Affirmed and Opinion Filed December 1, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01290-CR

JAMES AARON WHITTLE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-0923785-N

MEMORANDUM OPINION

Before Justices Bridges, Fillmore, and Stoddart
Opinion by Justice Bridges

James Aaron Whittle appeals the trial court's September 26, 2016 order denying his motion for post-conviction DNA testing. In a single issue, he argues the trial court erred by determining no evidence suitable for DNA testing exists. We affirm.

BACKGROUND

On January 24, 2009, appellant entered a negotiated guilty plea to the offense of continuous sexual abuse of a child younger than fourteen years of age. TEX. PENAL CODE ANN. §21.02(b) (West 2016). In accordance with the plea agreement, the trial court sentenced appellant to imprisonment for twenty-five years.

On June 23, 2016, appellant filed a motion requesting post-conviction DNA testing. Appellant requested DNA testing on the biological material secured by the State in relation to his case, but he did not specifically identify what biological material the State allegedly obtained.

On September 23, 2016, the State responded to appellant's motion in accordance with article 64.02 of the Texas Code Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 64.02 (West Supp. 2016). The State stated that after contacting the Garland Police Department (GPD) and the Southwest Institute of Forensic Sciences (SWIFS), no evidence amenable for DNA testing was found in relation to his case. On September 26, 2016, the trial court issued an order denying appellant's motion for forensic DNA testing. This appeal followed.

Standard of Review

We review a trial court's decision on a motion for DNA testing under a bifurcated standard of review. *Whitaker v. State*, 160 S.W.3d 5, 8 (Tex. Crim. App. 2004). We afford almost total deference to the trial court's determination of issues of historical fact and issues of application of law to fact that turn on credibility and demeanor of witnesses. *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002). We review de novo other issues of application of law to fact questions that do not turn on the credibility and demeanor of witnesses. *Id.*

Chapter 64 of the Texas Code of Criminal Procedure provides, in part, that a convicting court may order forensic DNA testing only if it finds (1) the evidence still exists and is in a condition making DNA testing possible; (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; (3) there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and (4) identity was or is an issue in the case. TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(l). The movant must establish 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) the request for DNA testing is not made to unreasonably delay the execution of sentence or the administration of justice. *Id*. art. 64.03(a)(2). Appellant bears the burden of establishing his entitlement to post-conviction DNA testing by proving, as a threshold

matter, that some evidence amenable to DNA testing exists in his case. *See Routier v. State*, 273 S.W.3d 241, 256 (Tex. Crim. App. 2008).

In his sole issue, appellant asserts that the record does not support the trial court's determination that no evidence suitable for DNA testing exists in relation to his case. Appellant asserts that the trial court should not have accepted the State's speculation that no biological evidence exists and should have required the State to prove that the complainant did not undergo a physical examination by a Sexual Assault Nurse Examiner (SANE).

First, to the extent appellant complains the State should have expanded its search to other laboratories or considered the possibility "a SANE may have examined complainant" and "could have obtained DNA material," he failed to raise this complaint to the trial court. Thus, his complaint is waived. *See* TEX. R. APP. P. 33.1(a); *Baranowski v. Stat*e, 176 S.W.3d 671, 677 (Tex. App.—Texarkana 2005, pet. ref'd).

Moreover, appellant presented no evidence that some biological evidence actually exists. Rather, the State presented evidence showing that neither GPD nor SWIFS possess any evidence related to his case. SWIFS provided the State an "archived evidence search" report stating that it was unable to find a forensic laboratory number associated with the case, and therefore, no evidence could be located. GPD's legal unit reported to the State that its records show that no property in relation to this case was ever logged in. GPD stated that the only items referenced in its reports for this case are the forensic interview, the appellant's interview, and a written statement.

Further, the prosecution report does not indicate complainant underwent any type of medical exam after her outcry or that any biological evidence was ever collected from her. The only evidence listed in the prosecution report are the recorded interviews of the complainant and appellant, written statements from the complainant's mother and appellant, and photographs of

the location where the offense occurred. Such statements in the State's response, along with the attached exhibits, were sufficient for the trial court to determine that appellant failed to meet his burden under chapter 64 and that DNA evidence does not exist for testing. TEX. CODE CRIM. PROC. ANN. arts. 64.0l(a-l), (b), 64.03(a)(l)(A)-(B); *see Cravin v. State*, 95 S.W.3d 506, 511 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

Because appellant failed to satisfy his threshold burden that some evidence amenable to DNA testing exists, we conclude the trial court properly denied appellant's motion for post-conviction DNA testing. *See Routier*, 273 S.W.3d at 256. We overrule appellant's sole issue.

Conclusion

We affirm the trial court's order.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
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JUDGMENT

JAMES AARON WHITTLE, Appellant

No. 05-16-01290-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-0923785-N.
Opinion delivered by Justice Bridges.
Justices Fillmore and Stoddart participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered December 1, 2017.