IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 19, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000035-MR
2009-SC-000361-MR

JOHN ROSCOE GARLAND — APPELLANT

V.

ON APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
NO. 97-CR-00024-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Following a jury trial, Appellant John Roscoe Garland was convicted of three counts of murder and sentenced to death. This Court affirmed his conviction and sentence on direct appeal. *See Garland v. Commonwealth*, 127 S.W.3d 529 (Ky. 2003), *overruled in part by Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005). Appellant now appeals to this Court from the denial of a post-conviction motion for DNA testing and analysis pursuant to KRS 422.285, and from the striking of a second, similar motion. We reverse in part, and remand to the circuit court for further proceedings on the first appeal. With respect to the second motion, we dismiss the appeal as moot.

I. BACKGROUND

A. Underlying Facts

On the night of Saturday, March 9, 1997, 26-year-old Jean Ferrier, 22-year-old Crystal Conaster, and 16-year-old April Sexton left McCreary County and went to a country music dance hall in Somerset. Jean had previously been in a relationship with Appellant, but was dating Gary Roberts at the time. Appellant's voice on an audiotape discovered after the murders stated his belief that Jean was pregnant, and that Roberts was the father.

April Sexton testified that, at the dance in Somerset that night, the three had circled the parking lot because Jean was afraid Appellant would be there. While there, they met Chris Boswell, who danced with Crystal and rode home with the women after the dance. On the way home, the friends dropped off April at about 12:30 or 1:00 a.m. On Sunday afternoon, the bodies of Jean, Crystal, and Chris were found in Jean's trailer. They had been shot to death. Jean had also been choked prior to her death.

Appellant's son Roscoe was the "star witness" against his father at trial. *Garland*, 127 S.W.3d at 535. Roscoe testified that Appellant had previously said he was going to kill Jean, because he was sick of her spending time with Gary. Roscoe testified that, on the night of the murders, he and Appellant were on their way to the auto auction in London, but turned around due to a traffic jam. According to Roscoe, some time later, he and Appellant saw Jean Ferrier's car, and Appellant pulled out behind her car and followed it. They then

watched as the friends dropped off April at her home and drove to Gary Roberts' home. According to Roscoe, Jean turned off her headlights in Gary's driveway, honked her horn, and then drove off.

Roscoe testified that Appellant followed Jean home and went inside. Roscoe heard arguing and went inside, where Appellant's hair and the interior of Jean's trailer appeared to be disheveled from a fight. Roscoe testified that Chris came out of the bedroom, and Appellant shot him, then shot Crystal, then shot Chris again, and then shot Crystal again. Roscoe testified that Jean "flipped" and began pulling her hair and running into her bedroom. When she emerged from the bedroom, Appellant shot her once, killing her.

Roscoe testified that he proceeded to help his father cover up evidence of the murders by arranging items in the trailer, burning clothing, and hiding the murder weapon. Roscoe stated that the murder weapon was a .357 magnum, which he (Roscoe) and his ex-wife had taken from her father, and that Roscoe had subsequently sold to Appellant. Roscoe would eventually lead police to the hidden weapon. Roscoe also testified that he purchased a new .357 magnum for Appellant, because everyone knew Appellant carried a gun.

Appellant testified at trial and, like Roscoe, testified that he had gone with Roscoe to the auto auction in London, but that there had been a traffic jam. However, unlike Roscoe, Appellant testified that he and Roscoe took an alternate route to London. According to Appellant, the auction was wrapping up by the time he and Roscoe arrived, and they soon returned to McCreary

County. Appellant testified that he dropped Roscoe off around 12:30 a.m., because Roscoe said he had plans. Appellant stated that he then went to see his ex-wife Eula Isgrigg, and that he spent the night at her home. Eula testified that Appellant arrived at her house around 2:00 a.m., though she was impeached with her prior inconsistent statement to police that she had not seen Appellant that night. Appellant initially told police that he had been with Roscoe at the time of the murders, which he explained at trial was to cover for Roscoe, whom he had assumed was meeting with a woman other than his girlfriend.

