IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,074

JUAN EDWARD CASTILLO, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM DENIAL OF MOTION FOR FORENSIC DNA TESTING IN CAUSE NO. 2004-CR-1461A IN THE 186TH JUDICIAL DISTRICT COURT BEXAR COUNTY

***Per curiam*. ALCALA, J., concurred. YEARY, J., did not participate.**

OPINION

Appellant Juan Edward Castillo, sentenced to death for capital murder, appeals an order denying his Chapter 64 motion for post-conviction forensic DNA testing.[1] We affirm the judgment of the trial court denying the testing.

[1] *See* TEX. CODE CRIM. PROC. art. 64.05. All citations to articles or chapters refer to the Texas Code of Criminal Procedure unless stated otherwise.

I. BACKGROUND

A. Facts and Evidence Presented at Trial

Appellant was convicted of intentionally causing Garcia's death while in the course of robbing him. *See* TEX. PENAL CODE § 19.03(a)(2). On direct appeal, in analyzing appellant's challenge to the sufficiency of the evidence supporting the accomplice witness testimony, this Court set out the evidence in the case:

> Francisco Gonzales and Debra Espinosa were accomplice witnesses for the State. Both testified that they, appellant, and Teresa Quintana[2] planned to rob the victim, Tommy Garcia, Jr. Pursuant to the plan, Espinosa called Garcia and made arrangements for him to pick her up and drive to Clamp Street, a secluded area, for sex. As Garcia and Espinosa were parked on Clamp Street, appellant and Gonzales came up behind the car, appellant smashed one of the windows with the butt of his gun, opened the car doors and demanded that Garcia hand over his money. Appellant had a loaded gun, and Gonzales had a gun as well, but it was "just for show" because it did not work. Gonzales and Espinosa both testified that appellant shot Garcia numerous times as he attempted to run. Appellant contends that without this testimony, the evidence does not "tend to connect" him to the offense. Following is a summary of the key non-accomplice testimony.
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> Several people testified that they saw Garcia wearing his gold medallion necklace on the night of the offense. The necklace was described as a "spinner" medallion on a thick gold chain. Jessica Cantu testified that she saw appellant wearing the necklace on the afternoon after the killing. She told appellant the necklace looked familiar. When Cantu saw appellant a little while later, he was no longer wearing the necklace. Cantu told Garcia's mother that she had seen appellant wearing Garcia's necklace.

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[2] Although the name "Teresa Quintana" was used in the direct appeal opinion, the trial record and other pleadings in both the trial and habeas records indicate that this co-defendant's name was actually "Teresa Quintero." We will use "Quintana" in the block quotes, but we will use what appears to be the correct name, "Quintero," elsewhere in the opinion.

> Frank Russell and Robert Jimenez both testified that they were at Jimenez's house with Garcia in the late night and early morning hours of December 2 and 3, 2003, when Garcia received a phone call from Espinosa. Garcia agreed to meet Espinosa and offered to give Russell a ride home on the way. Jimenez testified that ten or fifteen minutes after Garcia and Russell left, he received a phone call from Espinosa who was crying hysterically and told him that someone had shot Garcia. Jimenez drove to Russell's and the two of them went to Clamp Street where Espinosa said the shooting had occurred. When they arrived, they saw Garcia's car with the doors open and Garcia lying face-down in the street. He appeared dead. They told police what they knew about Garcia's plans to meet Espinosa.

Castillo v. State, 221 S.W.3d 689, 691-92 (Tex. Crim. App. 2007).

Gerardo Gutierrez testified that he was arrested and confined in the Bexar County Jail in March 2003 and was there for 18 months. Sometime after December 2003, he met appellant in the jail.

> Appellant told Gutierrez that he and two friends, Frank and Bita, planned to rob a person, but "it turned out wrong" when the victim took off running and appellant shot him numerous times. Appellant told Gutierrez that the female accomplice, Bita, was the one who had turned him in. He also said they would have a hard time convicting him because they did not have the weapon.

