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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
August 4, 2020 Session

CURTIS KELLER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 10-02756 Carolyn W. Blackett, Judge

No. W2019-01652-CCA-R3-ECN

The Petitioner, Curtis Keller, appeals the summary dismissal of his petition for writ of error coram nobis, in which he sought relief from his convictions for three counts of especially aggravated kidnapping, three counts of aggravated robbery, four counts of attempted aggravated robbery, aggravated burglary, and intentionally evading arrest in a motor vehicle. The Petitioner seeks coram nobis relief related to an undiscovered report matching his DNA to DNA from a ski mask used during the home invasion that led to his convictions. The Petitioner asserts he is entitled to due process tolling and a hearing. We conclude that because there is no reasonable basis to conclude that the evidence might have led to a different outcome, the trial court did not err in dismissing the petition without a hearing, and we affirm the judgment.

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

JOHN EVERETT WILLIAMS, P.J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and J. ROSS DYER, JJ., joined.

Lance R. Chism, Memphis, Tennessee, for the appellant, Curtis Keller.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL AND PROCEDURAL HISTORY

The Petitioner's convictions stem from a home invasion and robbery that took place in Germantown, Tennessee, in 2008. The proof at the Petitioner's trial established

that the Petitioner organized the robbery, which was perpetrated by seven accomplices. *State v. Curtis Keller ("Keller I")*, No. W2012-01457-CCA-R3-CD, 2013 WL 6021332, at *4-9 (Tenn. Crim. App. Nov. 6, 2013), *perm. app. granted, cause remanded* (Tenn. Feb. 11, 2014). According to the testimony of two of his accomplices, the Petitioner masterminded the crime and, serving as the "lookout," drove to the home in a blue truck. *Id.* The other seven accomplices arrived in a stolen white van, broke into the home, and terrorized and robbed the seven occupants. *Id.* at *5, 7-8. After one victim managed to call police, the accomplices fled in the van, throwing various pieces of evidence from the vehicle as they led law enforcement on a lengthy, high-speed chase. *Id.* at *4, 9. When the van crashed, five of the men were apprehended, and one co-defendant was taken into custody trying to retrieve his vehicle from a rendezvous point the following day. *Id.* at *6, 8. One of the co-defendants sustained an injury from broken glass and left DNA at the scene tying him to the crime. *Id.* at *5.

Two of the co-defendants implicated the Petitioner and testified about his involvement at trial. *Id.* at *4-9. Furthermore, a blue truck tied to the Petitioner was visible on footage from police vehicles involved in the high-speed chase. The Petitioner's involvement was also established by DNA analysis. A ski mask recovered from the getaway van was analyzed for DNA, and a partial profile was obtained. *Id.* at *10. A DNA sample taken from the Petitioner in May 2011 was subsequently matched to the profile on the ski mask, and this evidence was introduced at trial. *Id.* However, the Petitioner was unaware that a previous sample of his DNA, taken in 2009, had likewise returned a match with the DNA recovered from the same ski mask, and this is the evidence upon which he bases his petition for coram nobis relief.

According to the documents attached to the petition for writ of error coram nobis and the assertions in the petition, the Petitioner's DNA was obtained in Shelby County on March 16, 2009, when the Petitioner was being held in connection with the Germantown robberies and unrelated drug charges. On July 10, 2009, Special Agent Qadriyyah Debnam issued an Official Serology / DNA Report which stated that the ski mask had been tested and "a partial DNA profile was obtained consistent with a mixture of genetic material from unidentified individuals." Special Agent Debnam had DNA samples from six of the Petitioner's accomplices and six victims, and she excluded all of the subjects as possible contributors. The report stated, "The above DNA profile has been added to the CODIS database for forensic unknown samples." An "LDIS Specimen Detail Report" showed that Special Agent Debnam was able to obtain values for twelve loci and the gender marker amelogenin from the DNA from the ski mask.

