In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00459-CR

JARNYL DAYON BROWN, Appellant

V.

THE STATE OF TEXAS

On Appeal from Criminal District Court No. 2
Tarrant County, Texas
Trial Court No. 0629420D

Before Gabriel, Kerr, and Womack, JJ.
Memorandum Opinion by Justice Womack

MEMORANDUM OPINION

I. Introduction

Appellant Jarnyl Dayon Brown raises a single point challenging the trial court's finding of no reasonable probability of non-conviction following postconviction DNA testing under Chapter 64 of the Texas Code of Criminal Procedure.[1] We affirm.

II. Background

After the State indicted Brown for the capital murder of Dan Bolton while committing or attempting to commit a robbery that occurred in 1996, Brown pled guilty to the lesser charge of murder. Following his judicial confession, the trial court sentenced Brown to life imprisonment in the Institutional Division of the Texas Department of Criminal Justice.

Brown filed a pro se motion for postconviction forensic DNA testing under Chapter 64 of the Texas Code of Criminal Procedure in May 2017. *See* Tex. Code Crim. Proc. Ann. art. 64.01. Despite noting that it did not believe Brown had satisfied the requirements of Chapter 64, the State nevertheless agreed to this testing "in an abundance of caution." The trial court ordered the Texas Department of Public

[1]While the point of error set out in Brown's brief asserts that the trial court erred by granting the State's no-reasonable-probability motion, it is clear from the arguments made that Brown is challenging the trial court's finding that the DNA results indicate there is no reasonable probability that Brown would not have been convicted had these results been available at the time of the trial.

Safety Crime Laboratory (DPS) to conduct forensic DNA testing on the following items:

- Pack of Marlboro cigarettes
- Bloody sweat pant/lighter/burnt cigarette
- White high top shoes
- Black orange gray mask & hairs
- Paper from van floorboard
- Cash
- Money tray
- MCI card swab
- Blood stains (A-G, I, L)
- Washcloth
- Clothing
- Earring
- Blood samples from vehicle
- Hair samples
- Victim's known DNA samples

DPS then issued a report outlining its findings. The results indicated that Brown was excluded as a contributor to the DNA profile found on the stain from the left side of Bolton's shoe and the profile located on the MCI phone card recovered from the crime scene. However, DPS also concluded that Stain F[2] is 1.12 octillion times more likely to have come from Brown than an unrelated individual and that it is 1.72 quintillion times more likely that Brown's DNA contributed to the three-person

[2]Several stains, including Stain F, were collected from the crime scene and subsequently tested for DNA comparison.

DNA profile mixture found on a mask at the crime scene compared to three unknown individuals.[3]

Following the DPS report, the State filed its "Motion for a No Reasonable Probability of Non-Conviction Finding on Results of Post-Conviction DNA Testing." After a hearing, the trial court signed its "Finding on Defendant's Motion for Forensic DNA Testing" in which the court found that the results do not create a reasonable probability that Brown would not have been convicted during trial. This appeal followed.

III. Discussion

A. Standard of Review

We review the trial court's decision regarding DNA testing using a bifurcated standard of review. *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002). We afford almost total deference to the trial court's determination of historical fact and application-of-law-to-fact issues that turn on credibility and demeanor, while we review de novo other application-of-law-to-fact issues. *Id.*

We review the entire record, that is, all of the evidence that was available to, and considered by, the trial court in making its ruling, including testimony from the

[3]The DPS report also tested Brown's left white Fila tennis shoe in two locations. There was no DNA profile obtained from the stain on the toe of Brown's shoe, and no interpretations were made for the partial DNA profile obtained from swabbing Brown's shoe because of the potential number of contributors to that profile.

original trial. *Asberry v. State*, 507 S.W.3d 227, 228 (Tex. Crim. App. 2016). The ultimate question of whether a reasonable probability exists that exculpatory DNA tests would have caused the defendant to not be convicted "is an application-of-the-law-to-fact question that does not turn on credibility and demeanor and is therefore reviewed de novo." *See Rivera*, 89 S.W.3d at 59.

B. The Law Concerning Findings on Postconviction DNA Testing

The purpose of postconviction 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). Chapter 64 of the Code of Criminal Procedure provides that a convicted person may submit a motion to the convicting court to obtain postconviction DNA testing. Tex. Code Crim. Proc. Ann. art. 64.01; *Ex parte Gutierrez*, 337 S.W.3d 883, 889 (Tex. Crim. App. 2011). If such DNA testing is conducted, 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. Tex. Code Crim. Proc. Ann. art. 64.04; *Solomon v. State*, No. 02-13-00593-CR, 2015 WL 601877, at *4 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) (mem. op., not designated for publication); *Glover v. State*, 445 S.W.3d 858, 861 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). The defendant may appeal that finding. *See* Tex. Code Crim. Proc. Ann. art. 64.05; *Whitfield v. State*, 430 S.W.3d 405, 409 (Tex. Crim. App. 2014).

