

NOTICE

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2019 IL App (4th) 160702-U

NO. 4-16-0702

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 1, 2019

Carla Bender

4th District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

ERIC REID,)

Defendant-Appellant.)

) Appeal from

) Circuit Court of

) Champaign County

) No. 90CF2010

) Honorable

) John R. Kennedy,

) Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court properly denied defendant's motion for forensic testing pursuant to 725 ILCS 5/116-3 (West 2010), where additional forensic testing would fail to produce new, noncumulative evidence materially relevant to a claim of actual innocence.

¶ 2 In June 2011, defendant, Eric Reid, filed a *pro se* motion for forensic testing of deoxyribonucleic acid (DNA) and fingerprint evidence under section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2010)). In January 2013, appointed counsel for defendant filed a motion in support of defendant's 2011 motion for forensic testing. The trial court held an evidentiary hearing on three nonconsecutive days in September 2013, May 2014, and September 2014. In September 2016, the trial court denied defendant's motion for forensic testing.

¶ 3 Defendant appeals, asserting the trial court erred in denying his motion for forensic testing where his motion established that (1) identity was the issue at trial, (2) the evidence was subject to a chain of custody, and (3) additional forensic testing had the potential to produce new, noncumulative evidence materially relevant to a claim of actual innocence. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Defendant's Jury Trial

¶ 6 In October 1991, a jury convicted defendant of aggravated criminal sexual assault (Ill. Rev. Stat. 1989, ch. 38, ¶ 12-14) and the trial court sentenced defendant to an extended term of 60 years in prison. The following evidence presented at trial led to defendant's conviction. In June 1990, just after midnight, Belinda Shaffer (victim) exited her vehicle—in a grocery store parking lot—when a black male forced her back into her vehicle at knifepoint. Her attacker drove her to a nearby park where he robbed and raped her. During the assault, the attacker took the victim's eyeglasses and threatened her life. After the assault, the attacker made the victim drive her vehicle away from the park. He then exited the vehicle and walked away. The victim returned home, called the police, and went to the hospital where she subjected herself to the administration of a Vitullo kit.

¶ 7 Defendant's conviction relied on four pieces of evidence: (1) the victim's identification of defendant as her attacker at trial; (2) expert testimony that defendant's Nike-branded shoes could have made the shoe print found at the scene of the assault; (3) expert testimony that one of three partial palm prints found on the exterior of the victim's vehicle matched defendant's palm print—the other two prints were not tested; and (4) a Federal Bureau of Investigation (FBI) agent and an expert in DNA analysis testified that a four-loci match

appeared after conducting a Restriction Fragment Length Polymorphism (RFLP) DNA test of semen collected from the vaginal swab of the victim and defendant's blood resulting in a statistical probability that the DNA profile would appear once in a 17 million person sample size of African Americans.

¶ 8 B. Postconviction Proceedings

¶ 9 In December 1992, this court affirmed defendant's conviction and sentence. *People v. Reid*, 236 Ill. App. 3d 1116 (1992) (table) (unpublished order under Supreme Court Rule 23). In December 1994, defendant filed a postconviction petition alleging ineffective assistance of trial and appellate counsel. The trial court dismissed the petition without appointing counsel, stating that the petition was late and was neither verified nor supported by affidavit. This court affirmed the first stage dismissal. *People v. Reid*, 285 Ill. App. 3d 1114 (1997) (table) (unpublished order under Supreme Court Rule 23).

¶ 10 In May 2001, defendant filed a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2000)) challenging his sentence. . The trial court dismissed the petition and this court affirmed. *People v. Reid*, 334 Ill. App. 3d 1130 (2002) (table) (unpublished order under Supreme Court Rule 23).

¶ 11 In February 2005, defendant filed a second 2-1401 petition and a petition requesting forensic testing of physical evidence for gonorrhea. In response to the State's motion to dismiss, defendant raised an additional claim under section 116-3 of the Code (725 ILCS 5/116-3 (West Supp. 2005)) for Short Tandem Repeat Polymerase Chain Reaction (STR-PCR) DNA testing and mitochondrial DNA testing. Ultimately, in September 2006, the trial court denied defendant's section 2-1401 petition and his motion for testing under section 116-3, finding that the testing sought lacked the ability to provide new, noncumulative evidence where

DNA testing was available at the time of trial and the new testing would not produce different results. The court granted the State's motion to dismiss. This court affirmed the trial court's judgment and granted appellate counsel's motion for leave to withdraw. *People v. Reid*, 385 Ill. App. 3d 1149 (2008) (table) (unpublished order filed under Supreme Court Rule 23).

¶ 12 In 2007, the General Assembly amended section 116-3(a) of the Code, adding language allowing testing of evidence (1) not previously subjected to testing or (2) previously subjected to testing, that could now be tested using an additional method not scientifically available at the time of trial. 725 ILCS 5/116-3(a) (West Supp. 2007).

¶ 13 C. Defendant's 2011 Motion for Forensic Testing

¶ 14 In June 2011, defendant filed a *pro se* motion for forensic testing on DNA and fingerprint analysis under section 116-3 of the Code (725 ILCS 5/116-3 (West 2010)). In January 2013, appointed counsel for defendant filed a motion in support of defendant's 2011 motion for forensic testing. Specifically, defendant requested new DNA testing of the items in the Vitullo kit and fingerprint analysis of the two partial palm prints not previously tested.

¶ 15 Over the course of three nonconsecutive days, the court heard the following evidence.

¶ 16 1. *Gary Havey*

¶ 17 Gary Havey, a forensic scientist with the Illinois State Police Forensic Science Command in Springfield, Illinois, qualified as an expert in fingerprint analysis. Havey testified that prior to defendant's trial he examined one partial palm print found on the victim's vehicle. According to Havey, the partial palm print he examined matched defendant's palm print at 20 separate points of comparison. Havey indicated six points as the fewest points of comparison he previously testified to in any case.

¶ 18 When analyzing the prints, Havey not only looked at individual characteristics, he looked at the orientation of differing characteristics to each other, the special relationship within the print as a whole, and the size, shape, and uniqueness of ridge form. Havey testified to a lack of inconsistencies between defendant's print and the matched print. Havey represented that the Illinois State Police use the Automated Fingerprint Identification System (AFIS) to look at comparisons of fingerprint analysis but not to search palm prints; therefore, at no point did he use AFIS when analyzing the partial palm print.

¶ 19 Havey testified that since 1990, no changes in forensic fingerprint technology occurred that affected the opinions he gave at defendant's trial. Havey testified he did not examine the other two partial palm prints because the investigator, at the time, told him one matched print "would suffice[.]"

¶ 20 *2. William Frank*

¶ 21 William Frank, DNA research coordinator for the Illinois State Police, qualified as an expert in the field of DNA forensics and testified about various DNA tests. Frank testified in depth regarding the difference between RFLP and STR-PCR DNA testing. Frank admitted that RFLP ceased being the standard DNA testing performed by the Illinois State Police in the mid-1990s and STR-PCR testing became the new and current standard. The primary reason for this change being RFLP testing was "all manual, very labor intensive[,] and it took a long time to complete." RFLP testing required weeks, while STR-PCR testing requires one day.

¶ 22 Frank also indicated the change from RFLP to STR-PCR testing never involved issues of reliability. Frank stated RFLP provides a conclusive result from a match using fewer loci than STR-PCR testing because the loci in RFLP testing have more variability than STR-PCR testing. When questioned regarding the accuracy of RFLP testing compared to STR-PCR

testing, Frank stated that for the most part, the accuracy would not change. Frank represented that according to today's technology, the RFLP testing in this case was sufficient to ensure a reliable result. Frank testified to an absence of any new developments in the field of forensic DNA since defendant's trial that would cause him to question the determination that the probability of anyone besides defendant matching the DNA collected from the vaginal swab was approximately 1 in 17 million.

¶ 23 Frank also described the less discriminating nature of Y-STR DNA testing in comparison to RFLP DNA testing. In other words, Y-STR testing will not yield a more powerful result than RFLP testing. Frank explained that Y-STR testing is strictly limited to a single Y chromosome rather than analyzing several different chromosomes.

¶ 24 Frank testified that mitochondrial DNA testing is less discriminating than RFLP DNA testing. Frank recounted that mitochondrial DNA testing is similar to Y-STR testing because, like Y-STR testing where all individuals in a paternal line will have the same Y-STR DNA profiled, mitochondrial testing results "would be the same through a maternal line as well." Frank testified to the rare use of mitochondrial DNA testing in forensic samples because the testing is not appropriate to use with samples that consist of multiple DNA sources. For example, samples from sexual assaults frequently contain DNA from more than one source.

¶ 25 *3. David Turngren*

¶ 26 David Turngren is a forensic scientist who works for the Illinois State Police and specializes in biology and DNA analysis. He testified that prior to defendant's trial, he examined evidence of hairs and fibers. Turngren examined items of evidence from the sexual assault submitted to him for the presence of hairs. At the time, DNA analysis testing failed to support

testing just the shaft of a hair. Turngren testified he did not test the hair presumably belonging to defendant where the hair lacked the root.

¶ 27 The State twice objected, stating defendant's motion contained no claim for DNA testing of hair follicles. The court overruled the objections.

¶ 28 Turngren testified that, today, the FBI uses mitochondrial DNA testing to test the shaft of hair for DNA, while the Illinois State Police conducts no such testing.

¶ 29 *4. Trial Court's Decision*

¶ 30 In September 2016, the trial court denied defendant's motion for forensic testing. The trial court stated that where the petition for forensic testing "fails in the evidence is that there is not a showing, any evidentiary showing or really any evidentiary basis that the testing would produce new, non-cumulative evidence relevant to the defendant's assertion of actual innocence." The trial court found where there were conclusive DNA findings, an in-court identification, fingerprint-type identification, and shoe-print identification, new forensic testing would not "reveal anything different at all."

¶ 31 This appeal followed.

¶ 32 **II. ANALYSIS**

¶ 33 On appeal, defendant argues the trial court erred in denying his motion for forensic testing where his motion established that (1) identity was the issue at trial, (2) the evidence was subject to a chain of custody, and (3) additional forensic testing had the potential to produce new, noncumulative evidence materially relevant to a claim of actual innocence. A trial court's decision to deny a motion for forensic testing is reviewed *de novo*. *People v. Shum*, 207 Ill. 2d 47, 65, 797 N.E.2d 609, 620 (2003). For the following reasons, we affirm.

¶ 34 Section 116-3 of the Code (725 ILCS 5/116-3 (West 2010)), provides, in pertinent part, as follows:

"(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, Integrated Ballistic Identification System, 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, 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 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 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."

¶ 35 Section 116-3 imposes no limit on the number of forensic testing motions a defendant may file. *People v. Bailey*, 386 Ill. App. 3d 68, 72, 897 N.E.2d 378, 382 (2008). Section 116-3 allows for scientific testing of physical evidence not previously tested and the subsection of physical evidence previously tested to scientific testing not available at the time of trial, after meeting certain requirements. 725 ILCS 5/116-3(a) (West 2010). To obtain forensic testing, the defendant must present a *prima facie* case "that identity was the central issue at trial and that the evidence to be tested was subject to a sufficiently secure chain of custody." *People v. Johnson*, 205 Ill. 2d 381, 393, 793 N.E.2d 591, 599 (2002). "The trial court then must

determine whether this testing will potentially produce new, noncumulative evidence that is materially relevant to the defendant's actual innocence claim." *Id.*

¶ 36 A. *Prima Facie* Case for Forensic Testing

¶ 37 In his section 116-3 motion for forensic testing, defendant requests new DNA testing of the items in the Vitullo kit and fingerprint analysis of the two partial palm prints not previously tested. The State concedes defendant properly complied with section 116-3(b) requirements. 725 ILCS 5/116-3(b) (West 2010). Specifically, the State concedes defendant presents a *prima facie* case that identity was the issue at trial and that the two unexamined partial palm prints and the Vitullo kit were subjected to a sufficient chain of custody. See 725 ILCS 5/116-3(b) (West 2010). Therefore, the only question on appeal is whether new DNA testing and fingerprint analysis would produce new, noncumulative evidence materially relevant to defendant's claim of actual innocence.

¶ 38 Before we address whether current DNA testing and fingerprint analysis would produce new, noncumulative evidence, we find that defendant has forfeited his claim seeking mitochondrial DNA testing on hair collected from the crime scene. See *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶ 14, 43 N.E.3d 1005 (issues not raised in the trial court are deemed forfeited). Upon a review of defendant's section 116-3 motion filed relevant to this appeal, we find defendant neglected to request additional forensic testing of any hair. While defendant argues the trial court allowed testimony regarding hair during the evidentiary hearing, we note the State repeatedly objected to that line of questioning. Therefore, we find the issue forfeited. *Id.*

¶ 39 B. New, Noncumulative Evidence

¶ 40 Defendant argues the trial court erred in denying his section 116-3 motion for forensic testing where his conviction relied on (1) faulty identification from a traumatized victim who was unable to identify him until trial, (2) shoe-print analysis rendered irrelevant by the popularity of the shoe brand at the time, (3) partial palm-print analysis that ignored two other partial palm prints, and (4) a RFLP DNA test that is outdated and unreliable. Defendant asserts current DNA testing and fingerprint analysis have the potential to produce new, noncumulative evidence materially relevant to his claim of innocence.

