IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
September 29, 2015 Session
Heard at the University of Tennessee at Martin[1]

DARRELL KENNEDY v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 9608876 Carolyn W. Blackett, Judge

No. W2015-00148-CCA-R3-PC - Filed February 10, 2016

Petitioner, Darrell Kennedy, was convicted of one count of aggravated rape and two counts of theft of property, for which he received an effective sentence of forty-one years in confinement. He filed a request pursuant to The Post-Conviction DNA Analysis Act of 2001 seeking retesting of various swabs that were analyzed in 1993. The post-conviction court denied relief, and this appeal follows. Upon review, we affirm the judgment of the post-conviction court.

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

ROGER A. PAGE, J., delivered the opinion of the Court, in which JOHN EVERETT WILLIAMS and TIMOTHY L. EASTER, JJ., joined.

Lance R. Chism (on appeal) and Eugene Belenitsky (at post-conviction hearing), Memphis, Tennessee, for the Appellant, Darrell Kennedy.

Herbert H. Slatery III, Attorney General and Reporter; Jeffrey D. Zentner, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Anita Spinetta, Assistant District Attorney General, for the Appellee, State of Tennessee.

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[1] This case was heard on the campus of the University of Tennessee at Martin as a special project of the Tennessee Court of Criminal Appeals in furtherance of the educational process of students and faculty.

OPINION

I. Facts from Trial

On direct appeal from petitioner's convictions, this court adduced the following facts:

> On November 24, 1992, . . . ["the victim"] was working the 4:30 p.m. to midnight shift at [a] library. At midnight, [the victim] locked the doors to the library and began her short journey home to her . . . apartment . . . . After entering her parking "space" at the apartment complex, she proceeded to her front door, leaving her purse and book bag in her vehicle due to the late hour. While she was attempting to unlock the door to her apartment, she heard footsteps approaching from behind. Someone then grabbed her hair, jerked her head back, and placed a gun against her temple. The assailant warned [the victim] not to scream; advising her that if she did, she would be shot. She was then instructed to open the door.
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> Once the door was unlocked, the assailant pushed [the victim] into the apartment and asked her where her roommate was. [The victim] responded that her roommate was visiting her boyfriend and that she expected her to come home "any minute . . . ." [The victim] added that her roommate's boyfriend would be accompanying her home. Unswayed, the intruder asked for her purse and her money. In another attempt to persuade the intruder to leave, [the victim] informed him that her purse was in her car; she offered him her car keys and told him that he could have her car if he would "just leave." Ignoring the offer, the assailant led [the victim] to her bedroom, specifically to her dresser where her jewelry box was located. With the gun still aimed at her head, [the victim] was forced to go through her jewelry box, picking out only the "real stuff—gold," as instructed by the assailant . . . . Once he was satisfied that he had obtained all of the valuable jewelry from the box, he then forced [the victim] to remove all of the jewelry from her person. The assailant took "all the jewelry that [she] could find and all [her] rings and watches." [The victim] later reported that the intruder had taken approximately fifteen pieces of jewelry, comprised of gold necklaces, rings, and two or three watches, valued at approximately $2500.
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> With the gun still aimed at her head, [the victim] was then led into the living room where the assailant forced her to lie on the floor with her face against the carpet. The assailant again told her not to look at him. He instructed her to remove her clothes. Frightened, [the victim] complied.

The assailant then forced his victim to perform oral sex upon him. [The victim] again attempted to look at her assailant. This time she was able to see his stomach and noticed that he "was a light colored black man." She was unable to observe his face because he was wearing a black or dark blue ski mask. The assailant also wore heavy winter gloves.

The assailant then instructed [the victim] to lie on the floor on her back at which time he penetrated her vagina with his penis. He asked her "if [she] had ever had sex with a black man and if [she] had a boyfriend." While still [lying] on the floor, the victim was sexually penetrated a second time. Throughout the entire rape, the assailant continuously kissed [the victim] on her cheek. When he ejaculated, the assailant did so on a towel that he had previously laid beneath the victim. He then wiped himself and the victim off with the towel. The assailant led [the victim] into the bathroom where he told her to douche, "to wash yourself out." In an effort to avoid destroying potential evidence, [the victim] pretended to douche as ordered.

