

Affirmed and Memorandum Opinion filed February 11, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00120-CR

GERALD JEROD DURDEN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 905464**

MEMORANDUM OPINION

Appellant Gerald Jerod Durden challenges the trial court's denial of his motion for post-conviction DNA testing. We affirm.

Background

Appellant was arrested and charged with aggravated sexual assault of a child on July 23, 2001. At that time, appellant was married to Lakeysha Brooks and had fathered

one child with her. That child was the complainant. Brooks also had two children from a previous relationship fathered by Dennis Wimbley.

According to the State's evidence, appellant was home alone with Brooks' three children on July 23, 2001. Appellant called the complainant into his room, removed her underwear, and touched her "private part" with his hand and his "private part." Appellant also ejaculated on the complainant. Later that evening, the complainant told Wimbley that appellant had sexually assaulted her. Wimbley contacted the police, and appellant was arrested.

After a jury trial, appellant was convicted of aggravated sexual assault of a child and sentenced to confinement for 58 years. This court affirmed appellant's conviction in 2003. *Durden v. State*, No. 14-02-00818-CR, 2003 WL 22143293 (Tex. App.—Houston [14th Dist.] Sept. 18, 2003, pet. ref'd) (mem. op., not designated for publication). Appellant filed a pro se motion for post-conviction DNA testing of two hairs found on the complainant's underwear on July 2, 2008. The trial court denied appellant's motion on grounds that DNA testing was performed on the hairs in 2002. Appellant appeals the trial court's order denying his motion for post-conviction DNA testing.¹

Analysis

We review a trial court's denial of a request for post-conviction DNA testing under a bifurcated standard. *See Esparza v. State*, 282 S.W.3d 913, 921 (Tex. Crim. App. 2009). We defer to a trial court's findings of fact when they are supported by the record. *Id.* 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).

¹ We are unable to determine the date that the trial court denied appellant's motion for post-conviction DNA testing. The trial court denied appellant's motion by writing "Denied — Already done in 2002" on appellant's motion. The motion was file stamped on July 2, 2008.

Texas Code of Criminal Procedure article 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. art. 64.01 (Vernon 2010).

To be entitled to post-conviction DNA testing under article 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.* art. 64.03(a) (Vernon 2010); *Dinkins v. State*, 84 S.W.3d 639, 641-42 (Tex. Crim. App. 2002).

As a threshold matter, the State argues that the trial court did not err in denying appellant's motion for post-conviction DNA testing because appellant failed to prove that the hairs have not been tested previously. Tex. Code Crim. Proc. Ann. art. 64.01(b)(1). According to the State, the trial court's determination that the hairs previously were subjected to DNA testing in 2002 is supported by a pretrial order signed on April 3, 2002 granting appellant's motion "for an independent examination of certain evidence for the purpose of [DNA] testing and comparisons." The order authorized Identigene to conduct an independent examination of "the following evidence and samples thereof in possession, custody or control of the State in connection with [appellant's case]: blood, hair, seminal fluid, saliva and skin."

To establish that the hairs were not previously subjected to DNA testing, appellant attached two items to his motion for post-conviction DNA testing: (1) the first page of Identigene's Forensic Report dated June 4, 2002 regarding the results of DNA testing on samples relating to appellant's case, which does not refer to testing any hairs; and (2) an Identigene "Chain of Custody" form dated April 19, 2002 regarding samples relating to appellant's case, which does not refer to any hairs.

After reviewing the record on appeal, we conclude that no evidence supports the trial court's finding that the hairs previously were subjected to DNA testing. The trial court's April 3, 2002 order authorizes independent DNA testing of the hairs; it does not establish that the hairs actually were tested. The Identigene report and form do not include the hairs among the samples that were tested.

We next determine whether appellant satisfied the remaining requirements of Texas Code of Criminal Procedure article 64.03. *See id.* art. 64.03; *see also Ross*, 32 S.W.3d at 855-56 (if the trial court's decision is correct on any theory of law applicable to the case, we will sustain the decision).

To satisfy article 64.03, appellant must provide affidavits containing statements of fact in support of his motion; he cannot merely allege in his motion that the requirements have been met. Tex. Code Crim. Proc. Ann. art. 64.01(a); *Dinkins*, 84 S.W.3d at 642. The State argues that appellant failed to satisfy the multiple requirements of article 64.03. Specifically, the State argues that appellant failed to satisfy his burden regarding whether (1) the evidence still exists in a condition making DNA testing possible; (2) the evidence has been subjected to a sufficient chain of custody; and (3) appellant would not have been convicted if exculpatory results had been obtained through DNA testing.²

A. Does the Evidence Exist in a Condition Making DNA Testing Possible?

In his motion, appellant asserts that the hairs still exist and currently are in the custody of the Harris County Medical Examiner's Office. See Tex. Code Crim. Proc. Ann. art. 64.03(a)(i). In support of this statement, appellant attached an "Evidence Records Affidavit" of Cynthia Young, a "property and/or evidence records custodian" for the Harris County Medical Examiner's Office, that was signed on December 6, 2004. The affidavit states that the Harris County Medical Examiner's Office is in custody of "hairs collected from [the complainant's underwear]."

