

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 15, 2023

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Clerk of the
Appellate Courts

ERICK BAILEY v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 99-B-1017 Jennifer Smith, Judge

No. M2022-01752-CCA-R3-PC

The petitioner, Erick Bailey, appeals the post-conviction court’s denial of his petition for fingerprint analysis under the Post-Conviction Fingerprint Analysis Act of 2021. After review, we conclude the post-conviction court did not abuse its discretion in summarily dismissing the petition and affirm the post-conviction court’s judgment.

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

J. ROSS DYER, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT L. HOLLOWAY, JR., JJ., joined.

William D. Massey and Seth M. Segraves, Memphis, Tennessee, for the appellant, Erick Bailey.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Glenn Funk, District Attorney General; and Doug Thurman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

In May 1999, the petitioner and his twin brother, Derrick Bailey, were charged in a two-count indictment with the murder of Timothy Chandler during the perpetration of robbery and the premeditated first-degree murder of Timothy Chandler. On March 21, 2001, a Davidson County jury convicted the petitioner on both charges. The trial court merged the convictions and sentenced the petitioner to life imprisonment. On direct appeal, this Court “reverse[d] and vacate[d] the first-degree murder conviction on count two and impose[d] in lieu thereof a conviction of second-degree murder.” *State v. Bailey*, No.

M2001-01974-CCA-MR3-CD, 2002 WL 1336657, at *6 (Tenn. Crim. App. June 19, 2002), *perm. app. denied* (Tenn. Nov. 12, 2002).

This Court succinctly summarized the underlying facts of the case on direct appeal as follows:

[T]he evidence introduced at trial showed that the victim left his home on the evening of December 27, 1998 to rent video movies and to buy food for an evening meal for himself, his two children, his girlfriend, and other family members. The victim was driving his girlfriend's gold-colored Camaro that was accessorized with a set of chrome wire wheels valued at approximately \$4,000. After renting the videos and buying the food, he stopped at an Aztec convenience store on Dickerson Road and at 7:48 p.m. prepaid for ten dollars' worth of gas with ten one-dollar bills. He left the store through the rear door in the direction of the gas pumps that were located on the back side of the store.

At or about this time, the [petitioner] was riding on Dickerson Road with his twin brother Derrick Bailey and two cousins, Alvin Hall and Javon Garrison, in Derrick Bailey's Cadillac. According to Mr. Hall's testimony, Derrick Bailey was driving and the [petitioner] was riding in the front passenger seat. Due to the volume of the radio, Hall could not hear the conversation between the two Baileys in the front seat. After they passed the Aztec, Derrick Bailey turned the Cadillac around and drove back toward the Aztec. He pulled the car into the Taco Bell parking lot adjacent to the Aztec and parked behind the Taco Bell. The [petitioner] got out of the car and went through the shrubbery into the rear portion of the Aztec lot.

Derrick Bailey then drove the Cadillac back to the street and pulled up to the front of the Aztec store. Hall got out and went inside the store to buy a drink. Hall and the store clerk both testified that the [petitioner] was in the store when Hall came in. The [petitioner] asked Hall if he had change for \$20 and, after receiving a negative response, exited the store through the rear door. According to the clerk, the [petitioner] exited the store some time after the victim had exited through the same door. The clerk did not specify the amount of time that elapsed between the victim's exit and the [petitioner]'s exit through the same door. She testified that the next gas sale occurred "[a]t the most [] 20 minutes" after the victim's purchase.

Mary Ann Fenter, an Aztec customer, testified that when she drove to the rear of the Aztec only one car was present, a "champagne-colored" car parked beside a gas pump. Nearby were two men, one who was lying on the

ground and the other, a black man, who was standing over and looking down at the prone man. The man who stood was holding onto the jacket of the prone man, who did not move. When the man who was standing saw Ms. Fenter looking at him, he turned loose of the other man's jacket, got into the champagne-colored car, and drove away in a manner that she "wouldn't call speeding, but . . . wouldn't call it slow."

