

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-824

COMMONWEALTH

vs.

ALEXIS MIDDLETON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In 2008, after a jury trial in the Superior Court, the defendant was convicted of home invasion, aggravated rape, armed assault in a dwelling, four counts of kidnapping, two counts of indecent assault and battery, and four counts of assault and battery.¹ In 2011, a panel of this court upheld his convictions in an unpublished memorandum and order pursuant to our former rule 1:28. See Commonwealth v. Middleton, 80 Mass. App. Ct. 1110 (2011). In this appeal, the defendant challenges the trial judge's order denying his revised second motion for new trial (motion for new trial), arguing that his due process rights were violated by the Commonwealth's failure to produce exculpatory

¹ Two additional indictments for intimidating a witness were disposed of by nolle prosequi and a required finding of not guilty at trial.

evidence before trial, and that his prior appellate counsel was ineffective in failing to challenge the judge's handling of two peremptory challenges to prospective jurors. See Batson v. Kentucky, 476 U.S. 79 (1986); Commonwealth v. Soares, 377 Mass. 461 (1979).

Concluding that the judge relied on an incorrect standard in her assessment of the defendant's due process claims, we vacate the order denying the defendant's motion for new trial on that ground. We discern no error in the judge's rejection of the defendant's alternate argument on appeal, a claim of ineffective assistance of prior appellate counsel, and thus we remand only to allow the judge to consider whether, under the Massachusetts standards articulated in Commonwealth v. Tucceri, 412 Mass. 401, 412-413 (1992), the Commonwealth's failure to produce certain exculpatory evidence warrants a new trial.

Discussion. 1. Standard of review. On a written motion, a judge "may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). The decision is committed to the discretion of the motion judge, and our review is limited to determining "whether there has been a significant error of law or other abuse of discretion." Commonwealth v. DiBenedetto, 458 Mass. 657, 664 (2011), quoting Commonwealth v. Wolinski, 431 Mass. 228, 235 (2000). We give particular deference to the

motion judge where, as here, the same judge also presided over the trial. See Tucceri, 412 Mass. at 409.

2. Exculpatory evidence. The indictments in this case arose from a 2005 housebreak and robbery in Braintree. While the resident of the home was out, two masked men broke into the house looking for money and drugs. The resident and three companions returned, surprising the two men in the house. The intruders beat all four victims, ordered them to strip naked, and bound them. The men continued to beat the resident of the house while demanding money and drugs, forced another victim to take the defendant's penis into her mouth, and threatened to rape a third victim. The case was tried in 2008. Although none of the victims was able to identify either of the attackers, the Commonwealth tied the defendant to the crimes using deoxyribonucleic acid (DNA) evidence, the testimony of a witness who was present when the defendant and codefendant planned and prepared for the robbery and who spoke with the codefendant both during and after the robbery, and the defendant's possession of a Nextel cellular telephone linked to the codefendant's account.

The DNA samples taken in the case were gathered by the State Police and analyzed in the State Police Crime Laboratory (crime lab). In anticipation of the Commonwealth's introduction of the DNA evidence, defense counsel made pretrial discovery requests for "background information about each person involved

in . . . conducting or reviewing DNA testing in this case, including his/her current resume, job description and a summary of proficiency test results." Before trial, the Commonwealth produced responsive information about the chemists who tested the DNA in this case, Hilary Griffiths and Rachel Chow. More than a decade after the verdicts were returned, however, the defendant's ongoing discovery efforts revealed additional, undisclosed personnel file information about Griffiths's and Chow's employment at the crime lab in the files of the State Police, including 2006 notices to Griffiths and Chow of their temporary, performance-based suspensions from certain analytical duties (personnel files).²

In his motion for new trial, the defendant argued that the Commonwealth's failure to seek out and produce the personnel file information violated his due process rights under both the Fourteenth Amendment to the United States Constitution and

² The personnel files also contained information prepared after the date of trial but that related to Griffiths's work performance at and around the time of her work on the samples in this case -- a 2009 State Police report including indirect reports that Griffiths was "'not capable of performing' day to day exemplar work until shortly before June 3, 2008" and indications from Griffiths in an undated transcript excerpt and an e-mail exchange with a supervisor in 2013 suggesting that lab personnel were hiding mistakes made during testing. It also included a 2007 audit of the crime lab calling into question certain training and supervision practices at the crime lab.