> Lucinda Gonzales testified that she was the younger sister of Francisco ("Frank") Gonzales, one of the accomplice witnesses. At the time of the murder, Lucinda was living in the same house with Gonzales and his girlfriend Teresa ("Bita") Quintana, among others. Lucinda testified that on the night of the offense, appellant called numerous times looking for Gonzales, and eventually came over with his girlfriend, Debra Espinosa. Appellant and Gonzales asked to borrow Lucinda's car, and she finally agreed to let Teresa drive it. Appellant, Gonzales, and Teresa left in Lucinda's car around 9:30 p.m. that evening. Espinosa left earlier in her own car. Teresa returned around 2:30 a.m., and she told Lucinda that Gonzales had been arrested on a child-support warrant. The following day, Lucinda saw a news report about Garcia's murder. A couple of days later, Gonzales was charged with Garcia's murder and arrested. Later that day, Lucinda covertly listened in on a phone conversation between Teresa and appellant. Lucinda described the exchange:

> "I heard Teresa say that, you know, what was going to happen to Frank [Gonzales]. And [appellant] said nothing, because he didn't do it, I did it, but they ain't going to know it because they ain't got any evidence. . . . He said that he – after the shooting, that he had ran through an open field and he discarded the – he had a mask, gloves, and the gun, and that he threw everything in the open field." Lucinda called the police and reported what she had heard. A few days later, Lucinda confronted appellant and called him a murderer. Appellant made a threatening gesture toward her and told her that Gonzales was going to stay locked up.
>
> Bryan Anthony Brown testified that at the time of the offense he was fifteen and living in the same house with his aunt Lucinda, his uncle Frank Gonzales and Frank's girlfriend Teresa, and others. On the night of the offense, appellant and his girlfriend came over. Appellant had a gun and a bullet-proof vest. Appellant, his girlfriend, Gonzales, and Teresa all left in Lucinda's car. Brown found out the next day that Gonzales had been arrested. A couple of days later, Brown was riding in a car with appellant and Teresa when appellant said that he had to get out of town, that he had shot someone a bunch of times, and that he had hidden the gun and vest in a field.

Id. at 692-93.

B. Appellant's Motion for DNA Testing

In his motion, appellant requested that the court:

(1) "[o]rder the hairs/fibers and any other biological material that may be found within the knit cap[3] be tested for DNA markers";

(2) "[o]rder that any and all potential profiles on the knit cap be developed, including but not limited to swabbing or scraping for epithelial cells";

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[3] Appellant explains that two ski masks were found and collected during the course of the investigation. The first was found and collected from the perimeter of a nearby flea market. The second was found a day later on Clamp Street near the scene of the crime. At some point during the trial, an officer began referring to the second ski mask as a "knit cap." The lab reports use "ski mask" for the mask found near the flea market and "knit cap" for the ski mask found on Clamp Street. For ease of reference, we will also use the designation of "knit cap" to refer to the second ski mask collected as evidence.

(3) "[o]rder that the legible latent fingerprint collected from the passenger side exterior door handle b[e] re-run through AFIS";[4]

(4) "[o]rder . . . that any unidentified profiles developed . . . be compared with the databases maintained by the DPS and the FBI"; and

(5) find appellant indigent and order the State to pay for the testing.

The trial court denied appellant's request for DNA testing in a one-sentence order. On appeal, appellant raises two points of error. First, he asserts that the trial court erred in failing to enter findings of fact or conclusions of law in support of its order denying DNA testing. Second, appellant asserts that the trial court erred in denying his motion for DNA testing.

II. ANALYSIS

A. Chapter 64 Requirements and Standard of Review

Article 64.01 provides that "[a] convicted person may submit to the convicting court a motion for forensic DNA testing of evidence that has a reasonable likelihood of containing biological material." Art. 64.01(a-1). For the evidence to be eligible for post-conviction DNA testing under Chapter 64, it must have been "secured in relation to the offense that is the basis of the challenged conviction," and in the State's possession during the trial, "but: (1) was not previously subjected to DNA testing; or (2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a

[4] AFIS refers to the Integrated Automated Fingerprint Identification System maintained by the Federal Bureau of Investigation (FBI).

reasonable likelihood of results that are more accurate and probative than the results of the previous test." Art. 64.01(b).

> Under Article 64.03(a), a court may order DNA testing only if it finds that:
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> (1) the evidence still exists and is in a condition making DNA testing possible;
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> (2) the evidence has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;
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> (3) there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing;
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> (4) identity was or is an issue in the case;
>
> (5) the convicted person establishes by a preponderance of the evidence that the person would not have been convicted if exculpatory results had been obtained through DNA testing; and
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> (6) the convicted person establishes by a preponderance of the evidence that the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.

Art. 64.03(a)(1), (2). When reviewing a judge's ruling on a Chapter 64 motion, we use a bifurcated standard of review: we give almost total deference to the judge's determination of historical fact issues and application-of-law-to-fact issues turning on witness credibility and demeanor. *See Reed v. State*, ___ S.W.3d ___, No. AP-77,054, slip op. at 15 (Tex. Crim. App. Apr. 12, 2017)(citing *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002)(referring to *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997))); *see also Holberg v. State*, 425 S.W.3d 282, 284-85 (Tex. Crim. App. 2014). But we review *de novo* all other application-of-law-to-fact questions. *Reed*, ___ S.W.3d ___, No. AP-77,054, slip

op. a 15; *see also Holberg*, 425 S.W.3d at 285.

B. Lack of Findings of Fact and Conclusions of Law

In his first point of error, appellant complains that the trial court failed to issue findings of fact or conclusions of law in support of its order denying DNA testing. When the trial judge denied appellant's motion for post-conviction DNA testing, he issued a one-sentence order. Although the judge presumably made the findings required under Article 64.03, he did not expressly memorialize those findings in the written record.

In *Skinner v. State*, we noted that, when the trial court denied Skinner's motion for DNA testing, it "failed to enter determinations under Article 64.03 of Texas Code of Criminal Procedure." 122 S.W.3d 808, 809 (Tex. Crim. App. 2003). Although we remanded the case to the trial court with directions to enter an order containing the relevant Article 64.03 determinations, we received from the trial court an order finding only that Skinner did not satisfy the requirements of Article 64.03(a)(2)(A) and 64.03(a)(2)(B). *Skinner*, 122 S.W.3d at 809. Skinner asserted that the trial court (1) erroneously denied his motion, and (2) violated the principles of appellate review by failing to provide meaningful Chapter 64 findings. *Id.*

We noted that Article 64.03(a)(2)(A) requires a convicted person to establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing. *Id*. at 811. We further noted that Article 64.03(a)(2)(B) requires the convicted person to establish by a preponderance of the evidence

that his request for DNA testing has not been made to unreasonably delay the execution of sentence or the administration of justice. *Id*. We held that the questions posed by these two provisions are application-of-law-to-fact questions that do not turn on credibility or demeanor and are, therefore, reviewed *de novo*. *Id*. at 813.

Although we stated in *Skinner* that a trial court should provide the determinations required under the statute and that we "would appreciate more detailed findings from the trial court to facilitate our review[,]" we concluded that the findings in that case were sufficient when considered with the record because this Court conducted a *de novo* review. *Id*. at 812-13. We ultimately affirmed the trial court's denial of testing in the *Skinner* case. *Id.* at 813.

As in *Skinner*, our decision in this case does not rely on an issue requiring our deference to the trial court. Instead, we find after a *de novo* review, *infra*, that appellant failed to establish by a preponderance of the evidence that (1) his request was not made to unreasonably delay the execution of sentence or the administration of justice, or (2) he would not have been convicted if exculpatory results had been obtained through DNA testing. Therefore, we hold that appellant has not demonstrated that the trial court reversibly erred in failing to enter written findings of fact or conclusions of law in support of its order denying DNA testing.[5] Appellant's first point of error is overruled.

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[5] We also note that, if written findings of fact were required for our review, we would remand the case, not reverse it.

C. The Denial of Appellant's Motion

In his second point of error, appellant asserts that the trial court erred in denying his Chapter 64 motion for DNA testing. In his motion, appellant asked that the court order DNA testing on the "knit cap" and hairs collected from the cap. Appellant also asked the court to order that "a potentially relevant legible latent fingerprint with sufficient points of comparison . . . pulled from the passenger side exterior door handle of the victim's car" be re-run through AFIS to see if an identification can now be made.

We note that DNA testing is the only type of testing authorized by Chapter 64. *See* TEX. CODE CRIM. PROC. arts. 64.01(a-1) ("A convicted person may submit to the convicting court a motion for forensic DNA testing . . . ."), 64.03(a) ("A convicting court may order forensic DNA testing under this chapter only if . . . .").[6] Because running a fingerprint through a print database does not involve DNA testing, a Chapter 64 motion is not the proper vehicle for making this request. Thus, we will not further review the propriety of the trial court's ruling on this part of appellant's request.

With regard to ordering DNA testing of the knit cap and the hairs found within the cap, we will assume without deciding that the cap and hairs were secured in relation to the offense, in the State's possession during trial, and not previously subjected to DNA testing or can be subjected to testing with newer testing techniques. *See* Art. 64.01(b). We will also

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[6] We also note that Chapter 64 is titled "Motion for Forensic DNA Testing." *See id.*, Ch. 64 (title).

assume without deciding that the evidence: still exists and is in a condition making DNA testing possible; has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; and contains biological material suitable for DNA testing. *See* Art. 64.03(a). Finally, we will assume that identity was or is an issue in the case. *See id*.

