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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Beaufort County
Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2020-000110

Nathaniel Johnson, Jr.,

Petitioner,

vs.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Did the circuit court err in denying Petitioner's application for further forensic DNA testing when he failed to explain how the requested DNA test would provide a substantially more probative result?

- II. Are the remaining issues raised by Petitioner appropriately addressed through the Access to Justice Post-Conviction DNA Test Act (DNA Act) or preserved for review on appeal when they were never addressed by the circuit court's order and are not appropriate for consideration under the limited nature of the DNA Act?

STATEMENT OF THE CASE

As the Court can see from Petitioner's Statement of the Case and the numerous documents included in the Appendix, he has a long procedural history including a direct appeal (See State v. Johnson, Op. No. 2008-UP-690 (S.C. Ct. App. filed Dec. 11, 2008)) and numerous Post-Conviction Relief and other actions. Relevant to the proceedings below, Petitioner was convicted of criminal sexual conduct in the first degree and kidnapping in March 2007. The Honorable Howard P. King sentenced him to thirty years in prison on each charge, to be served concurrently.

Petitioner filed an Application for Forensic DNA Testing in April 2016. The State served and filed a Return. (App.665). The matter came before the Honorable Carmen T. Mullen for a hearing on November 15, 2018. After hearing arguments, the circuit court filed an Order Denying Petitioner's Application for Post-Conviction DNA Testing on October 21, 2019. (App. 757). Petitioner states he did not receive notice of the Order until January 16, 2020. He served and filed a Notice of Appeal on January 21, 2020. After further extensive procedural history with this Court, he served and filed a Petition for Writ of Certiorari. This Return follows.

STATEMENT OF FACTS

On the day of the incident, the victim noted most of her neighbors were working, her family was out of the house, and workers were around because building was going on. (App.49). While she was home, the victim indicated someone knocked on her door asking to use the phone. She identified Petitioner as the person. (App. 49). The victim indicated: "I can tell you for sure he was who knocked my door. He was who hurt me. That's for sure." (App. 52). Petitioner asked the victim if her neighbors were home or if she knew a Mr. Green. She said they were not home and that she did not know him, but he could be their new neighbor. She offered to take a message and got pencil and paper. When she turned back around, she heard the cock of the gun and Petitioner put the gun to her face. (App.55-56).

Petitioner made her go to the bedroom. There he made her pull down her pants, and, even though she was fighting the whole time, he raped her. (App.57-60). The victim tried to get the gun away from Petitioner and fought with him. Petitioner got the gun, pulled the phones so she could not make a call, and went through drawers, and as he went to look in another area, the victim was able to pull on her pants and ran to the back door. (App.62-63). She ran to the people at the work truck to get help and they called the police. (App.64).

The victim went to the hospital and they conducted a sexual assault kit taking samples for DNA. Additionally, officers collected items for her house to test for DNA. (App.165). Officers obtained Petitioner's DNA initially from a utensil and napkin he discarded after eating a meal at the detention center. (App.178-179). After it came back positive, they obtained a second sample from Petitioner. After testing the sample from Petitioner against the samples taken from the sexual assault kit and the fitted sheet from the victim's bedroom, the DNA profile matched Petitioner. The SLED analyst testified: "the probability of randomly selecting an unrelated individual who

would have that same profile as the semen on those items is 1 in 76 quadrillion.” (App. 279). During closing argument to the jury, Petitioner’s identity was not challenged. Instead, the argument became that he and the victim were having an affair. (App.295).

STANDARD OF REVIEW

While no published appellate decision in our state has explicitly articulated the applicable standard of appellate review for a ruling made pursuant to the DNA Act, a ruling made pursuant to the DNA Act directly relates to a criminal matter and, in a number of ways, is analogous to a ruling on a post-trial motion for a new trial in a criminal case. See, e.g., S.C. Code Ann. § 17-28-90(A) (Supp. 2018) (“All rules and statutes applicable in criminal proceedings are available to the applicant and the solicitor or Attorney General, as applicable.”); S.C. Code Ann. § 17-28-100(B) (Supp. 2018) (“The results of the DNA test may be used by the applicant, solicitor, or Attorney General in any post-conviction proceeding or trial. If the results of the DNA test are exculpatory, the applicant may use the exculpatory results of the DNA test as grounds for filing a motion for new trial pursuant to the South Carolina Rules of Criminal Procedure.”). Therefore, like in appeals from other criminal matters, an appellate court reviewing a ruling made pursuant to the DNA Act should review the ruling for errors on law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Moreover, since a ruling under the DNA Act necessarily involves a discretionary decision as to whether the defendant has met his or her statutorily-mandated burden of proof, an appellate court should only reverse such a ruling when it constitutes a clear abuse of discretion. See S.C. Code Ann. § 17-28-90(B) (Supp. 2018) (instructing a circuit court judge should order forensic DNA testing only upon determining the defendant has established a number of factors “by a preponderance of the evidence”); cf. State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983) (“The granting or refusal of a motion for a new trial is within the discretion of the trial judge and will not be disturbed absent a clear abuse of discretion.”). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

I. Did the circuit court err in denying Petitioner's application for further forensic DNA testing when he failed to explain how the requested DNA test would provide a substantially more probative result?

