IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Robert Smith Jr.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 21 C 1159
	)	
The City of Chicago, Former CPD Superintendent Phillip Cline, Detective Daniel McWeeny, Detective Steven Brownfield, Detective William Pedersen, Detective John Solecki, Detective Robert Dwyer, The Estate of John A. Yucaitis, The Estate of William Higgins, and The Estate of Robert Rice,	)	Judge Ronald A. Guzman
	)	
	)	Magistrate Judge M. David Weisman
	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' JOINT MOTION FOR LEAVE TO CONDUCT DNA TESTING AND FOR LEAVE TO REQUEST THE CIRCUIT COURT OF COOK COUNTY TO RELEASE CERTAIN IMPOUNDED EVIDENCE TO DEFENDANTS' DNA EXPERT

This matter coming before the Court on Defendants' Joint Motion for Leave to Conduct DNA Testing and for Leave to Request the Circuit Court of Cook County to Release Certain Impounded Evidence to Defendants' DNA expert (Dkt. 133), due notice given, and the Court having considered Plaintiff's Opposition to Defendants' DNA Motion (Dkt. 140) and Plaintiff's Status Report regarding same (Dkt. 146), the Court orders as follows:

1. Defendants' Joint Motion for Leave to Conduct DNA Testing and for Leave to Request the Circuit Court of Cook County to Release Certain Impounded Evidence to Defendants' DNA expert is granted in part;

GROUP EXHIBIT A

2. Subject to approval of the Circuit Court of Cook County as described in paragraph 4, *infra*, Defendants (through their expert DNA Labs International) are allowed to conduct DNA testing on the following items of evidence:

a. Blue Undershorts (CPD Inventory No. 428528; People's Ex. 57);

b. Black Socks (CPD Inventory No. 435436; People's Ex. 49);

c. Swabs – left and right foot (CPD Inventory No. 520272; People's Ex. 55);

d. White Handkerchief and Black Plastic Card Case (CPD Inventory No. 428527; People's Group Ex. 59);

e. Green Jacket (CPD Inventory No. 428530);

f. Extracts of the evidence contained in CPD Inventory No. 438315 (which in this instance means "cuttings"), which cuttings are currently in the possession of the Evidence and Recovered Property Section of the Chicago Police Department.

g. Extracts contained in Inventory No. 448106 (which in this instance means "blood vials"), which blood vials are currently in the Impounded Evidence.

3. Defendants' expert DNA Labs International is allowed to use the blood in the blood vials (Inventory No. 448106) to create a DNA profile for the victims Edith Yeager and Willie Bell Alexander, and for Robert Smith to compare to the evidence listed in paragraph 2a-2f of this Order.

4. Defendants are granted leave to request the Circuit Court of Cook County to release the impounded evidence identified in paragraph 2a through 2e and paragraph 3 of this Order to Defendants' retained expert, DNA Labs International. Nothing in this Order should be construed as directing the Circuit Court of Cook County to grant defendants' forthcoming motion to release the impounded evidence to Defendants' DNA expert. The sole purpose of this Order is to enter a ruling rejecting Plaintiff's federal arguments opposing Defendants' requests in their Motion (Dkt 133) and

allowing Defendants to conduct DNA testing of the impounded evidence in the federal litigation if the Circuit Court of Cook County grants the defendants' forthcoming motion and orders the release of the impounded evidence identified in paragraph 2a through 2e and paragraph 3.

5. After the parties execute on the Agreed Viewing Order entered contemporaneously with this Order, the Evidence and Recovered Property Section of the Chicago Police Department is ordered to send to DNA Labs International CPD Inventory No. 438315, and DNA Labs is allowed to conduct DNA testing on the evidence contained therein.

6. If the Circuit Court of Cook County grants Defendants' forthcoming motion to release the impounded evidence to Defendants' DNA expert, DNA Labs International shall follow established procedures for processing evidence and will inventory, document, and photograph the items before testing. Testing shall proceed as follows:

a. DNA Labs will follow the technical specifications currently in place at DNA Labs relative to all testing of the evidence.

b. During testing, DNA Labs shall consume no more of the item than is necessary to obtain a result.

c. If it is necessary to consume an entire item to obtain a result, DNA Labs will refrain from doing so until it receives a further Court Order.

d. All extracts, cuttings, and evidence from paragraph 2 above, ordered for transfer by the Circuit Court, if any, that are not consumed during testing shall be returned to the Circuit Court of Cook County for purposes of re-impounding the evidence.

