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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

KEVIN HARBIN,

PETITIONER,

V.

THE STATE,

RESPONDENT

APPELLATE CASE NO 2021-000362

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the court err in denying Petitioner's application for post-conviction DNA testing when Petitioner established that latent fingerprint lifts collected from the store that was robbed and the hairclip worn by the clerk who was robbed and assaulted met the requirements for testing provided in S.C. Code §17-28-90?

STATEMENT OF THE CASE

In August of 2004,[1] The Greenville County Grand Jury indicted Petitioner, Kevin Lamar Harbin, for kidnapping, strong arm robbery and criminal sexual conduct first degree, indictments #2004-GS-23-1622, 1623, 1624. (App. pp. 338-343). On September 6, 2005, Petitioner proceeded to jury trial before the Honorable Larry R. Patterson. Caroline Horlbeck represented Petitioner at trial. John Newkirk prosecuted the case. The jury returned verdicts of guilty for all three charges. Judge Patterson sentenced Petitioner to thirty (30) years concurrent for kidnapping and criminal sexual conduct and fifteen (15) years for strong are robbery. (App. pp. 344-346). A timely notice of intent to appeal was filed and the direct appeal perfected by the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Prior to the South Carolina Court of Appeals deciding the case, Petitioner moved to drop the direct appeal. On January 22, 2007, the Court of Appeals dismissed the appeal.

On January 12, 2007, Petitioner filed an application for post-conviction relief [PCR]. On July 10, 2007, an evidentiary hearing was held before the Honorable Edward W. Miller. Rodney W. Richey represented Petitioner at the PCR hearing. Karen C. Ratigan represented the State. On August 7, 2007, Judge Miller denied relief and dismissed the application. A timely notice of intent to appeal was filed with the South Carolina Supreme Court and a petition for writ of certiorari was filed on July 1, 2008. The petition was denied on January 22, 2009. Petitioner filed a *pro se* petition for federal habeas corpus that was denied on January 27, 2011.

In November of 2010, Petitioner filed a *pro se* motion for DNA testing. (App. pp. 1-5). On September 23, 2014, Petitioner filed an application for forensic DNA testing. (App. pp. 6-

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[1] The indictments indicate that the witness testified before the grand jury on June 4, 2004. (App. pp. 338-343). The indictment for criminal sexual conduct lists the year as 2005 in two different places but the 2005 is scratched out and replaced with 2004 in one place. (App. p. 342).

10). On September 17, 2015, Petitioner filed a motion for default. (App. pp. 11-24). On October 21, 2015, the State filed a response to Petitioner's application for forensic DNA testing. (App. pp. 25-29). On November 17, 2015, Petitioner filed a reply to the belated response. (App. pp. 30-33). Also on November 17, 2015, Petitioner filed an amendment of reply to belated response. (App. pp. 34-48). On January 25, 2019, counsel for Petitioner filed applicant's reply to State's response and request for a DNA hearing. (App. pp. 49-50). On March 6, 2019, the State filed a sur-reply to the application for forensic DNA testing. (App. pp. 51-53). On March 22, 2019, the State filed an amended sur-reply to the application for forensic DNA testing. (App. pp. 54-56). On July 11, 2019, the State filed a response to the motion for default. (App. pp. 57-58). On August 15, 2019, Petitioner filed another motion for default. (App. pp. 59-61).

On September 6, 2019, a hearing was held before the Honorable Letitia H. Verdin. Susannah Ross[2] represented Petitioner at the hearing. The cover of the transcript lists Allen Fretwell as representing the State but the body of the transcript indicates Taylor Smith represented the State. In a written order dated March 25, 2021, Judge Verdin denied the application for DNA testing. (App. p. 78). A timely notice of intent to appeal was served on April 2, 2021. This petition for writ of certiorari follows.

[2] In the body of the transcript counsel for Petitioner is incorrectly listed as "Mr. McCord."

STATEMENT OF FACTS

The jury found Petitioner guilty of the robbery and assault of the clerk of a jewelry store. There was no forensic evidence linking Petitioner to the crime scene. Fingerprints were lifted but did not match Petitioner. (App. p. 274, line 20 – p. 275, lines 1-6). Sergeant Darwin Shaw with Greenville County Forensics testified at trial that the clerk showed him areas in the store that the suspect may have touched and he dusted those areas for prints. (App. p. 259, lines 5-8). When asked where specifically he dusted for prints, the officer testified:

> Did the interior and exterior of the front door, the counter tops, the cash register drawer. There were two tables that had been pushed - - reportedly pushed in front of the bathroom door. I processed those two tables. I noticed that was no air-conditioning on and no lights on in the business. I went back to the breaker box, which was on the very back wall, and saw that the breakers had been switched off and processed the breaker box as well.

