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# Commonwealth of Kentucky

# Court of Appeals

NO. 2016-CA-000612-MR

JAMES C. POTTER, II — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 08-CR-00386

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JONES, JUDGES.

ACREE, JUDGE: James C. Potter II appeals, *pro se*, the March 14, 2016 order of the McCracken Circuit Court denying his motion for post-conviction forensic testing. We affirm.

## FACTS AND PROCEDURE

The victim of Potter's crime, J.A., was born in December 1994. Potter was a friend of J.A.'s mother and frequently babysat J.A. and her younger sister while their mother worked. Potter began abusing J.A. in July 2002. In July 2008, J.A. disclosed that over a period of approximately six years, beginning when she was seven years old, Potter had engaged in multiple instances of sexual contact with her.

In 2010, a jury convicted Potter of first-degree rape, first-degree sodomy, second-degree sodomy, attempted second-degree sodomy, two counts of second-degree rape, two counts of second-degree sexual abuse, and two counts of first-degree sexual abuse. For these crimes, the circuit court sentenced Potter to life in prison for the first-degree rape and sodomy convictions, five years' imprisonment for each conviction of first-degree sexual abuse, ten years' imprisonment for the second-degree sodomy conviction, and ten years' imprisonment for each conviction of second-degree rape, all to be served concurrently. For the three misdemeanor convictions,[1] the circuit court sentenced Potter to twelve months' imprisonment, to be served concurrently, and fined him $500.00 on each conviction.

[1] Two counts of second-degree sexual abuse and one count of attempted second-degree sodomy.

Potter appealed to the Kentucky Supreme Court as a matter of right. The Supreme Court found Potter had been subjected to double jeopardy due to erroneous jury instructions and reversed one count of first-degree sexual abuse and one count of second-degree sexual abuse. *Potter v. Commonwealth*, 2010-SC-000410-MR, 2011 WL 4430871, at *1 (Ky. Sept. 22, 2011). It also reversed the assessment of fines for the misdemeanor convictions. *Id.* In all other respects, the Supreme Court affirmed. *Id.*

Potter sought relief from his conviction under RCr[2] 11.42, alleging seventeen instances of ineffective assistance of counsel. The circuit court denied Potter's motion and we affirmed. *Potter v. Commonwealth*, 2013-CA-001099-MR, 2015 WL 3643431, at *1 (Ky. App. June 12, 2015).

Potter then filed a motion for post-conviction forensic testing and analysis of evidence pursuant to KRS[3] 422.285, a special exception to the rule of finality of judgments authorizing DNA testing even after a criminal conviction. *Virgil v. Commonwealth*, 403 S.W.3d 577, 578-79 (Ky. App. 2013). The Commonwealth responded that KRS 422.285 was inapplicable because the evidence had been previously subjected to DNA testing and, even if conducted, would not have affected the outcome of his trial. The circuit court denied Potter's

[2] Kentucky Rules of Criminal Procedure.
[3] Kentucky Revised Statute.

motion. Potter requested reconsideration, which the circuit court also denied. This appeal followed.

## STANDARD OF REVIEW

Whether a defendant is entitled to post-conviction forensic testing of evidence pursuant to KRS 422.285 is, in part, a matter of statutory interpretation. Statutory interpretation is a question of law necessitating a *de novo* review. *Commonwealth v. Love*, 334 S.W.3d 92, 93 (Ky. 2011). However, "[t]he trial court necessarily has broad discretion in applying the results of any DNA testing to the question of whether a new trial is warranted." *Bowling v. Commonwealth*, 357 S.W.3d 462, 470 (Ky. 2010). We defer to the circuit court's broad discretion related to the factual findings made while applying the statute, and will not disturb its findings absent an abuse of that discretion. *See id*.

## ANALYSIS

Potter argues he is entitled to testing of four items: hair located on an electric razor seized from Potter's residence, and three sex toys. The evidence at trial was that Potter used the razor to shave the victim's pubic hair while menstruating, and DNA from the victim and Potter was found on the razor. Additionally, evidence presented at trial showed the victim's DNA on multiple sex toys owned by Potter. The victim testified Potter used the sex toys on her.

