IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-22,074-10

EX PARTE ROBERT GANDY, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 532347-E IN THE 351ST DISTRICT COURT
FROM HARRIS COUNTY

YEARY, J., filed a dissenting opinion in which KELLER, P.J., and KEASLER and SLAUGHTER, JJ., joined.

DISSENTING OPINION

Today, the Court grants Applicant relief on the basis of a letter from the FBI that purports to undermine an FBI agent's testimony that the State offered at Applicant's 1990 trial. Applicant argues—and the habeas court agrees—that the 2009 letter from the FBI renders the FBI agent's testimony "junk science" for purposes of Article 11.073. TEX. CODE CRIM. PROC. art. 11.073(b)(2). But, because ample additional evidence in the record ties Applicant to the crime, he is unable—in my opinion—to demonstrate, by a preponderance of the evidence, that had the newly-discovered scientific evidence been presented at his trial, he would not have been convicted. As a result, I would deny relief.

I. BACKGROUND

Applicant was convicted in 1990 of an aggravated robbery that happened at a Fajita Junction restaurant in Houston in 1989. The State cast Applicant's role in the robbery as the getaway driver and the provider of the weapons used in the offense. To tie Applicant to the offense, the State offered the testimony of an accomplice witness—Clayvell Richard, an eyewitness—Gwendolyn Jessie, and an FBI Special Agent—John Riley. Even if Riley's testimony is entirely discounted—under the FBI's present claim that the science upon which Riley's testimony was based is not reliable—the remaining evidence in the record precludes Applicant from showing, by a preponderance of the evidence, that had the new scientific evidence been presented at Applicant's trial, he would not have been convicted.

Clayvell Richard, Applicant's accomplice and one of the two men who perpetrated the robbery inside the restaurant, provided testimony at trial that portrayed Applicant as a party to the aggravated robbery. Specifically, Richard described in great detail the events that occurred leading up to, during, and after the robbery at the Fajita Junction, as well as the role that Applicant played as the getaway driver. Richard stated that Applicant drove he and another man (James Woodie Foster) in Applicant's car to the restaurant on the evening of May 23, 1989, and that the three men shared a mutual understanding that the primary reason for going there was to commit a robbery. It was the agreement of the three men that Applicant would be the getaway driver, while Foster and Richard would carry out the robbery. Richard also testified that the guns used in the robbery came from inside Applicant's

car.

According to Richard, he instructed Applicant—while they were in the car in the Fajita Junction parking lot—to back the car into a parking spot about twenty to thirty feet from the back door to the restaurant in such a way that the car was well-positioned for an escape to Highway 59. Richard and Foster then entered the restaurant, grabbed some money that was in a money bag near a cash register, and demanded that the employees open the safe. When the employees did not comply to the robbers' satisfaction, Foster shot three of the restaurant's employees. The two men then fled out the back door and into Applicant's waiting car, which was parked in the same location and in the same manner as before the robbery. Applicant drove the car away immediately after the two men jumped into the car, pursued the planned getaway path down Greenbriar Street to Highway 59, and proceeded to drop Foster off at his home, and then Richard off at his brother's home. On the way, Foster discarded both of the guns used in the robbery out of the car's window, Richard described to Applicant what occurred inside the restaurant, and the three men split the proceeds of the robbery—$10 a piece.

The State also offered the testimony of Gwendolyn Jessie, who was an eyewitness to the robbers' escape. At around 9:30 p.m. that evening, Jessie was returning from a downtown community college class and decided to pull through the Fajita Junction drive-through to get something to eat. She only saw one car sitting in the parking area behind Fajita Junction. She described the car as a compact model car, dark in color ("maybe navy blue or black"), with

four doors, and she said that the car was backed into a parking space. While Jessie was sitting at the menu sign waiting to place her order, she heard "popping noises in rapid succession[,]"[1] and then she saw two black men run out of the back door of the restaurant carrying what looked like a money bag from a bank.[2] Jessie watched as the two men jumped into the waiting car, which then sped away with its headlights off.

Finally, the State offered the testimony of FBI Special Agent John Riley, who worked at an FBI laboratory where he examined bullets from crime scenes. Riley testified that, based on his scientific analysis of bullets recovered from Fajita Junction, from Applicant's car, from Applicant's residence, and from Foster's residence, all of the bullets *could* have come from the same box of ammunition. He also testified, however, that it is possible that the bullets actually came from different boxes that might have been packaged at the same location. Specifically, Riley testified that he "can't say that all these bullets could come from one box although it's most likely they did." When the prosecutor asked Riley to clarify: "So you're saying it's more likely they came from the same boxes, that's your conclusion?" Riley responded: "Yes."

In 2009, the FBI sent the Harris County District Attorney a letter stating that "[s]cience does not support the statement or inference that bullets . . . or bullet fragments can

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[1] Michelle Del Rio, another witness, testified at trial that she heard three to four shots on the evening of May 23, 1989, while she was taking trash out at her job at a McDonald's across the street from the Fajita Junction.