The subject of the current coram nobis action is the 2018 production by the Tennessee Bureau of Investigation ("TBI") of a report matching the Petitioner's March 2009 DNA sample to the DNA from the ski mask. On October 7, 2009, a "Local Match

Detail Short Report" indicated that there was a match between the Petitioner's March 2009 DNA sample and the partial profile obtained from the ski mask by Special Agent Debnam. Trial counsel executed an affidavit stating that he did not recall ever seeing this report. According to the Petitioner, TBI Special Agent Lawrence James's explanation for the State's failure to act on the 2009 match was that the match had "fallen through the cracks."

The Petitioner included documentation indicating that, even though law enforcement had obtained a sample of his DNA in March 2009, law enforcement proceeded as though they did not have his DNA sample. A TBI telephone log dated October 21, 2009, indicated that a detective told TBI personnel that he was attempting to collect a DNA sample from the Petitioner. On May 13, 2010, the State filed a motion to obtain the Petitioner's DNA, asserting that the State had no DNA sample for the Petitioner.

The Petitioner's Germantown robberies were not his only offenses. In late May 2010, the Petitioner was arrested for a similar home invasion and robbery committed in Collierville, Tennessee, and his DNA was collected in Collierville in May 2010. On October 12, 2010, the CODIS database of DNA returned a "hit" on the Petitioner's Collierville DNA sample, which likewise matched the DNA sample from the Germantown ski mask. The "hit" was confirmed in November, and Special Agent James was informed of the match obtained through the CODIS database. The accompanying report shows matching values at eleven loci and the amelogenin marker. Special Agent James issued an Official Serology / DNA Report on December 7, 2010, informing local law enforcement of the match and stating that, to confirm that the DNA was the same, the Petitioner's DNA must again be collected and submitted to the TBI. Accordingly, in May 2011, the prosecutor filed a motion to obtain another DNA sample from the Petitioner, and the motion was granted.

This third DNA sample, from May 2011, was compared to the DNA profile created by Special Agent Debnam from the ski mask in 2009. The Official Serology / DNA Report prepared by Special Agent James on June 27, 2011, concluded that the DNA of the major contributor to the ski mask matched the Petitioner's DNA at eleven out of thirteen loci and the amelogenin marker and that the probability of the DNA belonging to an unrelated individual exceeded the world population. At trial, the State introduced testimony from Special Agent Debnam regarding her retrieval of DNA from the ski mask and introduced testimony from Special Agent James that the Petitioner's May 2011 DNA sample matched the DNA on the mask. The match between the ski mask and the May 2010 sample was excluded from evidence under Tennessee Rule of Evidence 404(b) because that sample was taken pursuant to the investigation of the Collierville home invasion.

In relation to the Germantown robberies, the Petitioner was charged at trial with three counts of especially aggravated kidnapping, three counts of aggravated robbery, four counts of attempted aggravated robbery, four counts of aggravated assault, aggravated burglary, intentionally evading arrest in a motor vehicle, and theft of property. *State v. Curtis Keller ("Keller II")*, No. W2012-01457-CCA-R3-CD, 2014 WL 4922627, at *2 (Tenn. Crim. App. Sept. 29, 2014), *perm. app. denied* (Tenn. Jan. 15, 2015). A jury convicted him of all counts save the theft of property charge, and the trial court merged his aggravated assault convictions into the robbery crimes committed against each victim, sentencing him to an effective three-hundred-year sentence. *Keller I*, 2013 WL 6021332, at *11.

