Affirmed and Memorandum Opinion filed July 6, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01047-CR

ANDRES VENTURA MEJIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 829363

M E M O R A N D U M O P I N I O N

Appellant Andres Ventura Mejia challenges the trial court's denial of his motion for post-conviction DNA testing. We affirm.

Background

Deputy Terry Bernard of the Harris County Sheriff's Department was working at Funplex Amusement Center on November 20, 1999, when he noticed a pick-up truck parked away from all of the other vehicles. Deputy Bernard approached the vehicle and observed the complainant and the appellant in the front passenger side of the truck.

Looking through the window, Deputy Bernard observed that the complainant was lying on her back in the front passenger seat and was nude except for her shirt, which was pulled up over her chest. Deputy Bernard also observed the appellant, who was kneeling on the passenger floorboard and had his shirt unbuttoned and his pants pulled down around his thighs. Appellant was "leaning over and pressed against [the complainant's] nude body, and it appeared he was having sexual intercourse with her." Deputy Bernard knocked on the truck's window, and when he ascertained that the complainant was under the legal age of consent, Deputy Bernard asked appellant to leave the vehicle and placed the appellant under arrest.[1]

Appellant was charged with aggravated sexual assault of a child. On March 2, 2000, he pled guilty and was sentenced to 12 years' confinement. On October 13, 2006, appellant filed an original motion for post-conviction DNA testing pursuant to Chapter 64 of the Texas Code of Criminal Procedure, and included a signed affidavit. Neither the motion nor the affidavit included all of the elements necessary to pursue a claim under Chapter 64. *See* Tex. Code Crim. Proc. Ann. § 64.01(a) (Vernon Supp. 2009).[2] Appellant filed an amended motion for post-conviction DNA testing on April 17, 2008. The trial court conducted a hearing on this motion on September 4, 2008. His motion requested DNA testing of a "sexual assault kit, clothing, blood stain card and panties cutting;" it became clear at the hearing that appellant specifically was seeking testing of blood found on complainant's panties. The trial court noted that the statutorily required affidavit was absent from appellant's motion. The hearing was reset for October 15,

[1] Appellant was 52 years old at the time of the incident, and is the uncle of complainant. In an addendum to the judgment, complainant's age is listed as 10 years old at the time of the incident. Both the State's and appellant's briefs say that complainant was 12 years old at the time of the incident. Regardless, complainant was younger than 14 years old, as required by the Aggravated Sexual Assault statute. *See* Tex. Penal Code Ann. § 22.021(a)(2)(B) (Vernon Supp. 2009).

[2] Neither the motion nor the affidavit (1) identified the evidence for which the appellant was requesting testing; (2) asserted that the lack of previous testing was by no fault of the appellant; or (3) explained how exculpatory results would establish by a preponderance of the evidence that the appellant would not have been convicted.

2008, to allow trial counsel to obtain an affidavit from appellant.[3]

Trial counsel obtained an affidavit from appellant on September 26, 2008. The affidavit states as follows:

> My name is Andres Ventura Mejia, and I am the affiant of this affidavit. My attorney . . . notified me that:
>
> "The issue now is whether your lawyer . . . before your plea of guilty informed you that there was evidence suitable for DNA testing and whether you informed your lawyer to request DNA testing on that evidence."
>
> I declare that [my attorney] did advised [sic] me that in the evidence, clothing recovered in this case, there was a small amount of blood. [My attorney] also stated that if he were the District Attorney, he would take me to a doctor. I did request to [my attorney] that I wanted to go to a doctor. [My attorney] said that it was'nt [sic] advisable.
>
> I have read the above foregoing instrument and declare that each and every factual allegation contained herein is true and correct to my own personal knowledge.

Appellant's attorney had not filed the affidavit as of the morning of the scheduled hearing on October 15, 2008. In the meantime, the trial court signed an order denying appellant's motion on October 7, 2008.

