
# In The
# Court of Appeals
# Sixth Appellate District of Texas at Texarkana

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No. 06-16-00206-CR

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WILLIAM RAY JACOBS, Appellant

V.

THE STATE OF TEXAS, Appellee

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On Appeal from the 402nd District Court
Wood County, Texas
Trial Court No. 14,725-96

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Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Burgess

## MEMORANDUM OPINION

William Ray Jacobs appeals the trial court's denial of his motion for forensic DNA testing. We find that Jacobs has not shown a reasonable probability that he would not have been convicted even if DNA testing were conducted and yielded exculpatory results. Hence, we affirm the trial court's order.[1]

This is Jacobs' fifth request for DNA testing.[2] These requests followed Jacobs' 1997 conviction for aggravated sexual assault;[3] he was sentenced to life imprisonment.[4] This Court affirmed his conviction. *Jacobs v. State*, 951 S.W.2d 900, 901 (Tex. App.—Texarkana 1997, pet. ref'd). Here, Jacobs challenges the trial court's denial of short tandem repeat DNA testing on hairs found during the investigation of Jacobs' crime. For the same reasons explained in our previous opinions, we conclude that Jacobs has failed to show that favorable DNA testing would make it "reasonably probable that [he] would not have been convicted." TEX. CODE CRIM. PROC. ANN. art. 64.04 (West Supp. 2016).

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[1]We conduct a de novo review of the trial court's ruling on DNA testing. *Smith v. State*, 165 S.W.3d 361, 363 (Tex. Crim. App. 2005).

[2]*See Jacobs v. State*, 115 S.W.3d 108, 111 (Tex. App.—Texarkana 2003, pet. ref'd) ("trial court . . . held that a wealth of inculpatory evidence existed . . . establishing [Jacobs'] identity as the perpetrator"); *Jacobs v. State*, 181 S.W.3d 487 (Tex. App.—Texarkana 2005, pet. ref'd) (rejecting challenge to trial court's jurisdiction where new district court had been created and properly vested with original court's jurisdiction; rejecting same claim regarding DNA testing made in prior appeal); *Jacobs v. State*, 294 S.W.3d 192 (Tex. App.—Texarkana 2009, pet. ref'd); *Jacobs v. State*, No. 06-12-00173-CR, 2012 WL 6737823 (Tex. App.—Texarkana 2012, no pet.) (mem. op., not designated for publication) (dismissed for want of jurisdiction, no written order from trial court).

[3]*See* TEX. PENAL CODE ANN. § 22.021 (West Supp. 2016).

[4]One enhancement paragraph was found "true," and Jacobs was found to have used or exhibited a deadly weapon in the course of his offense.

Our earlier opinions have summarized the evidence and procedural history. For the instant appeal, we highlight the following facts:

- Jacobs met a young woman stranded by car trouble and gave her a ride;
- Wielding a pistol, he forced her to perform oral sex on him;
- The trial court, post-conviction, initially found that "[b]iological material consist[ing] of 'scrapings' from the victim's face, saliva samples, oral smear slides, oral 'swabbings', 'scrapings' from the victim's fingernails and 'scrapings' from her clothes" were obtained but not submitted for DNA testing;
- Two-and-one-half months after the trial court entered those findings, the Texas Department of Public Safety crime laboratory wrote the trial court, informing it that "no semen or blood was detected on any of the items in the sexual assault evidence collection kit, or on the clothing or bed sheet submitted," and, therefore, there was "nothing in this case that [the laboratory] ha[d] found to perform DNA testing on, except possibly the hair.
- The hair referred to strands of hair recovered from a pair of blue shorts, presumably the victim's, and a bed sheet. The laboratory informed the trial court these hairs had "no nuclear DNA," the only type of DNA the laboratory was equipped to test. The laboratory offered to refer the trial court to another laboratory which could analyze the hair for mitochondrial DNA.

To show oneself entitled to DNA testing, an applicant must meet several thresholds. Among these, one must demonstrate to the trial court that evidence exists "in a condition making DNA testing possible," that such evidence has been held in a chain of custody assuring the evidence's integrity, and that "identity was or is an issue in the case." TEX. CODE CRIM. PROC. ANN. art. 64.03(a) (West Supp. 2016). The applicant must also "establish[] by a preponderance of the

evidence that" he or she "would not have been convicted if exculpatory results had been obtained through DNA testing." *Id.*[5]

Here, the only physical evidence possibly subject to additional DNA testing are the hairs. Even if these hairs were tested and proved to be those of neither Jacobs or the victim, at most, the results would prove a third person was the donor of the hair(s). This would not exonerate Jacobs because it would not "establish[] by a preponderance of the evidence that . . . [Jacobs] would not have been convicted . . . . " TEX. CODE CRIM. PROC. ANN. art. 64.03(a). Where DNA testing would "merely muddy the waters," one is not entitled to the testing. *Ex parte Gutierrez*, 337 S.W.3d 883, 901 (Tex. Crim. App. 2011). Evidence which "would only demonstrate the presence of a third party" is insufficient to establish one would not have been convicted. *Skinner v. State*, 122 S.W.3d 808, 812 (Tex. Crim. App. 2003).

We previously summarized the evidence at Jacobs' trial:

> The victim had testified that her car had broken down and that Jacobs, a truck driver, had first presented himself as a good Samaritan, offering her a lift. After the victim had gotten into the truck Jacobs was driving, Jacobs first drove the truck to a trailer switch point, switched trailers, and then (upon re-entering the truck cab) threatened her with a gun and forced her to perform oral sex on him. The victim represented that her assailant had ejaculated after he withdrew his penis from her mouth. After this, Jacobs drove a short distance and then deposited the victim alone and in the rain on the highway. The victim was retrieved from the highway by relatives, who eventually returned the victim to the trailer switch point, where she got the license number of the trailer and the name "Vernon" from the side of the trailer. The victim then went to a nearby town, where a sexual assault nurse examiner took her statement and saved "scrapings" from the side of her face. The victim described Jacobs and the interior of the truck he was driving and many of its contents. The trailer bearing the license number the victim wrote down was identified as belonging to Vernon Sawyer trucking of Louisiana (Jacobs's

[5]The defendant must also establish the testing is not sought "to unreasonably delay the execution of sentence or administration of justice." TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(2)(B) (West Supp. 2016).

> employer) and the trailer had been assigned to Jacobs. After he was arrested, Jacobs enlisted a friend to go to the truck and remove many of its contents (including a pistol), but the friend was discovered as having done so; all of the removed items were recovered except for the pistol, which the friend said had been tossed in a nearby pond. Jacobs also wrote a letter to his wife wherein he attempted to have her fabricate an alibi for him. Jacobs matched the description given by the victim, and the victim identified Jacobs from a photographic lineup. Jacobs appealed his conviction, complaining of the admission into evidence of the letter to his wife and his wife's testimony concerning that letter.

*Jacobs*, 294 S.W.3d at 194. When reviewing a trial court's ruling on a request for DNA testing, we consider all of the trial evidence along with whatever possibly exculpatory evidence the petitioned-for testing might reveal. *See Wilson v. State*, 185 S.W.3d 481, 485 (Tex. Crim. App. 2006). Here, the evidence at trial would not be subverted or overcome even if there was evidence of a third party's presence, which is all testing of the hairs could possibly yield.

We affirm the trial court's ruling.

Ralph K. Burgess
Justice

Date Submitted: February 10, 2017
Date Decided: March 17, 2017

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