On direct appeal, this court upheld the sufficiency of the evidence, concluded that the State adequately established a chain of custody for the ski mask, and determined that a mistrial was not warranted. *Keller I*, 2013 WL 6021332, at *1. The Tennessee Supreme Court remanded the case to this court to determine whether the Petitioner was entitled to any relief based on the especially aggravated kidnapping jury instructions pursuant to *State v. White*, 362 S.W.3d 559 (Tenn. 2012), and *State v. Cecil*, 409 S.W.3d 599 (Tenn. 2013), and this court concluded that there had been no error in the instructions. *Keller II*, 2014 WL 4922627, at *1, 6. This court affirmed pursuant to Rule 20 of the Rules of the Court of Criminal Appeals the dismissal of the Petitioner's habeas corpus petition challenging the superseding indictment and certain sentencing issues. *Curtis Keller v. State ("Keller III")*, No. W2012-02076-CCA-R3-HC, 2013 WL 597789, at *1 (Tenn. Crim. App. Feb. 15, 2013), *perm. app. denied* (Tenn. May 7, 2013).

Shortly after trial, the Petitioner's 2009 DNA sample was destroyed. The Petitioner had been tried under a superseding indictment in March 2012, and the original indictment was dismissed on May 31, 2012.[1] A DNA expungement report indicates the March 2009 DNA sample was destroyed on June 25, 2012, and it notes that the reason for the expungement is "All Nolle."

The Petitioner filed a post-conviction petition and issued a subpoena to the TBI. During a conversation with Special Agent James, post-conviction counsel became aware of the 2009 report indicating that the Petitioner's 2009 DNA sample was a match for the partial profile obtained from the ski mask. The Petitioner filed a pro se coram nobis petition, which counsel amended. The coram nobis court concluded that the 2009 report contained the same information as the 2010 report which first brought the DNA

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[1] The judgment form, which is attached to the petition and indicates that these charges had been dismissed, is not file-stamped.

connection between the Petitioner and the ski mask to the attention of law enforcement, that it was merely cumulative, and that it would not have resulted in a different judgment. The court went on to observe that "it is unlikely that that would have resulted in a different outcome at trial," and it dismissed the petition without a hearing. The Petitioner appeals, seeking a hearing.

ANALYSIS

The Petitioner asserts that the 2018 discovery of the 2009 match between his DNA and the DNA recovered from the ski mask in the getaway vehicle entitles him to a hearing to present his coram nobis claim. He notes that the defense "could have raised serious questions as to why no action was ever taken" after the CODIS database returned a match between his DNA and that on the ski mask in 2009, and he asserts he is entitled to tolling of the statute of limitations. The State responds that the petition is barred because it was not timely filed, that the Petitioner is not entitled to due process tolling, and that the Petitioner is not entitled to a hearing because his claim is not meritorious. We agree that the evidence is cumulative, that the Petitioner cannot establish a reasonable basis to conclude that the result of the proceeding might have been different, and that the trial court did not err in dismissing the petition without a hearing.

Generally, the decision to deny a petition for writ of error coram nobis is entrusted to the trial court's discretion. *Payne v. State*, 493 S.W.3d 478, 484 (Tenn. 2016). We review de novo questions regarding whether a claim is barred by the statute of limitations or whether a claim is entitled to due process tolling. *Nunley v. State*, 552 S.W.3d 800, 830 (Tenn. 2018).

The writ of coram nobis "will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial." T.C.A. § 40-26-105(b). The writ is limited to "errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding." *Id.* Coram nobis relief is an "extraordinary remedy known more for its denial than its approval." *State v. Mixon*, 983 S.W.2d 661, 666 (Tenn. 1999). "The evil that the coram nobis statute is aimed at remedying is a conviction based on materially incomplete or inaccurate information." *Payne*, 493 S.W.3d at 486.

A petition for error coram nobis is "subject to dismissal on the face of the petition, without discovery or an evidentiary hearing, and even prior to notification to the opposing party." *Nunley*, 552 S.W.3d at 825. While some petitions cannot be resolved on the face of the petition, the court need not hold a hearing unless it is essential. *Id.* at

826. "'Judges anticipate that the petition itself embodies the best case the petitioner has for relief from the challenged judgment. Thus, the fate of the petitioner's case rests on the ability of the petition to demonstrate that the petitioner is entitled to the extraordinary relief that the writ provides.'" *Id.* (quoting *Harris v. State*, 301 S.W.3d 141, 154 (Tenn. 2010) (Koch, J., concurring in part and concurring in the result), *majority opinion overruled by Nunley*, 552 S.W.3d at 828.