The assailant again led [the victim] back into the living room where he asked her if she was going to call the police . . . . He unlocked the kitchen door, took the "telephone off the hook," and left the apartment. When the appellant left, he took the towel with him. Several minutes after her assailant's departure, [the victim] ran from her apartment to neighboring apartments seeking help. Eventually, a neighbor opened her apartment door and called "911."

When Memphis Police Officers arrived, [the victim] described her assailant as a fair-skinned black man, 5'10″ to 6' tall, 160 to 175 pounds, and approximately 25-30 years old. She added that the masked intruder attempted to hide his height because he would "hunch over." At the subsequent trial, [the victim] testified that the appellant had the same characteristic type slouch as her assailant.

Between 2:00 a.m. and 3:00 a.m. that morning, [the victim] was taken to the Memphis Sexual Assault Resource Center where both vaginal and oral swabs were taken to determine the presence of sperm. Margaret Aiken, a nurse at the Center, testified that . . . "moving sperm were present [up]on microscopic examination."

During the investigation of this case by Sergeant Bobby Napper, he discovered that several days before the crimes against [the victim], . . . a

resident at [the victim's] [a]partment [complex] [ ] reported a suspicious vehicle in the parking lot. Specifically, . . . she observed a strange car in her parking place and she pulled directly behind the vehicle, preventing it from leaving. The vehicle was an older model Cadillac, bright blue in color, like a "blue M & M." [The neighbor] observed a "black man" sitting in the driver's seat of the vehicle . . . . [The neighbor] reported the incident to [the] apartment manager . . . . , who turned the information over to the police.

In February 1993, the appellant was developed as a suspect in a jewelry store robbery in the Oak Court Mall. The officer in charge of this investigation . . . arrested the appellant at his 435 Webster Street residence. At the time of the arrest, the appellant was driving a 1978 bright blue Cadillac. The appellant's girlfriend, Thelma Baker, provided law enforcement officers consent to search the house. A search of the residence uncovered several items of jewelry. At this point, the appellant was not a suspect in the crimes against [the victim].

During this same period, Sergeant Bobby Napper, the officer in charge of investigating the rape of [the victim], was temporarily assigned to the robbery division. Sergeant Napper asked . . . if he could look at the jewelry seized from 435 Webster. On February 20, 1993, Sergeant Napper contacted [the victim] to examine items of jewelry recovered from the appellant's residence. [The victim] identified two items recovered as belonging to her. During a trip to Mexico, [the victim] had purchased a distinctive light blue stone and, upon return from her vacation, had had the stone mounted. Because of the irregular shape of the stone, the setting . . . was unusual in that the ring sat up high on the finger and the stone "was loose and it would kind of jiggle." [The victim] testified that she was "absolutely positive" that the ring belonged to her. The second ring was a gift from [the victim's] mother. The ring was silver and dome shaped with overlapping etching on the front. The ring, originally too small for her finger, had been stretched to fit. Because the metal was weak where it had been stretched, the ring had been twice broken and had been repaired. The ring recovered from the appellant's residence had the breaks in the same place.

After [the victim's] identification of the jewelry, the appellant was arrested for the rape and theft . . . . A search warrant was subsequently obtained to collect hair, blood, and saliva samples from the appellant. These samples along with the samples obtained from the victim . . . were ultimately sent to the FBI DNA Analysis Unit in Washington, D.C. Special

Agent John Quill led the team conducting the DNA analysis in this case. The analysis revealed that, in all four locations observed, the DNA from the vaginal specimen taken from [the victim] matched the appellant. Specifically, Special Agent Quill concluded that "the chance of an unrelated individual at random in the population having a profile at all four of these locations matching that of [the appellant] is one in nine million in the Black population, one in two million in the Caucasian population, and one in one million in the Hispanic population." Thus, he concluded that the DNA profiles match those of the defendant to a reasonable degree of scientific certainty.

