FILED BY CLERK
MAY -7 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. DAVID LEON STOKES, II, Petitioner.	2 CA-CR 2013-0088-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007005516001DT

Honorable Rosa Mroz, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Diane Meloche — Phoenix
Attorneys for Respondent

James J. Haas, Maricopa County Public Defender
By Louise Stark — Phoenix
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 David Stokes petitions this court for review of the trial court's summary denial of his petition for post-conviction relief, specifically the court's denial of his

request for post-verdict DNA[1] testing pursuant to A.R.S. § 13-4240. DNA testing pursuant to § 13-4240 is a form of post-conviction relief; we therefore review the court's denial of Stokes's request for an abuse of discretion. *See State v. Gutierrez*, 229 Ariz. 573, ¶¶ 19-20, 278 P.3d 1276, 1280 (2012).

¶2 In 1998, Stokes stabbed the sixteen-year-old victim, A., in the lower abdomen, forced her into the van she had been driving, and forcibly raped her. Stokes's DNA matched that of sperm cells found in the victim's vagina. Sperm found on the van's seat, however, was not tested for a DNA match, although a sample was taken and preserved. Stokes was convicted after a jury trial of sexual assault, kidnapping, aggravated assault, and armed robbery and sentenced to concurrent prison terms, the longest of which are twenty years. We affirmed Stokes's convictions and sentences on appeal. *State v. Stokes*, No. 1 CA-CR 08-0947, 12 (memorandum decision filed Feb. 11, 2010).

¶3 Stokes then sought post-conviction relief, arguing the sentencing minute entry contained "clerical error[s]" regarding his sentences. He additionally claimed, both in his petition and in a separately filed motion, that he was entitled to DNA testing of the sperm sample found in the van. Finally, he asserted that the results of that DNA testing "are expected to constitute newly discovered evidence previously ignored due to ineffective assistance" of counsel.

[1]Deoxyribonucleic acid.

¶4 The trial court granted relief on Stokes's claims regarding the sentencing minute entry and issued an order amending that minute entry. It denied Stokes's request for DNA testing, concluding that even if the test results excluded Stokes as a contributor to the sperm found on the van seat, that fact would not have changed the result at trial. The court concluded that, because the van was a rental "which had not yet been cleaned before the rape" and had been "abandoned after the rape where others could have had access," the sperm "could have [been] deposited" by "[a]ny fertile male who had access to the van." It further observed that if another person had raped A., that person's sperm would have been found in her vagina, and that the jury had rejected Stokes's claim that he and A. had consensual sex.

¶5 Pursuant to § 13-4240(A), a defendant may request DNA testing of evidence "in the possession or control of the court or the state, that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence." A trial court shall order testing if there is a "reasonable probability" that the petitioner "would not have been prosecuted or convicted if exculpatory results had been obtained" through DNA testing, that the evidence "is still in existence and is in a condition that allows" testing, and "[t]he evidence was not previously subjected to [DNA] testing or was not subjected to the testing that is now requested and that may resolve an issue not previously resolved by the previous testing." § 13-4240(B). A court may order DNA testing if the latter two conditions are met and there is a "reasonable probability" either that "the petitioner's verdict or sentence would have been more favorable if the results of [DNA] testing had been available at the trial

leading to the judgment of conviction" or that testing "will produce exculpatory evidence." § 13-4240(C). In the related context of prejudice resulting from the ineffective assistance of counsel, a "'reasonable probability' is 'less than more likely than not but more than mere possibility.'" *State v. Jaramillo*, 152 Ariz. 394, 397, 733 P.2d 279, 282 (1987), *quoting State v. Fisher*, 152 Ariz. 116, 120, 730 P.2d 825, 829 (1986).

