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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000143-MR

BRIAN K. SMITH

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 95-CR-00107

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: ACREE, VANMETER, AND WINE, JUDGES.

VANMETER, JUDGE: Brian Smith appeals from an order entered by the Hardin Circuit Court overruling his motion to allow the Kentucky Innocence Project (KIP) to have access to certain criminal evidence. Finding no abuse of the trial court's discretion, we affirm.

Following a jury trial, judgment was entered on November 26, 1997 convicting Smith of the 1995 first-degree murder of his elderly neighbor and the burglary of her residence. Smith was sentenced to life in prison without benefit of parole for twenty-five years. The Supreme Court of Kentucky affirmed Smith's conviction on January 6, 2000.

Smith sought RCr¹ 11.42 relief, which the trial court denied after an evidentiary hearing. This court affirmed the denial of Smith's RCr 11.42 motion. On March 9, 2005 the Supreme Court of Kentucky denied Smith's motion for discretionary review.

Smith then contacted the KIP and requested assistance in proving his innocence through additional DNA testing of the evidence relating to the crimes. After accepting Smith's case, KIP contacted the Elizabethtown Police Department for permission to review the evidence to determine whether it was suitable for more recently developed DNA testing procedures. Specifically, KIP sought access to clothing worn by Smith on the morning of the murder, which contained blood that DNA testing linked to the victim. The Police Department denied the request on the ground that permission would have to be granted by either the Commonwealth's Attorney or the trial court. The Commonwealth's Attorney did not agree to the KIP's review of the evidence. On December 11, 2006, Smith filed a motion seeking an order allowing the KIP to have access to the evidence. A

¹ Kentucky Rules of Criminal Procedure.

hearing was held on December 12, 2006, and the trial court overruled the motion.

This appeal followed.

Smith argues the trial court abused its discretion by overruling the motion requesting permission for the KIP to review the evidence. As noted in the past, “[t]he test for an abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.”

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

Although post-conviction discovery generally is not permitted in Kentucky, KRS² 422.285 permits post-conviction DNA testing under certain circumstances. More specifically, KRS 422.285 provides in pertinent part:

- (1) At any time, a person who was convicted of and sentenced to death for a capital offense and who meets the requirements of this section may request the forensic deoxyribonucleic acid (DNA) testing and analysis of any evidence that is in the possession or control of the court or Commonwealth, that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.
- (2) After notice to the prosecutor and an opportunity to respond, the court shall order DNA testing and analysis if the court finds that all of the following apply:
 - (a) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis;
 - (b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted; and

² Kentucky Revised Statutes.

(c) The evidence was not previously subjected to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and may resolve an issue not previously resolved by the previous testing and analysis.

(3) After notice to the prosecutor and an opportunity to respond, the court may order DNA testing and analysis if the court finds that all of the following apply:

(a) A reasonable probability exists that either:

1. The petitioner's verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or

2. DNA testing and analysis will produce exculpatory evidence;

(b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted; and

(c) The evidence was not previously subject to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and that may resolve an issue not previously resolved by the previous testing and analysis.

Here, Smith was not entitled to additional DNA testing since, although he was convicted of a capital offense, he was not sentenced to death. KRS 422.285(1). Moreover, even if Smith had been sentenced to death, the trial court would not have been compelled to order DNA testing under KRS 422.285(2) and (3), since, as previously noted by this court in holding that Smith was not entitled to RCr 11.42 relief even if the clothing was located as the result of an illegal search, the "evidence against Smith was so strong as virtually to guarantee the

same result,” even in the absence of a DNA analysis linking blood on his pants to the victim.” *Smith v. Commonwealth*, No. 2003-CA-001089-MR, 2004 WL 2315201, at 3 (Ky. App. Oct. 14, 2004). Finally, the evidence clearly was subjected to prior DNA testing. KRS 422.285(2)(c) and (3)(c). As there was no reasonable probability that the result would have been different as a result of additional testing, and the trial court did not abuse its discretion by denying Smith’s motion.

The trial court’s order is affirmed.

ALL CONCUR.

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