COMMONWEALTH OF MASSACHSUETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2020-0582

SUFFOLK SUPERIOR COURT
No. 8484CR49007

LEROY J. RANDOLPH vs. COMMONWEALTH & another[1]

RESERVATION AND REPORT & ORDER OF TRANSFER

The petitioner, Leroy J. Randolph, is a nephew of the defendant in the underlying criminal case, Richard Randolph,[2] who was convicted in 1987 of murder in the first degree. Richard's conviction was affirmed by this court in Commonwealth v. Randolph, 415 Mass. 364 (1993). In December, 2019, Richard moved for, and successfully obtained, an order from the Superior Court pursuant to G. L. c. 278A, § 7 (c), requiring Leroy to provide a saliva sample for purposes of deoxyribonucleic acid

[1] Richard Randolph.

[2] Because they share a last name, this order refers to Leroy and Rirchard Randolph by their first names.

(DNA) testing. Richard ultimately seeks to establish that DNA found on the murder weapon belongs to Leroy.[3]

Leroy filed a notice of appeal in the Superior Court pursuant to G. L. c. 278A, § 18, but because he claims that his right as a third party to appeal under G. L. c. 278A, § 18, is not clearly settled, he also has filed the present petition in this court. He asks, essentially, that I either confirm his right to appeal to the Appeals Court pursuant to G. L. c. 278A, § 18, or that I entertain his challenge to the Superior Court's order under G. L. c. 211, § 3.

This case raises an unresolved procedural question regarding the applicability of the appeals provision in G. L. c. 278A, § 18, to an order under G. L. c. 278A, § 7 (c). Because Richard was convicted of murder in the first degree, the case also raises the question whether an appeal by a third party from an order deciding a motion filed after our rescript in the underlying criminal case is subject to the gatekeeper provision of G. L. c. 278, § 33E.

In addition to these threshold procedural questions, Leroy claims that the underlying order itself raises a novel and important substantive issue under G. L. c. 278A, concerning the

[3] Richard claimed at trial that Leroy was the person who killed the victim. Postconviction testing apparently has confirmed that the DNA found on the weapon likely does not belong to Richard.

difference in language between G. L. c. 278A, § 7 (b) (4) (moving party must show "that the requested analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator) and G. L. c. 278A, § 7 (c) (moving party must show "that analysis of these items or biological material will, by a preponderance of the evidence, provide evidence material to the identification of a perpetrator"). Leroy represents that, if he is to proceed with an appeal in the Appeals Court, he will file an application for direct appellate review, with Richard's assent, asking this court to transfer the appeal here.

I agree that both the procedural and the substantive questions are appropriate for this court to consider. I therefore hereby reserve and report to matter, without decision, for determination by the Supreme Judicial Court for the Commonwealth.

I also order, pursuant to G. L. c. 211, § 4A, that Leroy's appeal in the underlying criminal case (Suffolk Superior Court Docket No. 8484CR49007) be transferred to this court once the record has been assembled.

The criminal clerk's office for the Suffolk Superior Court shall assemble the record in Docket No. 8484CR49007 forthwith, and the appeal shall be entered directly in this court.

The reserved and reported petition, and the transferred appeal, shall then be consolidated in the full court under a single docket number, and subject to a single round of briefing.

The record before the full court shall consist of the following:

1. the petition for relief pursuant to G. L. c. 211, § 3, with its exhibits;

2. all of the documents that were before the single justice in this case;

3. the docket sheet in this case;

4. docket sheet in the underlying Superior Court case, Docket No. 8484CR49007;

5. this reservation and report; and

6. the record to be assembled by the Suffolk Superior Court pursuant to the notice of appeal in Docket No. 8484CR49007.

Leroy will be designated the appellant in the full court, and the Commonwealth and Richard will be designated the appellees. In their briefs, in addition to any other issues they deem relevant to the question, the parties shall address both the threshold procedural issue (i.e., how one in Leroy's position obtains appellate review of an order like this), as well as the underlying substantive issue (i.e., the correctness of the Superior Court judge's order). The parties shall consult with the Clerk of the Supreme Judicial Court for the Commonwealth regarding the service and filing of briefs, and with respect to any difficulties they may encounter with respect

to the transfer of Leroy's appeal from the Superior Court. This matter shall proceed in all respects with the Massachusetts Rules of Appellate Procedure.

By the Court,

Frank M. Gaziano
Associate Justice

Entered: