IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PC 2015-0164**
	)	
DAVID PAYNE,	)	
	)	
Respondent.	)	

ORDER DENYING STATE'S POST-CONVICTION APPEAL AND AFFIRMING ORDER GRANTING FORENSIC DNA TESTING

On March 25, 2015, Petitioner, by and through Mark R. Stoneman, Assistant District Attorney, appealed to this Court pursuant to 22 O.S.Supp.2013, § 1373.7, from an order of the District Court of Comanche County, Case No. CF-1993-107, granting Respondent David Payne's request for forensic DNA testing.

Payne entered a blind plea of *nolo contendere* on June 17, 1993, to murder in the second degree, was sentenced to life imprisonment and fined $5,000.00. Payne did not timely file a motion to withdraw his plea or otherwise appeal his conviction. The victim, David Payne's mother, was found blindfolded with her hands and feet tied behind her back with cord and with a knife in her chest. She died from two stab wounds to the chest, had injuries consistent with having been punched in the face, and she also had injuries to her hands.

Payne filed his first application for post-conviction relief in the District Court on March 5, 2013, and a supplemental brief on November 15, 2013,

requesting DNA testing of evidence from the murder scene and further discovery of documents, physical evidence, recordings and photographs. The "Postconviction DNA Act" was enacted into law effective November 1, 2013. Following a hearing on May 22, 2014, the Honorable Gerald Neuwirth, District Judge, issued an order filed May 27, 2014, granting post-conviction DNA testing. The State appealed to this Court and in an Order issued November 5, 2014, the District Court order was vacated and the matter remanded for further proceedings.

On remand Judge Neuwirth entered an order February 24, 2015, granting Payne's request for forensic DNA testing (including, but not limited to, STR, Y-SR, mini-Filer and mitochondrial testing) on the evidence collected in association with this case and currently within the custody of the Lawton Police Department or any other governmental agency who might hold biological evidence related to this case. Judge Neuwirth found that "the absence of Petitioner's genetic profile on material evidence in addition to the inexplicable presence of an unknown male's genetic profile on that same evidence, one that yields a match in either the OSBI's DNA database or the FBI's Combined DNA Index System ("CODIS") – would clearly cast doubt on the veracity of Petitioner's confession and necessarily undermine confidence in his conviction." Judge Neuwirth concluded that "there is a clear probability that Petitioner would not have been convicted if favorable DNA testing results had been obtained at the time of his plea hearing ... ."

On post-conviction appeal, the State argues:

1. The speculated absence of Payne's DNA coupled with the speculated presence of DNA from an unknown person on

decades-old evidence would not undermine confidence in Payne's conviction for murder where Payne had detailed knowledge of the murder scene only the killer could have [known], tried to convince others to create a false alibi for him, was found in possession of items the victim would not have willingly given to him, had a motive for the murder, [had] confessed to the murder, has never offered a substantive argument as to why his confession should be disregarded and has offered no theory as to the identity of the "real killer".

2. The doctrine of laches bars Payne from relief where he waited until four State's witnesses had passed away over the course of twenty years before challenging his conviction.

3. The District Court abused its discretion by ordering State's evidence to be sent directly to an out-of-state private laboratory without first exploring options used by the Oklahoma State Bureau of Investigation and with no notice and opportunity to the State.

1.

Section 1373.7 of Title 22 provides: "An appeal under the provisions of the Postconviction DNA Act may be taken in the same manner as any other appeal." An order granting a DNA request under this Act is a final order from which the State may seek relief in this Court under the provisions of Section 1373.7. *State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 11, 337 P.3d 763, 765-766. Section V, Rule 5.1, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), sets forth the procedures that establish the manner of appealing from a final judgment of the District Court after an application for post-conviction relief has been heard in the District Court.

The trial court's initial requirement is set out in 22 O.S.Supp.2013, § 1373.4(A)(1), which provides that a court shall order DNA testing only if the court finds a reasonable probability that the petitioner would not have been

convicted if favorable results had been obtained through DNA testing at the time of the original prosecution. In this case Judge Neuwirth concluded that there is a clear probability that Payne would not have been convicted if favorable DNA testing results had been obtained at the time of his plea hearing.

Title 22 O.S.Supp.2013, § 1373.2(C) also requires that the motion requesting forensic DNA testing be accompanied by an affidavit sworn to by the convicted person containing statements of fact in support of the motion. In Payne's sworn affidavit filed in the District Court, he states: "I confessed to this crime because I was under the influence of prescription and illegal drugs at the time of the crime and my arrest, I was under duress, and I wanted very much to spare my family any further grief or trauma following the murder of my mother."

