

NORFOLK, ss. COMMONWEALTH OF MASSACHUSETTS SUPERIOR COURT DOCKET NOS. 1980-76394 & 1981-77144

COMMONWEALTH

vs.

FREDERICK WEICHELL

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER ON DEFENDANT'S THIRD MOTION FOR NEW TRIAL

INTRODUCTION

Nearly thirty years after being convicted of first-degree murder, the defendant Frederick Weichell ("Weichell" or "the defendant") learned of a document which appeared to cast into question the testimony of the sole witness who had identified him at trial as the man running from the scene shortly after shots had been fired. Early in the investigation, that same witness had helped police to produce a composite picture of the suspect, and the police had published the composite in a local newspaper to gain the public's assistance in identifying the running man. The recently discovered document appeared to be a memorandum from a detective stating that he had received such assistance and that "at least 10 guards" at M.C.I. Bridgewater believed the image in the composite to be that of a convicted murderer who happened to have escaped from that institution on the same weekend as the murder for which Weichell had been charged. The document, dated nine days after the murder and about two months before Weichell's arrest, had never been disclosed to the defendant or his attorney. Weichell now moves for a new trial. The Commonwealth opposes. For the reasons herein set forth, the motion is ALLOWED.

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## FINDINGS OF FACT

### BACKGROUND:

1. With respect to the general background of this case, the identification of the defendant, and his trial, the court adopts the description offered in *Commonwealth v. Weichell*, 390, Mass. 62 (1983), which is as follows:

"*The shooting.* [The victim, Robert W. LaMonica,] worked for the Boston Water and Sewer Commission. He worked from 4 P.M. to midnight. He would usually drive straight home from his job to his [Braintree] apartment, customarily arriving there between 12:15 A.M. and 12:30 A.M. He would turn off Faxon Street to park his [automobile] in a parking lot adjacent to his apartment building. Faxon Park is across from the entrance to the parking lot. [The victim] followed this routine on the morning of May 31, 1980. He parked and got out of his [automobile]. Four shots were fired, two of them hitting [the victim]. A bullet entered through his neck and penetrated the brain. A second bullet entered his back and lodged in his right rib cage. [The victim] died in the parking lot.

"*Identification.* Shortly before midnight on May 30, 1980, John Foley, Jean Castonquay, Frederick Laracy, and Lisa Krause went to Faxon Park, after attending a drive-in movie together. Foley testified the group had been drinking and that he had consumed four or five beers during the movies. At 12:15 A.M., Foley was walking away from a wooded area of the park. He heard four 'bangs' and saw a man run out of the parking lot and turn up Faxon Street to a waiting car. Krause screamed. The man looked toward the group briefly but continued running. Foley testified that he had a full-face view of the man for approximately one second as the man passed

under a street light. Foley and Laracy went across Faxon Street to the parking lot where they found the body of the victim on the ground. The police arrived shortly thereafter.

"Foley described to the police the man he saw running as being five feet, nine inches tall, 175 pounds, wearing jeans and a pullover shirt. [At the time of his arrest, the defendant was five feet, seven inches tall, and weighed 155 pounds.] He said that the man had dark curly hair, bushy eyebrows, and sideburns. He also stated that the man had a slightly crooked nose, 'as if it had been broken.' At trial, he identified the defendant as the man he saw running that night.

"Later that morning, Foley assisted Detective Wilson of the Braintree police department in making a composite drawing. After indicating that he could not draw a face by himself, Foley gave Wilson a general description. With the aid of an Identikit, Wilson and Foley assembled a composite. Foley examined the composite and asked for changes. Wilson then changed elements of the composite and put together a different face. Wilson used a pencil to alter the nose. After Foley altered the hair style, he declared that the composite 'looks like him.' A photostatic copy of the composite was introduced in evidence at trial.

"The next day, Foley was shown an array of nine photographs. He picked the defendant's picture as 'a pretty good likeness' of the man. Several months later, he again identified the defendant's photograph out of the same array but which now included one additional photograph.

"On June 12, 1980, two State troopers, Foley, and the victim's two brothers drove through the streets of South Boston in a van. The [two brothers] gave directions, but did not speak to Foley. Eventually, Foley picked, out of a group of young men, an individual whom he thought was the man he saw running. The van was driven around the corner and passed the group for a second time. Foley stated, 'That's the guy.' A State trooper took a photograph of the individual which was introduced in evidence and identified as a photograph of the defendant.

