IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 20, 2004

JIMMY WAYNE WILSON v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Sullivan County
Nos. C46, 506 Lynn Brown, Judge

No. E2003-02598-CCA-R3-PC
June 18, 2004

The Defendant, Jimmy Wayne Wilson, petitioned for post-conviction relief under the Post-Conviction DNA Analysis Act of 2001, Tenn. Code Ann. § 40-30-301 et. seq. The trial court summarily denied relief upon the State's response that no evidence remained available for testing. The Defendant now appeals, asserting that he should have been afforded a hearing in which to test the veracity of the State's claim of no remaining evidence. We affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JOE G. RILEY and THOMAS T. WOODALL, JJ., joined.

E. Lynn Dougherty, Bristol, Tennessee, for the appellant, Jimmy Wayne Wilson.

Paul G. Summers, Attorney General and Reporter; Michelle R. Chapman, Assistant Attorney General; Greeley Wells, District Attorney General; and William B. Harper, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Defendant was convicted of rape in 1985. His conviction was affirmed on direct appeal. See State v. Jimmy Wayne "Jimbo" Wilson, C.C.A. No. 717, 1986 WL 12922 (Tenn. Crim. App., Knoxville, Nov. 14, 1986). In May 2002, the Defendant filed a post-conviction petition requesting the forensic DNA analysis of evidence collected in conjunction with his prosecution. The State responded, stating, inter alia, that "[t]he evidence that the defendant seeks to have tested is not still in existence and in such a condition that DNA analysis can be conducted." According to the State, the evidence that was used as exhibits at the Defendant's trial was subsequently stored in an evidence vault at the "old courthouse" in Blountville, Tennessee. In 1990, a fire broke out in the evidence vault, which caused extensive damage to the vault's contents. According to the State's response, "the evidence that petitioner seeks to have tested was destroyed in the 1990 fire . . . and, therefore, cannot be tested."

The State's response included an affidavit from Mr. Raymond Winters, the Circuit Court Clerk for Sullivan County, which provides, in pertinent part, as follows:

> As part of my job duties, I am responsible for storing all evidence introduced at the trial of criminal cases that is filed with the Clerk's Office.
>
> On June 26, 1985, Court Reporter Barbara Hubble filed all trial exhibits associated with the case of State v. Jimmy Wayne Wilson, Sullivan County Criminal Court case number 18,745, in the Clerk's Office . . . .
>
> All items that were filed, including all evidence that Petitioner seeks to have tested in this post-conviction petition, remained in the evidence vault of the Clerk's Office until the morning of April 16, 1990, when a fire broke out in the evidence vault at the old courthouse. Damage to the evidence being stored in the vault was extensive. The majority of the items stored in the vault were not salvageable due to fire, smoke, and water damage. The only items recovered were a couple of guns and a few loose coins.
>
> No evidence from case no. 18,745 was recovered from the fire.
>
> I have searched the evidence vault currently used by the Clerk's Office and have found no evidence from the case of State of Tennessee v. Jimmy Wayne Wilson.

Also attached to the State's response was an affidavit from Mr. James Graham, evidence custodian for the Bristol, Tennessee Police Department, setting forth the following:

> According to the records of the Bristol Tennessee Police Department, our department was the agency that prosecuted the case of State of Tennessee v. Jimmy Wayne Wilson, case number 18,745. Detective Bill Smith collected the evidence in that case and later submitted it to the FBI for examination. The evidence was ultimately introduced at trial in the above-referenced case.
>
> I have searched our records and our evidence room for any exhibits from the case of State of Tennessee v. Jimmy Wayne Wilson. There is no evidence from that case currently in the custody of the Bristol Tennessee Police Department.

Given its determination that no evidence existed on which to perform a DNA analysis, the State moved the trial court to dismiss the Defendant's petition without a hearing. The Defendant responded by requesting that he be allowed a hearing in which to confront and cross-examine the State's affiants. The trial court granted the State's motion, stating:

> Upon the affidavits and attachments to the state's motion the court is of the opinion that the evidence in question was in fact destroyed. The petitioner's response to the motion does not state that any evidence for DNA testing has been found, although the petitioner requests a hearing in order to confront and cross examine the affiants. Counsel for the petitioner has informed the court that he has interviewed numerous witnesses and can find no evidence in existence relating to [the Defendant's] underlying conviction which could be analyzed for DNA. Accordingly, the court is of the opinion that the state's motion should be granted.

The Defendant now alleges that the trial court erred in granting the State's motion because the summary dismissal denied him his constitutional rights to a hearing in which to confront and cross-examine the witnesses against him.[1]

The Post-Conviction DNA Analysis Act of 2001 provides that persons convicted of rape may "file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence." Tenn. Code Ann. § 40-30-303. The trial court must then order a DNA analysis if it finds that:

> (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
>
> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
>
> (3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
>
> (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Id. § 40-30-304 (emphasis added). Alternatively, the trial court may order a DNA analysis if it finds that:

> (1) A reasonable probability exists that analysis of the evidence will produce DNA results which would have rendered the petitioner's verdict or sentence more

[1] The Defendant couches his argument in terms of a denial of due process, in that he was denied a hearing. See U.S.Const. amend. XIV; Tenn. Const. Art. I, § 8. Implicit in his argument, however, is also a claimed denial of his rights to confront and cross-examine witnesses. See U.S.Const. amend VI; Tenn. Const. Art. I, § 9.

