

SUPREME JUDICIAL COURT OF MASSACHUSETTS

Commonwealth v. Moore

480 Mass. 799 (2018) · No. SJC-11652 · Decided October 31, 2018

SUMMARY

The Massachusetts Supreme Judicial Court affirmed Anthony L. Moore, Jr.'s convictions for murder in the first degree and related offenses, as well as the denial of his motion for a new trial. The court addressed the exclusion of third-party culprit and Bowden evidence, alleged failures to preserve and disclose exculpatory evidence, a showup identification procedure, admission of prior testimony from an unavailable witness, and the court's authority under G. L. c. 278, § 33E. Although the court found error in excluding portions of a police broadcast relevant to the defendant's Bowden defense, it concluded that the error was not prejudicial and granted no relief.

CASE DETAILS

COURT	Supreme Judicial Court of Massachusetts
WRITING FOR THE COURT	Lowy, J.; Gants, C.J.; Gaziano, J.; Budd, J.; Cypher, J.
JURISDICTION	Massachusetts
DECIDED	October 31, 2018
DOCKET	SJC-11652
DISPOSITION	affirmed
PROCEDURAL POSTURE	The defendant appealed from convictions of murder in the first degree and related offenses and from the denial of his motion for a new trial. The appeals were consolidated and reviewed under G. L. c. 278, § 33E.
STANDARD OF REVIEW	The court reviewed the consolidated direct appeal and new-trial appeal under G. L. c. 278, § 33E. It reviewed the exclusion of Bowden evidence for abuse of discretion and prejudicial error, constitutional third-party-culprit evidence independently, showup identification procedures for due-process error, and ineffective-assistance and newly discovered evidence claims under the more favorable substantial-likelihood-of-a-miscarriage-of-justice standard applicable to first-degree murder cases.
PRECEDENTIAL VALUE	Published, precedential opinion of the Massachusetts Supreme Judicial Court

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether portions of a police radio broadcast containing physical descriptions of the perpetrators were inadmissible hearsay when offered as third-party-culprit evidence or as evidence supporting a Bowden defense.
2. Whether the Commonwealth's failure to provide the correct booking videotape required a new trial or other relief.
3. Whether the one-on-one showup identification procedures were unnecessarily suggestive and violated due process.
4. Whether admission of an unavailable witness's prior suppression-hearing testimony violated the defendant's confrontation rights.
5. Whether defense counsel was ineffective for failing to impeach the unavailable witness with inconsistent grand jury testimony.
6. Whether trial counsel was ineffective for refusing to consent to a nolle prosequi of the marijuana charge or for failing to call a blood-spatter expert.
7. Whether alleged newly discovered evidence concerning video technology warranted a new trial.
8. Whether relief was warranted under G. L. c. 278, § 33E, including reduction of the murder verdict or a new trial.

HOLDINGS

1. The physical descriptions were properly excluded under the third-party-culprit theory because they constituted layered hearsay from unidentified sources and lacked the reliability required for admission as evidence that another person committed the crime.
2. The trial judge erred by treating the physical descriptions as inadmissible layered hearsay when they were offered to show the inadequacy of the police investigation rather than to prove the truth of the descriptions. The evidence was relevant to the Bowden defense and its probative value was not substantially outweighed by unfair prejudice, but the error was harmless.
3. The defendant was not entitled to a new trial based on the missing or incorrectly disclosed booking videotape because the Commonwealth showed no bad faith and the defendant received a sufficient opportunity to remedy any prejudice through cross-examination concerning the absence of visible bloodstains.

4. The showup identifications did not violate due process because there was good reason for prompt one-on-one identification, and the procedures did not add unfairness sufficient to create a substantial risk of mistaken identification.
5. Admission of the deceased witness's prior suppression-hearing testimony did not violate the defendant's confrontation rights because the witness was unavailable and Moore had an adequate prior opportunity and similar motive to cross-examine him.
6. Although suppression counsel should have cross-examined the witness about inconsistencies between his grand jury testimony and suppression-hearing testimony, the omission did not create a substantial likelihood of a miscarriage of justice because the inconsistencies were immaterial in light of the other identification evidence.
7. Trial counsel was not ineffective for refusing to consent to the Commonwealth's proposed nolle prosequi of the marijuana charge because the decision was a reasonable strategic concession and was not manifestly unreasonable when made.
8. The ineffective-assistance claim based on failure to call a blood-spatter expert failed because the defendant supplied no expert affidavit describing the proposed testimony and trial counsel elicited through cross-examination evidence supporting the defense theory that the blood was transferred.
9. The defendant was not entitled to a new trial based on alleged newly discovered video technology because he failed to provide competent expert evidence showing that the technology could establish the absence of blood on his T-shirt at booking.
10. The court declined to reduce the degree of guilt, order a new trial, or grant other relief under its extraordinary review authority because the verdict was supported by overwhelming evidence and no justice-based claim warranted relief.

