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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

GEORGE N. MOSES,

PETITIONER,

V.

THE STATE,

RESPONDENT.

APPELLATE CASE NO. 2020-000093

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the circuit court err in finding Petitioner failed to meet the requirements of section 17-28-40(C) of the South Carolina Code (2014), which enumerates the required contents of the DNA testing application, rather than the requirements of section 17-28-90(B) of the South Carolina Code (2014), which specifies the factors to be proven at the hearing on the DNA testing application?

STATEMENT OF THE CASE

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.

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, Petitioner filed for DNA testing of two pieces of evidence collected, but never tested, pursuant to the Access to Justice Post-Conviction DNA Testing Act[1] (the DNA Act). App. 602-609.

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.

The court issued an order denying Petitioner's application for DNA testing on December 16, 2019. App 690-694. In denying Petitioner's application the court improperly cited to S.C. Code Ann. § 17-28-40, instead of § 17-28-90, to determine the factors that Petitioner was required to prove to prevail on his application. Counsel Waller was served with a copy of the order on January 9, 2020, and a notice of appeal was filed on January 16, 2020. A petition for writ of certiorari was filed in this Court on August 17, 2020. The State filed a return to the petition for writ of certiorari on November 3, 2020. On June 16, 2021, this Court granted certiorari on the issue presented. This brief follows.

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1 S.C. Code Ann. § 17-28-10, et. seq.

STANDARD OF REVIEW

The issue of statutory interpretation is a question of law for the Court. Univ. of S. California v. Moran, 365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005); see also Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007); Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). Questions of law are subject to de novo review and the Court is free to decide them without any deference to the court below. Smith v. State, 412 S.C. 472, 476–77, 772 S.E.2d 286, 289 (Ct. App. 2015).

ARGUMENT

The circuit court erred in finding Petitioner failed to meet the requirements of section 17-28-40(C) of the South Carolina Code (2014), which enumerates the required contents of the DNA testing application, rather than the requirements of section 17-28-90(B) of the South Carolina Code (2014), which specifies the factors to be proven at the hearing on the DNA testing application.

Relevant 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. The case proceeded to a jury trial[2] on February 9, 2009. App. 1. 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

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[2] During the investigation, police alleged that Petitioner gave two statements. In the first statement Petitioner claimed he did not know anything about the death of Livingston. In the second statement, which was written by Investigator Roman Rodriguez, Petitioner stated he acted in self-defense when Livingston and Livingston's rottweiler, Bowser, attacked him after a drug exchange. Petitioner also told police, and testified at trial, that Livingston was alive when he left the trailer following the fight. These statements were the subject of a contentious hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964). App. 9-58; App. 349, ll. 12-20; App. 372-375

from the jean 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 was subsequently found guilty of voluntary manslaughter and armed robbery. App. 577-78. On January 3, 2017, after exhausting his direct appeal and PCR remedies, Petitioner filed an application[3] for DNA testing of two items not previously tested, pursuant to the DNA Act. App, 602-609. 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. Specifically, 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 record reflects that Counsel Waller was aware of the seven factors that must be proven during a hearing on a DNA Act application. At the start of the hearing Counsel Waller stated that he had been unable to confirm with the clerk's office if the evidence that Petitioner wanted tested

3 Petitioner filed four pro se motions with the application for DNA testing. The pro se motions were: "Motion for subpoena," "Motion for the Appointment of Counsel," "Motion for Funds to hire DNA Expert," and "Motion for Summary Judgment." App. 610-617

was still in existence[4]. App. 642, ll. 11-18. Counsel Waller did not state that the evidence had been destroyed, only that he had yet to confirm that it had been preserved as was required by the DNA Act[5]. App. 643, ll. 4-9. However, the focus of the hearing was on whether the identity of the perpetrator was or should have been at issue during the trial which is not one of the seven factors that must be shown during the hearing. Counsel Waller argued that based on the contentious 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.

In the order dismissing Petitioner's application, the court found that based on Petitioner's statement to law enforcement and 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 and "would likely not change the results of the conviction if a new trial were granted." App. 692-693. The court made no ruling on the seven factors enumerated in S.C. Code § 17-28-90. Those factors require the court

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4 Counsel Waller told the court "Judge, that's the very first element for your consideration is whether the items still exist." App. 643, ll. 4-6.