¶ 41 *1. DNA Testing*

¶ 42 Defendant asserts current DNA testing of the Vitullo kit has the potential to produce new, noncumulative evidence materially relevant to his claim of innocence.

Specifically, he contends current DNA tests conducted on the Vitullo kit may identify the actual perpetrator and, upon generation of a complete profile from the tested material, running the profile through the available database could potentially match a profile other than defendant's. While the State argues *res judicata* bars the consideration of certain current DNA tests, we find all current DNA testing of the Vitullo kit will produce cumulative evidence already established by the prior RFLP testing.

¶ 43 In denying defendant's section 116-3 motion, the trial court found that RFLP DNA testing was conclusive and reliable even according to the more modern STR-PCR DNA standards. Specifically, it found nothing in the evidence indicated that RFLP testing was wrong or that STR-PCR DNA testing would reveal any different or more beneficial results to defendant. The trial court stated, "Ten years from now, there might be another method of testing. Ten years later, there might be another method of testing. That doesn't mean that *** there is any reason to

believe that additional testing using a different method is going to be anything other than cumulative[.]”

¶ 44 Defendant argues the trial court erred when it denied his section 116-3 motion where an exclusion of a single probe, or locus, would exclude a suspect entirely. Defendant contends it was significant that a four loci match appeared after conducting a RFLP DNA test of semen collected from the vaginal swab of the victim and defendant's blood, and not the fifth loci as well. Therefore, defendant argues for testing under modern STR-PCR DNA testing standards claiming the modern DNA test could lead to exclusion on a single locus. Defendant asserts this would result in new, noncumulative evidence materially relevant to defendant's actual innocence claim.

¶ 45 We find defendant fails to give weight to the expert testimony presented at the evidentiary hearing. Frank, an expert in the field of DNA forensics, testified that RFLP DNA testing could obtain a conclusive result from a match using fewer loci than STR-PCR testing because the loci in RFLP testing have more variability than loci in STR-PCR testing. Frank testified that according to today's technology, the RFLP testing in this case was sufficient to ensure a reliable result even if it relies on fewer loci than STR-PCR DNA testing does.

¶ 46 Rather, defendant relies on a letter attacking the reliability of RFLP DNA testing he submitted with his section 116-3 motion. Defendant argues the letter written by Dr. Karl Reich is expert testimony because Reich, the chief scientific officer at Independent Forensics, reviewed defendant's case and sent the letter with his opinion. However, at no point during the hearing did defendant provide the foundation necessary for the letter or the author of the letter. Thus, we find the trial court properly rejected the letter and agree that the letter was "basically contrary to the evidence that was [heard at the hearing].”

¶ 47 Defendant also relies on *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 46, 2 N.E.3d 1143, to challenge RFLP DNA testing. Defendant asserts that where the RFLP testing on defendant's DNA match considered only four loci, new testing under STR-PCR looks at a greater number of loci and could confirm or deny defendant's involvement. In *Crawford*, an Illinois State Police forensic scientist testified that a DNA analysis was performed using RFLP DNA testing but that the Illinois State Police lab later replaced RFLP testing with STR testing. *Id.* The scientist stated, "if there had been a five-loci match under RFLP, but a sixth locus did not match, 'that would be an elimination.'" *Id.* However, the same expert also stated that there was no sense in comparing the loci of RFLP testing with the loci of STR testing because these are " 'two different types of DNA analysis. ' " *Id.* ¶ 47. The expert also disagreed that STR testing was a " 'better method. ' " *Id.* ¶ 46. Therefore, defendant's reliance on a single sentence in *Crawford* fails to persuade. Absent is any showing that a four-loci match under the RFLP DNA test is insufficient to find defendant's DNA matched the semen found in the Vitullo kit. Rather, compared to STR-PCR DNA testing, RFLP testing simply requires fewer loci.

¶ 48 Other forms of DNA testing would also not produce new, noncumulative evidence materially relevant to defendant's actual innocence claim. Frank testified that Y-STR testing is much less discriminating than RFLP testing and will not yield a more powerful result than RFLP testing. In addition, the court in *People v. Pike*, 2016 IL App (1st) 122626, ¶ 40, 53 N.E.3d 147, found for identification purposes, Y-STR is limited because all individuals in a paternal line will have the same DNA profile. Therefore, considering the strength of RFLP testing compared to Y-STR testing we find additional Y-STR DNA testing of the Vitullo kit will not produce new, noncumulative evidence relevant to defendant's actual innocence claim.

