IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,075

RUBEN RAMIREZ CARDENAS, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM DENIAL OF MOTION FOR FORENSIC DNA TESTING IN CAUSE NO. CR-0722-97-G IN THE 370TH JUDICIAL DISTRICT COURT HIDALGO COUNTY

***Per curiam*.**

O P I N I O N

Ruben Ramirez Cardenas ("Appellant"),[1] sentenced to death for the capital murder of his 16-year-old cousin, appeals pursuant to Texas Code of Criminal Procedure Article

[1] This Court's previous decisions related to this offense have referred to appellant as Ruben Ramirez Cardenas (Cardenas). Appellant captions his brief with the name Ruben Cardenas Ramirez. Federal courts have alternatively referred to appellant as Ramirez and Cardenas. We will refer to appellant in the manner consistent with our precedent.

64.05 an order denying his Chapter 64 motion for post-conviction forensic DNA testing and requests that we stay his pending execution.[2] We now accelerate this appeal, affirm the judgment of the trial court denying the testing, and deny the motion to stay his execution.

In February 1998, a jury convicted appellant of the 1997 offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071 and the trial court, accordingly, set punishment at death. This Court affirmed appellant's conviction and sentence on direct appeal. *Cardenas v. State*, 30 S.W.3d 384 (Tex. Crim. App. 2000). This Court denied appellant's initial post-conviction application for writ of habeas corpus in 2001. *Ex parte Cardenas*, No. WR-48,728-01 (Tex. Crim App. May 16, 2001)(not designated for publication). This Court then dismissed appellant's first subsequent application in 2007. *Ex parte Cardenas*, No. WR-48,728-02 (Tex. Crim. App. Mar. 7, 2007)(not designated for publication). In 2009, we dismissed appellant's second subsequent post-conviction application for writ of habeas corpus. *Ex parte Cardenas*, No. WR-48,728-03 (Tex. Crim. App. Sep. 30, 2009).

Federal proceedings in the case concluded on January 9, 2017, when the United States Supreme Court denied certiorari in appellant's case. *Ramirez v. Davis*, 137 S. Ct. 625 (2017). Therefore, on February 9, 2017, the trial court scheduled appellant's execution for June 7, 2017. However, the court later withdrew this order. On August 7,

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[2] All subsequent citations to articles or chapters refer to the Texas Code of Criminal Procedure unless stated otherwise.

2017, the trial court set a new execution date for appellant on November 8, 2017.

On September 15, 2017, appellant filed in the trial court pursuant to Chapter 64, a motion for forensic DNA testing of the following items:

- Cuttings from the gray Ford Probe (OC4, OC5, OC6, OC7, OC9);
- The known blood samples (34, 35, and 36);
- The fingernail clippings from the victim (32F, 32G, and 32I); and
- The knit shirt and jeans (04 and 05)[.[3]]

Although some of these items had previously been tested, appellant argued that the DNA testing methods used during his trial are now considered obsolete. The State filed a response to appellant's motion on October 20, 2017.

On October 25, 2017, the trial court issued an order denying appellant's motion for forensic DNA testing and made findings of fact and conclusions of law. The trial court noted in its order that the State had conceded that the enumerated items were in its possession. The trial court concluded that the assertions in appellant's confession that he punched the victim in the face and dumped her body at a remote site in a canal were corroborated by facts discovered only after appellant led the police to the victim's body. Also, because appellant had confessed to perpetrating the crime with a known co-actor, Antonio Castillo, the trial court concluded that exculpatory DNA testing results that matched Castillo would only "muddy the waters." The trial court concluded that such results would not satisfy the requirement contained in Article 64.03(a)(2)(A) that the

[3] Although appellant mentions in his motion the existence of other items, he does not request testing of items other than those listed here.

appellant establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing.

Additionally, the trial court noted that appellant had filed his motion only 54 days prior to his scheduled execution date after twenty years had elapsed since his conviction. The trial court concluded that appellant had failed to establish by a preponderance of the evidence that his motion for DNA testing was not made to unreasonably delay the execution of his sentence. *See* Art. 64.03(a)(2)(B).

Appellant filed his notice of appeal of the trial court's order, a brief, and a motion to stay his execution on October 30, 2017.[4] He filed his third subsequent application for a writ of habeas corpus (WR-48,728-04) on October 31, 2017.[5]

In appellant's appeal of the trial court's denial of his motion for DNA testing, appellant argues that he has shown by a preponderance of the evidence that: (1) he would not have been convicted if exculpatory results had been obtained through DNA testing; and (2) his request for DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.

In *Ex parte Gutierrez*, this Court stated that:

> Under Article 64.03, a convicted person is not entitled to DNA testing unless he first shows that there is "greater than a 50% chance that he would not have been convicted if DNA testing provided exculpatory

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[4] This Court officially accepted these documents on October 31, 2017.

[5] Appellant filed a corrected application (correcting the page numbers) on November 1, 2017.

> results[.]" The burden under Article 64.03(a)(2)(A) is met if the record shows that exculpatory DNA test results, excluding the defendant as the donor of the material, would establish, by a preponderance of the evidence, that the defendant would not have been convicted. . . . In cases involving accomplices, the burden is more difficult because there is not a lone offender whose DNA must have been left at the scene. And DNA testing would frequently confirm that the material belongs, as one would expect, to the victim of the crime. The bottom line in post-conviction DNA testing is this: Will this testing, if it shows that the biological material does not belong to the defendant, establish, by a preponderance of the evidence, that he did not commit the crime as either a principal or a party?

Ex parte Gutierrez, 337 S.W.3d 883, 899-900 (Tex. Crim. App. 2011). Appellant sought more current testing of cuttings from the Ford Probe, the known blood samples, fingernail clippings of the victim and the knit shirt and jeans belonging to the victim. Of these items, except for the testing results of appellant's known reference sample, none of the items previously tested were consistent with appellant's profile. Yet, the jury still convicted him based upon the other evidence presented in the case.

Given the record, we conclude that, even if testing on the remaining items were not consistent with appellant's profile, these findings would not be exculpatory for appellant. At best, additional DNA testing of the enumerated items would only "muddy the waters." Thus, we affirm the trial court's determination that appellant has failed to satisfy the requirement contained in Article 64.03(a)(2)(A) that he establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained.

Likewise, the trial court's determination that appellant has failed to establish by a

preponderance of the evidence that his request for DNA testing is not made to unreasonably delay the execution of sentence or administration of justice is supported by the record. Appellant's request was made less than 60 days prior to his scheduled execution date. One of the main reasons given for this delay was that the "two-forum rule" prevented the filing of DNA proceedings in state court while habeas proceedings were ongoing in federal court. However, this Court held in *Thacker v. State*, 177 S.W.3d 926, 927 (Tex. Crim. App. 2005), that nothing legally prevents an appellant from filing a motion for DNA testing in state court during the pendency of federal habeas proceedings because a motion for DNA testing cannot, by itself, result in relief from a conviction or sentence.

Accordingly, we affirm the trial court's denial of appellant's request for DNA testing under Chapter 64, and we also deny appellant's motion for a stay of his execution. No motions for rehearing will be entertained, and mandate shall issue immediately.

Delivered: November 6, 2017
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