Relief for error coram nobis is only available "[u]pon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time." T.C.A. § 40-26-105(b). Furthermore, the petition for the writ must be filed "within one (1) year after the judgment becomes final." T.C.A. § 27-7-103. The Tennessee Supreme Court has rejected the contention that the limitations period begins upon the resolution of an appeal, instead holding that the judgment becomes final either thirty days after its entry or upon entry of an order disposing of a timely post-trial motion. *Mixon*, 983 S.W.2d at 670. However, "[t]o accommodate due process concerns, the one-year statute of limitations may be tolled if a petition for a writ of error *coram nobis* seeks relief based upon new evidence of actual innocence discovered after expiration of the limitations period." *Nunley*, 552 S.W.3d at 828-29. Such a claim for due process tolling "must be pled with specificity." *Id.* at 829.

> "To be entitled to equitable tolling, a prisoner must demonstrate with particularity in the petition: (1) that the ground or grounds upon which the prisoner is seeking relief are "later arising" grounds, that is grounds that arose after the point in time when the applicable statute of limitations normally would have started to run; [and] (2) that, based on the facts of the case, the strict application of the statute of limitations would effectively deny the prisoner a reasonable opportunity to present his or her claims...."

Id. (quoting *Harris*, 301 S.W.3d at 153 (Koch, J., concurring)). In addition to the strict pleading guidelines requiring a petitioner to demonstrate that the grounds are later arising and that application of the limitations period would offend due process, the Tennessee Supreme Court has also concluded that "'[a] prisoner is not entitled to equitable tolling to pursue a patently non-meritorious ground for relief.'" *Id.* (quoting *Harris*, 301 S.W.3d at 153 (Koch, J., concurring)).

Coram nobis relief is available only when a court determines that the new evidence may have led to a different result, T.C.A. § 40-26-105(b), "or in other words, 'whether a reasonable basis exists for concluding that had the evidence been presented at trial, the result of the proceedings might have been different.'" *Id.* at 816 (quoting *State v. Vasques*, 221 S.W.3d 514, 527 (Tenn. 2007)). "[A] petition for a writ of error *coram nobis* need not show that the result of the proceeding *would have* been different had the

evidence been available at trial—the petition need only show that the newly discovered evidence, had it been admitted at trial, *may have* resulted in a different judgment." *Id.* at 818. Generally, a petitioner cannot premise relief on evidence "which is merely cumulative or 'serves no other purpose than to contradict or impeach.'" *Wlodarz v. State*, 361 S.W.3d 490, 499 (Tenn. 2012) (quoting *State v. Hart,* 911 S.W.2d 371, 375 (Tenn. Crim. App. 1995)), *abrogated on other grounds by Frazier v. State*, 495 S.W.3d 246 (Tenn. 2016). When impeachment or cumulative evidence does not establish grounds for showing that it may have resulted in a different judgment, it cannot serve as the basis of relief. *Hart,* 911 S.W.2d at 375; *cf. Vasques*, 221 S.W.3d at 528 (concluding that the nature of newly discovered evidence as impeachment evidence is relevant to but not controlling of the determination of whether the evidence may have led to a different result).

In the case at bar, the parties agree that the limitations period expired in 2013 and that the petition was not filed until December 2018. The amended petition included as exhibits affidavits and material pertinent to the Petitioner's claims, pleading due process tolling with specificity. The petition alleges that it was earlier in 2018 that the Petitioner was first provided access to the Local Match Detail Short Report which demonstrated that the Petitioner's DNA had been matched to the ski mask on October 7, 2009.

