

2014 IL App (2d) 120685-U
No. 2-12-0685
Order filed April 21, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 98-CF-1709
)	
JOHN B. FERRYMAN,)	Honorable
)	George J. Bakalis,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* Postconviction counsel did not provide unreasonable assistance by failing to support defendant's actual-innocence claim with new evidence purportedly undermining the State's DNA identification evidence: the new evidence was not conclusive, as identity was not at issue and in any event the new evidence did not substantially undermine the DNA evidence.

¶ 2 Defendant, James B. Ferryman, appeals the denial of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He asserts postconviction counsel failed to amend his claim of actual innocence to note a new scientific understanding that would show critical weaknesses in the scientific evidence used at his trial. He

therefore asserts that postconviction counsel's representation was not the reasonable assistance to which he was entitled under the Act. We do not agree. We hold that defendant has failed to show that postconviction counsel acted unreasonably. The new evidence that defendant asserts counsel should have incorporated could not have supported an actual innocence claim, so that counsel's failure to incorporate it was reasonable. We therefore affirm.

¶ 3

I. BACKGROUND

¶ 4 The State charged defendant with two counts of aggravated kidnapping (720 ILCS 5/10-2(a)(2) (West 1998)), two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 1998)), and one count of attempted predatory criminal sexual assault of a child (720 ILCS 5/8-4(a), 12--14.1(a)(1) (West 1998)). The charges stemmed from the August 23, 1998, kidnapping and sexual assault of A.H., a six-year-old girl.

¶ 5 A.H. testified at defendant's jury trial; she was then seven years old. According to that testimony, on April 23, 1998, a skinny white man with short hair approached her and her friends, and, after talking to her, he led her behind a nearby store. He then placed her in the sleeper part of a large blue truck and drove it away.

¶ 6 The man stopped the truck and removed his shirt, undershirt, pants, and underwear. He told A.H. that he would spank her if she did not remove her clothes. The man also directed her to kiss him on the lips and put her mouth on his hard "weenies." She followed his directions because she was afraid. The man then touched A.H.'s "weenies," which is where she "goes pee."

¶ 7 After a while, the man stopped touching A.H. and permitted her to get dressed. They drove some more before the man ordered A.H. out of the truck. A woman (Yvette Brinkman) discovered A.H. and notified the police. At trial, A.H. could not identify defendant as the person who abducted her.

¶ 8 Brinkman testified that, at about 5 p.m. on August 23, 1998, she discovered A.H. crying and pacing back and forth on a sidewalk outside a shopping center. A.H. said that a man had left her there. Although she was sobbing and shaking, A.H. denied that the man hurt or “touched” her.

¶ 9 Bloomingdale police officer Timothy Roberts testified that, responding to a 911 call, he went to the shopping center where Brinkman was with A.H. A.H. told the officer that a man driving a large semi truck had left her there. When Roberts asked her whether the man had touched her anywhere, she said “no.” Roberts observed vomit residue on the front of A.H.’s shirt; A.H. told him that she had thrown up.

¶ 10 Detective Barry Muniz of the Addison police testified that he met with A.H. and her parents at the Addison police station. Muniz saw that there was a stain on the “chest portion” of A.H.’s shirt. He collected her clothing and placed it into evidence. Muniz spoke with A.H. at the hospital as well. He asked her if the man touched her or if she touched him; she averted her eyes and quickly said “no.”

¶ 11 Douglas Saul, a forensic scientist with the Du Page County sheriff’s department, testified that he had examined the clothing that A.H. had worn the day of the incident. He tested three stains from the shirt, the largest of which was near the neck, for the presence of semen. Two tests for proteins present in seminal fluid were negative, but his microscopic examination of an extract of one stain showed the head of one sperm cell. To make an acceptable identification of a sperm cell, he needed to “at least see spermatozoa head with the acrosome intact.” Under cross-examination, he agreed that he could not absolutely exclude the possibility that the shirt could have picked up the single sperm cell from contamination in, for instance, a washing

machine. On redirect examination, Saul explained that vomit, because it would contain stomach acid, would be likely to degrade many proteins.

¶ 12 Kara Bettisworth, an Illinois State Police forensic scientist, testified that she had examined the microscope slide on which Saul identified the head of a sperm cell and that she had confirmed that such a head was present.