[2] Applicant, Clayvell Richard, and Woodie Foster were all black males.

be linked to a particular box of bullets." The letter further stated that "any testimony stating bullets came from the same source of lead is potentially misleading without additional information[.]" As a result, Applicant filed the present application for a writ of habeas corpus seeking relief under Article 11.073.

II. ANALYSIS

The habeas court concluded that Applicant has shown, by a preponderance of the evidence, that had the newly-available scientific evidence been presented at his trial, he would not have been convicted. But the habeas court's conclusion does not give adequate attention to the other evidence in the record that links Applicant to the crime, including the accomplice testimony of Richard, which was corroborated by Applicant himself and another eyewitness. As a result, I do not agree with the habeas court's conclusion—and this Court's adoption of that conclusion—that, had the newly-available scientific evidence been presented at trial, by a preponderance of the evidence, Applicant would not have been convicted.

In making a claim in an application for a writ of habeas corpus that a conviction was obtained on the basis of "junk science," an applicant must show: (1) that the new scientific evidence was not available to be offered at the applicant's trial, or the new evidence contradicts evidence relied on by the State at the applicant's trial; (2) that the new scientific evidence would be admissible at a new trial; and (3) that, had the new "scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted." TEX. CODE CRIM. PROC. art. 11.073(a)–(b).

But even if Agent Riley's now questioned testimony is entirely discounted on the basis of Applicant's junk science claim, there is still evidence in the record linking Applicant to the offense such that Applicant cannot satisfy his burden. It is true that the additional evidence linking Applicant to the offense came, to a significant degree, in the form of accomplice witness testimony. In order for a conviction to be had on the testimony of an accomplice witness, the accomplice witness testimony must be "corroborated by other evidence tending to connect the defendant with the offense committed[,] and the corroboration is not sufficient if it merely shows the commission of the offense." TEX. CODE CRIM. PROC. art. 38.14. But, this is not a difficult burden to satisfy. *See Brown v. State*, 672 S.W.2d 487, 489 (Tex. Crim. App. 1984) ("Proof that the accused was at or near the scene of the crime at or about the time of its commission, when coupled with other suspicious circumstances, may tend to connect the accused to the crime so as to furnish sufficient corroboration to support a conviction."). Richard testified at trial in great detail about the robbery, and though his testimony amounted to accomplice witness testimony subject to Article 38.14, it was amply corroborated by testimony that was presented through another witness, Jessie, and by Applicant himself.

Jessie described the same scene that Richard recounted: Richard and Foster fled the back of the Fajita Junction, with the money bag in-hand, into a dark colored four-door sedan that was backed into a parking spot behind the restaurant. Jessie could not identify the precise make and model of the vehicle, but described it as a dark-colored, "maybe navy blue or

black, four-door" sedan. Applicant's vehicle was a four-door, blue Chevrolet Nova sedan. In addition, Jessie described the fast-paced departure the men took in Applicant's car away from the restaurant and down Greenbriar Street—the same exit route Richard described in his testimony—with the lights off even though it was night time.

Richard's testimony was further corroborated by the testimony of Applicant himself. Applicant admitted at trial that he drove Richard and Foster to Fajita Junction on the night of May 23, 1989. He admitted to backing into a parking space in the rear of the building as described by other witnesses. He admitted to waiting for the two men to go into the restaurant (he claimed the men were there to visit a woman inside the restaurant and to use the restroom), and he admitted to driving Richard and Foster home that night. But Applicant claimed that he drove them home out of fear for his own safety after realizing they had committed a robbery inside the Fajita Junction—not as a party to the aggravated robbery.

Agent Riley's now questionable testimony about the bullets may have incrementally increased the likelihood that the jury would find Applicant guilty. But when the false evidence is viewed in the context of all the other evidence presented at trial tying Applicant to this offense, I am unconvinced that it is more likely than not that Applicant would have been acquitted had the newly-discovered scientific evidence been presented at Applicant's trial. Applicant himself admitted to being at the scene of the crime, and he admitted to driving Richard and Foster to the restaurant before, and back home after, the robbery. The significant detail Applicant contested was essentially his mental state while chauffeuring

Richard and Foster on the evening of the robbery. Applicant maintained that he was unaware of the plan to commit a robbery inside the restaurant, and that he only drove Richard and Foster home out of fear for his own safety. Agent Riley's testimony did not offer a particularly cogent reason for the jury to believe Richard's account that Applicant was complicit in the robbery over Applicant's claim that he was not. The agent's testimony did purport to offer some scientific evidence tying Applicant to the robbery, but it was far from the most compelling evidence presented at Applicant's trial.

III. CONCLUSION

I cannot go along with granting relief to Applicant in this case when the record contains significant evidence—beyond Agent Riley's testimony—of Applicant's participation as a party in the aggravated robbery. In my opinion, the record does not support the habeas court's conclusion that Applicant has shown, by a preponderance of the evidence that, had the newly-discovered scientific evidence been presented at Applicant's trial, he would not have been convicted.

I respectfully dissent.

FILED: May 8, 2019
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