In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00284-CR

ROCCO MARTIN MASSELLE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 05-04-03736-CR

MEMORANDUM OPINION

Rocco Martin Masselle (Masselle or Appellant) appeals the trial court's denial of his motion for post-conviction DNA testing. *See* Tex. Code Crim. Proc. Ann. arts. 64.01-64.05 (West 2006 & Supp. 2016). Because Appellant failed to meet the requirements of Chapter 64, we affirm.

Underlying Facts

On April 27, 2005, a grand jury indicted Masselle and Brandy Marie King (King) for the murder of Yvette Rains King (Rains), King's mother. The indictment

alleged that Masselle "intentionally and knowingly cause[d] the death of an individual, namely, Yvette Rains King, by strangling Yvette King with a ligature and an electrical extension cord[.]" Thereafter, Masselle pleaded guilty, and he signed and initialed admonishments, statements, and waivers regarding his guilty plea. Masselle also signed a sworn stipulation of evidence, in which he stipulated and admitted that he and King caused the death of Rains by strangling her with an electrical extension cord. On April 20, 2006, after considering the evidence and a pre-sentence investigation report, the trial court found Masselle guilty of murder and sentenced him to forty years' confinement pursuant to a plea agreement. The Judgment and Order reflect that Masselle was represented by counsel and that the trial court found that Masselle "was mentally competent to stand trial, the plea was freely and voluntarily made, and [Masselle] was aware of the consequences of his plea[.]"

Post-Conviction Motion

On April 19, 2016, Masselle filed a pro se post-conviction motion, accompanied by an unsworn affidavit, requesting DNA testing pursuant to article 64.01 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 64.01. In his affidavit, Masselle stated that in March of 2005, he and King were

charged with the murder of King's mother. In his affidavit, Masselle alleged the following

> Defendant contends that the State asserts that the cause[] of death [to] Yvette Rains King was by strangling the victim with a ligature and an electrical extension cord. Defendant contends that he has new evidence that was not introduce[d] into evidence, into the investigation report, but it was not considered. Defendant wouldn't have been convicted of murder, but maybe a lesser included offense.
>
> This is the new facts that was not asked or considered during trial: Defendant contends that Brandy Marie King had already killed her mother Yvette R. King with an object, because there was already a pond of blood on the floor. Defendant contends that Bra[n]dy must had placed Yvette R. King['s] body back into the wheelchair before I (Defendant) was told to take an electrical cord around (Yvette['s]) neck. Defendant contend[s] when he [did] that (Yvette) did not move, nor fight back, nor make any choking sounds, nor grab the cord in defense. Defendant comes to the conclusion that Yvette R. King was already dead, and Defendant is not the one who killed Yvette King, it was her daughter, Brandy King. Defendant takes all responsibility for his actions, but request for a[] DNA test that was unavailable because of the ineffective assistance of counsel . . . . Defendant request that the ligature and electrical cord be tested of blood, hair, saliva, of anything to be tested of the possession of the State, that may be suitable for DNA testing, because Defendant is innocent of killing Yvette King. . . .

The affidavit further explained that his plea to the trial court was "because he was taking responsibility for something that he believed he [did], but really [he] did not kill Yvette King, but her daughter did with an unknown object." In Masselle's affidavit, he alleged that DNA testing was not available to him at the time of trial

because of the ineffective assistance of his trial counsel, and that he would not have been convicted of murder if DNA results had been available at the time of his plea.

Response to the Motion

On July 25, 2016, the State filed its response to Masselle's motion. Therein, the State noted that the Montgomery County Sheriff's Office (MCSO) "currently retains forty-six separately numbered items of evidence in connection with this case." The State attached an inventory of the evidence in MCSO's possession. The State argued that the items in MCSO's inventory include

> . . . four items [that] may conceivably contain "biological evidence" as that term is defined in article 64.01 of the Code of Criminal Procedure: items 5-23 ("possible blood swabs" collected from stains on a wall at the victim's home), 5-30 ("hair sample" collected from the burn pile containing the victim's remains), 5-34 (swabs collected from a beer can and a disposable lighter found in the vicinity of the victim's remains) and 5-35 ("buccal swabs" collected from Brandi King at the defendant's residence).

