



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-19-00242-CR

KIVEAN D. COFFEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 276th District Court
Morris County, Texas
Trial Court No. 10,774CR

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Justice Stevens

MEMORANDUM OPINION

In 2013, Kivean D. Coffey was convicted by a jury of aggravated sexual assault and sentenced to seventy-five years' imprisonment. Although DNA evidence presented at trial supported the victim's positive identification of Coffey as the perpetrator of the offense, Coffey filed a post-conviction motion for DNA testing seeking the use of different modern DNA testing methods. Coffey appeals from the trial court's order denying his motion for post-conviction DNA testing.¹ Because we find that Coffey failed to meet the threshold requirements of Chapter 64 of the Texas Code of Criminal Procedure for obtaining the requested testing, we affirm the trial court's decision.

"To be entitled to post-conviction DNA testing, a convicted person must satisfy the requirements of Chapter 64 of the Code of Criminal Procedure." *Hall v. State*, 569 S.W.3d 646, 655 (Tex. Crim. App. 2019). "One of those requirements is that 'the convicted person establishes by a preponderance of the evidence that . . . the person would not have been convicted if exculpatory results had been obtained through DNA testing.'" *Id.* (quoting TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(2)(A)). The trial court is also required to find that "identity was or is an issue in the case." TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(1)(C). "This means that a convicted person must show a greater than 50% chance that he would not have been convicted if exculpatory results from the requested DNA testing had been available at trial." *Hall*, 569 S.W.3d at 655. "'Exculpatory results' means only results excluding the convicted person as the donor of the DNA." *Id.* at 655–66.

¹Coffey also appeals from the trial court's order denying his motion for post-conviction DNA testing in cause number 06-19-00243-CR.

Coffey's post-conviction motion for DNA testing, which was supported by his unsworn declaration, attached DNA test results admitted at trial that supported the victim's identification of Coffey as her assailant. DNA obtained from the victim's right hand fingernail scrapings showed that "[t]he DNA profile [was] consistent with a mixture of the victim and Kivean Coffey" and that Coffey could not be "excluded as a contributor to the profile." DNA obtained from a stained black t-shirt recovered at the scene of the offense showed that, while "[n]o Y-STR profile was obtained from the sperm cell fraction of the stain . . . , [t]he partial Y-STR profile from the epithelial cell fraction of the stain [was] consistent with the Y-STR profile of Kivean Coffey." Even so, Coffey requested retesting of the sperm cell fraction on the black t-shirt and testing of other evidence obtained from the victim's sexual assault nurse examination and the scene of the offense in the hopes that it would exonerate him by providing evidence of a sexual relationship only between the victim and her boyfriend.² He asked the trial court to appoint him counsel for the Chapter 64 proceedings.³

The trial's order denying DNA testing and appointment of counsel included the following findings:

1. DNA was admitted at the trial without objection by the Defendant;
2. Defendant's DNA was found under the fingernails of the victim;
3. Defendant's DNA was on a T-shirt at the crime scene;

²Coffey also asked for testing of clothing items for gunpowder residue to prove that he was not carrying a deadly weapon.

³Appointment of counsel is only required under Chapter 64 if "the court finds reasonable grounds for a motion to be filed." TEX. CODE CRIM. PROC. ANN. art. 64.01(c).

4. The victim knew Defendant before the assault and positively identified him in open court as her rapist;
5. Victim testified she fought Defendant and scratched him. Photos of Defendant clearly depicted bloody scratches on Defendant's face and hands;
6. A neutral third-party witness, Josh White, identified Defendant in court as being at the crime scene.
7. Josh White noticed the scratch marks when he drove Defendant . . . shortly after the assault.
8. Police officer Tobias Frazier recovered victim's [cellphone] charger from Defendant's motel room.
9. Identity was *not an issue* in [the] sexual assault case.

As a result, the trial court determined that Coffey “failed to establish by a preponderance of the evidence that he would *not have been convicted* if exculpatory results had been obtained through DNA testing.”

On appeal, Coffey argues that the trial court erroneously denied his post-conviction motion for DNA testing and appointment of counsel. In reviewing the trial court's denial of Coffey's motion, “we give almost total deference to the judge's resolution of historical fact issues supported by the record and applications-of-law-to-fact issues turning on witness credibility and demeanor.” *Reed v. State*, 541 S.W.3d 759, 768 (Tex. Crim. App. 2017). Yet, “we review de novo all other application-of-law-to-fact questions.” *Id.* at 768–69.

Coffey’s brief acknowledges that his DNA was found in the victim’s fingernail scrapings and on the epithelial cell fraction of the stain on the black t-shirt, but claims this only showed evidence of a physical confrontation between the two. He argues that his requested DNA testing of other items could contradict the victim’s version of events by proving that a sexual relationship occurred only between the victim and her boyfriend. “A ‘favorable’ DNA test result must be the sort of evidence that would affirmatively cast doubt upon the validity of the inmate’s conviction; otherwise, DNA testing would simply ‘muddy the waters.’” *Ex parte Gutierrez*, 337 S.W.3d 883, 892 (Tex. Crim. App. 2011) (quoting *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002)).

Due to the victim’s testimony positively identifying Coffey as her assailant, the DNA evidence listing Coffey as a contributor at trial, and the trial court’s factual findings, we cannot conclude that the trial court erred in determining that Coffey would be unable to meet his burden to show that he would not have been convicted even if exculpatory results had been obtained through DNA testing of the other requested items.⁴ Also, because it would simply muddy the waters, Coffey would not be exonerated even if DNA testing showed that the victim’s boyfriend was a contributor to the DNA found on items he requested for testing. *See Hall*, 569 S.W.3d at 657–58; *Wilson v. State*, 185 S.W.3d 481, 485 (Tex. Crim. App. 2006).

⁴Moreover,

the issue of identity as it pertains to Chapter 64 is not raised solely by a plea of not guilty. The identity requirement in Chapter 64 relates to the issue of identity as it pertains to the DNA evidence. Therefore, if DNA testing would not determine the identity of the person who committed the offense or would not exculpate the accused, then the requirement of Article 64.03(a)(2)(A) has not been met.

Prible v. State, 245 S.W.3d 466, 470 (Tex. Crim. App. 2008).

We conclude that the trial court properly denied Coffey's post-conviction motion for DNA testing and request for appointment of counsel. As a result, we affirm the trial court's decision.

Scott E. Stevens
Justice

Date Submitted: May 26, 2020
Date Decided: June 19, 2020

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