"Jean Castonquay also testified that she heard four shots and saw a man running. At trial, she was unable to say whether the defendant was the man she saw. Moments later, she tentatively identified another person sitting in the back of the courtroom as the man [the victim's brother]. On three occasions Castonquay was shown the same array of photographs as Foley, but was unable to pick out any one photograph. Instead, she picked out two or three photographs each time, always including that of the defendant. Neither Laracy nor Krause made any identification." *Id.* at 65-67.

"Other evidence offered by the Commonwealth was admitted to create an inference that the defendant was conscious of his guilt. After the shooting, but before his arrest, the defendant asked Francis Shea and Dennis King if the police were looking for him. He said, 'Why would I want to kill Bobby? He was the only one who gave my brother money when he was in jail.'" *Id.* at 67 n.4.

On the issue of motive, the Commonwealth submitted evidence that in the weeks preceding the victim's death, the defendant and his friend, Thomas Barrett, had a series of confrontations, some involving physical altercations and threats, with the abovesaid Shea and Shea's friends, which included LaMonica, King, and a Chuckie Carr. *Id.* at 64-65.

*"The defendant's case.* At trial, the defendant's counsel [Anthony M. Cardinale], through cross-examination, attempted to bring out whatever discrepancies existed in Foley's testimony. He emphasized that Foley had indicated that the man he saw running had thick sideburns and bushy eyebrows. Foley admitted, however, that the defendant's eyebrows were different. It also appears that the defendant did not have any sideburns. Despite some evidence to the contrary, the jury could have concluded that the defendant had curly hair at the time of the murder. The

defendant also attempted to show that the lighting in the area was poor<sup>1</sup> and that the identification process was unreliable. The defendant did not testify.

"The defendant also sought to establish a defense of alibi. Three witnesses<sup>2</sup> testified on his behalf. One witness's testimony placed the defendant in downtown Boston until midnight. The other witnesses placed the defendant at the Triple O Lounge in South Boston at, or shortly after, the time of the shooting.

"In rebuttal, the Commonwealth introduced evidence that the defendant could have left downtown Boston shortly before midnight and driven to [the victim's] apartment by the time of the shooting. A trip to the Triple O Lounge from the victim's apartment would have taken only another fifteen or twenty minutes. The Commonwealth also attacked the credibility of the two witnesses who placed him at the Triple O Lounge. Both were long-time friends of the defendant, and one [Mahoney] was engaged to Thomas Barrett's sister. The other witness [Weeks] failed to explain why he never came forward until one week before the trial." *Id.* at 67-68.

2. The apparent murder weapon, a stolen .38 caliber handgun, was found less than a half mile away the following day. (Lead State Police Investigator's report, p. 1).
3. Early in the investigation, LaMonica's girlfriend and several members of his family told police they could offer no explanation for the shooting except perhaps as retaliation for the death of one Freeman "Punchy" Clifford. Approximately five years earlier in Hull, Massachusetts, Clifford was shot and killed by LaMonica's father, Paul LaMonica, Sr., in what police suspected to be a loan sharking dispute. The elder LaMonica was later convicted of manslaughter and sentenced to a brief period of incarceration and a lengthy

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<sup>1</sup> The Commonwealth introduced contrary evidence.

<sup>2</sup> Kevin McCormack, Leo Mahoney, and Kevin J. Weeks.

term of parole. Robert LaMonica, the deceased, was also involved and given a suspended sentence.

4. The distance from which Foley made his observations was and continues to be disputed by the parties. However, Judge Mulkern, in ruling upon the defendant's motion to dismiss, found that "Foley was no less than 180 feet from the running man when he made his nighttime observation." (Exhibit No. 37, p. 7). This court accepts and adopts that finding.
5. At a hearing pursuant to the defendant's pretrial motion to suppress evidence, Foley added to his description of "the running man." Foley stated that the man had a "kind of crooked, kind of large" nose, and "something like mine but it was just a little bit crooked." He further explained, "It wasn't a straight nose. I just noticed it was crooked. That was the first thing that hit me when he looked at me. He looked like maybe at one time or another he might have broken it." (Suppression hearing transcript, at 2-152 – 2-153). Foley struggled to explain what he meant by a "bump" on the nose and stated that he "must have looked through 300 noses' in helping to assemble the composite picture. (*Id.* at 2-153 – 2-155). He stated that the man's eyebrows were "black" and "thick" and "like and Italian's eyebrows." (*Id.* at 2-159). He described the man's hair as "black, thick, curly" and the man's sideburns as black and curly and extending "down to the jaw." (*Id.* at 160-161). He estimated that the man was "somewhere between five ten and a half and five eleven and a half, just under six foot basically" and weighing "about `175 pounds, 180 pounds." (*Id.* at 2-158). He further stated, "He had a good gait going. He was a fast runner, athletic." (*Id.* at 161).

