

Affirmed and Memorandum Opinion filed January 26, 2016.



In The

Fourteenth Court of Appeals

NO. 14-15-00538-CR

MONZELLE LAVAN STEPTOE, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 58852-6**

M E M O R A N D U M O P I N I O N

Appellant Monzelle Lavan Steptoe appeals the trial court's order denying his motion for post-conviction DNA testing pursuant to Chapter 64 of the Texas Code of Criminal Procedure. We affirm.

BACKGROUND

On January 22, 2010, a jury convicted appellant of aggravated robbery and aggravated kidnapping. This court affirmed the judgment in *Steptoe v. State*, No. 14-10-

00131-CR, 2011 WL 61854 (Tex. App.—Houston [14th Dist.] Jan. 6, 2011, pet. ref'd) (mem. op.) (not designated for publication). The background facts, as previously detailed by this court, are as follows:

On the evening of December 13, 2008, the complainant, Charlene Reed, drove to her local Kroger store. As she drove into the parking lot, she saw a man standing outside Kroger. She pulled into a parking space, removed her keys from the ignition and began to get out of her van. She saw someone quickly approaching out of the corner of her eye, realized he was not approaching in a normal manner, and closed the van door and locked it. The man walked up to the driver's side window, pressed a gun to the window, and said, "Open the door or I'll shoot you. Open the door." Reed described the gun as black with a square barrel. Thinking she could pacify the man by giving him her car, Reed opened the door to let him in. He got into her van and told her to move to the passenger seat. He asked for her purse, which was behind the seat. She brought the purse forward and put it in the front seat. He told her to start the car, which she did. During the entire time he held the gun to her head and told her, "Don't you move. Stay right there."

Reed testified that she believed the gun was real and believed she was going to be shot. Because she feared for her life, Reed fled the van. She testified that, "if I was going to get shot, then I wanted to get shot there at Kroger and die there at Kroger so at least my family would be able to find me." Reed was unable to escape the van because the man held on to her arm and struck her with the gun as she attempted to flee. As he pulled her back into the van, Reed pushed the panic button in the van, which drew bystanders toward them. When the bystanders began moving toward the van, the man ran away.

Police officers traced the man's cellular telephone he left behind, and eventually arrested appellant. Appellant gave a statement to police in which he admitted that as he was walking home on the night of December 13, 2008, he walked through the Kroger parking lot. On his way to Kroger he passed a McDonald's and saw several children's toys. He picked up a water gun and decided he "needed a ride home." Appellant stated that, "all I wanted was a car and not to rape nor harm anyone whatsoever." He said he never asked "the woman for anything but her keys and she scared me when she went to screaming. So, I hit her a couple of times and ran away." He stated, "All I wanted was her car to get home out of the cold weather."

Id. at *1.

On May 11, 2015, appellant filed his fifth motion for DNA testing and the appointment of counsel in which he sought DNA testing of the cell phone found at the scene. Appellant argues that a swab was taken from the cell phone, but was not tested. At trial, evidence showed the cell phone was found in a public parking lot and, when turned on, appeared to belong to appellant. The trial court denied appellant's motion for DNA testing on the grounds that appellant (1) filed four other motions seeking identical relief, all of which were denied; (2) failed to establish identity was an issue at trial; and (3) failed to show by a preponderance of the evidence that he would not have been convicted if exculpatory DNA results were obtained. On appeal, appellant challenges the trial court's denial of his motion.

STANDARD OF REVIEW

We review a trial court's denial of a request for post-conviction DNA testing under a bifurcated standard. *See Esparza v. State*, 282 S.W.3d 913, 921 (Tex. Crim. App. 2009). We defer to a trial court's findings of fact when they are supported by the record. *Id.* We also defer to a trial court's application of law to fact questions that turn on credibility and demeanor. *Id.* We review pure legal issues de novo. *Id.* If the trial court's decision is correct on any theory of law applicable to the case, we will sustain the decision. *State v. Ross*, 32 S.W.3d 853, 855–56 (Tex. Crim. App. 2000).

ANALYSIS

Texas Code of Criminal Procedure article 64.01 provides a convicted person with a procedural vehicle to have forensic testing of DNA material that is contained within existing evidence. The statute provides:

- (a) A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing biological material. The motion must be accompanied by an affidavit, sworn to by the convicted

person, containing statements of fact in support of the motion.

