2013 IL App (1st) 110785-U

FIFTH DIVISION
June 28, 2013

No. 1-11-0785

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 93 CR 15476-02
	)	
RONALD KLINER,	)	Honorable
	)	Joseph Urso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BILL TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

ORDER

HELD: Following defendant's conviction for murder, DNA testing showed that the defendant was not the source of two hair fragments on the victim's glove. Based upon these results, defendant moved for an evidentiary hearing as well as further DNA testing of various hairs on the victim's clothing. We affirmed the trial court's denial of defendant's motions, since (1) the DNA testing results were not "newly discovered" but were entirely cumulative of a forensic report tendered to the defense before trial, and (2) further testing would not significantly advance defendant's claim of actual innocence given the weight of evidence the State presented against him at trial.

¶ 1 Defendant Ronald Kliner appeals from an order of the circuit court denying his motion for a postconviction evidentiary hearing based on newly discovered DNA evidence, as well as denying his motion for additional DNA testing.

¶ 2 Defendant was convicted of the February 18, 1988, murder of Dana Rinaldi. The State's case relied heavily on the testimony of Dana's husband, Joseph Rinaldi, who stated that he hired defendant and his codefendant Michael Permanian to kill Dana in exchange for a portion of her life insurance proceeds. Prior to trial, the Illinois State Police conducted a microscopic analysis of certain hairs found on the victim's clothing and found that the hairs did not match the victim or either of the defendants; this information was made available to the defense.

¶ 3 After defendant's conviction, defendant filed a posttrial motion pursuant to the Illinois postconviction DNA testing statute (725 ILCS 5/116-3 (West 2010)), requesting mitochondrial DNA (mtDNA) testing on hairs that were found on the victim's glove. The trial court granted defendant's motion, and the resultant testing showed that the hairs at issue did not belong to the defendant. Based upon the results of this testing, defendant sought an evidentiary hearing under *People v. Dodds*, 344 Ill. App. 3d 513 (2003), to determine whether this information would entitle him to a new trial. Defendant also filed motions requesting additional DNA testing, namely: (1) further testing on the hairs from the victim's glove, to show that they did not belong to the victim, and (2) testing of other hairs found on the victim's clothing, to show that they also did not belong to the defendants.

¶ 4 The trial court denied defendant's motions, and defendant now appeals. For the reasons that follow, we affirm.

¶ 5 I. BACKGROUND

¶ 6 Because the facts of this case have been set forth fully in our supreme court's decision on direct appeal (*People v. Kliner*, 185 Ill. 2d 81 (1998)), we shall summarize them briefly in this order.

¶ 7 Prior to trial, Illinois State Police forensic scientist Laura Lee conducted a microscopic examination of hair and hair fragments lifted from Dana's sweater jacket, sweater vest, blouse, jeans, leather gloves, shoes, and socks. She then compared these hairs to known hair standards from the victim and both of the defendants. In a report dated December 16, 1993, she summed up her conclusions as follows: "No hair transfer between the victim and the suspects was observed. One Caucasian head hair on Exhibit #19, the black and white sweater jacket, did not originate from Dana Rinaldi, Michael Permanian or Ronald Kliner." The State tendered a copy of this report to the defense during discovery. However, the defense did not seek to introduce it at trial.

¶ 8 The evidence at trial showed that at around 12:30 a.m. on February 18, 1988, two neighbors discovered Dana's body in her car, which was located in the parking lot of the Wyndham Court apartment complex where she lived with her husband. At the time of discovery, the driver's side door was open, and Dana was seated in the driver's seat, with her left leg hanging out of the car and her body slumped over to the passenger side. Ted Nagorski, an evidence technician with the Cook County Sheriff's Police, testified that he examined the crime scene on the morning of the murder and found expended shell casings at the left rear of Dana's car, approximately four to six feet away from Dana.

¶ 9 Nancy Jones, an assistant medical examiner who performed an autopsy on Dana, testified that Dana had five gunshot wounds on her face and head, as well as several gunshot wounds on her hands, suggesting that she had raised her hands in front of her face in an attempt to protect herself. Jones opined that Dana had been shot from above while she was seated. In addition, Jones testified that one of the head wounds showed "stippling," indicating that the weapon was held 18 to 24 inches away. The other wounds did not show stippling, indicating that the weapon was more than 24 inches away. Jones further testified that there was no evidence that someone had pulled hair out of Dana's head. However, she said that if someone had pulled on her hair without actually pulling it out, there would be no indication.