In his defense, the appellant presented the testimony of Thelma Baker. Ms. Baker testified that she owned a barber shop/boutique called "Bare Essence." To obtain merchandise for her business, she and the appellant often frequented jewelry shows. She stated that she and the appellant had attended one such jewelry show on January 30 through February 2, 1993, at the Cook Convention Center.

The appellant took the stand in his own defense. He adamantly denied committing any of the offenses for which he was charged. When asked whether he recognized the rings that [the victim] had identified as those taken from her apartment, he stated that he had purchased the two rings at the Cook Convention Center at two different jewelry shows. pecifically, he testified that he had purchased the blue stone ring at the February 1993 jewelry show and the silver dome ring at a jewelry show held prior to November 25, 1992, the date of the present offenses. The appellant explained that he had "cut this ring to put on [Baker's] finger so she could fit her finger." Despite this assertion and his claim that he and his girlfriend retained receipts for all of their jewelry purchases, the appellant was unable to produce any such receipt for either ring at trial. The appellant admitted that he owned a bright blue 1978 Cadillac with a "peanut butter color" custom top. Although he stated that he did not purchase the Cadillac until December 1992, he conceded that he had driven the automobile on several occasions prior to the purchase.

Based upon this evidence, the jury convicted the appellant of one count of aggravated rape and two counts of theft of property over $1,000.

State v. Kennedy, 7 S.W.3d 58, 61-63 (Tenn. Crim. App. 1999).

II. Request for DNA Analysis

A. Evidentiary Hearing

On May 14, 2014, petitioner filed a petition pursuant to the Post-Conviction DNA Analysis Act ("The Act") requesting further DNA analysis of evidence submitted at trial. The post-conviction court held an evidentiary hearing. Excerpts from the trial testimony of Federal Bureau of Investigation ("FBI") Special Agent John Lawrence Quill were appended to the appellate record as an exhibit. A brief review of his testimony is useful to frame the context of this petition.

At trial, Special Agent Quill testified that in conducting a DNA analysis, the first step he would undertake is to extract the DNA from the cellular material. Next, he would cut the DNA with "biological scissors" and place it in a clear gel. He explained that the gel acts as a "sieve" that causes the DNA to migrate to one side. He would then transfer the DNA from the gel and place it on a nylon membrane. After further cleaning, the pieces of DNA were placed between two pieces of x-ray film. He would concentrate his analysis on the pieces of DNA that give off light and would then "develop[] the film" that was taken. The "picture" that resulted therefrom was known as an autoradiograph, or "autorad." Based upon his interpretation, Special Agent Quill could reach one of three conclusions: absolute exclusion of an individual; insufficient quality or quantity of DNA; or the DNA profiles match at all the locations that he reviewed. He could then formulate the probability of an unrelated person at random in the population having the same profile.

In petitioner's case, Special Agent Quill used the procedure set forth above in testing four samples and compiling four films. He also had known samples from both the victim and petitioner. He then utilized "a series of computers" to create "fragment sizes of these piece of DNA." Using those fragments in another computer, he arrived at "a probability statement based on our population studies." His conclusion was that "the chance of an unrelated individual at random in the population having a profile at all four of these locations matching that of [petitioner] [was] one in nine million in the Black population, one in two million in the Caucasian population, and one in one million in the Hispanic population." In sum, Special Agent Quill opined that "[t]he profiles indicate that the DNA profiles match those of [petitioner] to a reasonable degree of the scientific certainty."

