NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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August 1, 2013

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Re: *Commonwealth v. Mohammad Nadeer Hasan,*
Case No. FE-2001-100466

Dear Counsel:

This matter came on for a hearing on April 19, 2013 on the "Defendant's Motion to Set Aside the Verdict and Dismiss the Case or Order a New Trial." At that time, the court took the motion under advisement. The court has now fully reviewed the briefs and considered the arguments of counsel. For the reasons stated below, the motion will be denied.

Background

In 2002, after a three-day jury trial, Mohammad Nadeer Hasan (the "defendant") was convicted of the offenses of abduction with intent to defile, rape, and sodomy.

OPINION LETTER

The victim in this case was E.D., who shared an apartment with the defendant and his wife, Layla Castillo. E.D. testified that at about 10:30 p.m. on September 1, 2001, after Ms. Castillo had gone out for the evening, E.D. went to sleep for the night. She was awakened by the defendant, who was wielding a knife. He took her clothes off, got on top of her, and ordered her to perform fellatio on him. He repeatedly hit her with the blade of the knife. He alternated between putting his penis in her mouth and her vagina. She testified that when she asked for a drink of water, the defendant took her to the kitchen, where he continued to hold the knife to her neck. He demanded that she perform fellatio on him in the kitchen. At one point, E.D. ran from the kitchen. She testified that the defendant grabbed her by the neck with the knife and threatened to kill her if she left the apartment. He then took her to the bedroom, where he again forced her to perform fellatio on him. She testified that, at one point, the defendant was inserting the knife in her vagina. When the defendant left the room, she jumped out of a second-story window to escape the attack.

At trial, the knife was admitted into evidence as a Commonwealth's exhibit. Prior to trial, at the request of the defendant's initial trial counsel, the court ordered that that the knife be preserved for possible scientific testing. Despite that order, neither the defendant nor the Commonwealth requested that knife be scientifically tested. No testing was performed on the knife prior to trial.

The trial was not devoid of scientific evidence. Evidence was introduced at trial that the victim could not be excluded as a contributor to the mixture of DNA found in the swab of the defendant's pubic area. The defendant's wife was eliminated as a contributor to that DNA mixture.

On August 16, 2002, in accordance with the jury's verdict, the court sentenced the defendant to a total of 30 years of incarceration on all three counts, plus three years of post-release supervision under Code § 19.2-295.2. The Virginia Court of Appeals denied the defendant's appeal on July 1, 2003. On December 11, 2003, the Supreme Court of Virginia refused the defendant's petition for appeal.

On April 29, 2010, the defendant, acting pro se, filed a "Motion for New Investigation of Scientific Evidence." The court denied that motion, without prejudice, for the reasons stated in its opinion letter dated May 25, 2010.

On August 31, 2010, the court appointed attorney Crystal Meleen to represent the Defendant in his efforts to obtain scientific analysis of previously untested evidence pursuant to § 19.2-327.1.

On April 7, 2012, the defendant, by counsel, filed a "Motion for Scientific Analysis of Previously Untested Scientific Evidence." In that motion, the defendant asked the court to order scientific testing of the knife and re-testing of three spermatozoa found on the underwear of the victim that originally failed to generate a DNA profile. By order dated May 10, 2012, this court granted the defendant's motion.

The Department of Forensic Science reported the results of the new testing in August 2012. The victim's underpants were analyzed using methods of DNA testing that were more sophisticated than what was available in 2001-2002. Nonetheless, the spermatozoa found on the underpants continued to yield results of no value and unsuitable for comparison against the state or national DNA data banks. Similarly, the knife was tested for the first time, but yielded no usable results. A DNA type of no value was developed from the handle of the knife. No DNA was obtained from a piece of debris on the blade of the knife. It was noted that, "[d]ue to the limited quantity of nuclear DNA obtained from the edges of the blade, it is not suitable for PCR analysis and as a result, the DNA analysis was discontinued." Finally, no usable fingerprints could be obtained from the knife.

Defendant's Motion to Set Aside the Verdict
and Dismiss This Case or Order a New Trial

Having obtained the results of the new testing, the defendant now moves for the verdict in his case to be set aside. He asks that the case be dismissed or that he be granted a new trial. The defendant argues that the *lack* of DNA evidence and fingerprint evidence obtained after the testing of the knife is exculpatory in that it impeaches the testimony of the victim. Simply put, the defendant maintains that if the crimes happened as the victim testified, the knife would have contained both the victim's and the defendant's DNA. He says that if he is granted a new trial he could use the lack of DNA on the knife to impeach the victim's testimony.

At oral argument on his motion, the defendant reiterated that that his motion is brought under Code § 19.2-327.1. His pleading is not a petition

for a writ of actual innocence under Code § 19.2-327.3. The defendant concedes that he is unable to meet the standard of "actual innocence" under Code § 19.2-327.5: "that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt" if the trier of fact had the results of the scientific testing.