¶ 10 The State called Dana's husband, Joseph, to testify as part of a plea bargain agreement that he had made with the State. Joseph testified that in the fall of 1987, he was having "considerable marital problems" with Dana and was also deeply in debt. In December of that year, Joseph met with Pemanian and the defendant, and the two of them agreed to kill Dana in exchange for half of the insurance proceeds from her death. Joseph informed them that he wanted the murder to look like a botched robbery attempt and provided them with information regarding the apartment complex where he and Dana lived. On February 17, 1988, the night that Permanian and the defendant were scheduled to murder Dana, Joseph went out drinking with a friend. He returned home sometime after 4 a.m. Upon returning, he saw Dana's car being towed away and knew the murder had been carried out.

¶ 11 Joseph also testified that he met with Permanian sometime in March 1988 to discuss payment. At that meeting, Permanian told him that defendant "couldn't get the purse out of her

hand," and it looked as if one of the gunshots might have hit it.

¶ 12 The State called defendant's uncle, John Apel, Sr., and defendant's ex-girlfriend, Tammy Behenna, to testify to incriminating statements made by the defendant. Apel testified that sometime in May of 1988, defendant unexpectedly arrived at Apel's home. He was "laughing, very hyper and wired up." Apel testified that defendant told him, "I killed the Rinaldi girl." According to Apel, defendant said that Permanian drove him to the murder site, where he waited for Dana to arrive. When she did, defendant ran to the car as she was getting out. He stuck a gun to her head, grabbed her by the hair, and pulled the trigger. At that point, his gun jammed and he had to unjam it. He then shot Dana in the head.

¶ 13 Behenna testified that in August of 1988, defendant had a conversation with her about the Rinaldi murder, during which he stated: "I want you to picture this. It's cold outside. It's late. It's dark. You're just – somebody is just coming home from work. *** And I walk up to her car and point a gun at her. And she says 'what are you doing?' And then she put her hand up, and then I shot her five times." She stated that they had another conversation about the murder in July 1990. According to her, defendant walked up to her, put his finger to her head, said "What are you doing?" in a woman's voice, and then said "Bang, bang, bang, bang, bang."

¶ 14 The jury found defendant guilty of murder and conspiracy to commit murder. He was initially sentenced to death, but his sentence was later commuted to natural life in prison.

¶ 15 On August 26, 1999, defendant filed a motion requesting mtDNA testing of hair on Dana's sweater jacket, vest, and gloves, as well as sweepings taken from inside her car. The circuit court granted defendant's motion with respect to two hair fragments found on Dana's

glove but denied further testing. The ordered testing was performed by Mitotyping Technologies, LLC, which issued a report on June 11, 2003, that defendant was not the source of the hair fragments on Dana's glove. (We shall refer to this as the 2003 mtDNA testing.)

¶ 16 Based upon these DNA results, defendant filed a *pro se* motion on August 4, 2003, in which he sought an evidentiary hearing pursuant to *Dodds*, 344 Ill. App. 3d 513 (*Dodds* hearing). Some time thereafter, defendant was appointed counsel. On August 16, 2004, defendant, through his newly appointed defense counsel, filed another motion pursuant to section 116-3 of the Code of Criminal Procedure (725 ILCS 5/116-3(a) (West 2004)), seeking additional DNA testing of several shell casings, a single live cartridge, the victim's purse, and a strand of hair recovered from her sweater jacket. Defense counsel also requested that defendant's pending *pro se* motion for a *Dodds* hearing be put on hold, pending the court's resolution of his request for additional DNA testing. The circuit court granted counsel's request to put the motion on hold.

¶ 17 On July 21, 2005, the court denied defendant's 2004 motion for additional DNA testing. Defendant appealed to this court, and we affirmed the denial of his motion in *People v. Kliner*, Nos. 1-05-3150 and 1-07-0374 (2008) (unpublished order under Supreme Court Rule 23). While that appeal was pending, defendant filed another *pro se* motion seeking a *Dodds* hearing, but the trial court dismissed that motion for lack of jurisdiction because of the pendency of the appeal.

¶ 18 After the conclusion of the appeal, on May 26, 2010, defendant filed a third *pro se* motion requesting a *Dodds* hearing based upon the results of the 2003 mtDNA testing. Before the court ruled upon this motion, defendant's counsel filed a "Motion by Petitioner to Conduct a *Dodds* Hearing Support [*sic*] by DNA Testing." These two motions are the subject of the instant

appeal.

