

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 0085CR00430

COMMONWEALTH

v.

NATALE COSENZA

**MEMORANDUM AND DECISION ON DEFENDANT'S
SECOND MOTION FOR A NEW TRIAL**

On June 28, 2002, a Worcester County jury found the defendant, Natale Cosenza (Cosenza), guilty of armed burglary (G. L. c. 266, § 14) and assault and battery with a dangerous weapon (G. L. c. 265, § 15A(b)). He now moves, in a second motion for post-conviction relief, that a new trial be ordered as a result of the trial judge's ruling excluding expert testimony presented by Cosenza on the issue of the reliability of eyewitness identification. Cosenza brings this motion under the principles of the doctrine of "newly available" evidence. He contends that "justice was not done" at his trial.

Hearings were held on this motion on October 29, 2015 and February 25, 2016, at which counsel ably and thoroughly argued their respective positions. In addition, I received comprehensive written submissions from the parties, as well as from an Amicus Curiae, the Innocence Project. After careful review of all submissions and consideration of the arguments of counsel, I find and rule that Cosenza's motion for a new trial is **ALLOWED**.

BACKGROUND

I. **Factual Background**

On August 14, 2000, the victim, Melissa Horgan (Ms. Horgan), awoke at about 4:00 a.m. in

a dark room¹ to find an unknown man sitting at the foot of her bed. When she asked who he was, the man immediately began beating her in the head with a hard object. Ms. Horgan attempted to cover her head with her hands and was beaten upon her hands and arms. The attacker then climbed onto her bed, at which point Ms. Horgan began screaming and kicking him. The attacker fled her apartment. The entire attack was concluded in a matter of seconds.

Ms. Horgan called 911. Shortly thereafter, Worcester police officers arrived at her apartment. Ms. Horgan was hysterical when they got there. The officers found a piece of wood which appeared to be a rung broken off from a kitchen chair, among the clothes scattered on the bedroom floor. Presumably, this was the hard object with which the attacker beat Ms. Horgan.

The officers confirmed that the door to Ms. Horgan's apartment had been locked; however, the slider window in the second bedroom that overlooks a common balcony was found to be open. The screen that generally covers the entire window was found sitting in the common balcony next to the open window.

Ms. Horgan was able to provide a limited description of her attacker. She told police that the attacker was a white male, wearing a dark T-shirt, briefs underwear, and a white undershirt around his head. Ms. Horgan told police that she didn't recognize the attacker and didn't know if he had any hair.

Ms. Horgan was taken to the hospital for treatment of the lesions on her head, hands, and arms. Upon her release, she moved in with her niece, Rebecca Ritacco (Ms. Ritacco) in West Boylston. Ms. Horgan's nephew, Michael O'Bryant (Michael), moved into Ms. Horgan's apartment

¹The amount of light that was present in the room from the outside lighting was contested. The window had slatted blinds and there was differing testimony as to what degree the slats were open. I find that the lighting in the bedroom at the time of the attack was less than optimal.

the next day to stay with her cats and to occupy the apartment until Ms. Horgan's lease expired in September.

On the day of the attack, August 14, 2000, Ms. Horgan's sister, Paula O'Bryant, gathered up clothes and other things from the apartment and delivered them to Ms. Horgan at Ms. Ritacco's apartment. Two days later, on August 16th, Ms. Horgan returned to retrieve clothes from her bedroom which she took to Ms. Ritacco's apartment.

Immediately following the notice of the attack, the scene was searched and dusted for fingerprints. No usable fingerprints were detected. Officers knocked on doors of the building complex to discover whether anyone had heard or seen anything to do with the attack. No one responded that they heard or knew anything concerning the incident; however, one tenant, Robert Payton (Payton), expressed his suspicions about another resident, Cosenza. Payton told Officer Benedict that his dirt bike had been stolen recently. A week after the theft, Cosenza had approached him stating that he could obtain the return of the dirt bike. Cosenza led Payton into the woods where the dirt bike was recovered. Thereafter, Cosenza allegedly brought up the issue of a reward for such information and effort on his part.

Relying upon the information provided by Payton and recorded in Officer Benedict's report, Detective Hazelhurst compiled a nine-photo array. This array was not based on Ms. Horgan's description of the attacker. Instead, it was based on the information set forth concerning Cosenza in Officer Benedict's report.

Detective Hazelhurst conducted the array with Ms. Horgan on August 15, 2000. Detective Hazelhurst did not tell her, prior to the array procedure, that a suspect may or may not be in the array. When Ms. Horgan saw Cosenza's photograph, she stated "that's the guy that was in my apartment."

