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Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE.
Assigned on Briefs May 23, 2023

EDGAR BAILEY, JR. v. STATE OF TENNESSEE

Appeal from the Criminal Court for Hamilton County
No. 302310 Tom Greenholtz, Judge

No. E2022-01302-CCA-R3-PC

The Petitioner, Edgar Bailey Jr., appeals from the Hamilton County Criminal Court's denial of his petition for post-conviction relief from his convictions for first degree felony murder, setting fire to personal property, and three counts of aggravated assault. The Petitioner is serving an effective life sentence. On appeal, the Petitioner contends that: (1) the post-conviction court erred when it denied relief under the Post-Conviction DNA Analysis Act of 2001 (the DNA Act), Tennessee Code Annotated sections 40-30-301 to -313 (2018), and (2) the Petitioner is entitled to relief under the cumulative error doctrine. We affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and J. ROSS DYER, J., joined.

David W. MacNeill (on appeal), and Kristen Spires-Williams (at hearing), Chattanooga, Tennessee, for the Appellant, Edgar Bailey, Jr.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Coty G. Wamp, District Attorney General; Cameron Williams, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner's convictions originate from his actions on June 20, 2001. Anthony Lee McAffee, the victim, visited a friend, Marquis Gardner, to collect money from Mr. Gardner. The victim and Mr. Gardner were involved in selling cocaine. Mr. Gardner and others knew that the victim had a large sum of cash. The victim was alone at Mr. Gardner's house, and around midnight, the Petitioner and two codefendants entered the house and robbed and killed the victim. Mr. Gardner returned several hours later and discovered the

victim's body. Mr. Gardner knew that one of the codefendants was the only other person with access to the house, and he called the police to inform them of the killing and the likely culprit. Later that day, the Petitioner and a codefendant were seen burning the victim's car in a parking lot. A passing van with three occupants drove into the parking lot to see if anyone needed help, and the Petitioner shot at the van until it drove away. The Petitioner and a codefendant were apprehended by police shortly afterward.

A Hamilton County jury convicted the Petitioner of first degree premeditated murder, first degree felony murder, setting fire to personal property, and three counts of aggravated assault. The Petitioner's first degree murder convictions were merged, and he received an effective life sentence. The Petitioner appealed his convictions, and this court reversed the Petitioner's premeditated murder conviction and remanded the case for a new trial on this count. *State v. Edgar Bailey, Jr.*, No. E2005-02186-CCA-R3-CD, 2006 WL 3787911, at *1 (Tenn. Crim. App. Dec. 27, 2006), *perm. app. denied* (Tenn. Apr. 23, 2007). On remand, the premeditated murder charge was dismissed. The Petitioner filed a post-conviction petition that was dismissed as untimely. *State v. Edgar Bailey, Jr.*, No. E2009-00203-CCA-R3-PC, 2009 WL 3616665, at *1 (Tenn. Crim. App. Nov. 3, 2009), *perm. app. denied* (Tenn. Apr. 23, 2010). This court affirmed the trial court's dismissal on appeal. *Id.* The Petitioner next filed a writ of error coram nobis that was dismissed. The dismissal was affirmed on appeal. *State v. Edgar Bailey, Jr.*, No. E2012-02554-CCA-R3-PC, 2013 WL 3306692, at *3 (Tenn. Crim. App. June 27, 2013). The Petitioner then filed a writ of habeas corpus that was dismissed by the habeas corpus court. The dismissal was affirmed on appeal. *Edgar Bailey, Jr. v. Barbee*, No. W2012-01729-CCA-R3-HC, 2013 WL 865329, at *5 (Tenn. Crim. App. Mar. 5, 2013), *perm. app. denied* (Tenn. June 18, 2013). The Petitioner also filed a writ of habeas corpus in federal court that was dismissed. *Edgar Bailey, Jr. v. Jones*, No. 1:13-CV-268-CLC-WBC, 2014 WL 4955712 (E.D. Tenn. Sept. 30, 2014).