¶ 19 In counsel's motion, in addition to requesting a *Dodds* hearing, counsel also requested further DNA testing with regard to two pieces of evidence. First, counsel sought mtDNA testing to determine whether the hair fragments on Dana's glove were hers. (As noted, the 2003 mtDNA testing excluded defendant as a source of that hair, but it did not determine whether they came from Dana herself.) Second, counsel requested analysis of the remainder of the hairs recovered from the victim to determine whether a genetic profile could be obtained from them through a process known as STR analysis. Counsel argued that such a profile could be compared to profiles of criminal offenders stored in the FBI's Combined DNA Index System (CODIS). Counsel further argued that if the profile on those hairs matched the profile from the hairs tested in 2003, it would support defendant's theory that those hairs belonged to a person who had contact with the victim near the time of her death.

¶ 20 The circuit court denied defendant's motions on January 28, 2011. It is from this ruling that defendant now appeals.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant raises the same contentions as he did before the circuit court. First, he contends that the results of the 2003 mtDNA testing are sufficient to entitle him to an evidentiary hearing under *Dodds*. Second, he contends that he is entitled to further DNA testing of the hairs on Dana's clothing pursuant to the Illinois postconviction DNA testing statute (725 ILCS 5/116-3 (West 2010)). We consider these contentions in turn. In doing so, we review *de novo* the circuit court's denial of defendant's request for a *Dodds* hearing (*Dodds*, 344 Ill. App.

3d at 520), and we also review *de novo* the court's denial of defendant's motion for DNA testing (*People v. O'Connell*, 227 Ill. 2d 31, 35 (2007)).

¶ 23 A. Dodds Hearing on the 2003 mtDNA Testing Results

¶ 24 Defendant's first contention is that the results of the 2003 mtDNA testing, which show that he could not have been the source of the hairs on Dana's glove, are sufficient to entitle him to an evidentiary hearing to determine whether he should receive a new trial. The State contends that no such hearing is warranted because the results are merely duplicative of information that was known to the defense at the time of trial. We agree with the State.

¶ 25 Initially, we note that defendant waived any right he might have had to a *Dodds* hearing in 2008, when his counsel withdrew his request for a *Dodds* hearing during oral argument before this court. Counsel explained that he had spoken with defendant for an hour and a half and had his permission to withdraw the request. This court acknowledged this in its subsequent order, stating that "during oral arguments in the cause at bar, defendant withdrew his second argument [regarding a *Dodds* hearing], conceding that it was moot." *Kliner*, Nos. 1-05-3150 and 1-07-0374 (unpublished order under Supreme Court Rule 23). This waiver, though made by defendant's counsel, is binding upon defendant in this action. See *In re Marriage of Hindenburg*, 227 Ill. App. 3d 228, 230 (1992) (stating that "parties are presumed to act through their attorneys, and the action of an attorney in the conduct of a case is binding on his client").

¶ 26 Nor do we find defendant's motion for a *Dodds* hearing to have any substantive merit. Under section 116-3 of the Code of Criminal Procedure, a convicted defendant may move for DNA testing to be performed on evidence that "was secured in relation to the trial which resulted

in his or her conviction." 725 ILCS 5/116-3(a) (West 2010). The standard for granting or denying such a motion shall be discussed below. Provided that the motion is granted, the results of the testing determine whether any further action must be undertaken. If the DNA results inculpate the defendant, then the defendant is not entitled to relief. *Dodds*, 344 Ill. App. 3d at 519 (2003) (citing *People v. Peeples*, 205 Ill. 2d 480, 533-34 (2002) (where postconviction DNA testing showed that a bloodstain in the victim's apartment matched the defendant's DNA profile, defendant's postconviction claim was properly dismissed without an evidentiary hearing)). On the other hand, if the DNA results are "truly exculpatory," then the defendant's conviction should be vacated and the defendant should be released. *Dodds*, 344 Ill. App. 3d at 519. Finally, if the results are neither inculpatory nor truly exculpatory, but they have the potential to advance a defendant's claim of actual innocence, then they may provide a basis for a defendant to file a petition for postconviction relief. *Id.* (citing *People v. Henderson*, 343 Ill. App. 3d 1108, 1119-20 (2003)). In order to establish a claim of actual innocence in a postconviction petition, the petitioner must present evidence that is newly discovered, is material and noncumulative, and is "of such conclusive character that it would probably change the result on retrial." *People v. Morgan*, 212 Ill. 2d 148, 154 (2004); see *People v. Washington*, 171 Ill. 2d 475, 489 (1996).

