2018 IL App (3d) 160314-U

Order filed August 30, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0314 Circuit No. 97-CF-5743
TIERRION D. CARUTH,	)	Honorable Carmen J. Goodman,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Carter and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant presented a *prima facie* case that identity was at issue at trial and that the evidence was subject to a sufficient chain of custody. The forensic testing requested would employ a generally accepted scientific method and has the potential to be relevant to defendant's claim of actual innocence.

¶ 2 Defendant, Tierrion D. Caruth, appeals from the circuit court's order denying his motion for DNA testing. We reverse and remand for DNA testing on the hairs collected in the sexual assault kit.

¶ 3 FACTS

¶ 4 Defendant was convicted after a jury trial of residential burglary (720 ILCS 5/19-3 (West 1996)) and aggravated criminal sexual assault (*id.* § 12-14).[1] *People v. Caruth*, 322 Ill. App. 3d 226, 227 (2001). The evidence at trial established that Jacqueline Rizzo was home alone on the evening and morning of August 26-27, 1997. She went to sleep around 1:45 a.m. Shortly thereafter she woke up and saw a man standing on the side of her bed with a towel over his face and a knife in one hand. She tried to brush a hair out of her face, and he stabbed her in the hand. The man asked Rizzo for her money. She pointed him toward a water jug with money in it located in the closet. He took the money, some jewelry and a coin purse. The man walked her toward the kitchen with the knife to her back to get her purse. The man grabbed the purse, the towel fell off his face, and Rizzo we able to see his face. The man pushed Rizzo back to the bedroom. Once in the bedroom, the man pulled his shorts down and told Rizzo to get on her knees and "suck this." Rizzo told him that she could not because she was pregnant. He forced her onto her knees and held the knife at the back of her head. He shoved his penis into her mouth. After a few minutes, the man told Rizzo to return to her bed. The towel again fell off the man's face, and he did not replace it. The man held Rizzo's hands and forced his penis inside her vagina. After five or six minutes, the man told Rizzo to roll onto her stomach. He then tied her hands behind her back, tied her ankles together, and tied her hands to her ankles.

¶ 5 Upon freeing herself, Rizzo called the police, and they escorted her to the hospital, where she was examined and sexual assault kit was collected. The kit included a specimen of Rizzo's blood, rectal, oral, and vaginal swabs, fingernail scrapings, and some hair. Samples of defendant's blood, head hair, and pubic hair were also taken for comparison.

[1]This statute was renumbered as section 11-1.30 of the Criminal Code of 2012 (720 ILCS 5/11-1.30 (West 2012)).

¶ 6 David Turngren of the Illinois State Police forensic science laboratory tested the vaginal and rectal swabs and determined that they contained semen. The swabs and defendant's blood were then sent to the Chicago laboratory for DNA testing. Turngren found other hair fibers in Rizzo's head and pubic hair combings. He did not compare these to defendant's hair samples. Edgardo Jove with the Chicago laboratory performed the DNA testing. When testing the DNA, Jove said that they look at five loci. He found that the semen matched defendant's DNA profile at all five loci. "[T]he semen identified in the rectal swab and the vaginal swab [was] consistent with having originated from [defendant]. [Such a DNA profile] would be expected to occur in approximately one in ten billion Blacks, one in 120 billion Caucasians, or one in six billion Hispanics." However, siblings have a 50% chance of sharing a band in some of the loci. Jove did not test the DNA of any of the hair samples.

¶ 7 A defense expert reviewed the materials of the Chicago laboratory and stated that four of the loci on the rectal swab were unreliable and inconclusive and the remaining one was marginal. He also stated that two of the loci on the vaginal swab were unreliable and inconclusive, and he agreed with the Chicago laboratory on the other three loci. The expert stated that there was a 1 in 20 chance that one of defendant's three brothers would have the exact same DNA profile as the three reliable loci from the vaginal swab. He also stated that there was a 1 in 300 chance that one of the brothers would match at all five loci. Defendant's mother testified that defendant's three brothers lived in the area and were about the same height and build as defendant.

