

FIFTH DIVISION  
December 21, 2012

No. 1-10-3021

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 98 CR 24643
MARVIN WARE,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Carol A. Kipperman,
	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice McBride and Justice Palmer concurred in the judgment.

**ORDER**

*HELD:* Trial court's judgment denying STR testing is affirmed; case remanded with directions to allow defendant to amend his motion for DNA testing to

specifically request Y-STR testing.<sup>1</sup>

¶ 1 This appeal arises as the result of the dismissal of defendant Marvin Ware's section 116-3 (725 ILCS 5/116-3 (West 2008)) motion for DNA testing. On appeal, defendant contends that: (1) this court should order DNA testing on the semen sample from the complainant's underwear because his request for DNA testing met the requirements of 725 ILCS 5/116-3 (West 2008); and (2) alternatively, because of the "unique" posture of this case, this court should remand the cause for further proceedings pursuant to section 116-3 with the appointment of new counsel, before a new judge and with directions that all parties address the merits of defendant's request under the elements of the statute. For the following reasons, we affirm the judgment of the trial court and remand with directions.

## ¶ 2 BACKGROUND

¶ 3 Following a bench trial, defendant was convicted of aggravated criminal sexual assault of C.K. and was sentenced to natural life imprisonment as a repeat sex offender. His convictions and sentences were affirmed on direct appeal, and a full recitation of the facts of this case can be found in *People v. Ware*, 323 Ill. App. 3d 47 (2001). At trial, complainant testified that on the date of the occurrence, she decided to visit a bagel shop where she previously worked to visit her former coworkers. The victim knew defendant because they formerly worked together. Additionally, complainant talked about her new job with defendant. At one point during her visit, complainant testified that defendant followed her down a hallway, grabbed her and pulled

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<sup>1</sup> The Rule 23 Order filed earlier on December 21, 2012, has been withdrawn. This is the new Rule 23 Order that is being filed December 21, 2012.

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her into the men's bathroom where she was sexually assaulted.

¶ 4 Prior to trial, complainant identified defendant as the perpetrator to her mother, a nurse and police. She also identified defendant in a lineup. During an interview by police, defendant acknowledged that he and complainant were present in the location where complainant indicated that the assault occurred. Defendant, however, denied assaulting the complainant. The biological evidence presented at trial established that the vaginal and oral swabs from complainant contained no evidence of semen. Further, although a large semen sample was found from the crotch area of the complainant's underwear, no sperm cells were detected under a microscope and no DNA other than the complainant's was found.

¶ 5 Defendant's subsequent petition for leave to appeal was denied by the Illinois Supreme Court, (*People v. Ware*, 196 Ill. 2d 561 (2001)), and the United States Supreme Court later denied his petition for *writ of certiorari* (*Ware v. Illinois*, 122 S. Ct. 1205 (2002)).

¶ 6 Defendant filed a *pro se* post-conviction petition requesting DNA testing under section 116-3 on August 28, 2008. The trial court summarily dismissed defendant's *pro se* petition on September 18, 2008, finding that his claims were frivolous and patently without merit because he pled guilty and concluded as a matter of law that defendant was not entitled to DNA testing. Defendant appealed the dismissal of his *pro se* post-conviction petition, and argued that he did not plead guilty.

¶ 7 Meanwhile, during the pendency of his appeal, defendant filed a motion for forensic testing under section 116-3 (725 ILCS 5/116-3 (West 2008)) on June 17, 2009, seeking DNA testing that was unavailable at the time of his trial. In his motion, defendant alleged that identity

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was an issue at his trial; that the semen and pubic hairs collected by the State were subjected to a sufficient chain of custody; that the results of DNA testing has the potential to produce new, non-cumulative evidence materially relevant to his claim of actual innocence even though it may not completely exonerate him; and short tandem repeat based polymerase chain reaction identity testing (STR) employs a scientific method generally accepted within the relevant scientific community. The trial court subsequently appointed counsel to represent defendant.

¶ 8 On August 7, 2009, the State filed a motion to dismiss. On October 30, 2009, the assistant State's attorney (ASA) informed the trial court that an amended motion to dismiss defendant's motion was filed to rectify an error in the original motion. The State argued that defendant's motion should be dismissed on two grounds. First, the State argued that based on the trial record, defendant failed to make a *prima facie* case that identity was the issue at his trial, as required by section 116-3(b). The State also argued that the DNA testing requested by defendant had been performed prior to his trial, therefore, the results of such testing at this time could not produce the requisite "new non-cumulative evidence materially relevant to defendant's assertion of actual innocence even though the results may not completely exonerate him." At that time, the ASA also reported that defendant's pending appeal involved the same issue of DNA testing and suggested that the second petition be held in abeyance pending this court's disposition. The circuit court agreed and held the petition.

