NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ROBERT MUIR WADE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2041 EDA 2012

Appeal from the Order of June 15, 2012,
in the Court of Common Pleas of Monroe County,
Criminal Division at No. CP-45-CR-0000639-1998

BEFORE: OLSON, WECHT and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: Filed: March 20, 2013

This case is an appeal from the order denying Appellant's motion for DNA testing under 42 Pa.C.S.A. § 9543.1. We affirm the order.

On Appellant's direct appeal, a panel of this Court summarized the case facts in this way:

> [A]ppellant and the victim had known each other for approximately six years and had lived together at one point during their relationship. Although appellant was married, he and the victim had sexual relations until at least two months before the victim's death.
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> As the victim did not own a vehicle, appellant routinely drove her to and from work. Appellant admitted that he drove the victim to

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* Retired Senior Judge assigned to the Superior Court.

work on November 26, 1996, the day she was last seen alive. It was also confirmed that the victim made various telephone calls to appellant that day from her workplace. The victim had also telephoned her mother and explained that she was going to meet appellant after work to shop for a vehicle. Several business cards of car dealers were found in the victim's pockets. Appellant testified that he talked to the victim at approximately 5:00 p.m., which was also the last time she was seen alive. [Appellant's body was discovered six days later, on December 2, 1996.]

On December 3, 1996, a search warrant was issued in New Jersey for appellant's automobile. During the search, the police found bloodstains on the back of the passenger seat. The autopsy revealed that the victim had bled from the nose and that there was a substantial amount of blood around her mouth and on the top of her turtleneck. The Commonwealth introduced evidence establishing that the blood found in the vehicle matched the victim's blood within 1 of 207,000 in the African-American population.

In the trunk of appellant's automobile, the police discovered plastic shopping bags. One of these bags contained "Pathmark" brand products and a receipt from a "Pathmark" store in Montclair, New Jersey dated November 26, 1996. The receipt was timed at approximately 1:25 p.m. and had the victim's name on it. The information on the receipt was corroborated with a timed videotape depicting the victim at this store purchasing items found in the shopping bags. The victim was wearing the same clothes that she was found in when her body was discovered on December 2, 1996.

The garbage bag that the body was found in also led to evidence linking appellant to the crime. On December 3, 1996, appellant's wife consented to a search of their home. During the search, the police found clothing that belonged to the victim. Appellant's wife gave police a garbage bag, which was identical to the bag in which the victim was found. Two days later, while executing a search of appellant's home on December 5, 1996, the police found a box of these particular garbage bags in the basement.

The garbage bags in this case were unusual and proved to be important circumstantial evidence. The Commonwealth

> presented two experts in bag manufacturing to testify about the garbage bags. Frank Ruiz, one of the experts, testified that the bag in which the body was found and the bags discovered in appellant's home were manufactured by the same company within the same eight hours. Tests revealed that they were institutional garbage bags, not commonly sold in the consumer market. Further, the process by which this particular garbage bag was manufactured revealed that it was extremely uncommon within the garbage bag industry.

Commonwealth v. Wade, 790 A.2d 344 (Pa. Super. 2001) (unpublished memorandum at 5-7).

In 1998, Appellant was arrested in connection with the aforementioned killing. In 2000, a jury convicted Appellant of first-degree murder and abuse of a corpse. He filed a direct appeal, and we affirmed his judgment of sentence in 2001. ***Smith***, 790 A.2d 344 (unpublished memorandum). In 2002, the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal.[1]

In 2004, Appellant filed his first petition under the Post Conviction Relief Act ("PCRA"). The PCRA court appointed counsel and later dismissed the PCRA petition as untimely. This Court affirmed the dismissal in 2005. ***Commonwealth v. Wade***, 885 A.2d 587 (Pa. Super. 2005) (unpublished memorandum).

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[1] It appears this denial was unreported.

In 2006, Appellant filed his second PCRA petition. The PCRA court denied relief on the grounds that the petition was late. This Court affirmed on appeal in 2006. ***Commonwealth v. Wade***, 915 A.2d 152 (Pa. Super. 2006).

Also in 2006, Appellant filed a motion for DNA testing under 42 Pa.C.S.A. § 9543.1. More particularly, he sought testing of blood stains and hair collected from his vehicle, any semen found on the victim and the garbage bag in which the victim was found. The lower court denied his motion.[2] Appellant appealed the denial of his request for DNA testing. A panel of this Court affirmed the denial in 2007. ***Commonwealth v. Wade***, 945 A.2d 771 (Pa. Super. 2007) (unpublished memorandum).

