No. 24–127,534–S

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,
PLAINTIFF-APPELLEE,

v.

STANTON HOLT,
DEFENDANT-APPELLANT

BRIEF OF APPELLANT STANTON HOLT

APPEAL FROM THE DISTRICT COURT OF GEARY COUNTY
HON. KEITH COLLETT, JUDGE
DISTRICT COURT CASE NO. 93–CR–430

Kristen B. Patty KS No. 14714
Attorney at Law
P.O. Box 3545
Wichita, KS 67201–3545
Telephone: (316) 651–0030
eFax: (312) 261–9954
eMail: KristenBPatty@gmail.com
COURT-APPOINTED COUNSEL FOR APPELLANT STANTON HOLT

TABLE OF CONTENTS

STATEMENT OF THE CASE

Defendant Stanton Holt appeals from the denial of his Motion for DNA Testing Pursuant to K.S.A. 21–2512 which rescinded a previously-granted order.

STATEMENT OF ISSUES

> Did the district court err in rescinding a previously-granted order for DNA Testing pursuant to K.S.A. 21–2512, concluding that there was not a reasonable degree of scientific probability that the results would be accurate, warranting its reversal?

STATEMENT OF FACTS

In 1994, Holt was convicted by a jury of two counts of First Degree Murder (Class A felonies) and two counts of Aggravated Robbery (Class B felonies), as well as 9 Class C felonies, 13 Class D felonies, 9 Class E felonies, 27 Class A misdemeanors, and 1 Class B misdemeanor, for which he was sentenced to two consecutive Life terms plus 123 to 355 years in prison. [R.16, 86–155.] He appealed, but in No. 73,397, this Court affirmed his convictions and sentences. [R.16, 159–79.] *See State v. Holt,* 260 Kan. 33, 917 P.2d 1332 (1996). The Mandate issued June 8, 1996. [R.16, 158.]

Since then, Holt has sought post-conviction relief on other occasions, without success. [R.16, 203–27, 229–32.] *See also State v. Holt,* 298 Kan. 469, 470–71, 313 P.3d 826 (2013).

On October 19, 2020, Holt filed the *pro se* motion requesting DNA testing that is the subject of this appeal. [R.1, 16–28.] A lawyer appointed to represent Holt followed with a formal motion, in which she noted that DNA testing, including touch DNA, of physical evidence was not conducted at the time of trial and that, in particular, blood on items of clothing and shoes that had been used as trial exhibits might be found to not belong to the victims. [R.1, 50–55.] At the Junction City Police Department, Holt's lawyer and the current prosecutor went through four or five boxes of evidence with the custodian and discovered that those trial exhibits had not been returned. [R.8, 4–5.] Eventually, the lawyer and the prosecutor found the trial exhibits in a district court storage area located in the basement of a detached building, separate from the courthouse, contained in file boxes in no particular packaged manner, not repackaged or sealed with appropriate evidence tape, but stuffed into plastic grocery bags, with some items were open and loose and near other items contained within those packages. [R.8, 5–6; R.15, 5–6.] The following items were sent to the Kansas Bureau of Investigation for DNA testing:

- Exhibit 43, gloves seized from Holt [*see* R.22, 6, 179–80];
- Exhibit 44, a tire iron seized from Holt [*see* R.22, 6, 179, 378–79];
- Exhibits 69A & 69B, Holt's right and left shoes [*see* R.22, 7; R.25, 32–37];
- Exhibit 183, black jeans purportedly belonging to Holt, reportedly with blood on them [*see* R.22, 11; R.24, 223];
- Exhibit 228, cuttings from the jeans with blood stains and a control sample [*see* R.22, 13; R.26, 98–99];
- Exhibit 229, swabbing from right shoe [*see* R.22, 13; R.26, 82];

- Exhibit 230, swabbing from tire iron [*see* R.22, 13; R.26, 86]; and
- Exhibits 231A & 231B, stains made from Holt's blood [*see* R.22, 13; R.26, 117].

[R.1, 82–84, 88, 103–05.]

In February 2024, the district court held an evidentiary hearing during which the prosecution presented testimony from Emily Draper, the biology case work supervisor at the KBI, who began working as a DNA forensic scientist in Ohio in 2006. [R.15, 7–8.] Draper explained that her duties include reviewing cases to determine whether they qualified for DNA testing, usually based on whether testing had been done in the past and, if so, whether the technology had changed or progressed for it to be done again. [R.15, 11–12.] If testing has not occurred, then the items of evidence are reviewed to see if enough has been provided for testing to be performed. [R.15, 12.] Because the KBI was not yet performing DNA testing in 1993, it had no record that any DNA testing had been performed on this material "probably ever" and, in any event, the technology had progressed since that time, Holt's case qualified. [R.15, 19–21, 23–24.]

