

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1

AMOS LEE KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

SUPPLEMENTAL BRIEF OF THE APPELLANT

RICHARD E. KILEY
Florida Bar No. 0558893
Assistant CCC

APRIL E. HAUGHEY
Florida Bar No. 0119180
Assistant CCC

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

<p>CAPITAL CASE, DEATH WARRANT SIGNED; EXECUTION SCHEDULED FOR AMOS L. KING, JANUARY 24, 2002</p>

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. King's Amended Motion to Release Evidence for Additional DNA Testing. The motion was brought pursuant to Fla. R. Crim. Proc. 3.853 and Fla. Stat. ch. 925.11 (2001).

The following symbols will be used to designate references to the record in the instant case:

"HR.1" -- The record of the hearing held of the original Motion to Release Evidence of Additional DNA Testing held in the Circuit Court on January 8, 2002.

"HR.2" -- The record of the hearing held on the Amended Motion to Release Evidence for Additional DNA testing held in the Circuit Court on January 11, 2002.

"Att."-- The exhibits attached to this pleading, numbered as follows:

1. Motion to Release Evidence for Additional DNA testing.
2. Order Denying CCRC-M's Motion to Release Evidence for Additional DNA Testing
3. Amended Motion to Release Evidence for Additional DNA Testing.
4. State's Response to Amended Motion to Release Evidence for Additional DNA Testing
5. Order Denying Defendant's Amended Motion to Release Evidence for Additional DNA Testing.

6. Transcript of hearing held on January 8, 2002.

REQUEST FOR ORAL ARGUMENT

This Court has set oral argument for January 15, 2002, at 9:00
a.m.

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	i
REQUEST FOR ORAL ARGUMENT	ii
TABLE OF CONTENTS	iii
PROCEDURAL HISTORY	1
FACTS	2
ISSUE I	
THE LOWER COURT ERRED IN DENYING MR. KING'S AMENDED MOTION TO RELEASE EVIDENCE FOR ADDITIONAL DNA TESTING.	4
THE STANDARD OF REVIEW	4
ARGUMENT	4
CONCLUSION AND RELIEF SOUGHT	7
CERTIFICATE OF SERVICE	8
CERTIFICATE OF COMPLIANCE	10

PROCEDURAL HISTORY

Mr. King filed a Motion to Release Evidence for Additional DNA Testing on January 7, 2002 in the Circuit Court of the Sixth Judicial Circuit in Pinellas County, Florida. (Att. 1). Argument was heard on the motion on January 8, 2002 in front of the Honorable Susan F. Schaeffer. (HR.1). Judge Schaeffer entered an Order Denying CCRC-M's Motion to Release Evidence for Additional DNA Testing on January 8, 2002. (Att. 2). Mr. King filed an Amended Motion to Release Evidence for Additional DNA Testing on January 11, 2002 in the Circuit Court. (Att. 3). The State filed the State's Response to Amended Motion to Release Evidence for Additional DNA Testing on January 11, 2002). (Att. 4). Argument was heard on the amended motion on January 11, 2002 in the Circuit Court. (HR.2). Judge Schaeffer provided defense counsel with an Order Denying Defendant's Amended Motion to Release Evidence for Additional DNA Testing on January 13, 2002. (Att. 5.). A Notice of Appeal was filed with the Clerk of the Court in Pinellas County on January 14, 2002. (Att. 6).

FACTS

1. On October 1, 2001, Fla. Stat. 925.11 (2001), came into effect allowing prisoners who met certain criteria to challenge their convictions through DNA testing.

2. Mr. King petitioned the Circuit court to engage in DNA testing on certain pieces of evidence. Certain pieces of evidence were present within the Pinellas County Sheriff's Office, other pieces of evidence were not. The missing pieces of evidence are part of the subject of Mr. King's Initial Appeal Brief. (See, Initial Appeal Brief of Appellant, Issue I).

3. After Mr. King petitioned the court for DNA testing, it was discovered that the State, at the behest of the Governor's Office, had sent evidence in this cause to the Florida Department of Law Enforcement (FDLE) for DNA testing months prior, and that they had already received the results. The State had received copies of the lab results from FDLE in August of 2001, and copies of that report were provided to Mr. King's counsel on December 4, 2001.