7. As stated on the record during the hearings before this Court on January 7, 2022 and January 12, 2022, this Court rejects the arguments raised in Plaintiff's Opposition to Defendants' DNA Motion (Dkt. 140) and Plaintiff's Status Report regarding same (Dkt. 146). Without limiting

the generality of the foregoing, among other things, this Court specifically finds as follows: (a) Defendants' Joint Motion to Conduct DNA Testing is timely; (b) the testing Defendants request is relevant to this federal case; (c) the testing requested by Defendants constitutes expert discovery; (d) this Court rejects plaintiff's jurisdiction, abstention, and comity arguments raised in his briefs and during oral argument; (e) 725 ILCS 5/116-3 and 725 ILCS 5/116-4 are procedural rules that do not apply in federal court and do not preclude Defendants from testing the impounded evidence for purposes of this federal case, but this Court has not ruled and does not opine on whether the 725 ILCS 5/116-3 and 725 ILCS 5/116-4 are relevant to the Circuit Court's decision to release impounded evidence for such tests; and (f) under the Federal Rules of Civil Procedure, Defendants need not establish the chain of custody or absence of contamination for purposes of testing the evidence identified in this motion as part of expert discovery, although Plaintiff is free to raise any such arguments (1) before the Circuit Court of Cook County; and (2) during pretrial and trial proceedings before this Court. This Court makes no ruling on the admissibility of the results of any of the evidence subject to this Order.

ENTERED THIS 14th, DAY OF

January 2022.

M. David Weisman

Honorable Judge M. David Weisman

2022 WL 458729
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

Robert SMITH Jr., Plaintiff,
v.
CITY OF CHICAGO, et al., Defendants.

No. 21 C 1159
|
Signed 02/15/2022

Attorneys and Law Firms

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Paul A. Michalik, Reiter Burns LLP, Stacy Ann Benjamin, Rock Fusco & Connelly, LLC, Chicago, IL, for Defendant Robert Estate of Rice.

MEMORANDUM OPINION AND ORDER

Ronald A. Guzmán, United States District Judge

***1** Plaintiff's objections to the magistrate judge's January 14, 2022 order [163] are overruled. Plaintiff's motion for leave to file an oversized reply brief [190] is granted.

STATEMENT

Background

The Court assumes familiarity with the background facts of this case. Briefly, Plaintiff was convicted of the 1987 murders of his mother-in-law and grandmother-in-law. In 2020, Plaintiff's conviction was vacated, the charges against him were dismissed, and he received a Certificate of Innocence from the Circuit Court of Cook County. The instant case is Plaintiff's civil-rights action against several police officers and one assistant state's attorney, alleging that they coerced his confession, planted evidence, and fabricated evidence against him, among other things.

After granting one extension, the Court set the fact-discovery cutoff date in this case for January 21, 2022. On December 23, 2021, Defendants moved for leave to conduct DNA tests on several pieces of evidence being held by the Circuit Court of Cook County and the Chicago Police Department ("CPD"). The magistrate judge conducted two hearings on Defendants' motion; Plaintiff has attached the transcripts of these hearings to his objections. On January 14, 2022, the magistrate judge granted Defendants' motion, allowing DNA testing to proceed on the following evidence: blue undershorts; black socks; foot swabs; a white handkerchief and black plastic card case; a green jacket; extracts of evidence contained in the CPD evidence inventory; and extracts (blood vials) impounded with the Clerk of the Circuit Court. Defendants then moved the Circuit Court of Cook County to release the impounded evidence, but the presiding state-court judge agreed with Plaintiff's request to postpone release until this Court rules on Plaintiff's objections to the magistrate judge's ruling.

Plaintiff argues that the magistrate judge should have denied Defendants' request for DNA testing for the following reasons: the DNA evidence is neither relevant nor proportional to any disputed issue of material fact; Defendants' request was untimely; Defendants' request did not comply with Illinois law governing DNA testing in postconviction proceedings; and Defendants were required to "establish some minimal chain of custody sufficient to prove that the evidence has not been tampered with, altered, or contaminated in some material

respect." (Pl.'s Objs., Dkt. # 163, at 3.)

Standard

For non-dispositive matters, a district court may only reverse a magistrate judge's order when it is "clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). Thus, "the district court can overturn the magistrate judge's ruling only if the district court is left with the definite and firm conviction that a mistake has been made." *Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d 926, 943 (7th Cir. 1997). This Court's conclusion that it would have decided the matter differently provides an insufficient reason to overturn the magistrate judge's decision. *Pinkston v. Madry*, 440 F.3d 879, 888 (7th Cir. 2006). Rather, under the clear-error standard, reversal is appropriate only when the magistrate judge's decision strikes this Court "as wrong with the force of a 5[-]week[-]old, unrefrigerated, dead fish." *S Indus., Inc. v. Centra 2000, Inc.*, 249 F.3d 625, 627 (7th Cir. 2001).