Petitioner contends the circuit court erred in denying his motion for further DNA testing. He maintains the prior DNA testing was inaccurate and that new testing of the samples previously tested would demonstrate his innocence. He has failed to establish entitlement to further testing under section 17-28-90 of the South Carolina Code and the circuit court did not err in denying his motion and dismissing his Post-Conviction DNA action.

Pursuant to the DNA Act a person who pled not guilty to, was subsequently convicted of the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction. One such conviction is for criminal sexual conduct in the first degree. S.C. Code Ann. § 17-28-30(A)(10)(Supp. 2018). Petitioner has a qualifying offense entitling him to file an application.

In the application, Petitioner was required to:

- (1) identify the proceedings in which the applicant was convicted or adjudicated;
- (2) give the date of the entry of the judgment and sentence and identify the applicant's current place of incarceration;
- (3) identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication;
- (4) make a reasonable attempt to identify the physical evidence or biological material that should be tested and the specific type of DNA testing that is sought;

(5) explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, 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;

(6) explain why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, provide the results of the testing and explain how the requested DNA test would provide a substantially more probative result;

(7) explain why if the 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; and

(8) provide that the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

S.C. Code Ann. § 17-28-40 (Supp. 2018). Even though Petitioner's application failed to fully establish all the required elements to obtain a hearing, the circuit court held a hearing on November 15, 2018. In order to be entitled to further DNA testing, the DNA Act requires:

(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:

(1) the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;

(2) the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;

(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;

(6) the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and

(7) the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

S.C. Code Ann. § 17-28-90 (Supp. 2018). Significantly, if—and only if—the circuit court judge determines the applicant has met the requisite burden of proof in regard to all the necessary factors, testing should be ordered. Id.

Based on the clear language of the statute, Petitioner was required to demonstrate all seven of the elements discussed in section 17-28-90(B). Even assuming he satisfied most of the elements, his application and argument failed to provide how: 1) “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” under subsection (5); and 2) “the requested DNA test would provide a substantially more probative result” under subsection (6). In making his request for testing, he does not argue that a more accurate test has been developed, or that more DNA material could be tested under the current methods compared to those that existed

in 2007 for his trial. Instead, he merely argues that if the material that was already tested is tested again, it would show he was innocent as opposed to inculcating him in the crime and that there was an unknown male as part of a profile determined originally. (App. 823). Petitioner maintained there was no semen found in the rape kit. He maintained: “It’s impossible; I never had sex with the woman.” (App. 825).

At trial, the testimony established multiple samples taken from the victim after her sexual assault exam were compared to Petitioner’s DNA taken first from utensils and other items obtained after he discarded them and subsequently from a blood sample obtained from Petitioner. After testing by SLED the results are summarized:

The DNA profile developed from the semen on items 1.7, 2.1, 2.3, and 2.4 which 1.7 is miscellaneous body fluid swabs from the sexual assault kit; 2.1 is a cutting from a fitted sheet; 2.3 is also a cutting from a fitted sheet; and 2.4 again, another cutting from the fitted sheet. The DNA profile developed on the semen on those items matched the DNA profile of Nathaniel Johnson.

And the probability of randomly selecting an unrelated individual who would have that same profile as the semen on those items is 1 in 76 quadrillion.

. . . .

76 quadrillion. That is 76 with 15 zeros behind it.

(App.279-281). It is hard to imagine a more probative test result. Again, Petitioner has not indicated how new testing would be done any differently than the testing done by SLED; he simply exclaims his innocence without any other basis for testing. See Dist. Attorney’s Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 82 (2009) (Alito, J., concurring) (explaining requests for post-conviction DNA testing are *not* cost-free and noting “the risks associated with evidence contamination increase every time someone attempts to extract new DNA from a sample”).

