2018 IL App (4th) 160825-U

NO. 4-16-0825

FILED
March 26, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
RICKY A. PATTERSON,	)	No. 02CF1597
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Harris and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in dismissing defendant's motion for forensic testing as moot and denying independent testing.

¶ 2 In April 2003, a jury found defendant Ricky A. Patterson guilty of first degree murder, concealment of a homicidal death, and arson. The trial court sentenced him to 55 years in prison. This court, as well as our supreme court, affirmed defendant's convictions and sentences. In June 2006, defendant filed a *pro se* petition for postconviction relief and a motion for deoxyribonucleic acid (DNA) testing. After the trial court denied defendant his requested relief, this court reversed in part and remanded for further proceedings on defendant's request for DNA testing. In January 2014, the trial court found defendant's motion for DNA testing was moot and denied his request for independent testing.

¶ 3 On appeal, defendant argues the trial court erred in dismissing his motion for DNA testing as moot and in denying independent testing. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In October 2002, a grand jury indicted defendant on three counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2002)) and single counts of concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 2002)) and arson (720 ILCS 5/20-1(a) (West 2002)) in connection with the death of Derrick Prout. Defendant pleaded not guilty.

¶ 6 As the parties are familiar with the facts of this case, given the multiple trips to this court and the supreme court, we set forth only those facts necessary for the adequate consideration of the issues now on appeal. At defendant's April 2003 jury trial, the evidence indicated the body of Prout, a drug dealer, was found in his burning car in Lake County. He had been stabbed eight times and shot twice. According to the State's theory of the case, Prout was killed at defendant's residence, and defendant thereafter removed Prout's body from the residence to a remote location and set fire to the residence to conceal evidence of the killing.

¶ 7 During trial, M. Kelly Gannon, a forensic scientist with the Northern Illinois Police and Fire Laboratory, testified as the State's DNA expert. She utilized a technique called polymerase chain reaction (PCR) and conducted short tandem repeats (STR) on the DNA. At that time, STR testing examined 13 loci on the DNA and, if one did not match the samples, the provider of the known standard would be excluded.

¶ 8 Gannon testified that, based on her analysis of the human DNA in the small carpet sample from defendant's living room, the blood found on the carpet matched that of Prout. According to Gannon, the probability that the profile would appear again in the general population was one in 38.3 quadrillion for Caucasians, one in 16.3 quadrillion for African-Americans, and one in 51.9 quadrillion for Hispanics. Although exposure to sunlight, rain,

and/or air could degrade a sample to the point where no analysis could be made, Gannon found "enough there" on the carpet to make a comparison with Prout's standard.

¶ 9 The jury found defendant guilty. In May 2003, the trial court sentenced defendant to 50 years in prison for first degree murder; 5 years in prison for concealment of a homicidal death, to run consecutively with the murder sentence; and 5 years in prison for arson, to run concurrently with the other two sentences.

¶ 10 On direct appeal, defendant argued, *inter alia*, his trial counsel was ineffective for failing to effectively challenge the State's DNA evidence, including Gannon's qualifications as an expert and by not retaining a DNA expert. *People v. Patterson*, 347 Ill. App. 3d 1044, 1053-54, 808 N.E.2d 1159, 1166-67 (2004). This court found no merit in defendant's arguments and affirmed his convictions and sentences. *Patterson*, 347 Ill. App. 3d at 1055, 808 N.E.2d at 1169.

¶ 11 On appeal to the supreme court, defendant again argued defense counsel was ineffective for failing to effectively challenge the State's DNA evidence. *People v. Patterson*, 217 Ill. 2d 407, 441, 841 N.E.2d 889, 908 (2005). The supreme court disagreed and affirmed this court's judgment. *Patterson*, 217 Ill. 2d at 449, 841 N.E.2d at 913.