¶ 9 Meanwhile, this court affirmed the trial court's dismissal of the defendant's post-conviction petition for DNA testing on the basis of mootness. *People v. Ware*, No. 1-08-2911 (July 23, 2010). This court took judicial notice of defendant's then pending second motion

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before the trial court for DNA testing and that counsel had been appointed, and agreed with the State that these "intervening events" rendered defendant's DNA argument moot since he had the further proceedings he requested in his initial brief. This court further explained that the appointment of counsel to assist defendant would enable the trial court to fully consider whether defendant was entitled to further DNA testing under section 116-3.

¶ 10 Defendant subsequently filed a "Motion for Discovery of Crime Lab File and All Laboratory Reports" in the circuit court and a response to the State's motion to dismiss his successive petition. Defense counsel contended that identity was an issue at defendant's trial because he maintained his innocence and did not present a consent defense, and also stressed the possibility of a false accusation. Additionally, defense counsel argued that based on his consultation with a specialist at the Forensic Science Unit of the Public Defender's Office, he believed that scientific advances in DNA testing developed additional tests which were not available at the time of trial.

¶ 11 After reviewing the pleadings and hearing argument, the trial court granted the State's motion to dismiss defendant's motion for additional DNA testing, finding that the testing that defendant requested had already been done, and it could not produce newly discovered evidence that was material to a free-standing claim of actual innocence. This timely appeal followed.

#### ¶ 12 ANALYSIS

¶ 13 Defendant contends that: (1) this court should order DNA testing on the semen sample from the complainant's underwear because his request for DNA testing met the requirements of 725 ILCS 5/116-3 (West 2008); and (2) alternatively, because of the "unique" posture of this

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case, this court should remand the cause for further proceedings pursuant to section 116-3 with the appointment of new post-conviction counsel, before a new judge and with directions that all parties address the merits of defendant's request under the elements of the statute.

¶ 14 Here, defendant's motion for DNA testing under section 116-3 was dismissed on the State's motion. The standard of review for the trial court's dismissal of a motion seeking DNA testing under section 116-3 is *de novo*. *People v. Boyd*, 347 Ill. App. 3d 321, 327 (2004).

¶ 15 A defendant may file a motion for forensic testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2008)); *People v. Scott*, 2011 IL App (1st) 100122, ¶48. A ruling denying DNA testing pursuant to section 116-3 is reviewed *de novo*. *People v. Gecht*, 386 Ill. App. 3d 578, 581 (2008). Section 116-3 of the Code provides:

"(a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic DNA testing on evidence that was secured in relation to the trial which resulted in his or her conviction, but which was not subject to the testing which is now requested because the technology for the testing was not available at the time of trial. Reasonable notice of the motion shall be served upon the State.

(b) The defendant must present a *prima facie* case that:

(1) identity was the issue in the trial which resulted in his or her conviction; and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

(c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that:

(1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence;

(2) the testing requested employs a scientific method generally accepted within the relevant scientific community." 725

ILCS 5/116-3 (West 2008).

¶ 16 Thus, a defendant requesting DNA testing pursuant to section 116-3 must show that identity was the central issue at trial and that the evidence to be tested was subject to a sufficiently secure chain of custody. See *Gecht*, 386 Ill. App. 3d at 581. Here, defendant contends that identity was the central issue at trial because his conviction hinged on the accusation of the complainant and he maintained his innocence throughout.

¶ 17 Defendant is correct in stating that our Supreme Court has previously held that in such circumstances, identity is a central issue for purposes of satisfying the *prima facie* case prong for DNA testing. See *People v. Johnson*, 205 Ill. 2d 381, 396 (2002); *People v. Shrum*, 207 Ill. 2d 47, 66 (2003). We find identity to be a central issue. In this case, defendant has maintained his

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innocence throughout the proceedings and argues false accusation by the complainant. Although the complainant knew defendant, her testimony is the only direct evidence of defendant's guilt through her identification. See *Johnson*, 205 Ill. 2d at 396. As the identity evidence rested solely on complainant's testimony and information she relayed to others, we agree with defendant that identity is a central issue and that defendant has met the first requirement for establishment of a *prima facie* case for DNA testing under section 116-3.

¶ 18 We next determine whether the evidence to be tested was subject to a sufficiently secure chain of custody. Here, defendant contends that the record indicates that the semen sample sought to be tested is in the custody of the Illinois State Police and the State does not dispute that claim. Thus, defendant satisfies the second prong of the statute.

¶ 19 Once a *prima facie* case is established, a defendant is entitled to DNA testing if it is determined that the result of the testing has the scientific potential to produce new, non-cumulative evidence materially relevant to the defendant's assertion of actual innocence, and the testing requested employs a scientific method generally accepted within the relevant scientific community. See 725 ILCS 5/116-3(c) (West 2008); *Gecht*, 386 Ill. App. 3d at 581-82. DNA evidence that plays a minor role and is a collateral issue is not materially relevant because it does not significantly advance a claim of actual innocence. *People v. Savory*, 197 Ill. 2d 203, 213 (2001).