Analysis

***2** Relevance. Regarding the relevance and proportionality of the DNA evidence, Plaintiff asserts that DNA has never been an issue in this case. Plaintiff notes that although DNA testing was used by the CPD during the two years preceding his criminal trial,[1] no DNA testing was conducted on the evidence in Plaintiff's criminal case, either for the trial or during the postconviction proceedings. Thus, Plaintiff contends, because both sides agree that he arrived at the crime scene several hours after the murders occurred and "ended up on the floor" where the murders were committed, the fact that he had the victims' blood on him does not indicate that he is guilty.

However, given Defendants' position that they intend to show that Plaintiff committed the murders, the Court can see no basis on the current record for not allowing Defendants the ability to make their case. For example, Defendants point out that they are seeking testing on the pair of blue undershorts that were found at the scene and which Plaintiff claims the police planted. Although Plaintiff stated in his (purportedly coerced) confession that the undershorts were his, Defendants note that at his deposition in this case, Plaintiff testified that the underwear could be that of the son of one of the victims.[2] Defendants also seek to test swabs that were taken from the soles of Plaintiff's feet after the murders. According to Defendants, the swabs contain human blood, and "Plaintiff has never offered a plausible theory how the blood of the victim(s) got on the bottom of his feet if he isn't guilty." (Defs.' Resp., Dkt. # 180, at 7.) In any event, the relevance determination is premature given that it is not clear that Defendants will seek to rely on the DNA evidence at trial.

Timeliness. With respect to Plaintiff's argument that Defendant's request was untimely, the Court finds no clear error. The magistrate judge concluded that timeliness was not an issue because Defendant's request falls under the rubric of expert discovery given that Defendants are requesting evidence for examination by their expert, and expert discovery is ongoing. To the extent Plaintiff needs additional time beyond the previously set dates to conduct his own DNA testing and inquiry into the chain of custody,[3] it may seek such relief before this Court.

***3** Chain of custody. Nor is the Court left with a firm conviction that the magistrate judge was mistaken in concluding that he was not bound by state procedural rules in granting Defendants' request to seek release of the DNA evidence. Plaintiff argues that before granting Defendants request, the magistrate judge should have required Defendants to comply with the Illinois Code of Criminal Procedure, which states that a party moving to test DNA evidence collected by a criminal justice agency must present "a prima facie case that ... the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect." 725 ILCS 5/116-3(b)(2). The statute, however, begins by stating that "[a] *defendant may make a motion before the trial court that entered the judgment of conviction* in his or her case" for forensic evidence. *Id.* § 5/116-3(a) (emphasis added). Thus, the magistrate judge accurately concluded that the statute was inapplicable to Defendants' request in federal court. Any argument regarding compliance with the Illinois Code of Criminal Procedure should be made before the state-court judge.

Plaintiff's citation to 725 ILCS 5/116-4(d-10) does not persuade the Court otherwise. That section is entitled "[p]reservation of evidence for forensic testing," and subsection (d-10) provides that "[a]ll records documenting the possession, control, storage, and destruction of evidence and all police reports, evidence control or inventory records, and other reports cited in this Section, including computer records, must be retained for

as long as the evidence exists and may not be disposed of without the approval of the Local Records Commission." 725 ILCS 5/116-4(d-10). Not only is the Local Records Commission an Illinois state entity, it is not clear how the section applies here or supports a finding that the magistrate judge's ruling was in error.

Finally, to the extent that Plaintiff argues that even if the magistrate judge was correct in concluding that the requirements set forth in the Illinois Code of Criminal Procedure do not apply to Defendant's request at issue before this Court, "Defendants should still be required, as a pre-requisite to DNA testing, to establish some minimal chain of custody sufficient to prove that the evidence has not been tampered with, altered, or contaminated in some material respect." (Pl.'s Objs., Dkt. # 183, at 3.) The Court sees no basis on which to make this determination prior to any testing taking place, and indeed, any effort in that regard could significantly delay the progress of this case. If Plaintiff wants to challenge chain of custody, it may seek rebuttal expert testimony in that regard and present it either in some type of pretrial motion or at trial.

