IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ELLIOT ISAIAH HERNANDEZ, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13704 Trial Court No. 3AN-15-05401 CI MEMORANDUM OPINION No. 7032 — October 26, 2022

Appeal from the Superior Court, Third Judicial District, Anchorage, Herman Walker Jr., Judge.

Appearances: Jay A. Hochberg, Attorney at Law, Ewa Beach, Hawaii, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Terrell, Judges.

Judge TERRELL.

Elliot Isaiah Hernandez was convicted of first-degree assault, third-degree assault, and third-degree weapons misconduct for pointing a gun at one person inside an

apartment and shooting another person through the apartment door.[1] We affirmed his convictions on direct appeal.[2]

Hernandez now appeals the dismissal of his application for post-conviction relief. He argues that the superior court erred in concluding that he had failed to establish a *prima facie* case that he was entitled to DNA testing of the handgun under AS 12.73.020. For the reasons set out in this opinion, we reject Hernandez's claim of error and affirm the judgment of the superior court.

Factual and procedural background

Dale Clark alleged that Elliot Hernandez — whom he had known for a few months — became angry one evening in January 2013 while they were socializing at Clark's apartment. Hernandez pointed a gun at Clark, telling him that he was going to shoot him. Hernandez and his girlfriend then left the apartment, but immediately after they left, Clark heard the "boom" of a gunshot coming through the door and then saw blood gushing out of the neck of Raymond Thiele, another friend who was next to the door inside the apartment.

Clark's neighbor across the hall, Kacee Keene, heard the gunshot and called 911. A few days later, Keene identified Hernandez in a photo lineup. She testified at trial that although she had not met Hernandez before that evening, he had been in her apartment earlier that night for about ten to twenty minutes with her cousin. She testified that while Hernandez was in her apartment she heard him talking on the phone about selling guns.

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[1] AS 11.41.200(a)(1), AS 11.41.220(a)(1)(A), and AS 11.61.200(a)(1), respectively.

[2] *Hernandez v. State*, 2018 WL 314863 (Alaska App. Jan. 3, 2018) (unpublished).

A warrant was issued for Hernandez's arrest, and an officer subsequently saw a man on the side of the street who matched Hernandez's description. When the officer attempted to initiate a stop, the man immediately took off running. The officer testified that he was able to follow the man's footprints in the snow, and that he found a gun along the man's path that appeared to have freshly landed there. When the officer returned to where he first had seen the man, he found a prescription bottle with Hernandez's name on it on top of a nearby trash can.

Hernandez was eventually apprehended, and charged with first-degree assault (for shooting Thiele), third-degree assault (for pointing the gun at Clark), and third-degree weapons misconduct (for being a felon in possession of a concealable firearm). At trial, a crime lab technician testified that the shell casing found in the hallway outside of Clark's apartment matched the gun that the officer discovered while in pursuit of Hernandez.

At trial, Hernandez argued that he was not the shooter and that he had been misidentified by the witnesses at the scene. He presented an alibi defense — arguing that he was asleep in the smoke shack behind his grandfather's house at the time of the shooting.[3] Hernandez also challenged the reliability of the eyewitness identifications and argued that there was no physical evidence connecting him to the gun that was found since the State had failed to test the gun for any DNA evidence.

Ultimately, the jury rejected Hernandez's defense and convicted him of all charges.

After his convictions were affirmed on direct appeal, Hernandez filed an application for post-conviction relief. He argued, *inter alia*, that no DNA testing had

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[3] Two witnesses testified that they saw Hernandez at his grandfather's house early in the morning following the incident, although neither witness testified that they saw him at the precise time the shooting took place.

been conducted on the gun that was admitted into evidence against him at trial, and that he was entitled to DNA testing of the gun under AS 12.73.020. He argued that results from DNA testing of the gun would provide material support for his defense in one of two ways: (1) the sample would exclude him as the source of the DNA, thus undercutting the possibility that he handled the gun, or (2) the sample would match another individual, "possibly one whose DNA has already been compiled in the Alaska database," thus raising the possibility of another perpetrator.

Among the exhibits Hernandez attached to his application was an affidavit from his trial attorney. The attorney attested that "a negative result from the DNA testing would have been of some assistance in strengthening [Hernandez's] trial case." However, the attorney also wrote that he "did not . . . believe that [the] result would be dispositive or that this evidence (or lack thereof) appreciably [a]ffected the outcome of Mr. Hernandez's trial [because] a negative result . . . could have been relatively easily discounted by the State and jury." The attorney further explained that the lack of DNA testing may even have been helpful because it "allowed [him] to argue at trial that the State did not conduct a thorough investigation and that the State did not have physical evidence connecting Mr. Hernandez to the firearm."

The State filed a motion to dismiss Hernandez's application for failure to state a *prima facie* case for relief and, after briefing, the court provided notice of its intent to dismiss the case. Hernandez filed a response to the court's notice with an amended personal affidavit. However, the court found that Hernandez had not cured the defects in his application and it dismissed his claims. Specifically, the court stated that "Hernandez's affidavit [did] not provide context or explanation for *how* or *why* a negative DNA result could raise a reasonable probability that" Hernandez did not commit the offense, as required by AS 12.73.020(9)(B).

This appeal followed.

Why we affirm the dismissal of Hernandez's application for post-conviction relief for failure to state a prima facie case

On appeal, Hernandez challenges the superior court's denial of his request for post-conviction DNA testing. He argues that the court erred in concluding that he had not provided a rationale for why favorable DNA results would undermine confidence in his convictions, and that he is therefore entitled to have the gun submitted for DNA testing under AS 12.73.020.

Alaska Statute 12.73.020 authorizes courts to order post-conviction DNA testing of specific evidence when certain criteria are met. Among other things, a defendant must demonstrate that "the proposed DNA testing of the specific evidence may produce new material evidence that would (A) support the theory of defense . . . and (B) raise a reasonable probability that the applicant did not commit the offense."[4]

This Court has explained that a demonstration of "reasonable probability" requires an applicant "to show a reasonable chance, not an abstract possibility that the DNA test results, if favorable, would create a reasonable doubt where none had previously been found to exist."[5] A court will therefore weigh the strength of the State's evidence at trial against the significance of the evidence to be tested, and, "in cases where the evidence to be tested is only tangentially relevant to the defendant's guilt or innocence, the relative strength or weaknesses in the State's evidence will become more determinative of whether the standard has been met."[6]

While the superior court in this case found that Hernandez had established the first prong of the statutory requirement — that DNA testing of the gun may produce

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[4] AS 12.73.020(9).

[5] *Lambert v. State*, 435 P.3d 1011, 1020 (Alaska App. 2018) (internal quotations omitted) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

[6] *Id.*

new material evidence that would support his theory of defense — it further concluded that Hernandez had failed to demonstrate "why favorable [DNA] results would undermine confidence in his conviction in relation to the other evidence at trial." We have reviewed the record, and we reach the same conclusion.[7]

Under the balancing test articulated above, it is clear that the probative value of the DNA evidence Hernandez sought to produce was slight. As Hernandez's trial attorney averred, "[A] negative result in the DNA test could have been relatively easily discounted by the State and jury." The absence of Hernandez's DNA on the gun would not conclusively exclude him as the shooter.

Similarly, the presence of another person's DNA on the gun does little to bolster Hernandez's claim that someone else must have been the shooter. Another individual's DNA on the gun would only mean that someone else had touched the gun — but it would not indicate *when* that touching had occurred. Thus, DNA testing of the gun would provide evidence that is only tangentially relevant to supporting Hernandez's defense.

Moreover, the State's case against Hernandez was strong. The State presented testimony of two witnesses who had identified Hernandez as being at the scene of the incident — one of whom, Clark, knew Hernandez personally, had been spending time with him recently, and had invited him over to his apartment that night. Clark also testified that Hernandez had pointed a gun at him inside the apartment only moments before the shooting took place.

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[7] *See David v. State*, 372 P.3d 265, 269 (Alaska App. 2016) (reviewing *de novo* the question of whether a post-conviction relief application and its supporting documents set forth a *prima facie* case for relief); *Lindeman v. State*, 244 P.3d 1151, 1154 (Alaska App. 2011) (reviewing legal conclusion of whether a defendant is entitled to post-conviction DNA testing *de novo*).

The State presented evidence that Hernandez took off running when a police officer attempted to engage with him a few days after the incident. The officer found a prescription bottle with his name on it on top of a trash can near where he had first seen Hernandez, as well as a gun tossed in the snow along the path that Hernandez ran. The shell casing found at the scene outside Clark's apartment matched this gun. And Keene, the State's other witness, testified that, while Hernandez was briefly in her apartment, she had overheard him talking on the phone about selling guns.

Finally, even without DNA test results from the gun, Hernandez's attorney was still able to argue that the State had not presented any physical evidence linking Hernandez to the gun.

Given the other evidence presented at his trial, Hernandez has failed to demonstrate how DNA results from the gun would have "create[d] a reasonable doubt where none had previously been found to exist."[8] The superior court therefore did not err when it denied his application for post-conviction DNA testing.

Conclusion

The judgment of the superior court is AFFIRMED.

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[8] *See Lambert*, 435 P.3d at 1020.