Commonwealth's Response

The Commonwealth argues that the lack of scientific evidence disclosed by the testing (or retesting) has no bearing on the facts of the case or on the evidence submitted to the jury during the trial. In the Commonwealth's view, the absence of DNA or fingerprints on the knife does not prove anything, as an item may be touched and no DNA or fingerprints left behind. The jury considered the three unidentified spermatozoa on the victim's underpants. The jury did not think that evidence supplied a reasonable doubt. That more sophisticated testing revealed the same conclusion is not exculpatory. Finally, under Rules 1:1 and 3A:15(b) of the Rules of the Supreme Court of Virginia, the court no longer has jurisdiction to set aside the jury's verdict.

At oral argument, the Commonwealth argued that the court lacks jurisdiction to grant the defendant's motion because, under Code § 19.2-327.3, the defendant had 60 days to file for relief after the testing was performed. The results of the new analysis were reported to counsel in August 2012, but the defendant did not file his motion until April 7, 2013, long after the 60-day period had expired. Additionally, Code § 19.2-327.1 does not authorize the defendant's requested remedies. According to the Commonwealth, the results of any scientific testing under Code § 19.2-327.1 may be used by the defendant in seeking a writ of actual innocence, not a dismissal of his case or a new trial.

Discussion

Code § 19.2-327.1 permits a person convicted of a felony to apply to the court for scientific analysis of newly discovered or previously untested human biological evidence. Code § 19.2-327.1(A) provides, in pertinent part:

> Notwithstanding any other provision of law or rule of court, any person convicted of a felony or any person who was adjudicated delinquent by a circuit court of

> an offense that would be a felony if committed by an adult may, by motion to the circuit court that entered the original conviction or the adjudication of delinquency, apply for a new scientific investigation of any human biological evidence related to the case that resulted in the felony conviction or adjudication of delinquency . . . .

If, as in this case, the testing is granted, § 19.2-327.1 is silent on what remedies, if any, the defendant has after the testing is completed.

Code § 19.2-327.1 was enacted in 2001 as part of a "reform movement" in response to the perceived harshness of the "21 day rule" for the admissibility of after-discovered evidence. Kathryn Roe Eldridge & Matthew L. Engle, Case Notes: Code of Virginia Va. Code Ann. §§ 19.2-327.1 to -327.6, 14 Cap. Def. J. 217 (Fall 2001). Under § 19.2-327.1, a person convicted of a felony could for the first time apply to the court to have newly-discovered or previously-untested scientific evidence tested. To be entitled to the testing, the felon must allege and the court must find by clear and convincing evidence that the "testing . . . may prove the actual innocence of the convicted person." Code § 19.2-327.1(A)(iii). If the evidence once tested proves to be exonerating, the convicted person may apply for a writ of actual innocence under § 19.2-327.3.

Code § 19.2-327.3 was enacted simultaneously with Code § 19.2-327.1. Code 19.2-327.3 specifies the requirements for a petition for a writ of actual innocence based on previously unknown or untested human biological evidence. That statute refers to Code § 19.2-327.1 several times. For example, in a petition of actual innocence:

> The petitioner shall allege categorically and with specificity, under oath, the following: . . . (v) the date the test results under § 19.2-327.1 became known to the petitioner or any attorney of record; (vi) that the petitioner or his attorney of record has filed the petition within 60 days of obtaining the test results under § 19.2-327.1 ....

Code § 19.2-327.3(A).

Reading these statutes together, the court concludes that General Assembly intended that the results of scientific testing ordered pursuant to

Code § 19.2-327.1, if exonerating, would be used to provide a factual basis in support of a writ of actual innocence. Code § 19.2-327.1 provides no relief if, as in this case, the results of the new testing are potentially helpful to the defendant, but do not tend to prove the defendant's actual innocence.

The court finds that § 19.2-327.1 provides no basis for the court to vacate the jury's verdict and dismiss the charges or order a new trial for the defendant. The defendant concedes he does not meet the standard for a finding of "actual innocence." The discovery that there is no usable DNA or fingerprint evidence on the knife, now that it has been tested, does not entitle the defendant to relief under Code § 19.2-327.1

Conclusion

For these reasons stated, the defendant's motion will be denied. An order reflecting this ruling is attached hereto.

Sincerely,

[redacted]

Jane Marum Roush

OPINION LETTER

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	**CRIMINAL NUMBER FE-2001-100466**
VERSUS	)	
MUHAMMAD N. HASAN	)	**INDICTMENT - RAPE (COUNT I), ABDUCTION (COUNT II) and SODOMY (COUNT III)**

ORDER

On April 19, 2013, the Court had a hearing on the "Defendant's motion to set aside the verdict and dismiss the case or order a new trial", the Court took this matter under advisement.

For the reasons stated in the Court's opinion letter dated August 1, 2013, the motion is denied.

Entered on August 1, 2013.

[redacted]

JUDGE JANE MARUM ROUSH

JMR/wr
FE-2001-100466