No. 24-127534-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff / Appellee

vs.

STANTON HOLT,
Defendant / Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Geary County, Kansas
Honorable Keith Collett, Judge
District Court Case No. 93-CR-430

Andrew J. Lohmann, #27622
Assistant Solicitor General
Office of the Kansas Attorney General
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612
Phone: (785) 296-2215
Fax: (785) 296-3131
Andy.lohmann@ag.ks.gov
Attorney for Appellee

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BRIEF OF APPELLEE

NATURE OF THE CASE

Stanton Holt appeals the district court's denial of his K.S.A. 21-2512 petition for postconviction DNA testing. Because the biological material was previously tested under the same technique available now, this Court should affirm the district court. Alternatively, the district court should be affirmed because the current condition of the biological material would render DNA testing meaningless.

STATEMENT OF THE ISSUE

I. The district court did not err by denying Holt's motion for DNA testing.

STATEMENT OF FACTS

In 1994, Holt was convicted by a jury of more than 60 offenses, including two counts of first-degree murder, multiple counts of aggravated burglary, burglary, felony theft, misdemeanor theft, criminal damage to property, and other offenses. (R. XVI, 58-113).

Holt's case involved a string of burglaries occurring from March 4, 1993, to April 30, 1993. (R. XVI, 58-82). During these burglaries, two residents were killed: J.A. on April 25, 1993, and M.P. on April 29, 1993. (R. XVI, 58-113; XXIII, 49, 61, 283). The burglaries had a common element of attempting to pry open the exterior door using the doorknob as a fulcrum. (R. XXVII, 104-05). Often the telephone wires were also cut. (R. XXVII, 105).

On May 1, 1993, Holt broke into an apartment, and the resident shot him in the back with a .22 caliber revolver. (R. XXIV, 23-26, 78-80). Holt then ran from the apartment building. (R. XXIV, 31-32). On May 2, 1993, winter gloves and a blue tire iron were discovered together on the side of a different apartment building north of the location where Holt was shot. (R. XXIV, 119-20, 130-31). The gloves were wet when they were discovered as it had been raining. (R. XXIV, 29, 122). The gloves and tire iron would become State's Exhibits 43 and 44, respectively. (R. XXIV, 116-18). A swab was taken from the tire iron, which was State's Exhibit 230. (R. XXVI, 165).

When processing the scene of M.P.'s homicide, a greeting card with a partial shoe print made from dried blood was located. (R. XXIII, 332-36; XXVI, 138). Early on May 2, 1993, officers executed a search warrant at Holt's parents' home, where Holt had been residing. (R. XXV, 94). The search warrant authorized officers to seize

shoes that would leave behind a print matching the partial shoe print on the greeting card. (R. XXV, 95-97). An officer located and seized a pair of black high-top Nike basketball shoes. (R. XXV, 96-97, 109). Holt's parents stated that the shoes belonged to Holt and that he wore them to work. (R. XXV, 52-53; XXVI, 319-20). Officers were also attempting to locate bloody clothing, but were unable to find any bloody clothing at that time. (R. XXV, 105). The shoes would become State's Exhibits 69A and 69B. (R. XXV, 97). A swab was collected from the right shoe, which was State's Exhibit 229. (R. XXVI, 160).

After Holt was shot, he went inside a garage and changed into different clothes. (R. XXIV, 559; XXVIII, 200). When Holt was in jail, he called his girlfriend and asked her to retrieve the clothes from the garage and bring them to his parent's house. (R. XXIV, 557; XXVIII, 218). Holt's girlfriend found the clothes, including a pair of black jeans, which were wet from the rain. (R. XXIV, 560). Holt's girlfriend then brought the jeans to Holt's parent's home and gave them to his mom. (R. XXIV, 558). After law enforcement discovered that Holt's clothes were brought over to his parent's home, officers retrieved the black jeans. (R. XXIV, 300-01). An officer noted that the jeans appeared to have been washed and had blood stains. (R. XXIV, 301-02). The black jeans would become State's Exhibit 183. (R. XXIV, 299). Cuttings were taken from the jeans which were State's Exhibit 228. (R. XXVI, 98-99).

Evidence at trial showed that Holt was the owner of the gloves located with the tire iron. An officer testified that he saw Holt when executing a search warrant on a third party's house for narcotics. (R. XXII, 178-79). Holt was wearing gloves, and

had a flashlight and a tire iron. (R. XXII, 179). The officer noted that the gloves in Exhibit 43 matched the gloves he saw Holt wearing when he executed the search warrant. (R. XXII, 180-81). Frank Thompson, Jr., who assisted Holt with some of the burglaries, also stated that the gloves in Exhibit 43 were Holt's gloves. (R. XXIV, 473, 475). Holt, however, testified that the gloves were not his and that he saw John Thompson with them. (R. XXVIII, 170). The surface of the gloves tested positive for the presence of human blood, but no DNA typing results were able to be obtained. (R. XXVI, 89, 164, 177).

Frank Thompson, Jr., testified that Holt brought a tire iron with him to pry open doors when committing the burglaries. (R. XXIV, 474-85). However, Frank was not sure if the tire iron in Exhibit 44 was the same tool that Holt used during the burglaries that he assisted. (R. XXIV, 475-76). A KBI examiner determined that the tire iron in Exhibit 44, to the exclusion of any other tool, was used to commit one of the charged burglaries. (R. XXVI, 383, 389). The remaining burglaries had inconclusive results about whether the tire iron was the tool used in those burglaries. (R. XXVI, 391-400; XXVII, 1). A forensic pathologist determined that the tire iron was consistent with a weapon used to murder J.A. and M.P. (R. XXV, 2-6, 10-11). Holt testified that he had never seen the tire iron in Exhibit 44 before trial proceedings. (R XXVIII, 167-68). The tire iron tested positive for the presence of human blood, but no DNA typing results were able to be obtained. (R. XXVI, 86, 176, 189).

The black shoes in Exhibits 69A and 69B contained evidence linking the owner of those shoes to the murder of M.P. The swab from the shoes showed DNA consistent

with M.P.'s blood sample. (R. XXVI, 210-11). The shoes corresponded in size, design, and a possible unique identifying feature with the blood print on the greeting card found at M.P.'s residence. (R. XXV, 308). And fibers collected from the shoes were consistent with the carpet in M.P.'s bathroom and the possibility that they originated from another source was remote. (R. XXV, 276-78).

The State presented testimony linking the shoes to Holt. Both of Holt's parents had told law enforcement that Holt wore the shoes in Exhibits 69A and 69B to work. (R. XXVI, 319-20). Holt's former co-worker testified that Holt wore black high-top Nike shoes to work. (R. XXV, 70-71). Holt's former attorney testified that Holt was wearing black high-top tennis shoes at a sentencing hearing in a 1992 case. (R. XXV, 66). And at trial, Holt's father again confirmed that the shoes in Exhibits 69A and 69B belonged to Holt. (R. XXV, 34-35). Holt testified that John Thompson left the shoes in his car, and Holt brought the shoes inside his parent's home. (R. XXVIII, 173-74).

