

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Aug 17 2020
SC Court of Appeals

Certiorari to Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

GEORGE MOSES,

PETITIONER,

V.

THE STATE,

RESPONDENT

APPELLATE CASE NO 2020-000093

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the court erred in denying Petitioner's application for post-conviction DNA testing where the court misinterpreted the factors for post-conviction DNA analysis set forth in the plain language of S.C. Code Ann. § 17-28-90 by improperly relying on Petitioner's statements and trial testimony that he had been in a physical altercation with the victim as the basis for denying the application?

STATEMENT OF FACTS

Shortly after five o'clock in the morning on September 29, 2006, Harry Livingston was found lying on the kitchen floor of his mobile home. App. 127, ll. 4-22. Police and EMS responded to the trailer and Livingston was pronounced dead on the scene. App. 136, ll. 12-16; App. 144, ll. 10-19. An autopsy revealed that Livingston had suffered four non-fatal stab wounds, as well as various lacerations, contusions, and scrapes to the face and head. App. 260-261. Livingston also had defensive wounds on his fingers, hands, wrists, and arms. App. 263, ll. 15-24. It was determined that Livingston died as a result of acute respiratory insufficiency due to blunt force head trauma. App. 270, ll. 4-12.

Through the investigation police learned that the last person seen with Livingston when he was alive was George Moses, Petitioner. App. 345, ll. 4-8. Petitioner was picked up from his job at South Carolina State University and brought to the police station for questioning. App. 345, ll. 10-15. Petitioner purportedly gave two statements to police. In the first statement, Petitioner initially stated that he did not know anything about the death of Livingston.

According to Investigator James Shumpert, Petitioner "rescinded" that statement and said he had been at the trailer of Livingston in the early morning hours on the twenty-ninth to purchase drugs and that when he left Livingston was "fine and well." App. 17, ll. 1-20; App. 349, ll. 12-20. Petitioner was questioned again the follow day which resulted in a three-page statement written by Investigator Roman Rodriguez where Petitioner stated he acted in self-defense when Livingston and Livingston's rottweiler dog attacked him after a drug exchange. App. 27, ll. 14-21; App. 372-375.

In December of 2006 the Orangeburg County grand jury indicted Petitioner for one count of murder and one count of armed robbery. App. 596-597; App. 599-600. On February 9, 2009,

the state, represented by Don Sorenson and Charlie Johnson, called the case to trial before the Honorable James C. Williams, Jr. and a jury. Petitioner was represented by Doug Mellard and Margaret Hinds. App. 1.

Prior to the start of trial, the court held a hearing pursuant to Jackson v. Denno¹ to determine the admissibility of the statements Petitioner purportedly gave to police. App. 9. During the hearing Petitioner testified that he repeatedly asked for a lawyer but that police ignored the request and continued to question him. App. 42, ll. 3-25. Petitioner also testified that he never made a verbal statement to Schumpert. App. 46, ll. 5-15. Further, Petitioner testified that he never had a chance to review the written statement prior to signing it because he did not have his reading glasses with him that day. App. 41, ll. 6-13.

Investigator's Shumpert and Rodriguez testified that Petitioner was properly Mirandized² and waived his rights, agreeing to speak with them. App. 12, ll. 6-8; App. 14, ll. 11-20; App. 18, ll. 13-15; app. 27, ll. 1-13. Both investigators maintained that Petitioner freely and voluntarily gave them the respective statements and that they recorded those statements accurately. App. 14, l. 21-App. 15, l. 5; App. 28, ll. 5-17. However, neither testified regarding whether Petitioner asked for a lawyer. The court found that the state had met its burden and ruled that Petitioner's statements were admissible. App. 57.

During the trial the state called Dr. Laura Mills of SLED to testify regarding the DNA analysis that was performed on various pieces of evidence. Dr. Mills testified she tested swabs from the handle of a knife, from the blade of a knife, from a blood smear on a light switch by an exit door, and from the interior of Petitioner's car. She also tested two cuttings from the jean

¹ 378 U.S. 368 (1964)

² Miranda v. Arizona, 384 U.S. 436 (1966)

shorts Petitioner was allegedly wearing during the fight with Livingston, as well as DNA standards from Livingston and Petitioner. App. 318, l. 20-App. 320, l. 6. Dr. Mills was unable to recover sufficient biological material to perform any testing on the blade of the knife and the swabs from the interior of Petitioner's car. App. 321, ll. 4-8; App. 324, l. 22-App. 325, l. 7.