Alluding to what both counsel had proffered earlier [R.15, 5–6], Draper concurred that the evidence brought to the laboratory was not packaged appropriately, and there was not a lot of documentation regarding what previous testing might or might not have occurred, so it was returned to the submitting agency. [R.15, 12–13,

26–27.] Draper recalled plastic packages with what she thought were court exhibit stickers indicating that they had been in a courtroom, possibly opened:

> It looked like the items were not properly sealed, especially for today's standards. And it just was, again — like, I thought it was either maybe a Banker's box or a copy paper box that just had a kind of a hodgepodge of items and packages all mixed together in that box.

[R.15, 13.] "I can't recall a time that I've seen evidence in my career that would have been submitted the way this particular box of evidence came to the laboratory." [R.15, 28.]

Draper explained why it was important that items be preserved in separate packaging:

> What we are looking for in the laboratory, especially with regards to DNA testing, is we want items packaged in their own individual package, nothing mixed together, not several items combined into one package where you could have commingling of items together. We also want items packaged in something breathable, so a paper bag, an envelope, a box, something that is not airtight.
>
> If there is any moisture on an item, if it's metal, there could be rust. If there's not metal, there could still be mold growth, if something is packaged in plastic with any moisture whatsoever. Both of those, rust and mold, are detrimental to DNA testing. They actually start to eat away at DNA that's present, which would render our testing pretty useless at that point because there's no DNA remaining. So we want to see those items individually packaged in something that can breathe.

[R.15, 14–15.] But for the plastic packaging, she said, the age of the case would not concern her: "DNA is really hearty, it can stay on items for decades, if packaged and preserved properly." [R.15, 15.] Draper also was concerned with the lack of any record regarding how and when the items were handled, including, say, whether they were passed around the jury box. [R.15, 16–17.]

> The cases that are still being submitted that are older, some of our colder cases, those are being submitted and they've been maintained. They have been stored in an agency property room, they've been properly sealed and separated and marked.
>
> So even our older cases from the late '90s, early 2000s that are still being submitted today, we receive those regularly, but there is still documentation of a chain of custody, there's still proper packaging.

[R.15, 28.]

Also problematic was the fact that no known DNA samples were submitted for comparison, including from anyone who might have handled the evidence at any time and, in particular, from the victims. [R.15, 17–19, 22.] Regardless, Draper said that it was common at the time during a medical examination to collect hair with root material, from which DNA could be retrieved, and that it was possible that the autopsies would have included preserving a blood card or a blood sample, which today is common practice. [R.15, 22–23, 25–26.] Draper acknowledged that it is possible to perform the DNA testing on the items, and that with a sample from Holt, it could be determined whether the DNA was his. [R.15, 24–25.]

Draper said that she could presume, when items have been stored appropriately, that the evidence is in the state roughly that it was at the time that it was collected. [R.15, 17.] But in this case, knowing that the items were not packaged appropriately and suspecting that they were not stored appropriately caused Draper concern: "So I don't know that my DNA testing today would be reflective of the evidence as it was back in1993 versus how it is today in 2024." [R.15, 17.]

> What my concerns are, again, have to do with the current state of the evidence, because I don't know the history that occurred prior. I know how it's packaged and how it appears today to be mixed in, to be having — having been stored in plastic, having been in a basement in a separate building. I don't know who has access to that building. I don't know how much it could have been handled between now and then.
>
> When I'm testing an item I am testing its current state. I can tell you the DNA that's present today. The DNA that's present today might not have been present in 1993 due to all of those reasons. DNA that was present in 1993 might no longer be present because it could have been wiped away or wiped off or handled by other people and come off.
>
> So it's the same, I might find something today that wasn't originally there. I might find something absent that was — the DNA today is not necessarily reflective of how it was originally collected in 1993, that's what I'm trying to tell you.

[R.15, 21; *see also* R.15, 23.]

Based on Draper's testimony, as well as the lack of a known sample from murder victim M.P., the district court denied Holt relief, concluding that there was not a reasonable degree of scientific probability that the results of any DNA testing would be accurate, thereby rescinding its previously-granted order. [R.1, 156–58; R.15, 36–38.]

Holt timely filed Notices of Appeal. [R.1, 134–35, 140–42.]

ARGUMENT

The district court erred in rescinding a previously-granted order for DNA Testing pursuant to K.S.A. 21–2512, concluding that there was not a reasonable degree of scientific probability that the results would be accurate, and it must be reversed.

Standard of review.

