In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00448-CR

JOSEPH HERCULES NORTON, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 69th District Court
Sherman County, Texas
Trial Court No. 766; Honorable Ron Enns, Presiding

August 16, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

On January 27, 2016, pursuant to chapter 64 of the Texas Code of Criminal Procedure, the trial court entered an order directing the forensic DNA testing of two items of evidence: (1) a pair of blue jeans taken from Appellant, Joseph Hercules Norton, and (2) a known sample of the victim's blood. *See* TEX. CODE CRIM. PROC. ANN.

art. 64.01-05 (West Supp. 2016).[1] Testing resulted in a conclusion by the DNA testing facility that it was a statistical certainty that blood found on Appellant's blue jeans came from the victim. Based on that result, on November 8, 2016, the trial court entered its *Order Regarding Results of Forensic DNA Testing,* ordering that no further DNA testing be performed on numerous other remaining items of evidence. Appellant timely filed his notice of appeal contesting that order. By a sole issue, he asserts the trial court erred in denying his request for forensic DNA testing of other items of evidence collected from the crime scene. We affirm.

BACKGROUND

In 1994, Appellant was convicted by a jury of capital murder and sentenced to life in prison. His conviction was affirmed by this court. *See Norton v. State*, 930 S.W.2d 101, 111 (Tex. App.—Amarillo 1996, pet. ref'd). Appellant was indicted for shooting a Department of Public Safety Trooper while the trooper was lawfully discharging his official duty.

In 2003, Appellant moved for appointment of counsel pursuant to article 64.01(c) of the Texas Code of Criminal Procedure to pursue DNA testing of biological evidence. On January 28, 2005, court-appointed counsel filed *Defendant's Motion for DNA Testing*. The motion did not identify specific items of evidence not previously subjected

[1] Appellant's motion for DNA testing was filed in April of 2007. Chapter 64 of the Texas Code of Criminal Procedure was subsequently amended by the 80th, 82nd, and 84th Legislatures in 2007, 2011 and 2015, respectively. *See* Act of May 24, 2007, 80th Leg., R.S., ch. 1006, § 2, 2007 Tex. Gen. Laws 3523-25 (effective September 1, 2007); Act of May 21, 2011, 82nd Leg., R.S., ch. 278, § 5, 2011 Tex. Gen. Laws 883, 885 (effective September 1, 2011); Act of May 20, 2011, 82nd Leg., R.S., ch. 366, § 1, 2011 Tex. Gen. Laws 1016-17 (effective September 1, 2011); Act of May 12, 2015, 84th Leg., R.S., ch. 70, § 1, 2015 Tex. Gen. Laws 1062 (effective September 1, 2015). The amended text in chapter 64 is effective for motions for forensic DNA testing filed on or after the respective effective dates. Therefore, Appellant's motion for DNA testing is governed by the former law in effect at the time of the filing of his motion.

to DNA testing. In February 2005, the trial court granted Appellant's motion; however, that order was later vacated due to the lack of proper notice to the State. By letter dated July 1, 2006, court-appointed counsel requested DNA testing of twenty-five trial exhibits, eight non-trial exhibits, and four additional items held by the sheriff's department. No action was taken on that request and an amended motion was filed on April 11, 2007. Again, no action was immediately taken and on November 13, 2009, Appellant's court-appointed counsel was allowed to withdraw.

On March 2, 2012, new counsel was appointed to represent Appellant. The disputed evidence was not, however, made available to him until December 9, 2014. A year later, on December 16, 2015, the trial court held a hearing on Appellant's amended motion. On January 27, 2016, the trial court entered its *Order for DNA Testing*, authorizing a private lab to conduct testing on the two items of evidence mentioned above—Appellant's blue jeans and a known sample of the victim's blood. The order recognized that the evidence to be tested "represents only a portion of the evidence [Appellant] has requested to be tested" and it specifically reserved ruling on the remainder of the items, subject to the results of the DNA testing on the two items listed.

Once the results were available, another hearing was held. The results showed that, to a statistical certainty, the victim's blood was on Appellant's blue jeans. While Appellant's counsel acknowledged that the trial court would probably not authorize further testing on the other items, he nevertheless requested testing on those items. Based on the DNA test results from the items submitted, which the trial court described as "damning" to Appellant, the trial court denied any further DNA testing. The trial court subsequently signed an order memorializing its findings wherein it found that "had the

results of forensic DNA testing . . . been available during the trial . . . it is *not* reasonably probable that [Appellant] would *not* have been convicted of the offense of capital murder." (Emphasis added). The trial court then ordered that "no further DNA testing shall be performed on any other items of evidence . . . ." No further findings of fact or conclusions of law were requested or filed. Appellant now contests the trial court's decision to deny further testing.