Potter acknowledges that all the evidence at issue had been subjected to previous DNA testing. But he claims his post-conviction motion specifically sought "messenger RNA (mRNA) testing to determine the source tissue of the DNA recovered," a type of testing not previously performed. Potter asserts this type of testing would identify the source, *i.e.* saliva, vaginal fluid, semen, blood, menstrual secretions, and/or skin, of the DNA found on the sex toys and the razor. He argues the results of the testing of the razor would show none of the victim's pubic hairs or menstrual secretions were contained on the razor, and therefore the DNA must have come from another, non-sexual source. Additionally, mRNA testing of the three sex toys, Potter argues, would reveal that the DNA is also from non-sexual, non-vaginal sources, thereby contradicting the victim's testimony that the sex toys were used on her in a sexual manner. That is, mRNA testing will show that the DNA found on the sex toys is not from vaginal cells, thereby raising the possibility that the victim simply "touched" these items – thereby depositing DNA on them from skin, not vaginal mucous.

We have examined the record closely and have carefully considered the arguments. We find KRS 422.285 does not entitle Potter to the testing he seeks. To the extent the circuit court exercised its discretion in denying the motion, that discretion was not abused.

As discussed in greater detail in *Owens v. Commonwealth*, 512 S.W.3d 1 (Ky. App. 2017), KRS 422.285 affords certain felons the post-conviction right to DNA testing of certain evidence. The statute indicates a multi-step analysis, requiring a trial court to determine the availability of relief under KRS 422.285 by assessing (1) the petition (and supplements and response), (2) the petitioner, and (3) the evidence, to confirm that each meets the statute's requirements. Only after addressing these three preliminary steps can the trial court reach step (4), the more substantive and ultimate question – is there a reasonable probability that the DNA evidence the petitioner seeks would have made a difference had it been available at or before trial? KRS 422.285(5)(a), (6)(a).

Potter's pursuit of post-conviction testing hits an immediate roadblock in the first step. His petition seeks a kind of testing not authorized by the statute. "A petition is authorized by the statute to procure only one type of post-conviction forensic testing; of course, that is testing and analysis of evidence for DNA." *Owens*, 512 S.W.3d at 7. In the words of the authorizing statute, "a person . . . who meets the requirements of this section may . . . request . . . forensic ***deoxyribonucleic acid (DNA)*** testing and analysis of . . . evidence . . . ." KRS 422.285(1)(a). Potter did not request DNA testing; he requested messenger

***ribonucleic acid (RNA)*** testing. The legislature has not authorized mRNA testing and the circuit court would have erred had it granted Potter's petition.

Nevertheless, Potter argues mRNA testing is simply a subset of DNA testing. He cites no persuasive authority[4] to support his claim. On the other hand, in *In re O'Farrell*, 853 F.2d 894 (Fed. Cir. 1988), the Federal Circuit, in the context of a patent dispute, contrasted RNA and DNA. There, the court said:

> RNA is a molecule that closely resembles DNA. It differs, however, in that it contains a different sugar (ribose instead of deoxyribose) and the base thymine (T) of DNA is replaced in RNA by the structurally similar base, uracil (U). Making an RNA copy of DNA is called *transcription.* The transcribed RNA copy contains sequences of A [adenine], U [uracil], C [cytosine], and G [guanine] that carry the same information as the sequence of A, T [thymine], C, and G in the DNA. That RNA molecule, called *messenger RNA*, then moves to a location in the cell where proteins are synthesized.
>
> . . . .
>
> The function of messenger RNA is to carry genetic information (transcribed from DNA) to the protein synthetic machinery of a cell where its information is translated into the amino acid sequence of a protein.