Alvin Hall had exited the Aztec store through the front door and had rejoined Garrison and Derrick Bailey in Bailey's Cadillac. Bailey then drove the Cadillac around to the rear of the Aztec where Hall saw the Camaro with its headlights off, moving away from the gas pump. The Cadillac followed the Camaro onto and down Dickerson Road. Both vehicles turned onto Bellshire Road. Hall asked to be let out, and Derrick Bailey stopped the Cadillac and let Hall and Garrison out.

Meanwhile, Ms. Fenter had alerted the store clerk, who called the police. Although neither Ms. Fenter nor the clerk had heard a gunshot, the victim had been shot by a .9 mm weapon that was fired within six inches of the victim's chest. The bullet struck the heart, liver, aorta, and spine. The victim died while on a hospital operating table.

Later that evening, a motorist discovered the Camaro on Jackson Road about two miles from Dickerson Road and five miles from the Aztec. Jackson Road is connected to Dickerson Road via Brick Church Road and Bellshire. The wheels and tires, radio, and speakers had been removed from the Camaro, and someone had ineffectually attempted to set the car afire.

The police were alerted to the [petitioner]'s involvement in the crime by the store clerk's identification of him and his appearance on the store's surveillance videotape. After the police apprehended the [petitioner], they discovered \$950 on his person, including 166 one-dollar bills. The [petitioner] admitted being at the Aztec during the evening of December 27 and said that he had "heard a shot."

The police obtained Derrick Bailey's Cadillac. They found evidence that someone had placed tires in the backseat. They photographed a portion of the back of the leather front seat, where an impression of raised lettering from a tire had been left. This lettering was identified as belonging to a specific make and model of tire that had been sold to the victim and mounted on the Camaro in the summer of 1998. Also, after recovering the Camaro,

the police discovered a propane bottle in its trunk that bore the [petitioner]'s fingerprint.

Bailey, 2002 WL 1336657, at *1-2.

Thereafter, the petitioner sought post-conviction relief, asserting he received ineffective assistance of counsel. The post-conviction court denied the petition, and this Court affirmed the judgment of the post-conviction court on appeal. *See Bailey v. State*, No. M2005-00181-CCA-R3-PC, 2005 WL 2477532, at *1 (Tenn. Crim. App. Oct. 7, 2005), *perm. app. denied* (Tenn. Feb. 6, 2006). It appears that in 2015, the petitioner requested DNA analysis of a cigarette butt pursuant to the Post-Conviction DNA Analysis Act of 2001 (“DNA Act”). The petitioner’s request was granted, and the testing returned inconclusive results.

On April 5, 2022, the petitioner filed a “Petition for Fingerprint Analysis Pursuant to Tenn. Code Ann. § 40-30-403.” In the petition, the petitioner sought further testing of the fingerprint found on a propane tank in the trunk of the victim’s car that was matched to the petitioner by fingerprint analysis completed by analyst Lorita Marsh. The petitioner complained that Analyst Marsh failed to run the print through the Automated Fingerprint Identification System (“AFIS”) to check for additional suspects and only compared the print to the victim, the petitioner, and Derrick Bailey. The petitioner also asserted that a new algorithmic computer analysis was available to eliminate subjectivity in analysis and that the fingerprint should now be subjected to this testing. After a series of responses and replies by the State and the petitioner, the post-conviction court entered an order denying the petition without a hearing on November 29, 2022. The petitioner filed a timely notice of appeal.

Analysis

The petitioner argues that the post-conviction court erred in denying his request for fingerprint analysis under the Post-Conviction Fingerprint Analysis Act of 2021 (“Fingerprint Act”), asserting the court abused its discretion by considering the factual findings of this Court from the direct appeal and post-conviction appeal which construed the evidence in the light most favorable to the State. The petitioner avers that the post-conviction court should have considered the effect an exculpatory fingerprint on the propane tank would have had on the evidence at the time of trial without the “inappropriate lens” of evidence in the light most favorable to the State. The State responds that the post-conviction court properly denied the petition because even if further fingerprint analysis were to exclude the petitioner, it would not undermine confidence in the outcome of the case. We agree with the State.

The Fingerprint Act provides that a petitioner convicted of certain enumerated offenses, including first-degree murder,

may, at any time, file a petition requesting the performance of fingerprint 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 a judgment of conviction and that may contain fingerprint evidence.