(b) The motion may request forensic DNA testing only of evidence described by Subsection (a) that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but:

(1) was not previously subjected to DNA testing:

(A) because DNA testing was:

(i) not available; or

(ii) available, but not technologically capable of providing probative results; or

(B) through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing; or

(2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

Act of September 1, 2011, 82d Leg., R.S., ch. 278, § 5, sec. 64.01, 2011 Tex. Sess. Law. Serv. 882, 884; Act of September 1, 2011, 82d Leg., R.S., ch. 366, § 1, sec. 64.01, 2011 Tex. Sess. Law. Serv. 1015, 1015 (West) (amended 2015) (current version at Tex.Code Crim. Proc. § 64.01).¹

To be entitled to post-conviction DNA testing under article 64.03 of the Code of Criminal Procedure, a convicted person must establish that (1) the evidence exists in a condition making DNA testing possible; (2) the evidence has been subjected to a sufficient chain of custody to establish its integrity; (3) identity was or is an issue in the case; (4) the person would not have been convicted if exculpatory results had been obtained through DNA testing; and (5) the request for DNA testing is not made to unreasonably delay the execution of the sentence or interfere with the administration of justice. *Id.* art. 64.03(a); *Dinkins v. State*, 84 S.W.3d 639, 641–42 (Tex. Crim. App.

¹ The 2015 amendment to article 64.01 applies to motions filed on or after September 1, 2015, and is inapplicable to this case. All subsequent citations will be to the statute in effect at the time appellant's motion was filed.

2002).

The purpose of DNA testing under article 64.03 is to provide an avenue by which a defendant may seek to establish his innocence by excluding himself as the perpetrator of the offense. *See Blacklock v. State*, 235 S.W.3d 231, 232–33 (Tex. Crim. App. 2007) (exoneration by exclusion of a defendant as the DNA donor “is precisely the situation in which the Legislature intended to provide post-conviction DNA testing.”). A trial court is not required to order DNA testing under circumstances in which the appellant admitted to being the perpetrator, as in today’s case. *See Peyravi v. State*, 440 S.W.3d 248, 249–50 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (identity was not at issue where defendant admitted he stabbed his girlfriend, but claimed self-defense); *Lyon v. State*, 274 S.W.3d 767, 769 (Tex. App.—San Antonio 2008, pet. ref ‘d) (same).

Appellant admitted that he pointed a gun at the complainant, hit the complainant with the gun, and attempted to take her vehicle. On direct appeal, appellant argued that DNA evidence taken from the complainant’s van did not exclude him with sufficient certainty to identify him as the perpetrator. *Steptoe*, 2011 WL 61854 at *3. This court held that DNA evidence is irrelevant because identity was not at issue. *Id.*, citing *Harmon v. State*, 167 S.W.3d 610, 614 (Tex. App.—Houston [14th Dist.] 2005, pet. ref’d). Although appellant seeks testing of a different item than was tested before trial, identity still is not at issue. Appellant admitted that he used threats and physical brutality to restrain the complainant’s liberty and prevent her escape during the course of a robbery. *See Steptoe*, 2011 WL 61854 at *3. The trial court did not abuse its discretion in denying appellant’s motion for post-conviction DNA testing because identity was not at issue. Accordingly, we overrule appellant’s first issue.

In his second issue appellant argues he was entitled to appointment of counsel for purposes of filing a post-conviction motion for DNA testing. Appellant’s entitlement to appointment of counsel for this purpose is conditioned on the trial court’s finding that

reasonable grounds exist for filing the motion. *See Ex parte Gutierrez*, 337 S.W.3d 883, 889 (Tex. Crim. App. 2011) (recognizing that entitlement to appointment of counsel “used to be absolute, but it is now conditioned on the trial judge’s finding ‘that reasonable grounds exist for the filing of a motion.’”).

Though a convicted person need not prove entitlement to DNA testing (or a prima facie case of it) as a precondition for obtaining appointed counsel, whether “reasonable grounds” exist for testing necessarily turns on what is required for testing. *Id.* at 891. Basic requirements are that biological evidence exists, that the evidence is in a condition that it can be tested, that the identity of the perpetrator is or was an issue, and that this is the type of case in which exculpatory DNA results would make a difference. Tex. Code Crim. Proc. Ann. art. 64 .03(a)(1)(A)(i).

Because identity was not at issue, appellant did not demonstrate reasonable grounds for the motion to be filed. Thus, the trial court was not required to appoint counsel to represent him. *See Gutierrez*, 337 S.W.3d at 889. Therefore, we overrule appellant’s second issue.

We affirm the trial court’s judgment.

/s/ Kem Thompson Frost
 Chief Justice

Panel consists of Chief Justice Frost and Justices Boyce and Wise.
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