[4] Potter's citations to authority include Merriam-Webster 10th Ed. Collegiate Dictionary and several journal articles, including: "Analysis and Implications of the Miscarriages of Justice of Amanda Knox and Raffaele Sollecito;" "DNA Transfer: Review and Implications for Case Work;" and "Advancing Forensic RNA typing: On Non-Target Secretions, a Nasal Mucosa Marker, a Differential O-Extraction Protocol, and The Sensitivity of DNA and RNA profiling," all published in the Forensic Science International: Genetics journal. Only the last article was submitted to the circuit court for its consideration. Kentucky Rules of Civil Procedure (CR) 76.12(4)(b)(vii) ("[M]aterials and documents not included in the record shall not be introduced or used as exhibits in support of briefs.").

*Id.* at 897-98; *see also* Christopher M. Holman, *Mayo, Myriad, and the Future of Innovation in Molecular Diagnostics and Personalized Medicine*, 15 N.C. J. L. & Tech. 639, 657 (2014) ("The structural differences between RNA and DNA are functionally significant[.]"). There being no doubt that DNA and mRNA are distinct, and engaging in the presumption that such knowledge was available to the legislature when KRS 422.285 was enacted, and perceiving that the statute clearly includes DNA testing and not mRNA testing, we cannot accept Potter's argument that his petition falls within the parameters of that statute.

Potter argues alternatively that language in the statute does suggest that the legislature contemplated unknown types of testing and analysis beyond DNA testing, making it reasonable for him to request mRNA testing under the authority of KRS 422.285. He supports his position by pointing to subsections (5)(c) and (6)(c), which provide for DNA testing if "[t]he evidence was not previously subjected to DNA testing and analysis *or was not subjected to the testing and analysis that is now requested*[.]" KRS 422.285(5)(c), (6)(c) (emphasis added). However, our Supreme Court has already indicated otherwise. *Moore v. Commonwealth*, 357 S.W.3d 470, 478, 491 (Ky. 2011) ("[T]he mere fact that alternative or more advanced *DNA testing* is available . . . does not mean that a circuit court is required to order it, especially where so-called standard DNA testing has already been performed, as was the case here." (emphasis added)).

We note also Potter's admission that mRNA testing was not available in the United States at the time he submitted his request to the circuit court. Potter attached to his reconsideration motion a letter from the Kentucky State Police advising it "is not aware of any laboratory facilities that may perform this type of analysis." (R. 76). He also submits to this Court an email from the Netherlands Forensic Institute in which the correspondent provided, "I am not aware of an USA laboratory performing routine RNA testing in case work," along with a second email from the associate director of the National Center for Forensic Science in which the director stated, "Unfortunately, I do not know of anyone in the US right now who is using mRNA in case work although that should change in the next year."[5] A convicted felon's request of a circuit court under KRS 422.285 to authorize forensic testing that is not only unavailable in Kentucky, but unavailable in the United States, is unreasonable. The future availability of this testing has no impact on our decision. It was unavailable at the time Potter requested it.

The statute is clear. We are bound by its plain language. *Commonwealth v. Jones*, 406 S.W.3d 857, 859 (Ky. 2013) ("The most logical and effective manner by which to determine the intent of the legislature is simply to analyze the plain meaning of the statutory language: '[r]esort must be had first to

[5] It does not appear either email was provided to the circuit court or made part of the trial record. Again, it was improper for Potter to attach these items to his brief to this Court. CR 76.12(4)(b)(vii) ("[M]aterials and documents not included in the record shall not be introduced or used as exhibits in support of briefs.").

the words, which are decisive if they are clear.'" (internal citations omitted)). Potter is not entitled to mRNA testing under KRS 422.285. The circuit court did not err in denying his motion. And to the extent the circuit court exercised its discretion in denying the motion, that discretion was not abused in this case.

We need not address Potter's argument that his verdict or sentence would have been more favorable if the results of mRNA testing and analysis had been available at the trial because his petition failed to meet the requirements preliminary to that more substantive question.

## CONCLUSION

We affirm the McCracken Circuit Court's March 14, 2016 order denying Potter's request for post-conviction testing and analysis pursuant to KRS 422.285.

ALL CONCUR.

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