**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA<br><br>Appellant<br><br>v.<br><br>JERMEL SHULER<br><br>Appellee | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br>No. 2175 EDA 2013 |

Appeal from the Order Entered June 27, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0103002-1998

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| COMMONWEALTH OF PENNSYLVANIA<br><br>Appellant<br><br>v.<br><br>RASHEED SMITH<br><br>Appellee | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br>No. 2180 EDA 2013 |

Appeal from the Order Entered June 27, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0103001-1998

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| COMMONWEALTH OF PENNSYLVANIA<br><br>Appellant<br><br>v.<br><br>MARK BRITTINGHAM<br><br>Appellee | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br>No. 2213 EDA 2013 |

Appeal from the Order Entered June 27, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0103003-1998

BEFORE: PANELLA, J., LAZARUS, J., and JENKINS, J.

MEMORANDUM BY LAZARUS, J.: **FILED JULY 28, 2014**

The Commonwealth appeals from the order entered in the Court of Common Pleas of Philadelphia County granting the joint motion of Jermal Shuler, Rasheed Smith, and Mark Brittingham (hereinafter "Appellees") for post-conviction DNA testing. Upon consideration, we affirm.

This case arises from the 1997 death of 73-year-old Essie May Thomas in her home on North Judson Street in Philadelphia. Eric Palmer, Thomas' great-nephew, discovered her lifeless body on November 10, 1997. The medical examiner determined that Thomas died as a result of eight stab wounds and blunt force trauma. The police recovered several pieces of evidence from the crime scene: samples of bloodstains from the living room where the body was found; hair clutched in the victim's hand; and scrapings from the victim's fingernails. The police also recovered a bloodstained broom handle from the kitchen, pieces of another bloodstained broom handle from the living room, and a cane from atop the victim's body.

Palmer was the initial suspect, until the police learned that a neighbor, Wadia Brown, claimed to have witnessed three men leaving the victim's house on the night of the murder. Brown later identified Appellees as the men she saw leaving the house. In 1999, a jury convicted Appellees of

second-degree murder for Thomas' death.[1] Appellees received, and are currently serving, mandatory life sentences.

Appellees filed timely direct appeals. This Court affirmed their judgments of sentence in 2000 and the Supreme Court denied allowance of appeal. Appellees filed unsuccessful PCRA petitions between 2002 and 2004, based partially on alleged inconsistencies and fabrications in Brown's narrative of the night of the murder. Appellees then went unrepresented by counsel for the next decade.

On October 16, 2012, Appellees filed a joint motion for post-conviction DNA testing in the trial court, pursuant to 42 Pa.C.S. § 9543.1, requesting the physical evidence recovered from the crime scene be tested with a modern form of DNA testing, known as Short Tandem Repeat ("STR") technology. The Commonwealth moved to dismiss, arguing the petition was untimely, the evidence was no longer available, and DNA testing was available at the time of trial. In their response, Appellees refuted the Commonwealth's legal arguments and presented evidence that STR technology was not available at the time of trial. On June 27, 2013, the trial court entered an order granting Appellee's petition for post-conviction DNA testing. This appeal followed.

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[1] The Appellees were also convicted of burglary, possession of an instrument of crime, and criminal conspiracy.

This Court has set forth the following standard of review of orders for post-conviction DNA testing:

> Post-conviction DNA testing falls under the aegis of the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541–9546, and thus, "[o]ur standard of review permits us to consider only whether the PCRA court's determination is supported by the evidence of record and whether it is free from legal error." Moreover, because the resolution of this appeal involves statutory construction, which involves a pure question of law, we review that aspect of the trial court's decision de novo and our scope of review is plenary.