We will view a petitioner's entitlement to DNA testing under the post-conviction DNA act to be a question of law subject to *de novo* review. Any underlying factual findings made by the District Court will be reviewed for clear error. *See U.S. v. Jordan*, 594 F.3d 1265, 1269-1270 (10th Cir. 2010). In this case the State has not shown that Judge Neuwirth's decision to grant DNA testing pursuant to the post-conviction DNA act is clearly erroneous.

2.

The doctrine of laches does not apply in this case. We have a newly enacted Act which allows DNA testing. Those eligible for DNA testing pursuant to the post-conviction DNA act are defined in Section 1373.2 of Title 22. Petitioner meets these eligibility requirements.

Title 22 O.S. §§ 1373.4(D) and (F) require the following:

> D. The court may order DNA testing to be performed by the Oklahoma State Bureau of Investigation (OSBI), an accredited laboratory operating under contract with the OSBI or another accredited laboratory, as defined in Section 150.37 of Title 74 of the Oklahoma Statutes. If the OSBI or an accredited laboratory under contract with the OSBI conducts the testing, the state shall bear the costs of the testing. If another laboratory conducts the testing because neither the OSBI nor an accredited laboratory under contract with the OSBI has the ability or the resources to conduct the type of DNA testing to be performed, **or if an accredited laboratory that is neither the OSBI nor under contract with the OSBI is chosen for some other reason, then the court shall require the petitioner to pay for the testing . . .** . (emphasis added)
>
> F. If an accredited laboratory other than the OSBI or one under contract with the OSBI performs the DNA testing, the court shall impose reasonable conditions on the testing of the evidence to protect the interests of the parties in the integrity of the evidence and testing process and to preserve the evidence to the greatest extent possible.

In this case an out-of-state laboratory was chosen by Judge Neuwirth. He found that the OSBI does not have the capacity to perform mitochondrial DNA testing in-house and ordered the Innocence Project to "bear the costs of all testing, shipping and the reasonable hours used to find, collect and package the evidence." Therefore, the State has not shown that Judge Neuwirth has abused his discretion in this matter.

As Petitioner has failed to show entitlement to relief in a post-conviction DNA proceeding, the order of the District Court of Comanche County in Case No. CF-1993-107 granting forensic DNA testing is **AFFIRMED**. Respondent's Motion for Clarification and Request for Further Instruction filed in this Court on April

10, 2015, and Motion to Associate Counsel filed in this Court April 27, 2015, are **DISMISSED** for being **MOOT**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 4th day of June, 2015.

Clancy Smith
CLANCY SMITH, Presiding Judge

Gary L. Lumpkin Concur in Part/Dissent in Part
GARY L. LUMPKIN, Vice Presiding Judge

Arlene Johnson
ARLENE JOHNSON, Judge

David B. Lewis
DAVID B. LEWIS, Judge

Robert L. Hudson Concur in Part/Dissent in Part
ROBERT L. HUDSON, Judge

ATTEST:
Michael S. Richie
Clerk

PA

LUMPKIN, JUDGE: CONCURING IN PART/DISSENTING IN PART

I concur in the law which is applied within the Order. However, I cannot agree with the result which is reached because the District Court failed to properly consider the totality of the evidence supporting Respondent's conviction.

The Order correctly treats Respondent's application for post-conviction relief outside the normal manner and method of post-conviction review. The plain language of the Postconviction DNA Act clearly provides that the procedure set forth within the Act applies "[n]otwithstanding any other provision of law concerning postconviction relief" to a petitioner's claim of actual innocence raised pursuant to 22 O.S.Supp.2013, § 1373.2(A). *See State v. Young*, 1999 OK CR 14, ¶ 27, 989 P.2d 949, 955 ("It is also well established that statutes are to be construed according to the plain and ordinary meaning of their language."). This alternative post-conviction procedure is clearly set out in the Act.

If a petitioner believes that he meets the eligibility requirements for forensic DNA testing set forth in § 1373.2(A), he may request DNA testing of any biological material secured in the investigation or prosecution through the filing of a motion accompanied by a sworn affidavit containing statements of fact in support of the motion. 22 O.S.Supp.2013, § 1373.2(C). After the State files the response which § 1373.2(D) requires, the sentencing court must hold a hearing to determine whether DNA forensic testing will be ordered. 22 O.S.Supp.2013, § 1373.4(A).