¶ 20 Evidence which is materially relevant to a defendant's claim of actual innocence is simply evidence which tends to significantly advance that claim. *Savory*, 197 Ill. 2d at 213.

¶ 21 Reviewing the evidence introduced at trial, complainant's testimony identified defendant

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as the perpetrator and she subsequently identified defendant in a lineup. Complainant also identified defendant as the perpetrator to her mother, a nurse and police. During an interview by police, defendant acknowledged that he and complainant were present in the location where complainant indicated that the assault occurred. The biological evidence presented at trial established that the vaginal and oral swabs from complainant contained no evidence of semen. Additionally, a large semen sample found in the crotch area of the complainant's underwear contained no detectable sperm cells under a microscope and no DNA other than the complainant's was found.

¶ 22 On appeal, defendant argues that Y-STR testing available now was unavailable at the time of his trial. Defendant argues that the DNA testing performed in 1999 found no male DNA at all and asserts newer DNA testing methods, including the Y-STR test, are capable of detecting sperm in male and female mixed samples even where it was previously undetectable under older testing methods. He argues the 1999 method searched for DNA over 9 loci while more modern testing searches over 13 loci. Defendant further argues that his request for STR testing encompasses the relief he is seeking here because Y-STR testing is now a subset of modern STR testing and is routinely performed along with STR testing, unlike when the STR testing was done in 1999.

¶ 23 Some courts have determined that Y-STR testing is not material, particularly in cases where defendant's DNA has been identified through other tests. See *People v. Barker*, 403 Ill. App. 3d 515 (Y-STR testing of samples taken from murdered rape victim's fingernails not material where DNA testing of vaginal swab identified defendant to a statistical significance of 1

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in 1.1 billion of the black population.) The court found that although Y-STR testing can exclude an individual as a contributor to a crime scene, it cannot establish a singular contributor: "Y-STR testing cannot establish who the singular contributor [to] a crime scene source is, as the male chromosome traits may be found across people within a population as well as within a family.

\*\*\* The main value of the test is that it has the power to include an individual as a possible contributor [to] a crime scene, or to conclusively exclude him from the pool of possible suspects." *Barker*, 403 Ill. App. 3d at 528.

¶ 24 In this case, DNA testing performed in 1999 failed to find any male DNA in the vaginal swab taken from complainant. We conclude that newer DNA testing, specifically Y-STR testing, with the potential to find previously undetected male DNA and the potential to exclude defendant would be material in this case. Although defendant has not presented any evidence of actual innocence, we note that he is not required to under section 116-3. Section 116-3 only requires that the requested DNA testing have the "potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence." 725 ILCS 5/116-3(c)(1) (West 2008). A conclusive determination of whether defendant's DNA is present in the semen sample in complainant's underwear would be both new and noncumulative and would be materially relevant to defendant's claim of actual innocence. See *People v. Rokita*, 316 Ill. App. 3d 292, 302 (2000).

¶ 25 Although we have found that Y-STR testing under these circumstances would be material, we believe the judgment of the trial court denying STR testing must be affirmed. As the State points out, defendant did not specifically request Y-STR testing before the trial court,

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only STR testing, which had already been completed as the trial court correctly found.

Accordingly, the trial court's judgment denying STR testing is affirmed.

¶ 26 However, it is well settled that the number of motions a defendant may bring under section 116-3 is unlimited and this defendant can certainly file a new petition and request Y-STR testing. *People v. Patterson*, 2012 IL App (4th) 090656, ¶ 25. We note the defendant first requested DNA testing over four years ago but that request was denied based on a finding that defendant had pled guilty and therefore he did not meet the requirements of section 116-3 for DNA testing. However, the record before us clearly shows defendant was found guilty after a bench trial. The defendant in this case has satisfied the requirements of section 116-3 to get DNA testing except he failed to specifically request Y-STR testing. At oral argument, the State indicated that if defendant refiled a section 116-3 motion specifically requesting Y-STR testing, it would again contest every element of the statute. Such an exercise would be a waste of judicial time and resources, given our findings here and the history of this case.

¶ 27 Under Illinois Supreme Court Rule 366(a)(5) (Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994)), the reviewing court is authorized to make any order and grant any relief, including a remandment, that the case may require. Accordingly, to avoid a waste of judicial resources, we remand this case to the trial court with directions to allow defendant to amend his section 116-3 motion to specifically request Y-STR testing and upon such amendment, the court order that DNA testing be conducted, as all other requirements for section 116-3 testing have been met. Because of our disposition we need not address the other arguments raised by the defendant.

¶ 28 CONCLUSION

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¶ 29 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed and remanded with directions.

¶ 30 Affirmed and remanded with directions.