

IN THE CRIMINAL COURT OF TENNESSEE
FOR THE 30th JUDICIAL DISTRICT, AT MEMPHIS
DIVISION I

PERVIS PAYNE, Petitioner)		
	)		87-04408
	)		87-04409
v.	)	No. P-09594;	87-04410,
	)	Capital Case	
	)	Post-Conviction	
STATE OF TENNESSEE, Respondent.	)	Filed	1-25-21
	)	Heidi Kuhn, Clerk	
	)	BY	JK D.C.

ORDER DISMISSING "PETITION FOR POST-CONVICTION DNA ANALYSIS"

I. Introduction

This matter came before the Court January 19, 2021, upon the above-referenced petition. In an earlier Order, this Court granted the Petitioner, Pervis Payne, testing of several evidentiary items pursuant to the Post-Conviction DNA Analysis Act of 2001, Tennessee Code Annotated sections 40-30-301 through -313. On January 18, 2021, a report detailing the testing results was provided to counsel for Mr. Payne; this report was introduced into the record in open court on January 19.

After reviewing the report, this Court finds that the results of the previously-ordered DNA testing are not favorable to Mr. Payne. Accordingly, per the provisions of the Post-Conviction DNA Analysis Act, the Court ORDERS that Mr. Payne's DNA petition is DISMISSED.

II. The Present Post-Conviction DNA Action

On July 22, 2020, Mr. Payne filed a petition for post-conviction DNA testing. After subsequent filings by both parties, this Court held an evidentiary hearing on the

motion September 1, 2020. After taking the matter under advisement, this Court issued an order September 16, 2020, granting Mr. Payne’s motion. The Court ordered testing on several evidentiary items related to this case¹ but was forced to deny Petitioner’s motion as to two items he sought to have tested—specifically, vaginal swabs taken from Ms. Christopher and fingernail clippings taken during Ms. Christopher’s autopsy—because the items could not be located.² The State did not appeal this Court’s order granting DNA testing.

III. Test Results

The evidence at issue was submitted to Forensic Analytical Crime Lab (FACL) for DNA testing. On January 18, 2021, FACL forensic scientist Dave Hansen and senior forensic scientist Alan Keel³ submitted a report to Petitioner’s counsel detailing the testing results. DNA analysis was conducted by Mr. Hansen and his colleague, forensic scientist Nancy Wilson, and reviewed by Mr. Keel. The report, which was submitted into the record at the January 19 report date, summarized the relevant test results as follows:

1. A full autosomal profile of Charisse Christopher was obtained from the tampon [3C]. A partial but highly discriminating autosomal profile and a full Y-STR profile of Nicholas Christopher were obtained from a bloodstain on the curtains [6-1B]. Full autosomal and Y-STR profiles of Pervis Payne were obtained from his buccal swab [24A].
2. Kitchen knife [1-1]:
 - a. Handle swab [1-1A]: 3-person DNA mixture. Very strong evidence Charisse Christopher and Nicholas Christopher are contributors. Payne eliminated.

¹ See September 2020 order granting DNA analysis, at 45-46.

² See *id.* at 41.

³ Mr. Keel testified as an expert witness for the Petitioner at the September 1 evidentiary hearing.

- b. Hilt swab [1-1B]: 3-person DNA mixture. Very strong evidence Charisse Christopher and Nicholas Christopher are contributors. Limited evidence Payne is a contributor.
 - c. Blade edge swab [1-1C]: 3-person DNA mixture. Very strong evidence Charisse Christopher and Nicholas Christopher are contributors. Payne eliminated.
- 3. Paper towel bundle [1-2] packaged with the kitchen knife:
 - a. Bloodstain cutting [1-2A]: 3-person DNA mixture. Very strong evidence Charisse Christopher and Nicholas Christopher are contributors. Limited evidence Payne is not a contributor.
 - b. Bloodstain cutting [1-2B]: 2-person DNA mixture. Very strong evidence Charisse Christopher and Nicholas Christopher are contributors. Payne eliminated.
- 4. Washcloth [2]:
 - a. Fluorescent stain sperm fraction cutting [2ASp]: A few sperm microscopically observed in the sample cell debris. Trace-level 2-person DNA mixture. Limited evidence Payne is a contributor. Limited evidence Nicholas Christopher is not a contributor. Charisse Christopher eliminated.
 - b. Bloodstain cutting [2B]: 2-person DNA mixture. Very strong evidence Charisse Christopher is a contributor. Nicholas Christopher and Payne eliminated.
 - c. Bloodstain cutting [2C]: 3-person DNA mixture. Very strong evidence Charisse Christopher is a contributor. Limited evidence Nicholas Christopher and Payne are contributors.
 - d. Bloodstain cutting [2D]: 3-person DNA mixture. Very strong evidence Charisse Christopher is a contributor. Strong evidence Nicholas Christopher is a contributor. Limited evidence Payne is a contributor.
 - e. Bloodstain cutting [2E]: Trace-level apparent single contributor analyzed as 2- person mixture. Limited evidence Charisse Christopher is a contributor. Limited evidence Nicholas Christopher and Payne are not contributors.
 - f. Bloodstain cutting [2F]: 3-person DNA mixture. Strong evidence Charisse Christopher is a contributor. Limited evidence Nicholas Christopher is a contributor. Limited evidence Payne is not a contributor.
 - g. Substrate control cutting [2G]: 3-person mixture. Very strong evidence Charisse Christopher is a contributor. Limited evidence Nicholas Christopher

