

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 85-720

COMMONWEALTH

vs.

ARTHUR DAVIS

**FINDINGS OF FACT, RULINGS OF LAW, AND ORDER ON DEFENDANT'S
MOTION FOR NEW TRIAL**

In March 1986, a Middlesex County jury convicted the defendant, Arthur Davis ("Davis" or "defendant"), of murder in the first degree in the beating death of Patricia Richard. He was sentenced to life imprisonment in State Prison without the possibility of parole. The Supreme Judicial Court upheld his conviction on December 14, 1988. Commonwealth v. Davis, 403 Mass. 575 (1988).

This matter is before the court on the defendant's motion for new trial, pursuant to Mass. R. Crim. P. 30(b). The defendant claims that the interests of justice require that he be granted a new trial due to the discovery of new DNA evidence that was unavailable at the time of trial. The defendant claims that the new DNA evidence contradicts the conclusions the Commonwealth's expert reached at trial and that the remaining evidence against Davis, inculpatory statements provided after a ten-hour interrogation by police, is not sufficiently compelling to require denial of the motion. This court granted the request for an evidentiary hearing concerning the DNA evidence, which was held on April 3, 2018.¹ For the following reasons, the defendant's motion is **ALLOWED**.

¹ The evidentiary hearing was limited to the newly proffered DNA evidence. The defendant also sought to introduce extensive psychiatric evidence concerning his alleged mental illness at the time of his interrogation, as well as expert evidence concerning current knowledge regarding "false confessions." This court has determined that in light of its

PROCEDURAL BACKGROUND

Following the denial of his appeal, based upon Davis's argument that his statements to police should not have been deemed voluntarily given, Commonwealth v. Davis, 403 Mass. 575 (1988) ("Davis"), the defendant moved for additional testing of physical evidence, hair found in the victim's hands, and funds for that testing. The motion was denied on procedural grounds. Commonwealth v. Davis, 410 Mass. 680, 683 (1991). In 1996, Davis filed a petition for writ of habeas corpus in the federal district court, which that court denied in 1997. Davis v. Dubois, et al., No. 96-12197 (D. Mass. June 18, 1997), *aff'd*, Davis v. Dubois, et al., No. 97-1887 (1st Cir. Sept. 4, 1997). In 2002, the defendant filed a motion before the Superior Court for new trial challenging the jury instructions given at trial; this court (Chernoff, J.) denied that motion.

In 2012, the defendant filed a motion pursuant to the newly enacted G.L. c. 278A for forensic analysis of certain evidence used at trial to support his conviction. On March 6, 2013, this court (Tuttman, J.) allowed the motion for testing. The court also entered orders concerning procedures for the transportation and handling of evidence, and identifying Cellmark Forensics ("Cellmark") as the entity that would perform the testing. Cellmark performed various tests on the evidence provided, culminating in a report dated July 31, 2014 ("Cellmark Report"), and a supplemental report dated October 26, 2015 ("Supplemental Cellmark Report").

On June 30, 2107, the defendant filed the instant motion for new trial, which relies on the findings of the Cellmark Reports.

FINDINGS OF FACT

The following facts are taken from the trial record, as well as the evidentiary hearing on the defendant's motion for new trial.

conclusion based upon the DNA evidence, consideration of the psychiatric evidence concerning false confessions is not necessary for the purpose of deciding defendant's motion.

The underlying facts of the murder that occurred on February 10, 1985 and certain evidence introduced at trial were summarized by the Supreme Judicial Court in its opinion denying Davis's first appeal from his conviction. See Davis, 403 Mass. at 576-578. This court adopts that summary and includes the following additional facts and evidence that are relevant for the purposes of deciding the instant motion.

I. Additional evidence introduced at trial

At trial, the Commonwealth introduced physical evidence that it argued to the jury tied Davis to the murder. The prosecution argued that the blood matching the victim's blood "group" was found on items in Davis's home. The items included a billiard cue, a lavender bag, a comforter, and a pair of grey corduroy pants.

The Commonwealth's expert testified that a small bloodstain on the pants was determined to be human blood, Group A, consistent with the victim's blood group. In its closing, the Commonwealth asked the jury to infer that blood on evidence found on items recovered from Davis's person and his home was the victim's blood.² The Commonwealth also asked the jury to infer wrongdoing based upon the location of the blood-stained comforter.³

The Commonwealth proffered the pool cue as a possible murder weapon and its expert testified that the "grip area was positive for occult blood as well as the front, wooden portion of the cue." The Commonwealth asked the coroner whether the victim's injuries were "consistent with the upper portion of the pool cue?" In its closing, the Commonwealth argued to the jury "There is blood on the pool cue. Along the grip and in the pointed area."