The other items of evidence listed on the inventory include: 5-1, glass vials containing maggots collected from the body; 5-2, two pieces of a bra; 5-3, nine pieces of melted blue plastic; 5-4, a piece of burned cloth; 5-5, a piece of blue plastic string; 5-6, a beer can; 5-7, a "Strike 'N Lite" lighter; 5-8, 5-9, and 5-10, shoe cast impressions; 5-11, pieces of blue plastic tarp and string; 5-12, photographs and papers including notes, a pawn receipt, Deposit of Treasury Envelope, Shell receipt, and direct deposit flier; 5-13, a metal bracelet and buttons; 5-14, a burned piece of

cloth; 5-15, a white sock; 5-16 and 5-17, tennis shoes; 5-18, a checkbook; 5-19, material taken from a mattress; 5-20, a Phillips screwdriver; 5-21, a glass vial of water sample from mop water in sitting room; 5-22, a claw hammer; 5-24, a white hand towel; 5-25, bed sheets; 5-26, shorts; 5-27, a section of blue tarp; 5-28, burned clothing rivets; 5-29, possible burned fabric pieces; 5-31, possible burned tarp; 5-32, unknown burned objects; 5-33, a glass container containing insects found on body; 5-36, denim pants and fixed blade knife; and 1-1, three white metal rings. The State also noted that the MCSO's evidence inventory does not include an electrical extension cord.

The State argued that identity is not an issue in this case and Masselle "has always conceded that he was present in Rains's home at the time of her murder, and that he strangled her with an extension cord." The State argued that exculpatory DNA testing results would not change the outcome of this case because the record contains evidence of Masselle's guilt other than his confession or guilty plea. The State also argued that, because Masselle and King planned to kill Rains and participated together causing Rains's death and disposing of her body, Masselle could be guilty of the offense under the law of parties even if, as Masselle's motion alleged, Rains was already dead when he strangled her.

The State asserted that "security guard Robert Cummins told police that King had admitted to him that she and the defendant had murdered Rains in her residence and used her father's truck to dispose of the body." The State attached as an appendix a copy of a police offense report supplement summarizing Cummins's interview.

The State attached pages from a police offense report supplement summarizing Brandy King's confession. The offense report states that King made a written and signed statement and that her interview was also recorded on DVD. According to the offense report, in her interview with Deputy Mark Handler, "King stated she and Masselle planned the [m]urder to take money, social security income, from Rains." The report further states that King observed Masselle attempt to twist Rains's neck and wrap an extension cord around Rains's neck and King explained to Handler that Masselle stopped pulling the cord around Rains's neck after King could no longer find a pulse on Rains. The police report also states that King said she and Masselle drove Rains's body to an oil field where they set it on fire.

The State also attached pages from a police offense report supplement by Sergeant Carey Mace summarizing Masselle's "confession[.]" Therein, Mace wrote that "[a]fter listening to Masselle implicate himself in the planning of the death of Yvette [Rains] and the subsequent disposal of her body after she was killed, I made the decision that Masselle was no longer free to leave[.]" Mace stated that he advised

Masselle of his *Miranda* rights, and Mace informed Masselle that he was implicated in Rains's death. The report continues as follows:

> . . . Upon hearing this, Masselle immediately and without solicitation from us, began to talk about him and King killing [Rains]. Masselle then re-initiated the dialog between himself and Investigator Hess and I without the presence of an attorney. I attempted to interrupt Masselle on several occasions and ask him if he wanted to waive his rights and continue speaking about the death of Yvette [Rains], but Masselle would not stop talking about he and King killing [Rains] long enough to answer my question. Masselle continued to speak of the murder of Yvette [Rains] without being questioned by either Investigator Hess or me. I then informed Masselle that I believed that his unsolicited elaboration on [Rains's] death was a voluntary waiver of his rights, and I continued to speak with Masselle regarding the details surrounding [Rains's] death. Masselle continued to explain that King had approached him, wanting him to kill [Rains], and he had killed [Rains] by strangling her. According to Masselle, King had retrieved the extension cord for Masselle, and Masselle had used the cord to strangle [Rains], while [Rains] was seated in her wheelchair in the living room of her residence. King had also handed Masselle a blue silk nightgown to put under the extension cord to hide any marks on [Rains's] neck from being strangled by Masselle with the cord. According to Masselle, King cheered him on while he was strangling [Rains], and after several minutes of the cord around [Rains's] neck, King checked [Rains's] wrist for a pulse to confirm that she was dead. Masselle claimed that King never offered him anything for killing her mother, but after King cashed [Rains's] Social Security disability check King gave him eighty dollars, allegedly for the money owed to him by [Rains] for past electric bills. Masselle continued to speak at length about the murder of Yvette [Rains] before again asking if he could go outside to smoke his last cigarettes. . . .

The report states that a "voluntary statement form[]" signed by Masselle that included his *Miranda* rights was given to Detective Mike Landrum.

