IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,065

ROBERT LYNN PRUETT, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL OF A CHAPTER 64 DNA PROCEEDING FROM CAUSE NO. B-01-M015-0-PR-B IN THE 156TH JUDICIAL DISTRICT COURT BEE COUNTY

ALCALA, J., filed a concurring opinion.

CONCURRING OPINION

Unfortunately, the DNA evidence on the murder weapon in this case has been contaminated, and thus it appears that such evidence will never provide a more definitive answer to whether Robert Lynn Pruett, appellant, is guilty of the 1999 capital murder of Daniel Nagle, a correctional officer at the McConnell Unit. *See Pruett v. State*, No. AP-74,370, 2004 WL 3093232 (Tex. Crim. App. Sept. 22, 2004) (not designated for publication);

Ex parte Pruett, 207 S.W.3d 767, 767 (Tex. Crim. App. 2005) (per curiam, mem. op.) (denying initial post-conviction habeas application). I agree with this Court's assessment that the unknown female DNA profile that was recovered from the murder weapon would not likely change the outcome of appellant's trial because, as found by the trial court, that profile is the result of contamination of the evidence that occurred after the offense was committed. I, therefore, concur in this Court's opinion affirming the trial court's determination that it is not reasonably probable that appellant would not have been convicted had the results of DNA testing been available at trial.

I write separately to note that my agreement with the majority's holding today in this Chapter 64 DNA appeal is not an abdication of the view I have expressed in my previous dissenting opinions in this case with respect to appellant's recent post-conviction habeas applications. I maintain my position taken in those dissenting opinions that it appears there may be significant problems with the evidence of guilt and with the imposition of the death penalty in this case. Therefore, further attention by this Court is warranted, even if it means reopening appellant's subsequent habeas applications in WR-62,099-02 and in WR-62,099-05, which were dismissed by this Court on the basis of procedural bars. *See Ex parte Pruett*, No. WR-62,099-02 (Tex. Crim. App. Dec. 10, 2014) (not designated for publication) (Alcala, J., dissenting); *Ex parte Pruett*, 458 S.W.3d 537, 538-44 (Tex. Crim. App. 2015) (Alcala, J.. dissenting).

The record suggests that appellant was convicted at his 2002 trial primarily on

evidence of his motive to harm the victim, testimony of inmate-witnesses, and junk science, but without any physical evidence directly establishing appellant's guilt. *See In re Pruett*, 784 F.3d 287, 289 (5th Cir. 2015) (noting that "there was no physical evidence connecting [appellant] to the murder"). And as this Court's opinion today notes, DNA testing is not possible for purposes of identifying the perpetrator.

As to motive, the State's theory was that appellant was upset because Officer Nagle had written a disciplinary charge against him for having food in an area of the prison where it was not permitted. *Id*. Torn pieces of the disciplinary report were found near Officer Nagle's body after the murder. *Id*. At trial, appellant testified that he tore up the report in Officer Nagle's presence but then walked away without harming Officer Nagle. *Id*. DNA testing revealed that only Officer Nagle's blood was found on that disciplinary report. The report undisputedly provides evidence of motive, but appellant contends that others, both inmates and certain correctional officers, also had motive to kill Nagle or testify falsely against appellant.

Other than appellant's motive to commit the offense, the other evidence that the State relied on to prove appellant's guilt was the testimony by inmate-witnesses and a tape "expert." An inmate testified that he gave appellant masking tape, which appellant used to make the handle of the shank that was used to kill Officer Nagel. Specifically, this inmate-witness stated that appellant's cell mate, Phillips, gave masking tape to him and asked him to pass it along to appellant. To corroborate the inmate-witness's story, the State presented

the expert testimony of Lisa Harmon Baylor, who testified that, through the "science" of physical-match comparison, she was able to identify the tape wrapped around the handle of the weapon as having been torn off of one of the rolls at Phillips's workstation in the prison craft shop.

Appellant filed an initial habeas application. In 2004, the habeas court recommended that this Court grant appellant a new trial, but this Court declined that recommendation. The habeas court that heard appellant's initial application for a writ of habeas corpus made findings of fact that "fundamental and material violations of the Constitution, the Rules of Evidence, and the trial court's pretrial discovery" occurred in this case, and it recommended "that the applicant's conviction be set aside." *Pruett*, 207 S.W.3d at 767. This Court, however, denied the initial habeas application. In rejecting the habeas court's recommendation that appellant be granted a new trial, this Court held that, although the Due Process Clause confers upon defendants a right to be informed about the existence of exculpatory evidence, it does not require the prosecution "to 'reveal before trial the names of all witnesses who will testify unfavorably.'" *See id.* This Court further determined that, "[a]s for the trial court's conclusion that the failure to reveal the inculpatory statements also violated the rules of evidence and the trial court's discovery order, such violations, even if they occurred, would not be grounds for relief on habeas corpus." *Id.*[1]

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[1] After Pruett's initial writ application was decided, the Legislature passed the Michael Morton Act to ensure that defendants would receive discovery of the evidence the State had in its possession so that they could prepare a defense against it. *See* TEX. CODE CRIM. PROC. art. 39.14. Thus, under

(continued...)

Appellant filed subsequent habeas applications, two of which I will discuss in more detail, the -02 application and the -05 application, both of which were dismissed for procedural reasons.

