SJC-13016

COMMONWEALTH vs. ALFRED JENKS.

July 2, 2021.

Evidence, Scientific test. Practice, Criminal, Postconviction relief.

In this case, we are called upon once again to determine whether a defendant has met the modest threshold under G. L. c. 278A, § 3, to be entitled to a hearing on his motions for postconviction forensic testing. See, e.g., Commonwealth v. Williams, 481 Mass. 799, 804 (2019); Commonwealth v. Clark, 472 Mass. 120, 132 (2015); Commonwealth v. Wade, 467 Mass. 496, 507 (2014) (Wade II). At issue here is whether the defendant, Alfred Jenks, has satisfied the requirement of § 3 (b) (5) that he point to information "demonstrating that the evidence or biological material has not been subjected to the requested analysis," either because "the requested analysis had not yet been developed at the time of [his] conviction," see § 3 (b) (5) (i), or because his trial attorney failed to seek available analysis that "a reasonably effective attorney would have sought," see § 3 (b) (5) (iv). For the reasons discussed infra, we conclude that Jenks has met the statutory threshold under § 3 (b) (5) (iv) to be entitled to a hearing on his motions.[1]

Background. We summarized the facts of the underlying shooting, as the jury could have found them, in Commonwealth v. Jenks, 426 Mass. 582, 583-584 (1998) (Jenks I). As pertinent here, Jenks was convicted in 1996 of murder in the first degree and a related firearm offense, in connection with the shooting

[1] We acknowledge the amicus briefs submitted by the Boston Bar Association, and by the Committee for Public Counsel Services Innocence Program, Boston College Innocence Program, the Massachusetts Association of Criminal Defense Lawyers, and New England Innocence Project.

death of the victim at a crowded dance hall. Jenks was convicted of premeditated murder on a theory of transferred intent, based on evidence that, during an altercation on the dance floor, he shot at particular individuals with the intent to kill them, and one of the bullets passed through a wall, killing the victim.

At trial, the Commonwealth presented audio evidence that seven shots were fired. Six projectiles, six casings, and a nine millimeter semiautomatic handgun were recovered from the scene, and a hole in the wall suggested that an unrecovered projectile had traveled outside the dance hall. Based on his use of a comparison microscope to compare the recovered projectiles and casings with each other and with "test fires" (projectiles and casings test fired from the recovered firearm), a ballistics expert for the Commonwealth opined that all of the recovered projectiles and casings had been fired from the same nine millimeter handgun that was recovered from the scene.

The defense theory was that shots had been fired from more than one firearm and that Jenks had fired in self-defense to fend off a physical attack by multiple individuals, at least one of whom had a firearm. In support of this theory, defense counsel presented the testimony of two experts: a chemist (who had experience in ballistics and firearms) testified that, based on the trajectory of the projectiles, two of the projectiles had been fired from opposite sides of the room; and an audio engineer testified that, based on an analysis of the audio recording of the gunshots, the last two gunshots were similar in frequency to each other and different in frequency from the preceding five gunshots, which could indicate that two different guns had been fired. Neither expert had analyzed the recovered firearm, projectiles, casings, or the test fires performed by the Commonwealth's expert, and there is no indication in the docket that any other potential defense expert requested to view that evidence.[2]

This court affirmed Jenks's convictions and the denial of his first motion for a new trial. See Jenks I, 426 Mass. at 588. He then filed additional motions for a new trial in 2004 and 2010, which were denied. Jenks's gatekeeper applications pursuant to G. L. c. 278, § 33E, for leave to appeal from the denial of those motions also were denied.

In September 2019, Jenks filed a motion for postconviction testing and analysis of ballistics evidence, arguing, among

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[2] The trial judge had allowed Jenks's motions for funding for a firearms expert, a ballistician, and an audio engineer.

other things, that he was entitled to the testing under G. L. c. 278A and Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). In support of his motion, Jenks submitted the affidavit of a ballistics expert, who opined that "[t]here is information . . . indicating that more than one firearm may have been present during the incident." More specifically, the expert attested that some of the evidence envelopes containing projectiles recovered from the scene appeared to indicate weights in excess of 140 grains, and the average weight of nine millimeter projectiles is 115 grains, leading the expert to opine that "further examination is merited."[3]

