2015 IL App (1st) 132509-U

FIRST DIVISION
August 3, 2015

No. 1-13-2509

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 82 C 11416
	)	
OZZIE PICKETT,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was not entitled to DNA testing of evidence not previously subjected to DNA testing, where forensic evidence was immaterial in defendant's case.

¶ 2 Following a 1984 jury trial, defendant Ozzie Pickett was convicted of rape, aggravated kidnapping, and armed robbery and sentenced to concurrent prison terms of 20 years. We affirmed on direct appeal. *People v. Pickett*, No. 1-84-2302 (1987)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the denial of his *pro se* petition for

forensic testing under section 116-3 of the Code of Criminal Procedure (725 ILCS 5/116-3 (West 2012)) seeking the submission of certain evidence for DNA testing. He contends that the circuit court erred in denying his petition as he has shown all the elements of a section 116-3 claim. For the reasons stated below, we affirm.

¶ 3 Defendant and codefendants Paul Malone, Edward Stevenson and Christopher Walker were charged with the rape, armed robbery, aggravated kidnapping, and aggravated battery of G.K. on or about November 12, 1982. Defendant and codefendant Stevenson were tried by the same jury on the charges of rape, armed robbery, and aggravated kidnapping.

¶ 4 At trial, G.K. identified codefendant Malone as the man who pointed a gun at her and demanded her money on the afternoon of November 12 but could not identify the other man who then put another gun to her head. Malone and the other man dragged her to a light-green car containing two other men. They drove to another location, having her close her eyes and then putting a bag over her head, before the men sexually assaulted her and took her jewelry. She reported the attack and received treatment at a hospital, during which samples and her underwear were taken. On December 1 and 2, 1982, she went to the police station and identified Malone in two lineups and also identified a car, driven by codefendant Walker and owned by his father, as the attackers' car. At the police station on the 2nd, defendant approached her and tearfully apologized for raping her; Stevenson and Walker also apologized but without specificity.

¶ 5 After their arrests, defendant and Stevenson gave statements to the police and then to an Assistant State's Attorney (ASA) implicating defendants in the kidnapping and robbery of G.K. Stevenson implicated defendant alone in the sexual assault while defendant's statement was to the effect that all four defendants sexually assaulted her. Defendant and Stevenson apologized to G.K. after each stated in his interview with the ASA that he wanted to apologize.

¶ 6 No useable fingerprints were found in the car. Debris from the car's seats included various hairs, not compared to defendant's hair and having both similarities and dissimilarities to G.K.'s hair. Sperm was found on the swabs, and sperm and blood on the underwear, taken from G.K. at the hospital but could not be tested for "secretors" or blood type.

¶ 7 Defendant's mother Ellen, brother Sammie, sisters Casierne Collins and Janie Smith, and Reverend Sammie Ewing testified that defendant attended a relative's funeral in Mississippi on November 17, 1982, and returned to Chicago on or just after Thanksgiving Day, the 25th. Defendant, Ellen, Sammie, Collins, and Rev. Ewing drove together, leaving Chicago around midnight on the 11th, arriving in Mississippi on the afternoon of the 12th, and leaving Mississippi on or just after the end of the 25th. Sammie placed their arrival at about 1:30 p.m., Rev. Ewing placed it in the "later afternoon," Collins placed it "late in the evening," and Smith saw defendant arrive between 4 and 5 p.m. after she arrived at about 2 p.m.

¶ 8 Phyllis Myles testified that she saw defendant in Chicago on the evening of November 22, 1982, and the ASA who interviewed defendant testified that he mentioned seeing Myles on the evening of the 22nd.

¶ 9 The jury found defendant and codefendant Stevenson guilty of rape, aggravated kidnapping, and armed robbery. Defendant was sentenced to 20 years' imprisonment, to be served consecutively to his 6-year prison sentence upon a guilty plea in an unrelated case.

¶ 10 Defendant filed (by mailing in mid-May 2013) the instant *pro se* petition for forensic testing, seeking DNA testing of all evidence in State possession in this case on allegations that DNA testing was not available to him for his 1984 trial and would advance his claim of actual innocence. The court denied relief on June 10, 2013, and this appeal timely followed.

¶ 11 On appeal, defendant contends that the circuit court erred in denying his petition for forensic testing because he stated a case for DNA testing under section 116-3.