Trial Court's Order

The trial court denied Masselle's motion without conducting a hearing and issued a written order dated July 25, 2016. The order stated, in relevant part, as follows:

> . . . Having considered the defendant's motion, the State's response, and the contents of the Court's file for this case, the Court finds that:
>
> 1. The State is in possession of biological evidence collected during the investigation of the murder of Yvette King Rains in March of 2005, and that biological evidence 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. Identity is not an issue in this case.
>
> 4. The defendant has always admitted, and continues to admit, that he was present in Rains's home at the time of her death and that he strangled her with an electrical extension cord.
>
> 5. The defendant's speculation that Rains may have been dead when he commenced to strangle her does not place his identity in issue, as the evidence supported his conviction as a party under section 7.02(a)(2) and (b) of the Penal Code, even if Brandy King caused Rains's death before the defendant commenced to strangle her.
>
> 6. The defendant has not shown by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained from pretrial DNA testing of the physical evidence.

7. The defendant's request for DNA testing was not made to unreasonably delay the execution of sentence or the administration of justice.

Arguments on Appeal

Masselle timely appealed from the trial court's order denying his motion.[1] In a single issue, Masselle's pro se brief argues that the trial court erred in denying his post-conviction motion for DNA testing. Masselle contends that identity is at issue in this case, that it was King who caused Rains's death by hitting Rains with an unknown object, and that DNA testing would clear him of the murder charge. According to Masselle's brief, the only evidence against him is his "testimony that he attempted to strangle [Rains], thinking he killed her." Masselle also argues that the court should determine what object was used to cause blood to be on the wall and floor at the site of the murder.[2]

[1] Because Masselle filed a pro se appeal, his appellate brief has been liberally construed. *See Giddens v. Brooks*, 92 S.W.3d 878, 880 (Tex. App.—Beaumont 2002, pet. denied) ("pro se pleadings and briefs are to be liberally construed[]"); *see also Sterner v. Marathon Oil Co*., 767 S.W.2d 686, 690 (Tex. 1989) (a reviewing court construes points of error liberally to obtain a just, fair, and equitable adjudication of the parties' rights).

[2] Masselle argues that DNA testing was unavailable to him at the time of his plea due to the ineffective assistance of his trial attorney. Masselle also states in his brief that he was "misled into a[] plea." To the extent Masselle raises an argument on appeal concerning the voluntariness of his plea or ineffective assistance of his trial attorney, such issues fall outside the scope of Chapter 64, and we do not have jurisdiction to address such collateral attacks in a Chapter 64 appeal. *See In re*

Chapter 64 Motion for Forensic DNA Testing

Chapter 64 of the Code of Criminal Procedure governs a convicted person's request for post-conviction forensic DNA testing and contains multiple threshold requirements that must be met before an applicant is entitled to such testing. *See, e.g.*, Tex. Code Crim. Proc. Ann. arts. 64.01-64.05. The convicted person bears the burden of satisfying all article 64.01 and 64.03 requirements. *Wilson v. State*, 185 S.W.3d 481, 484 (Tex. Crim. App. 2006). Generally, 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*. Here, because the trial court did not conduct a live hearing, we review the trial court's denial of DNA testing de novo. *See Smith v. State*, 165 S.W.3d 361, 363 (Tex. Crim. App. 2005).

Garcia, 363 S.W.3d 819, 822 (Tex. App.—Austin 2012, no pet.); *see also James v. State*, No. 10-11-00215-CR, 2013 Tex. App. LEXIS 15025, at **4-5 (Tex. App.—Waco Dec. 12, 2013, no pet.) (mem. op., not designated for publication) (Chapter 64 does not confer jurisdiction on an appellate court to consider collateral attacks on the conviction).

Chapter 64 allows a convicted person to file a motion for post-conviction DNA testing of biological evidence. *Whitfield v. State*, 430 S.W.3d 405, 407 (Tex. Crim. App. 2014); *see* Tex. Code Crim. Proc. Ann. art. 64.01(a) (West Supp. 2016). "If the motion meets specific requirements and the court grants the motion, article 64.04 requires that 'the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted.'" *Whitfield*, 430 S.W.3d at 407 (quoting Tex. Code Crim. Proc. Ann. art. 64.04).

The purpose of post-conviction DNA testing is to provide a means through which a defendant may establish his innocence by excluding himself as the perpetrator of the offense of which he was convicted. *See Blacklock v. State*, 235 S.W.3d 231, 232-33 (Tex. Crim. App. 2007); *Birdwell v. State*, 276 S.W.3d 642, 645-46 (Tex. App.—Waco 2008, pet. ref'd). A convicting court may order forensic DNA testing only if the statutory preconditions of Chapter 64 are met. *See Holberg v. State*, 425 S.W.3d 282, 284 (Tex. Crim. App. 2014); *Bell v. State*, 90 S.W.3d 301, 306 (Tex. Crim. App. 2002).