On cross-examination, Special Agent Quill testified that in comparing band lengths of DNA fragments, one could establish that they are genetically identical "by sequencing the fragment." The test that he utilized involved "the visual identification of profiles, seeing a visual match, followed by a statistical interpretation." However, he stated that sequencing the fragment lengths requires a more involved test that did not

exist at the time he tested the samples in petitioner's case. Although the test was available at the time of trial, the FBI did not perform that test; private laboratories were available that would perform said test. Special Agent Quill confirmed that sequencing alleviates the need for a statistical analysis.

On redirect examination, Special Agent Quill confirmed that his testing procedures were capable of being duplicated by another laboratory that had the same samples. Another expert could also review his reports for accuracy. He stated that he provided the defense with copies of the film that he produced, along with all of his notes in the case, on May 12, 1996.

Petitioner testified at the instant post-conviction evidentiary hearing that he filed the petition to obtain further DNA testing to prove his innocence. He maintained that he was not guilty of the offense and that the previous DNA testing was simply wrong. He said that the description the victim gave of the perpetrator's complexion did not match his own skin tone and that the jewelry the victim identified as her own was purchased by petitioner and his girlfriend at a jewelry show. Petitioner asserted that he wanted the DNA subjected to the newer test because he had heard that it was more accurate and faster. Petitioner acknowledged that he had no proof that the DNA was still in existence and capable of being tested.

Based upon this evidence, the post-conviction court denied the petition, and this appeal follows.

B. Standard of Review

The Act allows petitioners convicted and sentenced for certain homicide and sexual assault offenses in which biological evidence may have existed to request post-conviction DNA testing. Tenn. Code Ann. § 40-30-303. The Act contains no statutory time limit and extends to petitioners the opportunity to request analysis at "any time," regardless of whether such a request was made at trial:

> [A] person convicted of and sentenced for . . . aggravated rape . . . 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.

Griffin v. State, 182 S.W.3d 795, 799 (Tenn. 2006) (citing Tenn. Code Ann. § 40-30-303).

The Act divides cases into two distinct categories—mandatory and discretionary—in which DNA analysis may be appropriate. Mandatory DNA analysis must be ordered in cases where the trial court 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;
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> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
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> (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
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> (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.[2] "A reasonable probability of a different result exists when the evidence at issue, in this case potentially favorable DNA results, undermines confidence in the outcome of the prosecution." *Harold James Greenleaf, Jr. v. State*, No. M2009-01975-CCA-R3-CD, 2010 WL 2244099, at *4 (Tenn. Crim. App. June 4, 2010) (citations and quotation marks omitted).

The Act "'does not specifically provide for a hearing as to the qualifying criteria . . . . '" *Dennis R. Gilliland v. State*, No. M2007-00455-CCA-R3-PC, 2008 WL 624931, at *3 (Tenn. Crim. App. March 3, 2008) (quoting *William D. Buford v. State*, No. M2002-02180-CCA-R3-PC, 2003 WL 1937110, at *3 (Tenn. Crim. App. Apr. 24, 2003)). Thus, "'[i]f the [S]tate contests the presence of any qualifying criteria [required by the Act] and it is apparent that each prerequisite cannot be established, the trial court has the authority to dismiss the petition' in summary fashion." *Id*. at *3 (quoting *William D. Buford*, 2003 WL 1937110, at *6). A petitioner's failure to establish any one of the qualifying criteria results in dismissal of the action. *Powers v. State*, 343 S.W.3d 36, 48 (Tenn. 2011).

"The post-conviction court is afforded considerable discretion in determining whether to grant a petitioner relief under the Act, and the scope of appellate review is limited." *William D. Buford*, 2003 WL 1937110, at *3. In ruling on petitioner's request for DNA analysis, the post-conviction court must consider all "available evidence,

[2] Although discretionary DNA analysis may be ordered pursuant to Tennessee Code Annotated section 40-30-305, petitioner's request is limited to mandatory DNA analysis as set forth *supra*.

including the evidence presented at trial and any stipulations of fact made by either party." *Id*. (citation omitted). For the purpose of conducting its analysis of a petitioner's claim, a post-conviction court must presume that DNA analysis would produce favorable results to the petitioner. *Powers*, 343 S.W.3d at 55 n.28; *see* Tenn. Code Ann. § 40-30-305(1). The post-conviction court may also consider appellate court opinions on petitioner's direct appeal or his appeals of prior post-conviction or habeas corpus actions. *Id*. (citation omitted). This court will not reverse the judgment of the post-conviction court unless it is unsupported by substantial evidence. *Id*.; *see Willie Tom Ensley v. State*, No. M2002-01609-CCA-R3-PC, 2003 WL 1868647, at *4 (Tenn. Crim. App. Apr. 11, 2003).