(App. p. 259, lines 10-18). The officer testified that he was able to lift prints and he sent those to the latent examiner. (App. p. 259, lines 20-21). On cross-examination the officer additionally testified that he dusted the doorknob of the bathroom, the sink and the toilet for fingerprints. (App. p. 261, lines 3-7). The officer, however, could not recall the number of prints he was able to lift. (App. p. 261, lines 14-15).

The latent print examiner, Rene Sherbert, testified that she reviewed prints from the interior and exterior of the entrance and from the glass counter tops. (App. p. 281, lines 7-14). The examiner testified that no prints were submitted from the doorknob of the bathroom, the sink or the toilet. (App. p. 281, lines 15-21). The examiner testified that she did not receive prints from a breaker box or a cash register. (App. p. 281, lines 22-25).

The case was based primarily on eye-witness identification by the clerk and a customer who was in the store prior to the robbery. Investigator Mike Fortner questioned Petitioner and at trial the investigator testified, "Basically he said during the course of our conversation that, I know the hammer is going to come down on me since I am black and the clerk is a white girl. And at that time, after he made that statement, he quickly stopped himself and then sked me, what color was the girl. And I explained to him that at no point in time during our conversation did I ever indicate to him that the clerk who was robbed was a white female." (App. p. 232, lines 1-8). This alleged statement was not in writing and not recorded. The investigator admitted that there was another officer present when he interviewed Petitioner but the State did not call that officer to testify at trial. (App. p. 246, lines 5-9). The investigator also admitted that a newspaper published an article about the incident. (App. p. 240, lines 5-8). Prior to sentencing Petitioner told the judge, "I just want to say I did not do this crime. And one thing I learned is that the law is not honest, because virtually that's probably what convicted me, that Detective Fortner, he openly lied. He lied. And that's all I have to say." (App. p. 334, lines 16-20).

The clerk testified that the robber grabbed the back of her head with his hand, breaking a clasp that was in her hair. (App. p. 154, lines 19-21). Part of the hair clasp or hairclip was introduced in evidence at trial as State's exhibit #4. (App. p. 160, lines 7-24). After the robbery one of the co-owners of the store, Mark Turcotte, found the piece of barrette behind the counter, picked it up and put in in the trashcan. (App. p. 217, line 2 – p. 218, lines 1-12). The next day the other co-owner, Gina Turcotte, found the piece of barrette in the trash and gave it to Investigator Fortner. (App. p. 210, line 11 – p. 211, lines 1-7). There appears to be no testimony in the trial transcript about dusting the hairclip for fingerprints.

ARGUMENT

The court erred in denying Petitioner's application for post-conviction DNA testing when Petitioner established that latent fingerprint lifts collected from the store that was robbed and the hairclip worn by the clerk who was robbed and assaulted met the requirements for testing provided in S.C. Code §17-28-90.

Pursuant to S.C. Code §17-28-90 the latent fingerprint lifts and the hairclip should be tested for DNA. In the reply to the State's response and request for a DNA hearing Petitioner wrote, "Furthermore, the applicant argues that physical evidence from numerous fingerprint cards, palm prints, a vacuum cord allegedly used, and from a hair clip torn from the victim's hair by the perpetrator during the crimes for which Mr. Harbin was convicted can and should be tested for a DNA profile." (App. p. 49). During the hearing Petitioner argued that it was possible to obtain DNA samples from the fingerprint cards and the hairclip or barrette and that the results of that DNA testing would be relevant and material to the identity of the perpetrator. (App. p. 70, line 11 – p. 71, lines 1-24). Additionally, Petitioner argued that if the DNA testing produced exculpatory results, those results would change the outcome of the case. (App. p. 71, line 25 – p. 72, lines 1-3).

The State argued that the statute required Petitioner to show that testing of the fingerprint cards and hairclip would result in contamination free DNA that would be admissible in a court of law. (App. p. 72, line 19 – p. 73, lines 1-25). The State also argued that any DNA results would not constitute new evidence because the jury knew that the fingerprints did not belong to Petitioner. (App. p. 74, lines 10-16). Petitioner responded:

> I think that's misstating the DNA evidence. Clearly, part of the statute says that the State has to hold evidence and care for it for this time. We would be in no position or expected to prove that it's somehow not contaminated. That would not be for us to prove. I think the only way to find out is to test it and see if it's possible to geta swab or whether any DNA exists on the barrette or the vacuum

> cord or on these print cards. And then have it - - if there is DNA, then test it. And that's what we ask for.

(App. p. 74, line 20 – p. 75, lines 1-6).

The State told the judge, "Judge, I just respectfully disagree. There is an obligation for the defendant to establish that there is contamination free DNA on these items." (App. p. 75, lines 7-10). The State argued that the process by which the prints were collected contaminated the items for DNA analysis. (App. p. 73, lines 14-25; p. 75, lines 15-22). The State additionally asserted that the barrette or hairclip was "processed" for latent prints[3] which would have also contaminated that item for DNA testing. (App. p. 73, line 17-25).