Article 64.03 also now requires the judge to find, in addition to other requirements, that "there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing." *See Reed v. State*, No. AP-77,054,

2017 Tex. Crim. App. LEXIS 376, at *17 (Tex. Crim. App. Apr. 12, 2017); *Swearingen v. State*, 303 S.W.3d 728, 732 (Tex. Crim. App. 2010) (applying prior version of 64.01(a-1), the convicted person was required to show the evidence sought to be tested "contains biological material.").

The statute defines "biological material" in relevant part as:

> . . . an item that is in possession of the state and that contains blood, semen, hair, saliva, skin tissue or cells, fingernail scrapings, bone, bodily fluids, or other identifiable biological evidence that may be suitable for forensic DNA testing[.]

Tex. Code Crim. Proc. Ann. art. 64.01(a)(1).

On the motion of a convicted person, a trial court may order forensic DNA testing of the biological material only if (1) the court finds the evidence still exists and is in a condition making DNA testing possible, and the evidence has been subjected to a sufficient chain of custody to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; (2) the court finds that identity was or is an issue in the case; and (3) the convicted person establishes by a preponderance of the evidence that: he or she would not have been convicted if exculpatory results had been obtained through DNA testing, and the request for testing is not made to unreasonably delay the execution of sentence or administration of justice. *Id.* art. 64.03(a); *see also Prible v. State*, 245 S.W.3d 466, 470 (Tex. Crim. App. 2008).

To be entitled to the testing, the convicted person must demonstrate that identity is an issue. *Prible*, 245 S.W.3d at 470. "Identity is not an issue in a case if DNA testing could not determine who committed the offense or exculpate the person convicted." *Pegues v. State*, 518 S.W.3d 529, 535 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing *Prible*, 245 S.W.3d at 470). "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, 900 (Tex. Crim. App. 2011).

A convicting court "is prohibited from finding that identity was not an issue in the case *solely* on the basis of [a] plea, confession, or admission[.]" *See* Tex. Code Crim. Proc. Ann. art. 64.03(b)) (emphasis added). However, the trial court is not prohibited from considering a guilty plea or confession in addition to considering the remainder of the record. *See Gutierrez*, 337 S.W.3d at 894-95 (appellant's confession was not the "sole basis" for finding identity not at issue where record included statements by a witness and accomplices that placed appellant at the scene of the murder and the case was tried under the law of parties); *Hill v. State*, No. 02-11-00398-CR, 2012 Tex. App. LEXIS 7827, at **32-33 (Tex. App.—Fort Worth Sept. 13, 2012, no pet.) (mem. op., not designated for publication) (citing *Bell v.*

State, No. 02-10-00557-CR, 2011 Tex. App. LEXIS 6865, at *4 (Tex. App.—Fort Worth Aug. 25, 2011, pet. ref'd) (mem. op., not designated for publication)); *O'Regan v. State*, No. 2-06-100-CR, 2006 Tex. App. LEXIS 11161, at **1-2 (Tex. App.—Fort Worth Dec. 21, 2006, pet. ref'd) (mem. op., not designated for publication) ("We know of no law . . . that prevents the trial court from considering a judicial confession in ruling on a motion for DNA testing.").

The statute expressly requires a convicted person to show "by a preponderance of the evidence that . . . the person would not have been convicted if exculpatory results had been obtained through DNA testing[.]" *See* Tex. Code Crim. Proc. Ann. art. 64.03(a)(2)(A). The courts have interpreted the phrase "the person would not have been convicted if exculpatory results had been obtained through DNA testing" to mean a "'greater than a 50% chance that he would not have been convicted if DNA testing provided exculpatory results. . . .'" *Leal v. State*, 303 S.W.3d 292, 297 (Tex. Crim. App. 2009) (quoting *Prible*, 245 S.W.3d at 467-68); *see also Holberg*, 425 S.W.3d at 286-87. "A 'favorable' DNA test result must be the sort of evidence that would affirmatively cast doubt upon the validity of the inmate's conviction; otherwise, DNA testing would simply 'muddy the waters.'" *Gutierrez*, 337 S.W.3d at 892 (quoting *Rivera*, 89 S.W.3d at 59). If the favorable or exculpatory test result would not change the probability that the inmate would have been

convicted, then there is no justification to order any testing, and a movant has not met his burden if there is sufficient evidence, other than the evidence in question, to establish his guilt. *Id.*; *Bates v. State*, 177 S.W.3d 451, 453 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