6. The composite picture which Foley helped to create ("the Foley composite") was published in the Patriot Ledger on June 3, 1980 and accompanied by an article which, among other things, stated that the depicted image was that of "a man wanted for questioning in connection with the murder of a South Boston man early Saturday morning." Robert LaMonica was named as the murder victim, and the crime scene was given as "the parking lot at the rear of 196 Commercial Street (Braintree)." The names of no witnesses were given. Detective Robert Wilson was quoted in the article and named as the person who drew the composite picture. Anyone with helpful information was instructed to call Braintree Police Captain Theodore K. Buker or a named State Trooper of the Office of District Attorney William Delahunt. (Exhibit No. 15).
7. The lead State Police investigator testified at trial that at the time of the creation of the Foley composite, police had no suspect in the case. (Trial Testimony 6/1/14). However, that same investigator, in his narrative report, stated the following:

As a result of the investigation conducted by this officer and Detective Wilson, information has been received from several confidential informants concerning LaMonica's murder. All sources have indicated that Frederick Weichell and Thomas Barrett were the ones who shot and killed Robert LaMonica.

Information has also been received from Detective Edward Walsh, Boston Police Department Intelligence Unit. Detective Walsh stated that a proven and reliable informant has told him that Subject Robert LaMonica was killed by Freddy Weichell and Thomas Barrett. Detective Walsh's source also stated that the "whole thing" was over a street "beef."

(Exhibit No. 2, Investigator's Report).

8. At least some of this informant information apparently had been received by police within thirty-six hours of the murder. The lead State Police investigator had included a photograph of the defendant in the array shown to witnesses, including Foley, on the

morning of Sunday, June 1, 1980, (Trial Transcript 6/119-6/123), the day after the murder and two days before publication of the Foley composite in the newspaper.

9. Prior to trial, Attorney Anthony Cardinale, on behalf of the defendant, filed a motion for production of "exculpatory or 'arguably' evidence." In it, he included among the matters "specifically" being requested "[a]ny information in the hands of the Commonwealth, or under its control, concerning identifications or descriptions purportedly made by witnesses at the scene of the incident." (Hearing Exhibit No. 36).
10. On behalf of the Commonwealth, Assistant District Attorney Sidney Hanlon, now an Associate Justice of the Massachusetts Appeals Court, responded to this motion and to the other discovery requests from the defendant. Her response was forthright and thorough, given the information made available to her at the time. She described her efforts to the trial judge as follows: "I have complied with every, single discovery agreement and had an open file policy since the beginning." (Trial Transcript, III at 338). "Every diagram in my possession and every diagram Trooper \_\_\_\_\_ has ever had, and I believe I have gone through the Braintree Police files, every diagram they have Mr. Cardinale has had since December [1980]." (Id. at 348.) It is important to note, however, that former ADA Hanlon had not been part of the initial investigation of this case. She had not been connected to the case at the time of the publication of the Foley composite. (Hearing Testimony of Hanlon). Her involvement likely did not commence before the time that police had applied for a warrant authorizing a wiretap upon the defendant's telephone in August, 1980.
11. At the conclusion of his trial, on August 20, 1981, the defendant was found guilty of murder in the first degree and sentenced to life imprisonment without possibility of



párole. His conviction was affirmed by the Supreme Judicial Court at *Commonwealth v. Weichell*, 390 Mass. 62 (1983).