¶ 12 In June 2006, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2006)) and a separate motion for DNA testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/116-3 (West 2006)). In his DNA motion, defendant alleged his claim of actual innocence was predicated upon DNA testing and "independent DNA testing in this case [would] reveal newly discovered evidence of [his] innocence." Defendant alleged the DNA sample in the carpet was significantly degraded, as it had been exposed to fire, rain, wind, and cleaning solutions, including bleach. Defendant also claimed Gannon "had little and insufficient

educational or professional background to be consider[ed] an expert" and had only testified as an expert on two previous occasions. Appointed counsel filed an amended postconviction petition, which included a claim under section 116-3 of the Procedure Code. Following an evidentiary hearing, the trial court denied the amended postconviction petition.

¶ 13 On appeal, defendant argued he was not provided reasonable assistance of counsel because his counsel failed to provide sufficient information to the trial court in support of his section 116-3 request for additional testing. This court reversed the trial court's denial of the amended postconviction petition and remanded for a determination as to whether defendant met the requirements of section 116-3 for new DNA testing. *People v. Patterson*, 2012 IL App (4th) 090656, ¶ 26, 971 N.E.2d 1204.

¶ 14 On remand, the trial court appointed new postconviction counsel Scott Schmidt, who filed a motion for DNA testing pursuant to section 116-3 in March 2013. Therein, Schmidt argued DNA analysis in 2002 tested only 13 loci on DNA, but new technology allowed for a 15-loci PCR analysis of degraded DNA, "using technology such as MiniFiler kits," which "provides a reasonable likelihood of substantially more probative results than the 13-loci PCR analysis presented at trial." Schmidt claimed the analysis used at trial "produced significant gaps" in the DNA profile and "new DNA testing would bring into question whether the DNA collected from blood found at the Defendant's home matched the victim's DNA—a major component of the State's case."

¶ 15 In April 2013, the State filed a motion to dismiss. The State argued any suggestion that gaps or degradation rendered testing by Gannon unreliable was directly contradicted by the trial record because (1) a truly degraded DNA sample would yield no results, (2) environmental factors such as heat or water could destroy a sample but would not change the

recovered DNA profile, (3) Gannon had a sufficient amount of DNA to engage in the testing performed, and (4) a "false positive" is not possible in DNA analysis. The State argued defendant could not establish the testing had "scientific potential to produce new, non-cumulative evidence materially relevant to Defendant's assertion of actual innocence." In support, the State noted the other evidence at trial included (1) the victim being found wrapped in a blanket identified by witnesses as belonging to defendant, (2) no evidence or argument as to why blood of someone other than the victim would be present on carpet of defendant's burned rented residence, (3) defendant was the last known person to see the victim alive, (4) cellular telephone records conflicted with defendant's account of his whereabouts, (5) defendant gave multiple conflicting accounts of his last encounter with the victim, and (6) Gannon gave proper statistical probabilities as to when DNA of the victim could randomly appear. The trial court denied the motion.

¶ 16 At the September 20, 2013, hearing, postconviction counsel Janie Miller-Jones informed the trial court that defendant's family had hired independent DNA expert Dr. Karl Reich to review the DNA discovery and prepare an affidavit in support of the DNA motion. In his affidavit, Reich stated new technology existed to better analyze DNA, including partially degraded DNA. Reich stated two partial DNA profiles were pertinent in this case, including one from the small carpet sample and Prout's known standard. While Reich noted it was unusual to have a partial profile from a known standard, he presumed the sample had been taken from Prout's cadaver, which had been exposed to intense heat. While the Northern Illinois Crime Laboratory used commercially available DNA-STR kits, *i.e.*, ProfilerPlus and Cofiler, to generate its reported DNA profiles, Reich stated "better, more sensitive kits are now currently available (*e.g.*, Identifiler, Identifiler Plus, PowerPlex 16 HS) and even a kit, Minifiler,

specifically marketed for one type of degraded DNA." Reich stated it was likely the newer testing kits "would provide complete DNA profiles from the two items in this case that currently have partial profiles." He opined data obtained from the new DNA testing would provide noncumulative evidence and "specifically address the issue of identification."