While the Petitioner included the requisite material in the petition, we conclude that the trial court did not err in dismissing the Petitioner's claims because he is "'not entitled to equitable tolling to pursue a patently non-meritorious ground for relief.'" *Nunley*, 552 S.W.3d at 829 (quoting *Harris*, 301 S.W.3d at 153 (Koch, J., concurring)). The evidence which the Petitioner has discovered is the very definition of cumulative evidence. *See Wlodarz*, 361 S.W.3d at 499. Clearly, the evidence was cumulative of other DNA analyses of which the Petitioner was aware, providing the same information: that the Petitioner had had contact with the ski mask. Furthermore, the 2009 match between the Petitioner's DNA and the ski mask was inculpatory, just as the subsequent 2010 and 2011 matches were inculpatory.

The Petitioner, while acknowledging that the report was inculpatory in that it matched his DNA to that recovered from the ski mask, asserts that the evidence may have led to a different outcome at trial. The Petitioner reasons that he could have cast doubt on the integrity of the State's investigation, and he hints that he could have excluded the ski mask as evidence by potentially establishing that the mask was either intentionally or accidentally contaminated with his 2009 DNA sample while undergoing analysis at the TBI. In his petition, he cites to this court's reliance on direct appeal on the ski mask as the necessary corroboration of the testimony of the Petitioner's accomplices. *Keller I*, 2013 WL 6021332, at *15. However, the ski mask was not the sole corroborating evidence; the State also introduced evidence that a blue pickup, connected by other

evidence to the Petitioner, had momentarily blocked Detective Jason Heath's pursuit of the white getaway van at the scene of the crime.[2] In any event, the evidence that a 2009 report matched the Petitioner's DNA to the ski mask and that law enforcement did not pursue this lead "serves no other purpose than to contradict or impeach." *Hart,* 911 S.W.2d at 375. Impeachment of the State's investigation of a prior CODIS "hit" would not have undermined the three DNA tests confirming the Petitioner's link to the ski mask or the testimony of his co-defendants implicating him. *Cf. Vasques*, 221 S.W.3d at 528-29 (evidence of the lead investigator's serious misconduct warranted coram nobis relief as to those defendants who had been implicated in large part through the investigator's testimony but did not warrant relief as to those defendants who were implicated by other evidence). The evidence of the 2009 DNA match is both cumulative and inculpatory, and accordingly, the Petitioner's claim is patently non-meritorious, not entitled to due process tolling, and subject to dismissal. *See Nunley*, 552 S.W.3d at 829.

The Petitioner also requests a remand for a hearing on the basis that the trial court applied an incorrect legal standard. The Petitioner notes that the trial court's order dismissing the petition found that "it is unlikely that [the newly discovered evidence] would have resulted in a different outcome at trial." The State concedes that the trial court should have analyzed whether the evidence *may have led* to a different outcome "or in other words, 'whether a reasonable basis exists for concluding that had the evidence been presented at trial, the result of the proceedings might have been different.'" *Nunley*, 552 S.W.3d at 816 (quoting *Vasques*, 221 S.W.3d at 527). We note that the trial court also found that "the evidence would not have resulted in a different judgment" and that "the result at trial would not have been different," and that these findings indicate the court did not believe that the evidence *may have led* to a different outcome. While the trial court used an inexact and incorrect formulation of the legal standard when it analyzed whether the evidence would have led to a different result or whether it was likely that the evidence would have led to a different result, we conclude that the court did not err in dismissing the petition for writ of error coram nobis. There was no reasonable basis for concluding that, had the Petitioner's recent discovery of cumulative and inculpatory evidence been introduced at trial, the result of the proceeding might have been different. Accordingly, the Petitioner is not entitled to relief for error coram nobis.

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[2] The transcript of evidence from the Petitioner's trial is part of the record on his pending post-conviction appeal, and this court may take judicial notice of its own records. *State v. Lawson*, 291 S.W.3d 864, 870 (Tenn. 2009).

CONCLUSION

Based on the foregoing analysis, the judgment of the trial court is affirmed.

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JOHN EVERETT WILLIAMS, PRESIDING JUDGE