No physical evidence linked Appellant to the crime scene, and Appellant's strategy at trial was to blame Roscoe for the murders. Appellant testified that Roscoe had never sold him the murder weapon, and that it still belonged to Roscoe at the time of the crimes. In addition, a great deal of evidence was introduced about Roscoe's unsavory past, including the fact that Roscoe had beaten a man nearly to death and had served time in prison as a result. Appellant, by contrast, had no extensive prior criminal history. There was also testimony that Appellant had temporary custody of two of Roscoe's children, and that Roscoe had wanted to date one of the victims, Crystal Conaster.

Kentucky State Police collected a clump of blackish-brown hair from Jean Ferrier's left hand, and a "possible hair" from her fingernail clippings. At the crime scene, Jean Ferrier's left hand was next to fellow victim Chris Boswell's head. Both Chris Boswell and Roscoe Garland had brown hair, while

Appellant's hair was silver-gray. Jean Ferrier's hair was described in the autopsy report as "blonde/brown." Victim Crystal Conaster's hair color is not mentioned in her autopsy report.

The KSP laboratory conducted a microscopic hair comparison between the hair found in Jean Ferrier's left hand and the hair of Chris Boswell. The hairs were "similar in color and microscopic characteristics." As this information was neither exculpatory nor incriminating, the microscopic testing results were never put before the jury. However, the jury did hear that Jean had a clump of hair in her hand, and defense counsel argued that the hair could have belonged to Roscoe. No DNA testing was ever performed on the clump of hair, nor on the possible hair.

The jury chose to believe Roscoe's version of the events on the evening of March 9, 1997, and convicted Appellant of all three murders. The jury recommended, and the trial court imposed, a sentence of death. Appellant's direct appeal and post-conviction motions have thus far been unsuccessful.

B. Procedural History

On January 2, 2007, Appellant filed a *pro se* post-conviction motion, requesting DNA testing of a number of items of evidence from the crime scene, including the clump of hair found in Jean Ferrier's hand and the possible hair found with Ferrier's fingernail clippings. He based his request on a number of rules, constitutional provisions, and statutes, including KRS 422.285. The Commonwealth filed a response objecting to the court's ordering any DNA

testing.

On November 5, 2008, the circuit court entered an order denying Appellant's *pro se* motion for DNA testing. The court found that Appellant had not made the necessary showing required by either KRS 422.285(2)(a) or KRS 422.285(3)(a). In addition, the court found that the evidence to be tested was not probative, as required by KRS 17.176(1). Appellant did not file a notice of appeal to this Court.

Apparently having never been served with a copy of the circuit court's November 5, 2008 order, Appellant's counsel from the Department of Public Advocacy filed a motion for DNA testing and analysis on December 8, 2008. This motion was limited to a request for testing of the clump of hair found in Ferrier's hand, and the possible hair found with Ferrier's fingernail clippings. The Commonwealth filed a response on January 15, 2009.

On January 21, 2009, Appellant, through counsel, filed a motion for a belated appeal with this Court from the trial court's denial of his *pro se* motion for DNA testing. On April 20, 2009, this Court entered an order granting Appellant's belated appeal.[1]

On May 8, 2009, the Commonwealth filed a motion with the circuit court to strike Appellant's second motion for DNA testing. The Commonwealth argued that the circuit court lost jurisdiction over the second motion when this

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[1] The Commonwealth argues that this Court improvidently granted Appellant's motion for belated appeal, and that the appeal must be dismissed. This argument is untimely. In its response to Appellant's motion for belated appeal, the Commonwealth stated that it "takes no position on the merits of Garland's Motion for Belated Appeal."

Court granted Appellant's request for a belated appeal of the first motion. In addition, the Commonwealth argued that the second motion was barred by the doctrine of *res judicata*. On May 19, 2009, the circuit court entered an order striking Appellant's second motion for DNA testing, but providing no specific grounds for doing so. Appellant then appealed that order to this Court. That appeal has now been consolidated with Appellant's belated appeal of the denial of the first motion, and we consider both appeals together at this time.

II. ANALYSIS

In his first, *pro se* motion, Appellant specifically requested DNA testing, pursuant to KRS 422.285, of the clump of hair in Jean Ferrier's hand and the possible hair under her fingernail. Appellant's first motion also requested testing of a number of additional items, and raised additional grounds for DNA testing. On appeal, however, Appellant now limits his argument to the two items previously mentioned, and cites KRS 422.285 as the only statutory ground for testing.[2] Therefore, we need not address testing of the other items listed in Appellant's first motion, and will now consider whether the trial court erred in denying Appellant's motion for DNA testing of the two hair specimens under KRS 422.285.