¶ 8 Rizzo told the police that the perpetrator was African American, about five feet, six inches, slender, but muscular. On October 8, 1997, Rizzo viewed a photographic lineup of possible suspects. She picked defendant out as the perpetrator. Rizzo also identified him in court.

¶ 9 On October 3, 1997, Officer Thomas Friddle with the Rockdale Police Department noticed a Buick parked on the road in the westbound lane of traffic. He left the car there for about an hour and then called a tow truck. He looked into the windows of the car and observed a small coin purse on the rear floorboard with flowers painted on it. Friddle was present when Rizzo viewed the photograph lineup on October 8. On that day, Rizzo described the coin purse that was taken and asked if she would get it back. Friddle remembered seeing a coin purse matching the description in the Buick. He then obtained a search warrant for the Buick and recovered the coin purse. The Buick was titled in defendant's name. Rizzo identified the coin purse as hers. Also on October 3, 1997, defendant was arrested on a separate matter. At the time he was arrested, before Friddle found the car parked on the road, the Buick was sitting in defendant's driveway. Defendant was in custody that entire day.

¶ 10 Defendant was sentenced to consecutive sentences totaling 59 years. *Caruth*, 322 Ill. App. 3d at 228. On direct appeal, defendant argued that his right to due process was violated when he was arraigned by use of closed circuit television and that his sentences should not have been consecutive. *Id.* at 227. This court affirmed defendant's convictions and sentences. *Id.*

¶ 11 Defendant filed a postconviction petition, alleging various claims of ineffective assistance of counsel, the illegality of the search of his vehicle, and the impropriety of the photograph lineup. The petition was dismissed at the second stage. On appeal, this court granted appellate counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and the judgment was affirmed. *People v. Caruth*, No. 3-06-0643 (2008) (unpublished dispositional order).

¶ 12 In March 2016, defendant filed (*pro se*) a motion for leave to file a successive postconviction petition. Simultaneously, defendant filed a motion to allow DNA testing, which is

the subject of this appeal. Defendant alleged that the laboratory did not test all the DNA evidence that they received, specifically that they did not test the hairs that were collected by the hospital in the head and pubic combings. The motion further alleged that identity was at issue at trial and "[t]o the best of [defendant's] 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." After a hearing, the court denied both motions. Defendant appealed.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant solely argues that the circuit court erred in denying the motion to allow DNA testing. He does not challenge the denial of the motion for leave to file a successive postconviction petition. First, we find that defendant made a *prima facie* case that identity was at issue at trial. Second, the chain of custody was sufficiently alleged where the evidence was admitted at trial. Third, we find that the result of the testing has the potential to produce new evidence relevant to defendant's assertion of actual innocence. Fourth, the DNA testing would employ a generally accepted scientific method. Therefore, we find that the court erred in denying the motion.

¶ 15 Under section 116-3 of the Code of Criminal Procedure of 1963 (Code) "[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 *** forensic DNA testing ***" which was not subject to the testing at the time of trial. 725 ILCS 5/116-3(a) (West 2016). In order to prevail on such motion, defendant must first make a *prima facie* case that:

> "(1) identity was the issue in the trial or guilty plea 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." *Id.* § 116-3(b).

Once a *prima facie* case is made, the circuit court "shall allow" the testing if it determines 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 when the defendant's conviction was the result of a trial, even though the results may not completely exonerate the defendant, ***; and

(2) the testing requested employs a scientific method generally accepted within the relevant scientific community." *Id.* § 116-3(c).

We note that the record is unclear on whether the circuit court denied the motion based on the failure to establish a *prima facie* case, the lack of material relevance to the potential result of the testing, or the lack of a generally accepted method. Therefore, we will consider each element in turn.

¶ 16 I. Identity

¶ 17 In making a *prima facie* case, defendant must first show that identity was at issue at trial. "A defendant makes a sufficient showing that identity was an issue at trial when he denied committing the crime at trial." *People v. Grant*, 2016 IL App (3d) 140211, ¶ 18 (citing *People v. Urioste*, 316 Ill. App. 3d 307, 316 (2000) ("[O]ur legislature wanted postconviction forensic testing to occur only in those cases where such testing could discover new evidence at sharp odds with a previously rendered guilty verdict based upon criminal acts that the defendant denied having engaged in." (Emphasis omitted.))