For these reasons, Plaintiff's objections to the magistrate judge's January 14, 2022 order are overruled.

All Citations

Not Reported in Fed. Supp., 2022 WL 458729

Footnotes

1 Defendants contest that DNA testing "was prevalent in 1987 or 1990." (Defs.' Resp., Dkt. # 180, at 7.)

2 Defendants also state in a subsequent section of their response brief that while the Special Prosecutor informed the Circuit Court that a primary basis for his dismissing the charges against Plaintiff was due to concerns related to the recovery of the undershorts and the absence of any photos of the undershorts at the crime scene, Defendants have a photo taken by the Chicago Fire Department on the morning of the murders "depicting the underwear exactly where the detectives reported they found them, refuting Plaintiff's allegation that they were planted." (Defs.' Resp., Dkt. # 180, at 9.)

3 Plaintiff contends that he should be able to pursue other "fact" discovery during the expert discovery period, stating:

> [O]ur arson expert wants to know how much gasoline was in the gas can when recovered, which is relevant to Smith's purported confession stating he spread gasoline all over the house (while in fact the evidence actually shows it was poured only on the sofa). We didn't pursue that question in the nine months discovery was open, but we want to now; therefore, we are going to send third-party deposition subpoenas to each of the firefighters at the scene to see if one of them remembers. Also, our police practices expert has asked for a long list of department rules and regulations we failed to ask for during fact discovery, but he really, really wants to see them, so we are just going to serve a document request today for the "expert evidence" we failed to obtain during fact discovery. It's not a big deal because the March 13 return date is well before the April 1 expert discovery cutoff.

(Pl.'s Reply, Dkt. # 189, at 6.)

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ROBERT SMITH, JR.,	)	
	)	**Case No. 21 C 1159**
Plaintiff,	)	
	)	**Magistrate Judge M. David Weisman**
v.	)	
	)	
THE CITY OF CHICAGO, et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

The case is before the Court on Defendants' Joint Motion to Reconsider the Denial of Defendants' Joint Supplemental Motion to Release Standards and Extracts at the Forensic Services Division and Nail Clippings at ERPS to Defendants' DNA Expert to Conduct Forensic Testing [ECF 195]. For the reasons explained herein, the Court denies the motion in part, and grants the motion in part.

Background

The matter involves allegations that the plaintiff was wrongfully convicted of a double-homicide and framed by various defendants, resulting in plaintiff's incarceration for 33 years, one month, and seven days. ECF 82 at 2. Plaintiff sought, and eventually received a certificate of innocence in state court and filed this lawsuit to be compensated for the damages he alleges were caused by the defendants. *See id.* at 3–4.

Fact discovery closed on January 20, 2022. ECF 120. In the run-up to that closing date, defendants filed a motion to secure certain physical evidence being held by the Chicago Police Department as well as physical evidence being held by the Circuit Court of Cook County, and to allow that evidence to be examined as part of defendants' expert discovery process. *See* ECF 133. In short, defendants were seeking DNA evidence that might implicate the plaintiff in the double-murder that he has since been exonerated of committing.

The Court granted defendants' request to allow access to the physical evidence and for testing of the same. ECF 152. Specifically, defendants sought to secure "the 'cuttings' the original CPD serologist took from the clothing the City Defendants' sought to test [for DNA purposes], including the blue undershorts, black socks, white handkerchief, and green jacket." ECF 173 at 2. Through the cuttings, the defendants hope to show that certain clothing belonging to the defendant was exposed to blood belonging to the victims.

In securing a court order to allow the transfer of physical evidence and DNA testing of Chicago Police Department Inventory #438315, defendants operated under certain beliefs as to where particular physical evidence would be found. As it turns out, these presumptions were not correct. When all counsel went to examine the evidence envelope for Inventory #438315, the cuttings of plaintiff's clothing were not found. *Id.* Instead, located in Inventory #438315 were the "victims' fingernail clippings taken at the morgue" during autopsies. *Id.* at 3–4. As defendants explain, they "did not reference the fingernail clippings in their original motion for DNA testing because they did not know the clippings still existed until they viewed Inventory No. 438315 on January 20, 2022." *Id.* at 4.