² The prosecution posed the following question to the jury in its closing: "What about the grey corduroys?"

³ The prosecution asked the jury in its closing: "what about the comforter in the bathroom? What is a comforter from the bedroom doing in the bathroom?"

The Commonwealth's expert testified the lavender bag taken from Davis's home had blood on it. The expert testified, "there was on one end of the bag I observed red-brown stains. Again, as a result of my [testing] those stains indicated the presence of blood." In its closing, the Commonwealth argued, "And isn't it curious that in the days to pass, during that search warrant, a lavender bag was found that was identified as his which had blood on it?"

The prosecution also introduced a bloody Newport cigarette butt found beside the victim at the crime scene. The prosecution presented testimony from an expert forensic serologist that saliva on the cigarette butt indicated "that the person who had smoked that cigarette was a blood Group A secretor."⁴ The Commonwealth also presented evidence from the same expert that Davis was a Group A secretor. The Commonwealth also established that Davis was a smoker. The jury was told that blood consistent with the victim's blood "group" was found on Davis's belongings in his home, and that the saliva of the smoker of the cigarette was the same secretor blood group as Davis. The Commonwealth employed the evidence that the cigarette butt had been smoked by a Group A secretor to link Davis to the crime scene.⁵

The prosecution also introduced a jacket and sneakers taken from Davis at the time of his arrest. Those items were tested prior to trial and yielded a positive result for the presence of human blood, Group A. Swabs of Davis's hands and arms at the time of his arrest also tested positive for the presence of occult blood prior to trial.

In its closing, the prosecution argued that these pieces of physical evidence tied Davis to the victim and to the scene of the crime. The prosecuting attorney later stated in an affidavit

⁴ At trial, the Commonwealth's expert testified that a "secretor" is an individual whose blood type can be determined from body fluids other than blood.

⁵ The Commonwealth also introduced evidence of a wooden "club" recovered from the crime scene. However, it appears from the transcripts that it did not proffer the "club" as a possible murder weapon, nor did the "club" contain any blood used to draw a link between Davis and the crime scene. Cellmark did not test the "club" post-conviction.

opposing Davis's request for post-trial forensic testing that it was "[her] recollection that the Commonwealth's theory of the case was that blood detected on clothing and other items seized from the defendant's house was consistent with being the victim's blood."

In addition, the jury heard testimony of the charge nurse at the nursing home where Davis was employed. She testified that Davis was late to work on the morning the victim's body was discovered. She testified that on Sunday, February 10, 1986 at about 8:30 a.m., she was coordinating a Catholic Mass for staff and patients in a room near the front entrance. She saw Davis walk in the entrance during the service. After the service concluded at about 9:00 a.m., she went to her station, where she encountered Davis at about 9:10 a.m. When she spoke to Davis, he told her that he was late because a woman had been "brutally beaten and stabbed to death" in Lowell, and the police were "all over the street" asking people if they knew anything about it. The jury also heard testimony that the victim's body was not discovered until after 9:10 a.m. on Sunday February 10, 1986. When she asked Davis later that day if he had anything to do with the murder in Lowell, he laughed and said, "no one would ever know." He also told her that the victim was twenty-three years old and that he knew of her.

The jury also heard testimony from Davis's friend John Barnes. When the murder was brought up in conversation, Davis said, "I killed her for a red-and-white polka dot dress."

The circumstances of Davis's arrest on February 12, 1985, and subsequent inculpatory statements he made to the police, including an alleged confession and a sketch of the alcove where the victim was found, were introduced into evidence and are discussed in detail in the Supreme Judicial Court's denial of his appeal. See Davis, 403 Mass. at 577-578. That evidence is incorporated by reference here.

At trial, Davis testified in his own defense. He testified that he had been in downtown Lowell on the night of the murder and had stopped to use a payphone near City Hall around midnight. Davis claimed to have seen a man in the area, and that the man was “jumpy” and had made him “nervous.” He offered testimony that the blood found on his arms was from a “roughhousing” incident with friends from weeks earlier. He also testified that the blood on the comforter found in his home was potentially from his sister, whose water broke when she was on the comforter. Davis also denied having the conversation with the charge nurse on the morning after the murder, and testified he had spoken to her the next day after the murder had been reported in the local newspapers. Much of Davis’s testimony was at odds with the prior statements he made to the police. Davis testified that any inculpatory statements to police were the result of fatigue, after extended interrogation; but Davis also denied having made some the statements the police reported.