The motion judge, who was not the trial judge, denied the motion without a hearing. The judge determined that Jenks had met all but one of the requirements to be entitled to a hearing on his motion under G. L. c. 278A, § 3 (b). More specifically, the judge determined that Jenks failed to satisfy the requirement of § 3 (b) (5) that Jenks point to information demonstrating that the evidence has not been subjected to the requested analysis, noting that the proffered ballistics expert "d[id] not attempt to qualify the requested analysis under any of the five subsections of [§] 3 (b) (5)."[4] The motion judge

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[3] As noted above, the only weapon recovered from the scene was a nine millimeter semiautomatic pistol. There was testimony at trial that a nine millimeter firearm can only accommodate nine millimeter casings, but that various types of .38 caliber class ammunition could be fitted into a nine millimeter casing.

[4] To satisfy G. L. c. 278A, § 3 (b) (5), a motion must point to "information demonstrating that the evidence or biological material has not been subjected to the requested analysis" for one of five reasons:

> "(i) the requested analysis had not yet been developed at the time of the conviction;
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> "(ii) the results of the requested analysis were not admissible in the courts of the commonwealth at the time of the conviction;
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> "(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;
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> "(iv) the moving party's attorney in the underlying case was aware at the time of the conviction of the existence of

also rejected Jenks's arguments under Mass. R. Crim. P. 30 (b), concluding that Jenks failed to make a prima facie showing that the requested discovery was likely to uncover evidence that might warrant a new trial.

Jenks filed a renewed motion to permit testing of ballistics evidence in November 2019, again based on both G. L. c. 278A and Mass. R. Crim. P. 30 (b), accompanied by a supplemental affidavit from Jenks's proffered ballistics expert. In the supplemental affidavit, the expert opined that "[o]ne area where the methodology of ballistics analysis has changed since the time of the 1994 incident in this case is that now comparison microscopes routinely utilize digital camera technology, whereas digital photography was rarely utilized in the forensic setting in the early to mid-90's." The expert also pointed to the absence of certain measurements in the report created by the Commonwealth's ballistics expert at the time of trial, including the absence of information about the weights of some of the projectiles, the diameters of the projectiles, the dimensions of the land and groove impressions, and the direction of the rifling system. According to Jenks's expert, if the diameters of any of the projectiles were determined to be .357 inches or greater, then the projectiles in question were not fired from the nine millimeter firearm recovered at the scene.

Based on this, Jenks argued that he had made the prima facie showing required by Mass. R. Crim. P. 30 (b) (4), and alternatively, that he had satisfied the requirements of G. L.

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

Section 3 (b) also requires that "when relevant" the motion "shall include specific references to the record in the underlying case or to affidavits that are filed in support of the motion that are signed by a person with personal knowledge of the factual basis of the motion." The motion judge interpreted this to require that Jenks support any factual representations about advances in the equipment or methodology associated with ballistics analysis with an affidavit from an expert in the field.

c. 278A, § 3 (b) (5), by, among other means, pointing to information that Jenks's trial counsel failed to seek an analysis that "a reasonably effective attorney" would have sought, see § 3 (b) (5) (iv).

The judge denied the renewed motion "for the reasons discussed in [his] earlier memorandum." The judge also "reject[ed] any argument that Jenks has shown, even on a preliminary basis, ineffective assistance of counsel."

A single justice of this court granted Jenks's application pursuant to G. L. c. 278, § 33E, for leave to appeal from the denial of his postconviction motions for forensic testing, and he now appeals.

Discussion. Jenks's primary argument on appeal is that he has satisfied the preliminary showing under G. L. c. 278A, § 3, such that he was entitled to a hearing on his motions for postconviction forensic testing. As noted above, the motion judge determined that Jenks had satisfied all of the statute's requirements, except § 3 (b) (5). Jenks asserts that he satisfied that subsection in two ways, either viewed alone or in combination. First, he argues that his motion pointed to adequate information under § 3 (b) (5) (iv), demonstrating that a reasonably effective attorney would have engaged an independent ballistics expert to analyze the evidence and to fill in the gaps left open by the Commonwealth's expert report, but his attorney did not do so. Second, he argues that his motion pointed to adequate information under § 3 (b) (5) (i), demonstrating that there have been material advances in the analysis of ballistics evidence and in the documentation of such analysis since the time of Jenks's trial, such that the analysis he seeks "had not yet been developed" at the time of his conviction.