To be entitled to DNA forensic testing, § 1373.4(A)(1) requires a petitioner demonstrate "[a] reasonable probability that the petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution." The "reasonable probability" burden which § 1373.4(A)(1) imposes is a familiar standard to legal practitioners. *See Toles v. State*, 1997 OK CR 45, ¶ 31, 947 P.2d 180, 188. It is the standard used to determine whether evidence is material for the purposes of a discovery violation. *Paxton v. State*, 1993 OK CR 59, ¶ 15, 867 P.2d 1309, 1318, *citing United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3384, 87 L.Ed.2d 481 (1985). It is also the standard used to review claims of ineffective assistance of counsel. *Hancock v. State*, 2007 OK CR 9, ¶¶ 106-07, 155 P.3d 796, 821, *citing Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland.*, 466 U.S. at 694, 104 S.Ct. at 2068. A petitioner need not show that he would not have been convicted more likely than not. *See id.*, 466 U.S. at 693, 104 S.Ct. at 2068. Rather, a petitioner must demonstrate that it is "reasonably likely" the result would have been different. *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011). "The likelihood of a different result must be substantial, not just conceivable." *Id.*

In the present case, the District Court correctly identified this standard but appears to have confused the potential exculpatory nature of DNA evidence

with materiality. At the hearing held on Respondent's motion, the District Court announced:

> In looking at the statute itself, one, a reasonable probability the petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution. I don't understand how you could ever deny that, if you have favorable results, they are such that they show exculpatory evidence, if they are favorable.

(Mtn. Tr. 20-21).

The District Court's conclusion that potential favorable DNA testing results always compels testing under the Act is contrary to the law. The mere fact that evidence is favorable or exculpatory does not automatically cause the evidence to be material, *i.e.*, meet the reasonable probability standard. *See Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *United States v. Agurs*, 427 U.S. 97, 109-10, 96 S.Ct 2392, 2400, 49 L.Ed.2d 342 (1976)("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.") It is not enough for a petitioner to show that favorable DNA test results would have had some conceivable effect on the outcome of the proceeding. *See id.*, 466 U.S. at 693, 104 S.Ct. at 2067; *Smith v. State*, 2010 OK CR 5, ¶¶ 19, 33, 245 P.3d 1233, 1239, 1242. Virtually every favorable DNA test result would meet that standard. *See id.*; *Stouffer v. State*, 2006 OK CR 46, ¶ 196, 147 P.3d 245, 279. (holding "mere possibility" that item might have affected outcome of trial insufficient to establish reasonable probability of different outcome). Instead, the reviewing court must consider

the materiality of the DNA test results in light of the totality of the circumstances. *See Harrington*, 562 U.S. at 113, 131 S.Ct. at 792; *Bagley*, 473 U.S. at 683, 105 S.Ct. at 3384; *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069.

The District Court's conclusion that "there is a clear probability that Petitioner would not have been convicted if favorable DNA testing results had been obtained at the time of his plea" is also clearly against the logic and effect of the facts presented (O.R. 437). *See Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (reiterating definition of abuse of discretion). In reaching this conclusion, the District Court only considered the potential favorable DNA test results in relation to Respondent's confession. (O.R. 437). The District Court wholly failed to consider the remaining evidence of Respondent's guilt. *See State ex. rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 5, 337 P.3d 763, 764-65 (setting forth State's purported evidence from plea transcript).

Reviewing the totality of the record in the present case, the evidence was such that favorable DNA test results would not have affected the outcome of the case. In its Findings of Fact the District Court determined that: 1) Respondent's sister, Susan Duncan, related that Respondent regularly borrowed money from their mother to purchase cocaine; 2) Respondent confessed that he stabbed his mother to death when she refused to give him more money and cleaned himself up before returning to her home; 3) Respondent arrived at the crime scene but his father, Hugh Payne, did not allow him to view the victim's body in the home; 4) Respondent's other sister, Carol Anthis, related that Respondent told her that their mother's hands were

clenched and that one of her fingers were broken and bruised from the forced removal of a ring; 5) Anthis also related that she found her mother's orange key ring, an item she was never without, in Respondent's apartment after the murder; 6) Respondent spontaneously exclaimed to two jail guards that "I didn't mean to kill her." (O.R. 427-28). The transcript of Respondent's plea also reveals that he stipulated that the State's evidence would also show that he knew the victim had been tied up with a heating pad cord and another electrical cord. (Plea Tr. 22-23). In light of this evidence, there is not a reasonable probability that Respondent would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution.

It is clear that the District Court misapplied the reasonable probability standard and failed to consider the totality of the evidence of Respondent's guilt. Therefore, I would reverse the District Court's Order directing DNA forensic testing of the evidence in Respondent's case.

I am authorized to state that Judge Hudson joins in this Concur in Part/Dissent in Part.