

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-16-00452-CR
NO. 09-16-00460-CR
NO. 09-16-00461-CR

STEVEN HOWARD LOVEDAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 10-09-10404-CR (Counts 1, 2, and 3)

MEMORANDUM OPINION

Steven Howard Loveday appeals from the trial court's order denying his post-conviction petition seeking the retesting of the biological material gathered by the State during its investigation that led to Loveday's indictment and conviction for sexually abusing his child. We affirm the trial court's order denying Loveday's request for additional DNA testing.

Background

In 2010, the State indicted Loveday on three counts for sexually abusing his daughter, a child. *See* Tex. Penal Code Ann. §§ 21.02(b) (Continuous Sexual Abuse of a Child), 22.021(a)(1)(B) (Aggravated Sexual Assault) (West Supp. 2016).¹ In 2012, the jury found Loveday guilty on two counts for the aggravated sexual assault of his child and guilty on another count for the continuous sexual abuse of his child. *Id.* On direct appeal, we affirmed Loveday’s convictions and his sentences. *Loveday v. State*, No. 09-12-00240-CR, 2013 WL 5874280, *8 (Tex. App.—Beaumont Oct. 30, 2013, pet. ref’d).

In June 2016, Loveday received a letter from Montgomery County’s District Attorney that led him to file the petition that is the subject of Loveday’s current appeal. The letter has a heading that states: “NOTICE OF IMPACT OF FBI DATABASE ERRORS ON DNA MIXTURE INTERPRETATION[.]” The letter suggests that “DNA evidence has become more complicated over the last 5-10 years, and forensic scientists have recently become aware that a common statistical method they used may not always have taken into account certain important scientific limitations.” The letter indicates that the Texas Forensic Science Commission was

¹ For convenience, we cite the current statute because the amendments to it are not relevant to the appeal.

working with prosecutors, defense attorneys, and laboratories “to determine which cases may have problems[,]” and the District Attorney suggested that Loveday should submit a written request asking to have his case reviewed to determine if the “DNA mixture issue [had been] material to [his] case.”² The record currently before us, which relates to Loveday’s appeal of the trial court’s denial of his petition for DNA testing, contains no evidence to suggest that Loveday requested that his case be reviewed by the Houston Regional Crime Lab, where the testing that was used in his case had been done, or the Texas Forensic Science Commission, the organization the District Attorney referenced in his letter.

In August 2016, Loveday filed a post-conviction petition requesting additional DNA testing.³ In his petition, Loveday requested that items of evidence containing biological material that were recovered by police from his daughter’s room be retested. Loveday’s petition includes four exhibits: his affidavit,⁴ a

²The letter references an attachment that is not in the record before us, but the context of the letter suggests that the requested review was to be sent to an entity other than the offices of the Montgomery County District Attorney.

³The judge who presided over Loveday’s trial was no longer in office when Loveday filed his petition, so the judge who denied Loveday’s petition for DNA testing is not the same judge who presided over his trial.

⁴Loveday’s affidavit alleges that he is actually innocent of the offenses for which he was convicted. The affidavit asserts that the testing of the items is necessary to prove his innocence, and that favorable DNA test results on the items he wanted retested would support his allegation that his daughter’s claims were false.

Supplemental Serology\DNA Report dated September 19, 2011;⁵ a Supplemental Serology\DNA Report dated October 18, 2011,⁶ and a copy of the letter that Loveday received from the Montgomery County District Attorney in June 2016.⁷

Our opinion resolving Loveday's direct appeal from his convictions for sexually abusing his daughter reflect that Loveday's identity was not at issue in the cases that led to his convictions. *Loveday v. State*, 2013 WL 5874280, at *1 ("The testimony from the trial reflects that Loveday is [the victim's] father, that [the victim] began living in Loveday's home when she was in fifth grade, and that Loveday began to sexually abuse her shortly after she moved in with him.") Our opinion in Loveday's direct appeal also reflects that during Loveday's trial, the

⁵The September 2011 report addresses biological evidence collected in a rape collection kit from Loveday's daughter, and other biological evidence collected by police on swabs taken from three sources: Loveday, a sex toy, and Loveday's daughter's panties. The report is signed by Angelina Temple, a forensic scientist with the Texas Department of Public Safety's Crime Lab in Houston.

⁶The October 2011 report addresses evidence collected by police on four swabs containing biological material identified as having been taken from a pillowcase, a tan flat sheet, a tan fitted sheet, and a mattress pad. The October report is also signed by Angelina Temple.

⁷The letter notified Loveday that there were possible errors in the FBI database the lab utilized to estimate the probability "that a random person who is unrelated to you could be included in" biological evidence containing DNA evidence that included DNA contributions from more than one person.

victim described how Loveday manipulated her into engaging in illegal sexual activity by making her fear that he would hurt her should she refuse his requests to engage in sexual acts. *Id.* at *3. Therefore, the relevance of the DNA evidence in Loveday's trial was that it corroborated the victim's testimony that Loveday engaged in sexual acts with her. The DNA evidence was not needed to establish Loveday's identity.

In the State's response to Loveday's petition, the State argued that Loveday had not demonstrated in his petition that the hairs he wanted to have retested still existed. Additionally, the State argued that a recalculation of the statistical estimates admitted during the trial of his criminal case could be accomplished without any additional DNA testing. The State also argued that Loveday had not shown that newer testing methods were available to retest the biological evidence that Loveday wanted retested. The State filed one exhibit supporting its response, a letter bearing the letterhead of the Texas Department of Public Safety dated June 30, 2015. In the letter, signed by Brady Mills, the Deputy Assistant Director of the Crime Laboratory Service, the crime lab offered to recalculate the estimates found in its earlier reports relating to the estimated probability that a person with a DNA profile matching Lovedays could have been a contributor to the mixed samples tested in its lab. The letter indicated that the crime lab would recalculate its results on written request, and that the changes in the formula resulted from corrections the FBI made to its

database. According to Mills, using the corrected database would have only a “minimal impact” on the lab’s prior calculations.

