In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00454-CR

PHILLIP JOSEPH FARRELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. 23,016

MEMORANDUM OPINION

Phillip Joseph Farrell appeals from the trial court's order denying his post-conviction motion seeking to have a firearm tested for the presence of "biological material." *See generally* Tex. Code Crim. Proc. Ann. art. 64.01 (West Supp. 2016) (Motion for forensic DNA testing); *id*. art. 64.05 (West 2006) (authorizing the appeal of such orders). We affirm the trial court's order denying Farrell's motion.

Before he filed the post-conviction motion that resulted in the ruling that is at issue in this appeal, a jury convicted Farrell, a felon, for unlawfully possessing a

firearm. *See generally Farrell v. State*, 13-14-00193-CR, 2014 WL 4161573, at *1 (Tex. App.—Corpus Christi Aug. 21, 2014, pet. ref'd) (mem. op., not designated for publication). Although Farrell appealed his firearms conviction, his conviction for unlawful possession of a firearm was affirmed. *Id*. In 2015, Farrell filed a motion to test the firearm for "biological material,"[1] and in his motion, he alleged that the firearm had not previously been subjected to DNA testing. *See generally* Tex. Code Crim. Proc. Ann. art. 64.01(a-1), (b)(1).[2] Following an evidentiary hearing on Farrell's motion, the trial court denied the motion. In its order, the trial court found that the firearm that Farrell was convicted of possessing "is no longer in the possession of the Polk County Sheriff's Office[,]" and found that the firearm "has not been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect."

Only one witness testified during the hearing the trial court conducted on Farrell's motion, Lieutenant Andy Lowrie. Lieutenant Lowrie testified that at the

[1] Under article 64.01(a), the term "'biological material'" "means an item that is in possession of the state and that contains blood, semen, hair, saliva, skin tissue or cells, fingernail scrapings, bone, bodily fluids, or other identifiable biological evidence that may be suitable for forensic DNA testing[.]" Tex. Code Crim. Proc. Ann. art. 64.01(a)(1) (West Supp. 2016).

[2] Although the statutes cited in this opinion have been amended since Farrell filed his motion for DNA testing, the changes are not material to the issues on appeal; for convenience, we cite the current version of the statutes.

prosecutor's request, he looked for the rifle that Farrell had been charged with having in his possession. According to Lieutenant Lowrie, the Sherriff's Office did not have the rifle.[3] Lieutenant Lowrie explained that he spoke to the officer who investigated Farrell's case, and the investigating officer told him that he had returned the rifle to its owner. When he was cross-examined by Farrell's attorney, Lieutenant Lowrie testified that although the Sheriff's Office maintains a paper trail to show the chain of custody of weapons that are in the custody of the Sheriff's Office, in preparing for the hearing, he had only checked on the rifle by looking at the records available to him on a computer and by calling the investigator who investigated Farrell's case. Lieutenant Lowrie also explained that he had not checked the evidence locker or pulled the paper records the Sheriff's Office maintained on evidence in its custody.

In the hearing, the prosecutor also asked Lieutenant Lowrie to address the procedures generally used in handling weapons recovered from cases involving burglaries. According to Lieutenant Lowrie, such weapons were not generally handled with gloves or placed in a bag to preserve any biological material that might be on the weapons.

In his first issue, Farrell contends that the trial court erred by denying Farrell's motion for forensic DNA testing. Farrell argues that if the trial court were to require

[3] The record does not indicate that the rifle was admitted into evidence in Farrell's criminal trial.

the rifle to be tested for DNA, his DNA would not be on the rifle, which he argues would show that he never touched the rifle.

In reviewing a trial court's ruling on a post-conviction motion seeking to test for the presence of DNA on evidence admitted in a trial, we afford almost total deference to the trial court's determination of issues of historical fact and issues of application of law to fact that turn on credibility and demeanor of witnesses. *Ex parte Gutierrez*, 337 S.W.3d 883, 890 (Tex. Crim. App. 2011). However, we consider all other application-of-law-to-fact questions involving rulings on such motions under a de novo standard. *Id*.

A trial court may decline to order forensic DNA testing on evidence that is not shown to be in a condition that makes DNA testing possible or for which a chain of custody cannot be established. *See Swearingen v. State*, 303 S.W.3d 728, 734 (Tex. Crim. App. 2010). Following the hearing on Farrell's motion, the trial court failed to find that the rifle had been "subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect[,]" one of the requirements needed to support an order on a motion for DNA testing. *See* Tex. Code Crim. Proc. Ann. art. 64.03(a)(1)(A)(ii) (West Supp. 2016). Lieutenant Lowrie's testimony supports the finding the trial court made that is relevant to Chapter 64's chain-of-custody requirement. *Id*. Additionally, the

defendant's motion must concern biological material in the State's possession. Tex. Code Crim. Proc. Ann. art. 64.01(a), (a-1). In Farrell's case, the trial court's finding that the rifle is not in the possession of the Sheriff's Office is also supported by Lieutenant Lowrie's testimony that the rifle had been returned to the person who owned it.

Farrell also argues that the trial court abused its discretion by ruling that his motion was moot rather than holding the State responsible for failing to preserve the rifle. However, complaints about the State's destruction or contamination of evidence are matters that fall outside the scope of a hearing and subsequent appeal from an order denying a motion for forensic DNA testing. *See Lewis v. State*, 191 S.W.3d 225, 229 (Tex. App.—San Antonio 2005, pet. ref'd); *Johnston v. State*, 99 S.W.3d 698, 702-03 (Tex. App.—Texarkana 2003, pet. ref'd). We overrule issue one.

In his second issue, Farrell contends the trial court abused its discretion by overruling his request to require the State to produce the documentation in its possession on the rifle's chain of custody and by denying his motion for new trial. The record shows that Farrell did not seek a continuance of the Chapter 64 hearing; however, during the hearing, he did request documentation that the State did not

produce in the hearing as an alternative remedy to his request that the trial court grant his motion for forensic DNA testing.

The Court of Criminal Appeals has explained: "Chapter 64 authorizes the convicting court to order DNA *testing*, and no more." *Wolfe v. State*, 120 S.W.3d 368, 372 (Tex. Crim. App. 2003). Farrell claims he is entitled to a new trial on his conviction for possessing the rifle because the State failed to follow the procedures that are required when evidence contains biological material. *See generally* Tex. Code Crim. Proc. Ann. art. 38.43 (West Supp. 2016). However, a motion for DNA testing does not invoke the trial court's authority to order a new trial. *State v. Holloway*, 360 S.W.3d 480, 485-90 (Tex. Crim. App. 2012), *overruled in part on other grounds by Whitfield v. State*, 430 S.W.3d 405, 409 (Tex. Crim. App. 2014) (holding an appeal under Chapter 64 extends to the sufficiency of the evidence to support the trial court's findings). We overrule issue two, and we affirm the trial court's order denying Farrell's motion for DNA testing.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on July 15, 2016
Opinion Delivered April 26, 2017
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.