TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00476-CR

In re Jose Luis Aguirre, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 403RD JUDICIAL DISTRICT
NO. D-1-DC-02-302388, HONORABLE BRENDA KENNEDY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Jose Luis Aguirre appeals the trial court's denial of his motion for postconviction DNA testing under Texas Code of Criminal Procedure chapter 64. *See* Tex. Code Crim. Proc. art. 64.05. He contends that the trial court erred by denying his motion without requiring a response from the State, by making findings of fact that were unsupported by the record, and by determining that his motion did not meet certain statutory requirements. We will affirm the trial court's order.

DISCUSSION

A jury convicted Aguirre of capital murder for stabbing a 92-year-old man to death with a knife. *See Aguirre v. State*, No. 03-05-00370-CR, 2007 Tex. App. LEXIS 354, at *1-4 (Tex. App.—Austin Jan. 19, 2007, pet. struck) (mem. op., not designated for publication).[1] At trial, the

[1] The facts of the underlying case are not recited in detail because they are well known to the parties and set forth in the opinion affirming Aguirre's conviction. *See Aguirre v. State*,

jury heard testimony that Aguirre's right thumbprint was found on the knife, consistent with where the knife would have been grasped. *Id*. at *6-7. The jury also heard testimony that Aguirre confessed to another inmate, Carlos Lavernia, about committing the crime with Jimmy Benavides. *Id*. at *13. Lavernia testified that Aguirre said he had killed an old man to buy drugs. *Id*. at *11-12. Lavernia also gave a statement to police that was provided to the jury, in which Lavernia recalled Aguirre saying that he had stabbed the old man "a lot of times." *Id*. at *15. Numerous details of Lavernia's account were corroborated by other evidence that had never been released to the public. *Id*. at *13. Notably, the name of the accomplice Lavernia mentioned, Benavides, who lived a few houses away from the victim and was a subject of the initial police investigation after the murder, was never mentioned in newspaper or television accounts. *Id*. at *13, *15. When Aguirre was arrested, he denied ever seeing the knife, but at trial he testified that the knife belonged to a friend who lived with him and who had died since the murder. *Id*. at *4, *26. Aguirre's testimony conflicted with that of the victim's daughter, who positively identified the knife as belonging to her father. *Id*. at *9-10. At the conclusion of the trial, the jury found Aguirre guilty, and the trial court assessed punishment at life in prison. *Id*. at *4.

Almost a decade later, Aguirre filed a motion for postconviction DNA seeking new testing and retesting of items and types of items of evidence that contained or may have contained biological material, which he alleged would show that he did not commit the murder.[2] The trial

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No. 03-05-00370-CR, 2007 Tex. App. LEXIS 354 (Tex. App.—Austin Jan. 19, 2007, pet. struck) (mem. op., not designated for publication); *see also* Tex. R. App. P. 47.1.

[2] Aguirre's motion requested testing of various items (all but two of which are identified by police report tag numbers) including a catchall request for testing of "any other biological material collected in relation to this case but not specifically identified hereinabove."

court denied Aguirre's motion without holding a hearing in open court and issued findings of fact and conclusions of law.[3] This appeal followed.

Standard of review

A convicted person may request that the convicting court order forensic DNA testing of evidence containing biological material that was in the State's possession during the trial if it was not previously tested or, although it was previously tested, newer techniques provide a reasonable likelihood of yielding more accurate or probative results. Tex. Code Crim. Proc. art. 64.01(b). The court may order testing of such material if the convicted person shows by a preponderance of the evidence that he would not have been convicted if DNA testing had produced exculpatory evidence.[4] *Id*. art. 64.03(a)(2); *Ex parte Gutierrez*, 337 S.W.3d 883, 889 (Tex. Crim. App. 2011).

Specifically, a convicting court may order forensic DNA testing only if: (1) the evidence still exists in a condition making DNA testing possible; (2) the evidence has been subjected

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[3] After the trial court signed its order denying DNA testing and making its findings and conclusions, Aguirre filed his combined objections and motion to vacate the court's order, followed by his filing of a supplemental exhibit. Aguirre relies on these post-ruling filings on appeal. However, as the State notes, these filings were not before the court when it ruled on the motion for postconviction DNA testing, and the order denying that testing is the only one before this Court. We agree that materials not presented to the trial court before its challenged ruling should not be considered in deciding whether the trial court erred by denying this particular motion for postconviction DNA testing. *See State v. Swearingen*,478 S.W.3d 716, 719 (Tex. Crim. App. 2015) (noting that appellee filed five motions under chapter 64); *see also* 43B George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure* § 60:24.50 (Supp. 2016-17) (noting that multiple motions for postconviction DNA testing may be filed).

[4] The statute was amended in 2015, but Aguirre's motion was filed before the effective date of the amendment. *See* Act of Apr. 3, 2001, 77th Leg., R.S., ch. 2, § 2, art. 64.03, 2001 Tex. Gen. Laws 2, 3 (amended 2003, 2007, 2015) (current version at Tex. Code Crim. Proc. art. 64.03(a)). References in this opinion are to the statute in effect when Aguirre filed his motion.

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 was or is an issue in the case; (4) the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice; and (5) the convicted person establishes by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing. Tex. Code Crim. Proc. art. 64.03(a); *Gutierrez*, 337 S.W.3d at 889. As to the last element, a defendant may meet his burden if the record shows that exculpatory DNA test results excluding him as the donor of the material would establish, by a preponderance of the evidence, that he would not have been convicted. *Gutierrez*, 337 S.W.3d at 899.

When reviewing the trial court's rulings on a motion for postconviction DNA testing and when the trial record and the appellant's affidavit are the only sources of information supporting the motion, the trial court is in no better position than the appellate court in making the determination, and we review the issues de novo. *Smith v. State*, 165 S.W.3d 361, 363 (Tex. Crim. App. 2005) (concluding that because trial court did not hold live hearing on request for DNA testing, appellate court would conduct de novo review); *Sadler v. State*, No. 10-15-00136-CR, 2015 Tex. App. LEXIS 11685, at *3 (Tex. App.—Waco Nov. 12, 2015, no pet.) (mem. op., not designated for publication) (same).

Denial of motion without requiring response from the State was harmless

Aguirre contends that the trial court erred by denying his motion without requiring a response from the State under article 64.02 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 64.02(a)(2) (providing that convicting court shall require State's attorney to

either deliver evidence to court with description of condition of evidence or provide written explanation for why evidence cannot be delivered). However, article 64.02 allows the trial court to proceed even if the State does not file a response. *Id*. art. 64.02(b); *see also Padilla v. State*, Nos. 03-12-00299-CR, 03-12-00300-CR & 03-12-00301-CR, 2013 Tex. App. LEXIS 7481, at *30 (Tex. App.—Austin June 20, 2013, pet. ref'd) (mem. op., not designated for publication); *Sepeda v. State*, 301 S.W.3d 372, 375 (Tex. App.—Amarillo 2009, pet. ref'd) (noting that Article 64.02(b) "allows the trial court to proceed after the response period expires and regardless of whether the State filed a response"). Additionally, Aguirre was not harmed by any failure to deliver the evidence or provide a written explanation for its nondelivery because the trial court did not deny Aguirre's motion based on the condition of the evidence, its ability to be tested, or its non-delivery. *See Padilla*, 2013 Tex. App. LEXIS 7481, at *30-31. Because we conclude that any failure to follow article 64.02(a)(2) was harmless and did not entitle Aguirre to the new DNA testing and retesting that he sought, we overrule Aguirre's complaint.

Inadequate briefing on challenge to court's findings of fact

Aguirre also contends that the trial court erred by making findings of fact that were unsupported by the record. However, Aguirre's brief identifies no particular fact findings that he claims lack record support, nor has he provided argument or authorities in support of this contention. Thus, Aguirre's challenge to the trial court's findings as unsupported in the record is inadequately briefed and presents nothing for our review. *See* Tex. R. App. P. 38.1(i); *Lucio v. State*, 351 S.W.3d 878, 896 (Tex. Crim. App. 2011) (concluding that point of error that was unsupported by argument or citation to authority was inadequately briefed and presented nothing for court's review).

Aguirre's motion failed to meet statutory requirements

Aguirre further contends that the trial court erred by determining that his motion did not meet certain statutory requirements in two subsections of article 64.03. Those subsections, in the version of the statute in effect when Aguirre's motion was filed, provided that the court could order forensic DNA testing if "identity was or is an issue in the case," and if the convicted person established by a preponderance of evidence that "the person would not have been convicted if exculpatory results had been obtained through DNA testing." *See* Tex. Code Crim. Proc. art. 64.02(a)(1)(B), (a)(2)(A).

A. No entitlement to retesting shown

As a preliminary matter, we note that Aguirre failed to show his entitlement to retesting certain items of evidence. A convicted person seeking retesting of evidence previously subjected to DNA testing must show that the previously tested evidence could be retested with newer techniques that provide a reasonable likelihood of more accurate and probative results than the prior tests. *See id*. art. 64.01(b)(2). To meet this burden, the convicted person must provide statements of fact supporting his claims; general, conclusory statements are insufficient. *See Dinkins v. State*, 84 S.W.3d 639, 642 (Tex. Crim. App. 2002); *Padilla*, 2013 Tex. App. LEXIS 7481, at *17; *see also* Tex. Code Crim. Proc. article 64.01(a-1) (requiring motion for DNA testing to be accompanied by affidavit containing statements of fact in support of motion).

Here, Aguirre's affidavit accompanying his motion stated that "retesting of previous[ly] tested Forensic D.N.A. evidence with newer technology will show I did not commit this offense," and "I believe with today's newer D.N.A. testing technology and D.N.A. Database, the

testing will show who really committed the murder and that I am innocen[t]." Nothing in Aguirre's affidavit establishes what newer testing is available, nor does it provide any basis for concluding that an unspecified newer technique would yield more accurate and probative results. *See* Tex. Code Crim. Proc. art. 64.01(a-1), (b)(2); *Sadler*, 2015 Tex. App. LEXIS 11685, at *3-4 (affirming trial court's denial of DNA retesting because appellant failed to set forth "specific newer technique" in support of his motion).[5] We conclude that the trial court did not err by denying Aguirre's requested DNA restesting of certain items of evidence because Aguirre failed to establish his entitlement to such restesting under the statute.

B. Identity issue

A defendant can make identity an issue by showing that DNA tests excluding him as the donor of biological material would establish his innocence. *Esparza v. State*, 282 S.W.3d 913, 922 (Tex. Crim. App. 2009); *Sims v. State*, No. 03-14-00201-CR, 2014 Tex. App. LEXIS 13434, at *6 (Tex. App.—Austin Dec. 17, 2014, no pet.) (mem. op., not designated for publication). But if such testing would not determine the identity of the person who committed the offense or would not exculpate the convicted person, the requirements for DNA testing under the statute are not met. *Leal v. State*, 303 S.W.3d 292, 296 (Tex. Crim. App. 2009); *Sims*, 2014 Tex. App. LEXIS 13434, at *6-7.

Here, nothing in the record suggests that if the testing and retesting that Aguirre requested were performed, and if test results determined that (1) Aguirre's biological material is not present on any of the items and (2) a third-party's biological material is present, that Aguirre's

[5] We note that the State's response to Aguirre's motion says that the items of evidence previously tested were consistent with the DNA profile of the victim or his son, who lived with him.

identity as the perpetrator of the murder would be ruled out. *See Sims*, 2014 Tex. App. LEXIS 13434, at *7. The jury heard testimony from Lavernia that Aguirre was not alone inside the victim's home at the time of the murder but was accompanied by Benavides. *See Aguirre*, 2007 Tex. App. LEXIS 354, at *13-15. There was also evidence that the victim lived with his adult son, who was one of his ten adult children, and that the victim's daughter was at his house every day preparing food before her children arrived home from school. *Id*. at *1, *9. Thus, the presence of a third-party's DNA at the scene of the crime would not rule out Aguirre as the perpetrator of the murder.

Further, the jury heard the victim's daughter testify that, based on her familiarity with her father's kitchen, she recognized the knife as one belonging to her father. *Id*. at *9. She was able to positively identify the knife because of the grooves on the top of the knife made by her father's hammering on the knife to cut frozen meat, the tape wrapped around the knife's handle, and the filing patterns from her father's sharpening of the knife. *Id*. Even if she had been mistaken in her identification of the knife, Aguirre's own testimony was that several of his acquaintances had used the knife for cooking, i.e., purposes unrelated to the commission of any crime. Aguirre testified that the knife belonged to a friend, Miguel Felan, who had lived with him but was now deceased, and that "probably" the other fingerprints on the knife would belong to Felan "or one of the others that lived there, because we all cooked and we never washed the dishes, because we were single." *Id*. at *26. Thus, we could not necessarily conclude from the presence of a third-party's DNA on the knife that the third-party used it in the course of the fatal attack on the victim. *See Sims*, 2014 Tex. App. LEXIS 13434, at *7.

In sum, Aguirre has failed to explain, and nothing in the record establishes, how the perpetrator of this murder—and no one else—would have deposited DNA on the items in question. *See id*.; *see also Bell v. State*, 90 S.W.3d 301, 306 (Tex. Crim. App. 2002) (concluding that bare assertion that certain biological samples might belong to someone else is insufficient and that "presence of another person's DNA at the crime scene will not, without more, constitute affirmative evidence of appellant's innocence"). Accordingly, Aguirre failed to establish that the DNA testing sought in his motion would determine the identity of the person who committed the murder or would exculpate Aguirre. *See Leal*, 303 S.W.3d at 296; *Sims*, 2014 Tex. App. LEXIS 13434, at

C. Probability of conviction if exculpatory results obtained

Additionally, even if Aguirre had shown that identity was an issue in this case, the trial court would not have erred in denying the requested testing here because the court may order such testing "only if . . . the convicted person establishes 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. art. 64.03(a)(2)(A); *Gutierrez*, 337 S.W.3d at 899. "Texas courts have consistently held that a movant does not satisfy his burden under Article 64.03 if the record contains other substantial evidence of guilt independent of that for which the movant seeks DNA testing." *Swearingen v. State*, 303 S.W.3d 728, 736 (Tex. Crim. App. 2010).

The jury in this case had such evidence. There was the evidence establishing a link between the victim's DNA and Aguirre's thumbprint, both found on the murder weapon. A latent print examiner with the Texas Department of Public Safety testified at trial that a right thumbprint was found on the knife, consistent with where the knife would have been grasped, and that the

examiner had "no doubt" that the print matched Aguirre's right thumbprint. *Aguirre*, 2007 Tex. App. LEXIS 354, at *6-7. This evidence conflicted with Aguirre's statement to police, in which Aguirre said that he had never seen the knife before. *Id*. at *28-29. As the State points out, the jury was also presented with evidence that DNA extracted from blood on the knife was consistent with that of the victim. Thus, even if Aguirre had obtained exculpatory results from DNA testing, his thumbprint on the knife containing the victim's DNA still inculpates him by connecting him to the murder weapon, despite his initial denial that he had ever seen it and his trial testimony that it belonged to his deceased friend, Felan. Further, Lavernia's statement to police and testimony about Aguirre's confession provided the jury with details that were not public knowledge: that Aguirre was friends with Benavides, who lived a few houses away from the victim; that Aguirre and Benavides did various drugs together; that on the night of the murder, Aguirre and Benavides went to Martin Middle School and smoked crack behind the school while they watched the victim's house, waiting for him to go to sleep; that they broke into the victim's home to find money for crack cocaine because Benavides knew that the victim received money every month; that Aguirre took a screen from a window of the victim's house but then entered through a door in the kitchen; that Aguirre and Benavides looked for money under the victim's mattress and did not find any there but did find money in the victim's shoes; and that Aguirre stabbed the victim "a lot of times," after which Aguirre and Benavides immediately left the house. *Id*. at *13-15.

Based on the evidence before the jury, and the lack of any factual basis to directly connect any third-party DNA that might be found on the items to a perpetrator of this murder, we cannot conclude that Aguirre would not have been convicted if exculpatory results had been obtained

through DNA testing. *See* Tex. Code Crim. Proc. art. 64.03(a)(2)(A); *Sims*, 2014 Tex. App. LEXIS 13434, at *8-9. Aguirre failed to meet his burden of showing by a preponderance of the evidence that exculpatory results would have changed the outcome of his trial. *See Gutierrez*, 337 S.W.3d at 899; *Sims*, 2014 Tex. App. LEXIS 13434, at *9; *Padilla*, 2013 Tex. App. LEXIS 7481, at *26-27. We overrule Aguirre's contention that the trial court erred by determining that his motion did not meet statutory requirements in article 64.03.

CONCLUSION

We affirm the trial court's order.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

Filed: May 24, 2017

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