2012 IL App (2d) 110098-U
No. 2-11-0098
Order filed August 20, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Stephenson County.
Plaintiff-Appellee,	)	
v.	)	No. 99-CF-157
ANTHONY D. ROBINSON,	)	Honorable William A. Kelly,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

ORDER

Held: The trial court properly denied defendant's section 116-3 motion for Y-STR DNA testing of hair samples, as the samples were not materially relevant: the case against defendant was strong and did not depend on the samples, which at trial were proved not to have come from defendant, and the testing he sought could not have identified a specific other person as the source. We affirmed the judgment of the trial court.

¶ 1 Defendant, Anthony D. Robinson, appeals a judgment denying his motion under section 116-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-3 (West 2010)) for scientific testing of evidence. We affirm.

¶ 2 After a bench trial, defendant was convicted of first-degree murder (720 ILCS 5/9-1(a)(1) (West 1998)). The full trial evidence is set out in our order on defendant's direct appeal. See *People v. Robinson*, No. 2-00-0614 (2001) (unpublished order under Supreme Court Rule 23). We provide the following.

¶ 3 On the evening of December 7, 1998, Esther Schwaber was murdered in her apartment at 127½ East Stephenson Street in Freeport. Schwaber, who resided in and managed the 12-unit Alba Apartments, was asphyxiated when someone placed a plastic bag, apparently taken from a nearby wastebasket, over her head. She also suffered numerous injuries. On the morning of December 8, 1998, two police officers who entered the building saw that the inner security door's window had been broken out. Entering Schwaber's apartment, 205, they found her body in the living room. They were accompanied by an African-American officer in training. Defendant had resided in the complex earlier that year, but he had been evicted in June. At the time of the murder, he was in jail but, on weekends, he lived in a house a short distance from Alba Apartments.

¶ 4 Several tenants testified about the circumstances surrounding the murder. Roy Van Sickle, who had lived next door to Schwaber, testified that, between 8 and 9 p.m. on December 7, 1998, he heard what sounded like glass breaking and also heard Schwaber talking to somebody in the hallway. According to Laurel Schwindenhammer, when she returned from work at approximately 8:40 p.m. on December 7, 1998, the security-door window had been broken out; James Buss, another tenant, helped her sweep up the glass. Schwindenhammer testified that they knocked on Schwaber's door, got no response, then went to Buss's apartment, which he shared with Paul Williams. They called the police, but the police refused to help. Williams testified that, on December 7, 1998, he was the sole African-American tenant in the building; that, on that day, he, Buss, and Schwindenhammer all

arrived from work at about 8:30 p.m.; and they proceeded as Schwindenhammer had testified. At that time, Williams knew defendant and Tracy Euells, but he did not see either of them that day. Buss testified consistently with Williams and stated that he did not see defendant on December 7, 1998.

¶ 5 The evidence against defendant included a pair of jeans that he was wearing, but changed out of, when he came home between 8 and 10 p.m. on December 7, 1998. Later, the police obtained the jeans, which had several bloodstains. Mary Margaret Greer-Ritzheimer, a forensic scientist at a state police crime laboratory, testified that, after receiving blood standards from Schwaber and defendant, she analyzed the bloodstains for DNA. One stain's DNA profile matched Schwaber's; that profile would be found in approximately 1 in 24 trillion black people and approximately 1 in 21 trillion white people. A second stain had a DNA profile that matched defendant's. That profile would be found in approximately 1 in 2.8 quadrillion black people or 1 in 11 quadrillion white people.

¶ 6 Robert Smith, who was in charge of the Freeport police detective bureau in December 1998, testified that both Caucasian and Negroid hairs were found on Schwaber's hands and chest and were sent to a crime lab for analysis. The Negroid hairs were head hairs. Because defendant was bald, no head hair exemplars were taken from him. Because defendant was the only suspect at the time, no hair exemplars were taken from anybody else. Smith explained that, to his knowledge, the state police crime labs were unable to perform DNA analysis on hair shafts that did not have the roots (follicles) attached; Laurie Lee, the forensic scientist who received the blood and hair samples from Smith and later sent them to Greer-Ritzheimer, had told Smith that the samples did not contain any roots. Greer-Ritzheimer did not know whether state police crime labs could perform DNA analysis on hair shafts lacking roots, but she said that it might be possible with mitochondrial DNA testing,

which, she believed, the FBI did perform. Greer-Ritzheimer testified that the defense never asked her to perform any DNA tests on the hair samples.