Tenn. Code Ann. § 40-30-403. The subsequent two code sections, sections 40-30-404 and -405, one mandatory and one discretionary, outline the process for this avenue of relief. Under both code sections, the State must be notified and given the opportunity to respond, and then the court considers whether:

(1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through fingerprint analysis;

(2) The evidence is still in existence and in such a condition that fingerprint analysis may be conducted;

(3) The evidence was never previously subjected to fingerprint analysis, was not subjected to the analysis that is being requested which could resolve an issue not resolved by previous analysis, or was previously subjected to analysis and the person making the motion under this part requests analysis that uses a new method or technology that is substantially more probative than the prior 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.

Tenn. Code Ann. § 40-30-404, or

(1) A reasonable probability exists that analysis of the evidence will produce fingerprint 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 fingerprint analysis may be conducted;

(3) The evidence was not previously subjected to fingerprint analysis, was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis, or was previously subjected to analysis and the person making the motion under this part requests analysis that uses a new method or technology that is substantially more probative than the prior 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.

Tenn. Code Ann. § 40-30-405.

This Court has had only a handful of opportunities to address a case under the Fingerprint Act, the first being in *Smith v. State*, No. M2021-01339-CCA-R3-PD, 2022 WL 854438 (Tenn. Crim. App. Mar. 23, 2022). *See also Garner v. State*, No. M2021-01396-CCA-R3-PC, 2023 WL 166832 (Tenn. Crim. App. Jan. 12, 2023); *Barnes v. State*, No. M2022-00367-CCA-R3-PC, 2022 WL 4592092 (Tenn. Crim. App. Sept. 30, 2022); *Johnson v. State*, No. M2021-01420-CCA-R3-PC, 2022 WL 2251333 (Tenn. Crim. App. June 23, 2022). In *Smith*, this Court determined that case law discussing the DNA Act was helpful for guidance in ruling on petitions under the Fingerprint Act because the language of the Fingerprint Act mirrored that of the DNA Act and the appellate courts “have had ample opportunity over the last twenty years or so to interpret the meaning of the DNA Act.” *Smith*, 2022 WL 854438, at *13. Accordingly, a trial court is not required to hold a hearing to determine whether a petition for fingerprint analysis should be granted or denied. *Id.* (citing *Elsea v. State*, No. E2017-01676-CCA-R3-PC, 2018 WL 2363589 at *3 (Tenn. Crim. App. May 24, 2018)). The post-conviction court’s determination of whether to grant a petition for post-conviction fingerprint analysis is reviewed for an abuse of discretion. *Id.* at *14.

A petitioner must satisfy all four elements of section 404 or section 405 before the trial court will order fingerprint analysis. *Id.* at *13; *see Powers v. State*, 343 S.W.3d 36, 48 (Tenn. 2011). However, the only element at issue in this case is the “reasonable probability” requirement found in sections 404(1) and 405(1) as that was the basis for the post-conviction court’s decision. *See* Tenn. Code Ann. § 40-30-404(1) and -405(1). “The definition of ‘reasonable probability’ has been well-established in other contexts, and is traditionally articulated as ‘a probability sufficient to undermine confidence in the outcome’” of the prosecution. *Powers*, 343 S.W.3d at 54 (quoting *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009) and *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

The post-conviction court’s analysis begins with the proposition that the fingerprint analysis, if done, will prove to be favorable to the petitioner. *Smith*, 2022 WL 854438, at *14; *see Powers*, 343 S.W.3d at 55, n.28. Courts must consider the evidence that was presented against the petitioner at trial, but the evidence must be viewed in light of the effect that favorable fingerprint evidence would have had on the fact-finder or the State. *Id.*; *see Powers*, 343 S.W.3d at 55. “[T]he analysis must focus on the strength of the [fingerprint] evidence as compared to the evidence presented at trial – that is, the way in which the particular evidence of innocence interacts with the evidence of guilt.” *Id.* (quoting *Powers*, 343 S.W.3d at 55).