¶ 49 Frank also testified that for the same reasons Y-STR DNA testing is less discriminatory than RFLP DNA testing, mitochondrial testing is similarly less discriminatory. While defendant did not specifically ask for mitochondrial testing in his section 116-3 motion, he asserts that mitochondrial testing falls under his motion because he broadly asked for new forensic testing of the contents of the Vitullo kit.

¶ 50 At the evidentiary hearing, Frank testified to the rare use of mitochondrial DNA testing in sexual assault cases because the testing is not appropriate to use with samples that consist of multiple DNA sources. The trial court found RFLP DNA testing positively and conclusively matched defendant's DNA. Therefore, when considering the strength of RFLP testing compared to mitochondrial testing, we find additional mitochondrial testing of the Vitullo kit will not produce new, noncumulative evidence materially relevant to defendant's actual innocence claim.

¶ 51 Lastly, defendant cites *People v. Rokita*, 316 Ill. App. 3d 292, 736 N.E.2d 205 (2000) and *People v. Johnson*, 205 Ill. 2d 381, 793 N.E.2d 591 (2002) to support his argument that new forensic testing has the potential to produce new, noncumulative evidence materially relevant to defendant's actual innocence claim. We find the cases distinguishable. In both cases, no conclusive DNA evidence was introduced at trial. See *Rokita*, 316 Ill. App. 3d at 295 (RFLP DNA testing of seminal material recovered from the victim was inconclusive); *Johnson*, 205 Ill. 2d at 396-97 (vaginal swabs were never tested for DNA).

¶ 52 In the absence of conclusive DNA evidence introduced at trial, subsequent testing of any potentially available DNA evidence would be new, noncumulative evidence materially relevant to defendant's claim of actual innocence. However, if conclusive evidence was

introduced at trial, then any additional testing on such conclusive evidence would not produce new, noncumulative evidence materially relevant to defendant's claim.

¶ 53 Here, a conclusive RFLP DNA match existed between the semen from the Vitullo kit and defendant's DNA. The RFLP DNA testing positively and conclusively matched defendant's DNA with a statistical probability of 1 in 17 million. Frank testified to the accuracy and reliability of RFLP DNA testing. Therefore, defendant cannot show how additional testing would produce new, noncumulative evidence materially relevant to advance defendant's claim of actual innocence.

¶ 54 *2. Fingerprint Analysis*

¶ 55 Defendant also asserts fingerprint analysis of the two partial palm prints not previously tested have the potential to produce new, noncumulative evidence materially relevant to his claim of innocence. Specifically, defendant requests testing of the two unidentified partial palm prints "because it's believe[d] that one of the unidentified prints will reveal the real perpetrator in this case." Defendant also claims that the tested palm print was not properly submitted to the AFIS system to look for a match.

¶ 56 Testing is required when new evidence will add new information to a defendant's claim of actual innocence. *People v. Gibson*, 357 Ill. App. 3d 480, 487-88, 828 N.E.2d 881, 887 (2005). However, defendant fails to show how analysis of the other two partial palm prints will produce new, noncumulative evidence. An expert in fingerprint analysis testified that he analyzed one partial palm print found on the victim's vehicle and determined the print matched defendant based on 20 separate points of comparison. Also, contrary to defendant's assertion, at the evidentiary hearing on defendant's section 116-3 motion, the fingerprint expert testified that AFIS does not analyze palm prints.

¶ 57 Defendant fails to show how reviewing the two other partial palm prints will produce new, noncumulative evidence materially relevant to defendant's assertion of actual innocence because even if one of the partial palm prints reveals a match to another person, that fails to change the fact that defendant's palm print existed on the vehicle. Furthermore, additional evidence such as (1) the semen from the Vitullo kit matching defendant's DNA profile, (2) the shoe-print match, and (3) the victim's in-court identification further evidence the fact that additional testing on the other two partial palm prints would not produce new, noncumulative evidence to support defendant's claim of actual innocence.

¶ 58 Accordingly, defendant's motion failed to meet section 116-3 requirements for additional forensic testing. The trial court properly denied defendant's motion for forensic testing.

¶ 59 III. CONCLUSION

¶ 60 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 for this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 61 Affirmed.