

RECEIVED & FILED
2024 APR 10 AM 7:56
COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

CLERK OF THE COURTS
NORFOLK COUNTY

SUPERIOR COURT DEPARTMENT
NO. 2282-CR-00117

_____)
COMMONWEALTH OF)
MASSACHUSETTS,)
Plaintiff)
)
V.)
)
KAREN READ,)
Defendant)
_____)

**DEFENDANT’S MOTION FOR SANCTIONS AND EXCLUSION OF EVIDENCE
BASED ON THE COMMONWEALTH’S FAILURE TO TIMELY COMPLY WITH
DISCOVERY ORDERS**

Now comes the defendant, Karen Read (“Ms. Read”) and respectfully moves this Honorable Court to sanction the Commonwealth based on its failure to comply with discovery orders by excluding any reference to the DNA testing by Bode Technology of the purported hair recovered from Ms. Read’s vehicle pursuant to Massachusetts Rule of Criminal Procedure 14, subdivisions (a)(1)(c) and (c)(2). As grounds for this motion, the Defendant states that the Commonwealth has failed to timely comply with numerous discovery orders imposed by this Court and has not produced the results of any DNA testing of the purported hair by Bode Technology in spite of the impending trial date, which is currently set for April 16, 2024. To allow the Commonwealth to introduce any findings by Bode Technology at this point would, therefore, unfairly prejudice the defendant by denying her the ability to make certain tactical decisions or have her own expert meaningfully evaluate any results. See Commonwealth v. Ellison, 376 Mass. 1, 25-27 (1978) (recognizing that late disclosure can severely prejudice defense by forcing counsel to make difficult tactical decisions quickly in the heat of trial).

STATEMENT OF FACTS

Ms. Read is accused of the following crimes arising out of the death of Officer John O'Keefe: Murder in the Second Degree in violation of M.G.L. c. 265, s. 1 (Count One); Manslaughter while under the Influence of Alcohol in violation of M.G.L. c. 265, s. 13 ½ (Count Two); and Leaving the Scene of Personal Injury and Death in violation of M.G.L. c. 90, s. 24(2)(a ½)(2) (Count Three).

On January 29, 2022, law enforcement seized Ms. Read's vehicle and towed it to Canton Police Department's Sallyport Garage, where it was held as evidence in connection with this case. On February 1, 2022, the vehicle was photographed and processed by a Criminalist with the Massachusetts State Police Lab, Maureen Hartnett. According to Ms. Hartnett, an "apparent hair" was purportedly recovered from the bumper of Ms. Read's vehicle. More than a year later, on March 6, 2023, Maureen Hartnett examined the hair with a microscope and opined that, based on a visual inspection of the hair, it appeared to be "human." However, discovery produced by the Commonwealth revealed that Ms. Hartnett failed her proficiency test associated with this precise subject matter (i.e. identifying types of hair) less than one month prior to her examination of the "apparent hair" in this case on February 16, 2023. Subsequently, on August 25, 2023, the purported hair was submitted to the Massachusetts State Police Lab for DNA testing and it was forensically determined that **no human DNA was detected.**

Apparently dissatisfied with those results, the Commonwealth then requested permission to send the hair to an independent lab, Bode Technology, to conduct destructive STR DNA testing on the hair. Ms. Read thereafter requested that her own expert, Microtrace, LLC, be permitted to forensically examine the hair to determine if it is human before any further destructive testing was conducted by the Commonwealth. On November 14, 2023, the Court

denied Ms. Read's request to have her own expert independently examine the hair and ordered that the Massachusetts State Police Lab send the hair directly to the Commonwealth's independent expert, Bode Technology, "to determine first whether the item is a human hair and then is permitted to conduct STR and mDNA testing on the sample which may consume and exhaust all the evidence." (Docket 164.) Based on Mr. Lally's representations at the last court hearing, the Commonwealth apparently altogether ignored the Court's order and authorized Bode Technology to proceed with exhaustive testing before forensically examining the hair to determine if it was human. To date, no reports have been produced by the Commonwealth regarding any of the analyses conducted by Bode Technology (DNA or otherwise). Based on the Commonwealth's continued failure to comply with its discovery obligations, the Court invited the defense to file a motion to exclude reference to forensic testing of the hair by Bode Tehcnology for her consideration.

ARGUMENT

"Motions in limine concerning the introduction or exclusion of purportedly relevant evidence are properly made and considered before and during trial, in advance of the evidence being offered." Commonwealth v. Spencer, 465 Mass. 32, 42 (2013). *See* Mass. G. Evid. § 103(f) (2023). "The purpose of a motion in limine is to prevent irrelevant, inadmissible or prejudicial matters from being admitted in evidence ... and in granting such a motion, a judge has discretion similar to that which [s]he has when deciding whether to admit or exclude evidence" Commonwealth v. Hood, 389 Mass. 581, 594 (1983). *See* Commonwealth v. Tantillo, 103 Mass. App. Ct. 20, 27–28 (2023), review denied, 493 Mass. 1102 (2023).