According to Detective Hazelhurst, he probably told her at that time that the person she picked was a resident at the apartment complex.

Several weeks after the attack, Ms. Horgan returned to the apartment a second time to retrieve additional clothes. Thereafter, during the second week of September, when she emptied the bags of clothes to do laundry, she came upon a pair of mens black shorts in one of the bags of clothes that had been retrieved from her apartment. She notified the police of this fact on September 13, 2000, after making inquiries of her nephew, Michael, who denied knowledge of the shorts. During the time from Michael's move into the apartment until the black shorts were discovered, Michael, his brother Matthew O'Bryant, and at least two friends from New York, Chad Johnson (Johnson) and Wesley Rufus (Rufus), had stayed overnight for some period at the apartment.

The black shorts were tested by the State Police and the presence of semen was discovered. A DNA analysis of samples excluded Cosenza as the source of the semen.²

Ms. Horgan refused the request by police to take part in a second photo array procedure.

II. Procedural Background

A Worcester Grand Jury returned three indictments charging Cosenza with assault with intent to rape, assault and battery by means of a dangerous weapon, and armed burglary on October 13, 2000.

Cosenza's motion to suppress identification made by Ms. Horgan was denied after an

² In addition to the second motion for post-conviction relief, Cosenza has moved for post-conviction deoxyribonucleic acid (DNA) testing, pursuant to G. L. c. 278A, on samples from Michael and Matthew O'Bryant, Rufus, Johnson, and any other persons who may have stayed at Ms. Horgan's apartment as Michael's guests. Additionally, assuming this testing does not produce a match, Cosenza seeks DNA familial match searches of the samples from the black shorts. These motions are pending and will be addressed in a separate decision.

evidentiary hearing on August 16, 2001.

The trial proceeded on June 19, 2002 and continued through June 28, 2002. Prior to the trial's commencement, Cosenza filed a motion in limine to permit the expert testimony of Steven Penrod, Ph.D. (Dr. Penrod), regarding the science of the reliability of eye-witness testimony. No affidavit of Dr. Penrod's anticipated testimony was submitted to the court with the motion. However, Cosenza's counsel informed the judge of the issues upon which he would testify and offered to conduct a voir dire of his testimony at that time. The trial judge, Walker, J., denied the motion without an evidentiary or voir dire hearing.³

The jury returned a verdict acquitting Cosenza of assault with intent to rape, and convicted him of the remaining charges. The judge imposed concurrent sentences of 12 to 20 years in state prison on the armed burglary charge and 9 to 10 years on the assault and battery by means of a dangerous weapon charge. Mr. Cosenza filed a timely notice of appeal.

On October 8, 2003, Cosenza filed a motion for a new trial. This motion alleged ineffective assistance of trial counsel for failing to adequately pursue the black shorts issue as being exculpatory evidence. Judge Walker held an evidentiary hearing on the motion. He denied the motion on July 26, 2004. Cosenza filed a timely appeal.

The Appeals Court consolidated the two appeals. On April 5, 2006, in an unpublished decision, the Appeals Court affirmed the judgments and the denial of Cosenza's first motion for a new trial. Commonwealth v. Cosenza, 65 Mass. App. Ct. 1127 (April 5, 2006) (Rule 1:28 opinion)

The United States District Court denied Cosenza's petition of habeas corpus relief, see

³The present motion is supported by Dr. Penrod's affidavit, setting forth the above issues that he was prepared to testify on at trial.

Cosenza v. Marshall, 568 F. Supp.2d 78 (D. Mass. 2007), as well as his request for a certificate of appealability, see Cosenza v. Marshall, 2007 WL 4245897(D. Mass. 2007).

Cosenza filed his second motion for post-conviction relief on October 6, 2015. As the trial judge had passed away before the filing, this second motion was reassigned to another judge.

DISCUSSION

Citing the Report Recommendations to the Justices of the Supreme Judicial Court Study Group on Eyewitness Evidence (Report) and the Supreme Judicial Court's decision of Commonwealth v. Gomes, 470 Mass. 352 (2015), Cosenza moves for an order granting a new trial based upon the "newly available evidence" that has become judicially accepted since the time of his trial. He argues that it was error for the trial judge to deny his motion in limine to permit expert testimony on the science of eyewitness identification for the reason that eyewitness identifications fell "within the general realm of knowledge of jurors" and did not require the assistance of expert testimony.