After a district court appoints counsel and conducts a *nonevidentiary* hearing, the denial of a K.S.A. 21–2512 petition for DNA testing presents a question of law over which an appellate court exercises unlimited review. *State v. Hernandez,* 303 Kan. 609, 613, 366 P.3d 200 (2016). Authority for the scope of appellate review where, as here, the district court denies a K.S.A. 21–2512 petition for DNA testing after appointing counsel and conducting an *evidentiary* hearing was not easily located.

To the extent that resolution of this appeal requires interpretation of K.S.A. 21–2512, this Court's review is unlimited. *Goldsmith v. State,* 292 Kan. 398, 400, 255 P.3d 14 (2011).

In other situations where a district court conducts an evidentiary hearing and makes findings of fact and conclusions of law in ruling on a motion, an appellate court applies a mixed standard of review. *Balbirnie v. State,* 311 Kan. 893, 897–98, 468 P.3d 334 (2020). Under this standard, an appellate court must determine whether the district court's factual findings are supported by substantial competent evidence and

whether those findings are sufficient to support the district court's conclusions of law, but ultimately, the district court's conclusions of law and its decision to grant or deny a motion are reviewed *de novo*. *See Bellamy v. State,* 285 Kan. 346, 355, 172 P.3d 10 (2007).

Substantial competent evidence is that which possesses both relevance and substance and which furnishes a substantial basis in fact from which the issues can reasonably be resolved. *State v. Sanders,* 310 Kan. 279, 294, 445 P.3d 1144 (2019). In reviewing a district court's factual findings for substantial competent evidence, appellate courts do not reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence. *Id.; see Khalil-Alsalaami v. State,* 313 Kan. 472, 486–87, 486 P.3d 1216 (2021).

Discussion.

K.S.A. 21–2512 sets out the requirements for post-conviction DNA testing:

> (a) Notwithstanding any other provision of law, a person in state custody, at any time after conviction for murder in the first degree … may petition the court that entered judgment for forensic DNA testing (deoxyribonucleic acid testing) of any biological material that:
>
> (1) Is related to the investigation or prosecution that resulted in the conviction;
>
> (2) is in the actual or constructive possession of the state; and
>
> (3) was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results.

• • •

(c) The court shall order DNA testing pursuant to a petition made under subsection (a) upon a determination that testing may produce non-cumulative, exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced.

• • •

(f) (1) Except as provided in subsection (f)(3), if the results of DNA testing conducted under this section are unfavorable to the petitioner, the court:

(A) Shall dismiss the petition; and

(B) in the case of a petitioner who is not indigent, may assess the petitioner for the cost of such testing.

(2) If the results of DNA testing conducted under this section are favorable to the petitioner and are of such materiality that a reasonable probability exists that the new evidence would result in a different outcome at a trial or sentencing, the court shall:

(A) Order a hearing, notwithstanding any provision of law that would bar such a hearing; and

(B) enter any order that serves the interests of justice, including, but not limited to, an order:

(i) Vacating and setting aside the judgment;

(ii) discharging the petitioner if the petitioner is in custody;

(iii) resentencing the petitioner; or

(iv) granting a new trial.

(3) If the results of DNA testing conducted under this section are inconclusive, the court may order a hearing to determine whether there is a substantial question of innocence. If the petitioner proves by a preponderance of the evidence that there is a substantial question of innocence, the court shall proceed as provided in subsection (f)(2).

The statute does not require the petitioner to make specific allegations regarding how the requested testing would produce noncumulative, exculpatory evidence but, instead,

permits a "fishing expedition" for DNA evidence, with the district court charged with the responsibility of assessing the exculpatory and cumulative nature of each item proposed to be tested. *State v. Lackey,* 295 Kan. 816, 824, 286 P.3d 859 (2012).

In deciding whether evidence is exculpatory, the district court is not permitted to weigh the evidence, but simply determine whether it tends to disprove a fact in issue which is material to guilt or punishment, that is, must only tend to establish a criminal defendant's innocence but need not be exonerating. *State v. Johnson,* 299 Kan. 890, 894, 327 P.3d 421 (2014). Because DNA testing is intended to confirm or dispute the identity of individuals involved in or at the scene of a purported crime, DNA evidence may be exculpatory if it tends to establish innocence based on an individual's identity. *Johnson, id.* Whether testing should be ordered is neither an exercise of discretion nor an issue of whether there is a substantial question of innocence. *Lackey,* 295 Kan. at 824; *State v. Hernandez,* 303 Kan. 609, 620–21, 366 P.3d 200 (2016). Exculpatory by the smallest margin is sufficient. *Hernandez, id.*

As for the requirement that the exculpatory evidence also be noncumulative, the term's opposite, *i.e.,* cumulative evidence, has been defined as "evidence of the same kind to the same point, and whether it is cumulative is to be determined from its kind and character, rather than its effect." *State v. Rodriguez,* 295 Kan. 1146, 1158, 289 P.3d 85 (2012).