Holt did not dispute that the jeans in Exhibit 183 were his jeans. (R. XXVIII, 245). The parties were instead focused on the source of the blood located on the front of the jeans. (R. XXVIII, 246-47). Although Holt was shot, the doctor who treated Holt believed the bullet wound produced only about a tablespoon of blood and the bleeding would have stopped quickly. (R. XXIV, 81). The State questioned Holt on whether he changed clothes and wanted them destroyed after being shot because he was afraid the blood on the front of the pants would implicate him in the homicides. (R. XXVIII, 246). Holt stated that the blood was the result of water and blood running

everywhere. (R. XXVIII, 247). Human blood was present on the jean cuttings, but no DNA typing results were able to be obtained. (R. XXVI, 95, 176).

DNA testing in the case was performed by Jennifer Maire Super Mihalovich and Edward Thomas Blake, who worked for a private lab. (R. XXVI, 150-51, 160-68, 192, 219-233.) They performed a type of DNA analysis called Polymerase Chain Reaction (PCR) testing on the submitted items. (R. XXVI, 150-51, 160-68, 192, 219-233.)

Following his convictions, the district court sentenced Holt to a controlling sentence of two consecutive life terms plus 123 to 355 years in prison. (R. XVI, 154-55). Holt filed a direct appeal, asserting that there were jury instruction errors, double jeopardy violations, and insufficient evidence to convict him. This Court affirmed his convictions. *State v. Holt*, 260 Kan. 33, 34-45, 907 P.2d 1332 (1996). Since his convictions were affirmed, Holt has pursued multiple avenues of relief from his convictions and sentence. See *Holt v. State*, No. 119,619, 2019 WL 6794473 (Kan. App. 2019) (unpublished opinion) (listing cases).

On October 19, 2020, Holt filed a *pro se* motion requesting DNA testing, which is the subject of this appeal. (R. I, 16-28). The district court appointed Holt counsel to file a proper motion for DNA testing under K.S.A. 21-2512. (R. I, 33). With counsel, Holt filed a formal motion, stating that DNA testing was not conducted before his trial. (R. I, 50-55). The motion continued that there were items of blood-stained clothing that the State used to convict him. (R. I, 50-55).

After Holt identified what he wanted tested, his attorney and the State went through evidence at the Junction City police department and discovered the trial exhibits were not returned to the department. (R. VIII, 4-5). However, the trial exhibits were located in a district court storage area located in the basement of a detached building. (R. XV, 5). The exhibits were contained in file boxes in no particular packaged manner and they were not repackaged or sealed with appropriate evidence tape. (R. XV, 5-6). Instead, they were placed in plastic grocery store bags, with items loose and near other items. (R. XV, 6).

The parties identified the following trial exhibits relevant to Holt's motion for DNA testing:

- Exhibit 43, gloves. (R. I, 83; XXII, 180).
- Exhibit 44, blue tire iron recovered with gloves. (R. I, 83; XXII, 379).
- Exhibits 69A and 69B, right and left black shoes. (R. I, 83; XXII, 7).
- Exhibit 183, Holt's black jeans with blood on them. (R. I, 83; XXIV, 223).
- Exhibit 228, cuttings from Holt's jeans. (R. I, 83; XXVI 98-99).
- Exhibit 229, swab from the right shoe. (R. I, 83; XXVI, 82-83).
- Exhibit 230, swab from tire iron. (R. I, 83; XXVI, 86).
- Exhibits 231A and 231B, Holt's known blood stains (R. I, 83; XXVI, 117).

On December 1, 2021, the district court signed an order directing that the identified items be removed from the district court storage, transferred to the police evidence custodian, and be sent to the KBI lab to determine if the items are in a condition that DNA testing could be performed. (R. I, 82-84). At a September 1, 2022,

status hearing, Holt's attorney informed the district court that the KBI lab requested an additional order showing why the evidence needed tested. (R. XII, 2). As a result, the district court signed an order directing that the items be tested for DNA. (R. I, 104).

At a November 2022 status hearing, Holt's attorney informed the district court that the KBI lab had concerns about testing because the agency needed DNA samples to test against and it had concerns about how the evidence was stored. (R. XIII, 2). At a January 2023 status hearing, the State requested that the district court set an evidentiary hearing and reconsider its order directing the KBI to perform DNA testing. (R. XIV, 2).

In February 2024, the district court held an evidentiary hearing on the State's motion to reconsider the order directing DNA testing. (R. XV, generally). The State presented testimony from Emily Draper, the biology case work supervisor at the KBI. (R. XV, 7). Draper had worked as a DNA forensic scientist since 2006. (R. XV, 8). Draper explained that she reviews cases to determine whether they qualify for DNA testing. (R. XV, 11). First, Draper assesses whether testing has been previously performed and, if so, whether the technology has progressed from the initial testing. (R. XV, 11-12). If the current technology was used, the agency's legal team raises an objection to the testing. (R. XV, 12). If testing has not occurred or technology had progressed, the KBI goes through the items to make sure everything is in place for testing. (R. XV, 12).

Draper explained that the KBI did not perform DNA testing in 1993, so it had no record of whether any DNA test had been performed. (R. XV, 23-24). Draper also explained that she believed the technology that exists today was not available when the case was tried:

> "Today we use what's called the polymerase chain recollection. We're able to make millions of copies of DNA that is present on a sample. That technology wasn't around in '91 or '93 -- I'm sorry, 1993, at the time the case was submitted within the State of Kansas that testing wouldn't have been available. A precursor to the current technology would have used something called an enzyme to cut DNA into pieces to look at the size of the pieces. That's -- again, that -- that technology ceased being used again in the late '90s, early 2000s. That might have been available in 1993. Certainly not at the KBI, possibly at the FBI." (R. XXV, 20).

As for the items Holt sought to test, Draper noted that the items were not packaged appropriately and documentation was missing about any prior testing. (R. XV, 12-13). As a result, the items were returned to the police department. (R. XV, 13). Draper explained that the items came in plastic packages, were not properly sealed, and were in a box all mixed together. (R. XV, 13). Draper explained proper methods of preserving evidence:

> "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 breath." (R. XV, 14-15).

In addition to the packaging, Draper was concerned about the lack of information about how the items were handled and who handled the items. (R. XV, 16-17). With the state of the evidence and lack of information, Draper would be unable to determine if the DNA present today was present in 1993. (R. XV, 21). And DNA that was present in 1993 might no longer be present. (R. XV, 21).

Another problem Draper identified was that there were no known samples for comparisons that were submitted. (R. XV, 22). Draper would not be able to determine whether victim DNA was present without a known sample from the victim. (R. XV, 22). Draper noted that it was possible that victim DNA may be available if it could be derived from a hair sample or if an autopsy included a blood sample. (R. XV, 22-23). Draper acknowledged that if the agency had a DNA sample from Holt, it would be possible to perform DNA testing on the items and determine whether any DNA matched his. (R. XV, 24-25).

The district court determined that DNA testing could not be performed with any degree of reasonable scientific certainty because of the condition of the items and the lack of a DNA sample from the victim. (R. I, 156-58; XV, 37-38). As a result, the district court dismissed Holt's motion for DNA testing. (R. I, 156-58; XV, 37-38).

Holt appeals. (R. 1, 134-35).

ARGUMENTS AND AUTHORITIES

I. The district court did not err by denying Holt's motion for DNA testing.

Holt argues that the district court erred by denying his motion for DNA testing and finding that DNA testing could not be performed with any degree of reasonable scientific certainty. (Appellate Brief, 7-13).