¶ 27 The *Dodds* court held that in this third category of cases, where the DNA results are at least partially favorable to defendant and can be used in support of an actual innocence claim, the trial court must conduct an evidentiary hearing to determine whether those results would likely change the result on retrial. *Dodds*, 344 Ill. App. 3d at 522. The facts of *Dodds* are illustrative. Following his conviction for first-degree murder, the *Dodds* defendant requested DNA testing of

his clothing. *Id.* at 516. That testing revealed that a bloodstain on defendant's sweater could not have originated from either of the victims. *Id.* It further revealed that no blood was found on various other articles of clothing worn by the defendant. *Id.* This directly contradicted the trial testimony of one of the State's witnesses, a criminologist who stated that there were traces of blood scattered all over those articles of clothing. *Id.* at 515. Based upon these results, defendant filed a postconviction petition alleging actual innocence, and the *Dodds* court found that the circuit court erred in dismissing defendant's petition without a third-stage evidentiary hearing. *Id.* at 522. It is this holding upon which the instant defendant seeks to rely.

¶ 28 We note in passing that the case of *People v. Brown*, 2013 IL App (1st) 091009, cited by the State for the proposition that no *Dodds* hearing was warranted in this case, is inapposite, because *Brown* was in a different procedural posture than the present case. The *Brown* defendant was convicted of aggravated criminal sexual assault, among other crimes. *Id.* ¶ 5. Postconviction DNA testing showed that DNA found on the victim's sanitary napkin and on vaginal swabs did not match the defendant but, rather, matched the victim's husband. *Id.* ¶ 36-37, 41. Following a *Dodds* hearing, the circuit court found that this evidence was insufficient to entitle defendant to a new trial, and the *Brown* court affirmed. *Id.* ¶ 42, 57. However, this holding has little, if any, bearing on the instant case, since this is an appeal from the denial of a *Dodds* hearing, not an appeal from a decision made after such a hearing. See *id.* ¶ 52-53 (standard of review for dismissal of a postconviction petition without an evidentiary hearing is *de novo*, while dismissal after an evidentiary hearing, such as a *Dodds* hearing, is typically reviewed for manifest error).

¶ 29 Nevertheless, we find that the results at issue in this case, unlike the results at issue in *Dodds*, do not have the potential to advance defendant's claim of actual innocence. As noted, in order to establish an actual innocence claim, a postconviction petitioner must present evidence that is both new and noncumulative. *Morgan*, 212 Ill. 2d at 154; *Washington*, 171 Ill. 2d at 489. The 2003 mtDNA testing results fail to meet this standard as a matter of law. It was already known prior to trial that defendant was not the source of the hair fragments on Dana's glove. This conclusion was contained in a 1993 report that was disclosed to the defense during pretrial discovery. The results of the 2003 mtDNA testing are entirely cumulative of those results from ten years earlier, unlike the results at issue in *Dodds*. Therefore, under the undisputed facts, these results cannot form the basis of an actual innocence claim. See *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008) (for purposes of an actual innocence claim, evidence is not considered "new" where the facts were known to the defendant at or prior to trial); *People v. Jones*, 2012 IL App (1st) 093180, ¶ 60 (allegedly newly discovered evidence did not support actual innocence claim where it was known to defendant's trial counsel prior to trial). Accordingly, the trial court did not err in denying defendant's motions for a *Dodds* hearing based on the results of the 2003 mtDNA testing.

¶ 30 B. Defendant's Request for Further DNA Testing

¶ 31 Defendant next contends that the trial court erred in denying his motion for additional DNA testing pursuant to section 116-3. In particular, defendant seeks testing of all of the hairs on Dana's clothing to see if they match any of the criminal offender profiles in the CODIS database, as well as further mtDNA testing of the hairs on Dana's glove to determine whether

those hairs are hers.

¶ 32 As has been previously discussed, under the Illinois postconviction DNA testing statute, a convicted defendant may move for DNA testing to be performed on evidence that "was secured in relation to the trial which resulted in his or her conviction" and that "was not subject to the testing which is now requested at the time of trial." 725 ILCS 5/116-3(a) (West 2010). In order to be entitled to DNA testing pursuant to this section, the defendant must make a *prima facie* showing that identity was at issue at trial and that the evidence was subject to a sufficiently secure chain of custody. 725 ILCS 5/116-3(b) (West 2010); *People v. Johnson*, 205 Ill. 2d 381, 393 (2002). If the defendant is able to make this *prima facie* showing, the trial court shall grant defendant's motion if it determines that the requested DNA testing "has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence." 725 ILCS 5/116-3(c)(1) (West 2010); see also *Johnson*, 205 Ill. 2d at 393.

¶ 33 In the present case, the State does not dispute that the identity of Dana Rinaldi's killer was the central issue at trial, nor does the State raise any arguments with regard to the chain of custody. Thus, the sole contested issue is whether the testing that defendant requests has the potential to produce new, noncumulative evidence that is materially relevant to his assertion of actual innocence.