¶ 13 Mary Margaret Greer-Ritzheimer, a forensic scientist at the state forensic science center, testified that she had performed polymerase chain reaction (PCR) based deoxyribonucleic acid (DNA) testing on material obtained from stained areas on A.H.'s shirt, comparing that DNA with known samples taken from A.H. and defendant. The testing was based on short tandem repeats (STRs) and examined nine loci. It also examined the amelogenin gene, which is sex-linked. (The exhibits show that Greer-Ritzheimer analyzed the test results on December 8, 1998.)

¶ 14 Greer-Ritzheimer testified that DNA from the stained area of A.H.'s shirt came from two people. She so concluded because one person can have no more than two alleles (genetic variants) at any one locus, and, in the test item, multiple loci showed more than two, but no more than four, alleles. Further, based on testing of the amelogenin gene, one contributor was male. The profile that was not A.H.'s—thus, the male's—was of a “minor contributor,” in that much more of A.H.'s DNA was present than the male's. At several of the minor contributor's loci, the test would not allow her to make an exact determination of the alleles present. She could, however, limit the possibilities to two or three. Taking into account that a full determination could not be made at those loci, the minor contributor's profile “would be expected to occur in approximately one in 96 billion blacks or one in 34 billion whites.” She agreed that the PCR/STR test was sensitive enough to detect DNA from, for instance, microscopic bits of shed skin and that nothing about the test guaranteed that the minor contributor's DNA was from semen.

¶ 15 Detective David Wall of the Addison police testified that, on the evening of the abduction (and thanks to witness's detailed description of defendant's truck), defendant's employer, Werner Transport Company, was able to tell him where defendant's truck was. Wall and other officers located the truck at the Sony Distribution Center in Roselle and arrested defendant.

¶ 16 Defendant, advised of his *Miranda* rights, spoke to Wall and Detective Paul Hardt. After initially denying any involvement with the victim, defendant eventually admitted that he encountered A.H. and her friends while he was looking for a prostitute. Defendant did not intend to abduct a child but, when he could not find a prostitute, he decided to "try something different."

¶ 17 Defendant approached A.H., spoke to her, and led her to his truck. As they drove away, defendant intended to sexually assault A.H. and force her to "go down on" him. When they arrived at the Sony plant, defendant joined A.H. in the truck's sleeper compartment, removed his pants, and told her that she could return home if she did what he wanted. A.H. hit and kicked defendant and began to cry. Defendant claimed that he abandoned his plan to assault the girl; he denied that any sexual contact occurred. However, he admitted that he considered killing her and leaving her body in a field. Because he was concerned that he would be detected while returning A.H. to her home, he left her at a medical building near a large shopping mall and returned to the Sony plant. Defendant repeated his account of events to allow the detective to make an audio recording. At 12 p.m. on the day after the incident, A.H. identified defendant in a live lineup.

¶ 18 Hardt testified that, on the morning after the arrest, he showed defendant a three-by-five-inch school photograph of A.H. Defendant admitted that this was the child he picked up. Defendant wrote, "This is [the] right girl" and signed his name on the back of the photograph.

¶ 19 A.H.'s mother testified that, after denying for some time that defendant had "touched" her, A.H. had told her that defendant had forced her to put her mouth on his penis and had touched her genital area in a way that made her feel as though she needed to "go pee."

¶ 20 Robert Holguin, a criminal investigator at the Du Page County Children's Center, testified that he had interviewed A.H. and had received answers consistent with what A.H. told her mother.

¶ 21 The jury found defendant guilty on both aggravated kidnapping counts, for which he was sentenced to 20 years' imprisonment; one count of predatory criminal sexual assault of a child, for which he was sentenced to 15 years' imprisonment consecutive to the first term; and one count of the lesser included offense of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 1998)), for which he was sentenced to 7 years' imprisonment concurrent to the other terms.

¶ 22 Defendant appealed, contending, among other things, that the trial court had erred in allowing the evidence of the head of a sperm cell without a *Frye* hearing. We concluded that any error was harmless because the evidence was overwhelming. *People v. Ferryman*, No. 2-99-0922 (2001) (unpublished order under Supreme Court Rule 23).

¶ 23 On September 6, 2001, defendant filed an initial petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2000)), in which he claimed error in sentencing. The trial court dismissed the petition. Defendant appealed, and this court affirmed. *People v. Ferryman*, No. 2-01-1311 (2003) (unpublished order under Supreme Court Rule 23).

¶ 24 On December 23, 2005, defendant filed a "First Amended Post-Conviction Petition." In this petition, he asserted that, through the expert testimony of Karl Reich, he could challenge the State's evidence that a sperm head was present on A.H.'s shirt. Reich would testify that the microscope slide on which Saul and Bettisworth had testified a sperm head was present had no

such structure present. He would also testify that, in his opinion, no such structure had ever been present. Defendant attached an affidavit from Reich consistent with defendant's description of Reich's potential testimony.