Standard of Review

As Holt mentions, Kansas caselaw reveals that a denial of a motion for DNA testing under K.S.A. 21-2512 typically occurs without conducting an evidentiary hearing. See, e.g., *State v. Hernandez*, 303 Kan. 609, 613, 366 P.3d 200 (2016). A district court's denial of a K.S.A. 21-2512 motion for DNA testing following a nonevidentiary hearing is a question of law subject to unlimited review. *Wimbley v. State*, 292 Kan. 796, 809, 275 P.3d 35 (2011).

In this case, however, the district court held an evidentiary hearing before denying Holt's motion for DNA testing. Generally, appellate courts apply a bifurcated standard of review when a district court conducts an evidentiary hearing and makes findings of fact and conclusions of law. *State v. Dooley*, 313 Kan. 815, 819, 491 P.3d 1250 (2021). If factual findings are in dispute, an appellate court examines the record and determines whether substantial competent evidence supports the district court's factual findings. *Dooley*, 313 Kan. at 819. The appellate court then reviews the district court's conclusions of law de novo. *Dooley*, 313 Kan. 815, 819.

Analysis

The right to postconviction DNA testing is contained in K.S.A. 2020 Supp. 21-2512, which provides, in relevant part:

> "(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 the 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.
>
> (b) (1) The court shall notify the prosecuting attorney of a petition made under subsection (a) and shall afford the prosecuting attorney an opportunity to respond.
>
> (2) Upon receiving notice of a petition made under subsection (a), the prosecuting attorney shall take such steps as are necessary to ensure that any remaining biological material that was secured in connection with the case is preserved pending the completion of proceedings under this section.
>
> "(c) The court shall order DNA testing pursuant to a petition made under subsection (a) upon a determination that testing may produce noncumulative, 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)."

K.S.A. 2020 Supp. 21-2512 creates an opportunity for innocent people convicted of severe crimes to be exonerated. *State v. Angelo,* 316 Kan. 438, 451, 518 P.3d 27 (2022). The statute allows utilization of "DNA testing to help determine if one who is in state custody 'was wrongfully convicted or sentenced' and if so, to vacate and set aside the judgment, discharge the person if in custody, resentence, or grant a new trial." *State v. Denney*, 278 Kan. 643, 654, 101 P.3d 1257 (2004). However, the procedures only "provide for postconviction DNA testing under narrow circumstances." *Denney*, 283 Kan. at 793-94.

While this case was pending, this Court in *Angelo* clarified that K.S.A. 2020 Supp. 21-2512 creates a three-step process leading up to the district court's decision whether to order DNA testing:

> "First, the petition must allege that biological material exists and satisfies the threshold requirements for testing under [K.S.A. 2020 Supp. 21-2512(a)]. Second, once the State has notice of the petition, it must preserve any remaining biological material that it previously 'secured in connection with the case' and identify such biological material in its response. [K.S.A. 2020 Supp. 21-2512(b)(2)]. Finally, once

> the pleadings have been filed, the parties will either agree or dispute that biological material satisfying the threshold requirements for testing under [K.S.A. 2020 Supp. 21-2512(a)] exists. If the parties agree such biological material exists, then they can proceed to argue whether testing will produce noncumulative, exculpatory evidence compelling the district court to order testing under [K.S.A. 2020 Supp. 21-2512(c)]. But if they continue to dispute the existence of such biological material, then they can present evidence to the district court for appropriate fact-finding. In that situation, the petitioner, as the proponent of DNA testing, bears the burden to prove the existence of such biological material." *Angelo*, 316 Kan. at 455.

The scope of testing in K.S.A. 2020 Supp. 21-2512 is limited to "any biological material." In reviewing whether a petition meets the threshold requirements for testing, the petitioner must request DNA testing of biological material, not just a physical object. *Angelo*, 316 Kan. at 452. "The plain language of subsection (a) does not contemplate or provide for testing of other physical evidence to determine whether biological material is present." *Angelo*, 316 Kan. at 452. As a result, "when an inmate's petition requests testing of other physical evidence, it must also contain allegations sufficient to establish that biological material is present on that physical evidence." *Angelo*, 316 Kan. at 456.

Once the State has notice of the petition, the State is required to preserve only the biological material that was secured in connection with the case. *Angelo*, 316 Kan. at 453. "The plain language cannot be read to impose a duty on the State to call its crime scene investigators back in to examine or re-examine the physical evidence and determine whether any of those items contain biological material that the prosecution had not previously 'secured.'" *Angelo*, 316 Kan. at 453-54.

In Holt's petition, he requested DNA testing of physical evidence, including any alleged weapons or clothing, arguing that the physical evidence was never tested for DNA. (R. I, 51-52). The petition then clarifies that items of clothing and shoes contained blood. (R. I, 52). Holt argued "[i]f DNA testing had existed at the time of the trial and the items tested and if it was determined that it was only the blood of the petitioner on the items, then that could have significantly swayed a jury to acquitting the petitioner." (R. I, 52).

Instead of filing a response, the State and Holt's attorney went through the items and agreed on the items that would be responsive to Holt's request for DNA testing. The State did not dispute the items contained biological material. After the KBI received the items and the order for DNA testing was issued, the State moved to reconsider the order for DNA testing based on the KBI's problems with the quality of the items submitted. The district court held an evidentiary hearing with Holt present on the State's motion to reconsider.

The State's motion to reconsider was properly before the district court.

Notably, the State's motion to reconsider was properly before the district court. This Court considered a similar situation in *Goldsmith v. State*, 292 Kan. 398, 255 P.3d 14 (2011), where a district court ordered testing on 35 items, the KBI tested only one item, and the district court denied Goldsmith's motion for DNA testing because the DNA testing on the one item was unfavorable to him. The *Goldsmith* Court held:

> "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." *Goldsmith*, 292 Kan. 398, ¶2.

In this case, the State did not unilaterally discontinue testing after the KBI noted concerns with the quality of the evidence. Instead, the State moved to reconsider the district court's order for DNA testing, an evidentiary hearing was held, and Holt attended with the assistance of counsel. As a result, the State's motion to reconsider was properly before the district court.

The district court should be affirmed because the biological material was previously tested under the same technique available now.

When deciding whether DNA testing should be ordered, the district court first determines whether the biological material sought to be tested meets the requirements listed in K.S.A. 2020 Supp. 21-2512(a)(1)-(3). *State v. Lackey*, 295 Kan. 816, 820, 286 P.3d 859 (2012). If those criteria are met, the district court must order DNA testing if it finds that "testing may produce noncumulative, exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced." K.S.A. 2020 Supp. 21-2512(c).

With respect to the criteria in K.S.A. 2020 Supp. 21-2512(a)(1)-(3), the first requirement is that the material be related to the investigation or prosecution that resulted in the conviction. The biological material in this case was clearly related to the investigation or prosecution. The State admitted the evidence at trial and argued

it pointed to Holt's guilt. The second requirement was also satisfied as the material was in the actual or constructive possession of the State.

The third requirement, set forth in K.S.A. 21-2512(a)(3), provides two alternatives: (1) The biological material has not been previously tested or (2) the material could be retested with new and improved techniques. *Lackey*, 295 Kan. at 822. The parties here stated the items were not previously subjected to DNA testing. However, they were.