Young's affidavit contains no statements regarding the condition of the hairs and whether DNA testing of the hairs is possible. Further, Young's affidavit shows at most that the Harris County Medical Examiner's Office was in possession of the hairs in 2004; it does not establish that the Harris County Medical Examiner's Office was in possession of the hairs when the trial court denied appellant's motion for post-conviction DNA testing or that the hairs still exist.

² The State does not argue that identity was not an issue in this case or that appellant's motion for post-conviction DNA testing is made to unreasonably delay the execution of his sentence or interfere with the administration of justice.

B. Was the Evidence Subjected to a Sufficient Chain of Custody?

Even if it is assumed that Young's 2004 affidavit established that the hairs still existed in a condition making DNA testing possible in 2008, appellant's proof still falls short. Appellant makes no assertions in his motion or affidavit regarding whether the hairs have been subjected to a sufficient chain of custody and offers no evidence regarding this issue. Thus, appellant has failed to satisfy his burden of proving that the hairs have been subjected to a sufficient chain of custody. *See id.* art. 64.03(a)(ii).

C. Would Appellant Have Been Convicted if Exculpatory Results Had Been Obtained Through DNA Testing?

Appellant asserts in his motion and affidavit that he would not have been convicted if exculpatory results had been obtained through subjecting the hairs to DNA testing. *See id.* art. 64.03(a)(2)(A). Appellant asserts that "[e]xpert testimony at trial is that I was excluded as the source of the DNA found in the semen found on the external genital swab And I'm confident [sic] after DNA testing is performed on the two (2) hairs this will only add to the already overwhelming evidence of my innocence."

The inculpatory evidence admitted at trial defeats appellant's assertions. The testimony at trial established that appellant was home with the complainant and two other children on the night of the sexual assault, and that appellant was alone with the complainant in his room. The complainant testified that appellant sexually assaulted her. Evidence at trial showed that the semen found on the complainant's underwear was consistent with appellant's DNA type. Therefore, even if DNA testing of the hairs established that they belonged to a third party, appellant has failed to prove by a preponderance of the evidence that he would not have been convicted given the evidence presented at trial. *See id.*; *Prible v. State*, 245 S.W.3d 466, 470 & n.3 (Tex. Crim. App. 2008) (even if DNA testing established the presence of another person's DNA, defendant failed to prove by a preponderance of the evidence that he would not have been convicted given the evidence presented at trial); *see also Prible v. State*, 175 S.W.3d 724, 726-29

(Tex. Crim. App. 2005) (discussing the inculpatory evidence from Prible’s trial, including evidence that he was present at the victims’ home on the night of the murder, his semen was found in one victim’s mouth, and he confessed to a fellow inmate); *Hood v. State*, 158 S.W.3d 480, 481-83 (Tex. Crim. App. 2005) (even if DNA testing showed presence of another person at the crime scene, defendant failed to establish by a preponderance of the evidence that he would have been acquitted on that basis given that defendant’s bloody fingerprints were found at the scene and showed his involvement in the crime; DNA evidence would at most establish that defendant acted with someone else in committing the crime).

Conclusion

Because appellant failed to satisfy his burden of proving that (1) the hairs exist in a condition making DNA testing possible, (2) the hairs were subjected to a sufficient chain of custody, and (3) he would not have been convicted if exculpatory results had been obtained through subjecting the hairs to DNA testing, the trial court did not err in denying appellant’s motion for post-conviction DNA testing. *See* Tex. Code Crim. Proc. Ann. art. 64.03; *Dinkins*, 84 S.W.3d at 642.

We overrule appellant’s sole issue and affirm the trial court’s denial of appellant’s motion for post-conviction DNA testing.³

/s/ William J. Boyce
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.

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³ The State also argued that this appeal should be dismissed for lack of jurisdiction because the original clerk’s record did not contain the trial court’s certification of appellant’s right to appeal. We asked the trial court to file a supplemental clerk’s record containing a certification of appellant’s right to appeal in an order signed April 2, 2009. The trial court filed a certification of appellant’s right to appeal on August 18, 2009 stating this case “is not a plea-bargain case, and the defendant has the right of appeal.”