SJC-08733

COMMONWEALTH vs. SHANE MOFFAT.

Hampden. April 3, 2017. - November 6, 2017.

Present: Gants, C.J., Lenk, Hines, Gaziano, Lowy, Budd, & Cypher, JJ.[1]

Deoxyribonucleic Acid. Evidence, Scientific test, Relevancy and materiality. Practice, Criminal, Postconviction relief, Assistance of counsel.

Indictment found and returned in the Superior Court Department on February 17, 2000.

The case was tried before Tina S. Page, J., and a postconviction motion for deoxyribonucleic acid testing, filed on July 8, 2013, was heard by her.

David A.F. Lewis for the defendant.
Bethany C. Lynch, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. On October 11, 2001, a Superior Court jury convicted the defendant of murder in the first degree on

[1] Justice Hines participated in the deliberation on this case prior to her retirement.

theories of deliberate premeditation and felony-murder in the shooting death of Malcolm Howard on May 13, 1999. Since that time, the defendant repeatedly has sought postconviction relief, while his direct appeal to this court has been stayed.

Shortly after his conviction, the defendant timely filed a notice of appeal; his direct appeal thereafter was stayed while he pursued a motion for a new trial in the Superior Court. The motion judge, who was also the trial judge, denied that motion in March, 2005. The defendant appealed from the denial of his motion for a new trial, and, represented by new counsel, again sought a stay of his direct appeal in order to pursue a second motion for a new trial. That motion was allowed. His motion for funds for deoxyribonucleic acid (DNA) testing was denied, and, on January 6, 2012, the defendant filed an appeal from that denial; his January 10, 2012, motion for another stay of appeal was allowed. In July, 2013, the defendant filed a motion for postconviction forensic testing pursuant to G. L. c. 278A. The same judge conducted a hearing on the motion for DNA testing of four cigarette butts found near the crime scene in October, 2013, and denied it in December, 2013. In May, 2014, the defendant filed an appeal from the denial of his motion for postconviction relief. We consolidated that appeal with the defendant's direct appeal. In May, 2014, the defendant filed a motion to sever his direct appeal from the appeal from the

denial of his G. L. c. 278A motion and a motion to stay his direct appeal. These motions were allowed.

Thus, at this point, while the defendant's direct appeal remains pending, the issues before us are limited to the defendant's appeal from the denial of his motion for postconviction DNA testing under G. L. c. 278A.

In denying the defendant's motion for testing of four cigarette butts collected by investigators near the crime scene, the judge found that the defendant had failed to meet his burden under G. L. c. 278A, § 7 (b), to establish that a reasonably effective defense attorney would have sought testing of the cigarette butts, and that DNA testing of them had the potential to result in evidence material to the identity of the perpetrator. We conclude that the judge did not abuse her discretion, and affirm the denial of the defendant's motion for postconviction testing of evidence.

1. Evidence at the G. L. c. 278A evidentiary hearing. Our discussion of the evidence at the hearing on the defendant's motion for DNA testing is based on the written findings by the motion judge.

In May, 1999, the defendant arranged for the victim to purchase $1,300 worth of cocaine from the defendant's associates. To that end, on May 13, the victim, the victim's cousin, and the defendant all met. The defendant refused to

allow the cousin to accompany them to the purchase, so the cousin lent the victim his Toyota Corolla automobile; the defendant and the victim dropped the cousin off in Hartford, Connecticut, before proceeding. After stopping briefly at the defendant's mother's house in Hartford to check his mail, the defendant and the victim drove to Fred Jackson Road in Southwick. The victim was shot in the back of the neck while sitting in the driver's seat of the Corolla.

That evening, the defendant and a friend took a taxicab ride to a number of locations in Hartford. During the drive, the friend saw the defendant dispose of the barrel of a shotgun in a storm drain. The defendant also showed his friend a shirt with blood on it, and left a bag containing a pair of boots in the trunk of the taxicab. Police later determined that bloodstains on the boots matched the victim's DNA profile.

On May 16, 1999, the victim's body was found at the bottom of a steep ravine approximately thirty feet from the edge of Fred Thompson Road. He was wearing a watch and jewelry, but there was no money in his pockets. During a general search of the environs of the crime scene, State police investigators recovered four cigarette butts near the scene. They were found near the edge of the road, north of the victim's body and a nearby telephone pole. The first cigarette butt was in the road, approximately 239 feet from the telephone pole, and

approximately fourteen feet from the edge of the road. The second cigarette butt was 174 feet north of the same telephone pole, near the edge of the road. The third cigarette butt was 194 feet from the telephone pole, and the fourth was 151 feet north of the pole and approximately two feet from the edge of the road.

