COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00113-CR

ALLEN FITZGERALD CALTON — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 0843168D

MEMORANDUM OPINION[1]

Pro se appellant Allen Fitzgerald Calton appeals the trial court's order denying his third motion for DNA testing. We affirm.

Background Facts

As we explained in our decision affirming the trial court's denial of appellant's second motion for DNA testing,

[1]*See* Tex. R. App. P. 47.4.

In 2002, Calton drove to Everett Angle's home, got out of his car to shoot Angle in the face while Angle was standing in his front yard, and then stood over Angle to shoot him two more times. Angle survived. Calton drove off and later engaged in a high-speed chase with police, which ended with Calton driving his car into a local lake. Calton was indicted with the attempted murder of Angle and argued at trial that he could not have formed the requisite intent because he was hypoglycemic that day and, thus, was effectively unconscious. The identity of the shooter was not a disputed issue in the case. Calton was convicted of attempted murder and sentenced to life confinement. This court affirmed his conviction.

After the court of criminal appeals and a federal district court denied Calton habeas corpus relief, he filed a motion requesting that material from his car's front seat and a slipper found at the crime scene be subject to forensic DNA testing. This evidence had been tested in 2002 and 2004, but no results could be produced because there was insufficient genetic material to produce reliable results. The trial court denied the motion on May 13, 2008. We affirmed the trial court's order because "[t]here [was] no showing . . . that identity was or is an issue in this case" and "there [was] no showing that any other person committed the offense and was in the car where the material subjected to DNA testing was found."

On August 13, 2013, Calton filed a second motion for forensic DNA testing and asked that the car-seat material and slipper again be tested against Calton's and Angle's blood samples "under the new and more advanced DNA lab testing technology and capabilities." . . . [T]he State responded to Calton's motion [by arguing] that although there was evidence that could be tested, Calton had failed to show that newer testing techniques had a reasonable likelihood of producing more accurate and probative results, identity was or is an issue, and DNA testing would exonerate him.

On March 24, 2014, the trial court denied Calton's second motion for forensic DNA testing and entered findings and conclusions. The trial court concluded that Calton's motion was without merit because Calton did not allege that identity was or is at issue, show that newer testing would be reasonably likely to produce more accurate and probative results, or prove by a preponderance of the evidence that he would not have been convicted of attempted murder if the DNA test results were exculpatory.

Calton v. State, No. 02-14-00158-CR, 2015 WL 3918013, at *1–2 (Tex. App.—Fort Worth June 25, 2015, pet. ref'd) (mem. op., not designated for publication) (citations omitted); *see Calton v. State*, No. 02-08-00208-CR, 2009 WL 976004, at *4 (Tex. App.—Fort Worth Apr. 9, 2009, pet. ref'd) (mem. op., not designated for publication) (affirming the denial of appellant's first motion for DNA testing); *Calton v. State*, No. 02-04-00228-CR, 2005 WL 3082202, at *5 (Tex. App.—Fort Worth Nov. 17, 2005, pet. withdrawn) (affirming appellant's conviction on direct appeal).

We affirmed the trial court's denial of appellant's second motion for DNA testing, explaining in part,

> A movant for DNA testing must do more than simply move for such relief; he bears the burden to satisfy the requirements of the statute allowing such testing and must provide facts in support of the motion. Because the evidence at issue here previously was subjected to DNA testing, Calton was required to allege facts to support his contention that newer testing techniques are available and that it is reasonably likely that such techniques would yield more accurate and probative results. In his supporting declaration, Calton stated that "DNA testing technology has evolved tremendously over the past few years" and that "several [new] methods" would "clearly trump[] the testing capabilities that were available when testing was done . . . in 2002." These bare allegations are insufficient to establish the need for further testing.

Calton, 2015 WL 3918013, at *2 (citations omitted).

In August 2015, appellant filed a third motion for DNA testing. He asked for "material relevant to the identity of the perpetrator [to be] tested under the . . . more advanced DNA lab testing technology . . . of 2015." He contended that testing in 2002 and 2004 was not capable of "providing probative results" and

stated that he had read literature about the advancement of DNA techniques. Appellant attached a handwritten "affidavit" to the third motion. In the affidavit, he asserted that DNA testing techniques had advanced in recent years and that current testing "clearly trumps" previous testing. He also asserted that in 2002, he had made a statement that there was another person in his car on the night of the shooting. He contended that the presence of a third person's (not his or the victim's) DNA in the car would prove his innocence. Finally, he attached his 2002 statement, in which he wrote that "Mike Ray" had shot the victim.

In January 2016, the State responded to appellant's third motion. The State conceded that testable evidence exists but contended, as it did with respect to appellant's second motion, that the evidence had already been tested and that appellant had failed to establish that the evidence could be tested again with newer techniques leading to more accurate or more probative results. The State alleged that when the evidence was previously tested, the scientist did not find a sufficient amount of genetic material.[2]

The trial court denied appellant's third motion and adopted findings and conclusions that the State had proposed. The court made the following findings and conclusions:

[2]A report contained in the clerk's record substantiates this allegation.

FINDINGS OF FACT

. . . .

19. Defendant presents no evidence, documentation, citation, or specific facts to support his claim that newer testing techniques would yield DNA results. . . .

