

Appeals Court Reverses Conviction of Hasidic Jewish Man in Brooklyn Gang-Assault Case

The appeals decision is being hailed by some as especially significant because the justices largely focused on weak DNA evidence used against Herskovic, and they seemed to call into question the city's Office of Chief Medical Examiner's use of "high-sensitivity" DNA analysis in Herskovic's case.

By **Jason Grant** | October 11, 2018 at 05:00 PM



Acting as a “13th juror,” a state appeals court has exercised its independent factual-review power to reverse the conviction of Mayer Herskovic, one of about 20 Hasidic Jewish men who allegedly gang-assaulted a gay black man in an attack in Brooklyn that sparked headlines.

The ruling, handed down on Wednesday by the Appellate Division, Second Department, is considered powerful and relatively rare. Unlike a reversal on a matter of law, in which the guilty party is typically ordered to be retried, throwing out Herskovic’s conviction on the facts means that the underlying indictment is dismissed. He can’t be retried on the same charges. It would be double jeopardy.

The appeals decision is also being hailed by some as especially significant because the justices largely focused on what they said was weak DNA evidence used against Herskovic. As part of their DNA examination, the justices looked intently at the city’s Office of Chief Medical Examiner’s use of “high-sensitivity” DNA analysis in Herskovic’s case.

“Today, Mayer [Herskovic] is an innocent man,” said his lawyer, Donna Aldea, head of the appellate and post-conviction litigation practice at Barket Epstein Kearon Aldea and LoTurco, in a statement issued Wednesday.

She added, “DNA analysis is a powerful tool, and has great value to law enforcement, both in exonerating the innocent and in convicting the guilty. But it must be properly applied, understood, and limited to what it can and cannot prove; otherwise it becomes dangerous, because its potential for misuse is enormous, and the consequences devastating.”

Herskovic, age 24 and convicted last year by Supreme Court Justice Danny Chun at what was actually a bench trial, will now walk free. When the controversial incident happened, it left the victim, Taj Patterson, a black man,

partially blind, and many said it sparked again the long-fraught divide between Brooklyn's Hasidic and African-American communities.

Herskovic was also the only one of five accused defendants to be convicted at trial and sentenced to prison.

The unanimous panel on Wednesday took Chun to task, writing that “upon the exercise of our independent factual review power ... we conclude that the verdict of guilt [against Herskovic] was against the weight of the evidence.”

Justices Reinaldo Rivera, Leonard Austin, Jeffrey Cohen and Betsy Barros further wrote that “under the circumstances of this case, including the complainant's [Patteron's] inability to positively identify any of his attackers, the varying accounts regarding the incident, and the DNA evidence, which was less than convincing,” Herskovic's guilt was not established beyond a reasonable doubt.

And the justices noted that their factual-review power was akin to “sit[ting] as a 13th juror and decid[ing] which facts were proven at trial,” quoting *People v. Danielson*.

But it was in evaluating the DNA evidence used at trial that the justices offered their most detailed and, perhaps far-reaching, inquiry and statements.

They described the “high-sensitivity” DNA analysis used by the Chief Medical Examiner's Office as a testing method OCME developed to analyze DNA samples that are smaller than the minimum DNA amount—100 picograms—needed for traditional testing. Then they pointed out that a OCME criminologist had “admitted” at trial that in developing high-sensitivity testing, OCME “tweaked the protocols” of DNA testing.

Moreover, the justices wrote that the DNA sample used—after being scraped from a sneaker that had been thrown to a rooftop—was a “nondeducible mixture” sample. That meant, they wrote, that it contained the DNA of two or more persons. And they said that OMCE’s “likelihood ratio” result of 133—the number indicating how likely it was that Herskovic was one of the two contributors to the sneaker’s DNA—was “a relatively insubstantial number.”

Aldea, in her statement Wednesday, said, “Mayer was taken away from his children, his home, and his family based on nothing more than a statistic, unreliably gleaned from a few cells of skin on the outer heel of a sneaker.”

“There was no other evidence. No identification, no confession, nothing,” she added. “This could have happened to anyone. It did happen to him.”

Reached for comment, the Brooklyn DA’s Office said only, “We respect the court’s decision.”