In addition to the Court's inherent authority to rule on evidentiary motions in advance of trial, Massachusetts Rule of Criminal Procedure 14 provides for sanctions and exclusionary

remedies based on the Commonwealth's failure to comply with its discovery obligations. Pursuant to Massachusetts Rule of Criminal Procedure 14(a)(1) "[t]he prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy", *inter alia*, "[i]ntended expert opinion evidence...and all reports prepared by the expert that pertain to the case." Mass R. Crim. P. 14(a)(1)(A)(vi). This requirement has "the full force and effect of a court order, and failure to provide discovery pursuant to [this subsection] may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c)." If the Commonwealth fails to comply with any discovery order issued or imposed by the Court or pursuant to Rule 14, the court may make further orders of discovery, grant a continuance, or enter such other order as it deems just under the circumstances, which includes excluding evidence for noncompliance with a discovery order. Mass. R. Crim. P. Rule 14(c)(1-2).¹

In determining whether an exclusionary remedy is appropriate, the Court must consider (1) the need to prevent surprise; (2) the effectiveness of sanctions less severe than exclusion; (3) evidence of bad faith; (4) prejudice to the other party caused by the testimony; and (5) the materiality of the testimony to the outcome of the case. Commonwealth v. Giontzis, 47 Mass.App.Ct. 450, 460, citing Commonwealth v. Chappee, 397 Mass. 508, 518 (1986).

Here, the Commonwealth has repeatedly violated its mandatory discovery obligations and, to date, has failed to produce the results of DNA testing and/or examination of the purported hair found on Ms. Read's vehicle by Bode Technology. The results of any forensic inspection and/or DNA testing by Bode Technology remain unknown and, at this point, would constitute an unfair surprise to the defense. Trial is set to commence on April 16, 2024, which is only one week away. Because of the delayed disclosure of *significant* material and relevant discovery in

¹ Notwithstanding the instant Motion, the defense notes that evidence supporting the defendant's lack of criminal responsibility cannot be excluded from trial. Mass. R. Crim. P., Rule 14(c)(2).

this case and in spite of repeated defense objections, the Court has made it clear that this trial will not be continued any further than April 16, 2024. Absent the Court's willingness to continue trial in this matter, Ms. Read will be undeniably prejudiced by the delayed disclosure of yet another piece of critical evidence in this case --- the results of any forensic examination and/or DNA testing that has been completed in this matter by Bode Technology. There is simply no excuse for the Commonwealth's continued delays. The hair in question has been in law enforcement's custody and control for more than two years, since January 29, 2022. It would be exceedingly unfair to force Ms. Read to make tactical decisions, including whether to expend funds hiring an expert to independently evaluate this evidence on the eve of trial (if the analysis is even completed by then), when the government has had more than two years to forensically examine this item of evidence—particularly when her own expert was denied the ability to forensically examine the evidence. See Commonwealth v. Ellison, supra, 376 Mass. at 25-27 (recognizing that late disclosure can severely prejudice defense by forcing counsel to make difficult tactical decisions quickly in the heat of trial). Based on the Commonwealth's years-long delays and the severe prejudice Ms. Read will suffer if the Commonwealth is permitted to “surprise” the defense with new results on the eve of trial, this evidence must be excluded.

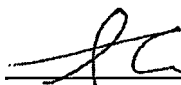
CONCLUSION

For the above reasons, Ms. Read respectfully requests that this Honorable Court sanction the Commonwealth based on its failure to comply with discovery orders by excluding any reference to the DNA testing of the purported hair recovered from Ms. Read's vehicle conducted by Bode Technology; or, in the alternative, continue trial in this matter such that Ms. Read has adequate

//

time to make tactical decisions based on the production of new evidence and effectively prepare for trial.

Respectfully Submitted,
For the Defendant,
Karen Read
By her attorneys,



Alan J. Jackson, Esq., *Pro Hac Vice*
Elizabeth S. Little, Esq., *Pro Hac Vice*
Werksman Jackson & Quinn LLP
888 West Sixth Street, Fourth Floor
Los Angeles, CA 90017
T. (213) 688-0460
F. (213) 624-1942



David R. Yannetti, Esq.
BBO #555713
Ian F. Henchy
BBO # 707284
44 School St.
Suite 1000A
Boston, MA 02108
(617) 338-6006
ian@davidyannetti.com
law@davidyannetti.com

Dated: April 9, 2024

CERTIFICATE OF SERVICE

I, Attorney Elizabeth S. Little, do hereby certify that I served the “Defendant’s Motion for Sanctions and Exclusion of Evidence Based on the Commonwealth’s Failure to Timely Comply with Discovery Orders” upon the Commonwealth by emailing a copy on April 9, 2024 to Norfolk County Assistant District Attorney Adam Lally at adam.lally@mass.gov.

April 9, 2024



Elizabeth S. Little, Esq., *Pro Hac Vice*
Werksman Jackson & Quinn LLP
888 West Sixth Street, Fourth Floor
Los Angeles, CA 90017
T. (213) 688-0460
F. (213) 624-1942