Having accepted these facts at true for the purpose of this analysis, we need only to decide whether appellant established by a preponderance of the evidence that (1) his request for the proposed DNA testing was not made to unreasonably delay the execution of sentence or the administration of justice, and (2) he would not have been convicted if exculpatory results had been obtained through DNA testing. *See* Art. 64.03(a)(2)(A) and (B). Because the questions posed are application-of-law-to-fact questions that do not turn on credibility or demeanor, we will review them *de novo*. *See Skinner*, 122 S.W.3d at 813.

1. *Whether appellant's request was not made for unreasonable delay*

In September 2005, a jury found appellant guilty of the 2003 capital murder of Tommy Garcia, Jr. The jury answered the special issues submitted pursuant to Article 37.071, and the trial court, accordingly, set appellant's punishment at death. This Court affirmed appellant's conviction and sentence on direct appeal. *Castillo v. State*, 221 S.W.3d 689 (Tex. Crim. App. 2007).

Appellant filed his initial writ of habeas corpus application in the trial court on

November 13, 2009.[7] This Court adopted the trial court's findings of fact and conclusions of law and denied relief on the four claims raised in the application. *Ex parte Castillo*, No. WR-70,510-01 (Tex. Crim. App. Sept. 12, 2012)(not designated for publication).

On February 23, 2017, after federal habeas proceedings had been completed, the trial court set appellant's execution date for May 24, 2017. On April 17, 2017, just over a month before his scheduled execution date, appellant filed in the trial court a motion for post-conviction DNA testing pursuant to Chapter 64.

The day after the motion requesting DNA testing was filed, the trial court withdrew the May 24th execution date.[8] The trial court subsequently re-scheduled appellant's execution date for September 7, 2017. On August 25, 2017, the trial court denied appellant's request for DNA testing in a one-sentence order, and appellant the same day filed a notice that he was appealing that order (this appeal). On August 30, 2017, the court again withdrew the execution date and rescheduled it for December 14, 2017.[9]

On October 30, 2017, appellant filed his first subsequent writ of habeas corpus

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[7] This Court later granted appellant's motion to consider the application timely filed as of October 11, 2007.

[8] The May 24th execution date appears to have been withdrawn for reasons unrelated to the filing of the motion for DNA testing. According to the State's motion to withdraw the date, the setting of the May 24th date violated Article 43.141(c), which states that an execution date may not be earlier than the 91st day after the date the convicting court enters an order setting the execution date.

[9] Because the defense team works and resides in the Houston area, which experienced devastation and confusion from August's Hurricane Harvey, the State again moved for the execution date to be reset.

application in the trial court. Appellant raised a single claim in this application. Specifically, he alleged that one of the trial witnesses, Gerardo Gutierrez, has now recanted his testimony. Therefore, appellant asserted, his conviction and sentence were based on Gutierrez's false trial testimony, which violated his right to due process. On November 28, 2017, this Court found that appellant's claim met the requirements of Article 11.071 § 5, and we remanded the application to the trial court. *Ex parte Castillo*, No. WR-70,510-04 (Tex. Crim. App. Nov. 28, 2017)(not designated for publication).

In his brief on appeal, appellant asserts that, because he would not have been convicted if exculpatory results had been obtained through DNA testing, the trial court should have found that his request was not made for the purpose of causing unreasonable delay. He emphasizes that his motion for testing "was filed over five weeks before [his] first scheduled execution."[10]

The discovery of the knit cap was mentioned in appellant's 2005 trial. Thus, appellant has known for more than a decade about the evidence. On February 23, 2017, the trial court signed an order setting appellant's execution for May 24, 2017. Nevertheless, appellant waited until April 18, 2017, to file his motion for DNA testing—fifty-four days after the trial court set his first execution date and only thirty-six days before that scheduled execution was to take place. Further, appellant filed his motion on a date which would not allow the State

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[10] Appellant also made these assertions in his motion for DNA testing presented to the trial court.

its full statutory period for responding to such motions. Art. 64.02 (providing that, once a motion for DNA testing is filed, the convicting court shall provide the State's attorney with a copy, and the State shall respond in one of two ways "not later than the 60th day after the date the motion is served on the attorney representing the [S]tate").

We find that appellant has not shown by a preponderance of the evidence that the request for testing was not made to unreasonably delay the execution of sentence or the administration of justice.

2. *Whether appellant would not have been convicted*

Appellant contends that the knit cap that is the subject of the testing motion was identified at trial "as the cap that was worn by the murderer." He also notes that, at the time of his trial, forensic testing that could have excluded him had not yet been developed.

