



his father, William Whalen, and sentenced to 60 years in prison. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Whalen*, 238 Ill. App. 3d 994, 605 N.E.2d 604 (1992). The supreme court affirmed this court's decision. *People v. Whalen*, 158 Ill. 2d 415, 634 N.E.2d 725 (1994). Defendant has raised a number of collateral challenges to his conviction. With regard to this appeal, in March 2003, he filed a *pro se* motion under section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2008)) for deoxyribonucleic acid (DNA) testing of blood samples recovered from the crime scene. The trial court partially granted the motion allowing testing of preserved hair samples and swabs of blood taken from five knives and denied testing of the knives themselves due to possible contamination based on uncertainty regarding the chain of custody of the knives.

¶ 5 Defendant appealed the trial court's denial of his motion in regard to testing of the knives themselves. This court, in a ruling pursuant to Supreme Court Rule 23 (Ill. S. Ct. R. 23 (eff. July 1, 2011)), reversed the court's denial and granted him the right to have DNA testing on the knives themselves. *People v. Whalen*, 2011 IL App (4th) 090563-U. While that appeal was pending, the parties reached an agreement on the DNA testing of hair samples and certain selected samples were tested using the short tandem repeat (STR) method of testing. The results showed the DNA matched the victim. Defendant then requested mitochondrial DNA testing be conducted on hairs from the samples that had not been tested and the trial court denied his request.

¶ 6 On June 2, 2011, defendant filed a timely notice of appeal and OSAD was appointed to represent him. OSAD has filed a motion to withdraw as counsel under *Finley*, asserting no issues of arguable merit warrant appeal. The record shows service of the motion on

defendant. On our own motion, we granted defendant leave to file additional points and authorities by September 21, 2012. He filed none. After examining the record in accordance with our duties under *Finley*, we affirm the trial court's judgment and grant OSAD's motion to withdraw as counsel on appeal.

¶ 7

## II. ANALYSIS

¶ 8 OSAD argues no colorable argument can be made the trial court erred by denying defendant's petition for leave to file a second postconviction petition. Specifically, OSAD contends, after reviewing the facts and applicable law, an appeal in this case would be frivolous.

¶ 9 The issue presented by this appeal is whether the trial court erred in denying defendant's request to have mitochondrial DNA testing performed on unexamined hairs though similar hairs had already been analyzed under the more precise STR DNA testing method. The court's ruling on this issue is subject to *de novo* review. *People v. Henderson*, 343 Ill. App. 3d 1108, 1115, 799 N.E.2d 682, 689 (2003). The DNA testing of the knives themselves is pending in the trial court, pursuant to our order reversing the court's order denying such testing. This could lead to more litigation concerning DNA test results. However, the trial court has ruled upon defendant's entire motion for DNA testing filed on March 10, 2003, and thus we have jurisdiction to consider this appeal.

¶ 10 On March 10, 2003, defendant filed a *pro se* motion under section 116-3 of the Code for DNA testing of blood samples recovered from the scene of the crime. On November 19, 2004, defense counsel filed a second amended motion for DNA testing identifying hair exhibits defendant wanted tested. On July 28, 2005, the trial court partially granted the motion, allowing testing of preserved hair samples and swabs of blood taken from five knives; the court

denied DNA testing of the knives themselves due to possible contamination based on uncertainty about chain of custody.

¶ 11 On December 5, 2006, the parties provided to the trial court an agreed order which the court entered, providing specific trial exhibits of hair to be tested should first be examined under a microscope or other better scientific methods to determine: (1) whether the hair sample was microscopically similar to either the victim's hair sample or defendant's hair sample; (2) whether a representative number of hairs within such sample could be chosen for DNA testing; and (3) whether representative hair could be tested utilizing STR DNA testing and, if not, such representative hair should be tested using mitochondrial DNA testing. The agreed order further provided if the State and defendant disagreed, either party had the right to a hearing for ruling on which hairs should be tested and the appropriate method. The hair samples consisted of hairs recovered from the victim's right hand; hairs recovered from the victim's left hand; the victim's own hair; defendant's own hair; and a clump of unidentified hair recovered from a table located near the victim.

¶ 12 On March 6, 2007, the results of sample testing were received and most samples yielded only the DNA of the victim but one sample (a swab from a filet knife blade) contained a mixed profile matching DNA of the victim and also a "whisper" of another source of DNA not matching defendant.

¶ 13 On July 1, 2009, the trial court entered an order showing the parties agreed hairs with root material and two blood swabs from knives would be tested at an independent lab. The hair samples consisted of four hairs recovered from a clump found on a table near the victim and one of the hairs recovered from the victim's right hand. These hairs had roots suitable for STR

DNA testing. That same day, the court refused defendant's request for reconsideration of its prior denial of DNA testing of the knives found at the scene.

¶ 14 Test results were filed with the court on February 28, 2010. The results showed the hairs belonged to the victim. A supplemental report on March 31, 2011, indicated the swab of blood from the knife that had previously been found to contain mixed DNA actually contained DNA of only the victim.

¶ 15 On June 2, 2011, defense counsel requested mitochondrial DNA testing be conducted on hairs which had not been tested; counsel acknowledged "[t]o be frank, I'm not sure it's that helpful \*\*\* because we've already tested hair follicles from I think four of them I believe." Counsel explained he was making this request because his client had asked him to do so. The State objected, noting there was nothing not already tested. The trial court denied the request, stating testing had identified the hairs as belonging to the victim so further testing would be pointless. Counsel also requested a defendant expert be allowed to examine raw electronic data generated by the company that had already done the analysis to confirm the analysis was correct. The court stated it wanted a letter from the expert explaining why examination of the data would be beneficial.

¶ 16 On June 21, 2011, defendant filed a *pro se* notice of appeal from the trial court's order denying his request for mitochondrial DNA testing of hair samples. OSAD was appointed to represent defendant and later filed a motion to withdraw as counsel.

¶ 17 Section 116-3 of the Code (725 ILCS 5/116-3 (West 2008)), allows for DNA testing upon a determination the result of the testing has scientific potential to produce new, noncumulative evidence materially relevant to a defendant's assertion of actual innocence. 725

ILCS 5/116-3(c)(1) (West 2008). As explained to the trial judge, and not contested by either party, STR DNA testing, which analyzes DNA found in the nucleus of the cell, is preferred over mitochondrial DNA testing because the thorough information provided by nuclear DNA can identify a particular individual, while the limited information provided by mitochondrial DNA serves only to narrow the pool of potential suspects. See *State v. Pappas*, 776 A.2d 1091, 1101 (Conn. 2001) (discussing the difference between nuclear (STR) and mitochondrial DNA testing and the usefulness of their respective results). The results of the less discriminating mitochondrial DNA testing of hairs would have been cumulative and not new since hair samples had already been tested using the more precise STR DNA method. The parties chose, by agreement, this method and the hairs to be tested because the hairs reflected a representative cross section of recovered hairs. The trial court did not err in denying defendant's request to test more hairs using the mitochondrial method.

¶ 18 If defendant was dissatisfied with the hair samples chosen or the DNA testing method, under the agreed order, he should have notified the trial court. He did not raise this issue. He had agreed to the hair samples to be tested and the STR testing method. It was only after results were returned which were unfavorable to him that he reversed his position.

¶ 19 After reviewing the trial court record, we find the court properly denied defendant's request to test additional hair samples using the mitochondrial DNA testing method and OSAD's motion to withdraw as counsel on appeal is granted.

¶ 20 III. CONCLUSION

¶ 21 The motion to withdraw as counsel is allowed and the judgment of the trial court is affirmed.

¶ 22 Affirmed.