. Under Rule 703, Arizona Rules of Evidence, expert testimony on reports or opinions of others is admissible if the expert reasonably relied on these matters in reaching his or her own conclusions. *State v. Smith*, 215 Ariz. 221, 228, 159 P.3d 531, 538 (2007). In this case, the data and information on which the lab analyst reasonably relied in testifying was offered to show the basis of her opinion the DNA recovered from items at the crime scene matched Gomez's; it was not offered to prove the truth of the matter asserted. Thus, it was not hearsay and the admission of the lab analyst's testimony did not violate Gomez's confrontation right.

Gomez also argued that the trial court erred in refusing to give a limiting instruction concerning the DNA expert's testimony. Gomez's instruction sought to clarify that the data the expert had relied upon had not been admitted or proven beyond a reasonable doubt. The proffered instruction provided:

A witness has testified in this trial as an "expert witness." This means that the witness was allowed to express her opinion on a subject. The expert witness testified that her opinion is based on the reports and work done by other people. The work and the reports of non-testifying people have not been admitted into evidence and should not be considered as facts that have been proven. The work of non-testifying witnesses is admitted only to allow the consideration of the reasons for the expert's opinion.

The trial court rejected the instruction because it believed the standard instruction on expert witness testimony was sufficient. It also found that the proposed instruction would constitute a comment on the evidence by improperly telling the jury not to believe the expert about work performed by the non-testifying lab workers.

The court of appeals found that the trial court did not abuse its discretion in rejecting the proposed instruction. Rule 105, Arizona Rules of Evidence, mandates giving a limiting instruction when evidence is admitted for a limited purpose. Gomez's proposed instruction went further and instructed the jury that the testimony concerning those matters should not be considered as evidence at all. This was the same as telling them not to believe what the expert said. Gomez's proposed instruction was an incorrect statement of the law. The court of appeals found that the trial court was not required to separate the good part of the instruction from the bad part, therefore, the refusal to give such an instruction was not an abuse of discretion.

## **ISSUES:**

- A. The State presented DNA expert opinion testimony linking Appellant to the crime scene without presenting the testimony of the laboratory personnel who performed the underlying procedures. Appellant claimed below that he was denied his right to confront the witnesses who actually produced the evidence used against him. Did the Court of Appeals erroneously hold that this

testimonial evidence does not implicate the Confrontation Clause because it was offered as a basis for the expert's opinion?

- B. The trial court refused to give a limiting instruction on the DNA evidence. Appellant claimed below that he was thereby deprived of his right to a fair trial and an impartial jury. Did the Court of Appeals erroneously deny Appellant's claim in contradiction of its finding that a limiting instruction is mandated for evidence admitted pursuant to Rule 703?

#### **EVIDENTIARY RULES:**

Rule 703, Arizona Rules of Evidence:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 105, Arizona Rules of Evidence:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

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