APPENDIX

A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2020-0111

HAMPDEN SUPERIOR COURT
NO. 0679CR00831

COMMONWEALTH

vs.

BRIAN CAVITT

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S GATEKEEPER PETITION UNDER G. L. c. 278, § 33E

The defendant was convicted of first-degree murder and other charges[1] in 2007. He filed a motion for a new trial in 2010; his appeal from the denial of this motion was consolidated with his direct appeal. We affirmed both his convictions and the denial of the new trial motion in Commonwealth v. Cavitt, 460 Mass. 617 (2011). Now before me is a petition pursuant to the gatekeeper provision of G. L. c. 279, § 33E, seeking leave to appeal the denial of a second motion for a new trial, filed in December of 2019.

Although the notice of appeal and application were not timely filed, see Mains v. Commonwealth, 433 Mass. 30, 36 n.10

[1] Burning of a dwelling house, armed robbery while masked, and assault and battery.

(App. A)

(2000), this court will allow the late filing and consider the petition. I conclude, however, that the defendant has failed to raise a "new and substantial" question justifying further review, and therefore deny leave to appeal the denial of this motion for new trial to the full court. See G. L. c. 278, § 33E ("no appeal shall lie . . . unless . . . it presents a new and substantial question which ought to be determined by the full court").

Background. I briefly summarize the facts from our decision in the defendant's direct appeal that are relevant to the issues raised in the gatekeeper petition. See Cavitt, 460 Mass. at 619-621. At around 8 A.M. on May 5, 2006, the defendant threatened the cashier at a grocery store courtesy desk with a knife and robbed her of several thousand dollars that were kept on hand for Western Union transactions. Two other store employees pursued the defendant outside and through the streets; during the chase the defendant discarded some of his clothes in a dumpster. The three eventually engaged in a physical altercation, after which the defendant fled and attempted, unsuccessfully, to force his way into a passing car. Shortly thereafter the defendant entered a home in a nearby housing project and stabbed the two elderly occupants to death. He then cleaned up in the bathroom before setting several fires in the dwelling. A police officer saw smoke coming from project

at 8:49 A.M. and summoned the fire department. That afternoon, the defendant described what had happened to a neighbor; he was arrested the following day. Although he did not testify at his trial, the defendant stated at sentencing that he had killed the two victims because he "didn't want witnesses."

In the defendant's consolidated appeal of his conviction and the denial of his first new trial motion, he advanced four different arguments. Cavitt, 460 Mass. at 618. First, that his trial counsel had been ineffective for failing to pursue suppression of DNA evidence from a pair of sneakers seized by police from the apartment where the defendant was living. Second, that all evidence from the search of the apartment should have been suppressed because the warrant was based on a tip from an anonymous informant. Third, that a photographic identification from a thirteen-year-old witness should have been suppressed as the result of undue suggestion by the police. Fourth, that the judge erred in allowing the introduction of inconclusive DNA evidence from a gold necklace abandoned by the defendant in the victims' dwelling, without explanatory statistical support. All four arguments were rejected. Id. at 618-619.

Standard of Review. Under G. L. c. 278, § 33E, a defendant whose conviction of murder in the first degree has been affirmed by this court may appeal the denial of a postconviction motion

for new trial only where the defendant presents "a 'new and substantial' issue that this court could not have considered in the course of plenary review." Commonwealth v. Gunter, 459 Mass. 480, 487 (2011). An issue is "new" within the meaning of § 33E if it was not and could not have been addressed at trial or on direct appeal -- as, for instance, when "the applicable law was not sufficiently developed at the time," or when "evidence not previously available comes to light." Id. at 487-488. An issue is "substantial," meanwhile, if it is "a meritorious issue in the sense of being worthy of consideration by an appellate court." Id. at 487.

Discussion. In his gatekeeper petition, the defendant raises six issues related to his trial. I could conclude that none are new and substantial to merit consideration by the full court.

First, the defendant claims that expert testimony and a report introduced at trial both contained a false claim that a match existed between DNA collected from the handle of a knife that was found in the victims' apartment and DNA from one of the victims. The defendant's claim is inaccurate: the allele charts in the report show that although the knife handle did not yield a full DNA profile, what DNA was found was consistent with the victim. (DNA from the knife blade, meanwhile, yielded a full profile matching the victim.) Even if the defendant was

correct, the lack of a match would have made no difference with respect to the central issue in the case, which was the identity of the killer (not the victim).

The second issue raised by the defendant relates to DNA evidence gathered from a black shirt that the Commonwealth claimed was discarded by the defendant during the chase. According to expert testimony at trial, the DNA profile from the shirt came from at least three individuals. The defendant and the woman with whom he lived were "potential contributors," one of the murder victims was "excluded" as a source, and the results for the other victim were "inconclusive." The expert further testified, however, that the probability that a randomly-selected, unrelated individual could have contributed to the profile instead of the defendant was one in one for all racial groups. The defendant's argument appears to be that it was prejudicial to describe him as a "potential contributor" when it was just as likely that the DNA in question came from someone else (especially given that the results for another individual were described as "inconclusive"). Although the expert's testimony may have been confusing, the statistics cited made clear to the jury that this particular DNA test did not actually suggest an affirmative connection to the defendant.

Third, the defendant argues that both the prosecutor and his own attorney falsely claimed in their closing arguments that

DNA from both the defendant and one of the victims was found on the sneakers seized in the apartment where the defendant had been living. In fact this claim was clearly supported by the evidence: there was expert testimony to the effect that both the defendant and one of the victims were included as potential contributors to the mixed DNA profile on the shoes with very low statistical probabilities of the DNA having come from another source. That the DNA link was clearly in evidence is signaled by the fact that the defense counsel saw a need to address it explicitly in his closing argument.