II. Post-conviction testing by Cellmark Lab

Cellmark used the victim’s bloodstained sock as a control sample for the victim’s DNA. The sock was among the victim’s personal items that were found adjacent to a large bloodstain. There is no dispute that the blood found at the scene was the victim’s. Cellmark obtained a female DNA profile from the blood on the sock. A sanitary napkin with bloodstains on it was also found near the sock. The sanitary napkin was tested and a matching female DNA profile was obtained by Cellmark. The matching female DNA profile found on the sock and the sanitary napkin was used as the control sample for the victim’s DNA. A DNA profile was obtained directly from Davis in 2013.

Cellmark tested the cigarette butt that was found in the alcove near the victim’s body. Cellmark performed DNA testing of the cigarette filter paper and filter material. It revealed a

DNA profile of an "unknown male." Cellmark concluded that Davis could be excluded as a possible contributor of the DNA profile found on the cigarette butt.

Cellmark tested the apparent blood stain on the lower rear left leg of the grey corduroy pants. Cellmark concluded that the "partial DNA profile" it obtained was "a mixture of at least two individuals." Cellmark found that "[the victim] is excluded as a possible contributor of the DNA types detected in this sample." Cellmark stated that "no conclusion could be made regarding [Davis]," or members of his family, as possible contributors to the DNA profile found in the sample.

Cellmark tested five blood stains on the comforter obtained from Davis's home. No DNA profile was obtained from stains "1" and "5" due to an insufficient amount of DNA. A partial DNA profile was obtained for stains "2," "3," and "4." Cellmark concluded that both the victim and Davis could be excluded as possible contributors to the DNA found in stain "2." Cellmark concluded that the victim could be excluded as a possible contributor to the DNA found in stain "4." Cellmark reached no conclusions concerning the DNA found in stain "3."

Cellmark's testing of the jacket obtained from Davis at the time of his arrest, and the lavender bag taken from Davis's home, was negative for presence of blood. No DNA profile was obtained from the previously tested side of the lavender bag due to an insufficient amount of DNA.

Cellmark tested the pool cue obtained from Davis's home. Cellmark obtained a DNA profile from a "fluorescing stain on the handle of the pool cue," and concluded that the victim and Davis "are excluded as possible contributors of DNA" to the sample examined. Cellmark also obtained a DNA profile from the lower end of the handle, and concluded that the victim was excluded as a possible contributor of DNA to the sample examined. Cellmark also obtained a

DNA profile from the upper end of the pool cue, and concluded that the victim and Davis “are excluded as possible contributors of the DNA types detected in this mixture.”

RULINGS OF LAW

A. Legal Standard

A motion for new trial may be granted “at any time if it appears that justice may not have been done.” Mass R. Crim. P. 30(b). The trial court has broad discretion in determining if a new trial is warranted. Commonwealth v. Brescia, 471 Mass 381, 391 (2015). A new trial may be ordered where the trial judge determines there was “a substantial risk of miscarriage of justice.” Commonwealth v. Rosario, 477 Mass. 69, 78-79 (2017). See Commonwealth v. Freeman, 352 Mass. 556, 564 (1967).

“In a motion for new trial based on new evidence, the defendant must show that the evidence is either ‘newly discovered’ or ‘newly available’ and that it ‘casts real doubt’ on the justice of the defendant’s conviction.” Commonwealth v. Sullivan, 469 Mass. 340, 350 (2014). New evidence casts real doubt on the conviction when the evidence “would have been a ‘real factor’ in the jury’s deliberations.” Id. at 350-351. The party moving for new trial bears the burden of demonstrating, not that the new evidence “might have influenced the trier of fact” to reach a different verdict, but that it is “potent, pertinent, and creditworthy to fundamental issues in the case.” Commonwealth v. Cintron, 435 Mass. 509, 517 (2001).

Where DNA evidence eliminates evidence that, in light of the testing results, should never have been submitted to the jury, a new trial may be ordered if “subsequently eliminated inculpatory evidence likely did play an important role in the jury’s deliberations.” Commonwealth v. Cowels, 470 Mass. 607, 618 (2015).

B. Analysis

Davis brings his motion on the basis of newly discovered DNA evidence. There is no dispute that the evidence is newly available. Davis established in his motion for post-conviction testing “that the evidence or biological material has not been subjected to the requested analysis” because the type of DNA testing performed by Cellmark “had not yet been developed at the time of the conviction.” See G.L. c. 278A, § 3(b)(5)(i) and § 7(b)(3). See also Cowels, 470 Mass at 616 (“[T]his court did not determine the admissibility of DNA testing of the type performed here until 1997. . . .”). This court (Tuttman, J.) noted in its previous findings concerning Davis’s motion for scientific/forensic analysis that “at the time of [Davis’s] conviction in 1986, forensic DNA analysis had not advanced to the point of reliably extracting a genetic profile from biological material” Commonwealth v. Davis, MICR1985-00720, slip op. at 6 (Mass. Super. Ct. March 6, 2013) (Tuttman, J.).