Additionally, his claim that testing may reveal an unknown or unidentified male does not provide exculpatory evidence. In order to establish an entitlement to testing, he must demonstrate “the testing will constitute new evidence that will probably change the result of the applicant’s conviction . . . if a new trial is granted.” S.C. Code Ann. § 17-28-90(B)(5). Evidence of other DNA, if that DNA is even able to be identified, being present in some of the samples does not negate the presence of Petitioner’s DNA, not does it provide exculpatory evidence demonstrating Petitioner’s innocence. See People v. Allen, 880 N.E.2d 223, 228 (Ill. App. Ct. 2007) (recognizing the absence of a defendant’s DNA on an object does not constitute conclusive evidence establishing the defendant did not handle the object and, therefore, concluding evidence establishing Allen’s DNA was not on a gun—even assuming it existed—would not in any way have exonerated him). It merely indicates other DNA was present. The failure of one sample to contain an identifiable sample of Petitioner’s DNA is not conclusive of his innocence, nor would it likely change the result of trial which included an in-court identification by the victim and a positive DNA match to semen found on the victim such that there was a 1 in 76 quadrillion chance of randomly selecting the individual. See e.g., Commonwealth v. Heilman, 867 A.2d 542, 547 (Pa. Super. Ct. 2005) (“In DNA as in other areas, an absence of evidence is not evidence of absence.”); State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197–98 (1978) (“The granting of a new trial because of after-discovered evidence is not favored.”). Petitioner simply has not met the required standard for further DNA testing and the circuit court properly denied his request and dismissed his Post-Conviction DNA action. Accordingly, this Court should deny Petitioner’s Petition for Writ of Certiorari as it relates to any issues properly raised under the DNA Act.

II. Are the remaining issues raised by Petitioner appropriately addressed through the Access to Justice Post-Conviction DNA Test Act (DNA Act) or preserved for review on appeal when they were never addressed by the circuit court's order and are not appropriate for consideration under the limited nature of the DNA Act?

Petitioner raises numerous issues related to errors at trial and during his various Post-Conviction Relief actions. In part, he argues his trial counsel failed to present a defense, failed to adequately represent him at trial, and failed to challenge the chain of custody for the DNA evidence. Additionally, he maintains he was denied the right to be present during a preliminary hearing and that he “received an unfair trial by way of an sham legal process.” (Pet. p. 6). He contends the delay in ruling on his DNA testing prejudiced him. He asserts the court was required to consider the exclusionary rule and suppress “illegally obtained DNA evidence.” Finally, he argues that the court failed to apply double jeopardy to find he could not be convicted of both criminal sexual conduct in the first degree and kidnapping.

The DNA Act was passed to provide for post-conviction DNA testing, a manner for the preservation of physical and biological evidence, and to allow the disclosure and use of additional DNA testing in actions for a new trial. See Act No. 413, § 1, 2008 S.C. Acts & Joint Resolutions. Its intent was never to act as a catch-all for any and every claim a Petitioner can raise, especially one that has already had a direct appeal and numerous post-conviction actions. As a result, the vast majority of his claims are not properly before this Court and were, should have been, or could be raised in other actions.

Additionally, the circuit court only ruled on the issues related to the DNA Act and testing. The circuit court did not address his many claims related to ineffective assistance of counsel or other violations of rights alleged by Petitioner. As a result, none of these claims are properly preserved for review on appeal even if they could be raised in an action pursuant to the DNA Act.

See e.g., State v. Langford, 400 S.C. 421, 446, 735 S.E.2d 471, 484 (2012) (“Constitutional issues are not exempt from issue preservation requirements.”); State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) (“For an issue to be properly preserved it has to be raised to and ruled on by the trial court.”); Jean Hoefler Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002) (“There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.”).

Accordingly, the vast majority of Petitioner’s claims should not be addressed because the DNA Act does not convey the necessary jurisdiction to consider the claims and because they are not properly preserved for review on appeal. As a result, this Court should deny the Petition for Writ of Certiorari as to all issues unrelated to the DNA Act.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the Court should deny Petitioner's
Petition for Writ of Certiorari.

Respectfully submitted,

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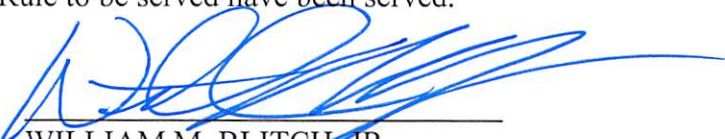
Respondent.

PROOF OF SERVICE

I, William M. Blich, Jr., certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by having a copy of the Return delivered via United States mail, postage prepaid, to:

Nathaniel Johnson, Jr., *pro se* Petitioner
SCDC # 211574, BBB-0026-B
Allendale Correctional Institution
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I further certify that all parties required by Rule to be served have been served.
This 12th day of May, 2021.



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