COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX COUNTY

DOCKET NO. FAR-27748

APPEALS COURT
DOCKET NO. 2019-P-0855

COMMONWEALTH

V.

STANLEY DONALD

APPLICATION FOR FURTHER APPELLATE REVIEW

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DEFENDANT

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REQUEST

Now comes the defendant, Stanley Donald, and hereby requests further appellate review of the Appeals Court's ruling affirming the denial by the trial court of the defendant's renewed motion (pursuant to G.L. chapter 278A) for DNA testing of bloodstain evidence. As grounds therefor, the defendant states the following:

STATEMENT OF PRIOR PROCEEDINGS

On December 29, 1997, indictments were returned against Mr. Donald charging him with two counts of aggravated rape, unarmed robbery, kidnapping, assault and battery by means of a dangerous weapon (cement floor) (hereinafter "ABDW (cement floor)"), and carjacking. After a jury trial (Barton, J., presiding), Mr. Donald was found guilty on all counts. The convictions were affirmed on direct appeal. *Commonwealth v. Donald*, 56 Mass. App. Ct. 1102 (2002).

On April 25, 2005, Mr. Donald filed a motion for an order authorizing further DNA testing of evidence ("the First Motion"), which was denied on August 9,

2005. The denial of the First Motion was affirmed by the Appeals Court on June 6, 2006. *Commonwealth v. Donald*, 66 Mass. App. Ct. 1110 (2006).

On August 7, 2006, Mr. Donald filed a petition in federal district court for habeas corpus relief, which was denied on February 23, 2010. *Donald v. Spencer*, 685 F. Supp. 2d. 250 (2010). On August 26, 2011, the denial was affirmed by the First Circuit Court of Appeals. *Donald v. Spencer*, 656 F.3d 14 (1st Cir. 2011).

On November 15, 2006, Mr. Donald filed a renewed motion to allow DNA testing on newly discovered evidence ("the Second Motion"). Before that motion was acted upon, on February 22, 2007, Mr. Donald filed a renewed motion for further DNA testing ("the Third Motion"). The Second Motion was denied on July 27, 2007. The Third Motion was denied on October 9, 2007. The appeal of the denials of the Second and Third Motions were consolidated. In 2008, the denials of both motions were affirmed by the Appeals Court. *Commonwealth v. Donald*, 72 Mass. App. Ct. 1104 (2008).

On March 15, 2012, Mr. Donald moved, pursuant to G.L. chapter 278A, for access to and scientific

analysis of DNA evidence ("the Fourth Motion"). On April 17, 2012, the motion was denied. A renewed motion ("the Fifth Motion") was filed on April 20, 2012, which was denied on May 22, 2012. This court affirmed the denials of the Fourth and Fifth Motions. *Commonwealth v. Donald*, 468 Mass. 37 (2014).[1]

On September 22, 2014, Mr. Donald moved for DNA testing pursuant to G.L. chapter 278A ("the Sixth Motion"), which was denied on March 19, 2015. On May 13, 2015, Mr. Donald filed a renewed motion ("the Seventh Motion"). On May 25, 2016, the Commonwealth represented that it was willing to agree to testing only of the victim's underwear, and the trial court signed a proposed order for testing. The court denied the Sixth and Seventh Motions with respect to any testing beyond the victim's underwear. The Appeals

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[1] In its opinion, this court acknowledged that Mr. Donald had moved in the Fourth and Fifth Motions for testing of "blood found on and around the victim's vehicle." *Commonwealth v. Donald*, 468 Mass. at 42 n.9. It then went on to say that it was not reaching the question of whether Mr. Donald had provided information demonstrating that tests of the blood had "the potential to result in evidence that is material to his identification as the perpetrator of the crime." *Id.* By granting further appellate review in the case at bar, this court would have the opportunity to finally address that precise question, and resolve this matter.

Court affirmed the trial court's decision. *Commonwealth v. Donald*, 92 Mass. App. Ct. 1107 (2017).

On September 17, 2018, Mr. Donald filed a renewed motion ("the Eighth Motion") for DNA testing of blood stains, discovery of rape kit forms, and photographs of the victim's injuries that were introduced at trial, which was denied as moot on March 28, 2019. On April 18, 2019, Mr. Donald filed a motion to reconsider ("the Ninth Motion"), which was denied on April 23, 2019.

On July 24, 2020, the Appeals Court affirmed the denial of the Eighth Motion. A copy of the Appeals Court's decision is appended hereto, and is referred to herein as "Appeals Court Decision." (Please note -- the Appeals Court was in error when it stated in its ruling, "[T]he forms the defendant hopes to discover were admitted as exhibits at trial." Appeals Court Decision at page 4. A review of the trial record clearly shows that no such forms from the rape kit were admitted as trial exhibits.)

On July 29, 2020, the defendant's Motion for Reconsideration was docketed by the Appeals Court. On July 31, 2020, the defendant's (pro se) "Notice for

Rehearing and New Panel" was docketed by the Appeals Court. On August 13, 2020, the Motion for Reconsideration was denied.

SHORT STATEMENT OF FACTS[2]

On the morning of October 21, 1997, the victim, E.W.,[3] was attacked in the parking garage of her apartment building. Her attacker tackled her to the ground, and smashed her face into the cement floor of the garage, breaking her nose, which began to bleed profusely.[4] He took E.W.'s keys, ordered her into the car, and drove off with her, threatening to kill her with a gun he claimed to have. As he drove away he demanded that she cover her head with her jacket and give him money. She complied. At one point, he stopped the car and forced her to drink an alcoholic liquid from a small bottle. He also took her bank access card and driver's license, and demanded that she tell him her password, which she did.

After driving for some time he stopped the car, and pulled her out of the passenger seat. While her

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[2] These facts summarize the Commonwealth's trial evidence.

[3] Because of the nature of the crimes in this case, the victim will be referred to by her initials only.

[4] One witness testified that there was "blood splattering of a large number, maybe thirty droplets of blood and blood splatter" on the cement floor. Trial Transcript Volume V, pp. 29-30. See *infra* at p. 13.

head was still covered with the jacket, he smashed her on the side of the head with what she believed to be a rock. He then demanded that she remove her shoes, tights and underwear, and hold her legs, and then he vaginally raped her with his penis and with his tongue.

The attacker then drove away in E.W.'s car.

E.W. got dressed, and was ultimately taken to a hospital where she was treated for her injuries.

Meanwhile, videotape recorded an individual withdrawing $300 from E.W.'s bank account at an ATM four miles from the scene of the rapes shortly after the attack. That evening, E.W.'s car was found approximately twenty miles from the attack. The following morning, Mr. Donald's driver's license was found about fifty yards from where the car was found.

The following month, police showed two men at Mr. Donald's workplace still images taken at the ATM of the individual who had withdrawn the money from E.W.'s account. The men identified the individual as Mr. Donald. They also confirmed that Mr. Donald did not show up for work on the day of the attack, and had not been to work thereafter. Later that same month, E.W.

picked Mr. Donald's photograph out of an array, saying that it looked "very, very much like" the attacker.

Tests on sperm samples found on E.W.'s underwear and on a blood sample from Mr. Donald revealed that the DNA profile of each matched, and that this profile was found in approximately 1 in 7,800 African Americans, excluding the profiles of 99.98% of the African American population as possible matches.

POINT WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW OF THE DECISION OF THE APPEALS COURT IS SOUGHT

Whether G.L. chapter 278A entitles the defendant to testing of the DNA of bloodstains on the cement floor of the victim's parking garage to determine if it matched the victim's DNA, where the absence of such a match would provide evidence material to the defendant's claim that the crime of ABDW (cement floor) did not occur.

WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

"[A] defendant who asserts that the requested testing has the potential to result in evidence that is material to his or her identity as the perpetrator of the crime because no crime in fact occurred satisfies the [G.L. chapter 278A], section 3 (b) (4) requirement." *Commonwealth v. Williams*, 481 Mass. 799, 809 (2019) (emphasis added).