¶ 34 In order for evidence to be "materially relevant" to a defendant's claim of actual innocence, it is not required that the evidence, standing alone, be enough to exonerate the defendant. *Johnson*, 205 Ill. 2d at 395; *People v. Savory*, 197 Ill. 2d 203, 213 (2001) ("if the legislature had intended to limit application of the statute to the instances in which a test result

favorable to the defendant would, standing alone, lead to his complete vindication, it would have chosen a different way of expressing the statutory requirements"). However, the evidence must tend to "significantly advance" his claim of actual innocence. *Savory*, 197 Ill. 2d at 213. In determining whether evidence meets this standard, courts must assess both the evidence that defendant is seeking to test as well as the evidence that was introduced at trial. *Id.* at 214; *People v. Urioste*, 316 Ill. App. 3d 307, 318 (2000) (in enacting section 116-3, the legislature "did not intend to provide a mechanism for convicted defendants to cast doubt upon extraneous evidence incapable of shaking our resolve in a guilty verdict's worth").

¶ 35 Defendant argues that DNA testing of the hairs found on Dana's clothing is relevant to his claim of actual innocence because "[t]he forensic evidence in this case showed that the victim came in close contact with her assailant or assailants." This assertion is not borne out by the record. The assistant medical examiner who performed an autopsy on Dana testified that *one* of the wounds on her head was caused by a bullet fired from 18 to 24 inches away, and the remaining bullets were all fired from farther away. This is consistent with the testimony of the State's evidence technician, who stated that he found expended shell casings at the left rear of Dana's car, approximately four to six feet away from her. Thus, contrary to defendant's assertion, the forensic evidence does not demonstrate that there was close contact between the killer and the victim.

¶ 36 Thus, in light of the evidence introduced at trial against the defendant, we hold that the evidence which defendant seeks would not "significantly advance" his claim of actual innocence. *Savory*, 197 Ill. 2d at 213 (review of a section 116-3 motion requires consideration of both the

evidence defendant is seeking to test as well as the evidence introduced at trial). In this regard, we are guided by our supreme court's decision in *Savory*, where the court held that denial of defendant's motion for postconviction DNA testing was proper. The *Savory* defendant was convicted of the stabbing deaths of two siblings who were found murdered in their home. *Id.* at 205. At trial, the State introduced evidence of defendant's statements to three of his friends that he had been at the victims' home on the day of the murders and had cut one or both of the victims. *Id.* at 206. The State also introduced statements by the defendant showing knowledge of the crime scene that only someone in the house on that day would have known. *Id.* at 207. Finally, the State presented physical evidence linking defendant to the crimes, including evidence that a bloodstain found on a pair of defendant's pants was of the same type as one of the victims. *Id.* Following his conviction, defendant filed a section 116-3 motion seeking DNA testing of the bloodstain, alleging that the test results would show that the blood did not match the victims. *Id.* at 208-09. The *Savory* court held that this evidence was not "materially relevant" to his claim of actual innocence, since the testimony regarding the bloodstain was only a "minor part" of the State's case, which rested much more heavily on defendant's admissions to his friends and his knowledge of the crime scene. *Id.* at 214-15. The court explained:

> "[T]he bloodstain evidence was essentially a collateral issue at trial and was not central to the State's evidence of guilt. 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.

See also *Urioste*, 316 Ill. App. 3d at 318 (defendant's section 116-3 motion was properly denied where the requested testing was "simply incapable of producing dramatic evidence of innocence" and "would not decisively refute other evidence of guilt").

¶ 37 Similarly, in the present case, the physical evidence recovered from the crime scene was essentially a collateral issue at trial. The State's case did not rest upon the physical evidence. Rather, it relied upon the testimony of Joseph, who testified that he hired the defendant to kill his wife, as well as defendant's statements to his uncle Apel and his girlfriend Behenna in which he bragged about murdering Dana. Moreover, the defense already knew prior to trial that a hair from a third party was found on Dana's jacket, yet it chose not to raise this evidence at trial. In light of this evidence, the test result that defendant hopes for – namely, additional evidence that hair from a third party was found on Dana's clothing – would not significantly advance his claim of actual innocence. Even if DNA testing would demonstrate that a third party deposited hairs on the victim at some unknown time, such evidence "would not decisively refute other evidence of guilt" (*Urioste*, 316 Ill. App. 3d at 318).

¶ 38 Therefore, for the foregoing reasons, we affirm the judgment of the trial court.

¶ 39 Affirmed.