

Superior Court of Massachusetts.

COMMONWEALTH of Massachusetts,

v.

Benjamin LAGUER.

No. 83103391.

May 2, 2001.

FURTHER FINDINGS AND ORDER ON DEFENDANT'S MOTION FOR DNA TESTING

HILLMAN, J.

The defendant was convicted of sexual assault in 1983. The crime for which he was convicted involved a single perpetrator sexual assault. The crime is alleged to have taken place over many hours on July 13, 1983. Much physical evidence was collected at the scene and included physical evidence that (presumably) only the perpetrator could have left. These items were collected and catalogued.

On January 12, 2000, Benjamin LaGuer asked this Court to allow him to conduct post-conviction DNA testing on certain of this evidence. The Commonwealth, while not opposing the motion, has sought to establish safeguards to insure reliable testing. After multiple hearings, interim procedural orders, and opportunities to identify, quantify, and preliminarily analyze this evidence, this court issued an Order for DNA Testing. That order, dated February 15, 2001, was the subject of a motion by the Commonwealth styled as Commonwealth's Motion for Clarification and Partial Reconsideration.

The Commonwealth argued, among other things, that the Court's order did not allow for STR-based DNA testing of the Single Samples. That order only provided for preliminary testing to assess the cellular content. The court agrees with the Commonwealth. The defendant has proffered to the court a modified version of the court's February 15, 2001 order which provides for STR-based DNA testing on discrete samples. The Commonwealth was given until the end of business on April 13, 2001 to provide the court with a response, if any, to the defendant's proposed order.

In addition, the defendant has provided the affidavit of Edward Blake of Forensic Science Associates whom they have designated to conduct the testing. Presumably that affidavit was an attempt to comply with paragraph 4(c) of the February 15th order. While that affidavit does not completely address the court's concerns, it does set forth in sufficient detail the order of testing and Dr. Blake's hopeful expectation that testing of the multiple samples, will recover spermatozoa which can be genetically analyzed.¹

It is my opinion that the modifications to my February 15th order suggested by the defendant addresses the Commonwealth's concerns that STR-based DNA testing proceed without further delay. I am also satisfied with the representations that the defendant's expert has made with respect to the preservation of the evidence and the order that he intends to test it in. Accordingly, I enter the following modified order:

Order for DNA Testing

1. Description of Evidence

Cellmark Diagnostics, Inc. ("Cellmark") in Germantown, Maryland currently has possession of the items of evidence to be analyzed ("Items"). The items of evidence shall be referred to using the letter designations from Cellmark's September 5, 2000 report. Items B, D, E and F, shall be referred to as "Multiple Samples." Items A, Commonwealth, G, H, I, J, K, L, M, N, O, P, Q, and R shall be referred to as "Single Samples."

2. Testing

STR-based DNA testing shall proceed on up to the eighteen (18) discrete Items of evidence listed in Cellmark's September 5, 2000 report, as described below. The defendant has selected Forensic Science Associates ("FSA"), 3053 Research Drive, Richmond, CA 94608 to conduct its testing. The Commonwealth shall notify Cellmark and the Defendant of the identity of their laboratory, and if so, shall inform Cellmark and the Defendant of the identity of their laboratory. Nothing in this order shall prohibit the Commonwealth from choosing Cellmark as their designated laboratory.

3. Multiple Samples

Cellmark will divide the biological material on those Items demonstrated to have sufficient biological material for replicate DNA testing to be conducted by two separate laboratories. Cellmark shall divide Items B, F, and D so that a portion of each Item may be provided to Mr. LaGuer's expert, Dr. Edward Blake of Forensic Science Associates and a laboratory designated by the Commonwealth. Cellmark shall divide these items in the manner described by Dr. Edward T. Blake, in his Affidavit dated April 5, 2001 ("Blake Affidavit"), as follows:

Crime Lab	# Cellmark	# Description of Evidence
3	B	Two partial swabs with red/brown stains and two partial swabs with tan/brown stains. Cellmark shall choose one of the swabs with the red/brown stains and one of the swabs with the tan/brown stains. Blake Affidavit P 7.
10	F	Towel found on floor under victim with red/brown and

This affidavit shall (1) describe the safeguards that will be taken to prevent contamination of the Single Samples while in the possession of FSA; (2) describe the "chain of custody" procedures that FSA will employ from the time the Single Samples arrive at the FSA facilities until the time they leave; (3) set forth FSA's agreement that FSA shall conduct testing without consuming more than half of any of the Single Samples; (4) set forth FSA's agreement that it shall return the remaining half of any of the Single Samples which have been tested to Cellmark within thirty (30) days of the completion of any such tests; (5) set forth the acknowledgment of FSA and the official designated by FSA to perform the testing that the samples are the property of the Massachusetts Trial Court and as such are to be returned upon the completion of the testing or upon request of the Clerk or the Worcester Superior Court.

(d) The Defendant shall execute an affidavit acknowledging that the testing that he requests will be destructive of the samples and that said samples may be destroyed without the opportunity to identify, quantify, or otherwise test potentially exculpatory evidence. The defendant shall also acknowledge that he understands and accepts the risks associated with such testing

5. Transportation

Cellmark shall place the selected Multiple Items and Item H in a secure, padded package, along with a copy of this order, and address the package to Dr. Edward Blake, Forensic Science Associates, 3053 Research Drive, Richmond, CA 94608. Defendant's counsel or their employee ("Defendant's representative") shall then personally carry the sealed package to Dr. Edward Blake at FSA. Defendant's representative shall be accompanied, if the Commonwealth so chooses, by a State Trooper or other representative of the Commonwealth ("Commonwealth's representative). Within 7 days of delivery to FSA, the Defendant's and Commonwealth's representatives shall execute and file with the Clerk of the Worcester Superior Court, an Affidavit, setting forth the time, date, manner of delivery, to whom delivered, and any other information deemed pertinent and relevant with respect to the delivery of the items to FSA.

6. Cost

Each party shall bear its own costs.

7. Comparison Samples

(a) Two blood samples shall be taken from the defendant for purposes of comparison, using purple-top test tubes containing EDTA preservative. The blood samples shall be taken by a qualified and, properly licensed medical professional at a reasonably convenient location and time to be agreed upon by counsel for the parties, in the presence of a named representative of the defendant and a named representative of the Commonwealth, who shall each receive one of the samples.

(b) A portion of the victim's blood sample, which is currently in the custody of the Massachusetts State Police Crime Laboratory in Sudbury, shall be provided to a named representative of the defendant, who can either obtain the sample in person from the Crime Lab at a reasonably convenient time to be communicated through the District Attorney's Office, or provide the Crime Lab with an address and a Federal Express account number to have the sample portion sent directly via Federal Express to the laboratory of defendant's choice.

8. Report

Upon completion of FSA's testing, FSA shall prepare and send written reports to defendant's counsel, David Siegel, New England School of Law, 154 Stuart Street, Boston, MA 02116, and to Assistant District Attorney Joseph Reilly at the District Attorney's Office, Courthouse Room 220, 2 Main Street, Worcester, MA 01608, and to the Court, "Attention Judge Timothy S. Hillman," Worcester Superior Court, 2 Main Street, Worcester, MA 01608, stating (a) which Items it subjected to testing, (b) a description of the process to which it subjected the Items, (commonwealth) with respect to any Items it did not subject to STR- based DNA testing, (1) whether spermatozoa are present and, if so, in what amount, and (2) whether any other biological material is present and, if so, in what amount, and (d) with respect to any Items it subjected to STR- based DNA testing, whether the results of such testing included, excluded, or neither included nor excluded Benjamin LaGuer.

¹ The affidavit does not address the requirements of subparagraph (5) of subsection (c) of paragraph 4 of the within order.