On May 18, 1999, the Corolla was found near an abandoned factory in Hartford. Mail that the defendant had picked up from his mother's house on May 13, 1999, was scattered nearby, as was a baseball cap that the victim had been wearing. Detectives determined that they wanted to speak with the defendant about the shooting, but were unable to find him at the address where they believed he had been living. In November, 1999, they located the defendant in Florida; he was using an alias.

The defendant agreed to speak with police in Florida. He denied having killed the victim and provided several inconsistent versions of what had occurred on May 13, 1999.[2] He

[2] The defendant first told police that the drug transaction did not take place because the defendant, the victim, and the cousin had been unable to find the seller, an individual named "Ayah." Thereafter, the defendant said that he led the victim to meet two men, "Quentin" and Ayah, in Massachusetts, and then that the meeting had occurred in Granby, Connecticut. The defendant told police that Quentin and Ayah entered the Corolla in which the victim was sitting, spoke with him, and then shot him. At another point, the defendant said that he, the victim, and the cousin met Ayah and Quentin, and followed them to an abandoned gasoline station in Granby, and then to Southwick.

also said that the $1,400 he had in his bedroom in Hartford, and his disposal of part of a shotgun in a sewer, were unrelated to the shooting. The defendant described himself as a drug dealer and said that he had been involved in a planned drug transaction between the victim and the defendant's associates. After he was arrested and returned from Florida, the defendant led police to the area on Fred Jackson Road where the victim's body previously had been found.

The defense at trial was that the defendant was merely present at the scene of the shooting because he had been instrumental in arranging the drug transaction, but that he had had no part in the shooting. He testified that the victim and the cousin arrived at his house on May 13 to purchase cocaine. The defendant, the cousin, and the victim drove to a convenience store, where they met two men, "Ayah" and "Quentin," and followed them to an abandoned gasoline station in Granby, Connecticut, and then on to Fred Jackson Road. After the two vehicles were parked on the side of the road, Ayah and Quentin got out of their vehicle and walked toward the rear of the driver's side window of the Corolla. Standing outside the Corolla, Quentin shot the victim from behind. The defendant testified that the victim was killed in revenge because the

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There, Quentin stood behind the Corolla and shot the victim from behind.

victim and his cousin had robbed someone in New York during a prior drug transaction.

The defendant's trial counsel was aware that police had found four cigarette butts near the crime scene, but did not seek to have them tested. Trial counsel referred to the cigarette butts in his closing argument, pointing to them as evidence supporting the defendant's trial testimony that he was not the only other person present at the scene of the shooting. Counsel argued:

> "Did they belong to any of the people there? We don't know that, because the Commonwealth didn't test them. They didn't test the DNA against those cigarette butts to see if one belonged to [the victim], one of them belonged to [the defendant,] and maybe the DNA would have been as unidentifiable as those fingerprints. But if two of them or even one of them belonged to one of them, then maybe the others would belong to some people, although the cigarettes could have been thrown out at any time by anyone. It's unlikely two or three groups of random people would throw cigarette butts out and they landed right next to each other."

In his initial affidavit in support of DNA testing, the defendant asserted his factual innocence. He did not state that anyone at or near the scene of the shooting had been smoking. After the hearing on his motion for postconviction testing, the defendant filed a supplemental motion and affidavit. The supplemental affidavit stated that, while the defendant had not been smoking at the scene, he recalled that "one or more of the three people I have identified as being at the crime scene . . .

were smoking. I do not recall who was smoking, how much, or what brand of cigarettes they were using . . . ."

2. Discussion. a. Statutory provisions. In 2012, the Legislature enacted G. L. c. 278A, "An Act providing access to forensic and scientific evidence." See St. 2012, c. 38; Commonwealth v. Donald, 468 Mass. 37, 38 (2014). General Laws c. 278A allows individuals who have been convicted of a crime to seek access to, and postconviction forensic or scientific analysis of, evidence or biological material. See Commonwealth v. Wade, 467 Mass. 496, 497 (2014) (Wade II). See also Commonwealth v. Clark, 472 Mass. 120, 121 (2015).

The statute establishes a two-step process under which defendants may seek postconviction testing. The first stage is "essentially nonadversarial." See Wade II, 467 Mass. at 503, citing G. L. c. 278A, § 3 (e). Pursuant to G. L. c. 278A, § 3, a motion judge conducts a threshold inquiry into whether a defendant has met the initial burden. At this preliminary stage, the defendant "is not required to 'establish any of the [statutory] factors alleged in the § 3 motion.'" Wade II, supra at 503-504, quoting G. L. c. 278A, § 3 (c). The judge's determination whether the motion meets the preliminary requirements is based on a review of the information contained in the motion and any references to the record, supporting documents, or affidavits. See Wade II, supra at 502, citing

G. L. c. 278A, § 6 (a). The judge does not "make credibility determinations, or . . . consider the relative weight of the evidence or the strength of the case presented against the [defendant] at trial." Wade II, supra at 505-506.

