

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 25, 2023

FILED

06/12/2023

Clerk of the
Appellate Courts

JONATHAN MICHAEL ATHA v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Sevier County
Nos. 20183, 20185-III Rex Henry Ogle, Judge**

No. E2022-01247-CCA-R3-PC

The petitioner, Jonathan Michael Atha, appeals the denial of his motion for a hearing on his petition for relief pursuant to the Post-Conviction DNA Analysis Act of 2001 (“the Act”). Discerning no error, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., P.J., delivered the opinion of the court, in which TIMOTHY L. EASTER, and TOM GREENHOLTZ, JJ., joined.

William L. Wheatley, Sevierville, Tennessee, for the appellant, Jonathan Michael Atha.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Jimmy B. Dunn, District Attorney General; and George Ioannides, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In May 2016, a Sevier County circuit court jury convicted the petitioner of two counts of aggravated rape, four counts of aggravated robbery, and three counts of aggravated kidnapping for offenses committed in October 2014, and the petitioner received an effective 50-year sentence. *See State v. Jonathan Michael Atha*, No. E2018-00663-CCA-R3-CD, 2019 WL 4567498 (Tenn. Crim. App., Knoxville, Sept. 20, 2019).

In November 2017, the petitioner moved the court for DNA testing of a pair of boxer shorts pursuant to the Act, which motion the post-conviction court granted in July 2018. The report of the DNA analysis was returned from the Tennessee Bureau of Investigation on January 11, 2021. On February 8, 2022, the petitioner moved the post-conviction court for a hearing pursuant to Code section 40-30-312, arguing that the DNA results were favorable to his defense. After hearing arguments on the petitioner’s motion,

the post-conviction court agreed with the State that the results were not favorable and denied the petitioner's motion for a post-conviction hearing.

In this appeal,¹ the petitioner argues that the post-conviction court erred by finding that the DNA report of January 2021 was unfavorable and denying him a hearing. Specifically, he argues that the post-conviction court erred by failing to determine whether the report was favorable in the context of an alleged violation pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

The Act applies only to certain felonies, which include, among others, aggravated rape and the attempted commission of that offense. T.C.A. § 40-30-303. "At any time," a petitioner "may . . . file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence." *Id.*

The Act provides no statutory time limit and gives petitioners the opportunity to request analysis at "any time," whether or not such a request was made at trial. *Griffin v. State*, 182 S.W.3d 795, 799 (Tenn. 2006). A post-conviction court is obligated to order DNA analysis when the petitioner has met each of the following four conditions:

- (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
- (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
- (3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and

¹ We note that the petitioner's notice of appeal was late filed by two days, being due on September 7, 2022. *See* Tenn. R. App. P. 4(a) ("In an appeal as of right to the . . . Court of Criminal Appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the appellate court within 30 days after the date of entry of the judgment appealed from."). The State noted the untimeliness but does not otherwise argue against appellate review. Because the notice of appeal is not jurisdictional, we waive the timely filing requirement in the interest of justice. *See id.*

(4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

T.C.A. § 40-30-304; *see also Griffin*, 182 S.W.3d at 798. Additionally, if DNA analysis would have produced a more favorable verdict or sentence if the results had been available at the proceedings leading up to the conviction or sentence, then the post-conviction court may order DNA analysis when the petitioner meets the same conditions. T.C.A. § 40-30-305; *see also Griffin*, 182 S.W.3d at 798. In either instance, some physical evidence must be available and in a proper condition to enable DNA analysis. T.C.A. §§ 40-30-304(2), -305(2).

A petitioner's failure to meet any of the qualifying criteria is fatal to the action. *See William D. Buford v. State*, No. M2002-02180-CCA-R3-PC, slip op. at 6 (Tenn. Crim. App., Nashville, Apr. 24, 2003). Moreover, the Act does not specifically provide for a hearing as to the qualifying criteria and, in fact, authorizes a hearing only after DNA analysis produces a favorable result. *See* T.C.A. § 40-30-312.

The post-conviction court has considerable discretion in determining whether to grant relief under the Act, and the scope of appellate review is limited. *See Sedley Alley v. State*, No. W2006-01179-CCA-R3-PD, slip op. at 7 (Tenn. Crim. App., Jackson, June 22, 2006). In making its decision, the post-conviction court must consider all the available evidence, including the evidence presented at trial and any stipulations of fact made by either party. *Id.* The lower court may also consider the opinions of this court and the Tennessee Supreme Court on direct appeal of the petitioner's convictions or the appeals of the petitioner's prior post-conviction or habeas corpus actions. *Id.* On appellate review, this court will not reverse unless the judgment of the lower court is not supported by substantial evidence. *Id.*

In interpreting the scope of the Act, this court has ruled that the Act's reach "is limited to the performance of DNA analysis which compares the petitioner's DNA to . . . biological specimens gathered at the time of the offense." *Sedley Alley*, slip op. at 11. In other words, the Act "does not authorize the trial court to order the victim to submit new DNA samples years after the offense, nor does the statute open the door to any other comparisons the petitioner may envision." *Id.* The Act, at most, creates "a limited interest of a defendant in establishing his . . . innocence and [does] not create an interest in establishing the guilt of a speculative and unknown third party." *Id.*

In our view, the post-conviction court did not abuse its discretion in finding that the DNA results were not favorable to the petitioner. The DNA testing of the boxer

shorts excluded the victims as contributors only as to the major DNA profile; the victims could not be excluded as to the minor profile because the testing was inconclusive due to an insufficient sample size. Furthermore, the absence of the victims' DNA on the boxer shorts does not speak to the petitioner's innocence; there is no evidence that a rape victim's DNA would necessarily be found on the boxer shorts worn by the perpetrator during the assault. Finally, a *Brady* claim is not cognizable under the Act, see *Thomas Edward Kotewa v. State*, No. E2011-02527-CCA-R3-PC, 2012 WL 5309563, at *2 (Tenn. Crim. App., Knoxville, Oct. 26, 2012), and, consequently, the post-conviction court did not err by failing to consider any such claim.

Accordingly, we affirm the judgment of the post-conviction court.

JAMES CURWOOD WITT, JR., PRESIDING JUDGE