IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-89,923-01, WR-89,923-02

In re State of Texas ex rel. JOHN H. BEST, Relator

ON MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION AND PETITION FOR WRITS OF MANDAMUS AND PROHIBITION IN CAUSE NO. C-17-0982-SB IN THE 340TH JUDICIAL DISTRICT COURT TOM GREEN COUNTY

Per curiam.

O R D E R

We have before us a motion for leave to file a petition for writs of mandamus and prohibition and a petition for writs of mandamus and prohibition filed by Relator John H. Best, the 119th District Attorney, in cases involving five codefendants (real parties in interest here). Stephen Lynn Jennings, Kristen Anne Jennings, and David Navarro were all indicted for capital murder and lesser offenses arising out of the same criminal episode, a shooting that occurred "on or about the 21st day of July, 2017." Garry Lynn Jennings was indicted

for murder and lesser offenses arising out of the same criminal episode; and Angella Rebecca Wray was indicted for aggravated kidnapping and engaging in organized criminal activity arising out of the same criminal episode. Relator asserts that the five cases were assigned to four district courts, with S. Jennings' and K. Jennings' cases assigned to Respondent's court. The State has not waived the death penalty in the three capital murder cases.

Pursuant to Texas Code of Criminal Procedure, Article 38.43,[1] the State submitted biological evidence collected in these cases to the Texas Department of Public Safety (DPS) Crime Lab in Lubbock for DNA testing. However, S. Jennings and Navarro moved in their respective courts to have the DNA testing halted. They maintained that some of the biological samples might not be sufficient for the State to conduct its DNA testing and for the five defendants to retest evidence. Respondent, the Honorable Jay K. Weatherby, Presiding Judge of the 340th Judicial District Court, stayed the testing until an evidentiary hearing could be held and scheduled a hearing.

Navarro requested that the four trial courts agree on a single DNA testing policy. Navarro's judge, the Honorable Barbara Lane Walther, Presiding Judge of the 51st Judicial District Court, signed an "Order to Halt DNA Testing until Further Order" that required Relator to provide all five codefendants with notice of any hearings in any of the four courts related to the scientific testing of evidence collected in these cases.

In December 2018, Respondent held an evidentiary hearing in which one witness,

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[1] Unless otherwise indicated, any reference to "articles" is to the Texas Code of Criminal Procedure.

DPS DNA Section Supervisor David Young, testified. Defendant S. Jennings' DNA expert, Dr. Elizabeth Johnson, was standing by on "Court Call" listening to Young's testimony.

Young testified that the DPS lab is periodically audited by various entities and accredited by a national board. Young conceded that some samples, like a swab used to collect touch DNA, can be completely "consumed" by the extraction process. Young said that DPS's quantification and amplification processes usually leave more than half of the fifty microliters of extract available for defense testing. But sometimes they must use another fifteen microliters of the extract, leaving a sufficient quantity of extract for a defendant to conduct independent testing. Young stated that DPS policy prohibits allowing non-employees (other than auditors) into the lab work area while they are testing the evidence. He said that DPS normally runs batch tests which might include samples from a number of cases. He testified that allowing non-employees into the work area or allowing electronic monitoring/recording would be "very disruptive," could make analysts anxious, and could create a risk of contamination or cause delays in multiple cases.

Respondent adjourned the hearing without taking additional testimony and ordered the parties to submit briefs. S. Jennings and Navarro filed briefs, Relator filed a "Brief in Opposition to Defense Request for Observation of State DNA Testing," and S. Jennings filed a reply to Relator's brief. With his briefing, S. Jennings submitted Johnson's two declarations discussing her qualifications, best practices for DNA testing, the proposed DNA testing of the biological samples in the instant case, her past experience with DPS labs and

other crime labs, and her observations responsive to Young's testimony.