To be entitled to a finding that, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted, "[t]he defendant must prove that, had the results of the DNA test been available at trial, there is a 51% chance that the defendant would not have been convicted." *Glover*, 445 S.W.3d at 861; *Medford v. State*, No. 02-15-00055-CR, 2015 WL 7008030, at *3 (Tex. App.—Fort Worth Nov. 12, 2015, pet. ref'd) (mem. op., not designated for publication). When the conviction is based on a charge bargain, the question then becomes whether the inculpatory evidence—including guilty pleas, judicial confessions, and other inculpatory evidence—is so undermined by the test results that it is reasonably probable a factfinder would not have convicted the defendant. *Dunning v. State*, 572 S.W.3d 685, 694 (Tex. Crim. App. 2019). A defendant is not required to establish actual innocence to be entitled to a favorable finding. *See Glover*, 445 S.W.3d at 862.

C. The Trial Court's No-Reasonable-Probability Finding

In this case, Brown argues that the lack of DNA evidence found on much of the newly-tested evidence, combined with the possibility of another individual's presence and the State's reliance solely on his guilty plea and judicial confession, demonstrates that the trial court erred by finding that the newly-obtained test results by DPS did not create a reasonable probability that he would not have been convicted had they been available at the time of his trial. We disagree.

Brown first points out that "there were a number of items for which either [Brown] was excluded as a contributor or for which no DNA profile was obtained" in the DPS laboratory report. Specifically, Brown notes that he was excluded as a contributor to both the stain on Bolton's right shoe and also the MCI phone card swab. While it is accurate that the DPS report excluded Brown as a contributor to these profiles, the report also indicates that these profiles were both from single individuals and that Bolton is likely that individual.[4] And as the State correctly points out, the "exclusion as a possible contributor for the single-source DNA profiles obtained from Mr. Bolton's shoe and his phone card does not create a reasonable probability of non-conviction since these same testing results establish Mr. Bolton as their contributor." *See Flores v. State*, 491 S.W.3d 6, 10 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) ("Even if we were to infer from the results that another person was present at the time of the shooting, this inference alone . . . would not demonstrate a reasonable probability of acquittal."). In fact, the DPS report confirms that Brown is the contributor for the single-source DNA profile obtained from crime scene Stain F, placing him at the scene of the crime that he previously confessed to committing.

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[4]The DPS report indicates that the DNA collected from the stain on the victim's shoe was 14.4 octillion times more likely to have come from the victim than an unrelated, unknown individual. Similarly, the report reflected that the DNA collected from the MCI phone card was 1.92 septillion times more likely to have come from the victim than an unrelated, unknown individual.

Further, the DPS report stated that Brown is a contributor to the three-person DNA mixture profile obtained from the mask found at the scene of the crime. Brown uses this three-person mixture profile to argue that retesting the evidence could potentially show that there was an additional individual that had access to the items in question and that the results from retesting "may then outweigh the plea of guilty and the judicial confession used to convict [Brown]." But this argument fails in two regards.

First, the presence of two unknown contributors in addition to Brown to the DNA profile from the mask does not create any inference that he did not commit the crime but instead only serves to "muddy the waters" of the evidence against him. *See Glover*, 445 S.W.3d at 862 ("Even if we accepted this argument, proof that Appellant was excluded as the minor contributor, at best, functions only to 'muddy the waters' of the evidence against him."). Second, a guilty plea is usually strong evidence supporting a non-favorable finding for the defendant because "courts should . . . give great respect to knowing, voluntary, and intelligent pleas of guilty." *Dunning*, 572 S.W.3d at 694 (quoting *Ex parte Tuley*, 109 S.W.3d 388, 391 (Tex. Crim. App. 2002)). The guilty plea and confession, therefore, combined with the lack of exculpatory DNA evidence as well as findings placing Brown at the scene of the crime, are insufficient to cross the preponderance of the evidence standard outlined in Chapter 64. Thus, the trial court did not err by finding that there was no reasonable probability of non-conviction, and that finding does not so undermine Brown's guilty

plea as to call it into question. *See Solomon*, 2015 WL 601877, at *5. We therefore overrule Brown's sole point.

IV. Conclusion

Having overruled Brown's sole point on appeal, we affirm the trial court's "Finding on Defendant's Motion for Forensic DNA Testing."

/s/ Dana Womack

Dana Womack
Justice

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Delivered: August 13, 2020