

his window and observed a large man standing over another man lying in the street. Two other individuals were nearby. Mr. Richardson telephoned the police. After he reported this incident to police, Mr. Richardson observed the large man converse with the other two individuals in the area. He then observed the large man grab the man lying in the street by the collar and drag him to the back of a pick-up truck parked nearby. Mr. Richardson also saw the large man open the passenger door of the pick-up truck and place something inside the cab of the truck.

5. In response to Mr. Richardson's call, police responded to the scene. Within a few blocks of Mr. Richardson's residence, they stopped a pick-up truck. Defendant was the sole occupant of the vehicle. In the bed of the truck, police located the victim suffering from two gunshot wounds. After asking Defendant to step out of the pick-up truck, police observed what appeared to be blood on Defendant's coat, pants, and shoes. Finally, police recovered a rifle on the passenger side of the cab of the pick-up truck.

6. No evidence regarding DNA testing was introduced at trial, but a forensic expert testified that the blood type found on Defendant's clothing matched that of the victim. Also, the jury heard testimony that the rifle found in the pick-up truck was the weapon that fired the shots killing the victim.

7. During the trial, Roland Allen also testified. Mr. Allen and Defendant were inmates together at the Jackson County jail while Defendant was awaiting trial. Mr. Allen testified that Defendant admitted on two separate occasions Defendant's involvement in the murder.

8. Following the presentment of evidence, the Court read instructions to the jury. The jury instructions included a second-degree murder instruction which included acting-in-

concert language. The instructions also included an armed criminal action verdict director which encompassed an acting-in-concert theory of criminal liability.

9. During closing arguments, the Prosecutor argued that the jury could convict Defendant of second-degree murder if the jury believed Defendant's only involvement in the murder was dragging the victim into the pick-up truck and driving the victim away to dispose of the body. The State contended that under an acting-in-concert theory Defendant could be convicted of second-degree murder even if the jury did not find that he fired the fatal shots.

10. Following deliberations, the jury returned verdicts finding Defendant guilty of second-degree murder and armed criminal action. The Court subsequently sentenced Defendant to two consecutive life sentences.¹

11. Defendant filed a post conviction relief motion pursuant to Missouri Rule of Criminal Procedure 29.15. After an evidentiary hearing, this motion was denied by the Court. Defendant appealed his conviction, sentence, and denial of his Rule 29.15 motion. In his appeal, Defendant specifically alleged that the Court erred in overruling his objections to the Prosecutor's closing arguments. Defendant alleged that the State misstated the law when arguing that Defendant could be found guilty of second-degree murder under an acting-in-concert theory if the jury found that Defendant dragged the victim into the pick-up truck and drove away in the truck to dispose of the body. The court of appeals rejected Defendant's argument, and upheld Defendant's conviction, sentence, and denial of his Rule 29.15 motion. *See State of Missouri v. Turner-Bey*, 812 S.W.2d 799, 805 (Mo.Ct.App. 1991).

¹ The sentencing and trial court was Division 1 of the 16th Judicial Circuit. At the time of sentencing, the Honorable David W. Shinn was presiding in Division 1. Defendant's Petition for DNA testing was assigned to Division 1 as the sentencing court, but the Honorable Sandra C. Midkiff recused herself from the case. Defendant's Petition was subsequently transferred to Division 11.

12. Subsequently, Defendant filed his Petition requesting DNA testing on the following items: 1) blood on Defendant's pants and shoes; 2) blood on the victim's clothes; and 3) five fingerprint cards. In his Petition, Defendant alleges that the blood found on his clothes was chicken blood. Defendant claims that he worked for Gaines Poultry eight weeks before the crime, and the blood on his clothing originated from his work. In his Petition, however, Defendant concedes that the victim's blood was present on his clothing. He claims this occurred because of cross contamination with the victim's clothing after the evidence was collected by police, and DNA testing will prove that cross contamination occurred.

CONCLUSIONS OF LAW

Section 547.035 of Revised Statutes of Missouri provides as follows:

1. A person in the custody of the department of corrections claiming that forensic DNA testing will demonstrate the person's innocence of the crime for which the person is in custody may file a postconviction motion in the sentencing court seeking such testing. The procedure to be followed for such motions is governed by the rules of civil procedure insofar as applicable.

2. The motion must allege facts under oath demonstrating that:

(1) There is evidence upon which DNA testing can be conducted; and

(2) The evidence was secured in relation to the crime; and

(3) The evidence was not previously tested by the movant because:

(a) The technology for the testing was not reasonably available to the movant at the time of the trial;

(b) Neither the movant nor his or her trial counsel was aware of the existence of the evidence at the time of trial; or

(c) The evidence was otherwise unavailable to both the movant and movant's trial counsel at the time of trial; and

(4) Identity was an issue in the trial; and

(5) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.