In February 2019, Respondent sent counsel for all five defendants a letter setting out his findings of fact and rulings regarding this matter. Respondent found that the State's proposed DNA testing would not provide enough remaining DNA sample or extract for each of the five defendants to conduct their own confirmatory testing of the biological evidence. Respondent stated that Article 38.43(i)[2] did not grant the State the absolute or exclusive right to select the DNA lab, and Article 38.43(k)[3] was not applicable here because no biological evidence had yet been "destroyed or lost." Respondent found that the DPS lab was the only statutorily authorized option to conduct the testing because there was no evidence that any "private, accredited lab would willingly absorb the cost of DNA testing for another party." Respondent found the real parties in interest's constitutional and fundamental fairness arguments to be "well taken." Respondent further found that the State's and the real parties'

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[2] Article 38.43(i) provides in relevant part:

> Before a defendant is tried for a capital offense in which the state is seeking the death penalty, subject to Subsection (j), the state shall require either the Department of Public Safety through one of its laboratories or a laboratory accredited under Article 38.01 to perform DNA testing, in accordance with the laboratory's capabilities at the time the testing is performed, on any biological evidence that was collected as part of an investigation of the offense and is in the possession of the state.

[3] Article 38.43(k) provides:

> If an item of biological evidence is destroyed or lost as a result of DNA testing performed under Subsection (i), the laboratory that tested the evidence must provide to the defendant any bench notes prepared by the laboratory that are related to the testing of the evidence and the results of that testing.

concerns could be addressed by requiring DPS to allow "indirect or remote observation" of the DNA testing of the samples in question. Respondent directed Relator to work with the DPS lab to acquire the necessary equipment and implement digital audiovisual recording of the handling, preparation, and testing of the samples in question, using no fewer than three cameras to capture the entire DNA testing process.

In March 2019, Respondent signed an order providing that "any DNA testing conducted on the biological evidence in these cases be recorded by both audio and video." Respondent ordered Relator to submit a plan to Respondent for approval, with notice to all five defendants, "to ensure that the handling, preparation and testing of all of the biological material that will be consumed by testing (that evidence for which there is insufficient biological material for each defendant to conduct confirmatory testing) will be audio and video digitally recorded in such a manner as will capture the entire process and maintain a constant view of the biological evidence and the individuals involved in the DNA testing process." Respondent further ordered that no fewer than three cameras must be used and, "[t]he digital recording must be sufficient to record all comments and conversations that occur in the DPS crime lab during the DNA tests, in addition to any other sounds in the crime lab that are in any way relevant to the DNA tests." Respondent allowed each defendant seven days to object to the State's plan. Respondent stated that his ruling was "limited to this case, these defendants, and the circumstances before [Respondent]."

Relator filed a motion for reconsideration asking Respondent to withdraw his orders.

Relator argued that Respondent had "no authority—constitutional, statutory, express, implied, inherent, or otherwise" to enter the orders. Relator also sent Respondent a letter asserting that "the State has no authority to order DPS to do anything." Relator further complained that the "changes to DPS's physical premises, testing procedures, and treatment of personnel contemplated by [Respondent] are massive." Relator estimated that the process "could take a year or more." S. Jennings filed a response to Relator's motion for reconsideration. In April 2019, Respondent denied Relator's motion.

In May 2019, Relator filed in this Court the instant petition for writs of mandamus and prohibition and motion for leave to file the same. Relator argues that Respondent lacked the judicial authority to enter his orders, which contravene Article 38.43 and the Separation of Powers Doctrine. Relator maintains that Respondent's "primary justification for interfering with" the State's testing of the biological evidence "is essentially based on the idea that the real parties in interest have a constitutional right to discover and test untested biological material. They do not." Relator contends that, at best, Respondent's orders "represent a premature determination that the defenses of the real parties in interest will be impaired if they cannot each conduct testing on every original sample of biological material." Relator maintains that, because Respondent had no authority to execute these orders, he has a "ministerial duty to withdraw [the] stay and to refrain from enforcing [his] latest order or otherwise interfering with Relator's statutorily mandated testing of biological material." Relator asks this Court to grant his petition and order Respondent to: withdraw the order

staying testing; withdraw the order requiring Relator to use DPS to perform testing and compelling DPS to utilize recording devices; and "refrain from further interference with Relator's testing of its evidence pursuant to statute."

Before we rule on Relator's motion for leave to file and his petition, Respondent and the real parties in interest should have the opportunity to respond. Therefore, Respondent and the real parties in interest have sixty days from the date of this order to file any response to Relator's pleadings. Relator should file any reply within thirty days of the deadline for filing responses. Any extensions of time shall be obtained from this Court. All DNA testing of biological evidence and related procedures in these cases are stayed pending further order of this Court.

IT IS SO ORDERED THIS THE 1ST DAY OF JULY, 2020.

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