Because the post-conviction court is not required to hold a hearing in order to determine whether testing should be granted, the opinions of the appellate courts from direct appeal or previous post-conviction actions can “provide the essential facts of the crime at issue.” *Id.* (quoting *Powers*, 343 S.W.3d at 56). However, previous appeals should not be used to determine the merits of any claim, such as whether the reasonable probability threshold has been established. *Id.*; *see Powers*, 343 S.W.3d at 56. “Courts, therefore, should guard against denying petitions for post-conviction [fingerprint] testing under the Act based upon an appellate court’s prior determination that the evidence on direct or post-conviction appeal, which was reviewed in the light most favorable to the State, was sufficient to convict.” *Id.* (quoting *Powers*, 343 S.W.3d at 57).

After detailing the law applicable to its review, the post-conviction court observed in the present case that “there are three possible outcomes: the prints could match the [p]etitioner; the prints could match another person; or the prints could be inconclusive.” Noting that the most favorable outcome for the petitioner would be for the prints to match another person, the court said it would “consider the effect this finding would have had on the State’s decision to prosecute or on the jury’s verdict at trial.”

With this standard in mind, the post-conviction court endeavored into a review of the proof at trial. The post-conviction court recalled that Tammy Taylor, the gas station clerk,

reviewed surveillance video from the night of the murder. She identified one man as “one of the twins” and stated that he had on a “brown jacket and some kind of hat on his head,” a description that was consistent with Mary Ann Fenter’s[a patron at the store on the night of the murder who saw the suspect and the victim,] description of the man she saw standing over the victim. [Ms. Taylor] also said that she recognized the suspect’s face as he had been in the store before. Ms. Taylor identified the [p]etitioner in open court.

The post-conviction court also recalled the testimony of Alvin Hall, the petitioner's cousin, who testified that when Derrick Bailey pulled up to the back of Taco Bell, the petitioner got out and walked through the bushes to the back of the gas station. Mr. Hall said that Derrick Bailey then pulled the car to the front of the gas station and Mr. Hall went inside where he briefly interacted with the petitioner who was inside. Mr. Hall stated that the petitioner then exited the store through the back door. Mr. Hall identified the petitioner on the store's surveillance footage.

The post-conviction court summarized that the evidence of the petitioner's presence at the gas station on the night of the murder was overwhelming, noting the petitioner was seen on the surveillance video and identified by at least two witnesses. The court recounted that the petitioner fled from the police the day after the murder and, after he was apprehended, admitted that he was present at the gas station the night before.

The petitioner's fingerprint on the propane tank in the trunk of the victim's car was not critical to the petitioner's conviction and the hypothetical presence of another person's fingerprint on the tank would not exonerate the petitioner of the crime. As stated by the post-conviction court, "[a] non-matching print on the propane tank would do little to undermine the strength of the remaining evidence, since that item was found in the trunk of the victim's car and had no direct link to the murder itself." The post-conviction court went on, "Indeed, the circumstantial evidence and eyewitness accounts far outweigh the impact of any potentially favorable fingerprint analysis."

Contrary to the petitioner's assertion that the post-conviction court viewed the evidence in the light most favorable to the State, the post-conviction court's order shows that the post-conviction court was well aware of its duty to view the evidence in light of the effect that exculpatory fingerprint evidence would have had on the fact-finder or State. Nothing in the post-conviction court's order suggests the court gave greater weight to the State's view of the evidence in its consideration of the possible impact of the possible fingerprint results. In fact, the post-conviction court's reference to the other decisions came only after the post-conviction court's review of the evidence from trial. Notably, the post-conviction court's reference to this Court's opinion on direct appeal was to show that this Court did not even mention the fingerprint on the propane tank in its summation of the convicting evidence with regard to the petitioner's sufficiency argument.

We conclude that the post-conviction court did not abuse its discretion in denying the petitioner's petition for post-conviction fingerprint analysis based on its determination that there was no reasonable probability that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through fingerprint analysis, or that analysis of the evidence would produce fingerprint results that would have rendered the petitioner's verdict or sentence more favorable.

Conclusion

Based upon the foregoing authorities and reasoning, we affirm the post-conviction court's dismissal of the petitioner's petition for post-conviction fingerprint analysis.

J. ROSS DYER, JUDGE