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Despite the relatively straightforward nature of the foregoing holding, the Appeal Court seemed to go out of its way to avoid it[5] in rejecting the following argument by the defendant:

Mr. Donald has averred that he is innocent of the crime of ABDW (cement floor), because the crime did not occur. The Commonwealth's evidence of the crime was dependent entirely on the testimony of the victim. And the testimony related to this charge was corroborated ***only*** by the presence of blood on the cement floor described by the victim. Therefore, if the blood found on the cement floor was ***not*** the

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[5] The Appeals Court decision did not reference the *Williams* case, despite the fact that Mr. Donald's reply brief relied on it heavily, citing it and quoting from it liberally.

victim's, that would be material evidence of Mr. Donald's innocence, because it would greatly undermine the Commonwealth's claim that the crime of ABDW (cement floor) occurred. Accordingly, Mr. Donald is entitled to testing of the bloodstains on the cement floor pursuant to G.L. chapter 278A.

Mr. Donald should have been granted the same benefit as the defendant in *Williams, supra*, to prove the crime did not occur, in accordance with the equal protection clause of the 14th amendment to the U.S. Constitution.

The Appeals Court offered two different rationales in dismissing this argument, and affirming the lower court's denial of Mr. Donald's motion to test the bloodstains. Neither withstands scrutiny.

1. The 'Law of the Case'

In 2014 and 2015, Mr. Donald moved to test the bloodstains (the Sixth and Seventh Motions). The trial court denied both motions, and the Appeals Court upheld the lower court's decision. *Commonwealth v. Donald*, 92 Mass. App. Ct. 1107 (2017). Citing the doctrine of the 'law of the case,' the Appeals Court in the instant matter appeared to reject Mr. Donald's

current claim because in its 2017 decision, the court had already considered and rejected his argument that he was entitled to test the bloodstains pursuant to G.L. chapter 278A.

This analysis fails because the claims decided by the Appeals Court in 2017 are different than the claims raised in the case at bar. In his previous motions, Mr. Donald's argued that the bloodstains should be tested because the DNA of the blood would match with and reveal the DNA of the true perpetrator, and thus be material to Mr. Donald's (mis)identification as the perpetrator. In 2017, the Appeals Court rejected this argument, stating that there was no evidence to indicate that the perpetrator was the source of the blood on the cement floor. *Commonwealth v. Donald*, 92 Mass. App. Ct. 1107, _____ (2017).

But in the case at bar, Mr. Donald's claim is different. Here he seeks to test the bloodstains because he claims that such tests will establish simply that the blood was not the victim's. And if the blood was not the victim's, then a critical component of the Commonwealth's case disappears, dramatically

undermining the claim that the crime of ABDW (cement floor) ever occurred. Thus, the testing could reveal evidence material to Mr. Donald's (mis)identification as the perpetrator, because if the crime did not occur, of course Mr. Donald was not the perpetrator, as there was no perpetrator. See *Williams, supra.*

2. The Purportedly "Misguided" Logic of Mr. Donald's Claims

Perhaps recognizing that the doctrine of the 'law of the case' was not truly applicable to the matter at bar, the Appeals Court went on to say that Mr. Donald's "logic [was] misguided," because "[e]ven if the bloodstain is tested, no matter the result, there is no potential that evidence material to the defense would be revealed." Appeals Court Decision at 3.

This is simply and plainly wrong. The ***sole*** direct evidence of the crime of ABDW (cement floor) was the following testimony of the victim on both direct and cross-examination:

> Q. And ... after the defendant ... mumbled something to you, what did he do?
>
> A. The next thing I knew I was on the cement floor of the garage, and it felt like someone had body-checked me, but that their hand had been on the back of my head, and that had been smashed onto the concrete floor.