The defendant makes a fourth argument based on a police report containing information from interviews with several witnesses, including a statement from the cashier at the grocery store courtesy counter to the effect that the robber had a "pock marked face." At trial, the cashier denied having told the police this detail. The defendant apparently now argues that the detail of the pock-marked face is a trace left in the police report from an interview with a different eyewitness whose identity was never disclosed. This, the defendant argues, shows that the prosecution withheld material exculpatory evidence (the defendant claims that he does not have a pock-marked face). This argument is, to say the least, entirely speculative. The inaccuracy of the report (provided to the defense to the

discovery) and the discrepancy with the cashier's testimony was something that could have been exploited at trial.

Fifth, the defendant makes an argument for ineffective existence of counsel based on the fact that his lawyer did not inform him of the existence of a statement taken by police from Melissa Cruz and did not call Cruz as a witness. In the statement, which was provided to the defense during discovery, Cruz told police that she saw one of the murder victims twice shortly before he was killed, the second time shortly after 8:34 A.M. The defendant argues that, had Cruz been called as a witness, her testimony would have cast doubt on the chronology of events put forward by the prosecution. The defense attorney did make the argument in his closing that the defendant would not have had enough time to get back from the scene of the crime to the area where he lived by 9 A.M., when he interacted with some of his neighbors. Cruz's testimony could have been marginally helpful to the defendant by narrowing the window of time in which the killing could have occurred, but it was far from disproving the Commonwealth's theory of the case.

Sixth, the defendant argues that the prosecution failed to disclose material exculpatory evidence relating to tests performed for the presence of blood on a reddish stain from a kitchen towel found in the murder victims' home. A criminalistics report turned over during discovery stated only

that a screening test for blood performed on the towel was positive; at trial, however, the criminologist testified on direct examination that, after the screening test, a follow-up antigen test for the presence of human blood was negative, a fact that was not included in the report. The criminologist further explained that certain factors, including heat, could cause a negative antigen test result even when human blood was present. The towel snippet was subsequently submitted for DNA testing, which yielded a match with the defendant. Defense counsel brought up the fact that the negative antigen test result was missing from the report both on cross-examination of the criminologist at trial and in his closing argument. In light of this, and of the subsequent DNA test results, the omission from the report made no material difference at trial.

We have said that the "bar for establishing that an issue is 'substantial' in the context of the gatekeeper provision of § 33E is not high." Gunter, 459 Mass. at 487. None of the issues raised by the defendant, with the possible exception of the failure to call Melissa Cruz as a witness, meets even this low bar. The evidence against the defendant was complex, involving many witnesses and DNA evidence from many items, but cumulatively it was overwhelming. Even if the inconsistencies that the defendant now points to were real, they are minor, and do not cast doubt on his conviction.

Furthermore, none of the issues qualifies as "new" under § 33E. Although the issues were not considered in the defendant's direct appeal, all are based on grounds that were known to both trial and appellate counsel. "The statute requires that the defendant present all his claims of error at the earliest possible time, and failure to do so precludes relief on all grounds generally known and available at the time of trial or appeal." Commonwealth v. Pisa, 384 Mass. 362, 365-366 (1981). The defendant argues that the failure of his appellate counsel to raise any of the above issues in his first motion for a new trial or in his direct appeal constituted ineffective assistance of counsel.[2] But "[r]eframing an omitted issue as an ineffective assistance of counsel claim does not necessarily make it 'new.'" Gunter, 459 Mass. at 490. In any case, following a conviction of murder in the first degree, a defendant challenging his counsel's strategic decision must show that the decision was "manifestly unreasonable" and that it created a substantial likelihood of a miscarriage of justice. See Commonwealth v. Burgos, 462 Mass. 53, 69 (2012). There is no reason to believe that the defendant's appellate counsel was unreasonable in choosing not to focus on any of the issues raised by the defendant in his gatekeeper petition.

[2] The defendant was not represented by the same attorney at trial and for his direct appeal.

For the foregoing reasons, an order shall enter denying the defendant's petition under G. L. c. 278, § 33E.

By the Court,

/s/ Frank M. Gaziano
Frank M. Gaziano
Associate Justice

Entered: September 16, 2021

APPENDIX

B

(CA.1)

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN , ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 06CR831

COMMONWEALTH

vs.

BRIAN CAVITT

HAMPDEN COUNTY
SUPERIOR COURT
FILED
DEC 23 2019
CLERK OF COURTS

ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

The defendant, Brian Cavitt, has filed a lengthy further motion for new trial which alternately regurgitates and/or thinly recharacterizes arguments that have been previously presented to the Superior Court, the United States District Court and to the Massachusetts Supreme Judicial Court. All such prior arguments were considered, and on some occasions reconsidered, and rejected.

As best as can be discerned, the current motion largely focuses on an ineffective assistance claim concerning DNA evidence. Such argument under another disguise has previously been rejected by the SJC and most recently this court. See, *Commonwealth v Cavitt*, 460 Mass. 617, 636 (2011) and Hampden Superior Court docket entry 113 dated November 25, 2016.

The defendant's motion for new trial is **DENIED.**

MICHAEL K. CALLAN
Justice of the Superior Court

DATE: 12/23/19

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n. 12/31/19 Def per his request. (Exp)
(APP. B)

Additional material from this filing is available in the Clerk's Office.