The trial court denied appellant's motion on the grounds that (1) appellant's motion for DNA testing did not include a sworn affidavit from the appellant containing statements of fact in support of his motion; (2) appellant failed to demonstrate that DNA testing had not previously occurred through no fault of his own; and (3) in light of Deputy Bernard's affidavit, appellant failed to establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing. Appellant appeals the trial court's order denying his motion for post-conviction DNA testing.

[3] Texas Code of Criminal Procedure section 64.01(a) requires that the motion be accompanied by an affidavit containing statements of fact in support of the motion. Tex. Code Crim. Proc. Ann. § 64.01(a). In this instance, the trial court requested that appellant submit an affidavit explaining why the evidence had not been previously subjected to DNA testing through no fault of appellant.

Analysis

In his sole issue, appellant contends that the trial court erred in denying his motion for post-conviction DNA testing without first reviewing appellant's affidavit.

We review a trial court's denial of a request for post-conviction DNA testing under a bifurcated standard. *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002); *Baggett v. State*, 110 S.W.3d 704, 706 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). We defer to a trial court's findings of fact when they are supported by the record. *Esparza v. State*, 282 S.W.3d 913, 921 (Tex. Crim. App. 2009). We also defer to a trial court's application of law to fact questions that turn on credibility and demeanor. *Id*. We review pure legal issues *de novo*. *Id*. If the trial court's decision is correct on any theory of law applicable to the case, we will sustain the decision. *State v. Ross*, 32 S.W.3d 853, 855-56 (Tex. Crim. App. 2000) (en banc).

Texas Code of Criminal Procedure section 64.01 governs a convicted person's request for post-conviction DNA testing:

> (a) A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing biological material. The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion.
>
> (b) The motion may request forensic DNA testing only of evidence described by Subsection (a) that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but:
>
> (1) was not previously subjected to DNA testing:
>
> (A) because DNA testing was:
>
> (i) not available; or
>
> (ii) available, but not technologically capable of providing probative results; or
>
> (B) through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing; or
>
> (2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood

> of results that are more accurate and probative than the results of the previous test.

Tex. Code Crim. Proc. Ann. § 64.01.

To be entitled to post-conviction DNA testing under section 64.03, a convicted person must establish that (1) the evidence exists in a condition making DNA testing possible; (2) the evidence has been subjected to a sufficient chain of custody to establish its integrity; (3) identity was or is an issue in the case; (4) he would not have been convicted if exculpatory results had been obtained through DNA testing; and (5) the request for DNA testing is not made to unreasonably delay the execution of his sentence or interfere with the administration of justice. *Id*. § 64.03(a) (Vernon Supp. 2009); *Dinkins v. State*, 84 S.W.3d 639, 641-42 (Tex. Crim. App. 2002).

In determining the effect of exculpatory results on a conviction, we must assume that all of the post-conviction results would be favorable to the appellant. *Routier v. State*, 273 S.W.3d 241, 257 (Tex. Crim. App. 2008). The appellant must establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing. Tex. Code Crim. Proc. Ann. § 64.03(a)(2); *Routier*, 273 S.W.3d at 257. The appellant has not met this burden if exculpatory test results would "merely muddy the waters." *Rivera*, 89 S.W.3d at 59. Further, even if results could be exculpatory, they are considered in the context of all other relevant evidence. *See Wilson v. State*, 185 S.W.3d 481, 485 (Tex. Crim. App. 2006) (en banc); *Johnson v. State*, 183 S.W.3d 515, 520 (Tex. App.—Houston [14th Dist.] 2006, pet. dism'd). DNA testing must conclusively outweigh all other evidence of the convicted's guilt. *Jacobs v. State*, 115 S.W.3d 108, 113 (Tex. App.—Texarkana 2003, pet. ref'd).

Appellant's sole argument is that the trial court erred in denying his motion for post-conviction DNA testing without considering appellant's affidavit. Section 64.01(a) states, "[a] convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing biological material. The motion must be

accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion." Tex. Code Crim. Proc. Ann. § 64.01(a).