is a contributor. Moderate evidence Payne is a contributor.

5. Tampon [3]; No acid phosphate activity detected in multiple areas tested; no sperm observed among the cell debris of the following samples:
 - a. String cutting [3A1]: Y-chromosome testing only; 3-person mixture. Nicholas Christopher and Payne not eliminated.
 - b. String cutting [3A2]: Y-chromosome testing only; 2-person mixture. Nicholas Christopher not eliminated. Payne eliminated assuming 2 contributors.
 - c. Cutting [3B]: Y-chromosome testing only; 2-person mixture. Nicholas Christopher not eliminated. Payne eliminated assuming 2 contributors.
 - d. Cutting [3C]: Autosomal testing as Charisse Christopher secondary reference [See 1]. Y-chromosome testing; 2-person mixture. Nicholas Christopher not eliminated. Payne eliminated assuming 2 contributors.
6. Eyeglasses [4]; blood detected in all samples:
 - a. Temple arms hinges and screws swabs [4A]: Results too weak to interpret.
 - b. Temple arms swab [4C]: Trace-level apparent single contributor analyzed as 2- person mixture. Nicholas Christopher comparison was uninformative. Limited evidence Charisse Christopher and Payne are not contributors.
 - c. Nose rest swab [4D]: Trace-level apparent single contributor analyzed as 2- person mixture. Limited evidence Charisse and Nicholas Christopher are contributors. Limited evidence Payne is not a contributor.
7. Curtains [6-1]:
 - a. Bloodstain cutting [6-1B]: Autosomal and Y-STR 2-person mixtures. Major autosomal and Y-chromosome profiles were utilized as a secondary reference for Nicholas Christopher [See 1]. Trace-level autosomal alleles foreign to Nicholas were not interpreted. Payne eliminated from Y-STR results assuming 2 contributors.
 - b. Bloodstain cutting [6-1C]: 2-person DNA mixture. Very strong evidence Charisse and Nicholas Christopher are contributors. Payne eliminated.
 - c. Bloodstain cutting [6-1D]: 2-person DNA mixture. Strong evidence Nicholas Christopher is a contributor. Charisse Christopher and Payne eliminated.
 - d. Bloodstain cutting [6-1E]: 2-person DNA mixture. Very strong

evidence Charisse and Nicholas Christopher are contributors. Payne eliminated.

8. Drapes [6-2]:
 - a. Bloodstain cutting [6-2A]: 2-person DNA mixture. Strong evidence Nicholas Christopher is a contributor. Limited evidence Charisse Christopher is a contributor. Payne eliminated.
9. Drapes [6-3]:
 - a. Bloodstain cutting [6-3B]: Trace-level apparent single contributor analyzed as 2- person mixture. Limited evidence Nicholas Christopher is a contributor. Limited evidence Charisse Christopher and Payne are not contributors.
 - b. Bloodstain cutting [6-3C]: Single contributor. Very strong evidence Nicholas Christopher is the contributor.
 - c. Bloodstain cutting [6-3D]: Single contributor. Very strong evidence Nicholas Christopher is the contributor.
10. Paper towel bundle [7]:
 - a. Bloodstain [7A]: 2-person mixture. Very strong evidence Charisse Christopher is a contributor. Strong evidence Nicholas Christopher is a contributor. Payne eliminated.
 - b. Bloodstain [7B]: 3-person mixture. Very strong evidence Charisse Christopher is a contributor. Limited evidence Nicholas Christopher is a contributor. Limited evidence Payne is not a contributor.
 - c. Bloodstain [7C]: Y-chromosome tested only; 2-person mixture. Nicholas Christopher not eliminated. Payne eliminated assuming 2 contributors.⁴