> favorable if the results had been available at the proceeding leading to the judgment of conviction;
>
> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
>
> (3) The evidence was never previously subjected to DNA analysis, or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
>
> (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Id. § 40-30-305 (emphasis added). In either event, a hearing is appropriate only if the evidence on which the DNA analysis is to be conducted "is still in existence."

Based on evidence submitted by the State, the trial court made a finding of fact that the evidence required for a hearing is no longer in existence. The Defendant has offered no contrary proof. Rather, he argues that he is entitled to a hearing to test the State's assertion that the evidence has been destroyed. The Defendant relies on reports provided by the State in its response to the Defendant's petition which reflect the investigation into the fire and which contain the following statements:

> The fire was extinguished [and] the remains of the safe w[ere] removed by maintenance personnel. Criminal Court Clerk Raymond Winters supervised the removal of the material from the safe. Mr. Winters had the items stored in rental trailers and locked at the Sheriff's Office impound lot.
>
> It was decided that to complete[ly] extinguish the fire, the contents of the vault would have to be brought out. Mr. Winter and Mr. Akard advised to proceed with Officer Sammons to stand-by and guard the contents until arrangements were made to transfer & store the vault contents.

We note that Mr. Winter's affidavit identifies these remaining contents as "a couple of guns and a few loose coins," none of which are relevant to the Defendant's case.

This Court has previously addressed contentions similar to the Defendant's in William D. Buford v. State, No. M2002-02180-CCA-R3-PC, 2003 WL 1937110 (Tenn. Crim. App., Nashville, April 24, 2003). In Buford, the defendant filed a petition for DNA analysis and the State responded with affidavits establishing that neither the clerk of the trial court, the TBI Crime Laboratory, the Franklin Police Department, nor the Williamson County Sheriff's Department had any evidence available for testing. The defendant replied that the State's affidavits were "not conclusive and did

not afford him the opportunity of cross-examination." 2003 WL 1937110, at *2. The trial court summarily dismissed the defendant's petition. On appeal, this Court affirmed the summary dismissal. In so doing, this Court noted that "[t]he Tennessee act does not specifically provide for a hearing as to the qualifying criteria . . . ." Id. at *3. Accordingly, "[i]f the [S]tate contests the presence of any qualifying criteria [required by the Act] and it is apparent that each prerequisite cannot be established, the trial court has the authority to dismiss the petition." Id. at *6. This Court then held that, "[b]ecause the trial court . . . made a conscientious effort to determine the existence of the statutory conditions and had substantial facts upon which to determine that the biological specimens were no longer available, a summary dismissal was appropriate. All four qualifying criteria were not present." Id.

In making its ruling, this Court relied heavily on the Texas case of Cravin v. State, 95 S.W.3d 506 (Tx. App. 2002), noting that Texas' DNA analysis statute is very similar to our own. See Buford, 2003 WL 1937110, at *5. In Cravin, the state responded to the defendant's petition for post-conviction DNA analysis with affidavits asserting that no evidence was available. The trial court then summarily denied the defendant's petition. The defendant appealed, arguing that the summary dismissal denied him his constitutional right to confront the witnesses against him. See U.S.Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.") The Texas Court of Appeals rejected the defendant's argument, stating that

> appellant's exclusion from the post-conviction DNA hearing did not implicate his rights under the Confrontation Clause. The convicting court relied on the State's response to dismiss the motion. However, these documents were not accusatory, they were filed in response to appellant's motion. Unlike a criminal trial, consideration of a post-conviction DNA proceeding does not necessarily involve any witnesses or accusations against the appellant.

Id. at 510 (citation omitted).

We are persuaded that the Texas Court of Appeals' reasoning is correct. The Sixth Amendment right to confront witnesses applies only to criminal proceedings. See, e.g., Burgess v. King, 130 F.2d 761, 762 (8th Cir. 1942). Similarly, Tennessee's constitutional rights to confront and cross-examine witnesses are limited to criminal prosecutions. See Deitch v. City of Chattanooga, 195 Tenn. 245, 258 S.W.2d 776, 778 (Tenn. 1953). The Defendant's petition for post-conviction DNA analysis is not a criminal prosecution. Accordingly, we reach the same conclusion as the Texas Court of Appeals: that the Defendant has not been denied his constitutional rights to confront and/or cross-examine witnesses by the trial court's summary dismissal of his petition. Moreover, this Court has already held that a summary dismissal of a petition for DNA analysis may be appropriate, see Buford, and we therefore need not address the Defendant's vague contentions that the summary dismissal of his petition somehow violate his due process rights. See also Cravin, 95 S.W.3d at 510 ("an applicant for a post-conviction DNA proceeding enjoys neither a presumption of innocence nor a constitutional right to be present at a hearing.")

Finding the Defendant's contentions to be without merit, we affirm the judgment of the trial court.

_____

DAVID H. WELLES, JUDGE