***Commonwealth v. Conway***, 14 A.3d 101, 108 (Pa. Super. 2011) (citations omitted).

Pennsylvania's post-conviction DNA testing statute states, in relevant part:

> (a) Motion.--
>
> (1) An individual convicted of a criminal offense in a court of this Commonwealth and serving a term of imprisonment . . . may apply by making a written motion to the sentencing court for the performance of forensic DNA testing on specific evidence that is related to the investigation or prosecution that resulted in the judgment of conviction.
>
> (2) If the evidence was discovered prior to the applicant's conviction, the evidence shall not have been subject to the DNA testing requested because the technology for testing was not in existence at the time of the trial or the applicant's counsel did not seek testing at the time of the trial in a case where a verdict was rendered on or before January 1, 1995[.]
>
> . . . .
>
> (d) Order.--
>
> (1) [T]he court shall order the testing requested in a motion under subsection (a) . . . upon a determination, after review of the record of the applicant's trial, that the:

. . .

> (iii) 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.
>
> (2) The court shall not order the testing requested in a motion under subsection (a) if, after review of the record of the applicant's trial, the court determines that there is no reasonable possibility that the testing would produce exculpatory evidence that:
>
> (i) would establish the applicant's actual innocence of the offense for which the applicant was convicted.

42 Pa.C.S. § 9543.1.

The Commonwealth first claims that Appellees' motion was untimely. To satisfy the timeliness requirement, "the moving party . . . bears the burden of showing that the test is requested for the purpose of demonstrating actual innocence and not for delay." ***Commonwealth v. Edmiston***, 65 A.3d 339, 356-57 (Pa. 2013).

Our Supreme Court recently addressed the issue of timeliness under the post-conviction DNA testing statute in ***Edmiston***, a capital case, in which the Court affirmed the denial of the defendant's motion for post-conviction DNA testing because it was untimely. ***Id.*** at 357. The defendant had undergone DNA testing at the time of trial and declined further testing. ***Id.*** He failed to raise the DNA issue in two separate PCRA petitions. ***Id.*** Counsel, who was aware of the statute and DNA testing technology, represented him for the twenty years between his conviction and the filing of the motion. ***Id.*** There was also very strong evidence against him, including

physical evidence, a confession, and a map that he drew for police leading them to the victim's body. ***Id.*** at 357-58. Applying what it called "a healthy skepticism," the court held these factors clearly showed the defendant's motive was to delay the imposition of his sentence, and not to show actual innocence. ***Id.*** at 358-59. The court held, as a matter of law, that the motion was untimely. ***Id.*** at 357.

Here, Appellees have filed a timely motion. This Court has instructed that section 9543.1 should be "interpreted liberally in favor of [defendants.]" ***Conway***, 14 A.3d at 113. However, we need not resort to any contortions of the law to arrive at our result. The circumstances here are clearly distinguishable from those in ***Edmiston***. The trial court explained as follows:

> The evidence against Petitioners consists of the eyewitness testimony of one drug user (who admittedly lied to the police), and it has been 12 years since their convictions. Unlike ***Edmiston***, [where the evidence was concrete and overwhelming,] the evidence of Petitioners' guilt in the instant case is wholly circumstantial. Petitioners have steadfastly professed their innocence and have made neither confessions nor incriminating statements, and no items belonging to the victim were ever recovered from Petitioners' persons or residences. Moreover, the victim's nephew, Eric Palmer, as well as the eyewitnesses' [sic] boyfriend, Michael "Truck" Thomas were initially suspects at the time of the murder. Additionally, during the investigation Petitioners provided DNA samples which the Commonwealth never used to determine if Petitioners' DNA was present at the crime scene.

Trial Court Opinion, 10/1/13, at 9-10. Here, the relative sparseness and circumstantial nature of the evidence on which the convictions rest suggests

there is a real chance the Appellees could prove their innocence. For a decade, Appellees did not have counsel and were not filing appeals. The DNA issue therefore does not appear to be simply a delay tactic, desperately employed at the end of a long appeals process. Finally, this is not a capital case, so Appellees do not have the same incentive to delay their sentences.

The Commonwealth next claims the trial court erred because DNA testing was available at the time of trial. The Commonwealth argues the post-conviction DNA testing statute should be read to allow post-conviction motions for DNA testing only when no DNA testing of any kind was available at the time of trial.

