

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-1010101-1994  
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: :  
: :  
v. : 1285 EDA 2014

**FILED**  
MAY 16 2014  
Criminal Appeals Unit  
First Judicial District of PA

CP-51-CR-1010101-1994 Comm. v. Scuderi, Salvator  
Opinion

SALVATOR SCUDERI



7151256691

**OPINION**

**McDermott, J.**

May 16, 2014

**Procedural History**

On July 26, 1995, Petitioner was sentenced for Involuntary Deviate Sexual Intercourse and Aggravated Assault after a trial in front of Judge Anthony DeFino. At trial, Petitioner was represented by Amy Galicchio with the Defender Association of Philadelphia. The petitioner was sentenced to concurrent terms of imprisonment of 10 to 20 years on each charge. Petitioner did not file a direct appeal.

On June 6, 1996, petitioner filed a *pro se* PCRA petition. He initially raised six issues: that counsel failed to file an appeal, failed to call alibi witnesses at trial, and failed to call him to testify at trial, that the victim's medical records conflict with her testimony, that she was not credible, and that one of his jurors was married to a prison officer at the facility where he was held pending trial. On December 16, 1998, Judge Barbara Joseph granted the Commonwealth's Motion to Dismiss and denied petitioner's request to appeal *nunc pro tunc*. Her opinion addressed trial counsel's failure to present the petitioner's alibi and trial counsel's failure to file

an appeal, concluding that the alibi claim was baseless given the petitioner's statement that put him at the scene, and that letters between petitioner and counsel established that petitioner made a counseled decision not to appeal his judgment of sentence. Superior Court affirmed in an unpublished opinion. Petitioner was represented by Kenneth Boyden on his initial PCRA petition and Alston Meade on the initial PCRA appeal.

On December 21, 2001, petitioner filed a Petition for Habeas Corpus Relief in the Eastern District of Pennsylvania, which was dismissed as untimely on September 20, 2002.<sup>1</sup>

On May 7, 2013, petitioner filed a motion for post-conviction DNA testing under 42 Pa.C.S. § 9543.1. On November 15, 2013, the Commonwealth filed a motion to dismiss the motion for Post-Conviction DNA testing. Petitioner filed a response on January 6, 2013. On May 19, 2014, after oral argument, this Court granted that motion. On April 17, 2014, the Commonwealth filed a timely Notice of Appeal and a statement pursuant to Pa.R.A.P. 1925(b).

### **Facts**

In the afternoon of August 27, 1994, Ms. L.C., a thirty-seven year old African American woman suffering from epilepsy and schizophrenia was hitchhiking on I-95 in the Philadelphia area. The previous night she checked herself into Presbyterian Hospital, and then checked herself out again at approximately 2:00 a.m. As she hitchhiked, she was still wearing her hospital gown underneath her clothing. N.T. May 11, 1995, pp. 339-40; October 18, 1994, p. 46.

At some point that afternoon, petitioner pulled over and offered L.C. a ride. She accepted, and they drove together for approximately one hour, making small talk, until the petitioner left the highway and parked near a secluded, wooded area of a dead-end street at the 2700 block of East Norris Street in Philadelphia. He removed the victim's clothes and raped her,

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<sup>1</sup> See 2:01-cv-07315.

and then pushed her from his car, retaining all of her clothing in the vehicle. He then stepped out of the car and assaulted her with a wooden stick, penetrating her rectum and vagina, and kicked her. He then drove away. N.T. May 11, 1995, pp. 327-83.

A warehouse worker saw the incident and called the police at 2:38 p.m., and Officer Michael Musial responded. He found the victim naked, confused, and bleeding. Shortly thereafter, a car drove by and the warehouse worker identified it to Officer Musial as being the one involved in the crime. Officer Musial pursued the car, but soon lost sight of it. Seconds later, another officer saw the car parked on the 800 block of Mercer Street, a few blocks from where the victim was ejected from the car. Police towed the car and traced its plate, which indicated that it was registered to the petitioner. The victim's clothes were found in the car. N.T. May 11, 1995, pp. 328-329; May 12, 1995 pp. 7-40.

Initially, the petitioner told police that he had attempted to report that his car was stolen earlier in the day, and denied any involvement in the crime. He said that he was at a doctor's appointment on South Street, miles from the crime scene, but when he came out of the doctor's office at 1:45 p.m., his car was gone. Several days later, police lured the petitioner by telling him that he could come to a police unit and pick up his car, which they had towed from the crime scene. When he arrived, police arrested and interrogated him, and within two hours he signed a statement drafted by Officer Nancy Radaszkiewicz in which he acknowledged having accepted oral sex from the victim and ejecting her from his car when she attempted to rob him. N.T. May 12, 1995, pp. 42-45; May 11, 1995, pp. 217-250, 343-44.

The victim identified an old mug shot of the petitioner from a photo array while she was in the hospital, seriously injured, sedated, and, in her own words, “messed up in the head.”<sup>2</sup> *Id.* at 256-307, 367. She also identified him at trial. *Id.* at 340-41.

