STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: January 13, 2015]

RAYMOND D. TEMPEST, JR.,	:	
Petitioner,	:	
	:	
VS.	:	**No. PM-2004-1896**
	:	
STATE OF RHODE ISLAND,	:	
Respondent.	:	

DECISION

PROCACCINI, J. This matter is before the Court pursuant to the State of Rhode Island's (State) Motion for Summary Disposition to foreclose Petitioner Raymond "Beaver" Tempest, Jr.'s (Petitioner) request for post-conviction relief.

I

Facts and Travel

This case has a long and complex history, beginning with the beating death of Doreen Picard of Woonsocket, Rhode Island on February 19, 1982. (Resp't Mem. 1.) After an initial investigation, the case sat idle for nearly a decade until the State indicted Petitioner on June 5, 1991. (Resp't Ex. 1.) On April 22, 1992, a jury found Tempest guilty of second degree murder, and our Supreme Court upheld that conviction in 1995. Id.

Nine years later, in 2004, Petitioner submitted an application for post-conviction relief seeking modern DNA testing of crime scene evidence under G.L. 1956 §§ 10-0.1-11 and 10-0.1-12. (Resp't Ex. 1.) It is noteworthy that the DNA analysis sought did not exist at the time of Petitioner's trial in 1992. (Resp't Mem. 12.) This Court granted Petitioner's request, and between 2005 and 2013 the Rhode Island Department of Health (RIDOH) and Orchid Cellmark

conducted DNA testing and comparison on multiple hairs recovered at the scene of the Woonsocket attack. On March 29, 2014, Petitioner filed a seventy-seven page amended application for post-conviction relief (PCR Application) requesting that the Court vacate the 1992 judgment. Id. Since that time, the parties have held numerous conferences; several scheduling orders have been entered, the last scheduling a hearing date for February 2, 2015, and the number of attorneys representing the parties has grown to twelve, eight representing Petitioner and four representing the State. The Court has been actively engaged in scheduling the matter, including a full evidentiary hearing that is expected to last at least two weeks. Now, within thirty days of the hearing, the State asks this Court to hear and consider requests for summary judgment on every claim raised in Petitioner's expansive PCR Application. For the following reasons, the Court declines to hear and decide the State's motion without prejudice.

II

Standard of Review

General Laws Section 10-9.1-6(c) empowers this Court to grant summary disposition of an application for post-conviction relief "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Sec. 10-9.1-6(c)). In deciding such a motion, this Court applies the same standard as when deciding summary judgment under Super. R. Civ. P. 56. See Palmigiano v. State, 120 R.I. 402, 406, 387 A.2d 1382, 1385 (1978). The preliminary question before the Court is whether there is a genuine issue as to any material fact which must be resolved. See R.I. Hospital Trust Nat'l Bank v. Boiteau, 119 R.I. 64, 376 A.2d 323 (1977); O'Connor v. McKanna, 116 R.I. 627, 359 A.2d 350 (1976). If an examination of the evidence, viewed in the light most

favorable to the opposing party, reveals no such issue, then the petition is ripe for summary judgment. See R.I. Hospital Trust Nat'l Bank, 119 R.I. at 66, 376 A.2d at 324; Harold W. Merrill Post. No. 16 Am. Legion v. Heirs-at-Law, Next of Kin and Devisees of Smith, 116 R.I. 646, 360 A.2d 110 (1976). When the moving party sustains its burden, the opposing party must then prove "by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." See Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996); see also McAdam v. Grzelczyk, 911 A.2d 255, 259 (R.I. 2006). The trial justice must keep in mind that summary judgment '"is a drastic remedy and should be cautiously applied."' See Steinberg v. State, R.I., 427 A.2d 338, 339–40 (R.I. 1981) (quoting Ardente v. Horan, 117 R.I. 254, 366 A.2d 162, 164 (R.I. 1976)). The purpose of summary judgment "is not to cull out the weak cases from the herd of lawsuits waiting to be tried . . . only if the case is legally dead on arrival should the court take the drastic step of . . . granting summary judgment." See Mitchell v. Mitchell, 756 A.2d 179, 185 (R.I. 2000).

III

Analysis

A

Timing and Judicial Economy

On December 16, 2014, the State informed the Court that it intended to submit a comprehensive motion for summary disposition on December 24, 2014. At that time, the Court advised the State that the timing of the motion could interfere with judicial expediency and impact the Court's ability to fully consider the issues presented. Undeterred, the State submitted its motion accompanied by a seventy-page memorandum and forty (40) voluminous exhibits. As

a threshold consideration, the sheer volume, timing, and breadth of the filing will almost certainly derail the speedy resolution of this matter.[1] Fairness dictates that the Court must afford Petitioner a proper opportunity to respond, which would inevitably delay the impending evidentiary hearing. This Court entered a scheduling order on June 11, 2014, with the full agreement and participation of counsel for both parties. That order sets the hearing date for February 2, 2015. Given the highly complex nature of this case, the Court is reluctant to vacate the hearing date, which was mutually agreed upon by both Petitioner and the State.[2]

This Court has broad authority to exercise its negative discretionary function to deny summary judgment in favor of a full hearing on the merits where, as here, fairness and the interest of justice commands.[3] See Nichola v. John Hancock Mut. Life Ins. Co., 471 A.2d 945 (R.I. 1984) (finding no abuse of discretion where a trial justice declined to decide a motion for summary judgment due to the motion's proximity to trial); McInnis v. Harley-Davidson Motor Co., 625 F. Supp. 943, 958 (D.R.I. 1986) (finding "[t]he court, in addressing summary judgment motions, has a certain 'negative discretion' which it may exercise in the interests of fundamental fairness.") Moreover, a Court may pass on a motion for summary judgment where there is reason to believe that the wiser course would be to proceed to trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L.Ed. 2d 202 (1986); Woods v. Robb,

[1] This motion was filed in the middle of the statutorily mandated Superior Court recess, which concluded on January 2, 2015.