In interpreting a statute, this Court first looks to the statute's plain language. ***Allstate Life Ins. Co. v. Commonwealth***, 52 A.3d 1077, 1080 (Pa. 2012). In addition, "each word used by the Legislature has meaning and was used for a reason, not as mere surplusage." ***Fisher v. Commonwealth, Dept. of Pub. Welfare***, 501 A.2d 617, 619 (Pa. 1985). Furthermore, "it is axiomatic that in determining legislative intent, all sections of a statute must be read together and in conjunction with each other, and construed with reference to the entire statute." ***Hoffman Mining Co. v. Zoning Hearing Bd. of Adams Twp., Cambria Cnty.***, 43 A.3d 587, 592 (Pa. 2011) (quoting ***E.B.D. v. Clair***, 987 A.2d 681, 684 (Pa. 2009)). Finally, it is important to reiterate that we interpret the post-conviction DNA testing statute liberally in favor of defendants. ***Conway***, 14 A.3d at 113.

Section 9543.1(a)(2) permits defendants to move for post-conviction DNA testing when "the evidence shall not have been subject to *the DNA testing requested* because the technology for testing was not in existence at the time of the trial." 42 Pa.C.S. § 9543.1(a)(2) (emphasis added). The Commonwealth urges that this language precludes the granting of a motion for DNA testing where *any* form of DNA testing was available at the time of trial. This interpretation is not reasonable, as it renders the definite article "the" and the word "requested" mere surplusage. ***See Fisher***, 501 A.2d at 619. The more reasonable interpretation, adopted by the trial court, is that a motion will be granted when *the type of testing requested* was not available at the time of trial. This gives full force to all the operative language of the statute. It is also consistent with the spirit of the statute, which is "to make sure that we do not have anyone in our prisons or on death row who is innocent." ***Conway***, 14 A.3d at 114 (quoting Commonwealth of Pennsylvania Legislative Journal, June 19, 2001, at 745-46).

The remainder of section 9643.1(a)(2), stating, "[o]r the applicant's counsel did not seek testing at the time of trial in a case where a verdict was rendered on or before January 1, 1995," also lends support to the latter interpretation. The 1995 cut-off creates two standards for granting petitions for post-conviction DNA testing. The standard is more liberal for convictions before January 1, 1995, where the only requirement is that the defendant did not request testing. The standard is stricter for convictions after January

1, 1995, but still allows for testing, provided the technologies requested did not exist at the time of the conviction. If the legislature wished to deny access to post-conviction DNA testing for all defendants who were convicted when *some* form of DNA testing was available, it would not make sense to include provisions for post-1995 convictions dependent on the availability of the technology. If the legislature did not wish to provide defendants with the ability to take advantage of improvements in technology, it could have simply declared that post-conviction DNA testing would only be available for verdicts rendered before a certain date. It did not do so, and therefore, the Commonwealth's argument fails.

The parties also dispute whether the types of DNA testing Appellees requested were available at the time of trial. The Commonwealth asserts that Appellees failed to prove that the technology for the testing they requested did not exist at the time of trial. Appellees disagree, noting that, in their response to the Commonwealth's motion to dismiss, they submitted two emails and one affidavit from experts stating that the type of DNA testing requested was not available, or was not sufficiently refined to be of use, at the time of trial. ***See*** Response to Commonwealth's Motion to Dismiss Petition for Post-Conviction DNA Testing, 6/21/13, at Exhibits A-C. The Commonwealth presented no evidence to contradict this assertion. ***See*** Commonwealth's Motion to Dismiss Defendants' Petition for DNA Testing, 5/24/13. The Commonwealth also notes the trial court's statement in its opinion that "these factual questions [regarding whether the types of DNA

testing Appellees requested were available at the time of trial] remain uncertain." Trial Court Opinion, 10/1/13, at 12.