Article 64.01(a-1) also requires that the motion be accompanied by an affidavit "containing statements of fact in support of the motion." *See* Tex. Code Crim. Proc. Ann. art. 64.01(a-1). Chapter 64 does not require the trial court to conduct an evidentiary hearing. *Gutierrez*, 337 S.W.3d at 893; *Whitaker*, 160 S.W.3d at 8-9. Rather, the trial court may rely on the motions and the State's written response. *Mearis v. State*, 120 S.W.3d 20, 23-24 (Tex. App.—San Antonio 2003, pet. ref'd) (citing *Rivera*, 89 S.W.3d at 58-59). In addition, the Court of Criminal Appeals has noted that "[t]he legislature has placed no barriers to the type of relevant and reliable information that the trial judge may consider when determining if identity was or is an issue in the case. The information must be reliable, but it need not be admissible or previously admitted at trial." *Gutierrez*, 337 S.W.3d at 893.

Analysis

The trial court's order stated in its findings that "[i]dentity is not an issue in this case[]" and that Masselle has admitted that he was present in Rains's home at the time of her death and that he strangled Rains. The MCSO evidence inventory in

the record does not reflect that an electrical cord or ligature is in evidence. As to the remaining evidence in inventory, exculpatory results would show, at most, that someone other than Masselle—perhaps King—had also left DNA at the crime scene. This might inculpate King, but it would not exonerate Masselle. *See LaRue v. State*, 518 S.W.3d 439, 449 (Tex. Crim. App. 2017) (citing *Wilson*, 185 S.W.3d at 485) ("if . . . DNA testing showed that another perpetrator was involved, that finding would not exonerate appellant because it would show nothing more than there was another party to the crime, at best")). The trial court could reasonably have concluded that Masselle failed to establish that he would not have been convicted if exculpatory results had been obtained through DNA testing, that is, that he failed to establish a "'greater than a 50% chance that he would not have been convicted if DNA testing provided exculpatory results. . . .'" *Leal*, 303 S.W.3d at 297 (quoting *Prible*, 245 S.W.3d at 467-68; *see also Holberg*, 425 S.W.3d at 286-87. Masselle failed to demonstrate how exculpatory DNA results on any evidence in the inventory would do anything more than "muddy the waters[.]" *See LaRue*, 518 S.W.3d at 449; *Blacklock*, 235 S.W.3d at 323-33; *Rivera*, 89 S.W.3d at 59. Accordingly, the trial court did not err in concluding that identity was not an issue. *See Prible*, 245 S.W.3d at 470.

We also address the trial court's finding that "the evidence supported [Masselle's] conviction as a party under section 7.02(a)(2) and (b) of the Penal Code, even if Brandy King caused Rains's death before [Masselle] commenced to strangle her." Under the law of parties, a person is criminally responsible for an offense committed by another if, acting with the intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. *See* Tex. Penal Code Ann. § 7.02 (West 2011). "Each party to an offense may be charged with commission of the offense." *Id.* § 7.01(b) (West 2011). "Evidence is sufficient to convict under the law of parties where the defendant is physically present at the commission of the offense and encourages its commission by words or other agreement." *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1996) (op. on reh'g). A factfinder may consider "'events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act.'" *See id.* (quoting *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985)). "[C]ircumstantial evidence may be used to prove party status." *Id.*

Evidence in the record that included, among other items, Masselle's own statements, supports an inference that Masselle was physically present at the commission of the offense. *See id.* King's and Cummins's statements are also

evidence from which it may be reasonably inferred that Masselle encouraged commission of the offense by his words or agreement. *Id.* Therefore, we find no error in the trial court's finding that Masselle's identity is not at issue because the evidence supports his conviction under the law of parties.

A court may not grant a post-conviction motion for DNA testing unless the movant has satisfied all the Chapter 64 requirements. *See Wilson*, 185 S.W.3d at 484. Therefore we need not address any other basis for the trial court's order. *See* Tex. R. App. P. 47.1. On the record before us, we conclude that the trial court did not err by denying Masselle's motion for post-conviction forensic DNA testing. *See Wilson*, 185 S.W.3d at 486; *see also Prible*, 245 S.W.3d at 470.

Having overruled Masselle's issue on appeal, we affirm the trial court's order denying Masselle's post-conviction motion.

AFFIRMED.

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LEANNE JOHNSON
Justice

Submitted on April 26, 2017
Opinion Delivered August 30, 2017
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.