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

No. 06-17-00044-CV

ERIC CARSON WYNN, Appellant

V.

HEATHER JOHNSON PATTERSON, Appellee

On Appeal from the 307th District Court
Gregg County, Texas
Trial Court No. 2015-200-DR

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

MEMORANDUM OPINION

Eric Carson Wynn really, really wants DNA testing. In our opinion issued approximately five years ago, we ruled against Wynn's repeated requests for DNA testing:

> Eric Carson Wynn really wants DNA testing. This is his second such application appealed to this Court, and it urges essentially the same argument as the first.
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> In 2000, Wynn pled guilty to, and was convicted of, aggravated sexual assault, and the supporting evidence included Wynn's DNA recovered from the person of the victim. In 2011, Wynn sought, and was denied, DNA testing. On appeal, we affirmed that denial, with the following reasoning:
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> > Even should the Y–STR test have revealed the presence of more than one male donor [of DNA], this finding would not exculpate Wynn, but would merely add another person to the mix. In *Bell v. State*, 90 S.W.3d 301 (Tex. Crim. App. 2002), the Texas Court of Criminal Appeals reviewed a claim in which the appellant sought to demonstrate the possibility of his innocence by proving that someone else's DNA was at the scene of the crime. The court determined that[,] without more, the presence of another person's DNA at the crime scene would not constitute affirmative evidence of the appellant's innocence and that therefore, the denial of DNA testing did not violate appellant's due process rights. *Id.* at 306.
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> > The same reasoning applies here. The presence of more than one male donor would not constitute affirmative evidence of Wynn's innocence. Moreover, the recovery of additional DNA would not determine the identity of the person who committed the offense and therefore would not exculpate Wynn. *See Prible v. State*, 245 S.W.3d 466, 470 (Tex. Crim. App. 2008) (mere presence of another person's DNA at crime scene does not constitute affirmative evidence of defendant's innocence).

Wynn v. State, No. 06-10-00226-CR, 2011 WL 5865710, at *4–5 (Tex. App.—Texarkana Nov. 23, 2011, pet. ref'd) (mem. op., not designated for publication).

> Wynn now appeals from the denial of his second request for DNA testing. This time, he seeks DNA testing of the child born to the victim in the aftermath of the

> assault. He argues that DNA testing would establish that he was not the child's father, therefore proving that he was innocent of the assault.

Wynn v. State, No. 06-12-00103-CR, 2012 WL 4350440, at *1 (Tex. App.—Texarkana Sept. 24, 2012, pet. ref'd) (mem. op., not designated for publication) (footnotes omitted). Later, Wynn appealed to us again, again regarding his quest for DNA testing and again with essentially the same results. *See Wynn v. State*, No. 06-16-00120-CR, 2016 WL 6135565 (Tex. App.—Texarkana Oct. 21, 2016, no pet.).

Wynn continues the struggle. Most recently, on March 2, 2017, citing Section 11.054(2)(b) of the Texas Civil Practice and Remedies Code, the trial court found Wynn to be a vexatious litigant in his civil suit against the victim of his earlier sexual assault. Wynn's appeal cites Section 11.054(1) of that Code. *Compare* TEX. CIVIL PRAC. & REM. CODE ANN. § 11.054(1) *with* § 11.054(2)(B) (West 2017). Wynn argues that the trial court's finding is improper because the previous actions decided against him do not match the requirements of subsection (1). If subsection (1) were the only option under which the trial court could have found Wynn a vexatious litigant, we would agree. It is not the only viable option, however, and it is not the subsection under which the trial court issued its ruling.

The applicable statute provides, in pertinent part, as follows:

> A court may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and that:
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> (1) the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under Section 11.051, has commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in a small claims court that have been:

> (A) finally determined adversely to the plaintiff;
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> (B) permitted to remain pending at least two years without having been brought to trial or hearing; or
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> (C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure; [or]
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> (2) after a litigation has been finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, pro se, either:
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> . . . .
>
> (B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination against the same defendant as to whom the litigation was finally determined.

TEX. CIV. PRAC. & REM. CODE ANN. § 11.054 (West 2017).

We review the trial court's ruling for an abuse of discretion. *Harris v. Rose*, 204 S.W.3d 903, 905 (Tex. App.—Dallas 2006, no pet.); *Leonard v. Abbott*, 171 S.W.3d 451, 458–59 (Tex. App.—Austin 2005, pet. denied). For us to find an abuse of discretion, the trial court must have acted without reference to any guiding rules and principles or in an arbitrary and unreasonable manner. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding); *Harris*, 204 S.W.3d at 905.

To make its ruling under subsection (2)(B), the trial court must have found (1) no reasonable probability that Wynn would prevail in his lawsuit and (2) Wynn's repetitive effort, pro se, to relitigate an issue or claim after it was finally decided against him. Because Wynn's requests to get DNA testing have been repeatedly rejected, there is no reasonable probability that he will prevail in the latest such effort. Because he has tried repeatedly, pro se, to accomplish his purpose, his effort to relitigate is properly considered repetitive. The record, thus, supports the

trial court's finding, here, that Wynn's request for DNA testing was finally decided against him, yet he has repeatedly, pro se, sought to relitigate requests for such testing. The trial court, in rejecting Wynn's latest request, did not abuse its discretion.

We affirm the trial court's ruling.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 27, 2017
Date Decided: August 29, 2017