### **Issues**

On appeal, the Commonwealth argues that this Court erred in granting the defendant’s DNA motion where 1) the motion was not made in a timely manner; 2) technology for DNA testing was available at the time of trial and defendant did not request it; and 3) there is no reasonable probability that DNA testing could establish defendant’s actual innocence.

### **Timeliness of the Motion**

The PCRA's one-year time bar does not apply to motions for the performance of forensic DNA testing under Section 9543.1. *Commonwealth v. McLaughlin*, 835 A.2d 747, 750 (Pa. Super. 2003). Rather, after DNA testing has been completed, the applicant may, within 60 days of receiving the test results, petition to the court for post-conviction relief on the basis of after-discovered evidence, an exception to the one-year statute of limitations. See 42 Pa.C.S. § 9543.1(f); 42 Pa.C.S. § 9545(b)(1)(ii), (b)(2); *Commonwealth v. Weeks*, 831 A.2d 1194, 1196 (Pa. Super. 2003)(while Section 9543.1 “does not directly create an exception to” the one-year time bar, “it allows for a convicted individual to first obtain DNA testing which could then be used within a PCRA petition to establish new facts in order to satisfy the requirements of an exception under 42 Pa.C.S. § 9545(b)(2).”). Therefore, the present petition for DNA testing is not barred by the PCRA's one-year statute of limitations.

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<sup>2</sup> The age of the mugshot could not be determined at trial, though it was clear from testimony that it was not current at that time.

Nevertheless, the Commonwealth argues that the present petition is untimely under Section 9543.1(d)(1)(iii), which requires that the “motion is made in a timely manner and for the purpose of demonstrating the applicant's actual innocence and not to delay the execution of sentence or administration of justice.” Nowhere in the statute does it define “a timely manner”; and as discussed above, a motion for DNA testing under Section 9543.1 is not subject to the PCRA's one-year jurisdictional statute of limitations.

There is no potential for this petition to delay the execution of sentence or administration of justice, as the petitioner is currently serving the sentence imposed in this matter and these proceedings will not impact that sentence, although a subsequent, successful PCRA petition might do so. Further, there is nothing unreasonable about the manner in which the current petition was brought or the time in which it was brought. Although the underlying case is approximately twenty years old, the present petition relies on DNA testing technology that was not available at the time of trial and has only become widely available in the last decade, as discussed below.

Present counsel represented to this Court that the Innocence Project has been investigating this case for some time, and did not want to bring a petition until it had completed an adequate investigation and was sure that the petition was meritorious. This Court does not intend to look into a statute with no hard and fast limitations on timeliness and extract therefrom a hard rule that will force organizations such as the Innocence Project to file petitions at the earliest possible moment, prior to completing a full case review, solely in order to preserve a potential client's ability to move forward with a DNA petition. Such an interpretation would have the inevitable effect of burdening PCRA courts with numerous non-meritorious petitions filed by well-meaning but overtaxed attorneys who otherwise perform the salutary function of

sifting much of the wheat from the chaff, in terms of such petitions. It is also unsupported by law. This Court finds that the petitioner and counsel brought the current petition within a reasonable amount of time, given the novelty of the technology with which they seek to conduct testing, and the obvious logistical limitations that an incarcerated defendant and a legal nonprofit both face.

The DNA testing statute is remedial and therefore must be “interpreted liberally in favor of the class of citizens who were intended to directly benefit therefrom, namely, those wrongly convicted of a crime.” *Commonwealth v. Conway*, 14 A.3d 101, 113 (Pa. Super. 2011), *rearg. denied, alloc. denied*, 29 A.3d 795 (Pa. 2011)(reversing denial of DNA petition arising from 1986 stabbing, 1987 trial where reasonable possibility existed that DNA testing could prove convicted defendant's actual innocence). In its Motion to Dismiss, the Commonwealth did not argue that the present petition was not timely, and thus cited no law in support of that argument. Therefore, this Court would find the argument to be waived. Further, this Court can find no law that supports the Commonwealth’s argument that a remedial statute should be interpreted so as to limit its intended remedy in such a manner. This case’s timeline is consistent with other cases that will be discussed in this opinion, including *Conway*. In *Conway*, a 1986 stabbing was reexamined as a result of a petition for DNA testing filed in 2008, over twenty years later. In *Commonwealth v. Wright*, 14 A.3d 798 (Pa. 2011), a 1991 murder is being reexamined (as discussed below) because of a 2005 petition for DNA testing using new techniques like the ones that are to be employed in this case. Because the present petition is timely under the statute, this argument is meritless.

### Availability of DNA Testing

The petitioner and this Court acknowledge that some form of DNA testing was available at trial. However, the petitioner seeks testing that would employ Short Tandem Repeat (“STR”) and Y-chromosome STR, and these techniques were certainly, and indisputably, not available in 1995 when the petitioner was convicted.<sup>3</sup> Y-STR technology was adopted by the Pennsylvania State Police in approximately 2007, and by the Philadelphia Police Crime Lab in 2010. *See* Response to Motion to Dismiss, Exhibits A and B (Garvey and Fumea Emails).