¶ 12 Section 116-3 provides that a defendant may make a motion in the circuit court for forensic DNA testing, "including comparison analysis of genetic marker groupings of the evidence collected by criminal justice agencies pursuant to the alleged offense, to those of the defendant, to those of other forensic evidence, and to those maintained under subsection (f) of Section 5-4-3 of the Unified Code of Corrections, on evidence that was secured in relation to the trial" at which he was convicted, if the evidence was either not subject at the time of trial to the testing now requested, or it was previously tested but "can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results." 725 ILCS 5/116-3(a), citing 730 ILCS 5/5-4-3(f) (West 2012). The defendant must present a *prima facie* case that identity was the issue in his trial and that the evidence to be tested has been subject to a sufficient chain of custody. 725 ILCS 5/116-3(b) (West 2012). An allegation that the evidence to be tested had been in the continuous possession of the police or some other State agency is facially sufficient regarding the chain-of-custody requirement; a defendant cannot be expected to prove at the outset a proper chain of custody because the evidence at issue will typically have been in State possession. *People v. Bailey*, 386 Ill. App. 3d 68, 75 (2008).

¶ 13 The circuit court must also determine that "the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant." 725 ILCS 5/116-3(c)(1) (West 2012). Evidence is materially relevant to a claim of actual innocence if it tends to significantly advance the claim even if it does not by itself exonerate the defendant.

People v. Stoecker, 2014 IL 115756, ¶ 33. Whether evidence would be materially relevant requires an evaluation of the trial evidence and the evidence the defendant seeks to acquire through the testing. *Id*. We review *de novo* the disposition of a section 116-3 petition. *Id*., ¶ 21.

¶ 14 Here, it is undisputed that identity was at issue at trial and that the forensic evidence in this case was not subjected to DNA testing. Defendant is seeking DNA testing of any evidence in this case in State possession, and we conclude that he has stated a *prima facie* case as to chain of custody by seeking testing of materials still in State possession. However, we also conclude that DNA testing is not materially relevant to his claim of actual innocence because none of the forensic evidence at trial implicated defendant. As in *People v. Savory*, 197 Ill. 2d 203, 214-16 (2001), and *Bailey*, 386 Ill. App. 3d at 77 (focusing on the defendant's confession with no inculpatory forensic evidence), "the testimony regarding the possible source of the [physical evidence] was only a minor part of the State's evidence" (*Savory*, 197 Ill. 2d at 214), if any, while the focus of the case was elsewhere. In particular, the State presented evidence of the existence, circumstances, and corroboration of defendant's inculpatory statements, defendant attacked those statements with alibi evidence, and the State attacked the alibi evidence with evidence to the effect that defendant was in Chicago when his alibi witnesses placed him in Mississippi. Similarly, this case is distinguishable from *People v. Smith*, 2014 IL App (1st) 113265, ¶ 30, where the "defendant made no inculpatory statements" and the forensic evidence was "a central focus both at trial and on appeal."

¶ 15 In his reply brief, defendant also contends that the trial court improperly summarily dismissed his petition, citing *People v. Luczak*, 374 Ill. App. 3d 172, 180-81 (2007)(it is "unfair to a defendant, when faced with a proposed *sua sponte* summary dismissal of a section 116-3 motion, to be deprived of notice and an opportunity to be heard," though such an error is subject

to harmless-error analysis). However, our supreme court has since rejected the contentions "that section 116-3 does not expressly provide for summary dismissal of motions for DNA testing and that a defendant has a right to notice and an opportunity to respond before ruling on the motion," holding instead that "the trial court did not err in *sua sponte* denying defendant's motion for section 116-3 testing when defendant's motion was insufficient, as a matter of law." *People v. O'Connell*, 227 Ill. 2d 31, 38 (2008), citing *People v. Vincent*, 226 Ill. 2d 1 (2007). As to what constitutes insufficiency as a matter of law, we have held that "because the evidence defendant seeks to test is not materially relevant to his claim of innocence, *** the trial court did not err in denying his *pro se* section 116-3 motion *sua sponte*." *Bailey*, 386 Ill. App. 3d at 77, citing *O'Connell*, 227 Ill. 2d at 38. We see no reason to hold otherwise here.

¶ 16 Accordingly, the judgment of the circuit court is affirmed.

¶ 17 Affirmed.