At Holt's trial, State presented testimony from Eileen Bruna, a forensic scientist at the KBI who supervised the biology department composed of a traditional serology unit, the DNA unit, and the trace unit. (R. XXVI, 44). Bruna explained that, in addition to older generic marker systems, there were two techniques for DNA analysis, PCR (Polymerase Chain Reaction) and RFLP (Restriction fragment length polymorphism). (R. XXVI, 45-46, 222). While, at the time of Holt's trial, the KBI only had the ability to do RFLP testing, the agency would evaluate what type of test should be performed and whether to send it to another lab for PCR testing. (R. XXVI, 47-48). The KBI would send evidence to Doctor Edward Blake, the first person to utilize PCR technology in forensic cases, to perform PCR testing. (R. XXVI, 49). In Holt's case, the KBI requested Dr. Blake's assistance for PCR testing. (R. XXVI, 50).

Laura Kwart, a KBI forensic scientist, explained that she preformed PGM and EAP enzyme testing and was currently training in RFLP DNA analysis. (R. XXVI, 72). Kwart was also experienced in testing for the presence of blood and human blood. (R. XXVI, 75). Kwart tested Exhibits 69A and 69B, Holt's right and left shoes, and

detected human blood on both shoes, (R. XXVI, 82). Kwart collected swabbing samples from the shoes, including Exhibit 229, which was from Holt's right shoe. (R. XXVI, 82-83). The swab from the right shoe was sent to Dr. Blake in California for PCR analysis. (R. XXVI, 83). Kwart also detected human blood on Exhibit 44, the tire iron. (R. XXVI, 86). Kwart collected a swab from the back of the tire iron, Exhibit 230, and sent it to Dr. Blake. (R. XXVI, 86-88).

Kwart next explained that she discovered human blood on Exhibit 43, the gloves. (R. XXVI, 89). Kwart attempted traditional genetic marker analysis on the gloves, but did not get any results. (R. XXVI, 89). Human blood was also detected on Exhibit 183, Holt's black jeans. (R. XXVI, 94-95). Again, Kwart attempted traditional genetic marker analysis on the jeans, but did not get any results. (R. XXVI, 95). Kwart cut out areas of the jeans, Exhibit 228, and sent them to Dr. Blake in California for PCR analysis. (R. XXVI, 95, 99). Kwart also sent the two stains from Holt's blood sample to Dr. Blake. (R. XXVI, 103-04, 117-18).

Mihalovich, who worked with Dr. Blake, testified about how PCR analysis is performed. (R. XXVI, 151-56). Mihalovich explained that in the process of PCR analysis, a region of DNA is copied over and over, otherwise known as amplifying the DNA, until there is enough to further analysis. (R. XXVI, 56, 152). PCR analysis can be performed with little genetic material. (R. XXVI, 152). Mihalovich testified that the lab received known blood samples from M.P., the blood stains from Holt, the swab from Holt's right shoe, cuttings from Holt's jeans, the gloves, and the swabbing from

the tire iron. (R. XXVI, 160-65). Mihalovich utilized PCR testing to attempt to extract DNA samples from these items. (R. XXVI, 165).

Mihalovich was not able to successfully amplify or type the cuttings from Holt's jeans, the tire iron swabbing, or the gloves. (R. XXVI, 176-77). However, Mihalovich was able to obtain typing information from Holt's blood stains, M.P.'s blood sample, and the swab from the right shoe. (R. XXVI, 178). Dr. Blake testified about the genetic markers discovered on the swab from the shoe. (R. XXVI, 201-07). Based on the genetic samples from Holt, he could not be responsible for the blood from the shoe. (R. XXVI, 208-09). However, the blood was consistent with M.P.'s blood. (R. XXVI, 211).

Turning back to the motion for DNA testing, Draper testified that PCR testing, which the KBI currently uses, was not available at the time of Holt's trial.[1] However, the record on appeal clearly shows that the evidence Holt now seeks to have retested with PCR testing at the KBI was already tested using PCR analysis. As a result, the biological material does not qualify for testing because it was previously subjected to DNA testing under the same technique available now. Therefore, the district court did not err by denying Holt's motion for DNA testing.

The State did not argue before the district court that the biological material was previously tested using the same technique as currently available. However, an appellate court may address an issue for the first time on appeal if the district court's judgment may be upheld despite its reliance on the wrong ground or reason for its

[1] Draper called the testing "polymerase chain recollection." However, Draper appears to have mistakenly said recollection instead of reaction.

decision. *State v. Gutierrez-Fuentes*, 315 Kan. 341, 347, 508 P.3d 378 (2022). In this case, the record from Holt's trial unequivocally shows that PCR analysis was preformed on the biological material he now seeks to get retested. And Draper testified that the KBI currently uses PCR analysis to perform DNA testing. Accordingly, this Court should address this argument for the first time on appeal and affirm the district court.

The district court should be affirmed because DNA testing results would be meaningless due to the condition of the items.

Even if biological material meets the threshold criteria for postconviction DNA testing under K.S.A. 2020 Supp. 21-2512(a)(1)-(3), the district court must order DNA testing only if "testing may produce noncumulative, exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced." K.S.A. 2020 Supp. 21-2512(c). "A petitioner need not show with certainty that DNA testing of the specified items will produce noncumulative, exculpatory evidence. Instead, the possibility of generating such evidence will suffice." *Angelo*, 316 Kan. at 462. Additionally, the petitioner need not make specific allegations regarding how DNA testing would produce noncumulative, exculpatory evidence. *Hernandez*, 303 Kan. at 618.

When determining whether evidence is exculpatory, the district court may not weigh evidence and the strength of the inculpatory trial evidence is irrelevant. *Angelo*, 316 Kan. at 461. Instead, the focus of the inquiry is limited to determining whether such results may tend to prove or disprove a disputed material fact, even if the results would do so by only the slightest margin. *Angelo*, 316 Kan. at 461.

"[W]here the identity of the perpetrator is in issue at trial, DNA testing of biological material from the items collected at the crime scene may produce exculpatory evidence where the results show the lack of petitioner's DNA coupled with the presence of a third party's DNA." *Angelo*, 316 Kan. at 464. Noncumulative evidence is evidence "not of the same kind and character or not tending to prove the same thing." *State v. George*, 308 Kan. 62, Syl. ¶4, 418 P.3d 1268 (2018).

Any potential DNA results from the items would either be incriminating or inconclusive. Holt denied that he was the owner of the gloves, tire iron, and shoes. Therefore, if Holt's DNA is located on the that property, then those results would be incriminating or potentially inconclusive if they were bagged with Holt's known blood stains or Holt's jeans. If third-party DNA is located on the gloves, tire iron, and shoes and Holt's DNA is not, then the results are inconclusive because the third-party DNA could have been deposited after trial and Holt's DNA could have been destroyed after trial. Additionally, without the victims' known DNA sample, DNA not belonging to Holt would support the theory that the blood on those items came from one of the victims.

Holt's position was that all the blood on his jeans originated from him. Holt's DNA would be expected to be found on the jeans as he was shot and was wearing the jeans. If DNA not belonging to Holt was found, the results would be inconclusive because the DNA could have belonged to the victims or could have been deposited after trial. If only Holt's DNA is found on the jeans, the results would be inconclusive because the victim's DNA could have been destroyed.