[2] The timing of the State's motion may ultimately contribute to undermining its own laches argument, which requires the State to demonstrate that Petitioner's unreasonable delay has caused the State substantial hardship.

[3] The Rhode Island and federal rules governing summary judgment are nearly identical. Accordingly, this Court looks to federal law for guidance. See Hall v. Kuzenka, 843 A.2d 474, 476 (R.I.2004) ('"[W]here the Federal rule and our state rule are substantially similar, we will look to the Federal courts for guidance or interpretation of our own rule."' (quoting Heal v. Heal, 762 A.2d 463, 466–67 (R.I. 2000)).

171 F.2d 539, 541 (5th Cir. 1948) (holding that a court may proceed to trial where a dormant motion is raised immediately prior to a fixed date for trial). In light of persistent scheduling difficulties, the February 2, 2015 hearing date, and the diminished procedural utility of the motion, the Court finds that fairness and judicial economy weigh heavily in favor of declining to decide the motion for summary disposition filed by the State.

B

Factual Complexity and Genuine Issues

This Court is mindful that the Petitioner bears a heavy burden in his pursuit of post-conviction relief. Based upon extensive conferencing and review of the pre-hearing material (which fills five, six-inch binders), this post-conviction relief matter is complex, scientifically and factually, and, in this Court's carefully considered opinion, poorly suited to summary disposition at this time. It is well established that summary judgment is typically only appropriate where the remaining unresolved disputes are primarily legal, rather than factual. See Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331 (R.I. 1992); Thomas v. Metropolitan Life Ins. Co., 631 F.3d 1153, 1160 (10th Cir. 2011). The Court's review of the State's memorandum in support of its motion for summary disposition provides additional support for the Court's conclusion that summary judgment is not appropriate in this matter.

For example, the State asks the Court to accept its characterization of certain evidence as uncontested fact, when it is clear from even a cursory reading that many of the State's characterizations are drawn inapposite to the record. In one instance, the State seems to seek to undermine the weight and credibility of the trial testimony given by the Deputy Chief Medical Examiner of the State of Rhode Island Arthur Burns, the State's own witness, regarding the position and condition of the victim's hands. (Resp't Mem. 15; Pet'r Mem. 17.) To resolve this

inconsistency, the Court must necessarily weigh the evidence, which it cannot do on a motion for summary disposition.[4] See Superior Boiler Works, Inc. v. R. J. Sanders, Inc., 711 A.2d 628, 631, 36 UCC Rep.Serv.2d 1031 (R.I. 1998).

Similarly, the Petitioner has alleged that land records discovered after his conviction conclusively demonstrate that State's witness, Ronald Vaz, fabricated testimony. (Pet'r Mem. 20.) In response, the State argues that these records were discoverable at the time of trial and should therefore be barred. (Resp't Mem. 22.) However, there are detailed allegations before the Court of police tampering and ineffective assistance of counsel supported, at least in part, by trial excerpts and affidavits. See, e.g., Pet'r Mem. 25-76. Therefore, this Court is reluctant to definitively rule as to whether any particular information was "discoverable" during a period of alleged obfuscation. It has been said:

> "[s]ummary Judgment procedure is not a catch-penny contrivance to take unwary litigants into its toils and deprive them of a trial; it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer at trial; it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." (Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940)).

[4] Petitioner avers, inter alia, that two new pieces of evidence have been discovered that establish his actual innocence. (Pet'r Mem. 15-20.) The parties seem to agree that mitochondrial DNA testing ordered by this Court conclusively proves that hairs obtained at the scene of the crime do not match that of Petitioner, but the weight of this evidence remains largely unresolved. The State avers that the DNA evidence cannot make out a meritorious claim, because there is no indication that the victim pulled hairs from her attacker's head. (Resp't Mem. 14-16.) However, this argument is, by its very nature, fact intensive and highly disputed. The Petitioner has submitted trial testimony from the State's witness, Medical Examiner Burns, that the hair was found in the clutches of the victim's fingers, and that the victim's hands were manipulated in such a way as to imply the hairs were pulled. Alternatively, the Court also has evidence before it that the hairs were cut rather than pulled in a violent action. (Resp't Mem. 15.) Without proscribing weight to this evidence, it is clear from the record that a genuine issue of material fact persists as to whether this DNA evidence is of the kind that could have changed the outcome at trial.

IV

Conclusion

If there is one uncontroverted fact in this case, it is that the Petitioner has been incarcerated for twenty-three years. He now seeks to avail himself of a post-conviction procedure that provides a full and fair hearing on multiple issues related to his conviction, including DNA test results that identify that hair belonging to someone other than the Petitioner was found in the hand of the victim. The State's motion for summary judgment is untimely, will surely result in a lengthy delay of this hearing, and raises, in part, issues that are simply not appropriate for summary judgment. The best use of this Court's time and resources is to prepare for the post-conviction relief hearing scheduled for February 2, 2015. For the foregoing reasons, this Court declines to decide the State's Motion for Summary Disposition.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Raymond D. Tempest, Jr. v. State of Rhode Island
CASE NO:	PM-2004-1896
COURT:	Providence County Superior Court
DATE DECISION FILED:	January 13, 2015
JUSTICE/MAGISTRATE:	Procaccini, J.
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