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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO GREENVILLE COUNTY
The Court of General Sessions (DNA Testing Act)

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2021-000362

Kevin Harbin..... Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the lower court properly deny Petitioner's application for post-conviction DNA testing where the biological material sought to be tested was previously subject to DNA testing and Petitioner failed to establish by a preponderance of the evidence that the requested DNA test would provide a substantially more probative result?

STATEMENT OF THE CASE

This case has a long procedural history including a direct appeal, which was voluntarily withdrawn as well as three applications for post-conviction relief and other actions. Relevant to the proceedings below, Petitioner was convicted of kidnapping, strong arm robbery, and criminal sexual conduct in the first degree in 2005. The Honorable Larry R. Patterson sentenced Petitioner to thirty (30) years concurrent for kidnapping and criminal sexual conduct and fifteen (15) years for strong arm robbery.

In November of 2010, Petitioner filed a *pro se* motion for DNA testing. (App. 1-5). On September 23, 2014, Petitioner filed an application for forensic DNA testing. (App. 6-10). On September 17, 2015, Petitioner filed a motion for default. (App. 11-24). On October 21, 2015, the State filed a response to Petitioner's application for forensic DNA testing. (App. 25-29). On November 17, 2015, Petitioner filed both a reply to a belated response as well as an amendment of reply to belated response. (App. 33-48). On January 25, 2019, counsel for Petitioner filed applicant's reply to State's response and request for a DNA hearing. (App. 49-50). On March 6, 2019 the State filed a sur-reply to the application for forensic DNA testing. (App. 51-53). On March 22, 2019, the State filed an amended sur-reply to the application for forensic DNA testing. (App. 54-56). On July 11, 2019, the State filed a response to the motion for default. (App. 59-61).

On September 6, 2019, a hearing was held before the Honorable Letitia H. Verdin. Susannah Ross represented Petitioner at the hearing. Allen Fretwell represented the State. In a written order dated March 25, 2021, Judge Verdin denied the application for DNA testing. (App. 78). A timely notice of intent to appeal was served on April 2, 2021. 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 May 12, 2004, Megan George, (Victim) worked at the Silver Closet, a jewelry store in Greenville County. (App. 151). At approximately 5:15 in the afternoon Petitioner entered the store. (App. 152). At the time Petitioner entered the store, Denise Henderson, a customer, was also present. (App. 153). After Henderson left, Victim asked Petitioner if she could help him find anything. (App. 153). Victim couldn't find the jewelry Petitioner stated he was looking for so she went behind the counter to get him a catalog. (App. 154). When Victim turned around, Petitioner had come behind the counter. (App. 154). He proceeded to grab the back of her head, breaking the clasp in Victim's hair. (App. 154). Petitioner told Victim to give him the money from the cash register. (App. 154). Victim struggled to get the register open, but ultimately did and gave the money to Petitioner. (App. 155). Petitioner asked if there was any other money in the store. (App. 155). Victim took him to a drawer with a cashbox and gave Petitioner that money as well. (App. 155).

Petitioner then forced Victim to the back of the store and into the bathroom. (App. 156). Petitioner entered the bathroom with Victim and closed the door. (App. 157). Petitioner forced Victim to pull her pants down. (App. 157). Petitioner then inserted two fingers into Victim's vagina. (App. 157). Petitioner told Victim to pull her pants up and began looking around the room. (App. 157). While Petitioner was distracted Victim began hitting Petitioner. (App. 157). Petitioner grabbed Victim threw her against the wall, and attempted to punch her, but Victim was able to block it. (App. 157-158). Petitioner then retrieved a vacuum cord and tied Victim's wrists together and to the bar beside the toilet. (App. 158).

Petitioner left the bathroom and placed furniture in front of the door, blocking Victim's exit from the bathroom. (App. 159). Victim was able to free herself from the bathroom and was able to call 911. (App. 165).

Victim spoke with Investigator Fortner from the Greenville County Sheriff's Office and gave a description of Petitioner. (App. 238). Victim also gave an artist a description of Petitioner's face from which the artist was able to create a drawing. (App. 167). On May 28, Victim spoke again with Investigator Fortner at which time he showed Victim a photo lineup. (App. 171). Victim identified Petitioner, Kevin Harbin, in the photo lineup as the man who robbed the store and assaulted her. (App. 171). A photo lineup was also shown to Henderson who also identified Petitioner as the man in the store when she was there. (App. 200-201).

Immediately following the incident, Darwin Shaw, a sergeant with Greenville County Forensics dusted the interior and exterior of the jewelry store's front door, the counter tops, the cash register drawer, the furniture in front of the bathroom door and the breaker box for fingerprints. (App. 259). Fingerprints were lifted and sent to the latent examiner. (App. 259). At trial, Rene Sherbert, an expert in fingerprint science, testified that he analyzed the finger prints and that none matched the Petitioner's. (App. 275).

On the day of the incident, after police left the scene, Mark Turcotte (Mark), a co-owner of the Silver Closet, went to turn the lights off and lock the store. (App. 216-217). While there, Mark found a hair barrette behind the counter and placed it in the trash can. (App. 217). He also untied the vacuum cleaner cord that was still tied between the railing and the toilet, turned off the lights and locked up the store. (App. 217).