¶ 17 On November 8, 2013, defendant filed a *pro se* motion seeking a continuance to hire private counsel. Therein, defendant argued an independent test of the DNA was necessary because the crime lab that tested the DNA samples in this case was under the direction of "Pamela Fisk" (or Pamela Fish, according to defendant's appellate counsel), who "was found tainting evidence in favor of the prosecution." Further, defendant claimed Gannon worked under Fisk. Defendant stated Miller-Jones would not seek independent testing because " 'there is no money for that.' " Defendant noted he told Miller-Jones she was relieved of her duties in representing him.

¶ 18 On November 12, 2013, Miller-Jones sent an e-mail to the trial court, stating she and the prosecutor "had been working on a resolution to the matter regarding testing but have as of this point been unable to reach an agreement." Miller-Jones indicated she and the prosecutor were of the understanding "that the Crime Lab has initiated testing on this matter."

¶ 19 At a November 15, 2013, status hearing, the prosecutor stated he had "been attempting to get the testing done so that the petition would be rendered moot." Miller-Jones indicated she had just received reports regarding test results and asked for a continuance to talk with her expert and defendant.

¶ 20 On December 2, 2013, defendant filed a *pro se* motion seeking the production of all documents related to the new DNA testing, including a report performed by Kelly G.

Lawrence (formerly M. Kelly Gannon, hereinafter Gannon) of the Northern Illinois Regional Crime Laboratory.

¶ 21 At the December 9, 2013, hearing, Miller-Jones stated her belief that her representation of defendant was "complete," since the DNA testing had been conducted and defendant received the resulting documents. The court continued the case for another status hearing.

¶ 22 In January 2014, the prosecutor argued to the trial court that defendant's petition was moot because new DNA testing had been conducted and the results tendered to him. Miller-Jones agreed testing had been completed, and thus, "the postconviction proceeding has ended." The court found the DNA motion was moot because new DNA testing had been performed, and there was "no objective basis here of record that would inform the court in exercising discretion to have the evidence tested by an independent laboratory."

¶ 23 Defendant filed a notice of appeal and a motion to reconsider in February 2014. In the motion, defendant argued the State committed "a huge error" by sending the DNA "back to the same laboratory and original analyst to be tested again." Given the appeal, the trial court found the motion to reconsider was moot. Defendant filed a motion to dismiss the appeal in this court, arguing the trial court was required to rule on a timely filed motion to reconsider. In April 2016, this court granted the motion to dismiss and remanded for a ruling on the motion to reconsider.

¶ 24 In his motion to reconsider, defendant argued it was improper for the State to have the DNA retested by the same analyst who performed the initial analysis for trial at the same laboratory. In its July 2016 amended response to defendant's motion, the State noted the two rounds of testing "conclusively demonstrate[d] the carpet recovered from Defendant's home

had Prout's blood on it." Further, the State argued defendant "has failed to make a prima facie case that independent testing will result in use of a method not scientifically available at the time of trial that provides a reasonable likelihood of more probative results." The State attached Gannon's report, which indicated she tested the two stains using "the Identifiler Plus amplification kit 15 STR loci and Amelogenin."

¶ 25 At the November 1, 2016, hearing on the motion to reconsider, defendant was represented by private counsel Jennifer Bonjean, who argued it was inappropriate for Gannon to be the one conducting the second test. Bonjean stated Gannon had testified "there was a match" between the DNA profiles, which was not an appropriate way to state her conclusions according to the scientific community. While Gannon provided statistical probabilities when she presented her results, Bonjean argued her testimony was misleading.