The trial court denied Loveday’s petition without conducting an evidentiary hearing. The trial court also did not make written findings or conclusions supporting its ruling. Subsequently, Loveday appealed.

Standard of Review and Post-Conviction Forensic Testing Statute

When a trial court decides a motion based solely on the evidence and pleadings submitted by the parties, we review the issues de novo because the trial court was in no better position to decide the matter than we are. *Smith v. State*, 165 S.W.3d 361, 363 (Tex. Crim. App. 2005). A person convicted of a crime who seeks to have items containing biological evidence tested to determine whether the items contain DNA must satisfy the multiple requirements that are found in Chapter 64 of the Texas Code of Criminal Procedure, the statute that governs a district court’s decision on whether a person is entitled to have material tested for the presence of DNA. Tex. Code Crim. Proc. Ann. art. 64.01-.05 (West 2006 & Supp. 2016); *Swearingen v. State*, 303 S.W.3d 728, 731 (Tex. Crim. App. 2010) (indicating that Chapter 64 “requires multiple threshold criteria to be met before a convicted person is entitled to DNA testing”)

In Loveday’s case, the reports included in Loveday’s post-conviction petition for DNA testing reflect that all of the biological material that he wanted to have

tested had already been tested for DNA. Under article 64.01(b)(2), biological material which has already been tested may only be retested if the evidence presented by the person who filed the motion demonstrates that the material 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(b)(2). (West Supp. 2016). And, courts may not order further forensic testing unless the court finds that the evidence containing DNA still exists, that the evidence is in a condition making DNA testing possible, that the evidence has been subjected to a chain of custody establishing that the material has not been substituted, tampered with, replaced, or altered in any material respect, that a reasonable likelihood exists that the evidence to be retested contains biological material suitable for DNA testing, that identity was or is an issue in the case, that the person would not have been convicted if exculpatory results had been obtained through DNA testing, and that the request is not made to unreasonably delay the execution of a sentence or the administration of justice. *Id.* art. 64.03(a) (West Supp. 2016).

Analysis

Based on the evidence that Loveday included with his motion, and the evidence the State included with its response, we conclude that Loveday failed to demonstrate that his identity was a contested issue in his trial. Consequently,

Loveday failed to meet his burden to show that the retesting, if done, would have proven that he was innocent of sexually abusing his daughter.

Based on the evidence before the jury in Loveday's criminal trial, the jury was entitled to convict Loveday on the charges that resulted in the verdicts we affirmed on his daughter's testimony alone. *See* Tex. Code Crim. Proc. Ann. art. 38.07 (West Supp. 2016) (permitting the "uncorroborated testimony" of a victim to support a conviction of certain sexual offenses); *Garcia v. State*, 563 S.W.2d 925, 928 (Tex. Crim. App. [Panel Op.] 1978) (holding that victim's testimony is sufficient to prove sexual contact occurred even without physical evidence). In Loveday's criminal case, Loveday's daughter testified that he assaulted her over a period of years. Given the relationship that existed between Loveday and his victim, and the circumstances surrounding the alleged sexual assaults and the evidence leading to Loveday's convictions for continuous sexual abuse, we conclude that Loveday's identity was not a contested issue in his trial. *See* Tex. Code Crim. Proc. Ann. art. 64.03(2)(A) (West Supp. 2016); *Prible v. State*, 245 S.W.3d 466, 470 (Tex. Crim. App. 2008) (explaining that "even if the evidence was retested and determined to contain another person's DNA in addition to Appellant's DNA, it would not establish by preponderance of the evidence that Appellant would not have been convicted if the jury had heard that DNA from a third-party was present").

In Loveday's criminal trial, the DNA evidence was used to corroborate his daughter's claims that the sexual assaults occurred. The DNA evidence was not used to establish that Loveday was the person who committed the alleged assaults. While the absence of DNA evidence might have been to cast doubt on the truthfulness of the testimony given by Loveday's daughter, the presence of other DNA in the mixed samples cited in the lab reports would not establish Loveday's innocence. *See Esparza v. State*, 282 S.W.3d 913, 922 (Tex. Crim. App. 2009); *Blacklock v. State*, 235 S.W.3d 231, 233 (Tex. Crim. App. 2007).

Additionally, the evidence before the trial court about the FBI's correction of its database concerned the small chance that a person with a DNA profile matching Loveday's DNA might randomly have contributed to the DNA in the mixed samples that were tested. Consequently, correcting the error the letter referred to does not require the mixed samples to be retested. Our conclusion that the error is one that concerns a statistical calculation and not the method used in testing the sample is supported by the Texas Department of Public Safety's letter of June 30, 2015, which states that "the database corrections have no impact on the inclusion or exclusion of victims or defendants in any result."

We conclude that Loveday failed to establish that the trial court erred by denying his petition to retest the DNA evidence used in his trial. *See Tex. Code*

Crim. Proc. Ann. art. 64.03; *Esparza*, 282 S.W.3d at 922. We overrule Loveday's arguments, and affirm the trial court's ruling.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on August 7, 2017
Opinion Delivered November 8, 2017
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Before McKeithen, C.J., Kreger and Horton, JJ.