Even if it is assumed for argument's sake that the trial court erred in denying appellant's motion for DNA testing without considering appellant's affidavit, no harm resulted because the affidavit failed to establish that the appellant would not have been convicted if "exculpatory" results had been obtained through DNA testing. *See id.* § 64.03(a)(2)(A). At most, appellant's affidavit asserts that he asked for DNA testing and his lawyer said it "was'nt [sic] advisable." The affidavit did not address whether appellant would have been convicted had the DNA test returned "exculpatory" results.

Appellant contends that if the blood on the complainant's panties is tested, and the test reveals that the blood did not belong to appellant or complainant, then the test results would confirm appellant's claim of innocence. Appellant's argument fails because the presence of a third party's DNA will not, without more, constitute affirmative evidence of appellant's innocence. *Prible v. State*, 245 S.W.3d 466, 470 (Tex. Crim. App. 2008); *Bell v. State*, 90 S.W.3d 301, 306 (Tex. Crim. App. 2002) (en banc).

Appellant also fails to meet his burden in light of Deputy Bernard's eyewitness account. *See Prible*, 245 S.W.3d at 470; *Whitaker v. State*, 160 S.W.3d 5, 9 (Tex. Crim. App. 2004) ("Regardless of whose blood is on the rifle, other evidence at trial established Whitaker's guilt . . ."). Deputy Bernard observed the complainant lying on her back in the passenger seat of the vehicle, nude except for her shirt which was pulled up over her chest. Deputy Bernard also observed appellant kneeling in front of complainant on the floorboard, with his shirt unbuttoned and his pants pulled down around his thighs. Deputy Bernard observed appellant leaning over and pressed against complainant's nude body, and it appeared to the officer that appellant was having sexual intercourse with complainant.

A person can be convicted of aggravated sexual assault if it is demonstrated that he intentionally or knowingly caused the sexual organ of a child younger than 14 years of age to contact the sexual organ of another person, including the actor. Tex. Penal Code

Ann. § 22.021(a)(1)(A)(iii), (a)(2)(B) (Vernon Supp. 2009). In light of Deputy Bernard's affidavit, appellant has not demonstrated by a preponderance of the evidence that he would not have been convicted if "exculpatory" DNA test results were returned. *See Johnson*, 183 S.W.3d at 520 (although DNA test demonstrated that semen stain on complainant's underwear could not belong to appellant, appellant failed to meet burden because (1) police officer caught him at the crime scene with complainant; (2) DNA testing of vaginal swabs indicated appellant as a possible assailant; and (3) evidence was presented that complainant was sexually active during period in which the assault occurred).

These circumstances distinguish this case from others in which evidence or testimony suggested that the recovered biological material belonged to the true assailant. *See Esparza*, 282 S.W.3d at 922; *Blacklock v. State*, 235 S.W.3d 231, 232 (Tex. Crim. App. 2007) (exculpatory test results would establish innocence where victim's lone attacker is the donor of the material for which appellant seeks DNA testing). In this case, there is no evidence that the person who assaulted the complainant deposited the blood. Nor is there anything in the record to suggest that the blood was left on the panties on the date of the offense. *See Smith v. State*, 165 S.W.3d 361, 364 (Tex. Crim. App. 2005) (appellant was not entitled to DNA testing because even if blood on the murder weapon belonged to a third party, it could have been left on the weapon before the date of the offense) (citing *Whitaker*, 160 S.W.3d at 5).

Appellant failed to establish by a preponderance of the evidence that that he would not have been convicted if "exculpatory" results had been obtained through DNA testing. *See* Tex. Code Crim. Proc. Ann. § 64.03(a)(2). Appellant set forth only a bare assertion that the biological samples might belong to someone else, which is not enough to meet his burden. *See Bell*, 90 S.W.3d at 306. We overrule appellant's sole issue.

Conclusion

We affirm the trial court's denial of appellant's motion for post-conviction DNA testing.

/s/ William J. Boyce
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.

Do Not Publish — Tex. R. App. P. 47.2(b).