¶ 18 Here, identity was at issue at trial. Defendant denied committing the crime. At trial, the defense theory of the case was that the offense was committed by one of defendant's brothers. Defendant has continued to maintain his innocence after his conviction. We reject the State's argument that identity was not at issue at trial because there were no other suspects, there was DNA evidence linking defendant to the crime, and Rizzo identified defendant as the perpetrator. We rejected the same argument in *Grant*, and we continue to follow that reasoning here. *Grant*, 2016 IL App (3d) 140211, ¶¶ 21-22. In *Grant*, we stated,

> "Contrary to the State's position, *** the question of whether identity was at issue at trial is not tied to the amount of evidence the State presents against a defendant. See *Urioste*, 316 Ill. App. 3d at 316. Although the State argues that identity was not disputed at trial, in actuality, its argument is that defendant is not entitled to forensic testing because the State prevailed at trial given the evidence presented on the disputed issue of identity. That is not the test here. See *id.*
>
> To be sure, the eyewitness testimony *** was sufficient to convict defendant of the charged offenses. However, the present question is not whether the evidence was sufficient, or even if the evidence was closely balanced as to the issue of identity. The only question is whether defendant disputed being the person who committed the crime. By denying that he committed the offense—and, indeed, by stating that it was Jeremy who had sex with Z.G.—defendant put the question of identity squarely at issue at trial." *Id.*

¶ 19 II. Chain of Custody

¶ 20 The second step in making a *prima facie* case for DNA testing is for defendant to show that the evidence was subject to a sufficient chain of custody. "Our supreme court has held that a

defendant's assertion that the evidence sought to be tested has remained in the State's control since the time of trial is sufficient to establish a *prima facie* case of sufficient chain of custody under section 116-3." *People v. Perez*, 2016 IL App (3d) 130784, ¶ 28 (citing *People v. Johnson*, 205 Ill. 2d 381, 394 (2002)). The court in *Johnson* stated, "Though the State contends that the defendant has presented no evidence of the kit's location since his 1984 trial, such evidence would not be available to the defendant. The [sexual assault] 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." *Johnson*, 205 Ill. 2d at 394.

¶ 21 Here, the sexual assault kit was admitted into evidence. Defendant asserted in his petition that "[t]o the best of [defendant's] 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." The case law is clear that "the introduction of evidence at trial is itself *prima facie* evidence that the evidence has been subjected to a sufficient chain of custody under section 116-3." *Perez*, 2016 IL App (3d) 130784, ¶ 28 (citing *People v. Shum*, 207 Ill. 2d 47, 66 (2003)); see also *People v. Bailey*, 386 Ill. App. 3d 68, 70, 75 (2008); *People v. Sanchez*, 363 Ill. App. 3d 470, 478 (2006); *People v. Travis*, 329 Ill. App. 3d 280, 285 (2002); *People v. Kines*, 2015 IL App (2d) 140518, ¶ 29.

¶ 22 In coming to this conclusion, we reject the State's contention that defendant should have "request[ed] discovery, or *** at least contact[ed] the circuit clerk's office, to ascertain that the evidence that is the subject of the DNA motion is actually in the possession of the circuit clerk and that it has not been destroyed pursuant to law or by error." First, defendant was not represented by counsel when presenting this motion in the circuit court. Second, defendant's job is to present a *prima facie* case 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." 725 ILCS 5/116-3(b) (West 2016). As stated above (*supra* ¶ 21), the case law is clear that introducing evidence at trial is enough to satisfy this requirement. Defendant is not required to show that the evidence is still available for testing. Obviously, if a defendant's motion for DNA testing is granted and the evidence to be tested was previously destroyed, the defendant's DNA will not be able to be tested. However, this has no bearing on the establishment of a *prima facie* case. Further, "[t]o require defendant to provide any more specific information than this, information he would not be privy to, would render it nearly impossible for a defendant to ever obtain forensic testing." *Perez*, 2016 IL App (3d) 130784, ¶ 30. Practically speaking, defendant's *pro se* call to the circuit clerk about evidence in a 20-year-old case is unlikely to render any pertinent results.

