Affirmed and Memorandum Opinion filed April 1, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01060-CR

MARCUS LEROY SCOTT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 726638

MEMORANDUM OPINION

Appellant, Marcus Leroy Scott, was convicted of capital murder in 1996 and given a life sentence. We affirmed that conviction in a prior unpublished opinion. *Scott v. State*, No. 14-96-01540-CR, 1999 WL 351173 (Tex. App.—Houston [14th Dist.] June 3, 1999, no pet.). In a single issue in the present appeal, appellant contends that the trial court erred in denying his post-conviction motion for DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. We affirm.

Chapter 64

Article 64.01 of the Code of Criminal Procedure permits a convicted individual to file a motion seeking DNA testing of evidence containing biological material. Tex. Code Crim. Pro. § 64.01(a). The motion must be accompanied by an affidavit by the individual, containing statements of fact in support of the motion. *Id*. The motion may request testing only of evidence that was not previously subjected to DNA testing either (1) because DNA testing was not available or was technologically incapable of providing probative results, or (2) through no fault of the individual. *Id*. at 64.01(b). Article 64.02 provides for a response to the motion by the State. *Id*. at 64.02(a). Under article 64.03, a trial court may order DNA testing only if the court finds that (1) the evidence to be tested still exists and is in a condition making testing possible; (2) the evidence has been subjected to a reliable chain of custody; and (3) identity was or is an issue in the case. *Id*. at 64.03(a). Additionally, in order to be entitled to forensic DNA testing, the convicted individual must establish by a preponderance of the evidence that (1) he or she would not have been convicted if exculpatory results had been obtained, and (2) the request for testing was not made to unreasonably delay execution of the sentence. *Id*. In reviewing the trial court's denial of post-conviction DNA testing, we afford almost total deference to the court's determination of historical fact and application-of-law-to-fact issues that turn on credibility and demeanor, while we review de novo other application-of-law-to-fact issues. *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002).

Discussion

The parties are familiar with the facts of the underlying case, and we see no reason to recount them here.[1] Among other arguments, the State contends that appellant failed to identify existing evidence containing biological material not previously subjected to DNA

[1] A recitation of the facts can be found in our prior opinion. *See Scott*, 1999 WL 351173, at *1.

testing, either because such testing was not available or through no fault of appellant.[2] *See* Tex. Code Crim. Pro. § 64.01(b). In his motion, appellant asserted that there existed evidence containing biological material not previously subjected to DNA testing through no fault of appellant. The motion, however, simply parrots the requirements of the statute on this issue and does not point to any specific evidence to substantiate the claims made that biological material was not tested through no fault of appellant. An individual requesting post-conviction DNA testing must provide evidence demonstrating that the evidence containing biological material was not previously tested. *Dinkins v. State*, 84 S.W.3d 639, 642 (Tex. Crim. App. 2002). Likewise, an individual who claims to have not been at fault for the failure to previously test must actually demonstrate such absence of fault. *Routier v. State*, 273 S.W.3d 241, 247 (Tex. Crim. App. 2008).

The only evidence appellant presented in support of his motion was his own statement. In this statement, appellant asserts: "I believe that . . . had I been given a DNA test the day of my trial, after the results returned negative, I would've been released." While the statement could be read generously as indicating that no prior testing occurred, there is no indication in the statement that appellant was not at fault for any such failure to test. Furthermore, the affidavits filed by the state also provide no indication as to whether any failure to test was or was not due to appellant's fault. Consequently, appellant failed to meet his burden under Chapter 64. *See Routier*, 273 S.W.3d at 247. Appellant's sole issue is overruled.

[2] Although the trial court apparently did not explicitly base its decision to deny DNA testing on this requirement, we may affirm on this basis as a trial court's decision on a case must be sustained if it is correct under any theory of law applicable to the case. *See State v. Ross*, 32 S.W.3d 853, 855-56 (Tex. Crim. App. 2000).

We affirm the trial court's order denying the motion for post-conviction DNA testing.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges, Justice Anderson, and Senior Justice Mirabal.[*]
Do Not Publish — TEX. R. APP. P. 47.2(b).

[*] Senior Justice Margaret Garner Mirabal sitting by assignment.