Appellant seeks DNA testing and analysis of the two hair specimens found at the crime scene in order to determine whether the hair matches the

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[2] In his second motion, Appellant requested testing only of the two items now at issue, and raised only KRS 422.285 as a statutory ground for testing. In this appeal, Appellant also raises constitutional grounds for DNA testing. We need not reach the constitutional issues to resolve this case, but note that Appellant's constitutional claims were substantially resolved by this Court's opinion in *Bowling v. Commonwealth*, ___ S.W.3d ___, 2010 WL 3722283 (Ky. Sept. 23, 2010).

DNA profile of his son Roscoe. Appellant argues that, if the hair found at the crime scene belongs to Roscoe, then Roscoe's credibility as a witness would be so severely undermined that it would either exonerate Appellant or, at the least, have lead to a more favorable verdict or sentence.

KRS 422.285, which permits persons sentenced to death to request DNA testing and analysis, was enacted "for the purpose of allowing DNA analysis of evidence that had not been previously tested or previously tested according to current standards, when such evidence would negate a prior conviction or result in a more favorable verdict or sentence." *Bowling v. Commonwealth*, ___ S.W.3d ___, 2010 WL 3722283, at *4 (Ky. Sept. 23, 2010). The statute provides for DNA testing and analysis under two sections.[3] Both sections require that

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[3] The relevant portions read in their entirety:

(2) After notice to the prosecutor and an opportunity to respond, the court shall order DNA testing and analysis if the court finds that all of the following apply:

(a) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis;

(b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted; and

(c) The evidence was not previously subjected to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and may resolve an issue not previously resolved by the previous testing and analysis.

(3) After notice to the prosecutor and an opportunity to respond, the court may order DNA testing and analysis if the court finds that all of the following apply:

(a) A reasonable probability exists that either:

1. The petitioner's verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or

2. DNA testing and analysis will produce exculpatory evidence;

the evidence still be testable and not previously tested (or not tested in the manner now proposed, which would resolve an issue not resolved by earlier testing). KRS 422.285(2)(b), (2)(c), (3)(b), & (3)(c).

If the requirements of sections (2)(b) and (2)(c) are also met, the statute mandates DNA testing and analysis where "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained . . . ." KRS 422.285(2)(a). "Such a showing is essentially one of exoneration." *Bowling*, 2010 WL 3722283, at *4.

Section (3) provides that, if the requirements of sections (3)(b) and (3)(c) are also met, the court "may" order DNA analysis and testing where "[a] reasonable probability exists that" either "[t]he petitioner's verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction," KRS 422.285(3)(a)1, or that "DNA testing and analysis will produce exculpatory evidence . . . ." KRS 422.285(3)(a)2. "Thus, the first level of proof the movant must make . . . under either section (2) or (3) of the statute, is that the evidence sought would either exonerate the defendant, lead to a more favorable verdict or sentence, or otherwise be exculpatory." *Bowling*, 2010 WL 3722283, at *4.

(b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted; and

(c) The evidence was not previously subject to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and that may resolve an issue not previously resolved by the previous testing and analysis.

The court must "undertake the 'reasonable probability' analysis under the assumption that the evidence will be favorable to the movant." *Id.* Therefore, for purposes of this appeal, we assume that DNA testing and analysis will reveal that the hair specimens match the DNA profile of Appellant's son Roscoe.

We agree with the circuit court that Appellant has not met the exoneration standard for DNA testing and analysis under KRS 422.285(2)(a). Assuming that the hair samples match Roscoe's DNA profile, this does not exonerate Appellant, but shows that Roscoe was not merely a witness. Roscoe testified that he was present at the crime scene, and that he witnessed his father kill the three victims. If the hair samples belonged to Roscoe, it would do nothing to show that Appellant was not also present, so DNA testing is not available under KRS 422.285(2)(a).