APPEALABLE ORDER

A convicted person may appeal a trial court's findings following DNA testing to a court of appeals under article 64.05 in the same manner as an appeal of any other criminal matter. *See Whitfield v. State*, 430 S.W.3d 405, 407, 409 (Tex. Crim. App. 2014). The Legislature has broadened the scope of appeals under article 64.05 to include the sufficiency of the evidence to support the trial court's findings as well as other grounds of appeal. *Id.* at 409. A convicted person may also appeal the denial of a motion for DNA testing. *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002).

STANDARD OF REVIEW

In reviewing a trial court's ruling under chapter 64 of the Texas Code of Criminal Procedure, we apply a bifurcated standard of review. *Id.* We afford almost total deference to that court's determination of issues of historical fact and application-of-law-to-fact issues that turn on credibility and demeanor, but we review *de novo* other application-of-law-to-fact issues. *Id.* The ultimate question of whether there is a reasonable probability that exculpatory DNA tests would have caused the defendant not to be convicted is "an application-of-law-to-fact question that does not turn on credibility and demeanor and is therefore reviewed *de novo*." *Id.*

APPLICABLE LAW

To obtain DNA testing under chapter 64, a convicted person must establish (1) the evidence still exists and is in condition for DNA testing and 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; (2) there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and (3) identity was or is an issue in the case. Art. 64.03(a)(1). The convicted person must also 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 the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice. *Id.* at (2).

Exculpatory DNA test results are results that would cast doubt on the accused's conviction by establishing a reasonable probability that he would *not* have been convicted of the offense had the evidence been available at trial. *Ex parte Gutierrez*, 337 S.W.3d 883, 892 (Tex. Crim. App. 2011). "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.'" *Id.* Typically, exculpatory DNA test results are results that would exclude the accused as the perpetrator of the offense. If, regardless of the results, DNA testing would not show by a preponderance of the evidence that the appellant would not have been convicted, then there is no reason for a court to order DNA testing. *Prible v. State*, 245 S.W.3d 466, 469-70 (Tex. Crim. App. 2008).

ANALYSIS

In support of his motion for DNA testing, Appellant included his affidavit in which he averred that he "was not present at the scene of the crime," making identity an issue.[2] He argues that testing of items found at the scene would implicate a third person's presence which would have resulted in a different verdict. The State contends that eyewitness testimony and other evidence placed Appellant at the scene and further DNA testing would not have resulted in a different verdict.

The facts leading to the trooper's death are that he made a routine traffic stop of Appellant on a "somewhat busy highway in the middle of the afternoon on a summer day." *Norton*, 930 S.W.2d at 106. Three eyewitnesses placed Appellant at the scene. *Id.* One of the eyewitnesses testified at trial that she observed Appellant and the trooper "standing chest to chest fighting." *Id.* at 103. She decided to go for help and saw Appellant "standing there with a gun in his hand and the trooper was out in the edge of the wheat field." She testified the trooper "was running away from appellant, turned and held his hands in front of his face, and was shot by appellant while in that posture." *Id.* The trooper was shot five times at close range. *Id.*

There was overwhelming evidence linking Appellant to the crime and the two items tested only further served to link Appellant to the offense by placing him in close proximity to the victim while he was bleeding. DNA testing of additional items implicating a third party would not have established by a preponderance of the evidence that Appellant would not have been convicted. Rather, additional testing would have

[2] At trial, Appellant's defensive theory was that he had no memory of the traffic stop or contact with the trooper. He claimed that after suffering a head injury as a teenager and receiving a "severe electrical shock," he experienced blackout spells. *Norton*, 930 S.W.2d at 107. He also raised an insanity defense which he later withdrew. *Id.* at 107-08.

merely "muddied the waters." A trial court need not initially order the testing of every item requested, but may instead rely on the results from the forensic DNA testing of a sample of the items requested to assist the court in its determination of whether the testing of the other items is necessary. Because the trial court's findings were not based on evaluation of credibility and demeanor, we review those findings *de novo* and conclude the trial court did not err in denying Appellant's request for further DNA testing of the numerous items requested. Appellant's sole issue is overruled.

CONCLUSION

The trial court's *Order Regarding Results of Forensic DNA Testing* is affirmed.

Patrick A. Pirtle
Justice

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