A trial judge may grant a new trial under Rule 30(b) "at any time if it appears that justice may not have been done." Commonwealth v. Brescia, 471 Mass. 381, 388 (2015). In moving for a new trial based on new evidence, Cosenza must show that the evidence is either "newly discovered" or "newly available" and that this evidence "casts real doubt on the justice of his conviction." Commonwealth v. Sullivan, 469 Mass. 340, 350 (2014). The Sullivan court defined these terms as follows:

Newly discovered evidence is evidence that was unknown to the defendant or counsel and not reasonably discoverable by them at the time of trial . . .
. Newly available evidence is evidence that was unavailable at the time of trial for a reason such as a witness's assertion of a privilege against testifying or . . . because a particular forensic testing methodology had not

yet been developed or gained acceptance by the courts The standard applied to a motion for a new trial based on newly available evidence is the same as applied to one based on newly discovered evidence

Id. at 350 n.6 (internal quotations and citations omitted). “New evidence will cast real doubt on the justice of the conviction if there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial.” Id. at 350 (citation omitted). “The standard is not whether the verdict would have been different, but whether the evidence probably would have been a real factor in the jury’s deliberations.” Id. at 350-351 (internal quotations and citation omitted).

Here, Cosenza argues that the development of the law at the time of his conviction in 2002 had not yet accepted the scientific principles which would have been set forth by Dr. Penrod, had he been permitted to testify. The guiding decision on eyewitness identification at the time of Cosenza’s trial was Commonwealth v. Rodriguez, 378 Mass. 296 (1979). Rodriguez dealt with allegations of assault and battery with a dangerous weapon and forcible rape. Id. at 298. A crucial issue at trial was the identity of the assailant. Id. at 301. The trial judge instructed the jury only on the factors pertaining to the identifying witness’s credibility, such as honesty and bias. Id. The defendant’s request that the jury be instructed to take into account the possibility of mistaken identity was denied. Id. Specifically, the defendant sought instructions that the jury consider “the victim’s opportunity to observe her assailant, the length of her observation and the circumstances surrounding it, the time lapse between assaults and the date of the probable cause hearing, the police procedures employed to obtain the identifications, and the possibility that the victim’s memory had deteriorated with the passage of time.” Id.

As a result of the Rodriguez decision upholding the Appeals Court’s award of a new trial and

the remand for further hearings on the defendant's motion to suppress identification evidence, *id.* at 310, new jury instructions evolved. These instructions, which took into account the ability of a witness to observe and make an accurate identification of the defendant, became the norm.

Since Rodriguez, the science and psychology of eyewitness identification has further developed, while new concerns have been voiced by the Supreme Judicial Court. In 2011, the Supreme Judicial Court stated in Commonwealth v. Walker, 460 Mass. 590, 604 n.16 (2011), that "eyewitness identification is the greatest source of wrongful convictions but also an invaluable law enforcement tool in obtaining accurate convictions [.]" The Walker court declared its intention to convene a study group to consider, among other matters "whether existing model jury instructions provide adequate guidance to juries in evaluating eyewitness testimony." *Id.* This resulted in the study group on eyewitness identification that rendered the 2013 Report. This Report contained the updated scientific and psychological findings concerning the reliability of eyewitness identification. Dr. Penrod was prepared to testify at Cosenza's trial to the principles which were later identified in the Report. Dr. Penrod consulted with the study group in its investigation.

In 2015, the Supreme Judicial Court seized the opportunity in Commonwealth v. Gomes, 470 Mass. 352 (2015), to expand on the findings of the study group that: (1) common sense can't determine the reliability of eyewitnesses identification; (2) the scientific research is not generally known to jurors; and (3) in many instances, the research results are counterintuitive. The Gomes court set forth new provisional model jury instructions regarding eyewitnesses identification, which "should be given, where appropriate, in trials that commence after issuance of this opinion until a model instruction is issued." *Id.* at 354. The instructions adopt many of the findings of the Report, all of which relate to five principles that are now generally accepted in the scientific/psychological

community. These principles may be summarized as follows: (1) human memory does not function like a video recording but is malleable and subject to many factors with the passage of time; (2) an eyewitness's expressed certainty in an identification is of questionable value as to the identification's reliability; (3) high levels of stress can reduce an eye witness's ability to make an accurate identification; (4) unrelated information received after an identification is made can influence the witness's later recollection of the memory or of the identification; and (5) a prior, innocent viewing of a suspect may reduce the reliability of a subsequent identification procedure involving the same suspect. Gomes, 470 Mass. at 369-376.