While a district court has discretion to hold a hearing to determine whether there is a substantial question of innocence if DNA test results are inconclusive, no DNA test results in this case would indicate that Holt is innocent because any otherwise exculpatory evidence would be explained by the condition of the evidence.

The Kansas Court of Appeals recently rejected the argument that DNA testing under K.S.A. 21-2512 requires that the specimen undergo genetic typing analysis. *State v. George*, No. 126,875, 2024 WL 3385153, at *4 (Kan. App. 2024) (unpublished opinion). Instead, the Court determined that a specimen is subjected to DNA testing if it is examined by a technician and determined to be an unviable candidate for further analysis. *George*, 2024 WL 3385153, at *4. This case differs from *George* in some respect. In *George*, eight hairs were submitted for testing and only one was sufficient for PCR testing. *George*, 2024 WL 3385153, at *4. The Court determined that the remaining seven hairs were subjected to DNA testing when it was determined that they would not contain enough DNA to be tested. In contrast with *George*, the KBI technician here noted the items could be tested and it could determine whether DNA on the items belonged to Holt.

However, the lack of DNA available in *George* is analogous to the unreliability of DNA testing in this case. While the items can be tested, the results are of no use given how the evidence was stored. DNA evidence that was on the items in 1993 was susceptible to being destroyed or transferred. And any DNA evidence on the items now could have come from anyone handling the evidence or from comingling with other evidence. The evidence was uncontroverted that the items were so poorly stored

that a person could not expect the DNA evidence on the items to reflect how it was at the time of trial.

As the district court found, there is no reasonable degree of scientific possibility that the results of DNA testing would be accurate. Therefore, the lack of Holt's DNA coupled with the presence of a third party's DNA does not produce the exculpatory value it otherwise would. As a result, this Court should find that if a forensic examiner reviews a specimen and it is determined that the specimen is not a candidate for additional testing due to its condition, then further genetic typing analysis is not needed. Because all of the biological material submitted for testing was compromised by their storage, the district court did not err by dismissing Holt's petition.

CONCLUSION

Because the biological material sought to be tested was previously subjected to PCR testing, this Court should affirm the district court. Alternatively, the district court should be affirmed because the current condition of the biological material would render DNA testing results meaningless and inconclusive with no indication that Holt is innocent of the two counts of first-degree murder.

Respectfully submitted,

KRIS W. KOBACH
Attorney General

/s/ Andrew J. Lohmann
Andrew J. Lohmann #27622
Assistant Solicitor General
Office of the Kansas Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, Kansas 66612
(785) 296-4785
Fax: (785) 296-3131
Email: andy.lohmann@ag.ks.gov
Attorney for Appellee

CERTIFICATE OF SERVICE

I certify that on January 21, 2025 the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which automatically sent a notice of electronic filing to the following:

Kristen Patty
Attorney for Appellant

/s/ Andrew J. Lohmann
Andrew J. Lohmann #27622
Assistant Solicitor General

453 P.3d 1208 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

Stanton S. HOLT, Appellant,
v.
STATE of Kansas, Appellee.

No. 119,619
|
Opinion filed December 13, 2019
|
Review Denied July 28, 2020

Appeal from Geary District Court; RYAN W. ROSAUER, judge.

Attorneys and Law Firms

Kristen B. Patty, of Wichita, for appellant.

Krista Blaisdell, county attorney, and Derek Schmidt, attorney general, for appellee.

Before Atcheson, P.J., Bruns, J., and Burgess, S.J.

MEMORANDUM OPINION

Per Curiam:

***1** Since Stanton Shane Holt's convictions were affirmed in 1996, he has sought multiple avenues of relief, including several motions for writs of habeas corpus under K.S.A. 60-1507. In 2018, the district court summarily dismissed Holt's eighth such motion as being conclusory and successive. Holt now appeals that dismissal, arguing that he established his right to an evidentiary hearing on the claim. We affirm.

FACTUAL AND PROCEDURAL HISTORY OF HOLT'S PREVIOUS POSTCONVICTION CHALLENGES

In 1994, a jury convicted Holt of over 60 offenses, including two counts of first-degree murder. The district court ordered Holt to serve two consecutive life sentences plus 123 to 355 years in prison. Holt appealed his sentence, asserting that there was insufficient evidence to convict him, as well as, jury instruction errors, and double jeopardy violations. The Kansas Supreme Court affirmed his convictions. *State v. Holt*, 260 Kan. 33, 34-45, 907 P.2d 1332 (1996) (*Holt I*).

In the 23 years since his convictions were affirmed, Holt has pursued multiple avenues of relief from his convictions and sentence: *Holt v. State*, No. 81,489, unpublished opinion filed January 29, 1999 (K.S.A. 60-1507 motion) *(Holt II)*; *Holt v. State*, No. 89,273, 2003 WL 22990148 (Kan. App. 2003) (unpublished opinion) (K.S.A. 60-1507 motion) (*Holt III)*; *Holt v. State*, No. 96,270, 2007 WL 1413131 (Kan. App. 2007) (unpublished opinion) (K.S.A. 60-1507 motion) (*Holt IV)*; *State v. Holt*, No. 96,169, 2007 WL 1309615 (Kan. App. 2007) (unpublished opinion), (K.S.A. 60-1507 motion and motion to correct illegal sentence) (*Holt V)*; *Holt v. State*, 290 Kan. 491, 232 P.2d 848 (2010) (K.S.A. 60-1507 motion) (*Holt VI)*; *State v. Holt*, 298 Kan. 469, 313 P.3d 826 (2013) (motion for new trial construed as K.S.A. 60-1507 motion) (*Holt VII)*; *Holt v. State*, No. 113,196, 2016 WL 197720 (Kan. App. 2016) (unpublished opinion) (K.S.A. 60-1507 motion) (*Holt VIII*).

As of 2013, Holt had also filed two habeas corpus motions under 28 U.S.C. § 2254 in United States District Court for the District of Kansas. See *Holt VII*, 298 Kan. at 470.

On September 25, 2017, Holt filed a pro se "Motion Requiring Relief From Malicious Prosecution" pursuant to K.S.A. 60-1507. In his motion, Holt alleged that all motions filed since 1997 were not successive because he never received a hearing on the merits. Holt filed an amendment to his motion five months later in which he argued about the sufficiency of evidence, maintained that the jury was erroneously instructed at his trial, and claimed prosecutorial error. The district court found Holt's motion lacked factual support and was conclusory. The district court also found that the claims were successive because the same issues had been summarily denied by the district court and affirmed by this court.

DISCUSSION

When the district court summarily dismisses a K.S.A. 60-1507 motion, this court conducts a de novo review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief.

Beauclair v. State, 308 Kan. 284, 293, 419 P.3d 1180 (2018).

***2** To be entitled to relief under K.S.A. 60-1507, the movant must establish by a preponderance of the evidence either: (1) "the judgment was rendered without jurisdiction"; (2) "the sentence imposed was not authorized by law or is otherwise open to collateral attack"; or (3) "there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." K.S.A. 2018 Supp. 60-1507(b); Supreme Court Rule 183(g) (2019 Kan. S. Ct. R. 228).