C. Analysis

Petitioner argues that the post-conviction court incorrectly denied his request for further DNA testing because he met each of the four requirements as set forth by Tennessee Code Annotated section 40-30-304. The State answers that petitioner has failed to meet his burden of proof in all regards.

The post-conviction court made conclusions of law and found that petitioner had failed to carry his burden of proof. Specifically, the court concluded that petitioner had not demonstrated that he would not have been prosecuted or convicted if the newer DNA test had been available and utilized in his case, citing the victim's testimony and petitioner's possession of the victim's jewelry as supporting facts. Second, the court surmised that petitioner had not established that the DNA sample still existed, although the State put forth no effort to locate it.

However, the post-conviction court "[gave] petitioner the benefit of the doubt" and concluded that he met the third prong of the requirement, stating that the requested DNA test would have been more specific and would have "matched" the DNA to a specific person rather than excluding groups of individuals. Finally, the court opined that petitioner made application to the court for the purpose of demonstrating innocence rather than delaying justice. We will now consider each of the requirements in turn.

1. A Reasonable Probability Exists that the Petitioner Would Not Have Been Prosecuted or Convicted if Exculpatory Results Had Been Obtained Through DNA Analysis

Petitioner argues that if present-day DNA testing proved that the DNA from the victim's oral and vaginal swabs was deposited by a third party, there is a reasonable probability that petitioner would not have been prosecuted or convicted. The State asserts the contrary, citing the incriminating circumstantial evidence against petitioner.

The threshold for establishing this factor is whether "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis." Tenn. Code Ann. § 40-30-304(1). A "reasonable probability . . . is traditionally articulated as 'a probability sufficient to undermine confidence in the outcome.'" *Powers*, 343 S.W.3d at 54 (quoting *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009)). "'[T]he trial court should postulate whatever realistically possible test results would be most favorable to [the] defendant in determining whether he has established' the reasonable probability requirement under [our] jurisdiction's DNA testing statute." *Id.* (quoting *State v. Peterson*, 364 N.J. Super. 387, 836 A.2d 821, 827 (N.J. Super. Ct. App. Div. 2003)). In considering the evidence presented at trial, that "evidence must be viewed in light of the effect that exculpatory DNA evidence would have had on the fact-finder or the State." *Id.* "[T]he analysis must focus on the strength of the DNA 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.* (internal quotation marks and citation omitted). In this case, the post-conviction court did not postulate as to "whatever realistically possible test results" could have been favorable to petitioner. As such, our analysis of this issue necessarily begins there.

In this case, the most realistically possible test results that would be favorable to petitioner is that the DNA sample that was taken from the victim and tested would have excluded petitioner.[3] At trial, the evidence established that although the victim could not identify her assailant's face, she provided physical descriptors such as her perpetrator's effort to mask his height by "slouching," a trait that was shared by petitioner. She also described his skin tone, which matched petitioner's. The victim detailed two unique pieces of jewelry that were taken from her during the attack, which coincidentally *both* ended up in petitioner's possession through his attendance, he claimed, at two separate jewelry shows. A witness also observed petitioner's distinctive automobile—a bright "M&M" blue 1978 Cadillac—in the parking lot of the victim's apartment complex days before the attack on the victim, and an African-American male was seated in the driver's seat. This evidence, claims the State, would have supported the prosecution of petitioner regardless of whether a DNA test provided exculpatory results and would have led to petitioner's ultimate conviction based thereon.