Here, it is undisputed that Holt was convicted of First-Degree Murder, twice, and that biological material related to the investigation and prosecution that resulted in his convictions remains in the actual or constructive possession of the state and was not previously subjected to DNA testing; thus, Holt's case qualifies under K.S.A. 21–2512(a). Otherwise, as Holt's lawyer pointed out in argument to the district court [R.15, 33], the only similar case appears to be *Goldsmith v. State,* 292 Kan. 398, 255 P.3d 14 (2011), in which this Court determined that the district court erred in dismissing pursuant to K.S.A. 21–2512(f)(1) a previously-granted petition for DNA testing without granting a hearing and on the unilateral request of the prosecution after testing on the first of 35 items of evidence produced a result unfavorable to the defendant. The proper procedure, this Court said:

> When a district court has issued an order pursuant to K.S.A. 21–2512 for postconviction forensic DNA testing of multiple items of evidence, the State may not unilaterally discontinue testing after obtaining a single result unfavorable to the defense. Nor may the district court automatically dismiss the petition. If the State believes further testing of additional items to be pointless, it should move to reconsider or amend the court's order; the court should hold an evidentiary hearing on the motion; and the defendant should be permitted to attend the hearing and participate with the assistance of counsel.

292 Kan. 398, Syl. ¶ 2.[1] The prosecution's request that the district court reconsider the order for DNA testing in Holt's case was oral. [R.1, 111–13; R.14, 2.]

[1]Following remand, Goldsmith's subsequent appeal focused on whether the district court complied with this Court's mandate and does not appear to assist with resolution of this appeal.

K.S.A. 21–2512(f) identifies three possible results of postconviction DNA testing — unfavorable to the petitioner, favorable to the petitioner, and inconclusive — requiring specific and distinct procedures for each result. *Haddock v. State,* 282 Kan. 475, 495, 146 P.3d 187 (2006) [characterizing statutory dispositions and procedural requirements as "mandatory"]. Whether the results of any DNA testing would be accurate to a reasonable degree of scientific probability [R.1, 156–58; R.15, 36–38] is not a factor that the Kansas Legislature has included for consideration anywhere in K.S.A. 21–2512, and this Court cannot delete vital provisions or supply vital omissions in a statute. "No matter what the legislature may have really intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one that the legislature alone can correct." *State v. Urban,* 291 Kan. 214, 216, 239 P.3d 837 (2010). If anything, its consideration would seem to be appropriate in, say, determining materiality under K.S.A. 21–2512(f)(2), but only after testing has completed and the results released.

K.S.A. 21–2512 permits Holt a "fishing expedition" for DNA evidence, and this Court has concluded that such an expedition is one the Legislature deems worth conducting. *Bruner v. State,* 277 Kan. 603, 606, 88 P.3d 214 (2004). The prosecution is already in possession of Exhibits 231A and 231B, stains made from Holt's blood [*see* R.22, 13; R.26, 117], and he can provide an additional sample for determination of what DNA is his. [R.15, 24–25.] Further, hair with root material, blood cards or blood samples might have been collected during the autopsies for determination of what

DNA belongs to the murder victims. [R.15, 22–23, 25–26.] The district court erred in rescinding its previously-granted order, then denying Holt's Motion for DNA Testing Pursuant to K.S.A. 21–2512, and it must be reversed.

CONCLUSION

For the foregoing reasons, the denials of Stanton Holt's motions for DNA testing pursuant to K.S.A. 21–2512 must be reversed.

Respectfully submitted,

Kristen B. Patty KS No. 14714
Attorney at Law
P.O. Box 3545
Wichita, KS 67201–3545
Telephone: (316) 651–0030
eFax: (312) 261–9954
eMail: KristenBPatty@gmail.com
COURT-APPOINTED COUNSEL FOR APPELLANT
STANTON HOLT

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Appellate Courts by using the electronic filing system (which will send a notice of electronic filing) and provided it in digital format by e-mail to the Kansas Attorney General's Appeals Office (ksagappealsoffice@ag.ks.gov) and the Geary County Attorney (sue.burkett@gearycounty.org), as well as the Deputy Kansas Solicitor General (Kris.Ailslieger@ag.ks.gov).

Dated this 27 day of November, 2024.

COURT-APPOINTED COUNSEL FOR APPELLANT