2013 IL App (1st) 093141-U

No. 1-09-3141

SIXTH DIVISION
March 29, 2013

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. 97 CR 12134
	)	
NATHAN ANTOINE,	)	The Honorable
	)	Colleen McSweeney-Moore,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶ 1 HELD: The trial court properly denied defendant's posttrial motion for additional forensic testing where defendant failed to present a prima facie case establishing a sufficient chain of custody for two of the materials to be tested, and failed to establish that retesting of one material would produce "new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence" as required by section 116-3 of the Code of Criminal Procedure (725 ILCS 5/116-3 (West 2002)).

¶ 2 Defendant, Nathan Antoine, was convicted of aggravated criminal sexual assault and sentenced to two consecutive 60-year prison terms. Defendant's conviction and sentence were upheld on appeal. People v. Antoine, 335 Ill. App. 3d 562 (2002). Defendant filed numerous pro se posttrial pleadings, including a motion requesting fingerprint and forensic testing to demonstrate his actual innocence pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2002), which was denied following a hearing by the trial court. On appeal, defendant contends he satisfied the requisite elements of section 116-3 and, therefore, the evidence he identified should have been tested and/or retested. Based on the following, we affirm.

¶ 3 FACTS

¶ 4 On direct appeal, our opinion detailed the following relevant facts:

> "At trial the jury heard the following evidence.
>
> On March 15, 1997 around midnight, Rose B. stopped at a Jewel on her way home from work. When she returned to her car, she noticed a dark car parked nearby with a man sitting in it. After placing her groceries in her car, she drove away.
>
> While on the road, she realized she had a flat tire. She pulled over to check the tire and opened her trunk. A man she later identified as Antoine pulled alongside her car and offered assistance. A special lug wrench was needed to change her tire, which was not in her trunk. Antoine then offered her a ride back to the Jewel so she could call a friend; she accepted.

Antoine drove to an alley and stopped the car. He unzipped his pants, forced her head down, and said 'suck it or I'll cut you.' She begged Antoine not to force her and told him she was 72 years old. She then noticed she was cut over her right eye and was bleeding. She wiped the blood onto Antoine's pants.

After [an] unsuccessful attempt at anal sex, Antoine again pushed Rose B.'s head into his lap and ordered her to perform oral sex on him. She did, and he quickly ejaculated. Antoine then drove down the alley ordering her to keep her head down. After about 15 minutes, he stopped his car and told her to get out. He threatened to shoot her if she looked at him. He did not allow her to take her purse. After she got out of the car, Antoine drove away.

Rose B. went to a nearby home. The homeowner called the police, and Officer Brian Duffy responded to the call. The paramedics arrived and took her to the hospital.

She was treated with a sex assault kit. The treating nurse collected her pantyhose and took oral and rectal swabs.

While at the hospital, Rose B. told Duffy what happened. Her car was recovered, and the evidence technician David Winston searched for latent prints. He located fingerprints on various parts of the car. He photographed and lifted prints. He also found her flat tire had a puncture-hole on the side.

Officer Stanley McCadlow, an expert in latent print identification and comparisons, made a tentative, but not complete, identification that the latent

impression belonged to Antoine. Detective William Villanova obtained an arrest warrant and search warrant for Antoine's home.

On March 19, 1997, police officers arrested Antoine. He was placed in a lineup. Rose B. viewed the lineup and immediately identified Antoine as the perpetrator.

Antoine's car was confiscated and taken to the police station. The front seats were removed and sent, along with the sex assault kit, to the Illinois State Police Crime Lab in Joliet. The pantyhose and oral swab tested positive for semen. The front passenger seat of Antoine's car tested positive for the presence of blood. Blood samples were taken from Antoine and Rose B.

The semen stains from the oral swab could not be tested because of insufficient material. But the semen stains from Rose B.'s pantyhose were tested. The DNA profile from these stains matched Antoine's DNA profile. The blood stains taken from the seat of Antoine's car were tested and matched Rose B.'s blood.

Forensic Scientist Thomas Skinner compared nine suitable latent prints taken from Rose B.'s car. He determined all of the lifts were prints made by Antoine." Antoine, 335 Ill. App. 3d at 565-66.

¶ 5 Following his trial and direct appeal, defendant proceeded *pro se* and filed numerous postconviction pleadings. The subject of this appeal is defendant's request for section 116-3 testing. Defendant filed his initial section 116-3 motion in conjunction with his petition for

postconviction relief on September 22, 2003. The record fails to reveal whether any action was taken on the pleading. Then, on December 9, 2008, defendant filed an "amended and revised" section 116-3 motion. The State filed a motion to dismiss on September 4, 2009. The trial court conducted a hearing on October 16, 2009, after which the section 116-3 request was denied on the basis that "there is no need for any retesting, that there was appropriate DNA testing done at the time of [defendant's] trial." The trial court further found defendant failed to meet his burden of establishing the materiality and non-cumulative nature of the requested tests. The trial court also denied defendant's motion to reconsider that finding. This appeal followed.