The trial court had before it written statements from three individuals, including an affidavit from a Forensic Casework Analyst with over nine years of experience in the field, stating the DNA testing requested was not available at the time of trial. The Commonwealth did not present any evidence to the contrary. Thus, implicit in the granting of Appellees' petition is the fact that the trial court found that the Appellees established that the testing was not available at the time of trial. The record supports this finding. Accordingly, the Commonwealth's claim fails.

Finally, the Commonwealth argues Appellees have failed to show that the DNA testing requested would establish their actual innocence. In order to prove the "actual innocence" element of section 9543.1, a petitioner needs to show "there is a reasonable probability 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 (quoting ***Commonwealth v. Brooks***, 875 A.2d 1141, 1147 (Pa. Super. 2005)) (punctuation and emphasis omitted). "The newly discovered evidence must make it 'more likely than not that no reasonable juror would have found [a defendant] guilty beyond a reasonable doubt.'" ***Id.*** (quoting ***Schlup v. Delo***, 513 U.S. 298, 327 (1995)). Therefore, we are required to "'make a probabilistic determination about what reasonable, properly instructed jurors

would do' if presented with the new evidence." ***Id.*** (quoting ***Delo***, 513 U.S. at 329).

This Court has held defendants are entitled to DNA testing where they were convicted based entirely on circumstantial evidence. ***See Conway***, 14 A.3d at 109 (actual innocence prong satisfied where majority of evidence circumstantial, victim likely had contact with assailant, and DNA testing could reveal presence of assailant other than defendant). Where DNA testing has been denied because of a failure to make a prima facie case that the testing could prove actual innocence, the circumstances have either made the petitioners' claims illogical, or there has been overwhelming evidence that would make the testing frivolous. ***See Commonwealth v. Heilman***, 867 A.2d 542, 545-47 (Pa. Super. 2005) (DNA testing futile where petitioner's only argument was absence of his DNA on items not conclusively linked to crime or on which absence would be inconclusive in proving innocence); ***Commonwealth v. Williams***, 35 A.3d 44, 52 (Pa. Super. 2011) (DNA testing futile where conviction based on testimony of three eyewitnesses, confession, and access to weapon); ***see also Edmiston***, 65 A.3d at 358-59 (denying DNA testing in light of overwhelming evidence of guilt).

Here, the jury convicted Appellees based solely on the testimony of one witness, whose credibility was later called into serious question. No physical evidence ever linked any of the Appellees to the crime. Were DNA testing to reveal the absence of Appellees' DNA, and the presence of the

DNA of some other person, especially one of the suspects eliminated from the investigation by Brown's testimony, it seems exceedingly unlikely that a rational jury could have convicted Appellees. The trial court expressed similar reasoning in its Rule 1925(a) opinion:

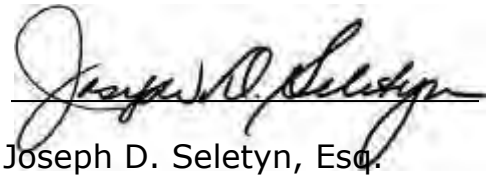
> Here, Petitioners have satisfied their burden of presenting a prima facie case of actual innocence. The identity of Ms. Thomas' murderer(s) was at issue, as Petitioners have denied being present at the crime scene and murdering the victim. The victim's walking cane, a bent broom handle, four broken broomstick pieces, and blood stains are still available for testing, and the close and violent nature of the attack makes it likely that the attackers left his DNA at the crime scene. When the court assumes exculpatory testing results – that another individual's DNA is present on all or some of the evidence and Petitioners' DNA is absent – the chances that the jury would have convicted Petitioners are slim.

Trial Court Opinion, 10/1/13, at 15-16.

Because the trial court correctly deemed Appellees' motion timely, correctly applied the statute, had sufficient evidence to conclude that the types of DNA testing requested did not exist at the time of Appellees' trial, and correctly determined Appellees satisfied their burden to show DNA testing could prove actual innocence, we affirm.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/28/2014