On July 11, 2017, the Petitioner filed a pro se petition for a writ of error coram nobis, which alleged that there was newly discovered evidence of untested hair samples that were found on the victim's body at the autopsy and sought DNA analysis of the untested hair samples. On December 6, 2017, the post-conviction court entered an order which considered part of the petition as a petition for post-conviction DNA analysis under the DNA Act and appointed counsel for the Petitioner.

The Petitioner alleged in his petition that he received a letter from the district attorney stating that untested hair samples collected from the victim in his case had been discovered in July 2016. However, the district attorney later notified the Petitioner that the untested hair samples had been taken from the autopsy of Anthony L. McAffee, a person different from the victim, Anthony Lee McAffee. The autopsy of the victim took place in 2001, and the autopsy of Anthony L. McAffee took place in 1990.

Dr. James Metcalf, the Hamilton County chief medical examiner, testified at the Petitioner's post-conviction DNA hearing regarding the procedure for collecting autopsy evidence. He testified that the samples taken for an autopsy differed depending on the circumstances and that hair taken directly from a victim and hairs found on a victim would be labeled and stored separately. He stated that after an autopsy, police determined what pieces of evidence would be tested and that his office merely collected and stored samples for the police to pick up.

Dr. Metcalf testified that he was aware of the letter the district attorney sent to the Petitioner regarding untested evidence. Dr. Metcalf said that the untested samples were found during an audit of the medical examiner's files and had been collected in 1990 during Anthony L. McAffee's autopsy. He also stated that hair samples collected from Anthony L. McAffee were used for a paternity test in 2002. He said that the audit did not find any untested evidence that had been collected during the victim's autopsy.

On cross-examination, Dr. Metcalf testified that Dr. Frank King performed the victim's autopsy. Dr. Metcalf stated that samples from the victim's autopsy would have been stored in one of two freezers at the medical examiner's office. Dr. Metcalf acknowledged that the letter the district attorney sent to the Petitioner stated that untested scalp and pubic hairs were found which might relate to the Petitioner's case. Dr. Metcalf stated that facial, scalp, and pubic hairs were collected from the victim but that only pubic and scalp hairs were collected from Anthony L. McAffee.

On redirect examination, Dr. Metcalf testified that the untested samples from the victim's autopsy should still be in the refrigerators of the medical examiner's office if they were not found during the audit. The post-conviction court continued the hearing for Dr. Metcalf to search for any of the victim's untested samples. When the hearing resumed, Dr. Metcalf testified that he did not find any samples and that records indicated the victim's samples in possession of the medical examiner's office were disposed of one year after the case was closed.

The Petitioner testified that he received a letter in July 2016 stating scalp and pubic hair samples related to his case had been recently discovered. He believed that the hair samples were collected from the victim. The Petitioner believed that the untested samples were critical to his case because they would counter the testimony of Mr. Gardner. The Petitioner testified that he believed that the untested samples would contradict Mr. Gardner's trial testimony that the Petitioner and his codefendants were the only ones in the house with the victim the night the victim was killed. The Petitioner believed the untested samples would prove another person had access to the house. The Petitioner said the hair samples could have served as effective impeachment evidence if the hair collected from the victim was from another person.

The Petitioner testified that the testimony of Dr. Metcalf did not prove that the hair was pulled from the victim and speculated that the hair could be from another person. He stated that Dr. Metcalf's testimony regarding the chain of evidence of the hair samples was untrustworthy because Dr. Metcalf was not the medical examiner who performed the victim's autopsy. Furthermore, the Petitioner believed the untested samples identified as being taken from the 1990 autopsy were actually from the victim's 2001 autopsy.

Dr. Frank King, Jr., the former Hamilton County medical examiner, testified that he performed the victim's autopsy. Dr. King testified that any hair samples collected during the autopsy would have been put into separate, sealed envelopes for each type of hair collected. He stated that a chain of evidence document or photostatic copy of the envelopes would exist if the evidence had been taken from the medical examiner's office for testing. Dr. King stated that he was unaware that the district attorney mistakenly sent the Petitioner a letter regarding untested hair evidence.