As to the cuttings, because DNA testing was not used at the original criminal trial, defendants hope that expert discovery, vis a vis DNA testing, will connect plaintiff's clothing to the blood of the victims, which defendants presume will be found on plaintiff's clothing. Yet, this DNA connection would not be nearly as devastating to the plaintiff's case as one might think. First, the victims and the plaintiff were related. Plaintiff was their son-in-law and grandson-in-law and had been in the residence on multiple occasions. *See* ECF 82 at 6, 7; ECF 160, Exhibit 1 at 16, 231, 233. Moreover, plaintiff alleges detectives fabricated bloody underwear found at the crime scene in an effort to frame plaintiff in 1987 (ECF 82 at 18-19) and that the police threw him to the floor where the victims had been killed the day of the murders in 1987 as an explanation for blood being present on his clothes and body (ECF 160, Exhibit 1 at 243, 249). Thus, from plaintiff's standpoint, the DNA connection does not have nearly the negative implications as one might normally expect. Finally, the issue of the cuttings was known to all parties. Christine Anderson, the serologist who created the cuttings, was deposed about her practice of creating the cuttings, and her knowledge of the preservation of the cuttings since the original forensic investigation. *See* ECF 195, Exhibit 15.

As to the fingernail clippings, the same cannot be said. Neither side was aware of the clippings' existence. Neither side developed any background information that might explain why the plaintiff's DNA might be found in the clippings (if in fact such DNA material is found there). In fact, defendants had never even disclosed the existence of the "clippings" because defense counsel were not aware of the clippings' existence until they discovered them on January 20, 2022.

Original Rulings

When defendants first presented their motion to allow DNA testing of the clothing cuttings, this Court granted the motion over plaintiff's vigorous objections. *See* ECF 140. Among the many objections raised by plaintiff, the one that is most relevant at this juncture is plaintiff's concern as to the chain of custody for the cuttings. *Id.* at 16–25. Despite plaintiff's objections, this Court allowed defendants to secure the physical evidence from the Chicago Police Department and subject the cuttings to DNA testing. ECF 152. While neither side argued this point, much of this Court's consideration as to plaintiff's chain of custody objections was informed by the presumption of regularity, as explained in cases such as *United States v. Tatum*, 548 F.3d 584 (7th Cir. 2008), *United States v. Prieto*, 549 F.3d 513 (7th Cir. 2008), *United States v. Scott*, 19 F.3d 1238 (7th Cir. 1994), and *United States v. Lott*, 854 F.2d 244 (7th Cir. 1988). The Court presumed that defendants' representations of the handling and custody of the cuttings were true. And, despite plaintiff's concerns on this point, the presumption of regularity would apply in guiding the admissibility of the cuttings at trial.

Second Motion for Inspection and DNA Testing

After all counsel determined that the cuttings were not where they had supposed, defense counsel did some more investigating and again sought an order from this Court to conduct similar DNA examination on the cuttings, having now determined that those cuttings should be located in an envelope at the Forensic Services Division of the Chicago Police Department. ECF 173 at 3. In addition to this request, defendants also sought permission to conduct similar DNA testing on the fingernail "clippings," which to everyone's surprise were located in Inventory No. 438315. *Id.* at 3–4.

This Court then heard argument on this motion and denied both of defendants' requests. We again considered the presumption of regularity, this time explicitly explaining our assessment of that doctrine on the record. *See* ECF 187. We also considered issues of Federal Rule of Civil Procedure 26(a)(1) disclosure requirements and prejudice to the plaintiff, ultimately concluding that the motion for DNA testing as to both the cuttings and the clippings would be denied. ECF 186.

Third Motion for Inspection and DNA Testing

Not satisfied with this Court's ruling, defendants filed a motion to reconsider, arguing that the presumption of regularity would support admission of both the cuttings and the clippings. ECF 195 at 10.

Analysis

Motions to reconsider serve a limited function, to be used "where 'the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension.'" *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir.1990) (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va.1983)). The parties may not introduce evidence previously available but unused in the prior proceeding or tender new legal theories. *See In re Prince*, 85 F.3d 314, 324 (7th Cir.1996). In the instant case, this Court's reliance on the presumption of regularity, a theory or issue that neither party suggested nor relied upon, provides a sound basis for a motion to reconsider.

As to the clippings, however, even upon reconsideration, we are confident that our decision to bar DNA testing was appropriate because the clippings (unlike the cuttings) suffer from a more fundamental issue. The clippings were never disclosed by the defendants in the discovery process. To address the lack-of-disclosure concerns, the defendants argued: 1) their practice in these types of cases is to wait to examine the physical evidence until the end; 2) plaintiff was equally as able to have requested an examination of Inventory #438315 and could have discovered the clippings if he had done so; and 3) there is no prejudice to plaintiff because of this late disclosure.[1]

[1] The first two arguments were made in response to the Court's question at the motion hearing. The third argument was included in defendants' motion to reconsider. *See* ECF 195 at 14.