5 In the petition for writ of certiorari, the undersigned stated that Factor 1 – the existence of the evidence – was not in contention. Counsel based this opinion on the requirements of the DNA Act which places separate and distinct duties on the solicitor, court, and evidence custodian upon receipt of an application for post-conviction DNA testing. Specifically, the Act requires the solicitor to notify the evidence custodian of the application so that the evidence will be preserved (S.C. Code. Ann. § 17-28-50). It requires the court to order the custodian of evidence to preserve all physical evidence and biological material related to the applicant's conviction (S.C. Code Ann. § 17-28-70(A)), and it requires the evidence custodian to prepare a written inventory, for the parties, of the physical evidence and biological material related to the case (S.C. Code Ann. § 17-28-70(B)). Admittedly, Counsels opinion was based on the assumption that the statutory mandates were followed and that was why the hearing was held. The State, as the ultimate custodian of the evidence, should know whether the evidence exists.

to determine whether the items sought to be tested were material to the issue of the identity of the perpetrator of the crimes.

Discussion

The court improperly relied solely upon the requirements in S.C. Code Ann. § 17-28-40, which sets forth the form and contents of the application, to deny Petitioner's application for post-conviction DNA testing. This was an error of law. S.C. Code Ann. § 17-28-90 sets forth the factors to be proven at the hearing on the application, and it is those factors that must be analyzed in granting or denying an application under the DNA Act. While both sections contain some similar language, there are distinct differences between what must be shown in the application and what must be proven at the hearing to obtain testing.

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. 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, 403 S.E.2d 660 (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).

Statutes are not intended to be read in a piecemeal fashion, taking only those parts which best serve a party's particular position. Citizens for Quality Rural Living, Inc. v. Greenville County Planning Commission, 426 S.C. 97, 825 S.E.2d 721 (2019) (The intention of the legislature

when enacting a statute must be gleaned from the entire section and not simply clauses taken out of context). Courts, when interpreting a statute, should not concentrate on isolated phrases within the statute; a statute must be read as a whole and sections that are part of the same general statutory law must be construed together and each one given effect. Id.

SC. Code Ann. § 17-28-40, titled "Form and contents of application," sets forth what must be included in the *application* submitted by a defendant requesting post-conviction DNA testing. That section first requires that the application for post-conviction DNA testing be made on a form prescribed by our Supreme Court. The section then details eight requirements[6] that must be included on the application. Among the required explanations are why the identity of the applicant was or should have been a significant issue during the original court proceedings, and how the requested DNA testing would provide a substantially more probative result than the evidence submitted at trial.

After an application has been filed, but before any judgment has been rendered, the court may issue orders for "amendment of the application and for any documents related to the application." S.C. Code. Ann. § 17-28-50(C). After review of the application, responses, and any motions by the parties, the court may determine that "the applicant is not entitled to DNA testing and no purpose would be served by any further proceedings, it may indicate...its intention to summarily dismiss the application and its reasons for so doing. ... The court shall make specific findings of fact and expressly state its conclusions of law." Id. The applicant will be given an opportunity to reply to the proposed dismissal. "In light of the reply, or on default thereof, the court may order the application dismissed, grant leave to file an amended application, or direct that the proceedings otherwise continue." Id.

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[6] As can be seen in the record, the form provided by the Supreme Court outlines all eight questions that an individual seeking post-conviction DNA testing must answer. App. 603-608.

If the court determines that further proceedings are necessary then the "application **must** be heard in, and before a judge of, the general sessions court ... in which the conviction...took place. A record of the proceedings must be made and preserved." S.C. Code Ann. § 17-28-90(A) (emphasis added).

By comparison, S.C. Code Ann. § 17-28-90, aptly titled "Hearing; factors to be proved; orders relating to DNA samples" sets forth the factors to be *proven at the hearing* on the application, as well as the standard of proof to be used. S.C. Code Ann. § 17-28-90, states in relevant part,

> (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.

(emphasis added).

Section 17-28-90 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. To be material to the issue of identity means to be *relevant* to the 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) (emphasis added). 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.* See S.C. Code Ann. § 17-28-90 (3)-(4). 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 when the material sought to be tested was not previously subjected to DNA testing. See S.C. Code Ann. § 17-28-90(6).

The procedure laid out in the DNA Act is straight forward and clear. If a judge decides, based on the application and responses, that there is not a need for additional proceedings, the judge may deny the application. The denial of the application must include findings of fact and conclusions of law explaining why the application, pursuant to section 17-28-40, was denied. However, if the court convenes a hearing on the application, the parties must present testimony and evidence on the seven factors of section 17-28-90. The court must base its ruling on whether those factors, and only those factors, were proven by a preponderance of the evidence. This did not happen in Petitioner's case.