¶ 7 Defendant's primary witnesses were he and Tracy Euells. Euells, whom the trial court ultimately discredited for various cogent reasons, testified as follows. On the morning of December 7, 1998, he and defendant drove to Chicago and bought drugs to resell; on the drive back, Euells received a page from Williams, called him back, and agreed to go to his apartment to sell him drugs. When Euells and defendant arrived, Williams and his roommate were there. Williams told Euells that he wanted the drugs but needed more money; he walked a few doors down, knocked on a door, and entered. Euells heard some "bumping around," although he could not specify from which apartment it came. A few minutes later, Williams emerged, breathing heavily, with money in his hand. According to Euells, he and Williams returned to Williams' apartment, where Euells took the money from Williams. Euells and defendant left, drove around, went to Little Dick's, a liquor store, and returned. They consummated a second deal with Williams and departed about midnight. Euells admitted that, in December 1998, he told an acquaintance of Schwaber, and then told the police, that defendant had murdered Schwaber because he and Williams wanted her money and Williams did not dare kill her himself.

¶ 8 Defendant's account of the events of December 7, 1998, was partly consistent with Euells' testimony. According to defendant, he and Euells returned from Chicago at 6:30 or 7 p.m. On the way, Euells had arranged the sale to Williams. Defendant and Euells drove to Alba Apartments, stopping on the way at Little Dick's. Entering the apartment building on Adams Street, they went to Williams' apartment, which was either 201 or 301. There, Williams said that he was short the money for the drugs, but he then said that he could get it. Defendant stayed in the apartment with

Buss. Williams and Euells left. After 10 minutes, they returned. Williams was perspiring and had money in his hand. Defendant, sitting in a chair, agreed to sell Williams drugs. Williams took the money and slapped defendant across the knee of his jeans with it. Defendant handed him the drugs and put the money into his pocket. He and Euells departed, drove around for a half-hour, returned to Williams' apartment, and made another sale. Defendant and Euells drove off at about 9:30 p.m. At home, defendant changed his clothes, including the jeans. Defendant had lied to the police by telling them that, before December 7, 1998, he had not been at Alba Apartments for months.

¶ 9 In rebuttal, Williams testified that, on December 7, 1998, he never went to Schwaber's apartment, which had been downstairs from his; he did not kill or take money from Schwaber; he did not see defendant or Euells; and he spent the day at work until about 8:30 p.m. Buss testified that, on December 7, 1998, he never saw either defendant or Euells.

¶ 10 In closing argument, the State emphasized that the jeans had contained bloodstains with the DNA of both Schwaber and defendant. The State conceded that Negroid head hairs had been found on Schwaber's body and could not have come from defendant, but it reasoned that the hairs could have come from various sources, including the African-American police officer who was in the apartment the next day. Defendant argued primarily that the hairs supported defendant's theory of Williams' guilt and coming from someone other than he created a reasonable doubt of his guilt. He stressed that the hairs had not been tested, and he asked why Smith had not sought mitochondrial testing that could have been performed even without roots.

¶ 11 The trial court found defendant guilty. The court emphasized that the blood-DNA evidence was a "smoking gun," and he noted that defendant had been impeached in various ways. The court sentenced defendant to life imprisonment as a habitual criminal.

¶ 12 On appeal, we affirmed. Defendant raised no issue relating to the head-hair evidence. See *People v. Robinson*, No. 2-00-0614 (2001) (unpublished order under Supreme Court Rule 23).

¶ 13 In 2002, defendant petitioned for relief under the Post-Conviction Hearing Act (725 ILCS 5/ 122-1 *et seq*. (West 2002)), contending that his trial attorney had been ineffective for failing to obtain DNA testing of the head-hair samples. The trial court denied the petition. We affirmed, holding that counsel's decision to forgo DNA testing of the head-hairs evidence had not been objectively unreasonable. We noted that counsel's trial strategy had been to argue that the mysterious head hairs raised a reasonable doubt of defendant's guilt by pointing to Williams as the murderer. Testing the hairs might have shown that they came from the African-American officer at the scene on December 8, 1998, or from one of "the numerous people the victim came in[to] contact with daily," which would have eliminated counsel's "main argument at closing." *People v. Robinson*, No. 2-03-0332, slip order at 12 (2004) (unpublished order under Supreme Court Rule 23).

¶ 14 On August 3, 2007, defendant petitioned under section 116-3 for mitochondrial, or "Y-STR," testing of the head-hair samples. Defendant asserted that Y-STR testing was not available at the time of his trial and that it was relevant to the issue of identity, because it would establish that the Negroid head hairs that were recovered from Schwaber's body did not come from him. In response, the State contended that (1) because defendant had deliberately forgone any attempt to obtain DNA testing of the hair samples before his trial, he should not be given a second chance; (2) the requested tests lacked the potential to produce new evidence, as they had been available at the time of his trial; and (3) defendant had not made a *prima facie* case that the testing would be materially relevant to his claim of actual innocence, because the hair evidence neither had contributed significantly toward his

conviction nor had the potential, whatever the result, to exonerate him. The trial court denied defendant's motion and his motion for reconsideration. Defendant timely appealed.

¶ 15 On appeal, defendant argues that he satisfied section 116-3, which reads, as pertinent here:

> "(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 *** forensic DNA testing *** 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 the 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 *** 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 2010).