20. Defendant presents no evidence, documentation, citation, or specific facts that there exists a reasonable likelihood that newer testing techniques would produce results based on the miniscule amount of DNA that previously was insufficient.

CONCLUSIONS OF LAW

. . . .

3. To be considered for DNA re-testing, a defendant must demonstrate that items previously subjected to DNA testing can now be subjected to "newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test." . . .

4. . . . Because the evidence at issue here previously was subjected to DNA testing, Calton was required to allege facts to support his contention that newer testing techniques are available and that it is reasonably likely that such techniques would yield more accurate and probative results. . . . In his supporting declaration, Calton stated that "DNA testing technology has evolved tremendously over the past few years" and "several [new] methods" would "clearly trump[] the testing capabilities that were available when testing was done . . . in 2002." . . .

5. Defendant's bare allegations are insufficient to establish the need for further testing.

Appellant brought this appeal.

The Trial Court's Denial Decision

Appellant contends that the trial court erred by denying his third motion for DNA testing. He argues, in part, that he has demonstrated that more advanced

testing procedures exist to "yield conclusive results with the miniscule amount of available evidence." He asserts that a "reasonable probability exists that [he] would have been found not-guilty at trial had the evidence been tested using methods that are available today." He also contends that his 2002 statement to the police serves as evidence that identity was an issue in his trial. The State argues that the trial court properly denied appellant's third motion because like in his second motion, appellant failed to prove that newer DNA testing techniques exist that would provide more accurate and more probative results.

When, as here, the trial court denies a motion for postconviction DNA testing without conducting a hearing, we review the ruling de novo. *See Smith v. State*, 165 S.W.3d 361, 363 (Tex. Crim. App. 2005); *Fain v. State*, No. 02-10-00412-CR, 2012 WL 752652, at *6 (Tex. App.—Fort Worth Mar. 8, 2012, pet. ref'd) (mem. op., not designated for publication). A trial court may order forensic DNA testing only if statutory conditions are met. *Bell v. State*, 90 S.W.3d 301, 306 (Tex. Crim. App. 2002). Those conditions include the requirement that if evidence that a convicted person asks to be tested has already been tested, the convicted person must show the existence of "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). The convicted person must provide "statements of fact" satisfying this requirement and may not "simply rely on general and conclusory statements." *See Smith v. State*, No. 03-15-00549-CR, 2016 WL 3361208, at *4

(Tex. App.—Austin June 10, 2016, no pet.) (mem. op., not designated for publication); *Padilla v. State*, Nos. 03-12-00299-CR, 03-12-00300-CR, 03-12-00301-CR, 2013 WL 3185896, at *5 (Tex. App.—Austin June 20, 2013, pet. ref'd) (mem. op., not designated for publication) (stating that "general, conclusory statements are insufficient" to meet the requirement for retesting); *see also Fothergill v. State*, No. 05-15-00862-CR, 2016 WL 1435658, at *3 (Tex. App.—Dallas Apr. 11, 2016, pet. ref'd) (mem. op., not designated for publication) (observing that nothing within a convicted person's motion for retesting biological materials established "what testing methods were used, what specific 'newer' methods [were] available, or a basis for concluding that any newer methods would yield more probative results"); *Sadler v. State*, No. 10-15-00136-CR, 2015 WL 7074577, at *1 (Tex. App.—Waco Nov. 12, 2015, no pet.) (mem. op., not designated for publication) ("[I]t was Sadler's burden to show that newer techniques are available . . . . Sadler did not expressly set forth a specific newer technique at all in his motion or affidavit. Because of this, he did not set forth statements of fact necessary to support his motion." (citations omitted)).

We affirmed the trial court's denial of appellant's second motion for DNA testing on the basis that his bare allegations regarding newer testing techniques were insufficient to establish the need for further testing. *Calton*, 2015 WL 3918013, at *2. Appellant's third motion contains the same bare allegations as

his second motion.[3] As before, we conclude that these conclusory, unsupported assertions are insufficient to justify further testing. *See id.*; *see also* Tex. Code Crim. Proc. Ann. art. 64.01(b)(2). Thus, we conclude that the trial court did not err by denying appellant's third motion, and we overrule his sole issue.

[3]We have taken judicial notice of the record in cause number 02-14-00158-CR and have compared the second motion's "declaration," which was at issue in that cause, with the third motion's "affidavit," which is at issue here. *See Turner v. State*, 733 S.W.2d 218, 223 (Tex. Crim. App. 1987) (recognizing that an "appellate court may take judicial notice of its own records in the same or related proceedings involving same or nearly same parties"). The second motion's "declaration" stated:

> (1) DNA testing technology has evolved tremendously over the past few years.
>
> (2) DNA testing technology continues to advance and there are several methods to test biological material that did not exist as recent as three years ago.
>
> (3) A review of the literature has revealed several different methods including but not limited to Touch DNA and other more advanced testing methods.
>
> (4) The DNA testing technology now available in the year 2013 clearly trumps the testing capabilities that were available when testing was done . . . in 2002.

The third motion's "affidavit" contains nearly identical statements.

Conclusion

Having overruled appellant's only issue, we affirm the trial court's order denying his third motion for DNA testing.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: May 18, 2017