If a defendant meets the minimal threshold under G. L. c. 278A, § 3, the proceedings advance to the next stage: an evidentiary hearing. See G. L. c. 278A, § 6 (a). At such a hearing, the motion judge determines whether the defendant "has established by a preponderance of the evidence sufficient facts" to meet the criteria outlined in G. L. c. 278A, § 7 (b) (1)-(6). Wade II, 467 Mass. at 501, 503. See Donald, 468 Mass. at 41 These criteria are:

> "(1) that the evidence or biological material exists;
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> "(2) that the evidence or biological material has been subject to a chain of custody that is sufficient to establish that it has not deteriorated, been substituted, tampered with, replaced, handled or altered such that the results of the requested analysis would lack any probative value;
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> "(3) that the evidence or biological material has not been subjected to the requested analysis for any of the reasons set forth in clauses (i) to (v), inclusive, of paragraph (5) of subsection (b) of [§] 3;[3]

[3] General Laws c. 278A, § 3 (b) (5), sets forth the following reasons:

> "(i) the requested analysis had not yet been developed at the time of the conviction;

"(4) that the requested analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the underlying case;

"(5) that the purpose of the motion is not the obstruction of justice or delay; and

"(6) that the results of the particular type of analysis being requested have been found to be admissible in courts of the [C]ommonwealth."

G. L. c. 278A, § 7 (b). Having conducted such an evidentiary hearing, a motion judge "shall state findings of fact and conclusions of law that support the decision to allow or deny [the defendant's] motion." G. L. c. 278A, § 7 (a).

b. Analysis. The Commonwealth does not challenge the

"(ii) the results of the requested analysis were not admissible in the courts of the [C]ommonwealth at the time of the conviction;

"(iii) the moving party and the moving party's attorney were not aware of and did not have reason to be aware of the existence of the evidence or biological material at the time of the underlying case and conviction;

"(iv) the moving party's attorney in the underlying case was aware at the time of the conviction of the existence of the evidence or biological material, the results of the requested analysis were admissible as evidence in courts of the [C]ommonwealth, a reasonably effective attorney would have sought the analysis and either the moving party's attorney failed to seek the analysis or the judge denied the request; or

"(v) the evidence or biological material was otherwise unavailable at the time of the conviction."

defendant's claim that his motion for postconviction testing met the threshold requirements set forth in G. L. c. 278A, § 3. The Commonwealth argues, however, that the defendant failed to establish, by a preponderance of the evidence, that his motion met the requirements of G. L. c. 278A, § 7 (b) (3) and (4).

i. Standard of review. The parties dispute the appropriate standard of review when considering the denial of a motion pursuant to G. L. c. 278A, § 7. The defendant contends that, because no testimony was introduced at the hearing, we are in the same position as the motion judge to conduct a de novo review of the record. The Commonwealth, by contrast, argues that the motion judge necessarily weighed the evidence introduced at the hearing, and that we therefore should defer to her factual findings. We conclude that, where the motion judge was the trial judge, a decision under G. L. c. 278A, § 7, should be reviewed under an abuse of discretion standard.

De novo review is appropriate where the claim at issue involves statutory interpretation, or where the judge was not required "to make credibility determinations, or to consider the relative weight of the evidence or the strength of the case presented against the moving party at trial." See Clark, 472 Mass. at 130, citing Wade II, 467 Mass. at 505-506. In appeals from a denial of a G. L. c. 278A, § 3, motion, de novo review is appropriate because review of a moving party's threshold showing

under G. L. c. 278A, § 3, is limited to consideration of the motion and supporting documents. Thus, in Wade II, supra at 501, we reviewed a "question[] of statutory interpretation de novo" in a decision "concerned only with the threshold review at the first step [mandated by § 3]." Similarly, in Clark, supra, we observed that, where review is wholly "based on documentary evidence," an appellate court stands "in the same position as the [motion] judge in determining whether the information presented in the motion meets the requirements of § 3."