To avoid the summary denial of a motion brought under K.S.A. 60-1507, a movant bears the burden of establishing entitlement to an evidentiary hearing. To meet this burden, a movant's contentions must be more than conclusory. The movant must set forth an evidentiary basis to support those contentions or the basis must be evident from the record. If such a showing is made, the court is required to hold a hearing unless the motion is a " 'second' " or " 'successive' " motion seeking similar relief. *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014) (quoting *Holmes v. State*, 292 Kan. 271, 274, 252 P.3d 573 [2011]).

Under K.S.A. 60-1507(c), a sentencing court is not required to entertain a second or successive motion for similar relief on behalf of the same prisoner. *Beauclair*, 308 Kan. at 304. "A movant in a K.S.A. 60-1507 motion is presumed to have listed all grounds for relief, and a subsequent motion need not be considered in the absence of a showing of circumstances justifying the original failure to list a ground." *State v. Trotter*, 296 Kan. 898, Syl. ¶ 2, 295 P.3d 1039 (2013).

To avoid a dismissal of a second or successive K.S.A. 60-1507 motion, the movant bears the burden of establishing exceptional circumstances. *Beauclair*, 308 Kan. at 304. Exceptional circumstances are unusual events or intervening changes in the law that prevented the defendant from raising the issue in a prior K.S.A. 60-1507 motion. 308 Kan. at 304. Exceptional circumstances can include ineffective assistance of counsel claims. See 308 Kan. at 304; *Rowland v. State*, 289 Kan. 1076, 1087, 219 P.3d 1212 (2009).

This is Holt's eighth K.S.A. 60-1507 motion. Clearly, it is successive. However, in his motion, Holt did not try to establish exceptional circumstances justifying the consideration of his successive motion. Rather, Holt argued that his motion was not successive because he never received an evidentiary hearing on his claim of ineffective assistance of his counsel appointed to assist him with his first K.S.A. 60-1507 motion. On appeal, Holt concedes that he did not "explicitly acknowledge" the exceptional circumstances requirement, but he suggests that his use of Kansas caselaw regarding ineffective assistance of counsel was sufficient to establish exceptional circumstances. This argument is not persuasive. Although a claim of ineffective assistance of counsel could be an exceptional circumstance, it has been determined that this claim was successive because it could have been raised in any of the previous motions filed after Holt's initial K.S.A. 60-1507 motion. See *Holt VIII*, 2016 WL 197720, at *1. The district court did not err in finding Holt's claims to be successive.

Holt's motion was also filed more than 20 years after his convictions became final, which is well outside the one-year time limitation a defendant has to file a motion under K.S.A. 60-1507(a). K.S.A. 2018 Supp. 60-1507(f)(1). The district court may extend the one-year time limitation for bringing an action under K.S.A. 60-1507(f)(1) only to prevent a manifest injustice. K.S.A. 2018 Supp. 60-1507(f)(2). A defendant who files a motion under K.S.A. 60-1507 outside the one-year time limitation in K.S.A. 60-1507(f) and fails to affirmatively assert manifest injustice is procedurally barred from maintaining the action. *Trotter*, 296 Kan. at 905.

***3** In this current motion, Holt argued that manifest injustice was created when the trial court abused its discretion and denied his request for an evidentiary hearing. Holt's motion was filed after the 2016 Kansas Legislature amended K.S.A. 60-1507(f)(2) to include a definition of manifest injustice and consideration of his motion is controlled by this statutory definition. See *Hayes v. State*, 307 Kan. 9, 12, 404 P.3d 676 (2017). The plain language of K.S.A. 2018 Supp. 60-1507(f)(2) limits a court's consideration of what constitutes a manifest injustice to "(1) a movant's reasons for the failure to timely file the motion and (2) a movant's claims of actual innocence." 307 Kan. at 14.

Holt does not give any reason for his failure to timely file his motion and submits no claim of actual innocence. Holt, again, only submits conclusory allegations against his appointed K.S.A. 60-1507 counsel in arguing that manifest injustice

exists. Holt's current motion was filed over 20 years after the one-year deadline passed, and he has failed to establish any legal basis to extend this time limitation.

In addition to Holt's motion being successive and filed after the one-year time limitation, it is also conclusory. The motion does not set forth an evidentiary basis to support Holt's contentions, nor is one evident from the record. The district court did not err in dismissing Holt's motion for being conclusory.

Holt had the burden to establish his entitlement to an evidentiary hearing and the burden to demonstrate exceptional circumstances and manifest injustice necessary to justify consideration of his eighth K.S.A. 60-1507 motion. See *Beauclair*, 308 Kan. at 304. Given Holt's failure to do so, the district court did not err by summarily dismissing the motion.

Affirmed.

All Citations

453 P.3d 1208 (Table), 2019 WL 6794473

552 P.3d 22 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Gregory Mark GEORGE Jr., Appellant.

No. 126,875
|
Opinion Filed July 12, 2024.

Appeal from Leavenworth District Court; CLINTON LEE, judge. Submitted without oral argument.

Attorneys and Law Firms

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, for appellant.

Ethan C. Zipf-Sigler, assistant solicitor general, and Kris W. Kobach, attorney general, for appellee.

Before Coble, P.J., Schroeder and Cline, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Gregory Mark George Jr. seeks additional DNA testing under K.S.A. 21-2512 as part of his efforts to set aside his criminal convictions. But since the 10 fibers he seeks to test were already subjected to DNA testing after his prior motion for DNA testing was granted, and he is not requesting a new testing technique be used, we find the district court correctly denied his motion for additional testing.

FACTUAL AND PROCEDURAL BACKGROUND

George has pursued multiple postconviction remedies after a jury convicted him in 2006 of rape, aggravated robbery, and aggravated intimidation of a witness, crimes he committed in December 2004. As pertinent to this appeal, he moved for DNA testing under K.S.A. 21-2512 in 2013. In maintaining his innocence, he asked for previously untested hairs gathered from the crime scene be tested against the DNA profile of the rape victim's boyfriend. While the district court initially denied George's motion, the Kansas Supreme Court reversed and remanded that case in 2018. *State v. George*, 308 Kan. 62, 75, 418 P.3d 1268 (2018).

On remand in 2019, the district court granted George's motion for DNA testing. The following year, evidence was submitted to the Serological Research Institute (the Institute) to be tested. The Institute completed an analytical report in 2021. The report stated it received 10 paper bindles each containing a fiber. It analyzed the fibers and decided one fiber was not hair and another was nonhuman hair. After excluding these two fibers, the Institute still had eight human hairs left for polymerase chain reaction (PCR) DNA testing. It selected one hair for testing which was about 4 centimeters long and had a root end of the hair and a portion of the adjacent hair shaft. The Institute sampled and extracted this hair for DNA but was unable to recover any DNA from the hair root. And since there was only a trace amount of DNA in the hair shaft, it could not create a DNA profile.

After receiving these inconclusive results, George voluntarily dismissed his motion, through appointed counsel, because "only one hair root was sufficient to attempt DNA testing. A trace amount of DNA was recovered, and that amount was insufficient to obtain a DNA profile." George then filed a new K.S.A. 21-2512 motion on his own behalf. The State opposed George's motion, and the district court appointed new counsel to represent him. George's new counsel filed a response to the State's brief, requesting DNA testing of the eight hairs which were not selected for testing.

The district court denied the motion because both parties agreed "the hair sample did not contain enough DNA to make a comparable sample." The court also found "that no evidence exists that can produce a DNA result therefore there is no evidence that exists to be DNA tested." George appealed this decision, but it was later dismissed.