¶6 On review, Stokes asserts the trial court erred in rejecting his request for DNA testing, arguing that if he were excluded as a contributor to the sperm found on the van's seat, that evidence would have been exculpatory and that there would be "a reasonable probability that the jury would not have convicted" him. Stokes points to his testimony that he did not recognize A., but that he would give drugs to women in exchange for sex, and that the day before A. had been attacked, he had sex with "some Caucasian girl, 16 years old" in exchange for giving her fake drugs. He further observes that A. had admitted she previously used drugs and that there was testimony suggesting it was possible that A. could have been raped without sperm being deposited in her vagina if the rapist had used a condom or had a vasectomy. He relied on this evidence to argue at trial that his sperm had been found in A.'s vagina because they had consensual sex, but that she had been raped by someone else. Thus, he reasons, if the sperm found on the seat was not his, that fact would corroborate his defense theory. He further claims the state "repeatedly argued" the presence of sperm on the van's seat supported A.'s testimony, thereby "impliedly bolster[ing]" her credibility regarding her claims she had been a virgin and drug-free at the time of the attack. He therefore argues if the sperm was not his, that fact would weaken the state's case.

¶7 If it were determined that Stokes was not the source of the sperm found in the van, it would provide some support for his defense and marginally weaken the state's case. However, the mere possibility of a different result is not sufficient for Stokes to be granted relief pursuant to § 13-4240(B), *cf. Jaramillo*, 152 Ariz. at 397, 733 P.2d at 282, and the court has discretion whether to order testing pursuant to § 13-4240(C) even if the evidence would be exculpatory. We agree with the trial court that, based on the evidence in the record, there is no reasonable probability the evidence would change the verdict. Stokes's theory that he had intercourse with A. the day before she was attacked finds scant support in the record—he failed to recognize her and, during his interview with police, denied having had sex with her and never mentioned having had intercourse with any woman, much less a sixteen-year-old girl, the day before the assault, despite being asked why his sperm would have been found in the victim's vagina. And, as the court noted and Stokes conceded, even if the sperm was not Stokes's, the van had not been cleaned before the incident and had been abandoned—thus, the sperm was not necessarily the rapist's.

¶8 Moreover, Stokes's theory is entirely dependent on the supposition that the attacker wore a condom or had a vasectomy. The latter contention is flatly disproven by the record; an expert testified that an individual who had a vasectomy would not deposit sperm. And Stokes's claim the attacker could have been wearing a condom conflicts with the evidence. A. testified that she believed her attacker had not done so, and her testimony was entirely consistent with that belief—she testified that she felt "a warm fluid rush" just before her attacker stopped raping her and that he had then "handed [her]

a[] rag to wipe [her]self with." And, as the trial court noted, it is far less likely that A.'s attacker would have deposited sperm on the van seat had he been wearing a condom during the attack.

¶9 Finally, we disagree with Stokes that the state "repeatedly" argued that the sperm found in the van supported its case. During its rebuttal closing argument, the prosecutor stated that the "one spot of semen" in the van "happened to be on the same [seat on which A.] said [she] was raped." We see no reasonable likelihood the jury would have reached a different result had the state been precluded from making this statement because the sperm was not from Stokes. This was the only instance that Stokes has identified where the prosecutor mentioned the sperm found on the van's seat.[2] The state concentrated its argument on the far more damning evidence—the presence of Stokes's sperm in A.'s vagina. And Stokes identifies nothing suggesting the state implied or suggested the sperm found in the van bolstered A.'s credibility in regards to her claim of virginity or that she was not using drugs at the time of the attack.

¶10 For the reasons stated, we conclude the trial court did not abuse its discretion in concluding there was no reasonable probability Stokes would not have been prosecuted or convicted if the sperm found in the van proved not to be from him. *See* § 13-4240(B). And, to the extent that evidence would be exculpatory, a trial court's decision whether to order testing pursuant to § 13-4240(C) is discretionary. Because the

[2]In support of his claim that the state "repeatedly argued that the presence of semen in that particular location was strong corroboration of the victim," he cites five different excerpts from the trial transcript. Only one of those excerpts, however, contains any reference to the sperm found in the van.

evidence is unlikely to have changed the verdict, we have no basis to conclude the court abused its discretion in denying Stokes's request pursuant to § 13-4240(C).

¶11 Although review is granted, relief is denied.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Michael Miller
MICHAEL MILLER, Judge