Q. And where were you within the garage when you were smashed onto the concrete floor?

A. Between my car and the Mercedes. ... I don't know where the defendant and I landed. I had so much blood. ...

Q. And you say you had so much blood, what part of your head and/or body hit the concrete floor?

A. Apparently -- well, in my face a couple of places, I guess, hit the floor and had abrasions, sort of, but the blood was really coming from what was apparently a broken nose.

...

Q. And blood was coming -- you had a broken nose?

A. Apparently I did.

Q. And blood was coming out of your nose?

A. It just burst. It gushes, really, yeah.

Q. And it was in your face?

A. It was on my face. It was mainly dripping down.

...

Q. And there was blood everywhere?

A. There was blood on my face, on my clothes, on the cement.

Trial Transcript Volume IV: pp. 97-98, 222-223.

The only other evidence of the ABDW (cement floor) was the corroborating testimony of the police investigators who reported to the parking lot after the attack, and then observed and collected blood samples from the "large number, maybe thirty droplets of blood and blood splatter" from the cement floor.[6]

In sum, the Commonwealth's evidence of the relevant crime was: 1) the victim's testimony that the defendant smashed her face into a cement floor, breaking her nose, and causing her to bleed profusely on the cement floor; and 2) the presence of blood on the cement floor where the victim claimed she had been assaulted. Surely it is not illogical to argue that if the blood found on the cement floor was *not* the victim's, then the Commonwealth's case for ABDW (cement floor) becomes dramatically weaker. *Commonwealth v. Williams*, *supra* at 809 (G.L. c. 278A, s.3(b)(4) satisfied if the evidence requested is material to the question of whether the crime occurred). Evidence that the blood was not the victim's renders her description of the ABDW (cement floor) significantly less believable. As such, a test

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[6] See footnote 3.

to determine whether the blood was the victim's clearly has the potential to yield evidence material to Mr. Donald's (mis)identification as the perpetrator. See *Commonwealth v. Wade*, 467 Mass. 496, 507-509 (2014) (G.L. c. 278A, s.3(b)(4) only requires that requested analysis "could be material" to the identity of the perpetrator, ***not*** that it would "raise doubt about the conviction"); *Commonwealth v. Williams, supra.*

Mr. Donald submitted affidavits which support "a claim of actual innocence as a ground for federal habeas relief" (*Schlup v. Delo*, 518 U.S. 298, 315 (1995)), affidavits that satisfied the threshold requirement set forth in Chapter 278A. See G.L. c. 278A, s.2, cited in *Williams, supra*, at 806-808.

For the foregoing reasons, further appellate review is necessary, so this court can reverse the trial court's denial of Mr. Donald's motion to test

the blood stains, and order that such tests be conducted forthwith.

Respectfully Submitted,

Stanley Donald
by his attorney

/s/ Edward B. Gaffney

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 16(K) OF THE MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, Edward B. Gaffney, Esq., hereby certify that the foregoing application for further appellate review complies with the rules of the court that pertain to the filing of such applications, including, but not limited to:

Mass. R. A. P. 20(a).

Compliance with the applicable length limit of Rule 27.1 was achieved by filing a application for further appellate review using Courier Font (12 point, 10 characters per inch), generating a "Why Further Appellate Review is Appropriate" section comprised of 8 pages of text.

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX COUNTY

DOCKET NO. FAR-27748

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COMMONWEALTH

V.

STANLEY DONALD

CERTIFICATE OF SERVICE

The undersigned certifies that on August 17, 2020, he served a copy of Defendant's Application for Further Appellate Review on:

Hallie White Speight, ADA
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by efiling.

Respectfully Submitted,

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-855

COMMONWEALTH

vs.