¶ 25 The court allowed his claim of ineffective assistance of counsel and his claim based on new evidence (which he now frames as one of actual innocence) to go forward initially. Ultimately, the court granted a motion to dismiss; defendant timely appealed.

¶ 26 On appeal, defendant argued that the trial court had erred in granting the motion to dismiss, while the State asserted that, because defendant failed to move for permission to file a successive postconviction petition, the dismissal was proper. We agreed with the State that defendant's failure to get express leave to file a successive postconviction petition precluded the trial court from considering the merits of the petition regardless of whether it raised an actual innocence claim. *People v. Ferryman*, No. 2-06-1221 (2009) (unpublished opinion under Supreme Court Rule 23).

¶ 27 On June 3, 2010, defendant filed a motion for leave to file a successive petition under the Act. He noted that he sought to challenge only the sex-crime convictions. Among others, he raised the same claims that he raised as in the first successive petition described above. The court granted leave and appointed the public defender to represent defendant. Counsel did not file an amended petition. The court, on the State's motion, dismissed claims that the State had improperly failed to preserve evidence and that the State had knowingly used false testimony. In a pre-evidentiary hearing memorandum of law, counsel stated that the issues for hearing were (1) whether the sperm head had ever existed, and (2) whether trial counsel had been ineffective because he failed to challenge the evidence of a sperm head's presence.

¶ 28 The court filed a memorandum decision denying defendant’s remaining claims on June 4, 2012. It ruled that the new evidence of Reich’s opinion would have only a marginal effect on the balance of the evidence, so that the evidence in favor of conviction would remain overwhelming. Defendant appealed.

¶ 29

II. ANALYSIS

¶ 30 On appeal, defendant asserts that postconviction “counsel failed to raise a claim, apparent in the record, and readily supported by documentation available at the time of the proceedings, that a DNA ‘match’ at only nine loci has been found to be wholly inadequate.” Because of this, defendant concludes, postconviction counsel’s representation of defendant was not the reasonable assistance to which defendant was entitled under the Act.

¶ 31 Specifically, defendant asserts that, “[i]f counsel had adequately represented [defendant], counsel would have found that there was significant doubt as to the reliability of s nine loc[us] ‘match,’ that the gold standard for frequency comparison was 13 loci, and that even the use of the term ‘match’ under the circumstances in this case was improper.” He asserts that the “literature and case law supportive of the claim that a DNA analysis at only nine loci was insufficient to establish guilt was not available at the time of trial in 1999, or even at the time of his direct appeal.” For the change in the understanding of a nine-locus match, defendant relies heavily on *People v. Watson*, 2012 IL App (2d) 091328, and, in particular, on the description of an article by David H. Kaye, *Trawling DNA Databases for Partial Matches: What is the FBI Afraid Of?*, 19 Cornell J.L. & Pub. Pol’y 145 (2009) (*Trawling DNA Databases*), that appears in *Watson*.¹

¹ Although defendant does not cite it, we also take into account the holding in *People v. Wright*, 2012 IL App (1st) 073106, which addresses the same issues concerning DNA evidence

¶ 32 We hold that defendant has failed to show that postconviction counsel acted unreasonably. The new evidence that defendant asserts counsel should have incorporated could not have supported an actual-innocence claim, so not incorporating it was reasonable.

“Substantively, in order to succeed on a claim of actual innocence, [a] defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. [Citation.] New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of the petitioner’s innocence. [Citation.] Noncumulative means the evidence adds to what the jury heard. [Citation.] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result.” *People v. Coleman*, 2013 IL 113307, ¶ 96.

¶ 33 Defendant implies that, since his trial, a major shift has occurred in the understanding of DNA evidence such that the claim of a match between defendant’s DNA and the DNA from the stained shirt would no longer be scientifically accepted. However, the new evidence would not be conclusive, as (1) identity was not at issue; and (2) any change in the understanding of DNA is not so fundamental as to suggest that the match evidence here would have been completely excluded under the modern understanding.

¶ 34 First, we accept temporarily for the sake of argument that defendant is correct that a major shift has occurred concerning the significance of DNA comparisons where fewer than 13 loci are available for comparison. Specifically, we will assume that Greer-Ritzheimer’s testimony concerning that probability of the likelihood of finding matching profile would now be

that *Watson* discusses, deeming them to be a basis for a new trial for the defendant.

treated as outside the scientific consensus and that, under current standards, proper testimony would now be that the STR-based identity evidence was wholly inconclusive.