Here, there can be little doubt that the eyewitness testimony of Ms. Horgan that Cosenza was her attacker was the critical piece of evidence at trial. This fact has been recognized by the Appeals Court. See Cosenza, 65 Mass. App. Ct. 1127, at *2 (“[T]he evidence other than the identification was not strong[.]”). Defense counsel sought to rebut this identification with scientific/psychological findings to be presented by Dr. Penrod. As previously mentioned, the trial judge's ruling that expert testimony would not “assist the jury in its evaluation of the identification” was consistent with the decisions of that time. The courts then considered reliability of an eyewitness identification to be a function of the credibility of the witness and ability of the witness to make the observation. See Commonwealth v. Burgos, 464 Mass. 23, 32-35 (2012); Commonwealth v. Watson, 455 Mass. 246, 259-260 (2009); Commonwealth v. Hyatt, 419 Mass. 815, 818-819 (1995); Commonwealth v. Francis, 390 Mass. 89, 101 (1983). Expert testimony on these and other pertinent principles of eyewitness identification had not yet achieved general judicial acceptance. See, e.g., Commonwealth v. Santoli, 424 Mass. 837, 842, 845 (1997) (only “[i]n a relatively small number of cases, the exclusion of expert testimony on eyewitness identification has been characterized as an abuse of

discretion The acceptability of the expert's conclusions in the relevant community of experts remains a factor, but not necessarily a controlling one, bearing on the admissibility of an opinion.")

Scientific and psychological factors that should be considered in evaluating the reliability of identification testimony have now been accepted by the courts. This was demonstrated by the Supreme Judicial Court's committee that rendered the Report and the adoption of its principles by the Court in Gomes. The factors recognized to be bearing on the identification made in the Cosenza trial, and to which Dr. Penrod was prepared to testify, are as follows:

- a. The effects of stress on an identification;
- b. The weakness of the correlation between an eyewitness' confidence in the identification and its accuracy;
- c. The effects of the passage of time on memory;
- d. The effect of feedback from police officers on a witnesses confidence in the identification;
- e. The effects of poor lighting on identifications;
- f. The effect of a weapon being wielded on an identification;
- g. The effects of a disguise or concealment of a perpetrator's face and hair;
- h. The effect of presenting photos simultaneously during an array procedure;
- i. The effect of a lack of a double blind administration of a photo array;
- j. The effect of a lack of pre-identification instructions telling the witness that the suspect may or may not be in the photo array; and
- k. The phenomenon of "unconscious transference" (i.e. when a witness might identify a suspect as the perpetrator based upon a prior innocent encounter with the perpetrator which can result in the face being "familiar" to the witness).

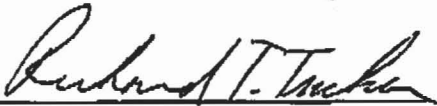
Here, I find and rule that the testimony of Dr. Penrod, had it been admitted at the trial, would

have been a “real factor” in the jury’s deliberations and that there is a substantial risk that the jury would have reached a different conclusion. See Sullivan, 469 Mass. at 350-351. Thus, I find that Cosenza is entitled to a new trial. In so ruling, I am aware that the proposed model jury instructions were intended to have “no retroactive application.” Gomes, 470 Mass. at 376. However, in Brescia, 471 Mass. at 388, decided five months after the Gomes decision, the Supreme Judicial Court examined closely the principles guiding trial judges in ruling on Rule 30(b) motions for a new trial. The court found that a judge may grant a new trial if it appears that justice may not have been done even without a finding of error having been committed at the trial. Id. at 389-390. In so ruling, the Brescia court reviewed the decision of Commonwealth v. Pring-Wilson, 448 Mass. 718 (2007) as being illustrative of the trial judge’s broad discretion to see that justice is done. Id. at 390. In Pring-Wilson, a new trial was granted by the trial judge, and affirmed by the Supreme Judicial Court, by the application of the new rule set forth in Commonwealth v. Adjutant, 443 Mass. 649, 664 (2005), that propensity evidence for violence of the victim is admissible on the issue of who was the first aggressor. Id. Even though the Adjutant rule was espoused after the Pring-Wilson trial, and the new rule was to have only prospective application, the court in Pring-Wilson affirmed the trial judge’s conclusion that fairness required granting the defendant a new trial. Id. The ruling was not an abuse of the trial judge’s broad discretion to see that justice was done. Id. at 392.

In light of the above discussion, I rule that, upon a fundamental fairness standard, justice may not have been done at Cosenza’s trial and that he is entitled to a new trial.

ORDER

For the reasons set forth above, I **ORDER** that Cosenza’s second motion for a new trial is **ALLOWED**.


Richard T. Tucker
Justice of the Superior Court

Dated: May 31, 2016