IV. Parties' Arguments at January 19 Court Date

Kelley Henry, counsel for the Petitioner, asserted the test results "corroborated" Mr. Payne's trial testimony, in which he claimed he came upon the crime scene after the victims had been attacked. Ms. Henry particularly noted the Petitioner had been eliminated as the contributor of the DNA on the handle and blade of the knife used to carry out the attack. Ms. Henry acknowledged the Petitioner's DNA was present on the

⁴ DNA testing report at 3-6.

knife hilt, but counsel argued this fact corroborated the Petitioner's trial testimony, in which he said he cut himself while attempting to remove the knife from one of the victims. Counsel also claimed that partial DNA profiles of other individuals (not Mr. Payne) were found on the items tested, but the partial profiles were not sufficient to generate a DNA profile which could be compared against other profiles, such as those in CODIS.

For the State, Mr. Jones asserted the test results were not exculpatory or otherwise favorable to the Petitioner. Mr. Jones noted the murder weapon had "limited" DNA belonging to the Petitioner, a "sperm fraction" cutting from a washcloth had limited evidence of the Petitioner being a contributor, and Mr. Payne could not be eliminated as a potential contributor to DNA found on the string of the tampon found near Charisse Christopher's body. Regarding the DNA fragments which may or may not belong to unknown persons, Mr. Jones stated the parties have no way of knowing, based on the test results, when the DNA of persons other than the Petitioner and victims was placed onto the tested items.

Mr. Jones reiterated the State's earlier argument—found unavailing by this Court in its September 16 ruling—that the principles of res judicata, issue preclusion, and law of the case precluded the Court from granting the Petitioner relief. Considering these principles and the test results—which were not exculpatory and did not yield a DNA profile which could be compared to other known profiles—the State urged this Court to dismiss the petition.

In response, Ms. Henry asserted the current proceedings were "at an end" and there was nothing else for this Court to do. Petitioner's counsel stated she needed to review the results to determine whether to file a motion to reopen or some other cause of

action in this Court. At the very least, she intended to present the test results to the Governor as part of Mr. Payne's clemency petition.

Ms. Henry acknowledged that the results of the testing were not exculpatory for the Petitioner. However, she asserted that the report made clear that the sperm fraction taken from a washcloth inside the apartment was not consistent with having been produced at the time of the offenses. She also emphasized unknown DNA fragments were found throughout the crime scene, and she was not willing to conclude that the DNA profiles found on the tampon string and washcloth were those of the Petitioner.

V. Analysis

The Post-Conviction DNA Analysis Act allows, under certain circumstances, individuals convicted of certain crimes, including first degree murder, to obtain DNA testing of certain evidence at any time. *See* Tenn. Code Ann. §§ 40-30-301 through -313.

Specifically, the court *shall* order DNA analysis if it finds:

- (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.

Tenn. Code Ann. § 40-30-304 (emphasis added).

A “reasonable probability” of a different result exists when potentially favorable DNA testing results “undermine the confidence in the outcome of the prosecution.” *Sedley Alley v. State*, No. W2006-01179-CCA-R3-PD, 2006 WL 1703820, at *14 (Tenn. Crim. App. June 22, 2006), *abrogated on other grounds* by *Powers v. State*, 343 S.W.3d 46 (Tenn. 2011). “Under section 40-30-304(1), therefore, prior to a mandatory order of testing, a petitioner’s argument must merely establish ‘a probability sufficient to undermine confidence’ in the decision to prosecute or in the conviction had the State or the jury known of exculpatory DNA testing results.” *Powers*, 343 S.W.3d at 55. When reviewing a DNA petition (i.e., before ordering testing), the court assumes the DNA testing will reveal exculpatory evidence, and “the evidence must be viewed in light of the effect that exculpatory DNA evidence would have had on the fact-finder or the State.” *Id.* However, “there is no presumption of innocence afforded to a petitioner” who files a DNA post-conviction petition. *Charles Elsea v. State*, No. E2017-01676-CCA-R3-PC, 2018 WL 2363589, at *4 (Tenn. Crim. App. May 24, 2018), *no perm. app. filed*. The petitioner bears the burden of establishing all four criteria under T.C.A. section 40-30-304, and “[t]he court must dismiss the petition if the petitioner fails to establish each of the four criteria required” in the statute. *Powers*, 343 S.W.3d at 48.