As to the other items, Dr. Mills testified that the knife handle contained a mixture of the DNA of at least two individuals, one of which was Livingston, that the light switch contained a mixture of the DNA of at least two individuals, one of which was an unknown male, and that the cuttings from the shorts were a match to Livingston's DNA profile. Importantly, Petitioner's DNA was excluded from every item that was tested. App. 321-326; App. 339, ll. 11-13.

Petitioner took the stand in his own defense. He testified that he had gone to Livingston's trailer between one forty-five and two in the morning to purchase cocaine from Livingston's roommate, George Robinson. App. 400, ll. 1-13. Petitioner had purchased cocaine from Robinson and Livingston on numerous prior occasions and characterized the trailer as a known "drug house." App. 400, l. 14-App. 401, l. 2. When Petitioner arrived at the trailer Livingston and Yvette Linguard³ told him that Robinson was not there but would be back shortly, so Petitioner decided to wait for Robinson to return. App. 402, ll. 17-24. While waiting for Robinson, another individual came to the trailer and had "some dealings" with Livingston. App. 404, ll. 13-18.

Around two-thirty in the morning Linguard went home leaving Petitioner in the trailer with Livingston and Livingston's large rottweiler. App. 404, ll. 19-22; App. 405, ll. 13-14.

³ Linguard was called as a witness by the state. She testified that she left Livingston's house between one-thirty and two-thirty in the morning and that Petitioner and Livingston were the only two people in the trailer when she left. Linguard also testified that prior to Petitioner arriving at the trailer another man came by and "sat for a minute." App. 186, ll. 3-6; App. 188, ll. 1-15.

Petitioner testified the dog was well trained and listened to Livingston's commands. App. 403, l. 22-App. 404, l. 2. After Linguard left, Livingston told Petitioner that he had some cocaine that he would trade for crack cocaine. Petitioner had crack cocaine in his possession that night and agreed to trade with Livingston. App. 406, ll. 1-12.

Initially, Livingston seemed happy with the trade but when Petitioner was getting ready to leave Livingston said he was not satisfied with the trade. Livingston demanded more crack cocaine from Petitioner, but Petitioner said no. As Petitioner tried to leave the trailer Livingston called his dog to attack and picked up a stick⁴. App. 407, ll. 14- App. 407, l. 3; 411, ll. 3-6. In an attempt to diffuse the situation, Petitioner offered Livingston twenty-five dollars⁵ that he had in his wallet to "make the deal even." However, Livingston "slapped the money" from his hand stating he only wanted more crack cocaine. App. 411, ll. 12-19.

Livingston began to hit Petitioner with the stick as the dog attempted to bite and grab Petitioner around his legs. Petitioner grabbed a knife from the kitchen counter to protect himself and was swinging it at Livingston and the dog when Livingston knocked the knife from his hand. At that point Petitioner and Livingston began to fight over the stick, falling over the kitchen table and chairs. App. 408, ll. 7-24.

Petitioner was able to get the stick from Livingston and again tried to leave. However, Livingston grabbed one of Petitioner's legs and commanded his dog again attack shouting "kill

⁴ Petitioner described the stick as fifteen to sixteen inches long similar to an axe handle. App. 413, ll. 19-22; App. 439, ll. 12-22.

⁵ Petitioner maintained that he told Investigator Rodriguez this when he gave him his statement. In the written statement it says that Petitioner saw a bag with fifty dollars in it and that he grabbed that money as he left the trailer – this was the basis of the armed robbery charge. Petitioner contended that never said anything about a bag of money and that Rodriguez added that to his statement instead of including that Petitioner picked up his own money from the floor as he left. App. 411, l.23-App. 412, l. 3.

him Bowser, kill him, kill him.” Petitioner then struck Livingston with the stick until he released his leg. Using the stick and a chair from the kitchen Petitioner was able to back the dog away from the door and leave the trailer. App. 490, ll. 1-15. As Petitioner left the trailer, he stopped to pick up the money that Livingston had knocked from his hand. As Petitioner picked up his money, he noted that Livingston was alive, breathing, looking at him, and trying to get up. App. 417, ll. 1-17.

It was around three o’clock in the morning when Petitioner left Livingston’s trailer. As he was driving home Petitioner realized he had blood on his shorts but he did not know if it was his blood or Livingston’s blood. App. 419, ll. 1-17. Petitioner stopped at the home of his friend, Jeffery Conner, to get a pair of pants from the “surplus clothes” that Conner kept on his front porch, before continuing down the road to the car wash⁶ where he examined himself for injuries. App. 419, l. 17-App. 420, l. 12. Petitioner had some scratches on his legs but was not bleeding that bad. He tried to put on the pants he had taken from Conner’s, but they did not fit him. Petitioner then drove back to Conner’s house, got a different pair of pants, and “stuck” the shorts he had been wearing “in the side” of Conner’s porch. App. 420, ll. 6-12. App. 422, l. 24-App. 423, l. 21.

Petitioner testified that he did not remember stabbing Livingston but that it was possible he could have gotten “stuck” several times while they were fighting. App. 409, ll. 20-24. When he left the trailer, Petitioner did not think he had hurt Livingston “that bad” because they had only been in a “little fight.” App. 425, ll. 2-10; App. 427, ll. 23-24; App. 464, l. 25-App. 465, l. 4.

⁶ Petitioner stated he went to the car wash because he needed light to check for injuries and Conner did not have electricity. App. 420, ll. 1-6.

The jury found Petitioner guilty of the lesser included offense of voluntary manslaughter and armed robbery. App. 577-578. Pursuant to S.C. Code Ann. §17-25-45 Petitioner was sentenced to two concurrent terms of life imprisonment. App. 589-591. On January 3, 2017, after exhausting his direct appeal and PCR remedies, Petitioner filed for DNA testing of two pieces of evidence collected but not tested pursuant to the Access to Justice Post-Conviction DNA Testing Act⁷ (the DNA Act). App. 602-609. In the application Petitioner asserted his actual innocence and argued that the testing of the two items would show another person assaulted Livingston the morning that he died. App. 604.

The state filed a return to Petitioner's application under the DNA Act on November 14, 2017. App. 618-634. A hearing was convened before the Honorable Edgar W. Dickson on August 28, 2019. The state was represented by Thomas Scott, III. Petitioner was represented by John Waller, Jr. App. 635. At the hearing Petitioner requested that the court order testing of SLED items 8.3 "swab from pocket of blue jean shorts" and SLED item 18 "the fingernail clippings from Harry Livingston." App. 643, l. 12-App. 644 l. 3; App. 684.

The focus of the hearing was whether the identity of the perpetrator was or should have been at issue during the trial. Counsel Waller argued that based on the contentious Jackson v. Denno hearing and the fact that trial counsel based the directed verdict motion on the lack of evidence corroborating Petitioner's statement, identity was at issue. App. 644-646. The state argued that identity was "one hundred percent" not an issue in the case based on Petitioner's statements to law enforcement and his testimony at trial. App. 650, ll. 18-24; App. 655, ll. 1-5.

The court issued an order denying Petitioner's application for DNA testing on December 16, 2019. App 690-694. Notably, in denying Petitioner's application the court cited to S.C.

⁷ S.C. Code Ann. § 17-28-10, et. seq.

Code Ann. § 17-28-40 instead of § 17-28-90 to determine the factors that Petitioner was required to demonstrate in order to prevail. While the two code sections are similar in their requirements, there are important differences.

SC. Code Ann. § 17-28-40 sets forth the form and contents that must be included in the *application* submitted by a defendant requesting post-conviction DNA testing. That section requires, in pertinent part, that the application include an explanation of why the identity of the applicant was or should have been a significant issue during the original court proceedings and an explanation of how the requested DNA testing would provide a substantially more probative result than the evidence submitted at trial.

S.C. Code Ann. § 17-28-90 sets forth the factors to be *proven at the hearing* on the application, as well as the standard of proof to be used. This section does not require that an applicant show identity was or should have been at issue but only requires a showing that the items sought to be tested would be *material* to the issue of the applicant's identity. Further, there is no requirement that an applicant show how the requested DNA test would provide a substantially more probative result than the evidence submitted at trial.

In the order dismissing Petitioner's application, the court found that based on Petitioner's statement to law enforcement and his trial testimony identity was not at issue during the original trial. Further, the court ruled that Petitioner had failed to show how the DNA testing would provide a substantially more probative results than the evidence submitted at trial. App. 692-693. The court made no ruling as to whether the items sought to be tested were material to the issue of the identity of the perpetrator of the crimes.

ARGUMENT

The court erred in denying Petitioner’s application for post-conviction DNA testing where the court misinterpreted the factors for post-conviction DNA analysis set forth in the plain language of S.C. Code Ann. § 17-28-90 by improperly relying on Petitioner’s statements and trial testimony that he had been in a physical altercation with the victim as the basis for denying the application.

In denying Petitioner’s application for post-conviction DNA testing the court ruled that identity was not at issue based on Petitioner’s statements to law enforcement and his testimony at trial. Further the court relied on S.C. Code Ann. § 17-28-40, which delineates the requirements of the application, instead of S.C. Code Ann. § 17-28-90, which sets forth the factors to be considered at the hearing, as the basis for its ruling. This error by the court was twofold.

First, S.C. Code Ann. § 17-28-90 limits the factors to be proven and does not require a showing that the requested testing would provide a substantially more probative result than items previously tested. Second, the plain language of the DNA Act states that identity can be at issue “notwithstanding the fact that the applicant made or is alleged to have made an incriminating statement or admission as to identity.” In his application for DNA testing Petitioner asserted his actual innocence and requested testing of materials that went directly to the issue of the identity of the perpetrator of the crimes. As such, he met the statutory factors for DNA testing under the DNA Act and his application should not have been denied.

The basic principles of statutory construction as applied to criminal statutes have been clearly and repeatedly set forth by this Court. It is well established that in interpreting a statute, the court's primary function is to ascertain the intention of the legislature. When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning.

Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (citations omitted); *see also* Kerr v. State, 345 S.C. 183, 188, 547 S.E.2d 494, 496–97 (2001); State v. Johnson, 347 S.C. 67, 70, 552 S.E.2d 339, 340 (Ct.App.2001); *accord* Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 346, 549 S.E.2d 243, 246 (2001); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

The appellate courts of this state have not yet addressed whether a lower court has misinterpreted the factors an applicant has to prove in order to receive post-conviction DNA testing. The only published appellate opinion regarding the DNA Act in South Carolina is Smith v. State, 412 S.C. 472, 772 S.E.2d 286 (Ct. App. 2015), where the Court of Appeals held that based on the principles of statutory construction, the seven-year time frame in which a person must file an application under the DNA Act only applied to those who entered guilty pleas.

Although the appellate courts of this state have not addressed the proper interpretation of the factors in the DNA Act, other jurisdictions have tackled various issues that have arisen under similarly written post-conviction DNA testing acts. A survey of other jurisdictions shows that the majority of cases turn on whether or not identity was or could have been at issue.

In Com v. Wright, 14 A.3d 798, 72 A.L.R.6th 673 (Pa. 2001) the Supreme Court of Pennsylvania held that a confession, even if previously and finally adjudicated as voluntary, did not constitute a per se bar to establishing a prima facie case demonstrating that DNA testing would establish actual innocence. In State v. Braa, 2 Wash.App.2d 510, 410 P.3d 1176 (2018),

the Washington State Court of Appeals held that a claim of self-defense did not categorically preclude a defendant from obtaining an order for DNA testing to identify the perpetrator.

In Zollman v. State, 820 So.2d 1059 (Fla. Dist. Ct. App. 2d. Dist. 2002) a Florida court of appeals held that identity is a genuinely disputed issue even in a case where a victim has provided a positive identification of his or her assailant. See Also Blacklock v. State, 235 S.W.3rd (Tex. Crim. App. 2007) (holding that victim's trial testimony that she knew defendant and identified him as perpetrator was irrelevant to whether defendant could make identity an issue with exculpatory DNA test results).

Further, numerous jurisdictions have held that even when a defendant has entered a guilty plea, which effectively concedes the issue of identity, that defendant can still prevail on an application for post-conviction DNA testing. See State v. Smith, 34 Kan. App. 2d 368, 119 P.3d 679 (2005) (a Kansas court of appeals held that postconviction DNA testing may not be denied solely because the conviction was the result of a guilty plea); Weeks v. State, 140 S.W.3d 39 (Mo. 2004), (the Missouri Supreme Court held that Missouri's postconviction DNA-testing statute applies to both defendants convicted after trials and those convicted after guilty pleas); Glenn v. State, 954 So. 2d 732 (Fla. Dist. Ct. App. 1st Dist. 2007) (a Florida appeals court held that a defendant who pled guilty at his trial to charges of first-degree murder and robbery was not precluded from filing a motion for postconviction DNA testing); State v. Winslow, 274 Neb. 427, 740 N.W.2d 794 (2007) (the Nebraska Supreme Court held that the DNA Testing Act does not exclude defendants who were convicted and sentenced pursuant to pleas).

Unlike the defendant in Wright, *supra*, who actually confessed to rape and murder, Petitioner never confessed to killing Livingston. His statements to law enforcement and his trial testimony were always that the two men had a “little fight” and that Livingston was alive when

he left the trailer. Also, unlike the defendants in Zollman and Blacklock, *supra*, Petitioner was not positively identified as the perpetrator. Petitioner was only ever identified as the last person left in the trailer with Livingston many hours before Livingston's body was discovered. Further, Petitioner did not enter a guilty plea, but pled not guilty and has maintained his actual innocence even after being convicted.

Applying the rules of statutory construction and using the case law from other jurisdictions as guidance shows that Petitioner met his burden of proof and is entitled to DNA testing under the DNA Act. S.C. Code Ann. § 17-28-90⁸ provides in relevant part that:

(B) The court **shall** order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant has established each of the following factors by a **preponderance of the evidence**:

(3) the physical evidence or biological material sought to be tested is material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense **notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity**;

(4) the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense **notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity**;

(5) **if the requested DNA testing produces exculpatory results**, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching;

(emphasis added).

⁸ Factors 1 (that the evidence is available to be tested), 2 (that the evidence has been subjected to chain of custody), 6 (that the evidence was not previously tested) and 7 (that the application is made to demonstrate actual innocence) are not contested in Petitioner's case.

When evaluating an application under the DNA Act, the question for the court is not whether identity is or was at issue but whether or not the evidence sought to be tested is *material* to the issue of identity. To be material to the issue of identity means to be *relevant* to this issue, *not dispositive* of it. See Richardson v. Superior Court, 43 Cal. 4th 1040, 1049, 183 P.3d 1199, 1204 (2008), as modified (July 16, 2008). Further, a court should make this inquiry *notwithstanding the fact that the applicant made or is alleged to have made an incriminating statement or admission as to identity*. In Petitioner's case, the lower court failed to make the proper inquiry.

Petitioner maintained that although he was in a physical altercation with Livingston, he did not believe that he had hurt him "that bad" and that it had just been a "little fight." Further, Petitioner testified that Livingston was breathing and trying to get up when he left the residence. The evidence also showed that numerous individuals were in and out of Livingston's home during the early morning hours, presumably because this was a drug house, and people would show up to purchase narcotics. Finally, the DNA evidence submitted at trial had no forensic link to Petitioner. It is not outside the realm of possibility to conclude that someone could have entered the trailer after Petitioner left and dealt Livingston the fatal blow. The testing of the fingernail scrapings in particular could provide exculpatory evidence that, when combined with the facts of the case and the other DNA evidence, such as the unknown male DNA from the blood smear on the light switch, could persuade a jury to find Petitioner was not the person responsible for Livingston's death.

The court ruling that Petitioner did not meet the factors set forth in the DNA Act because he had made statements to law enforcement and had testified that he acted in self-defense was an error of law. Further, the court relied on the wrong section of the DNA Act to support its ruling.

The court did not afford Petitioner's application the proper consideration based on the plain language of the statute. Petitioner has shown that the requested testing would be material to the issue of the identity of the perpetrator of the offense and that the results of that test, if exculpatory, would constitute new evidence that would probably change the results of Petitioner's conviction. As such, the court was required to grant Petitioner's application for DNA testing.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of August, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and a copy of the Appendix has been served upon opposing counsel this 17th day of August, 2020 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS); and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on George Moses, #103370, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER