2015 IL App (4th) 130502-U

NO. 4-13-0502

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 8, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
WILLIE FREEMAN,	)	No. 92CF591
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying defendant's section 116-3 motion for forensic testing because (1) the evidence to be tested has been subject to a chain of custody sufficient to establish it has not been altered; and (2) the requested testing has the potential to produce new, noncumulative evidence materially relevant to defendant's assertion of actual innocence.

¶ 2 In October 2012, defendant, Willie Freeman, filed a *pro se* motion for forensic testing of "material" under section 116-3 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/116-3 (West 2012)). The State filed a motion to dismiss, alleging the chain of custody had not been preserved with regard to the items of evidence still in existence and any scientific testing would not produce new, noncumulative evidence materially relevant to defendant's claim of actual innocence. In May 2013, the trial court granted the State's motion to dismiss, thereby denying defendant's motion for forensic testing. Defendant appeals, asserting the trial court erred in denying his motion for deoxyribonucleic acid (DNA) testing because (1)

his motion established a *prima facie* case for forensic testing, and (2) any "nonmatch" of DNA would constitute noncumulative evidence relevant to his claim of actual innocence. We reverse and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 On July 22, 1992, the State charged defendant by information with armed robbery (Ill. Rev. Stat. 1991, ch. 38, ¶ 18-2(a)) and attempt (first degree murder) (Ill. Rev. Stat. 1991, ch. 38, ¶ 8-4(a), ¶ 9-1) following a July 15, 1992, incident where a black male entered South Shores Liquor (the liquor store) in Decatur, Illinois, pointed a gun at the store clerk, took money from the instant lottery drawer, cut the clerk's throat with a butcher knife, and shot the clerk in the face.

¶ 5 A. Defendant's Trial

¶ 6 At defendant's November 1992 trial, the State presented testimony from three eyewitnesses. Larry Willoughby, the clerk working at the time of the robbery, testified first for the State. Willoughby stated that, at approximately 9 a.m. on July 15, 1992, a man wearing a flowered shirt entered the liquor store and asked if "Barb" still worked there. The man then asked about getting some beer from the cooler. Willoughby stated he went to retrieve the beer, and when he turned around, the man was pointing a gun at him. The man then told Willoughby to turn around and face the wall. Willoughby testified the man removed his wallet and cut his throat with a butcher knife. He testified he struggled with the man, pushed the blade away, and the man shot him in the face. Willoughby described the perpetrator as having a small braided pigtail at the back of his head, stated he recognized the perpetrator as a man he had seen carrying trash from the Dairy Queen down the street to the Dumpsters, and made an in-court identification of defendant as the man who robbed the liquor store. On cross-examination, Willoughby

admitted he initially told the police he "thought" he recognized defendant from the Dairy Queen. In addition, Willoughby admitted he had not been able to identify defendant when he was shown five photographs of possible suspects—one of which was of defendant—but stated he had positively identified defendant from a physical lineup on July 22, 1992.

¶ 7 The State called two other witnesses, who testified they saw a black male sitting inside a parked white car at the time of the robbery. Bridgett Wallace, an employee at Monical's Pizza, testified the police had taken her to defendant's residence, where she identified the car parked in the driveway as the one she had seen parked near the liquor store during the robbery. On cross-examination, Wallace admitted she was unsure whether it was actually the same car because the car she saw parked at the liquor store was all white, while the car at defendant's residence had a blue top. The State's other witness, Mike Bruner, identified People's exhibit Nos. 1 and 14 (photographs depicting defendant's girlfriend Pamela Burgess's car) as the car he had seen parked near the liquor store. Both witnesses were shown the same five photographs of possible suspects as were shown to Willoughby and both failed to identify defendant as the man they had seen in the white car. Both witnesses later identified defendant as the man they had seen in the white car during the physical lineup on July 22, 1992. Defendant was the only suspect in both the photographic array and the physical lineup.

¶ 8 The State offered 14 exhibits, which were admitted into evidence without objection. Among these exhibits were photographs of Burgess's car and several items recovered from the crime scene, including a brown wallet, United States currency, ammunition, and a butcher knife.

¶ 9 Gary Havey, a forensic scientist with the Illinois State Police Bureau of Forensic Scientists, testified he conducted latent-fingerprint examination on the butcher knife. He

explained he tested the knife with cyanoacrylate ester, black powder, Super Glue, and rhodamine dye. Havey testified the knife bore no suitable prints for comparison.

¶ 10 Defendant's girlfriend at the time, Pamela Burgess, testified on his behalf. Burgess identified the white car in People's exhibit No. 1 as her car, and she testified defendant did not have a pigtail braid on July 15, 1992. Defense counsel also called Officer Robert Davis of the Decatur police department to the stand. Davis testified he had executed a search warrant on defendant's residence but was unable to recover any of the items he was searching for; namely, firearms, bloody clothing, United Stated currency, and a flowered shirt.

¶ 11 Following the presentation of the evidence, a jury found defendant guilty on both counts. In December 1992, the trial court sentenced defendant to consecutive 45-year terms in the Illinois Department of Corrections. This court affirmed defendant's conviction and sentence on direct appeal. *People v. Freeman*, No. 4-92-1033 (Oct. 8, 1993) (unpublished order under Supreme Court Rule 23).

¶ 12 B. Defendant's Motion for Forensic Testing

¶ 13 In October 2012, defendant filed a *pro se* motion to allow DNA testing. Defendant's motion stated:

> "1. Defendant was convicted of attempted murder and armed robbery on 11/22/92.
>
> 2. Samples from which DNA can be obtained were collected.
>
> 3. None of the material collected was subjected to the test requested.

4. Identity was the issue at the trial which resulted in this conviction.

5. The DNA technology available today was not available at the time of the trial.

6. To the best of my belief, the material collected is in the possession of the proper authorities and has not been tampered with, replaced, or altered in any material aspect.

7. Test results are relevant to an assertion of actual innocence.

8. Requested testing uses generally accepted scientific methods."

¶ 14 In March 2013, the State filed a motion to dismiss defendant's *pro se* motion for DNA testing. It alleged only five items of evidence remained in the custody of the Macon County circuit clerk's office: one knife, one brown wallet, the United States currency, one ammunition shell, and one piece of ammunition (deformed). It further alleged:

"[A]s a result of the intrusive and exhaustive nature of the latent fingerprint testing as well as the physical handling of the knife, wallet, and US currency, before and during trial by various individuals, the defendant is unable to show that 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."

Due to the identification of defendant by multiple witnesses along with other circumstantial evidence, the State asserted "defendant could in no manner overcome the requirement of 725 ILCS 5/116-3(c) 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."

¶ 15 In May 2013, a hearing on the State's motion to dismiss defendant's motion for DNA testing commenced. After hearing arguments from both parties, the trial court granted the State's motion. Finding defendant had not met the requirements of section 116-3, the trial court stated:

> "Identity was the issue at trial. As for the chain of custody, to err on the side of caution, we'll assume that those items of evidence which remain have been properly preserved by the chain of custody in that they have been in constant possession of a police department and/or the Court Circuit Clerk's Office.
>
> The Statute also provides that, among other things, the result of the testing as to scientific potential can produce new noncumulative evidence, and the evidence would be material relevant—materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant, and then, the testing employs a scientific method generally accepted within the relevant scientific community. There's some case law which discusses the term—uh—'significantly advances a claim of innocence.'

Basically, as the Court understands the case law, that would be a situation where the scope of the Statute is limited to allow for scientific testing only where it has the potential to exonerate the defendant.

Now, the Court has reviewed the—uh—Appellate Court Decision and pleadings in this case. In this particular case, obviously, there was a jury trial. The clerk, who was the victim, identified the defendant as her assailant, both at trial as well as in the lineup. Witnesses identified the defendant as—uh—the person seen leaving the car near the liquor store at the time of the robbery. There were three other witnesses I believe who identified the defendant as being present near the crime scenes—scene at the time the crimes were committed.

Under these circumstances, the Court finds that the burden has not been met insofar as even if there were DNA testing, it would not be material—be materially relevant to the defendant's assertion of actual innocence."

¶ 16 Later that month, the trial court denied defendant's motion to reconsider the denial of his motion for DNA testing.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant contends the trial court erred in denying his motion for DNA testing. We review a trial court's denial of a defendant's motion for forensic testing *de novo*. *People v. Shum*, 207 Ill. 2d 47, 65, 797 N.E.2d 609, 620 (2003).

¶ 20 Section 116-3 of the Procedure Code (725 ILCS 5/116-3 (West 2012)), provides, in pertinent part, as follows:

> "(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, Integrated Ballistic Identification System, or 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 which resulted in his or her conviction, and:
>
> (1) was not subject to the testing which is now requested at the time of trial; or
>
> (2) although previously subjected to testing, 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. 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 even though the results may not completely exonerate the defendant;

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

In other words, "Section 116-3 allows a defendant to have physical evidence subjected to scientific testing that was not available at the time of trial if certain requirements are met." *People v. Savory*, 197 Ill. 2d 203, 208, 756 N.E.2d 804, 808 (2001).

¶ 21 "[I]n order to present a *prima facie* case for forensic testing, the defendant 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." *People v. Johnson*, 205 Ill. 2d 381, 393, 793 N.E.2d 591, 599 (2002). The trial court must then determine "whether this testing will potentially produce new, noncumulative evidence that is materially relevant to the defendant's actual-innocence claim." *Id.*

¶ 22 A. Defendant Has Established a *Prima Facie* Case for DNA Testing

¶ 23 Defendant argues his motion for DNA testing established both that identity was the central issue at trial and that the evidence he seeks to have tested has been subject to a secure chain of custody. See 725 ILCS 5/116-3(b) (West 2012). The State concedes identity was the central issue at defendant's trial, but it maintains defendant failed to meet his burden of establishing a *prima facie* case under section 116-3(b)(2). Specifically, the State contends defendant cannot establish the knife he seeks to test for DNA has not been altered in any material respect because it was subjected to multiple fingerprint tests using multiple techniques and chemicals prior to trial. We agree with defendant.

¶ 24 "The purpose of the chain-of-custody requirement [(section 116-3(b)(2))] is to ensure the reliability of the evidence to be tested." *People v. Sanchez*, 363 Ill. App. 3d 470, 480, 842 N.E.2d 1246, 1254 (2006). Here, defendant's motion for DNA testing alleged, "to the best of [his] belief, the material collected is in the possession of the proper authorities and has not been tampered with, replaced, or altered in any respect." The State filed a motion to dismiss defendant's motion for DNA testing wherein it indicated several items admitted into evidence at defendant's trial, including the knife, remain in the custody of the Macon County circuit clerk's office. We find these circumstances sufficient to establish a secure chain of custody for purposes of a section 116-3 motion. See *Johnson*, 205 Ill. 2d at 394, 793 N.E.2d at 600 (finding a secure chain of custody because "[t]he Vitullo kit, as a piece of real evidence admitted at trial, would

have remained in the custody of the circuit court clerk after the defendant's conviction"); see also *People v. Travis*, 329 Ill. App. 3d 280, 285, 771 N.E.2d 489, 493 (2002) ("It asks too much to require petitioning defendant in these cases to plead and prove proper chain of custody at the outset, for the evidence at issue will undoubtedly have been within the safekeeping of the State, not the defendant.").

¶ 25 In doing so, we decline to adopt the State's interpretation of section 116-3(b)(2). We recognize evidence at trial established the knife underwent latent-print examination utilizing cyanoacrylate ester, black powder, Super Glue, and rhodamine dye. Nevertheless, the purpose of section 116-3(b)(2) is to establish a reliable chain of custody. In the present case, we find defendant has met that burden and has therefore established a *prima facie* case for forensic testing. Whether the knife was altered within that chain of custody in a way rendering DNA testing impossible is a matter to be resolved at the time of testing.

¶ 26 B. DNA Testing Could Potentially Result in New, Noncumulative Evidence Materially Relevant to Defendant's Claim of Actual Innocence

¶ 27 Once a defendant presents a *prima facie* case, the trial court must determine whether the requested testing has the potential to produce new, noncumulative evidence materially relevant to his claim of actual innocence. See 725 ILCS 5/116-3(c)(1) (West 2012).

¶ 28 As an initial matter, we note the trial court misapprehended Illinois Supreme Court jurisprudence regarding when evidence is "materially relevant." In determining DNA testing would not be materially relevant to defendant's claim of innocence, the court stated:

> "There's some case law which discusses the term—uh—
>
> 'significantly advances a claim of innocence.' Basically, as the
>
> Court understands the case law, that would be a situation where the
>
> scope of the Statute is limited to allow for scientific testing *only*

where it has the potential to exonerate the defendant." (Emphasis added.)

¶ 29 However, as our supreme court explained in *Savory*, 197 Ill. 2d at 214, 756 N.E.2d at 811, "section 116-3 is not limited to situations in which scientific testing of a certain piece of evidence would completely exonerate a defendant." Indeed, "the plain and unambiguous language [of section 116-3] evinces no legislative intent to limit the use of scientific testing only to situations where the testing will result in total vindication or has the potential to exonerate the defendant." *People v. Rokita*, 316 Ill. App. 3d 292, 302, 736 N.E.2d 205, 212 (2000). Rather, "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, 756 N.E.2d at 810-11. In addition, whether forensic testing is warranted under section 116-3 depends upon the individual circumstances of each case and "requires a consideration of the evidence introduced at trial, as well as an assessment of the evidence defendant is seeking to test." *Id.* at 214, 756 N.E.2d at 811.

¶ 30 On appeal, defendant argues DNA testing of the previously untested knife has the potential to significantly advance his claim of actual innocence because it has the potential to identify the actual perpetrator. He asserts, if DNA evidence is found on the knife that matches neither him nor Willoughby, his claim that someone else committed the crimes will be significantly advanced. The State contends DNA testing of the knife would not materially advance defendant's claim of actual innocence because the knife was not linked to him at trial and therefore played a very minor role in defendant's trial and later conviction.

¶ 31 Presumably, the State's argument is premised upon the court's language in *Savory*. There, the court held DNA testing of a pair of bloody trousers recovered from the defendant's

home and used against him at trial would not materially advance his claim of actual innocence because the trousers were "only a minor part of the State's evidence" against the defendant. *Savory*, 197 Ill. 2d at 214-15, 756 N.E.2d at 811. However, the court also noted the defendant in that case made inculpatory statements to three friends only hours after the crime occurred and made statements to the police in which he revealed a knowledge of the crime scene only the offender could have had. *Id.* at 216, 756 N.E.2d at 812. The court ultimately concluded, "Under these circumstances, a test result favorable to defendant would not significantly advance his claim of actual innocence, but would only exclude one relatively minor item from the evidence of guilt marshaled against him by the State." *Id.* at 215, 756 N.E.2d at 811-12.

¶ 32 Following its decision in *Savory*, the court decided *Johnson*, 205 Ill. 2d at 397, 793 N.E.2d at 601, where it reversed the trial court's denial of a defendant's motion for DNA testing of samples collected in a rape kit. The court concluded a favorable result would be materially relevant to the defendant's claim of actual innocence because the State had presented "a strong, but largely circumstantial, case." *Id.* at 396-97, 793 N.E.2d at 601. The court noted the evidence seeking to be tested was not introduced at trial; defendant never made damning admissions placing himself at the crime scene; and the only direct evidence of the defendant's guilt was a weak identification by the rape victim. *Id.*

¶ 33 Similarly, in *Shum*, 207 Ill. 2d at 66, 797 N.E.2d at 621, the court held that a "nonmatch" of DNA obtained from a rape kit would significantly advance the defendant's claim of actual innocence. There, the court stated, "The only direct evidence in this case is the identification of defendant by [one of the victims] for murder and rape in which there was a single assailant, and defendant has consistently denied involvement in the crimes." *Id.*, 797 N.E.2d at 620.

¶ 34 In the present case, we recognize there was no physical evidence linking the knife to defendant at trial. However, we also recognize there was no physical evidence recovered from any item linking defendant to the crimes. Defendant's conviction was based largely on his identification by three witnesses and other circumstantial evidence. Defendant never admitted the crimes and has consistently maintained his innocence. Accordingly, we conclude the discovery of someone else's DNA on the knife recovered from the scene and introduced by the State at trial has the potential to significantly advance defendant's claim of actual innocence.

¶ 35 Lastly, the State argues defendant cannot establish any DNA evidence is on the knife to be tested. It further argues, even if there was DNA evidence at the time of trial, there is no claim or indication that the DNA evidence would still remain intact and undegraded after 22 years of storage in an unknown manner and conditions. This issue was not raised below. Nonetheless, due to the manner in which the knife was tested and stored, we agree it is possible the knife may not contain DNA at all or may contain the DNA of a person completely unrelated to the commission of the crimes. However, it is also possible the DNA of a third person could be identified who actually committed the crimes. The fact that a particular result is speculative does not detract from its *potential* importance. Science may not always yield an answer, but it is a tool that ought to be used.

¶ 36 We therefore conclude the trial court erred when it denied defendant's section 116-3 motion for DNA testing. In so holding, we emphasize that a section 116-3 motion does not seek a new trial; it merely seeks forensic testing. Defendant will have to overcome more significant hurdles should any "nonmatch" of DNA actually be found. See *Johnson*, 205 Ill. 2d at 392, 793 N.E.2d at 598 ("A claim of actual innocence *** may be raised in a post-conviction

petition" and any "supporting evidence must be new, material, noncumulative, and so conclusive that it would probably change the result on retrial.").

¶ 37 III. CONCLUSION

¶ 38 For the aforementioned reasons, we conclude DNA testing has the potential to materially advance defendant's claim of actual innocence. We therefore reverse the trial court's denial of defendant's section 116-3 motion and remand this case so that the trial court may order DNA testing of any remaining evidence from which a sample can be obtained.

¶ 39 Reversed and remanded with directions.