In stark contrast with the evidence against the petitioners in *Powers*, the evidence in this case yields the conclusion that, as the State posited, the State might very well have prosecuted petitioner and secured a conviction. *But c.f. Powers*, 343 S.W.3d at 57-58 (finding first factor to be satisfied in case where no prior DNA testing of rape victim's underwear had been performed; State inferred that seminal fluid found on victim's

[3] Judge Williams believes that the most realistically possible test results would exclude petitioner and identify a third party. Under either standard, he agrees with final result of this opinion.

underwear belonged to petitioner although she acknowledged recent consensual sexual intercourse with another male; evidence at trial consisted of eyewitness identifications of victims who testified after a finding that this was a "signature crime" and other corroborative evidence); *State v. Ricky Lee Nelson*, No. W2013-00741-CCA-R3-CD, 2014 WL 295833, at *8 (Tenn. Crim. App. Jan. 27, 2014) (concluding that first factor had been met when no prior DNA testing of knife brandished during rape and robbery had been performed and petitioner's conviction was premised primarily on the testimony of one eyewitness and one witness who merely heard petitioner's voice over the telephone immediately prior to commission of the crimes), *no perm. app. filed*. However, even if petitioner established the first requirement for mandatory DNA testing, the petition must nonetheless be dismissed on other grounds as set forth below.

2. The Evidence Is Still In Existence and In Such a Condition that DNA Analysis May Be Conducted

Petitioner asserts that the DNA sample from 1993 is still in existence and capable of being tested. The State counters that petitioner presented no evidence in support of this factor.

Portions of the trial testimony of FBI Special Agent John Lawrence Quill were appended to the appellate record from the post-conviction DNA proceedings. Petitioner cites to Special Agent Quill's assertion that the remaining DNA he extracted from the cotton swabs was contained in a test tube and was returned to the requesting agency along with the membranes his testing produced. He testified that in a particular case, a membrane produced in 1989 was capable of retesting in 1995. However, his testing consumed the actual cotton swabs. Special Agent Quill further testified *if* "a few strands of cotton [were] . . . left on the swab," a newer technique called polymerase chain reaction ("PCR") could be utilized. Petitioner posits that the State presented no evidence to overcome Special Agent Quill's testimony.

The State concedes that it made no attempt to locate the DNA samples. However, it also notes that it recently searched for evidence in another rape case that occurred during the same time period and found that the evidence had been destroyed by a flood at the storage facility. The State also points to factors such as the passage of time, movement of storage facilities, and multiple handlers of the evidence in support of the contention that the DNA samples, even if found, could not be tested.

Petitioner cites several cases in which this court has affirmed the summary dismissal of petitions for DNA analysis when the State presents evidence of unsuccessful attempts to locate the evidence or confirmation that the evidence no longer existed. However, the State's diligence in those cases should not be viewed as shifting the burden to the State to prove lack of evidence. We review this matter within the jurisprudence

governing post-conviction proceedings, *see Bondurant v. State*, 208 S.W.3d 424, 428 (Tenn. Crim. App. 2006) (applying the standards governing post-conviction proceedings in general to post-conviction petitions for DNA analysis), which dictates that a post-conviction petitioner bears the burden of proving his or her factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). "'Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010) (quoting *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009)).

Under these guiding principles, we note first that accepting Special Agent Quill's testimony as true, his testimony at trial alone does not establish that the evidence was still in existence, only that he returned the unused portion. Without proof, the State offered plausible explanations for why the evidence *might not* exist. However, petitioner undertook no efforts to require the State to perform a search therefor. Petitioner did not seek the post-conviction court's involvement in ordering the State to exercise due diligence in locating the specimen. Standing idly by and awaiting a proclamation from the State does not rise to the level of carrying one's burden of proof.