In the order of dismissal, the only code section that was cited as the basis for denying the application was section 17-28-40. Nowhere in the five-page order is section 17-28-90 cited to or

mentioned. The seven factors that must be proven by a preponderance of the evidence are not listed or discussed in any fashion in the order. In fact, the factors were not even properly discussed during the hearing on the application.

In analyzing Petitioner's application, the court cited to section 17-28-40 and found that Petitioner "failed to meet any of the statutory requirements listed above." App. 693. The order then stated that Petitioner failed to show how identity was an issue in the original trial and failed to "explain how additional DNA testing would provide substantially more probative results than the evidence submitted at trial." App. 693. Finally, the court ruled that "additionally testing would likely not change the results of the conviction if a new trial were granted." App. 693.

Once a hearing was held, whether or not Petitioner met the statutory requirements contained in section 17-28-40 did not matter because those factors only involve the form and contents of the application. At the hearing, as plainly stated in the title of the section and the language used in the code, Petitioner was required to show the factors in section 17-28-90. The court must only grant or deny the application on proof, or lack thereof, of those factors. Additionally, the court was required to analyze the factors "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 Ann. 17-28-90 (3)-(4). However, the order in Petitioner's case directly takes into account Petitioner's statements.

The appellate courts of this state have had little opportunity to analyze the DNA Act since its codification. Notably, one of the two[7] published opinions addressing the DNA Act, Smith v. State, 412 S.C. 472, 772 S.E.2d 286 (Ct. App. 2015), also concerned the issue of statutory construction. In July 2000, Smith was tried and convicted of murder. Id. at 473, 772 S.E.2d at

[7]The other published opinion, Mack v. State, 433 S.C. 267, 858 S.E.2d 160 (2021), concerns an applicant's right to a belated appeal.

287. Twelve years after his conviction, Smith filed for post-conviction DNA testing pursuant to the DNA Act. Id. at 475-76, 772 S.E.2d at 288. The State, relying on section 17-28-30(B), asserted that Smith's application for post-conviction DNA testing was untimely because it was not filed within seven years of his conviction. Id.

Smith contended that the section of the DNA Act the State was relying on only applied to individuals who pled guilty. Smith argued that under the clear and unambiguous language of section 17-28-30(A), individuals who, like himself, had pled not guilty were not subject to any time limitations. Id. This Court agreed with Smith holding the plain meaning of the words in section 17-28-30(B) applied a seven-year time limit only to those defendants that pled guilty or no contest. Id. at 476, 772 S.E.2d at 289. In explaining its holding this Court stated, "[b]ecause the subsection that applied to those who pled *not* guilty does not include such a limitation, nothing indicates the legislature intended a time limit for defendants who pled not guilty." Id. at 477, S.E.2d at 289 (emphasis in original).

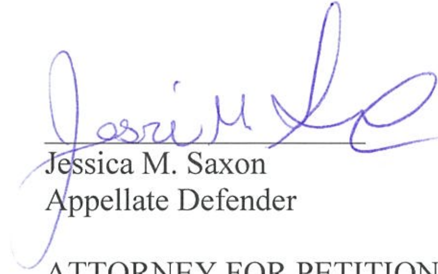
While Petitioner's case involves a different section of the DNA Act, the analysis is the same. The clear and unambiguous language of the DNA Act creates two distinct sets of factors for two distinct steps in the process. The first set of eight factors, outlined in the "Form and contents of application," applies *only* to the information contained in the written application. S.C. Code Ann. 17-28-40. Those factors are not intended to be used in analyzing an application after a hearing has been granted. The only factors that a court is to consider at a hearing are the seven factors listed in "Hearing; factors to be proved; orders relating to DNA samples." S.C. Code Ann. 17-28-90.

The language used in the DNA Act is plain and unambiguous. The lower court erred in Petitioner's case by relying on the wrong section of the statute to deny Petitioner's application. Additionally, the record reflects a certain amount of confusion as to what should be presented to

the court during a hearing on a DNA Act application. Petitioner respectfully requests that this Court find the lower court made an error of law by ruling under section 17-28-40 instead of section 17-28-90. Further, Petitioner respectfully request that this matter be remanded to the lower court for a new hearing on the merits of the application so that the lower court can properly address the factors set forth in section 17-28-90.

CONCLUSION

Based on the foregoing Petitioner respectfully requests this Court reverse the decision of the lower court and direct the new proceedings commence in accordance with the statute.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of July, 2021.