¶ 16 Defendant asserts that the Y-STR test of the hairs has the potential to produce evidence that would support his claim that he did not kill Schwaber. Defendant's specific argument on this score is terse and not entirely clear. However, he notes that he introduced testimony that (1) Williams actually murdered Schwaber; and (2) the "smoking gun" bloodstains got on defendant's jeans when Williams slapped him with the money. Defendant reasons that testing the head hairs could support his theory that Williams was the murderer, as it might help to establish that (1) Williams' hair (not merely that of an unidentified African-American) was found on Schwaber's body; and (2) Schwaber's DNA got onto his jeans when Williams slapped him with the money.

¶ 17 The State responds that (1) because Y-STR DNA testing was available at the time of defendant's trial, although he decided not to request it, he cannot show that the hair evidence "was not subject to the testing which is now requested at the time of trial" (725 ILCS 5/116-3(a)(1) (West 2010)); (2) Y-STR DNA testing is not "generally accepted within the relevant scientific community" (725 ILCS 5/116-(3) (c)(2) (West 2010)); and (3) owing to the strong evidence of defendant's guilt and the limitations of Y-STR DNA testing, the requested test lacks the potential to produce new, noncumulative evidence that is materially relevant to defendant's claim of actual innocence (725 ILCS 5/116-3(c)(1) (West 2010)). Because we agree with the State's third argument, we affirm the judgment without considering the State's other two grounds.

¶ 18 A ruling on a section 116-3 motion is reviewed *de novo*. *People v. Price*, 345 Ill. App. 3d 129, 133 (2003). Evidence that is materially relevant to a defendant's claim of actual innocence is that which tends to significantly advance that claim. *People v. Savory*, 197 Ill. 2d 203, 213 (2001).

The defendant need not establish that a favorable result would lead to his complete exoneration. *Id*. In determining whether a defendant has shown material relevance, a court considers the evidence introduced at trial and assesses the evidence that the defendant seeks to have tested. *Id*.

¶ 19 We explain why we agree with the State that defendant's material-relevance argument fails. First, the evidence of defendant's guilt was strong. The trial court observed that the presence of the victim's DNA in the bloodstains on the jeans that defendant wore on the day of the murder was akin to a "smoking gun." Also, while Euells and defendant both testified that Williams met them at his apartment, went next door to find money to pay for the drugs, and (presumably) then murdered Schwaber, the court found neither Euells nor defendant credible, noting that they had been impeached in many respects. The court could also have reasonably found that defendant's theory was inherently implausible, as it implied that Williams had promised to buy drugs for a given price with no idea where to get the money and had improvised at the last moment by committing a murder. Also, defendant's account, that he came over at Williams' request, appears to be at odds with the other testimony that the apartment's security door had been vandalized, which would have been unnecessary for a consensual entry into the building.

¶ 20 Second, the hair evidence was neither crucial to the State's case nor a major obstacle to the finding of guilt. The trial court acknowledged that the hairs were not from defendant but concluded that it proved little, as the hairs might have come from Schwaber's innocent contact with another African-American or from the police officer who had been at the crime scene on December 8, 1998.

¶ 21 The foregoing might not present an insurmountable obstacle to defendant's motion if the requested testing could potentially establish that Williams, and no other person, was the source of the head hairs. In that event, the certainty that Williams had had some sort of contact with Schwaber

might bolster defendant's account of the events of December 7, 1998, as implausibly as the trial court had found it to be. However, Y-STR DNA testing, which examines "a class of polymorphisms in DNA called 'short-tandem repeats' " in Y (male) chromosomes (*People v. Barker*, 403 Ill. App. 3d 515, 527 (2010)) is not capable of providing such certainty. As *Barker* explained:

> "Y-STR testing cannot establish who the singular contributor [to] a crime scene source is, as the male chromosome traits may be found across people within a population as well as within a family. *** The main value of the test is that it has the power to include an individual as a possible contributor [to] a crime scene, or to conclusively exclude him from the pool of possible suspects. [Citation.] However, *** a match between a suspect and evidence only means that the individual in question could have contributed to the forensic stain ***." *Id*. at 528.

¶ 22 Given this limitation, we conclude that the requested testing does not have the potential to produce new, noncumulative evidence that would be materially relevant to defendant's claim of actual innocence. Defendant's claim is that he did not murder Schwaber and that Williams did. We note that there is no question that *somebody* murdered Schwaber, and defendant has never suggested anyone other than Williams. Y-STR testing of the hairs would neither weaken the case against defendant nor significantly strengthen the case against Williams. Although it might exclude defendant as the source of the head hairs, the trial evidence already did that. And the testing could not identify Williams as the source of the head hairs. At most, it would suggest that Williams might have been the source—a possibility that the trial evidence had already raised, and on which the defense rested its theory of the case. To the extent that other forms of testing might be superior,

defendant has forfeited that issue, because his motion requested only Y-STR testing. See *id*. at 524-25.

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court of Stephenson County.

¶ 24 Affirmed.