¶ 6 DECISION

¶ 7 Defendant contends that he satisfied the requirements of section 116-3 of the Code and, therefore, his request for additional testing to advance his claim of actual innocence should have been granted.

¶ 8 The purpose of section 116-3 of the Code "is to provide an avenue for convicted defendants who maintained their innocence to test *** genetic material capable of providing new and dramatic evidence materially relevant to the question of the defendant's actual innocence." *People v. Henderson*, 343 Ill. App. 3d 1108, 1114. Section 116-3 provides:

> "(a) A defendant may make a motion before the trial court that entered the judgment on the conviction in his or her case for the performance of fingerprint 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 [730 ILCS 5/5-4-3], on evidence that was secured in relation to the trial which resulted in his or her conviction, but which was not subject to the testing which is now requested because the technology for the testing was not available at the time of trial. Reasonable notice shall be served upon the State.

(b) The defendant must present a prima facie case that:

(1) identity was at 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 requested employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3 (West 2002).

We review rulings on section 116-3 motions *de novo*. *People v. Moore*, 377 Ill. App. 3d 294, 298 (2007).

¶ 9 Defendant argues that new and more advanced testing methods not available at trial are available for the forensic evidence collected from the victim, namely, two semen stains on her pantyhose, an oral swab containing semen, and the offender's pubic hair recovered from the sexual assault kit. At the time of trial, the two semen stains on the victim's pantyhose were tested using the restriction fragment length polymorphism (RFLP) method, but the oral swab and the pubic hair were not tested. According to defendant, "only the offender could have left" the evidence and, therefore, further testing could exclude defendant in support of his actual innocence claim.

¶ 10 Pursuant to section 116-3 of the Code, it is the defendant's burden to first establish a *prima facie* case that identity was a central issue at trial and that the evidence to be tested was subject to a sufficiently secure chain of custody. *People v. Savory*, 197 Ill. 2d 203, 208 (2001). Neither party disputes that identity was a central issue at trial. Defendant claims the evidence was subjected to a sufficiently secure chain of custody, as demonstrated by the thorough testimony presented at trial indicating that the forensic samples, namely, the semen samples from the pantyhose and the oral swabs, were obtained by a nurse at the hospital and sealed and then transferred to the police station until they were sent to the Illinois State Police labs for testing. In his amended and revised section 116-3 motion, defendant stated that "[c]urrently, fingerprint and forensic DNA evidence ha[ve] been in the complete possession of the Cook County Clerk's Office, Ms. Dorothy Brown, for evidence preservation, which is the proper authorities since the year 2000, and meets the statutory requirements of subsection (b)(2) of section 725 ILCS 5/116-3."

¶ 11 The State, however, argues that defendant failed to present a *prima facie* case establishing a sufficient chain of custody where defendant's other postconviction pleadings repeatedly alleged that an insufficient chain of custody was maintained and that the police tampered with the evidence. Moreover, in defendant's amended and revised section 116-3 motion, he alleged that the "semen, blood or hair evidence sat idle at the Joliet Branch Laboratory from March 21, 1997 until August 27, 1997, supposingly [*sic*] under safekeeping and preservation" and that there were "suspicious characteristics of [the police] actions in collection and the chain of custody evidence by the [Illinois State Police Forensic Technician], and the intentional misconduct of handling and safekeeping, (chain of custody) of this *** fingerprint and forensic evidence during the Pre-Trial proceedings in this case." The State concedes that it failed to challenge defendant's *prima facie* case before the trial court. Defendant contends the State, therefore, has forfeited its challenge on appeal. *People v. Gibson*, 357 Ill. App. 3d 480, 489 (2005).

¶ 12 The State's forfeiture aside, it remained defendant's burden to present his *prima facie* case establishing a sufficient chain of custody. *People v. Bailey*, 386 Ill. App. 3d 68, 74-75 (2008). We may affirm a trial court's judgment on any basis contained in the record. *People v. Bartlett*, 241 Ill. 2d 217, 239 (2011). Based on our review of the record, defendant failed to satisfy his burden in regard to the oral swab and the pubic hair.[1] Neither the oral swab nor the pubic hair were admitted at trial. Defendant, therefore, was required to establish a sufficient chain of custody since the time the evidence had been collected, not just since the time of trial. See

[1]We note that, on appeal, defendant has abandoned his request for testing of the additional blood samples.