In its order denying the Petitioner's claim, the post-conviction court considered the relevant parts of what the Petitioner characterized as an error coram nobis petition as a petition under the DNA Act. The post-conviction court found that the Petitioner did not satisfy two of the four elements necessary for post-conviction DNA analysis. *See id.* § 40-30-304 (2018). The court found that the Petitioner failed to demonstrate a reasonable probability that the Petitioner would not have been prosecuted or convicted if the DNA analysis had been performed because any hair samples from the victim's autopsy were the victim's hairs, had been pulled directly from the victim's body, and would not have been from another person.

The post-conviction court also found that the Petitioner failed to satisfy the second element because the hair samples sought by the Petitioner to be tested no longer existed. The court found that the testimony and evidence presented at the hearing supported the conclusion that the letter sent to the Petitioner about untested evidence was a mistake because the district attorney confused the 1990 autopsy report of Anthony L. McAffee with the 2001 autopsy report of the similar-named victim. This appeal followed.

I

Post-Conviction DNA Analysis Act

The Petitioner contends on appeal that the trial court erred in denying his post-conviction DNA analysis claim. He argues that the court erred when it did not order the testing of existing untested hair samples from the 1990 autopsy of Anthony L. McAffee. The Petitioner does not dispute that the hair samples in question are from the 1990 autopsy of Anthony L. McAffee. The Petitioner argues that while the post-conviction court's denial of relief was "not wholly want of logic," the untested samples were "so tainted by [] controversy" that the court should have ordered testing of the hair samples. The State

counters that the post-conviction court did not err because the Petitioner failed to show that the evidence in question was exculpatory or that a reasonable probability existed that DNA testing would render the Petitioner's verdict or sentence more favorable. The State also asserts that the post-conviction court did not err because the Petitioner failed to show that untested hair samples from the victim still existed. We agree with the State.

The DNA Act provides that persons convicted of first degree murder, among other offenses, may at any time file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence. *Id.* § 40–30–303 (2018). The DNA Act further provides that if certain criteria exist, testing shall be mandatory:

> After notice to the prosecution and an opportunity to respond, the court shall order DNA analysis if it finds that:
>
> (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
>
> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
>
> (3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
>
> (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Id. § 40-30-304 (2018).

In other instances, testing is discretionary, provided the following criteria exist:

> (1) A reasonable probability exists that analysis of the evidence will produce DNA results that would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction;
>
> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;

(3) The evidence was never previously subjected to DNA analysis, or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and

(4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Id. § 40-30-305 (2018).

A post-conviction court is not required to hold a hearing in order to determine whether to grant a petition for DNA testing. *Powers v. State*, 343 S.W.3d 36, 56 (Tenn. 2011). The court must dismiss the petition if the petitioner fails to establish each of the four criteria required pursuant to either Code section 40-30-304 or 40-30-305. *Id.* at 48. The court's determination is not subject to reversal unless it is unsupported by substantial evidence. *See Charles E. Jones v. State*, No. W2014-02306-CCA-R3-PC, 2015 WL 3882813, at *3 (Tenn. Crim. App. June 24, 2015), *perm. app. denied* (Tenn. Sept. 21, 2015); *Willie Tom Ensley v. State*, No. M2002-01609-CCA-R3-PC, 2003 WL 1868647, at *4, n.2 (Tenn. Crim. App. Apr. 11, 2003); *see also State v. Hollingsworth*, 647 S.W.2d 937, 938 (Tenn. 1983) (stating that in matters entrusted to the discretion of the trial court, "the appellate court is not authorized to substitute its judgment for that of the trial court when the judgment of the trial court is supported by substantial evidence").

We begin by addressing the Petitioner's argument that the post-conviction court erred in denying the Petitioner's request to have the untested hair samples from Anthony L. McAffee's 1990 autopsy tested. The Petitioner points to the "controversy" surrounding the district attorney's letter, which said relevant untested hair samples existed, the letter's retraction, and the confusion created by the victim's name's similarity to a person whose autopsy was performed in 1990. The court denied the Petitioner relief because it found that the "controversy" created by the district attorney's letter failed to satisfy the four-element test for mandatory or discretionary DNA testing under the DNA Act. The Petitioner conceded in his brief that the court's reasoning for denying the Petitioner's relief was "not wholly want of logic." The Petitioner's argument focuses on his belief that the evidence is "so tainted by [] controversy" that the post-conviction court should have ordered DNA testing despite the evidence identifying the untested hair samples as belonging to a victim who died ten years before the autopsy of the homicide victim in the Petitioner's case.

The record supports the post-conviction court's finding that Dr. Metcalf's testimony established the medical examiner's office protocols and how hair recovered from a victim is labeled either as the victim's own or as third-person hair. Dr. Metcalf further testified that the hair samples could easily be identified as to whether they belonged to a victim due

to the roots of the hair in the sample. The record reflects that Dr. Metcalf was allowed to search the medical examiner's office for the victim's hair samples. Dr. Metcalf determined after the search that the victim's hair samples were destroyed one year after the case was closed.

The record reflects that the victim's 2001 autopsy collected facial, scalp, and pubic hairs from the victim and that Anthony L. McAffee's 1990 autopsy collected only pubic and scalp hairs. Dr. Metcalf testified that the 1990 autopsy samples reflected the types of hair listed on the district attorney's letter informing the Petitioner about untested DNA evidence in his case. Dr. Metcalf identified the hair samples from the 1990 autopsy of Anthony L. McAffee as the only remaining untested hair samples.

The record further reflects that Dr. King performed the victim's autopsy in the Petitioner's case. Dr. King testified that he remembered the victim's autopsy and that nothing unusual happened. Dr. King's credited testimony confirmed Dr. Metcalf's testimony that hair samples collected by the medical examiner's office were collected from the victim's body and were properly labeled. Further, Dr. King testified that had third-party hairs been collected during the victim's autopsy, they would have been labeled and sealed differently.

The record supports the post-conviction court's finding that the Petitioner failed to meet either the mandatory or discretionary requirements for DNA testing under the DNA Act. *See* T.C.A. §§ 40-30-304, -305. The record supports the court's determination that the samples from the victim's autopsy no longer exist and that any DNA testing of samples from Anthony L. McAffee's 1990 autopsy would not yield any evidence relevant to the Petitioner's case. The Petitioner is not entitled to relief on this basis.

II

Cumulative Error

In a novel argument, the Petitioner contends that he is entitled to relief under the cumulative error doctrine based upon multiple uncertainties created by the district attorney's erroneous letter and the misidentification of the hair samples based upon the similarity between the names of the victim of the 2001 homicide the Petitioner committed and that of a 1990 homicide victim.

The Petitioner claims that the cumulative effect of his receiving a letter informing him of untested DNA evidence in his case, that the DNA in question belonged to a different victim of the same name, and that during the litigation of this issue, it was uncertain that the DNA sample from the victim, Anthony Lee McAffee, existed, warrant relief for the Petitioner. The State responds that the Petitioner has failed to establish a single error for relief and is not entitled to cumulative error relief.

The cumulative error doctrine requires relief when "multiple errors [are] committed in the trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76-77 (Tenn. 2010) (internal citations omitted); *see State v. Jordan*, 325 S.W.3d 1, 79 (Tenn. 2010) ("'[T]he combination of multiple errors may necessitate . . . reversal . . . even if individual errors do not require relief.'") (quoting *State v. Cribbs*, 967 S.W.2d 773, 789 (Tenn. 1998)).

The Petitioner did not raise this issue in the post-conviction court. Issues raised for the first time on appeal are waived. *See* T.R.A.P. 36(a); *see also State v. Johnson*, 970 S.W.2d 500 (Tenn. Crim. App. 1996) ("Issues raised for the first time on appeal are considered waived."). We will not consider this issue further.

In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

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ROBERT H. MONTGOMERY, JR., JUDGE