¶ 35 However, that new evidence would not probably lead to a different result at a retrial. Here, identity was not at issue; the only issue was whether sexual contact took place. On that issue, that DNA from a male was detected on a vomit-stained area of A.H.'s clothing was probably the most inculpatory evidence. But nothing in *Watson* or *Trawling DNA Databases* suggests that anything was improper about Greer-Ritzheimer's testimony that the minor contributor to the mixed DNA was male. Thus, as to the issue of identity, the evidence would still allow a strong inference that defendant's DNA was present in a vomit-stained area of A.H.'s shirt.

¶ 36 Further, the studies discussed in *Watson* and *Trawling DNA Databases* have not changed the understanding of DNA identification evidence in the way that defendant suggests. Defendant argues that DNA matches at nine loci are now known to be "unreliable."² That argument seems to misunderstand the probabilistic nature of DNA identification evidence. Certain scholars think (or have thought) that real-world studies of offender databases have discredited the standard method of calculating the random-match probabilities (RMPs) for all

² Some of the wordings in *Watson* might encourage this interpretation. However, the reader must note that the DNA "match" at issue in *Watson* was, in a sense, actually a mismatch with a plausible technical explanation. *Watson*, 2012 IL App (2d) 091328, ¶ 11; see also *People v. Luna*, 2013 IL App (1st) 072253, ¶ 105 & n. 7 (explaining the phenomenon of allelic dropout and noting that considering it can result in a profile that would ordinarily be treated as excluding a suspect being treated as including him or her). *Watson* thus must be read in the context of the significant technical challenges in the interpretation of the profile.

DNA profiles. See *Trawling DNA Databases*, 19 Cornell J.L. & Pub. Pol’y at 148-49, 152, 155, (discussing opposition to the standard method that arose after studies of offender databases). Nothing about the criticisms of standard RMPs are specific to profiles involving fewer than 13 loci: everything reported suggests that the critics’ claim was that the entire method understated the risk of a random match regardless of the number of loci. See *Trawling DNA Databases*, 19 Cornell J.L. & Pub. Pol’y at 148-49, 152, 155. Thus, if one assumes that the critics are right, *all* RMPs, not just ones for nine-locus-or-fewer matches, would have to become larger (that is, show a higher likelihood of a coincidental match). Some might become larger such that the relevant match no longer could form a proper basis for generation of a suspect by means of a cold hit. However, nothing suggests that calculation of RMPs would need to cease entirely for any kind of match.

¶ 37 Here, Greer-Ritzheimer testified that the minor contributor’s profile “would be expected to occur in approximately one in 96 billion blacks or one in 34 billion whites.” Given the nature of the evidence in this case overall, “billion” could be changed to “million” or even “hundred,” and evidence of the match would retain most of its value. It would still point to defendant as a very plausible source of the DNA on A.H.’s shirt and thus continue to serve as confirmatory evidence.

¶ 38 As a final matter, we point out that *Trawling DNA Databases*, the source for the data that defendant presents as new evidence, gives an analysis that goes directly against defendant’s argument. Although the article provides rather incendiary quotations from skeptics of the standard RMP calculations, the heart of the article is an explanation of why the database studies largely support standard RMP calculations. For instance, one study that generated much skepticism about standard RMPs found “ ‘approximately 90’ ” pairs of offenders with matches at

9 of 13 loci in a 65,493-person database. See *Trawling DNA Databases*, 19 Cornell J.L. & Pub. Pol’y at 154-55 (2009). However, the article persuasively argues that the critics failed take into account that a database of that size generates “ 1.53×10^{12} opportunities to find *** nine-locus matches,” with the results that the number of such matches found was actually *fewer* than what was predicted by standard RMP calculations and that all matches were in line with predictions. See *Trawling DNA Databases*, 19 Cornell J.L. & Pub. Pol’y, at 161-62. Although the critics’ arguments might have appealed to common sense, defendant has not presented anything to suggest a change in the scientific consensus concerning the proper calculation of RMPs. The most recent case to examine the material presented in *Trawling DNA Databases*, *Young v. United States*, 63 A.3d 1033 (D.C. 2013), came to exactly that conclusion. On the view supported by the primary source of scientific analysis in the primary authority that defendant cites, the new evidence he would have had postconviction counsel present would have helped him not at all.

¶ 39

III. CONCLUSION

¶ 40 For the reasons stated, we affirm the denial of defendant’s postconviction petition.

¶ 41 Affirmed.