People v. Jones, 334 Ill. App. 3d 61, 65-66 (2002) (the defendant failed to present a *prima facie* case establishing a sufficient chain of custody for evidence that was not part of the trial record and may or may not have been collected). Defendant failed to do so where he provided no information regarding the chain of custody for the pubic hair and where he challenged the sufficiency of the chain of custody for the oral swab within his amended and revised section 116-3 motion. Defendant could not establish a *prima facie* case based on the very issue he later challenged within the same pleading. We recognize that defendant's conclusory assertion regarding the chain of evidence would have been sufficient had he merely requested additional testing on evidence that had been admitted at trial. See *Bailey*, 386 Ill. App. 3d at 74-75 (and cases cited therein). Defendant, however, requested testing on materials which were not admitted at trial; therefore, his inconsistent statements regarding the chain of custody within his amended and revised section 116-3 motion prevented him from establishing a *prima facie* case. *Cf. Id*.

¶ 13 In regard to defendant's section 116-3 request for retesting of the semen stains on the victim's pantyhose, we find defendant has established a *prima facie* case. As stated, identity was a central issue at trial and defendant's conclusory statement regarding the chain of custody was sufficient for the pantyhose because the evidence was admitted at trial and defendant alleged it remained in the safekeeping of the clerk's office since trial. *Id*.

¶ 14 "If a defendant can establish his *prima facie* case for section 116-3 testing, *** he must then establish that the testing requested was scientifically unavailable at the time of his trial." *People v. Barker*, 403 Ill. App. 3d 515, 524 (2010); 725 ILCS 5/116-3(a)(2) (West 2002). In his

amended and revised section 116-3 motion, defendant requested mitochondrial DNA testing of the materials. On appeal, defendant requests "new and more advanced testing techniques, including STR testing, which is different than RFLP." The State argues that defendant has waived review of his contention where he failed to request retesting of the pantyhose and failed to expressly request Y-STR testing of the specified materials. We find defendant did not forfeit his request related to the pantyhose where he did request retesting of the pantyhose in his amended and revised section 116-3 motion. However, defendant's amended and revised section 116-3 motion only requested mitochondrial DNA testing. We are aware that in his initial section 116-3 motion, defendant requested "[n]ewer and more [a]dvanced DNA [p]rofiling [p]rocedures [which] are DQ Alpha Kits DNA Profiling Test, CO Filer Profiling Test, Profiler Plus testing Procedure and Mitochondrial DNA sequencing." However, when a pleading is amended the original pleading "ceases to be a part of the record, being in effect abandoned or withdrawn." *People v. Cross*, 144 Ill. App. 3d 409, 412 (1986). As a result, we will proceed to review defendant's request for retesting of the pantyhose pursuant to the mitochondrial DNA testing procedure.

¶ 15 The State argues that defendant's request was barred because mitochondrial DNA testing was available at the time of his trial. Defendant was tried in September 2000. It appears that mitochondrial DNA testing was not invented until the late 1990s. *Barker*, 403 Ill. App. 3d at 525 (citing Brandon L. Garret, *Claiming Innocence*, 92 Minn. L.Rev. 1629, 1658-59 (2008)). To the extent it is unclear when the mitochondrial DNA testing became widely available in Illinois, we turn to the final element of section 116-3, namely, whether "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 2002).

¶ 16 A determination of whether materially relevant evidence of actual innocence would result from forensic testing "requires consideration of the evidence introduced at trial, as well as an assessment of the evidence defendant is seeking to test." *Savory*, 197 Ill. 2d at 214. The RFLP test of the two semen stains on the victim's pantyhose produced results matching the DNA profile of defendant with matches that would be expected to occur in "approximately 1 in 556 million Blacks, 1 in 203 million Caucasians or 1 in 105 million Hispanics" for one of the samples and "approximately 1 in 200 million Blacks, 1 in 160 million Caucasians and 1 in 100 million Hispanics" in the second sample. Considering the strength of the matches between the semen samples on the victim's pantyhose and defendant's DNA profile in conjunction with the victim's blood having been found on the front passenger seat of defendant's car, defendant's eight fingerprints having been found on the victim's car, and the victim's positive identification of defendant in a police lineup within 4 days of the offense, we conclude that retesting of the pantyhose using the mitochondrial DNA procedure would not produce new, noncumulative results to support defendant's claim of actual innocence.

¶ 17 CONCLUSION

¶ 18 We affirm the judgment of the trial court denying defendant's section 116-3 motion where defendant failed to satisfy the requisite elements of the statute.

¶ 19 Affirmed.