As we recently reiterated in Williams, 481 Mass. at 804:

> "'[T]he threshold determination to be made at the preliminary stage, pursuant to G. L. c. 278A, § 3, . . . is essentially nonadversarial,' Wade II, 467 Mass. at 503; the Commonwealth may, but need not, provide an initial response. G. L. c. 278A, § 3 (e). And although the motion judge makes a preliminary determination as to whether a defendant has included all the information required by § 3 based on a review of the motion and the supporting documentation, it is not until the hearing stage that the defendant must prove the assertions that he or she makes in that motion. See Wade II, supra at 503-504, quoting G. L.

> c. 278A, § 3 (c). At the motion stage, '[t]he 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."' [Commonwealth v.] Moffat, 478 Mass. [292,] 296 [2017], quoting Wade II, supra at 505-506. In other words, at the motion stage, the movant's burden is low. See [Clark, 472 Mass. at 124-125]."

We review the denial of a G. L. c. 278A, § 3, motion de novo. Moffat, supra at 298.

We turn first to Jenks's claim that he satisfied the requirements of § 3 (b) (5) (iv) by pointing to information demonstrating that his trial attorney failed to seek available analysis that "a reasonably effective attorney would have sought." Significantly, § 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.'" Moffat, 478 Mass. at 302, quoting Wade II, 467 Mass. at 511. "The determination whether a reasonable attorney would have sought the testing is an objective one," and "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" (quotation and citation omitted). Moffat, supra.

We are of the view that Jenks has satisfied the low bar under § 3 (b) (5) (iv) to be entitled to a hearing on his motions. More specifically, Jenks has pointed to information (in form of his expert's supplemental affidavit) that the two-page ballistics report produced by the Commonwealth's expert lacked basic measurements that one would expect to see in such a report, including the "unusual" omission of the weights of some (but not all) of the projectiles. According to Jenks's expert, the omitted measurements had the potential to demonstrate that not all of the projectiles were fired from the same firearm, which was a key element of the defense's theory of the case. The record also indicates the trial judge had granted defense counsel's request for funds for a ballistics expert, but that no such expert requested to view the recovered firearm, projectiles, or casings, or the test fires performed by the Commonwealth's expert. Under these circumstances, Jenks has satisfied § 3 (b) (5) (iv), by pointing to sufficient information that his trial attorney failed to seek basic

ballistics analysis that a reasonable attorney would have sought.

Having determined that Jenks has cleared the threshold to proceed to a hearing, we need not address his further arguments under § 3 (b) (5) (i), and we express no opinion as to his likelihood of success on the merits.[5]

Conclusion. The orders denying Jenks's G. L. c. 278A motions are reversed, and the case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

The case was submitted on briefs.

Dennis M. Toomey for the defendant.

Kristen W. Jiang, Assistant District Attorney, for the Commonwealth.

Anthony D. Mirenda, Neil Austin, Rachel Hutchinson, John Frank Weaver, & Madison F. Bader for Boston Bar Association, amicus curiae.

Ira L. Gant & Lisa M. Kavanaugh, Committee for Public Counsel Services, Sarah Carlow, of Connecticut, Radha Natarajan, Sharon Beckman, & Chauncey Wood for Committee for Public Counsel Services & others, amici curiae.

[5] Jenks also argues that the motion judge erred in denying him the requested discovery under Mass. R. Crim. P. 30 (b) (4). We conclude that the motion judge did not abuse his discretion in declining to grant the requested discovery at the motion stage pursuant to rule 30 (b) (4). See Commonwealth v. Linton, 483 Mass. 227, 242 (2019) ("The requirements of G. L. c. 278A are, by design, less stringent than a motion for a new trial pursuant to Mass. R. Crim. P. 30"). For the reasons discussed above, we now remand for an evidentiary hearing on Jenks's motions for postconviction testing under G. L. c. 278A, § 7. Following that hearing, nothing precludes the judge from considering anew whether Jenks has met the requirements of rule 30 (b) (4).