



CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OR 97309-0869

CHANNING BENNETT
Circuit Court Judge
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Re: State of Oregon v. Jesse Lee Johnson
Case No.: 98C46239

Counsel:

This matter came before the Court on Defendant Jesse Lee Johnson's Motion for Post-Conviction DNA Testing pursuant to ORS 138.690. Steven T. Wax, Brittney R. Plesser and Aliza B. Kaplan appeared on behalf of Defendant. Katie A. Suver and Matthew D. Kemmy appeared on behalf of the State of Oregon. The court reviewed the Defendant's Affidavit, Brief, Memorandum, Reply, exhibits and the State's Response and exhibits. The Court also had the benefit of oral argument, extensive colloquy with counsel on the record, the opportunity to review the cited case law and to review the entire trial transcript. Being fully advised on the premises, and for the reasons stated below, Defendant's Motion for Post-Conviction DNA Testing pursuant to 138.690 is DENIED.

A jury found Defendant Guilty of aggravated murder and Defendant was sentenced to death on March 31, 2004. Defendant unsuccessfully appealed his conviction and was ultimately unsuccessful in his pursuit of post-conviction relief. On or about November 16, 2016 Defendant filed the instant Motion for Post-Conviction DNA testing pursuant to ORS 138.690 and an Affidavit in support as required by ORS 138.692. The State of Oregon opposes the motion and asserts that the affidavit is deficient because it fails to state a theory of defense that DNA testing would support; and it fails to present a Prima Facie showing that DNA testing would lead to a finding of actual innocence of the offenses for which the defendant was convicted.

ORS 138.690 states:

A person may file in the circuit court in which the judgment of conviction was entered a motion requesting the performance of DNA (deoxyribonucleic acid) testing on specific evidence if the person has been convicted of aggravated

murder or a felony in which DNA evidence could exist and is relevant to establishing an element of the offense.

ORS 138.692 states in relevant part:

(1)

- (a) When a person files a motion under ORS 138.690 requesting the performance of DNA (deoxyribonucleic acid) testing on evidence, the motion must be supported by an affidavit. The affidavit must:
 - (A) Contain a statement that the person is innocent of the offense for which the person was convicted;
 - (B) Identify the evidence to be tested with as much specificity as is reasonably practicable and a theory of defense that the DNA testing would support. The evidence must have been secured in connection with the prosecution, including the investigation, that resulted in the conviction of the person; and
 - (C) Include the results of any previous DNA test of the evidence if a previous DNA test was conducted by either the prosecution or the defense.
- (b) Consistent with the statement of innocence described in subparagraph (a)(A) of this subsection, **the person must present a Prima Facie showing that DNA testing of the evidence would, assuming exculpatory results, lead to a finding that the person is actually innocent of the offense for which the person was convicted.** (emphasis added).

Defendant's affidavit contains an assertion that he is innocent of the offenses for which he was convicted. ORS 138.692(1)(a)(A). Defendant's affidavit identifies 37 items of evidence he requests be either retested or tested for the first time. All of the items identified by the Defendant were gathered by the State in connection with the investigation and prosecution of Defendant.¹

¹ The State objects to the retesting of some of the items because the items are not currently in state custody. The enumerated items are currently held by a defense expert and have been in the custody of the expert for a number of years. Because the Court has decided that the Defendant failed in his burden to identify a theory of defense which DNA testing would support and has failed to make out a Prima Facie case that exculpatory DNA results would lead to a finding that Defendant was actually innocent of the crime for which he was convicted, the Court has not addressed the chain of custody issue nor would the record before the court allow me to adequately ascertain whether proper procedures have been maintained or if the samples have been contaminated.

Some but not all of the items were introduced at trial. ORS 138.692(1)(a)(B). Defendant also properly included the results of prior DNA testing. ORS 138.692(1)(a)(C).

Defendant's affidavit fails to articulate a cognizable theory of defense that DNA testing would support nor does it make out a Prima Facie case, assuming exculpatory results, that would lead to a finding that the Defendant is actually innocent. ORS 138.692(1)(b)

During the underlying prosecution, the State tested a number of items collected at the scene of the crime for DNA. Those tests excluded the Defendant as a contributor of the DNA on the tested items. The defense was aware of these results and that only a portion of the items in evidence were tested. The Defendant did not seek, at the time, to have the additional items tested for DNA. Similarly, after conviction and appeal, Defendant sought post-conviction relief and had the benefit of assigned counsel to review the case. Selected items of evidence were requested and sent to Defendant's experts for review and analysis. Defendant did not seek the DNA testing of all the items in evidence at that time. DNA testing was available during the investigation of the underlying crimes, the prosecution and conviction of Defendant, during the entire appeal period, and during the post-conviction relief period.

The availability of DNA testing since the date of the murder to present; and Defendant's selective, situational use, or non-use, of DNA testing undercuts Defendant's asserted theory of defense and Prima Facie case. Defendant knew at the time of trial that the items that had been tested for DNA excluded Defendant as a contributor. The Jury was aware at the time of trial that key pieces of evidence had been tested for DNA and that the tests excluded Defendant. The Jury knew that the semen found inside the victim did not belong to the Defendant. The Jury knew that Defendant's DNA was not present on the likely murder weapon. The Jury knew that the Defendant's DNA was not present in the blood splatter samples taken at the scene of the crime. As important, the Jury also knew that numerous items collected at the crime scene had not be tested for DNA. The trial transcripts demonstrate that the State did not rely on DNA as the basis for its argument that the Defendant was guilty. Instead the State acknowledged that DNA testing of evidence collected at the crime scene had excluded Defendant as a contributor.

At trial, the State's presentation focused on Defendant's denial that he knew the victim, his denial that he had been in the victim's apartment, his confession made to a drug dealer, Defendant's possession of the victim's jewelry shortly after the crime, Defendant's palm print and thumb print found on items at the crime scene and a witness who described someone similar to the Defendant being outside the crime scene on the night of the murder. Further DNA testing of the items identified by the Defendant would not controvert any of this evidence.

Conversely, Defendant does not point to any piece of DNA evidence that was improperly presented to the jury as implicating the Defendant. Nor does the Defendant point to an inconclusive DNA test result that was used to argue that Defendant could be a

contributor but the result was uncertain. Herein lies the Defendant's deficiency to identify a cognizable theory of defense. Defendant's motion and affidavit agrees that Defendant was excluded from the samples previously tested and asserts that the items not previously tested, if tested would also exclude him as a contributor of DNA. Defendant does not articulate a specific theory of defense, different from his defense at trial, that definitively demonstrates that Defendant was excluded from all the untested items would more likely than not have the jury conclude he was not guilty. The Jury knew he had been excluded from the tested items and the Jury was told that the State had not performed DNA tests on the other items. The Defendant has already argued this point and was convicted.

Instead, Defendant generally asserts that if the DNA was retested on all 37 items it might identify DNA of other individuals not previously identified. If new DNA profiles were found and the State were willing to submit the DNA samples to CODIS, including DNA profiles which have been gathered in the database since the date of conviction, new leads/suspects could be developed. If new leads or suspects were developed, and a new trial was held, new defense counsel could argue the case differently and a jury might find defendant not guilty. The chain of "ifs" that would need to occur is too attenuated to constitute a cognizable theory of defense. Defendant's position is more akin to a belief that if a new investigation were done and a new trial was held, new counsel would likely argue the case differently and a jury might find him not guilty. Defendant's inability to articulate a recognized theory of defense that DNA testing would support is fatal to the instant motion.

Defendant similarly fails in articulating a Prima Facie case, assuming exculpatory results, that would lead to a finding of actual innocence. Simply stated, Defendant's position is that if new DNA tests were conducted, new avenues for investigation might be discovered and the identity of potential new suspects might be discovered. As stated above, this theory does not articulate how DNA testing would lead to a finding of actual innocence. Underscoring Defendant's true intent is his admission in the Affidavit "I acknowledge that I have been in the victim's apartment, and there is physical evidence supporting my presence. None of the physical evidence connected to me is significant with regard to the crime." Affidavit Section 5, Second Paragraph. Defendant recognizes that his denial that he had ever been to the victim's apartment, despite physical evidence to the contrary, was likely a determining factor for the jury in convicting him. Contrary to Defendant's assertion that "none of the physical evidence connected to me is significant with regard to the crime" the Jury considered the evidence, including Defendant's denial, and concluded he was guilty beyond a reasonable doubt. Nothing in Defendant's argument demonstrates that a jury would more likely than not find him not guilty and Defendant has failed to state a Prima Facie case.

For all the reasons stated above, Defendant has failed to articulate a theory of defense or a Prima Facie case that would lead to a finding of actual innocence. Accordingly, Defendant's Motion for Post-Conviction DNA Testing is DENIED. The State shall prepare an appropriate order/judgment.

Very truly yours,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Channing Bennett
Circuit Court Judge

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