In 2011, Appellant filed a motion for DNA testing in the lower court. More particularly, he sought testing of the following items:

1. the victim's fingernails/fingernail scrapings;
2. the victim's yellow turtleneck sweater, lavender leather coat, bra, underpants, pantyhose, and shoes;
3. the contents of the lavender leather coat; and
4. the trash bag in which the victim was found.

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[2] It seems Appellant thereafter resubmitted his motion for DNA testing to the lower court and the court again denied it.

In addition to seeking testing on several items not listed in his 2006 motion, Appellant asked that the testing be done by employing Touch DNA, a technique he had not specifically requested in his earlier motion. Appellant's essential contention was that, assuming DNA testing would demonstrate the presence of DNA from someone other than him or the victim on the foregoing items, the existence of that DNA on multiple items would point to someone other than him as the victim's killer and, as such, would establish Appellant's actual innocence as that term is construed for purposes of 42 Pa.C.S.A. § 9543.1, ***see infra***. In this regard, Appellant advanced the type of redundancy theory raised in ***Commonwealth v. Conway***, 14 A.3d 101 (Pa. Super. 2011), where we reversed the lower court's order that denied DNA testing.[3] The court denied Appellant's motion. Appellant filed this appeal.

In order to obtain DNA testing, a petitioner must establish, *inter alia*, a *prima facie* case demonstrating that the identity of the perpetrator was a trial issue and that DNA testing, assuming exculpatory results, would establish the defendant's actual innocence. 42 Pa.C.S.A. § 9543.1(c)(3)(i), (ii)(A). The term "actual innocence," as used in the context of Section 9543.1, means that the exculpatory evidence would make it more likely than not that no reasonable juror confronted with that evidence, along with all the

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[3] This type of theory posits that the presence of DNA on multiple pieces of evidence associated with an assault or similar crime, rather than DNA on just a single item of evidence, gives rise to the inference that it was the assailant who deposited the DNA. ***Id.*** at 110.

evidence admitted at trial, would find the defendant guilty beyond a reasonable doubt. ***Conway***, 14 A.3d at 109. A court entertaining a DNA-testing motion shall not order the testing if the court determines there is no reasonable possibility that the testing would produce exculpatory evidence establishing the defendant's actual innocence. 42 Pa.C.S.A. § 9543.1(d)(2)(i).

Our standard for reviewing a court's determination under Section 9543.1 is whether the court's determination is supported by the evidence and free of legal error. ***Conway***, 14 A.3d at 108. It is an appellant's burden to convince us that the court erred and that relief is due. ***Commonwealth v. Wrecks***, 931 A.2d 717, 722 (Pa. Super. 2007).

The record reveals the identity of the killer was an issue at trial. However, Appellant fails to convince us the court erred in in its determination that Appellant did not present a *prima facie* case as required by the DNA statute. Appellant and the victim knew each other, having had a preexisting relationship. On November 26, 1996, the last day the victim was seen alive, she was in a certain store wearing the same clothes in which she was found dead six days later. Items from the store and a receipt from that store, a receipt bearing the victim's name and dated November 26, 1996, were found in Appellant's vehicle. This evidence gives rise to the inference that the victim was in Appellant's car on the last day she was seen alive and after her trip to the store in question and that, for some reason, the items she bought remained in the car after she was no longer in it. Blood in the

back of Appellant's vehicle was consistent with the victim's blood. The autopsy revealed the victim had bled from her nose and that she died from strangulation. This evidence leads to the inference that the victim was in Appellant's car during or after her assault and death. Evidence indicated the uncommon garbage bag in which the victim was found was manufactured by the same company within eight hours of garbage bags found in Appellant's home. This last bit of evidence allowed the factfinder to infer that Appellant placed the victim's body in the garbage bag in question after she was dead. Taken together, all the foregoing evidence supports the conclusion that it was Appellant who killed the victim.

In light of this evidence, as well as the other trial evidence, including the evidence summarized earlier in this memo, and even assuming DNA testing would reveal DNA from someone other than Appellant or the victim on the multiple items Appellant seeks to have tested, Appellant does not demonstrate it is more likely than not that no reasonable juror confronted with the DNA and other evidence would find the defendant guilty beyond a reasonable doubt. Accordingly, he does not establish it was error for the lower court to deny his petition. As we have no factual or legal basis to disturb the court's order, we will not do so. As such, we affirm the court's order.[4]

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[4] The lower court also denied the petition on other grounds that we will not address in light of our resolution of this case.

Order affirmed.