This Court is mindful of *Commonwealth v. Wright*, 14 A.3d 798 (Pa. 2011), a case arising from this district in which our Supreme Court held that a confession in a 1991 homicide is not a bar to establishing a *prima facie* case demonstrating that DNA testing could establish an appellant’s actual innocence. *Wright* is another case in which basic DNA testing was available at the time the underlying crime was committed, but the petition that is the subject of that appeal sought STR testing. Indeed, it now appears that a PCRA petition has been filed based on new evidence, to wit, exonerative STR testing results that confirmed the presence of DNA in sperm left on the female victim’s body from a male donor other than Wright. *See* docket, CP-51-CR-1131582-1991, at 6.11.2013 and 8.15.2013.

In this case, evidence indicated that the victim’s attacker did not ejaculate, which is probably why no DNA testing was conducted in preparation for trial. However, modern techniques are more sensitive, and may be able to isolate the attacker’s DNA from epithelial cells

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<sup>3</sup> “STR Analysis determines the number of repeating sequences of two to five base pairs present at multiple chromosomal loci. Typically, at least 13 separate chromosomal loci are examined in standard STR Analysis, since this is the minimum number required for test results to be included in CODIS (“Combined DNA Indexing System”) the national DNA database maintained by the FBI. Because of the multiplicity of chromosomal loci used in this type of testing, and the fact that 8 to 20 alleles may potentially occur in the population for each chromosomal locus, it is statistically improbable for any two random individuals in the world, except identical twins, to share the same DNA profile obtained from this test. Principles of Forensic DNA for Officers of the Court, [] 54–58[, available at <http://forensic.dna.gov>].” *Commonwealth v. Wright*, 14 A.3d 798, 807 n.7 (2011).

left behind during the attack and retained in the rape kit that was collected shortly after the attack. Given *Wright*'s exhortation not to engraft extra-statutory barriers to relief onto a remedial statute, this Court will not apply a pinched reading of the postconviction DNA statute's requirement that "the technology for testing was not in existence at the time of the trial." STR was not available at the time the petitioner was convicted; nor was Y-STR. This argument is meritless.

#### The Probability of Establishing Petitioner's Actual Innocence

The *prima facie* requirement to obtain DNA testing of specific evidence relating to the investigation or prosecution that resulted in judgment of conviction requires that defendant demonstrate that there is a reasonable possibility that favorable results of the requested DNA testing would establish the appellant's actual innocence of the crime of conviction. *Conway*, 14 A.3d at 109. *Conway* adopts the standard of actual innocence set out in *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 867, 130 L.Ed.2d 808, 836 (1995), that the newly discovered evidence must make it "more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt." *Id.*

The Commonwealth argues that there is no reasonable probability that DNA testing could establish defendant's actual innocence. It argues this in part on the basis that the petitioner gave a statement that was somewhat incriminating, although in it he continued to deny raping the victim. After *Wright*, it is clear that a confession is not a barrier to a subsequent motion under § 9543.1.<sup>4</sup>

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<sup>4</sup> The Innocence Project estimates that in approximately 25% of DNA exonerations, innocent defendants made incriminating statements, gave confessions or pled guilty. See <http://www.innocenceproject.org/understand/False-Confessions.php>. See also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 902 (2004)("[M]ore recent studies have identified false confession as the leading or primary cause of wrongful conviction in anywhere from 14-25% of the sample cases studied."). The National

The victim in this case was in the hospital on the night before her attack, but checked herself out very early the next morning. She had only one attacker. There is no evidence on the record that would point to any possible male donor of DNA in her rape kit, which was taken shortly after the attack, other than her attacker. The presence of another man's DNA would shatter the Commonwealth's theory of the case and call the victim's shaky identification of the petitioner, made during a time when she was suffering from mental illness and was heavily medicated, into further question. Put simply, there is no question that the presence of male DNA from a donor other than the petitioner would establish that it is "more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt."

For the foregoing reasons, the decision of this Court should be affirmed.

BY THE COURT,



Barbara A. McDermott, J.

**Commonwealth v. Lloyd Butler, CP-51-CR-0009687-2012**

**PROOF OF SERVICE**

I hereby certify that I am this day serving the foregoing Court Order upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa. R. Crim. P. 114:

Philadelphia District Attorney's Office  
Three South Penn Square  
Philadelphia, PA 19107  
Attn: Hugh Burns, ADA

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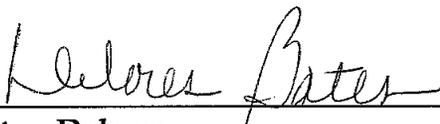
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Innocence Project  
40 Worth St., Suite 701  
New York, NY 10013

**Type of Service:**           **Certified Mail**

**Dated: May 16, 2014**



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**Bates, Delores**  
**Administrative Assistant to the**  
**Honorable Barbara A. McDermott**