In the written order denying the application for DNA testing the judge wrote:

> The Court finds Defendant has failed to establish that (1) biological material is available in a condition permitting DNA testing; (2) biological material to be tested or DNA results from the testing of biological material would be material to the issue of Applicant's identity as the perpetrator of or accomplice to the offenses of which he has been convicted; (3) DNA testing, were it to produce exculpatory evidence, would constitute new evidence that would probably change the result of Applicant's conviction(s) if a new trial were granted; and (4) the application is made to demonstrate innocence and not solely to delay the execution of his sentence or the administration of justice.

(App. p. 78). The judge erred in denying the application for DNA testing.

S.C. Code §17-28-90 provides:

> (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

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[3] There appears to be no testimony in the trial transcript about the barrette or hairclip being dusted for fingerprints.

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.

The judge found that Petitioner failed to establish that biological material is available in a condition permitting DNA testing. The judge, however, overlooked the fact that the statute requires the **physical evidence or** biological material to be available and is potentially in a condition that would permit DNA testing. S.C. Code §17-28-90(B)(1). The latent fingerprint cards and hairclip/barrette are available and in a condition that would permit DNA testing. The fact that the DNA may have been contaminated does not place the evidence in a condition that would preclude DNA testing. In fact, the only way to know if the DNA was contaminated is to test. The statute does not require Petitioner to establish that the DNA to be tested is not contaminated.

The judge additionally found that Petitioner failed to establish that biological material to be tested or DNA results from the testing of biological material would be material to the issue of Applicant's identity as the perpetrator. As argued by Petitioner at the hearing (App. p. 71, line 11 – p. 72, lines 1-13), if another person's DNA was found on the fingerprint cards and the hairclip/barrette and the identity of the DNA could be tracked in the DNA database, that would be material to the issue of Petitioner's identity as the perpetrator. The fact that the clerk and a witness identified Petitioner from a photo line-up does not render the issue of identity immaterial. See Zollman v. State, 820 So. 2d 1059, 1062 (Fla. Dist. Ct. App. 2002) ("The supreme court has recognized that there is a substantial body of academic work challenging the reliability of eyewitness identifications in criminal cases. See McMullen v. State, 714 So.2d 368, 372 n. 6 (Fla.1998). Thus, the fact that the victim identified Zollman as her assailant at trial does not mean that identity was not genuinely disputed at trial for purposes of postconviction DNA testing."). The purported statement testified to by Investigator Fortner does not render the issue of identity immaterial because the statute specifically provides that, "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**." S.C. Code §17-28-90(B)(4) (emphasis added). Petitioner established that the DNA results from the testing of biological material would be material to the issue of identity

The judge additionally found that Petitioner failed to establish that DNA testing, were it to produce exculpatory evidence, would constitute new evidence that would probably change the result of Applicant's convictions if a new trial were granted. If another identifiable person's

DNA was found on the fingerprint card and the hairclip/barrette, that would constitute new evidence that would probably change the result of Petitioner's conviction if a new trial were granted. The fact that the jury knew the fingerprints did not match Petitioner does not defeat the new evidence claim with regard to the DNA. There is a difference between evidence that the fingerprints did not match Petitioner and evidence that another person's DNA was found on the fingerprint lift cards and the hairclip/barrette. Petitioner established that the DNA testing, were it to produce exculpatory evidence, would constitute new evidence that would probably change the result of Applicant's convictions if a new trial were granted.

Finally, the judge found that Petitioner failed to establish that the application is made to demonstrate innocence and not solely to delay the execution of his sentence or the administration of justice. As Petitioner's defense lawyer told the judge at sentencing, Petitioner maintained his innocence the entire time. (App. p. 334, lines 6-13). Petitioner first asked for DNA testing in November of 2010. (App. pp. 1-5). Petitioner filed an application for forensic DNA testing on September 23, 2014. (App. pp. 6-10). Petitioner filed a motion for default on September 17, 2015. (App. pp. 11-24). The State's case against Petitioner was based on eye-witness identification unsupported by any forensic evidence and a statement attributed to Petitioner that was not recorded or reduced to writing and the other officer who was present when the statement was allegedly made was not called as a witness by the State. Petitioner established that the application for DNA testing was made to demonstrate innocence.

CONCLUSION

Based on the arguments presented above this Court should grant the petition for writ of certiorari, reverse the finding of the trial court and remand for an order granting the application for DNA testing.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of July, 2021.

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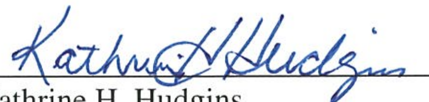
APPELLATE CASE NO 2021-000362

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 have been served upon opposing counsel this 19th day of July, 2021 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 Kevin Harbin, #303214, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335.



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