After court-ordered testing is completed,

If the results of the post-conviction DNA analysis are not favorable to the petitioner, the court shall dismiss the petition, and make further orders as may be appropriate. If the results of the post-conviction DNA analysis are favorable, the court shall order a hearing, notwithstanding any provisions of law or rule of court that would bar the hearing as untimely, and thereafter make orders as are required or permitted by the rules of criminal procedure or part 1 of this chapter.

Tenn. Code Ann § 40-30-312.

In determining whether the results of DNA analysis are favorable to the Petitioner,

there is no “provision of the Post–Conviction DNA Analysis Act, the Rules of Criminal Procedure, or the Post–Conviction Procedure Act which requires a post-conviction court to, essentially, call its own expert witness before determining whether a petitioner is entitled to relief based upon a newly ordered DNA analysis.” *Kenneth Alan Steele v. State*, No. E2016-01375-CCA-R3-PC, 2018 WL 842936, at *3 (Tenn. Crim. App. Feb. 13, 2018), *perm. app. denied*, (Tenn. June 6, 2018). Furthermore, “the Post-Conviction DNA Analysis Act does not contemplate an evidentiary hearing until after DNA testing produces results favorable to the petitioner.” *Alley*, 2006 WL 1703820, at *6.

VI. Application to Present Case

The Court has reviewed the report detailing the results of the DNA analysis in this case. After doing so, the Court concludes the results are not favorable to Mr. Payne. The Petitioner argues the absence of his DNA from several of the items tested supports his trial testimony, but Mr. Payne’s DNA is not entirely absent from the apartment. Not only does Mr. Payne’s DNA appear on a washcloth taken from the victims’ apartment, but Mr. Payne also cannot be excluded as a contributor to DNA found on a tampon found near Charisse Christopher’s body. Given these results, the Court must reach the same conclusion acknowledged by both parties during the January 19 court date—the results of the court-ordered DNA analysis are not exculpatory.

As the State suggested may happen during the September 1 hearing, several of the items contained genetic material that was insufficient to generate a DNA profile to be compared against known DNA profiles, such as those contained in CODIS. Counsel for the Petitioner asserts that the DNA analysis in this case establishes the presence of unknown persons’ DNA in the victims’ apartment, and counsel also argues that the

Petitioner may not even be the contributor of those samples for which he could not be eliminated as the contributor. However, the Court finds these arguments by Petitioner's counsel to be purely speculative. The DNA analysis in this case did nothing to resolve this long-standing speculation, nor did the testing establish that anyone other than the victims and Mr. Payne were present in the victims' apartment at the time of the offenses.

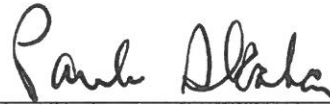
In short, had these DNA testing results been available at trial, such results would not have been sufficient to undermine confidence in the verdict and sentence returned by the jury considering the other evidence presented at trial inculcating the Petitioner. The DNA test results did not reveal Mr. Payne's DNA to be present on every item found in the victims' apartment, but "[t]he failure of the DNA results to corroborate the State's . . . evidence does not equate to the results being favorable to the petitioner." *James Eric Winston v. State*, No. M2006-01699-CCA-R3-PC, 2007 WL 2351164, at *5 (Tenn. Crim. App. Aug. 20, 2007). This Court therefore concludes the DNA testing results are not favorable to the Petitioner, and per T.C.A. section 40-30-312, the Petition for DNA analysis is DISMISSED.

VII. Conclusion

If the results of the DNA analysis would have raised any serious question about Mr. Payne's guilt, this Court would have done everything in its power to assist Mr. Payne in any way possible under the law. However, the results of the DNA analysis in this case are, for the reasons stated above, not favorable to Mr. Payne. Accordingly, per T.C.A. section 40-30-312, the Court is constrained to dismiss this petition.

This Court's dismissal of the current petition should not be viewed as a comment on the merits of any potential litigation Mr. Payne may bring in the future.

IT IS SO ORDERED this the 25 day of January 2021.



Paula Skahan, Judge
Criminal Court, Division I
30th Judicial District, at Memphis