However, for the same reasons, we conclude that Appellant *has* met the standard of KRS 422.285(3)(a)1 by showing "[a] reasonable probability exists that . . . [t]he [Appellant's] verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial[.]" Roscoe was "the star witness against his father." *Garland*, 127 S.W.3d at 535. His testimony was absolutely critical to the Commonwealth's case. No physical evidence linked Appellant to the crime scene, and Appellant testified that he (Appellant) was not present at Jean Ferrier's home when the murders occurred. The defense argued that Roscoe was the murderer, and demonstrated that

Roscoe had an extensive criminal history, while Appellant did not. It was undisputed that the murder weapon had, at one time, belonged to Roscoe. Roscoe testified that he had sold it to Appellant prior to the murders, while Appellant denied this.

The case against Appellant came down, in large part, to whom the jury found to be more credible – Appellant or Roscoe. Roscoe denied *any* involvement in the altercation or murders prior to the subsequent cover-up. There was no evidence that Roscoe ever moved the victims' bodies. If the clump of hair found in Jean Ferrier's hand or the hair found under her fingernail belonged to Roscoe, this would have made Roscoe's version of events less likely to be true, and seriously undermined Roscoe's credibility as a witness.

Given the importance of Roscoe's testimony to Appellant's conviction, and given the seriously detrimental consequences to Roscoe's credibility if DNA testing reveals the hair specimens to match Roscoe's DNA, we conclude that there is a reasonable probability that Appellant's "verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction[.]" Appellant has therefore met the requirements of KRS 422.285(3)(a)1.

In addition, it is undisputed that Appellant has met the requirements of KRS 422.285(3)(c), because the evidence has not been previously subjected to DNA testing and analysis. However, the circuit court made no findings, and

the record contains no evidence, with respect to KRS 422.285(3)(b), i.e., whether the evidence is still in existence and in a condition that allows DNA testing and analysis to be conducted. It also appears from the record that, for whatever reason, the court and the parties did not comply with the requirements of KRS 422.285(6), which requires that, when a petition for DNA testing is filed, the court order the state to preserve all evidence in its possession and to prepare an inventory of evidence for the court and the defense.[4]

As a result, it is necessary to remand this case to the circuit court for compliance with KRS 422.285(6), and for a determination of whether the evidence is still in existence and in a condition that allows DNA testing and analysis to be conducted, as required by KRS 422.285(3)(b). If the evidence still exists and can be tested, the circuit court is to order DNA testing and analysis.

The circuit court also found that the evidence that Appellant sought to have tested was not probative. KRS 17.176(1) requires that, in addition to the requirements of KRS 422.285, any evidence submitted for testing and analysis be of "probative value."[5] The hair samples Appellant seeks to have tested are

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[4] "If a petition is filed pursuant to this section, the court shall order the state to preserve during the pendency of the proceeding all evidence in the state's possession or control that could be subjected to DNA testing and analysis. The state shall prepare an inventory of the evidence and shall submit a copy of the inventory to the defense and the court. If the evidence is intentionally destroyed after the court orders its preservation, the court may impose appropriate sanctions, including criminal contempt." KRS 422.285(6).

[5] "In addition to the requirements specified in KRS 422.285, any evidence submitted for testing and analysis pursuant to KRS 422.285 or 422.287 shall be of probative

evidence taken from the crime scene. When subjected to DNA testing and analysis, the evidence may lend credibility to Appellant's theory of the case. We conclude that this is sufficient to satisfy the requirement of KRS 17.176(1) that the evidence be of probative value.

Finally, we note that we are reversing and remanding based on Appellant's first, *pro se* motion. Therefore, the appeal regarding Appellant's second (supplemental) motion for DNA testing and analysis is rendered moot, and is dismissed

III. CONCLUSION

We affirm that part of the circuit court's judgment that denied testing of items of evidence that Appellant has abandoned on appeal. As to Appellant's first appeal regarding his *pro se* motion for DNA testing and analysis of the clump of hair collected from Jean Ferrier's left hand, and the possible hair collected from Ferrier's fingernail clippings, the judgment of the McCreary Circuit Court is reversed, and the matter remanded for proceedings consistent with this opinion. The appeal from the McCreary Circuit Court's striking Appellant's second or supplemental motion for DNA testing and analysis is rendered moot and dismissed.

All sitting. All concur.

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value. When the motion is filed with the court requesting testing and analysis of evidence pursuant to this section, the applicant shall include sufficient information about the evidence, the necessity for its testing and analysis, and its applicability to the proceeding for a court to make a determination of the probative value of the evidence proposed to be tested and analyzed." KRS 17.176(1).

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