KEY QUOTATIONS

“Bowden evidence is admissible so long as its probative value is not substantially outweighed by its prejudicial effect.” (17)

“Although one-on-one showup identification procedures are “generally disfavored as inherently suggestive,” they only raise due process concerns if it is determined that the procedure was unnecessarily or impermissibly suggestive.” (22)

“An adequate prior opportunity means effective cross-examination at a prior proceeding addressed to “substantially the same interests” where the defendant had a “similar motive” to cross-examine the witness.” (27)

“When we undertake review under [G. L. c. 278,] § 33E, we do not function as a second jury.” (34)

FACTUAL BACKGROUND

During an armed home invasion and robbery in Springfield, a masked gunman shot Margaret Przewozniak in the head after the victim partially pulled down the gunman's mask and recognized him as someone with whom she had attended school. Witnesses described two masked African-American men fleeing in a gray minivan and

provided a vehicle registration number that, after a one-digit adjustment, matched a gray Dodge minivan registered to Moore's mother. Police stopped the minivan within hours, and witnesses identified Moore or matched him to the taller perpetrator during showup procedures. Police later found the victim's DNA on Moore's T-shirt and on a stain inside the minivan.

PROCEDURAL HISTORY

A Hampden County grand jury returned indictments against Moore on April 16, 2010. After a July 2013 trial in the Superior Court, a jury convicted him of murder in the first degree and related offenses. While his direct appeal was pending, Moore moved for a new trial; the trial judge denied the motion, and the Supreme Judicial Court consolidated the appeals. The court found an evidentiary error in excluding portions of a police broadcast offered for a Bowden defense but held the error nonprejudicial, rejected the remaining claims, and affirmed the judgments and the order denying a new trial.

DISPOSITION

affirmed

CASES CITED

- Commonwealth v. Alicea, 464 Mass. 837, 840 (2013)
- Commonwealth v. Cassidy, 470 Mass. 201, 209 n.9, 210, 216 (2014)
- Commonwealth v. Kellogg, 461 Mass. 1001, 1003 (2011)
- Commonwealth v. Silva-Santiago, 453 Mass. 782, 800-804 (2009)
- Commonwealth v. Bowden, 379 Mass. 472, 479, 485-486 (1980)
- Commonwealth v. Lawrence, 404 Mass. 378, 387 (1989)
- Commonwealth v. Conkey, 443 Mass. 60, 66-67 (2004), S.C., 452 Mass. 1022 (2008)
- Commonwealth v. Caillot, 449 Mass. 712, 721 (2007)
- Commonwealth v. Phinney, 446 Mass. 155, 166 (2006), S.C., 448 Mass. 621 (2007)
- Commonwealth v. Reynolds, 429 Mass. 388, 390-392 (1999)
- Commonwealth v. Bizanowicz, 459 Mass. 400, 414, 419 (2011)
- Commonwealth v. Ridge, 455 Mass. 307, 316-318 (2009)
- Commonwealth v. Caruso, 476 Mass. 275, 292-295 (2017)
- Commonwealth v. Dew, 478 Mass. 304, 306-307 (2017)
- Commonwealth v. Figueroa, 468 Mass. 204, 217-218 (2014)
- Commonwealth v. Meas, 467 Mass. 434, 441 (2014), cert. denied, 135 S. Ct. 150 (2014)
- Commonwealth v. Martin, 447 Mass. 274, 279 (2006)
- Commonwealth v. Phillips, 452 Mass. 617, 628 (2008)
- Commonwealth v. Austin, 421 Mass. 357, 361, 364 (1995)
- Commonwealth v. Leaster, 395 Mass. 96, 103 (1985)
- Commonwealth v. Gomes, 470 Mass. 352, 361-378 (2015)

- Commonwealth v. Bastaldo, 472 Mass. 16, 23 (2015)
- Commonwealth v. Bly, 448 Mass. 473, 496 (2007)
- Commonwealth v. Hurley, 455 Mass. 53, 60-62 (2009)
- Commonwealth v. Sena, 441 Mass. 822, 833 (2004)
- Commonwealth v. Canon, 373 Mass. 494, 500-501 (1977), cert. denied, 435 U.S. 933 (1978)
- Commonwealth v. Grady, 474 Mass. 715, 719 (2016)
- Commonwealth v. Vazquez, 478 Mass. 443, 448 n.2 (2017)
- Commonwealth v. Johnston, 467 Mass. 674, 696, 705 (2014)
- Commonwealth v. Fisher, 433 Mass. 340, 357 (2001)
- Commonwealth v. Bart B., 242 Mass. 911, 916 (1997)
- Commonwealth v. Hudson, 446 Mass. 709, 715 (2006)
- Commonwealth v. Gulla, 476 Mass. 743, 745-746 (2017)
- Commonwealth v. Wright, 411 Mass. 678, 681-682 (1992), S.C., 469 Mass. 447 (2014)
- Commonwealth v. Long, 476 Mass. 526, 529 (2017)
- Commonwealth v. Lang, 473 Mass. 1, 14 (2015)
- Commonwealth v. Vardinski, 438 Mass. 444, 455 (2003)
- Commonwealth v. White, 409 Mass. 266, 277 (1991)
- Commonwealth v. Seino, 479 Mass. 463, 474 n.18 (2018)
- Commonwealth v. Alicea, 464 Mass. 837, 850-851 (2013)
- Commonwealth v. Jones, 432 Mass. 623, 633 n.6 (2000)
- Commonwealth v. Salvati, 420 Mass. 499, 506-507 (1995)
- Commonwealth v. Moore, 408 Mass. 117, 126 (1990)
- Commonwealth v. Grace, 397 Mass. 303, 305-306 (1986)
- Commonwealth v. Cannon, 449 Mass. 462, 469 n.17 (2007)
- Commonwealth v. Rakes, 478 Mass. 22, 32 (2017)
- Committee for Public Counsel Servs. v. Attorney Gen., 480 Mass. 700, 706-710 (2018)

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