For second-stage motions under G. L. c. 278A, § 7, where the motion judge was not the trial judge, and where the record before us is purely documentary, we also review claims of error under a de novo standard, because "we regard ourselves in as good a position as the motion judge to assess the trial record." Commonwealth v. Grace, 397 Mass. 303, 307 (1986). See Commonwealth v. Petetabella, 459 Mass. 177, 181 (2011). See also Commonwealth v. Melo, 472 Mass. 278, 293 (2015), quoting Commonwealth v. Thomas, 469 Mass. 531, 539 (2014) ("We review de novo any findings of the motion judge that were based entirely on the documentary evidence, [such as] the recorded interviews of the defendant").

Where a motion under G. L. c. 278A, § 7, is considered by the trial judge, however, we review the trial judge's findings under an abuse of discretion standard. Commonwealth v. Wade,

475 Mass. 54, 55 (2016) (Wade III). See Commonwealth v. Kolenovic, 471 Mass. 664, 672 (2015), S.C., 478 Mass. 189 (2017) (in appeal from trial judge's determination on motion for new trial, "we consider whether the judge committed a significant error of law or abuse of discretion in allowing the defendant's motion"). As we consistently have held, "[a] reviewing court extends special deference to the action of a motion judge who was also the trial judge." Grace, 397 Mass. at 307. This deference is warranted because a motion judge who was the trial judge conducts a "fact-specific analysis [predicated on] a thorough knowledge of trial proceedings." Commonwealth v. DiBenedetto, 475 Mass. 429, 439–440 (2016). See Commonwealth v. Chatman, 466 Mass. 327, 333–334 (2013), S.C., 473 Mass. 840 (2016) (motion judge who sat as trial judge "entitled to rely on her knowledge of what occurred at trial"). This analysis involves credibility judgments and other assessments made in light of the trial testimony. See Commonwealth v. Cadet, 473 Mass. 173, 179 (2015); Commonwealth v. Rosario, 460 Mass. 181, 195 (2011).

ii. Whether denial of the G. L. c. 278A, § 7, motion was erroneous. The Commonwealth does not dispute that the defendant established by a preponderance of the evidence four of the six enumerated requirements under G. L. c. 278A, § 7. The Commonwealth agrees that the defendant has shown that the

evidence he seeks to test -- the four cigarette butts -- exists, see § 7 (b) (1); the chain of custody has been adequate, see § 7 (b) (2); the purpose of the motion was not to obstruct justice or delay, see § 7 (b) (5); and the results of the proposed testing is admissible in the Commonwealth, see § 7 (b) (6).

The question we confront is thus whether the defendant established, by a preponderance of that evidence, that the DNA testing sought has the potential to result in evidence material to the defendant's identification as the perpetrator, see § 7 (b) (4); and that a reasonably effective defense attorney would have sought testing of the cigarette butts, see § 7 (b) (3).

A. Material evidence of the identity of the perpetrator. The defendant argues that DNA from the four cigarette butts could have originated from others who were at the scene, in particular the two others who took part in the drug transaction, and accordingly could suggest that someone other than he shot the victim. To establish that he has met the requirements of this factor, the defendant was required, pursuant to G. L. c. 278A, § 7 (b) (4), to establish by a preponderance of the evidence that "the requested analysis has the potential to result in evidence that is material to the [defendant's] identification as the perpetrator of the crime in the underlying

case." We discern no abuse of discretion in the judge's determination that "the DNA testing sought here is on material which is not directly involved with the crime, and therefore cannot help identify the perpetrator."

As discussed, the four cigarette butts were collected from a public road after police responded to a report that a body had been found at the bottom of an embankment near the road. The cigarette butts were almost 200 feet from the location where the victim's body was found (in a range of from 151 to 239 feet). Some of them were near a driveway leading off the main road, which the defendant suggested was the most natural place in the area to turn around and head back in the direction that the defendant had testified the others returned after the shooting. This, of course, cuts both ways: by the defendant's own statement, an unknown number of others could have stopped at the only nearby location wide enough to pull over and smoke a cigarette.

Moreover, there was nothing to indicate when the cigarette butts might have been deposited on the road, and therefore nothing showing a temporal link with the shooting of the victim. Because three days had elapsed between the shooting and the date when the victim's body was discovered, the cigarette butts could have been left on numerous occasions after the shooting, just as they could have been discarded days, weeks, or months before the

evening of the shooting.

Further, in his statements to police, the defendant had not indicated that either Ayah, Quentin, or anyone else had smoked cigarettes at the scene, either while in a vehicle or on foot. Nor did the defendant, who testified at trial, mention cigarette smoking on direct or cross-examination.