In arguing that he would not have been convicted if testing on the cap in question yielded exculpatory results, appellant reiterates that no physical evidence connected him to the scene. He further asserts that there was no eyewitness testimony placing him at or near the scene of the offense and that he has never confessed to any involvement in the crime. Also, appellant argues that testimony from the accomplices and informants implicating him was inconsistent, contradictory, and unreliable. Finally, he states that Gutierrez recanted his testimony in a 2013 sworn statement filed in appellant's federal habeas proceedings.

But appellant's argument and assertions mischaracterize the evidence. No trial witness testified that the knit cap in question "was worn by the murderer." Witnesses

testified that the perpetrators wore ski masks or black masks, but appellant has pointed us to no witness who testified that the murderer wore *this* knit cap. Furthermore, the knit cap was found by a nearby resident in the area of the crime scene a day after the murder. By the time the authorities took possession of the cap, it had been moved from the place the resident found it. No witness connected *this* cap to the offense other than to say that it was a ski mask and it was found near the scene.

Further, at trial, two of appellant's co-defendants testified for the State that they, appellant, and a fourth person planned to rob the victim, Tommy Garcia, Jr. Co-defendant Espinosa called Garcia to pick her up and drive her to a specific place. After they parked, appellant and co-defendant Gonzales came up behind the car, opened the doors, and demanded that Garcia hand over his money. Appellant had a loaded gun. Both co-defendants testified that appellant shot Garcia numerous times as he attempted to run.

Several people testified that they saw Garcia wearing his gold medallion necklace on the night of the offense. Jessica Cantu testified that she saw appellant wearing the necklace after the murder, and she told appellant that the necklace looked familiar. When she saw appellant later, he was no longer wearing it.

Frank Russell and Robert Jimenez both testified that they were with Garcia in the late night and early morning hours of December 2 and 3, 2003, when Garcia received a phone call from Espinosa and agreed to meet her. Ten or fifteen minutes after Garcia left, Jimenez received a phone call from Espinosa, who told him that someone had shot Garcia. Russell

and Jimenez told the police what they knew about Garcia's plans to meet Espinosa.

Co-defendant Gonzales's sister, Lucinda, testified that she saw the four co-defendants together before the offense and she let three of them borrow her car, but only co-defendant Quintero returned. After Lucinda saw a news report about Garcia's murder, she covertly listened to a phone conversation between Quintero and appellant. During that conversation, Lucinda heard appellant confess to the crime. She reported what she heard to the police.

Gonzales's nephew, Brown, testified that he lived in the same house with Lucinda, Gonzales, and Quintero. On the night of the offense, appellant and his girlfriend came to Brown's house. Appellant had a gun and wore a bullet-proof vest. Appellant, his girlfriend, Gonzales, and Quintero all left in Lucinda's car. A couple of days later, Brown was riding in a car with appellant and Quintero when appellant said that he had shot someone several times and had hidden the gun and vest in a field.

Gerardo Gutierrez testified that he met appellant in the Bexar County Jail after December 2003.[11] Appellant told Gutierrez that he and two friends had planned to rob a person, but "it turned out wrong" when the victim took off running and appellant shot him. Appellant told Gutierrez that one of his accomplices turned him in, but the authorities would

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[11] That Gutierrez subsequently recanted his testimony is of no moment here. This Court does not consider post-trial evidence when deciding whether or not the appellant has carried his burden to establish by a preponderance of the evidence that he would not have been convicted had exculpatory results been obtained through DNA testing. *See Holberg*, 425 S.W.3d at 285. Further, Gutierrez's recantation would not lessen the impact of Lucinda's or Brown's testimony about overhearing appellant's highly incriminating statements.

have a hard time convicting appellant because they did not have the weapon.

The jury convicted appellant after hearing all of the testimony and other evidence presented. The jurors were aware of the relationships between many of the witnesses and the possible biases inherent in those relationships. The jurors also heard inconsistencies in the witnesses' testimonies, and they were aware that none of the forensic evidence connected appellant to the scene, yet they still found him guilty.

Although appellant accurately states that no physical evidence connected him to the scene, his co-defendants witnessed the crime, and appellant told various people that he shot the victim. Given this evidence and the lack of evidence connecting the knit cap at issue to the crime, appellant cannot show by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing.

Appellant's second point of error is overruled.

D. Conclusion

Because we find that appellant failed to meet his burden under Article 64.03(a)(2), we affirm the trial court's decision to deny his motion for DNA testing under Chapter 64.

Delivered: February 7, 2018
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