> Federal Rule of Civil Procedure 26(a)(1)(A)(ii) requires, in part, disclosure of the following:
>
> [A] copy—or a description by category and location—of all documents, electronically stored information, and *tangible things* that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses[.]

Defendants concede the clippings were not "disclosed" until they were "found" on January 20, 2022. This 'disclosure' is simply not timely. Moreover, the defendants do not offer any reasonable explanation for the delay. Defendants' prior practices are an explanation but not a suitable justification for the current situation. The fact that plaintiff was able to request an earlier examination of Inventory #438315 is not the point. Rule 26 does not require the plaintiff to dig around a huge discovery production, seek court orders, and the like to identify evidence that defendants themselves did not know existed. Finally, there is prejudice to plaintiff as to the late disclosure of the clippings. If the parties were aware of the clippings at the onset of the case, both sides would have had the opportunity to explore how plaintiff's DNA may have been transmitted to the victims' fingernails. Again, this is not a case where the plaintiff and murder-victims did not know each other, had never had contact, etc. In addition to a dereliction of their discovery obligations, the defendants' late disclosure of the clippings also creates a level of potential prejudice that properly timed disclosure would have completely obviated. For all of these reasons, this Court reaffirms that as a matter of discovery management, this Court will not allow expert discovery as requested in defendants' motion to proceed on the clippings.

As to the cuttings, however, after further consideration, we find that defendants should be able to proceed with inspection and expert discovery as to possible DNA findings. Here's why. The Court's reliance on the presumption of regularity was misplaced. That doctrine involves admissibility of evidence at trial. *United States v. Scott*, 19 F.3d 1238, 1245 (7th Cir.1994) (presumption of regularity applied to admission of physical evidence at trial); *United States v. Tatum*, 548 F.3d 584, 587 (7th Cir. 2008) (presumption of regularity applied to admission of crack cocaine at trial); *United States v. Dewitt*, 943 F.3d 1092, 1098 (7th Cir. 2019) (same as to cellphone). The presumption of regularity is not a discovery concept or mandate. This is an important distinction.

This Court's sole authority is to manage discovery. True, this Court's decisions in the discovery process may impact the evidence used at trial. However, in making discovery decisions, this Court should be focused on the discovery process. Unlike the clippings, which were not disclosed in any meaningful way (and thus violated discovery obligations), the existence of the cuttings was well known by all the parties. The parties engaged in discovery regarding how the forensic scientist created the cuttings. *See* ECF 195 at 4–5; ECF 187 at 20. In fact, the plaintiff has laid out an extensive amount of evidence that he has obtained in the discovery process as to how the cuttings were (or were not) properly maintained over the years. *See* ECF 197 at 8–10.

While plaintiff presses arguments as to disclosure and prejudice, the evidence simply contradicts these arguments. *See e.g.*, ECF 195, Exhibit 15 at 63 (plaintiff's counsel's detailed and informed questioning of Christine Anderson regarding the extracts of clothing that are at issue here). Plaintiff was aware of the cuttings and was able to conduct meaningful discovery as to the chain of custody of those cuttings.

In short, there is nothing about the discovery process that has been implicated by defendants' incorrect identification of the cuttings' location. Therefore, my decision to not allow examination and DNA testing of RD #J403385 was erroneous for two reasons. First, the legal reasoning I applied was incorrect. The presumption of regularity informs evidentiary decisions at trial, not discovery obligations. Second, plaintiff has been able to explore issues related to the chain of custody. Plaintiff's counsel's work on this point may ultimately rule the day, and he may convince the trial court that certain evidence should not be admitted at trial. But, again, that is a decision for trial, not a discovery issue. This Court's reliance on presumption of regularity put the evidentiary cart before the discovery horse, and that was error. Defendant's motion for reconsideration as to allowing inspection and DNA testing of the cuttings is therefore granted.

Conclusion

For the reasons stated above, the Court denies in part, and grants in part, defendants' motion to reconsider (ECF 195). The parties shall confer and send a proposed order to Proposed_Order_Weisman@ilnd.uscourts.gov by March 25, 2022. If parties cannot come to an agreement, they shall each submit their own respective proposed order, copying opposing counsel, for the Court's consideration. The Court will rule by mail following review of the proposal(s).

SO ORDERED.

ENTERED: March 18, 2022

M. David Weisman

M. David Weisman
United States Magistrate Judge