

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CR 1993-1249

LEDELL LEE

DEFENDANT

ORDER

Comes now for consideration the Defendant's Motion for Post-Conviction DNA testing pursuant to Ark. Code Ann. § 16-112-201 et. seq., and based on the pleadings of the parties, the arguments of counsel at the hearing held April 18, 2017, the files and records of the case, and all other matters considered, the Court DOTH FIND:

The Defendant was charged with one count capital murder on May 19, 1993. After one mistrial resulting from a hung jury, a second jury found him guilty and sentenced him to death on October 16, 1995. His sentence was affirmed by the Arkansas Supreme Court on March 24, 1997, Lee v. State, 327 Ark. 692 (1997). After two hearings, the Court denied a timely Rule 37 Petition on May 28, 1999. That denial was affirmed by the Arkansas Supreme Court on February 22, 2001, Lee v. State, 343 Ark. 702 (2001). The Supreme Court later recalled that mandate upon motion by the Defendant because of ineffective assistance of counsel issues at the prior Rule 37 hearing. Lee v. State, 367 Ark. 84 (2006). A second hearing was held on the Rule 37 Petition, and this Court entered an Order on November 21, 2007, again denying Rule 37 relief. This Order was also affirmed by the Arkansas Supreme Court by mandate entered May 27, 2009. The United States Supreme Court denied certiorari review of the Rule 37 denial. Lee v. Arkansas, 558 U.S. 1013 (2009). At various times during the pendency of these actions, the Defendant

pursued federal relief unsuccessfully. The Defendant is currently scheduled to be executed on April 20, 2017.

On April 17, 2017, the Defendant filed in this Court a Motion for Post-Conviction DNA Testing Pursuant to Ark. Code Ann. § 16-112-201 et. seq. A response to the Defendant's Motion was filed by the State on the same day. The matter was set for a hearing on April 18, 2017, at 1:00PM.

The Defendant argues that advances in DNA testing technology entitle him to new testing of biological evidence previously introduced at trial. This evidence consists of a hair of African American origin found at the crime scene and blood stains on the shoes Defendant was wearing at the time of the incident. The Defendant asserts that testing of the hair would show that it was not his and that the blood on the shoe was not that of the victim.

Pursuant to the limited form of habeas relief codified in Ark. Code Ann. § 16-112-201, there are a number of requirements that the Defendant must make to present a prima facie case for relief. The threshold burden that the Defendant must overcome is the presumption against timeliness for a motion not made within 36 months of the date of conviction. Ark. Code Ann. § 16-112-202(10)(B) provides that

There shall be a rebuttable presumption against timeliness for any motion not made within thirty-six (36) months of the date of conviction. The presumption may be rebutted upon a showing:

- (i) That the person making a motion under this section was or is incompetent and the incompetence substantially contributed to the delay in the motion for a test;
- (ii) That the evidence to be tested is not newly discovered evidence;
- (iii) That the motion is not based solely upon the person's own assertion of innocence and a denial of the motion would result in a manifest injustice;
- (iv) That a new method of technology that is substantially more probative than prior testing is available; or
- (v) Of good cause.

Here, the Defendant has not shown that he was incompetent at any time or that any incompetence has contributed to the delay in the motion for a test. The evidence in question is

not newly discovered, as both items sought to be tested were introduced in his trial. There is, to be sure, a new method of technology that is substantially more probative than the testing available in the early 90s, but it has been available for some years prior to the Defendant's Motion, and the Defendant has not given a satisfactory explanation for the delay in this petition. The Court would strongly emphasize its observation that this motion seems to be based solely on the Defendant's own assertion of actual innocence, and the Court does not find that a denial of same would result in a manifest injustice.

Ark. Code Ann. § 16-112-202(2)(A) provides that evidence in a motion under this section "was not previously subjected to testing and the person making the motion under this section did not . . . [k]nowingly and voluntarily waive the right to request testing of the evidence in a court proceeding commenced on or after August 12, 2005[.]" Since August 12, 2005, the Defendant has filed in this Court an Amended Petition for Post-Conviction Relief pursuant to Rule 37 (as permitted by the Arkansas Supreme Court), two pro se Motions for Rehearing of that Petition, various appeals of this Court's rulings in those matters, federal habeas proceedings, and appeals of the federal rulings. He has not requested testing of these or any items in a 16-112-201 motion or otherwise in a proceeding in this Court since August 12, 2005. Counsel for the Defendant conceded that a claim of actual innocence was not alleged or argued prior to this Motion.

The Defendant provided this Court with the Arkansas Supreme Court's recent decision in Carter v. State, 2015 Ark. 57, arguing that it stands for the proposition that testing of the materials should be granted. The holding of Carter, as the State points out, was not that testing should have been granted, but that a hearing should have been held to determine the merits of the defendant's claim in that case. Here, and with consideration of the Defendant's impending

execution date, the Court held a hearing within 24 hours of being informed of the parties' pleadings. Carter does not control.

Looking at the evidence the Defendant argues should be tested in the best possible light, this Court does not find that the proposed testing would raise a reasonable probability that the Defendant did not commit the offense, as required by § 16-112-202(8)(B). If the Court were to accept the Defendant's argument about both the hair and the blood on the tennis shoe, there would still be sufficient proof presented by the State at trial for the jury to reach a guilty verdict. The presence of another individual's hair at the scene or the presence of another party's blood on the Defendant's shoe would not implicitly raise a reasonable probability of innocence.

The trial record still would contain the testimony of three eyewitnesses who placed the Defendant at the victim's home or nearby at the time of the murder. Although the Defendant attacks those witnesses' credibility, he has pointed to no evidence that was not available to trial counsel as cross-examination material. The State argues, and the Court agrees, that the credibility of these witnesses has been determined by a jury. The verdict has been attacked, appealed, and considered multiple times here and in higher courts, and this Court will not now substitute its own judgment for that of the jurors two decades removed.

THEREFORE, the Court finds and determines that the Defendant's Motion should be, and is hereby, ordered denied.

IT IS SO ORDERED.


HERBERT T. WRIGHT, JR. - CIRCUIT JUDGE

4-18-17
DATE