Massachusetts common law.³ Although the defendant articulated these standards slightly differently, we consider that for purposes of the Federal "materiality" analysis the question is whether there "is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," United States v. Bagley, 473 U.S. 667, 682 (1985); by contrast, and because the judge here found that the defendant did not make a specific request (but see note 4, infra), under Massachusetts common law we ask "whether there is a substantial chance that the jury might not have reached verdicts of guilty if the undisclosed evidence had been introduced in evidence," Tucceri, 412 Mass. at 413. The defendant argued that the Massachusetts standard be applied. In a thoughtful and detailed memorandum of decision denying the motion, the judge relied on the Federal standard, citing to Flores-Rivera v. United States, 16 F.4th 963, 968 (1st Cir. 2021), and concluded that the defendant had failed to show "a 'reasonable probability' that the result of the trial would have been different" if the personnel files had been disclosed.

We discern no abuse of discretion or other error in the judge's analysis under the Federal standard she applied. Where,

³ The motion for new trial included additional alternative arguments, including the defendant's claim that the judge failed to follow proper procedures during the jury's empanelment.

however, the defendant argued violations of both Federal and Massachusetts due process protections, and where the applicable Massachusetts standard is more favorable to the defendant, see Tucceri, 412 Mass. at 413, we conclude that the more favorable standard controls. See id. at 413 n.11. Because we are not able to determine whether the judge took the Massachusetts standard into account in her decision,⁴ we vacate the order denying the motion for new trial and remand the matter to the

⁴ The judge found that although the Commonwealth should have produced the personnel files, the defendant did not specifically request them. Although the parties have not briefed the point, we are not convinced that the request for "background" on the chemists involved in the DNA testing fell short of being a "specific request" for the records ultimately produced from the personnel files. On remand, the judge may reconsider or clarify this finding. But correct or not, we note that the judge's finding, which is significant to analysis under the Massachusetts bifurcated standards but has no significance to the unitary Federal test, see Tucceri, 412 Mass. at 412-413, suggests that the judge may have considered all relevant standards. The parties have fully briefed the defendant's claim under those standards; based on this record, we would be unlikely to conclude that denial of the motion would be an abuse of the judge's discretion, even if based on the "specific request" Massachusetts standard, which "lessens the burden in proving prejudice." Tucceri, 412 Mass. at 407. See Commonwealth v. Ferreira, 481 Mass. 641, 650 (2019), quoting Commonwealth v. Imbert, 479 Mass. 575, 582 (2018) (to obtain new trial on basis of exculpatory evidence not produced despite specific request, defendant must demonstrate "jury would have been influenced by timely disclosure of the [undisclosed] evidence"); Tucceri, 412 Mass. at 413 (where undisclosed exculpatory evidence not specifically requested, defendant must show "substantial chance that the jury might not have reached verdicts of guilty if the undisclosed evidence had been introduced in evidence").

trial court for further proceedings applying that standard, consistent with this memorandum and order.

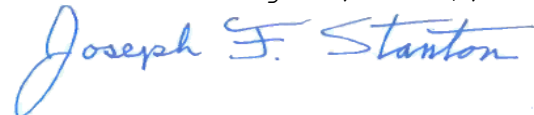
3. Batson-Soares challenge. In his motion for new trial, the defendant argued that prior appellate counsel provided him with ineffective assistance when he failed to argue in an earlier appeal that the judge erred in applying the protocol established under Batson, 476 U.S. 79, and Soares, 377 Mass. 461, to the Commonwealth's peremptory challenges of Jurors 51 and 118. The defendant's objection -- based on his contention that the jurors belonged to protected classes -- was not preserved at trial and the record is, as a result, undeveloped. Because the existing record was insufficient to establish whether the defendant could have rebutted the presumption of propriety accorded to peremptory challenges, see Commonwealth v. Sanchez, 485 Mass. 491, 511 (2020) (under Soares analysis defendant must first overcome presumption of propriety), the defendant's argument falters on the first prong of the familiar test set forth in Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). See Commonwealth v. Alcide, 472 Mass. 150, 165 (2015), quoting Commonwealth v. Collins, 470 Mass. 255, 261 (2014) (attorney "[i]s not ineffective for failing to make an objection that would have been futile under the prevailing case law"); Commonwealth v. Lacoy, 90 Mass. App. Ct. 427, 434-435 (2016) (failure to raise timely Batson challenge resulted in waiver; no

substantial risk of miscarriage of justice where record failed to provide evidence of facts relevant to determination of discriminatory purpose). There was no error in the judge's denial of the motion for new trial on this factually unsupported argument.

Conclusion. The order denying the defendant's revised second motion for new trial is vacated and the case is remanded for such further proceedings as are consistent with this memorandum and order.

So ordered.

By the Court (Green, C.J.,
Hand & D'Angelo, JJ.⁵),



Clerk

Entered: August 12, 2022.

⁵ The panelists are listed in order of seniority.