Moreover, petitioner failed to establish that the specimen in question was in such a condition that further DNA testing could be accomplished. Special Agent Quill stated that a six-year-old membrane was once successfully retested. However, there was no evidence presented that a twenty-two-year-old membrane would be capable of the same result. In addition, PCR testing was only available *if* small cotton fibers remained on the wooden stick of the cotton swab. Special Agent Quill indicated that his testing procedures consumed the sample. The possibility of an errant cotton fiber remaining on the stick is insufficient to meet the burden of demonstrating that the sample was capable of being retested. The post-conviction court did not abuse its discretion in finding that petitioner failed to carry his burden of proof in this regard.

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

Petitioner asserts that based on Special Agent Quill's trial testimony, the "sequencing method" of DNA analysis did not exist at the time he tested petitioner's DNA. He argues, simply, that "all of the areas of physical evidence that were previously tested by the FBI need to be retested using the 'sequencing method.'" In addition, he maintains that PCR testing should be conducted on any strands of cotton that *may have come* from the swabs. He flatly asserts that "the testing he is requesting could resolve an issue that was not resolved by previous analysis."

The State answers that PCR testing was available at the time of trial, but there has been no testimony that it would resolve any issue not previously resolved, and neither would sequencing.

The post-conviction court concluded that petitioner carried his burden of proof on this point because sequencing would have matched the DNA to the donor rather than excluding a group of individuals. While this may be true, respectfully, the post-conviction court failed to engage in the further analysis that the requested DNA analysis "could resolve an issue not resolved by previous analysis." By failing to conduct the full analysis of this factor, the post-conviction court failed to apply the correct legal standard and thereby abused its discretion. *See Wilson v. State*, 367 S.W.3d 229, 235 (Tenn. 2012) (holding that "[a] court abuses its discretion when it applies an incorrect legal standard").

Rather, we conclude that both PCR testing and DNA sequencing were available at the time of trial; Special Agent Quill addressed both testing methods and briefly described them. Petitioner had the benefit of expert witnesses, whom he did not call to testify at trial, either of whom could or should have advised him of the availability of this test so that petitioner could seek a continuance and further DNA testing. Moreover, there has been no showing that either of the requested tests would resolve an issue not previously resolved by DNA analysis. Mere conjecture and the desire for more advanced testing than that previously conducted does not rise to the level of proof anticipated by this factor of the statute. Were that the case, this court and laboratories across the country would be inundated by petitioners seeking to second-guess their DNA analysis simply because newer protocols have been implemented. Without proof to the contrary, we conclude that petitioner has not met his burden of proof as to this factor.

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

Based on his testimony at the evidentiary hearing and this court's finding of fact on direct appeal that petitioner "adamantly denied" his involvement, *see Kennedy*, 7 S.W.3d at 63, petitioner surmises that he has met his burden of proof in this regard. The State counters that petitioner conceded that he knew that there were methods of DNA analysis that existed at the time of his trial but that were not implemented. Coupled with the fact that petitioner retained a DNA expert at trial who did not conduct additional testing, the State submits that petitioner's delay in petitioning for DNA testing was a strategic plan that relied on the degradation of DNA evidence and was initiated for the purpose of delaying the administration of justice.

The post-conviction court found merit in petitioner's testimony that he sought DNA testing for the purpose of demonstrating actual innocence. Given the deference that accompanies a post-conviction court's assessment of credibility, we decline to reassess the post-conviction court's determination of petitioner's credibility as a witness, which is a matter entrusted to the post-conviction judge as the trier of fact. *Dellinger v. State*, 279 S.W.3d 282, 292 (Tenn. 2009) (citations omitted); *R.D.S. v. State*, 245 S.W.3d 356, 362 (Tenn. 2008). Although this factor inures to petitioner's benefit, in light of his failure to carry his burden of proof with regard to the previous three factors, he is not entitled to relief.

CONCLUSION

Based on our review of the record, the arguments of counsel, the briefs of the parties, and applicable legal authority, we affirm the judgment of the post-conviction court.

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ROGER A. PAGE, JUDGE