The Legislature intended G. L. c. 278A to make postconviction forensic testing easier and faster than it had been for defendants who sought such testing in conjunction with motions for new trials pursuant to Mass. R. Crim. P. 30, as appearing in 435 Mass. 1501 (2001). See Wade II, 467 Mass. at 503-504. While our jurisprudence strongly favors that approach, a decision on a motion filed under G. L. c. 278A, § 7, is not insulated from any exercise of discretion by the motion judge. Here, the judge, acting within this discretion, concluded that DNA testing of cigarette butts found at the side of a public road in the general vicinity of a crime scene did not have the potential to result in evidence material to the identity of the perpetrator.

In many instances, a defendant may utilize G. L. c. 278A to seek forensic testing of evidence in an effort to establish a direct link to the perpetrator's identity. See, e.g., Clark, 472 Mass. at 121-122 (kitchen knife wielded by assailant warranted testing for potential handler DNA); Wade II, 467 Mass.

at 497-498 (defendant convicted of rape and murder sought DNA testing of vaginal swabs to establish identity of perpetrator); Commonwealth v. Lyons, 89 Mass. App. Ct. 485, 485-486 (2016) (defendant convicted of murder sought DNA testing of hairs found clutched in victim's hands to identify perpetrator); Commonwealth v. Coutu, 88 Mass. App. Ct. 686, 687, 702 (2015), S.C., 90 Mass. App. Ct. 227 (2016) (defendant sought DNA testing of finger swabs of victim who testified that she attempted to "pull" and "peel" her attacker's fingers off her face).

We do not suggest that postconviction forensic testing under G. L. c. 278A is limited to direct evidence of the perpetrator's identity. By its plain language, G. L. c. 278A, § 7 (b) (4), requires a defendant to establish "that the requested analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the underlying case." In other circumstances, it might be possible, or, indeed, likely, depending on the facts of a particular case, that DNA evidence could be used in conjunction with other evidence to establish the identity of a third party. Because of the nature of the evidence in this case, however, and the facts and circumstances of the crime, the defendant failed to meet this legal standard.

B. Whether a reasonably competent defense attorney would have sought DNA testing. The defendant contends that his trial

counsel was constitutionally ineffective because counsel did not seek DNA testing of the cigarette butts prior to trial. Pursuant to G. L. c. 278A, § 7 (b) (3), a defendant bears the burden of demonstrating, by a preponderance of the evidence, that the item he or she seeks to have tested has not previously been subjected to the requested analysis, for any of the reasons listed in G. L. c. 278A, § 3 (b) (5).[4] General Laws c. 278A, § 3 (b) (5) (iv), does not require that a defendant satisfy the general ineffective assistance standard under Commonwealth v. Saferian, 366 Mass. 89, 96-97 (1974), but, rather, that he or she demonstrate "only that 'a' reasonably effective attorney would have sought the requested analysis, not that every reasonably effective attorney would have done so." Wade II, 467 Mass. at 511.

The determination whether a reasonable attorney would have sought the testing is an objective one. Id. at 511-512.

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[4] The defendant seeks to establish that the below criteria referenced in G. L. c. 278A, § 7 (b) (5), is applicable in this case:

> "(iv) the moving party's attorney in the underlying case was aware at the time of the conviction of the existence of the evidence or biological material, the results of the requested analysis were admissible as evidence in courts of the commonwealth, a reasonably effective attorney would have sought the analysis and either the moving party's attorney failed to seek the analysis or the judge denied the request."

G. L. c. 278A, § 3 (b) (5).

"[B]ecause the act uses the language of 'a' hypothetical reasonably effective attorney, a moving party is not required to explain the tactical or strategic reasoning of the party's trial counsel in not seeking the requested analysis." Wade III, 475 Mass. at 63, citing Coutu, 88 Mass. App. Ct. at 703. "Thus, regardless whether a moving party proceeds under the reasonably effective attorney prong or any other prong of [G. L. c. 278A,] § 3 (b) (5), whether his or her trial counsel made a strategic decision to forgo such testing is not relevant to that inquiry." Wade III, supra.

Here, the judge determined that a reasonably effective attorney would not have sought DNA testing of the cigarette butts. We agree. As discussed with respect to the question of identity, any analysis of the DNA on the cigarette butts would have done virtually nothing to identify the perpetrator, and thus would not have supported an inference that someone other than the defendant killed the victim. Contrast Clark, 472 Mass. at 121-122 (DNA on knife could be material to identifying perpetrator); Wade II, 467 Mass. at 497-498 (DNA on vaginal swabs potentially could identify perpetrator).

Accordingly, there was no abuse of discretion in the judge's determination that the defendant's "motion, arguments, attached submissions, and the record of the trial and motion hearing fall short of meeting even the low threshold for relief

under G. L. c. 278A."

3. Conclusion. The order denying the defendant's G. L. c. 278A, § 3, motion is affirmed.

So ordered.