¶ 23 As defendant has established both that identity was at issue and that the evidence was subject to a sufficient chain of custody, a *prima facie* case has been made. We, therefore, turn to the questions of whether the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to defendant's assertion of actual innocence and whether the testing requested employs a generally accepted scientific method. 725 ILCS 5/116-3(c) (West 2016).

¶ 24 III. Material Relevance

¶ 25 "Section 116-3(c)(1) makes clear that forensic testing need only have the potential to produce relevant evidence; it is not required that any potential new evidence completely exonerate a defendant." *Perez*, 2016 IL App (3d) 130784, ¶ 35 (citing 725 ILCS 5/116-3(c)(1) (West 2012)). "Evidence is 'materially relevant' if it will significantly advance defendant's claim of actual innocence." *Grant*, 2016 IL App (3d) 140211, ¶ 25 (citing *Shum*, 207 Ill. 2d at 65).

¶ 26 At trial, a sexual assault kit was introduced that included Rizzo's vaginal and rectal swabs and hair recovered from combings of Rizzo's head and pubic region. The vaginal and rectal swabs were tested for DNA, but the hair was not. Though a representative from the Illinois State Police forensic crime laboratory testified that defendant's DNA matched the profile at five loci, the defense expert stated that only three of the loci of the vaginal swab were reliable and only one loci of the rectal swab was marginally reliable. Moreover, the defense expert stated that there was a 1 in 20 chance that one of defendant's three brothers would have the exact same DNA profile at the three reliable loci from the vaginal swab. He also stated that there was a 1 in 300 chance than one of the brothers would match at all five loci.

¶ 27 Defendant's theory of the case was that one of his brothers committed the offense. His three brothers all lived in the area and were similar in size to defendant. Defendant presented evidence that his family had access to his car where Rizzo's coin purse was discovered and that defendant was in custody at the time that the car was moved. DNA testing has significantly advanced since 1997-1999 when this case was taking place. Jove stated at trial that they looked at five loci when testing the DNA. Since then, developments in DNA have allowed experts to match DNA at more than twice the loci. See *In re Brandon P.*, 2014 IL 116653, ¶ 27 (looking at 16 loci); *People v. Wright*, 2012 IL App (1st) 073106, ¶ 37 (Jove, the same expert that testified in this case, testified at trial that they look at 13 loci). While a nonmatch to defendant's DNA would not completely exonerate him with the evidence that was introduced at trial, as the State points out, "it is arguable that such a result could advance defendant's claim that he is innocent of the crime." *Grant*, 2016 IL App (3d) 140211, ¶ 27.

¶ 28 While forensic testing may provide evidence that would be materially relevant to a claim of actual innocence, we offer no opinion as to whether defendant's claim of actual innocence would be meritorious.

> "When a claim of actual innocence, supported by newly discovered evidence, is brought in a postconviction petition, a new trial will be granted if the new evidence is of such conclusive character as would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 84 (quoting *People v. Washington*, 171 Ill. 2d 475, 489 (1996), quoting *People v. Silagy*, 116 Ill. 2d 357, 368 (1987), quoting *People v. Molstad*, 101 Ill. 2d 128, 134 (1984)). While defendant's claim could potentially be bolstered by a favorable forensic testing result, whether the claim would be bolstered enough to meet that standard is ultimately a question for a future trial court." (Internal quotation marks omitted.) *Id.* ¶ 28.

¶ 29 IV. Generally Accepted Scientific Method

¶ 30 The last element of section 116-3 of the Code requires the court to determine that the testing requested would employ a generally accepted scientific method. 725 ILCS 5/116-3(c) (West 2016). The State does not dispute, and we find, that the DNA testing is now generally accepted in the scientific community. See *People v. Rokita*, 316 Ill. App. 3d 292, 300 (2000); *People v. Price*, 345 Ill. App. 3d 129, 143 (2003). Because defendant made a *prima facie* case and the DNA testing would be materially relevant and would employ a generally accepted scientific method, we find the court erred in denying defendant's motion for DNA testing.

¶ 31 CONCLUSION

¶ 32 The judgment of the circuit court of Will County is reversed and remanded for the court to enter an order for further forensic testing.

¶ 33 Reversed and remanded with directions.