12. On August 5, 1991, the defendant filed a motion for new trial, claiming that his trial counsel was ineffective in disallowing the defendant from testifying. On August 8, 1991, the motion was denied by the trial judge without a hearing. (See Docket, Paper No. 46).
13. On January 23, 2002, the defendant filed a second motion for new trial. The motion was based centrally upon a letter by the defendant's friend, Tommy Barrett, to the defendant's mother. In the letter, postmarked March, 1982, Barrett confessed to the shooting of Robert LaMonica. At a hearing upon the motion, the defendant claimed that he did not know the letter's contents and did not ask his mother to reveal them earlier because he had been threatened by James ("Whitey") Bolger and Stephen ("The Rifleman") Flemmi against doing so.<sup>3</sup> Also at the hearing, Barrett invoked his Fifth Amendment privilege not to testify. Though the hearing judge allowed the motion, the ruling was overturned by the Supreme Judicial Court, which concluded that the letter was not covered by "the newly discovered evidence" doctrine because its contents were known or reasonably could have known by the defendant s at the time of his first motion for new trial. Also, the Court concluded that Barrett's statements were inadequately corroborated and bore insufficient indicia of trustworthiness. See *Commonwealth v. Weichell*, 446 Mass. 785, 799-806 (2006).

IMPORTANCE OF IDENTIFICATION EVIDENCE:

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<sup>3</sup> The defendant testified that he had been visited by Bulger and Flemmi four times on the matter and that Bulger had told him, "I do not want you to bring up Tommy Barrett's name ever." Bulger threatened to harm the defendant or his family should he disregard the warning. The defendant understood that the visit was intended to ensure that he never spoke of Barrett." *Commonwealth v. Weichell*, 446 Mass. 785, 793 (2006).

14. It was abundantly clear to both sides in this case early on that a successful prosecution of the defendant would rest upon his identification as "the running man." There were no eyewitnesses to the actual shooting. (Exhibit No. 37, p. 2). No physical evidence connected the defendant to the scene. The murder weapon revealed no fingerprint or other evidence. (Lead State Police Investigator's Report, p.1). The "waiting car" was never located. A wiretap upon the defendant's telephone produced no incriminating evidence. (Exhibit No. 2, Lead State Police Investigator's Sprague report to O'Donovan, p. 2).

15. At trial, Weichell hinged his defense upon evidence that he was elsewhere at the time of the murder and an energetic attack upon the testimony of John Foley, the single witness identifying the defendant at trial.<sup>4</sup> During his cross examination of the witness, defense counsel drew from Foley the admission that in several respects (i.e. eyebrows and sideburns) the defendant's appearance varied from that of the composite image the witness had helped to create just hours after the murder. The defendant sought leave to supplement its challenge by presenting expert testimony from a Dr. Robert Buckhout, the Director of the Center of Responsive Psychology at Brooklyn College, Brooklyn, New York. According to the proffer, Dr. Buckhout was prepared to testify concerning "the elements which effect the retention stage of memory, matters which may add to or alter an individual's memory based upon post-event information, such matters as those which cause witnesses to label or guess, or cause non-existent details to become

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<sup>4</sup> The defendant also sought to introduce evidence of LaMonica's involvement in the 1974 killing of one Freeman "Punchy" Clifford as tending to show that persons other than the defendant (i.e. compatriots of Clifford) would have a reason for killing LaMonica. However, the trial judge excluded the evidence as being too remote in time and too attenuated in motive. (Hearing Exhibit No. 40).

incorporated in memory, and ... the effect of various factors on the retrieval stage of memory, which ... may add to, alter or subtract from the witness's initial sense impression and perception." (Hearing Exhibit No. 39). Additionally, the defendant sought to introduce expert testimony from a photographer who had endeavored to reproduce what might have been perceived by a witness at the subject parking lot under measurably similar lighting conditions. (Trial transcript, 8-92 – 8-122). Both these requests were denied by the trial judge. In his closing, Attorney Anthony Cardinale on behalf of the defendant argued that identification in this case was "the ultimate issue." (Hearing Exhibit No. 51)

16. The point was not lost on the prosecutor, who, displaying the Foley composite before the jury,<sup>5</sup> argued its resemblance to the defendant detail by detail:

THE PROSECUTOR: "He saw him that night. He did a picture of him, and I ask you to look at the picture of Fred Weichell that Mr. Foley did, and compare it with the camera's picture taken two months later. Now, I ask you to look at the hair in this picture. Wouldn't you describe it as bushy and curly? And look at the eyebrows. Aren't they thick? Look, particularly, at the nose and see how good the match is between the nose in Mr. Foley's picture of Mr. Weichell, and the camera's picture of Mr. Weichell. Look at the mouth. Look, if you would, at the little marks under his lip here in the camera picture and see if that isn't here in Mr. Foley's picture. Look at the shape of the chin."

DEFENSE COUNSEL: "Objection."

THE JUDGE: "Your objection is overruled, sir."

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<sup>5</sup> Admitted in evidence over the defendant's objection.