The Commonwealth does not dispute the results of the DNA testing Cellmark conducted. This court accepts Cellmark’s testing method and results and concludes that the testing provides credible evidence that the victim’s DNA profile was not detected on any of the blood samples tested that were taken from items in Davis’s home or his belongings, and that Davis’s DNA profile was excluded from the physical evidence recovered from the scene. This court credits Cellmark’s conclusion that the jacket taken from Davis at the time of his arrest and the lavender bag recovered from his home tested negative for the presence of blood, but recognizes that the passage of time between the trial expert’s testing and Cellmark’s tests, nearly thirty years, might cast doubt on the result.

While the Commonwealth does not challenge the DNA testing method or results, it argues that even if the physical evidence was excluded at the underlying trial, there was

sufficient evidence for the jury to convict Davis and that a new trial is not warranted. The Commonwealth labels the physical evidence as “highly equivocal,” and states that it was not the focus of the Commonwealth’s case against Davis. Instead, they argue that the most potent evidence against Davis came from his own inculpatory statements to police, and to the charge nurse he spoke with on the morning after the murder.

This court disagrees with the Commonwealth’s characterization of the physical evidence as “highly equivocal.” The characterization is belied by the questions the prosecution asked its expert witness, the statements and arguments it made in closing argument, and the affidavit from the lead prosecutor confirming that her recollection of the “theory of the case” was that “the blood detected on clothing and other items seized from the defendant’s house was consistent with being the victim’s blood.” While the physical evidence and expert testimony about Davis’s and the victim’s blood “Group” was not the only inculpatory evidence presented, it formed a central issue in the case.

This court agrees that Davis’s statements to police, his friend Barnes, and the charge nurse are potentially inculpatory, but under these circumstances, where the newly discovered DNA evidence appears to eliminate the entirety of the physical evidence the prosecution relied upon in linking Davis to the victim and the crime scene, a substantial risk of a miscarriage of justice exists. This court concludes this, even where the prosecution offered evidence of a potential confession, inconsistent statements to police, and the potentially confirmatory testimony of the charge nurse and Barnes. While no Massachusetts cases directly parallel the facts of this case, there have been instances in other jurisdictions where DNA evidence has warranted a new trial despite the introduction of a confession by the defendant. See, e.g., In re Bradford, 140 Wash. App. 124, 131 (2007) (new trial ordered in light of DNA testing even

where “the most persuasive evidence against [the defendant] at trial was his confession”); Hildwin v. State, 141 So. 3d 1178, 1181 (Fla. 2014) (new trial ordered where DNA proved defendant’s biological material was not at crime scene despite his confession). Davis testified at trial about the circumstances of his interrogation and inculpatory statements to police. It cannot be known what weight the jury gave to those statements where the prosecution also argued that the physical evidence tied Davis to the crime based upon his similar blood group. This court concludes, however, that the testimony and argument concerning the physical evidence “would have been a ‘real factor’ in the jury’s deliberations.” See Sullivan, 469 Mass. at 350-351.

This court finds that the results of the DNA testing Cellmark performed “cast[] real doubt” on the justice of Davis’s conviction and “would have been a real factor in the jury’s deliberations” if available at the time of trial. See Sullivan, 469 Mass. at 350-351. Further, if the results had been available at trial, it is likely that much of the inculpatory physical evidence the prosecution introduced would not have been allowed to be presented to the jury as it was. As the prosecution argued and inferred to the jury, both during questioning of its serology expert and/or during its closing, that the physical evidence with matching Group A blood connected Davis to the victim and the crime scene, it is likely that the evidence “played an important role in the jury’s deliberations.” See Cowels, 470 Mass. at 618. Finally, Davis has carried his burden of demonstrating that the new evidence is “potent, pertinent, and creditworthy to fundamental issues in the case.” See Cintron, 435 Mass. at 517.

This court concludes that in light of its findings concerning the new DNA evidence, and the likely role the challenged physical evidence played in the jury’s deliberations, there is “a substantial risk of a miscarriage of justice” and a new trial is warranted. See Rosario, 477 Mass. at 78-79. Davis’s motion for a new trial is **ALLOWED**.

ORDER

For the above reasons, it is hereby **ORDERED** that the Defendant's motion to for new trial is **ALLOWED**.



Maynard M. Kirpalani
Justice of the Superior Court

DATED: November 23, 2018