3. Movant shall file the motion and two copies thereof with the clerk of the sentencing court. The clerk shall file the motion in the original criminal case and shall immediately deliver a copy of the motion to the prosecutor.

4. The court shall issue to the prosecutor an order to show cause why the motion should not be granted unless:

(1) It appears from the motion that the movant is not entitled to relief; or

(2) The court finds that the files and records of the case conclusively show that the movant is not entitled to relief.

5. Upon the issuance of the order to show cause, the clerk shall notify the court reporter to prepare and file the transcript of the trial or the movant's guilty plea and sentencing hearing if the transcript has not been prepared or filed.

6. If the court finds that the motion and the files and records of the case conclusively show that the movant is not entitled to relief, a hearing shall not be held. If a hearing is ordered, counsel shall be appointed to represent the movant if the movant is indigent. The hearing shall be on the record. Movant need not be present at the hearing. The court may order that testimony of the movant shall be received by deposition. The movant shall have the burden of proving the allegations of the motion by a preponderance of the evidence.

7. The court shall order appropriate testing if the court finds:

(1) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing; and

(2) That movant is entitled to relief. Such testing shall be conducted by a facility mutually agreed upon by the movant and by the state and approved by the court. If the parties are unable to agree, the court shall designate the testing facility. The court shall impose reasonable conditions on the testing to protect the state's interests in the integrity of the evidence

and the testing process.

8. The court shall issue findings of fact and conclusions of law whether or not a hearing is held.

This statute authorizes Defendant to seek post conviction relief from his conviction and sentence if he believes that DNA testing could exonerate him. Pursuant to the statute, the Court must order the State to show cause why Defendant's request should not be granted and hold a hearing unless it appears from Defendant's motion and the Court's files and records that Defendant is not entitled to relief. § 547.035.4 RSMo. In order to be entitled to relief, Defendant must allege facts demonstrating that a reasonable probability exists that he would not have been convicted if exculpatory results had been obtained through DNA testing. § 547.035.2 (5) RSMo. Defendant does not meet this burden.

During the trial, uncontradicted evidence established that Defendant was operating a vehicle in which the victim and murder weapon were located. In addition, evidence was introduced at trial that Defendant admitted his involvement in the murder to another inmate while awaiting trial. Defendant was convicted of the homicide under an acting-in-concert theory. Under this theory, Defendant is guilty of second-degree murder even if his only involvement in the homicide was dragging the victim into the pick-up truck and driving away to dispose of the body. *See State of Missouri v. Turner-Bey*, 812 S.W.2d 799, 805 (Mo.Ct.App. 1991). The overwhelming evidence introduced at trial suggests that Defendant is criminally liable for these acts.

A reasonable probability does not exist that the outcome of Defendant's trial would have been different if exculpatory DNA results had been obtained. Defendant claims that the blood found on his clothes was from chicken. Even if DNA tests were able to confirm Defendant's

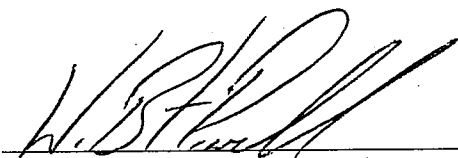
claim, a reasonable probability does not exist that the outcome of the case would have been any different. In light of all the incriminating evidence introduced at trial, this evidence would not have exonerated him.

Furthermore, Defendant concedes in his Petition that the victim's blood was on his clothes. He claims this occurred because of cross contamination with the victim's clothing after the evidence was collected by police, and DNA testing will prove cross contamination occurred. While DNA testing could confirm the presence of the victim's blood on Defendant's clothing, it cannot establish how the blood came to be on Defendant's clothing. This argument is without merit.

Likewise, conducting DNA testing for blood on the victim's clothing and five fingerprint cards would not present a reasonable probability that the outcome of Defendant's trial would change. Even if foreign DNA was found on any of these items, the test results would not exonerate Defendant under the acting-in-concert theory of criminal liability of which Defendant was convicted.

IT IS SO ORDERED, ADJUDGED AND DECREED, for the reasons set forth in these findings of fact and conclusions of law, Defendant's Petition for DNA testing is denied.

4/15/09
Date



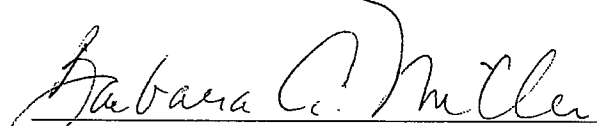
W. Brent Powell, Circuit Judge

Copies mailed on this 15th day of April 2009, to:

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