For a third time, George moved, again on his own behalf, for DNA testing under K.S.A. 21-2512. This time, he requested the nine fibers not PCR tested be subject to STR DNA testing. In its response, the State pointed out that all 10 fibers had been subjected to DNA testing. It noted that George's counsel stated in the voluntary dismissal of George's first motion for DNA testing that the hairs were all tested and

" 'only one hair root was sufficient to attempt DNA testing.' " George filed an addendum to his motion arguing only one fiber had been "subjected to" DNA testing under K.S.A. 21-2512. The district court appointed George another attorney who filed a supplemental motion for DNA testing which requested both short tandem repeat (STR) and mitochondrial DNA (mtDNA) testing on eight fibers. In the supplemental motion, George's counsel conceded STR and mtDNA testing are not "new" testing techniques because courts accepted both testing methods in the early 2000s.

***2** The district court denied both motions because the fibers George requested to be tested were already subjected to testing and the STR and mtDNA testing were not new DNA techniques that could provide a more accurate and probative result than PCR testing.

George appeals this decision.

REVIEW OF GEORGE'S APPELLATE CHALLENGE

District courts must follow three steps under K.S.A. 21-2512 when a qualified inmate requests DNA testing on biological material. It must notify the prosecuting attorney, determine whether the material qualifies for testing, and assess whether the testing may produce relevant, noncumulative, exculpatory evidence. *State v. Hernandez*, 303 Kan. 609, 615, 366 P.3d 200 (2016). In contention is whether the district court erred in determining " 'whether the biological material sought to be tested qualifies for testing under K.S.A. 21-2512(a)(1)-(3).' " 303 Kan. at 615 (quoting *State v. Lackey*, 295 Kan. 816, 820-21, 286 P.3d 859 [2012]). To qualify for DNA testing under K.S.A. 21-2512(a)(3), the statute requires that either (1) the biological material has never been subjected to testing or (2) the material could be retested with new and improved techniques. *Lackey*, 295 Kan. at 821-22.

Here, George requested retesting so he must show the hairs were "not previously subjected to DNA testing" or the existence of "new DNA techniques that provide a reasonable likelihood of more accurate and probative results." K.S.A. 21-2512(a)(3).

A. *Standard of review*

The parties agree the district court summarily denied George's and his attorney's motions without an evidentiary hearing. Kansas courts have held a summary denial of such a motion presents a question of law over which an appellate court has unlimited review. *Wimbley v. State*, 292 Kan. 796, 809, 275 P.3d 35 (2011). We also employ an unlimited review of the district court's interpretation of K.S.A. 21-2512. See *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021).

B. *Analysis*

1. *The district court did not apply collateral estoppel to deny George's claim.*

George contends the district court applied an improper rule of law by using common-law estoppel to deny relief to him under K.S.A. 21-2512. He spends most of the analysis section in his brief on this point. But George's argument is problematic for several reasons. First, George cherry-picks a few words from the district court's ruling which he contends means the court employed "a res judicata approach to DNA science." Specifically, George challenges the district court's use of the term "bite at the apple" and the word "estopped." The district court concluded that under K.S.A. 21-2512(a)(3), George should not "get another 'bite at the apple' since he did not get the results he had hoped for after the first round of testing." In its final sentence in its analysis section, the district court noted it found George "is *estopped* from requesting STR and/or mtDNA testing." (Emphasis added.)

Most of George's appellate argument is rooted in this one saying and one word used by the district court, but he places a particular focus on the district court's use of the word estopped. George contends the word estopped means the court applied some form of the common-law estoppel doctrine. He tries to breakdown the court's use of this word by determining whether the district court meant estoppel by election, collateral estoppel, or equitable estoppel.

***3** But George put too much weight into a few words written by the district court. Nowhere in the court's decision did it note it was applying collateral estoppel to K.S.A. 21-2512 or George's motion. Although the district court could have used a more precise term than estopped, especially considering that term can be legally operative in other contexts, that stray comment does not accurately describe the basis for its decision nor was it necessarily improper. For instance, Black's Law Dictionary 691 (11th ed. 2019) notes estoppel

can mean: "A bar that prevents one from asserting a claim." K.S.A. 21-2512 bars qualified inmates from petitioning the court for DNA testing if the biological material was "previously subjected to" testing. And it also bars inmates from seeking retesting of those materials if there are no "new DNA techniques." The district court's use of the word estopped is accurate even without applying any estoppel doctrine.

We do not read the district court's decision the same way George does, especially considering the precise location in its decision where it noted George is estopped from successfully bringing a third K.S.A. 21-2512 motion. The district court addressed George's "new DNA techniques" arguments in one paragraph. And in the following paragraph, it determined he was barred or estopped from the fibers being tested because K.S.A. 21-2512(a)(3) mandates the testing must be new. It noted George should not "get another bite at the apple" because his attorneys did not initially request STR and mtDNA testing even though those techniques were available at the time of George's request. Simply because the district court said "estopped" or "bite at the apple" does not mean it was applying collateral estoppel to its analysis. Rather, a close reading of the district court's decision shows it used those words to show K.S.A. 21-2512(a)(3) bars George from retesting because he is not requesting testing with new DNA techniques.

In addressing the district court's decision and its use of the word estopped, George makes stray comments framing K.S.A. 21-2512 as largely permitting unlimited DNA testing. He states the statute does not limit timing, testing, and methods and allows "for successive testing of available materials." Since in George's eyes K.S.A. 21-2512 essentially grants inmates unlimited DNA testing motions, "[t]here is no statutory bar on successive motions." He thus believes it does not matter if this is his third K.S.A. 21-2512 motion.

George's framing of the statute is incorrect. Although the statute does not expressly discuss successive motions, the statute is clearly written to authorize motions for DNA testing only *if* the motion meets K.S.A. 21-2512(a)(1)-(3). So even if the statute is written to generally allow for DNA testing motions, the statute itself significantly limits inmates' ability to petition for testing. Part of that limitation is disallowing inmates to petition for additional DNA testing if the biological material was previously subjected to DNA testing. Thus, inmates' (as George frames it) successive K.S.A. 21-2512 motions can be denied if the material was previously tested and there are no new DNA techniques that would provide a reasonable likelihood of more accurate and probative results.

George's reading of the district court's opinion is unreasonable and far removed from what the court stated. And we do not believe his argument that K.S.A. 21-2512 essentially permits unrestricted DNA testing is supported by the language of the statute.

2. *All 10 fibers were subjected to DNA testing by the Institute even if all 10 fibers did not undergo PCR testing.*

After the district court approved George's request for DNA testing in a previous motion, the Institute tested 10 fibers for DNA. One fiber appeared not to be hair and another fiber appeared to be nonhuman hair. Eight fibers remained after these two fibers were excluded. Ultimately, one fiber with the root end of the hair and portion of the adjacent hair shaft was sampled and extracted for DNA. Although the report from the Institute did not expressly state the remaining seven hairs were unsuitable for testing, George's counsel represented to the district court in his motion to voluntarily dismiss that "only one hair root was sufficient to attempt DNA testing." When George brought his second K.S.A. 21-2512 motion, he also agreed "the hair sample did not contain enough DNA to make a comparable sample," and therefore, "no evidence exists that can produce a DNA result." And on appeal, he also does not seem to contest the technician ruled out the remaining seven fibers as unsuitable for the PCR technique.