STANLEY DONALD.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In 1999, the defendant, Stanley Donald, was convicted of two counts of aggravated rape, assault and battery by means of a dangerous weapon, kidnapping, carjacking, and unarmed robbery. Those convictions were affirmed on direct appeal. See Commonwealth v. Donald, 56 Mass. App. Ct. 1102 (2002). Since then, the defendant has filed a number of unsuccessful postconviction motions, including requests for forensic testing under G. L. c. 278A, § 3.[2] See Commonwealth v. Donald, 468 Mass. 37 (2014); Commonwealth. v. Donald, 92 Mass. App. Ct. 1107 (2017). Before us now is the appeal from an order denying a "renewed motion" that restated an earlier request for forensic

[1] As is our custom, we use the name set forth on the indictments.

[2] These have included motions for a new trial, for postconviction discovery, for release from unlawful restraint, for DNA testing, and to revise and revoke his sentence.

testing of a bloodstain found in the garage where the defendant attacked his victim and for discovery of the Commonwealth's rape kit forms and certain photographs that were introduced as exhibits at the defendant's trial. The "renewed motion" was filed on September 17, 2018, and, at a hearing in Superior Court, was deemed moot. We affirm.

Discussion. A detailed description of the facts underlying the offenses can be found in Commonwealth v. Donald, 56 Mass. App. Ct. 1102 (2002). We consider de novo whether the defendant's motion and affidavits meet the requirements of G. L. c. 278A, § 3. See Commonwealth v. Wade, 467 Mass. 496, 506 (2014). In order to prevail on the motion the defendant must establish that a "reasonably effective attorney" would have sought additional DNA analysis at the time of trial. See G. L. c. 278A, § 3 (b) (5) (iv).

The denial of the defendant's motion was proper in all respects. It is clear here that the defendant makes the same arguments that he made in a previous motion from which he appealed and that were rejected by this court in 2017. See Commonwealth v. Donald, 92 Mass. App. Ct. 1107 (2017). "The 'law of the case' doctrine reflects this court's reluctance 'to reconsider questions decided upon an earlier appeal in the same case.'" King v. Driscoll, 424 Mass. 1, 7-8 (1996), quoting Peterson v. Hopson, 306 Mass. 597, 599 (1940). "An issue[,]

once decided, should not be reopened unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice" (quotation and citation omitted). Commonwealth v. Clayton, 63 Mass. App. Ct. 608, 611 (2005). Nonetheless, the defendant still seeks to conduct a forensic analysis of the bloodstain discovered on the garage floor because, he asserts, such testing might show that the blood did not belong to the victim or to the defendant, and only if it belonged to the victim would it corroborate the victim's account of events.[3] This logic is misguided. Even if the bloodstain is tested, no matter the result, there is no potential that evidence material to the defense would be revealed.

We likewise discern no abuse of discretion in the denial of the defendant's motion for discovery of the rape kit forms or trial photographs. Postconviction discovery is governed by Mass. R. Crim. P. 30 (c) (4), as appearing in 435 Mass. 1501 (2001). That rule "allows a judge to authorize such discovery [w]here the affidavits filed by the moving party . . . establish

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[3] Quoting from the defendant's brief, "[t]he defendant asserts in an affidavit that he is innocent and he is not the person who assaulted the allege[d] victim with the cement floor and testing of the blood stains would prove no such crime occurred."

a prima facie case for relief" (quotation and citation omitted). Montefusco v. Commonwealth, 452 Mass. 1015, 1016 (2008). Because the defendant does not have a motion for new trial pending, he cannot now obtain discovery under the rule. See id. at 1015-1016. Additionally, the forms the defendant hopes to discover were admitted as exhibits at trial, as were the photographs, and thus have been available to the defendant since his trial in 1999.

To the extent the defendant asserts new arguments in his brief, they are waived but have not been overlooked.[4] See Commonwealth v. Randolph, 438 Mass. 290, 296 (2002). We have reviewed the claims under the substantial risk of a miscarriage of justice standard and discern none.

Order denying renewed motion for forensic and scientific testing affirmed.

By the Court (Vuono, Milkey & Desmond, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: July 24, 2020.

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[4] Among them, he alleges that he is the victim of judicial and racial bias, and he argues that an earlier motion for recusal of the judge was improperly denied.

[5] The panelists are listed in order of seniority.