¶ 26 In its response, the State noted Gannon testified there was a match but also gave the required statistical probabilities. Moreover, the only defect alleged in the testing was possible cross-contamination between the known standard and the testing sample, and the retesting refuted that allegation with new extractions from both samples. The State argued defendant failed to present a *prima facie* case for testing by an independent lab and defendant had not identified an independent lab that would maintain a chain of custody for the samples. Bonjean noted Dr. Reich's lab was prepared to conduct a new test.

¶ 27 The trial court denied the motion, finding the State's response to defendant's request for independent testing was appropriate. This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 Defendant argues the trial court erred when it dismissed his motion for DNA testing as moot and denied his request for independent testing. We disagree.

¶ 30 Section 116-3 of the Procedure Code provides:

"(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 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 section (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, 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 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 requested employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3 (West 2006).

The trial court's denial of a request for forensic testing pursuant to section 116-3 of the Procedure Code is reviewed *de novo*. *People v. Brooks*, 221 Ill. 2d 381, 393, 851 N.E.2d 59, 65 (2006).

¶ 31 In the case *sub judice*, defendant sought new DNA testing following this court's remand. Specifically, defendant asked for 15-loci PCR DNA testing on the original DNA samples, which provided "a reasonable likelihood of substantially more probative results than the 13-loci PCR analysis presented at trial." In his affidavit, Dr. Reich noted "better, more sensitive kits," including the Identifiler Plus, were available and "designed to provide robust and reproducible results from a variety of samples that failed to provide results using the older, less sensitive reagent kits." The State essentially agreed with defendant's request, as it had the DNA samples retested.

¶ 32 In her analysis, Gannon used the "Identifiler Plus amplification kit" and concluded the DNA profile obtained from the carpet matched the DNA profile obtained from

Prout. Further, she noted this profile would be expected to occur by chance in approximately one in 892 sextillion random, unrelated African-Americans; one in 987 quintillion random, unrelated Caucasians; and one in 669 sextillion random, unrelated Hispanics. The report indicated her work was reviewed by Sarah Owen.

¶ 33 The evidence indicates defendant received the new 15-loci PCR DNA test he desired. While defense counsel stated at oral argument that the Minifiler kit should have been used per Reich's suggestion, defendant did not raise the issue of which specific test he was seeking in his pleadings before the trial court, and arguments raised for the first time on appeal are forfeited. *People v. Cherry*, 2016 IL 118728, ¶ 30, 63 N.E.3d 871. Instead, in his trial court pleadings and his brief on appeal, defendant argues the "real issue" is whether the additional testing should have been conducted by an independent expert or laboratory, as opposed to Gannon, the same DNA expert who performed the initial analysis and testified at trial.

¶ 34 We note section 116-3 of the Procedure Code does not require a new test to be conducted by a different analyst or a different lab. Moreover, defendant has not shown the statutory language or case law provides him with an absolute right to independent testing. Instead, defendant is left to attacking the credibility of Gannon. Defendant claims Gannon's trial testimony was misleading, as she testified "there was a match" between the partial DNA profiles from Prout's known standard and the carpet sample. Defendant contends the scientific community does not accept this testimony as an appropriate way to present DNA evidence and its effect misled the jury. While defendant can only speculate on the impact of Gannon's testimony, she appropriately provided the statistical probabilities of the DNA profiles appearing in the population. See *People v. Miller*, 173 Ill. 2d 167, 185, 670 N.E.2d 721, 730 (1996) ("For a [DNA] match to be meaningful, a statistical analysis is required."); *People v. Watson*, 2012 IL

App (2d) 091328, ¶ 27, 965 N.E.2d 474 (stating "[t]he statistical probability of finding a DNA profile in the general population is a critical step in DNA analysis"). Moreover, defendant offers nothing to indicate Gannon's original and subsequent DNA testing was improperly influenced or her analysis based on inadequate procedures. Defendant received his sought-after DNA test, and he is free to do with those results as he pleases. However, defendant has not shown he is entitled to yet another test by an independent laboratory. Thus, the trial court did not err in denying his request for independent testing.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 37 Affirmed.