This Court dismissed appellant's -02 writ application that was filed in 2014, in which he alleged a due process violation due to the use of false evidence at his trial and ineffective assistance of counsel for failure to investigate mitigation evidence. *Pruett*, No. WR-62,099-02. This Court determined that the subsequent application failed to satisfy the requirements of Article 11.071, § 5(a), and the Court dismissed it. *See id.*; TEX. CODE CRIM. PROC. art. 11.071, § 5(a). I dissented to that dismissal on the basis that appellant had made a prima facie showing that his claims should have been remanded to the trial court for consideration. *Pruett*, No. WR-62,099-02 (Alcala, J., dissenting).

With respect to his complaint that false evidence was used to obtain his conviction, appellant contended that "due process was violated when the State failed to disclose deals that had been made with the inmate witnesses [who] testified during guilt/innocence and [the State] failed to correct false testimony." *Id*., slip op. at 3. Appellant explained that his due-process rights were violated by the State's failure to disclose that a deal had been made with witness Harold Mitchell and also by the State's failure to correct Mitchell's false testimony. Furthermore, appellant contended that his "right to due process was violated by the State's

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[1](...continued)
today's law, the State would be required to reveal this type of evidence to a defendant.

failing to disclose that inmates who desired to testify on Pruett's behalf were threatened and physically assaulted." *Id.*, slip op. at 3-4. Appellant argued that the factual basis of this claim was unavailable on the date that he filed his initial application, but this Court's majority opinion held that his claims were procedurally barred. In my dissenting opinion, I concluded that Pruett had pleaded a prima facie case that his due-process rights were violated and voted to remand that complaint for consideration of its merits.[2]

Appellant additionally alleged in the -02 habeas application that his trial counsel was ineffective for failing to conduct an adequate investigation for mitigating evidence. *See id.*, slip op. at 2-3. This Court determined that the ineffective-assistance-of-trial-counsel claim failed to satisfy the requirements of Article 11.071, § 5(a), and the Court dismissed it. *See id.*; TEX. CODE CRIM. PROC. art. 11.071, § 5(a). I dissented to that dismissal on the basis of my conclusion that appellant had presented a prima facie case on which relief could be granted and thus his claim should have been remanded to the trial court for further

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[2] In my later dissenting opinion with respect to this Court's dismissal of Pruett's -05 writ application, I noted that appellant's assertions that the State used the false testimony of inmate-witnesses is precisely what the Legislature was concerned about when it passed a statute to regulate this type of evidence after appellant's trial took place. *See Ex parte Pruett*, 458 S.W.3d 537, 543 (Tex. Crim. App. 2015) (Alcala, J., dissenting). There, I noted that, in 2009, the Legislature enacted Code of Criminal Procedure Article 38.075, which states, "A defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed." *See* TEX. CODE CRIM. PROC. art. 38.075(a). I asserted that, because this enactment reflects a legislative determination that testimony by one inmate against another is inherently unreliable, this Court should permit appellant to litigate the substantive merits of his claim that his fellow inmates gave false testimony against him.

consideration, relying on the reasoning in my dissent in *Ex parte Buck* and suggesting that inadequate representation by appellant's initial habeas counsel in failing to raise a potentially meritorious claim should serve as a basis to overcome the bar on subsequent writs. *Pruett*, No. WR-62,099-02, slip op. at 2 (citing *Ex parte Buck*, 418 S.W.3d 98, 109 (Tex. Crim. App. 2013) (Alcala, J., dissenting)). In my dissenting statement with respect to the Court's dismissal of that claim, I noted that appellant had presented new evidence that he was the victim of sexual abuse as a child for an extended period of time, that his mother prostituted him to men, and that his extreme poverty required him and his mother to dig through dumpsters to look for food and to sleep in parks due to homelessness. Based on this evidence that had emerged since the time of his trial, I concluded that he had presented a prima facie case of ineffective assistance of trial counsel due to counsel's failure to conduct an adequate investigation for mitigating evidence, worthy of remanding to the habeas court for consideration of that claim on its substantive merits.

In 2015, appellant filed his -05 subsequent writ application in which he asserted a complaint on the basis of new-science evidence regarding testimony at his trial. In that application, appellant asserted that he was entitled to receive a new trial because it was likely that jurors would not have convicted him had they been informed that the "science" relied upon by the State's expert regarding the masking tape has now been discredited. *See* TEX. CODE CRIM. PROC. art. 11.073(b)(2). In support, appellant cited a 2009 Forensic Report issued by the National Academy of Sciences. Appellant asserted that, had the jurors at his

trial known that the science relied upon by the State has now been discredited, it is probable that they would not have convicted him of capital murder. This Court dismissed the subsequent application as an abuse of the writ on the basis that the pleadings failed to satisfy the procedural bar on subsequent writs, and I dissented. *See Pruett*, 458 S.W.3d at 538 (Alcala, J., dissenting). I suggested that appellant's complaint that junk science was used to convict him is precisely what the Legislature envisioned when it enacted Article 11.073 to permit post-conviction challenges premised on relevant scientific evidence that was unavailable to the defense at trial or that contradicted scientific evidence relied on by the State at trial. *See id.* at 540; *see also* TEX. CODE CRIM. PROC. art. 11.073(a).

In my view, since his trial, appellant has presented sufficient evidence to call into question whether his conviction and death sentence are reliable, but this Court has denied him a substantive hearing to address the merits of his claims. Although I maintain that this Court should permit further litigation on appellant's post-conviction challenges in which he has sought to undermine the validity of his guilt and death sentence, I am compelled to agree with the majority opinion's determination that any DNA results in this case would not provide further pertinent information. With these comments, I respectfully concur.

Filed: April 5, 2017

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