Gina Turcotte (Gina), another co-owner of the Silver Closet, went in to the store the day following the incident to clean everything up. (App. 210). Her husband had told her about the

hair barrette that he placed in the trash can the previous night. (App. 217). When Gina arrived at the store she found the piece of a hair barrette in the trash can and called Officer Fortner to give it to him. (App. 210).

Petitioner was found guilty of criminal sexual conduct in the first degree, strong arm robbery, and kidnapping. (App. 330-331). Petitioner was sentenced to 30 years on both the criminal sexual conduct and kidnapping and 15 years for robbery to run concurrent. (App. 335).

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, as in other appeals from criminal matters, an appellate court reviewing a ruling made pursuant to the DNA Act should review the ruling for errors of 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

The lower court properly denied Petitioner's application for post-conviction DNA testing where the biological material sought to be tested was previously subject to DNA testing and Petitioner failed to establish by a preponderance of the evidence that the requested DNA test would provide a substantially more probative result.

Petitioner argues the lower court erred in denying his application for DNA testing because he met his burden of proving by a preponderance of the evidence that DNA results from the latent fingerprint lifts and hair clip torn from the Victim's hair would be relevant and material to the identity of the perpetrator. Specifically, Petitioner argues that if the DNA testing produced exculpatory results, those results would change the outcome of the case. The State strongly disagrees. Any DNA results would not be relevant or material to the identity of the perpetrator and any results would not change the outcome of the case because the jury knew that the fingerprints did not belong to Petitioner. Certiorari is not warranted.

The DNA Act

Section 17-28-90 of the South Carolina Code sets forth the factors that must be proven by the applicant at a DNA Act hearing in order to obtain relief. It 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 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 (2014) (emphasis added).

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 probable 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. 78).

The judge clearly did not abuse her discretion in finding that Petitioner failed to establish that biological material is available in a condition permitting DNA testing because based on the evidence and testimony presented it is not feasible that there would be contamination free DNA. The latent fingerprints have already been processed and to process them again would not produce contamination free DNA. DNA analysts indicate that using a non-sterile brush (in conjunction with fingerprint powder) may result in cross contamination for DNA purposes.¹ (App. 51). The hair barrette had been touched by multiple people including at least the defendant, victim, Gina and Mark Turcotte and Officer Fortner. The vacuum cord was not collected so testing that item is not possible. Further, even if it had been collected it was also touched by forensic technicians as well as Mark when he untied it from the railing the following day. (App. 217).

Even if biological material was available in a condition permitting DNA testing, the judge did not abuse her discretion in finding that Petitioner failed to establish that DNA results from the testing of biological material would be material to the issue of Petitioner's identity as well as the DNA testing would produce exculpatory evidence, constituting new evidence that would probably change the result of Petitioner's conviction. Rene Sherbert, an expert in fingerprint science, testified that fingerprints found in this case did not match Petitioner. Evidence of other DNA or the lack of Petitioner's 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

¹ As the sole intent of the forensic technicians is capturing the latent print, no measures were in place to preserve the integrity of the biological material.

DNA, nor 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 would merely indicate that other DNA was present or none was found. Further, DNA would not be expected to be on latent fingerprints that were not Petitioner's. Significantly, Petitioner does not explain how DNA testing of the barrette or latent fingerprints, even if his DNA is not found on the specific items, would actually exclude him or change the outcome of the trial.

At trial, two witnesses testified to Petitioner's identity. Victim identified Petitioner in the courtroom as well as in a photo lineup given to her days after the incident. (App. 173). Denise Henderson, a witness in the store immediately preceding the incident identified Petitioner in the court room as the man who was in the store with her. (App. 201). She also identified him in a photo lineup days after the incident. (App. 201). It is unlikely that DNA testing would change the results given the identification by two eyewitnesses including a neutral eye witness.

The presence of someone else's DNA, in a store multiple people visit daily, would not likely change the result of a trial in which two in court-identifications and two photo lineup identifications were made, one of them by a neutral party. The jury knew that the fingerprints analyzed did not match Petitioner in this case, therefore any other results would not be material to the issue of Petitioner's identity as the perpetrator or constitute new evidence because the jury already knew the fingerprints found did not belong to him. Petitioner simply has not met the required standard for further DNA testing and the circuit court did not abuse her discretion in

denying his requests. Accordingly, this court should deny Petitioner's Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated above, Respondent submits this Court should deny Petitioner's Petition for a Writ of Certiorari and affirm the lower court's decision declining to order additional DNA testing of the biological material sought to be tested. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issues discussed above.

Respectfully submitted,

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Letitia H. Verdin, Circuit Court Judge

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State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Anne Mueller, certify that I have served the within Return To Petition For Writ Of Certiorari on counsel of record for the Appellant, Kathrine H. Hudgins, Esquire, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 15th day of September, 2021.



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Good morning, Ms. Hudgins.

Attached to this email is a copy of the State's Return To Petition For Writ Of Certiorari in the above matter. This Return will be filed electronically with the Court later today.

If you would, please respond by return email to confirm that you have received both this email and the attachment.

Thanking you in advance for your cooperation.

Sincerely,

Anne Mueller, Legal Assistant to Assistant Attorney General Ambree M. Muller

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