***4** After these testing results came back and George voluntarily dismissed his motion, he again moved under K.S.A. 21-2512 for DNA testing. He requested DNA testing for all the fibers not PCR tested, which would be nine fibers. He asserted below the fibers were not "subjected to" DNA testing, as required by the district court's order for DNA testing. But the district court determined eight fibers (not including the nonhair and nonhuman hair fibers) were all subjected to DNA testing because "only one hair was deemed a viable candidate to contain DNA material."

George strings together several statements to bolster his argument that only one fiber was subjected to DNA testing.

He first contends the district court undermined the Legislature by not interpreting the ordinary and common meaning of K.S.A. 21-2512's language. See generally *Brown v. U.S.D. No. 333*, 261 Kan. 134, 141-42, 928 P.2d 57 (1996); *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, Syl. ¶¶ 7-8, 834 P.2d 368 (1992). To connect these cases to his own, George makes a statutory interpretation argument. George asserts that under Merriam-Webster's Collegiate Dictionary 1243 (11th ed. 2005), " 'subjected' " means the subject is " 'to cause or force to undergo or endure (something unpleasant, inconvenient or trying),' " to show the remaining fibers were not "subjected to" DNA testing under K.S.A. 21-2512. George believes this interpretation means the non-PCR tested fibers were not subjected to DNA testing under K.S.A. 21-2512 "even if they were examined—and eliminated by the technician—as to suitability for a particular technique."

But even under George's provided definition, the district court correctly determined the seven hairs underwent and endured testing. As the State persuasively put it: "While it is accurate to say that 7 fibers were not subjected to the PCR test, this is not the same as saying the 7 fibers were not subjected to DNA testing." The remaining fibers were "cause[d] or force[d]" to undergo an examination for DNA by George's previous motion for DNA testing. And as the State argues, all testing by its nature, involves a form of an examination, experiment, or trial. The technician examined all 10 fibers for DNA testing but only PCR tested 1. Thus, even if we adopt George's submitted definition of "subjected to," all 10 fibers were subjected to DNA testing because the fibers were examined by the technician.

He finally states that the statute does not permit district courts "to determine the viability of future testing of available biological materials." The district court, however, did not determine whether the eight fibers would produce future viable DNA testing. Instead, it simply concluded the eight fibers were subjected to testing but were unviable candidates for PCR tests. Although the district court pontificated that approving George's motion would be futile, which in a way implies the DNA testing would be unsuccessful, it nevertheless correctly held the seven fibers were subjected to DNA testing previously.

3. *George's motion cannot be granted because STR and mtDNA testing are not new DNA testing techniques.*

George demands STR and mtDNA testing be completed on all eight hairs. But the testing he requests does not include "new DNA techniques that provide a reasonable likelihood of more accurate and probative results." K.S.A. 21-2512(a)(3).

The district court concluded STR and mtDNA testing were not new testing methods because both were available in the early 2000s. See, e.g., *State v. Pappas*, 256 Conn. 854, 878 n.6, 776 A.2d 1091 (2001) (finding, as of 2001, "[a]ll of the state appellate courts that have considered the methodology of mtDNA analysis in criminal trials thus far have concluded that it is scientifically valid and admissible"); *People v. Shreck*, 22 P.3d 68, 82 (Colo. 2001) (en banc) (finding STR DNA testing reliable). Meaning, George could have selected one of these techniques when he retained the Institute to examine the fibers.

***5** On appeal, George maintains the district court misinterpreted the word new in K.S.A. 21-2512. He posits that under the statute, the Legislature intended " 'new' " to be synonymous with " 'different.' " He urges this panel to accept this different definition of new because "the Legislature has not provided a definitive definition" of the word. To explain his interpretation, he states that a person may buy a factory new model car, or a person may buy a used car. In either scenario, George believes the car is new. He argues the statute necessarily contemplates this flexible meaning because "[t]he nature of science" requires it. This approach is wrong for several reasons.

"An appellate court's first task is to 'ascertain the legislature's intent through the statutory language it employs, giving ordinary words their ordinary meaning.' " *Padron v. Lopez*, 289 Kan. 1089, 1097, 220 P.3d 345 (2009) (quoting *State v. Stallings*, 284 Kan. 741, 742, 163 P.3d 1232 [2007]). The ordinary meaning of new is not defined as different. See Black's Law Dictionary 1253 (11th ed. 2019) (defining new as "recently come into being," "recently discovered," "changed from the former state," "[u]nfamiliar; unaccustomed," or "[b]eginning afresh"). George implores this panel to follow K.S.A. 21-2512(a)(3)'s ordinary meaning and even cites Black's Law Dictionary's definition of new. But the ordinary meaning of "new" is not "different" nor does Black's state that. If the Legislature wanted K.S.A. 21-2512 to use the word "different" instead of the word "new," it would have.

Besides the ordinary meaning, the word new, as interpreted like "factory new model," makes more sense in the statutory scheme than new, as read like "used car." The sentence itself allows for retesting of biological material with new methods if those techniques would lead to "more accurate and probative results." K.S.A. 21-2512(a)(3). George's interpretation requires us to read words in K.S.A. 21-2512 in an isolated fashion. Appellate "courts are not permitted to consider only a certain isolated part or parts of an act but are required to consider and construe together all parts." *Kansas Commission on Civil Rights v. Howard*, 218 Kan. 248, Syl. ¶ 2, 544 P.2d 791 (1975). By reading the statute in George's preferred way, inmates would be encouraged to begin their requests for DNA testing with methods of minimal accuracy and probative value. And then inmates would continually move for more different DNA testing, each time asking for the biological material to be tested with methods slightly more accurate and probative. Effectively, George's interpretation of the statute would lead to inmates receiving unlimited testing so long as they begin their request with less accurate and probative testing methods. George's interpretation requires us to read the word new in isolation which is not only inappropriate under Kansas' statutory interpretation caselaw, but it also leads to an absurd result.

He also argues the district court's interpretation of new thwarts "the statute's goal of freeing the innocent." It is true the Kansas Supreme Court has found K.S.A. 21-2512's "statutory goal is to use DNA testing to help determine if one who is in state custody 'was wrongfully convicted or sentenced.' " *State v. Smith*, 34 Kan. App. 2d 368, 371, 119 P.3d 679 (2005) (quoting *State v. Denney*, 278 Kan. 643, 654, 101 P.3d 1257 [2004]). But this court cannot accept every possible interpretation under the umbrella in the name of preserving a broad statutory goal. And if the ordinary meaning of the word new frustrates George's particular argument, that does not mean it foils K.S.A. 21-2512's general purpose.

***6** Lastly, he maintains that since we could apply two definitions of new, we should adopt his definition under the rule of lenity. He notes that under Kansas caselaw, the rule of lenity requires this panel "to strictly construe ambiguous criminal statutes in favor of the accused." *State v. Horn*, 288 Kan. 690, 693, 206 P.3d 526 (2009). But he is incorrect to ask us to apply this rule. There is a nothing ambiguous about the word new as used in K.S.A. 21-2512. Not only does the ordinary meaning of new not support George's argument, but assessing the word through his isolated lens produces an incoherent reading of the statute. The rule of lenity, consequently, is inapplicable because the statute is not ambiguous.

Affirmed.

All Citations

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