4. Certain pieces of evidence appeared in the FDLE report, Specifically, a hair fragment found on the nightgown of the murder victim, three hairs obtained from the pubic hair combings of the murder victim, and fingernail scrapings taken from both the right and left hands of the murder victim.

5. The FDLE report stated that DNA analysis was not able to

be conducted on this evidence due either to quality or quantity of the sample. (See, FDLE report provided in EX. 4 of Mr. King's Successive Motion for Postconviction Relief).

6. Mr. King retained an expert, Dr. Gary Litman, to review the FDLE report.

7. On January 7, 2002, Dr. Litman informed counsel that FDLE does not perform mitochondrial DNA analysis. The analysis which FDLE does perform is Short Tandem Repeat Typing (STR) analysis. STR typing is less sophisticated than mitochondrial testing. Thus, when FDLE issues a report, such as was done in this case, stating that no profile could be obtained due either to quantity or condition of the sample, their analysis does not mean that there is not enough to perform mitochondrial DNA test results. Dr. Litman explained that FDLE has in the past sent the samples to other laboratories to conduct the additional mitochondrial testing. That was not done in this case. Mitochondrial DNA testing, unlike STR testing, can be performed on hair fragments with no root attached. Thus, results from the more sophisticated scientific procedure, mitochondrial DNA testing, would likely produce a definitive result not obtainable by STR testing.

8. Based upon this information, counsel for Mr. King immediately filed a Motion to Release Evidence for Additional DNA Testing, requesting mitochondrial DNA testing on the hair evidence and a retesting of the fingernail scrapings. The Circuit Court

denied the motion, in part because of technical pleading deficiencies. Thus, counsel filed an amended motion correcting any technical deficiencies. That motion was denied on January 13, 2002.

ISSUE I

THE LOWER COURT ERRED IN DENYING MR. KING'S AMENDED MOTION TO RELEASE EVIDENCE FOR ADDITIONAL DNA TESTING.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State , 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

ARGUMENT

The Circuit Court denied Mr. King's Amended Motion to Release Evidence for DNA Testing on the several grounds. Pursuant to Fla. R. Crim. Proc. 3.853(c)(5)(C), the court was required to make the following findings:

The court shall make the following findings when ruling on the motion:

(A) Whether it has been shown that the physical evidence that may contain DNA exists

(B) Whether the results of DNA testing of that physical evidence would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.

(C) Whether there is a reasonable probability that the movant would have been acquitted or would have received lesser sentence if the DNA evidence had been admitted at trial.

Fla. R. Crim. Proc. 3.853(c)(5)(C)(2001).

The circuit court failed to make the findings required by statute. There is no ruling as to whether the evidence exists, nor is there a ruling that the evidence would likely be admissible at trial or whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic. (Att. 5).

In addition, there is nothing in the court's order which denies that mitochondrial DNA testing is more sophisticated than the STR testing previously employed by FDLE. Nor does the court find that such testing would not produce a more definitive result than the STR typing. Further, the court does not find that such testing is unavailable. The court did, however, rule that there does not exist a reasonable probability that the defendant would be acquitted or would receive a life sentence. (Att. 5).

Mr. King submits that if the hairs found both on the nightgown of the deceased and in her pubic area were tested another suspect would be identified. If a third person were revealed, the jury would have had reason to acquit Mr. King. Given that the location of the hairs is such an intimate area of the deceased's body, there does exist a reasonable probability that the jury's verdict would have been different.

The evidence against Mr. King was entirely circumstantial.

The presence of another person, even if unidentified, would have weighed heavily upon a jury relying upon the scant evidence in the case. The State agreed that the testing of such evidence was warranted when they sent such evidence to be tested by FDLE months ago. Their submission of such evidence for testing is an admission of the importance of such testing. Only now, when an execution date has been set, does the State change their position and deny the value of such DNA testing. The exculpatory value of any evidence showing another possible suspect is obvious- it supports an actual innocence claim both in front of the jury and in front of this court. Each person listed by the court as having been in contact with the body could be eliminated by DNA comparison. The presence of hairs of unknown origin would shift to the State the burden of explaining where those hairs came from.

The court stated in its order that, "There is no statute or rule that requires additional DNA testing," (Att. 5, pg. 3, emphasis in original), and thus, Mr. King should not be allowed mitochondrial DNA testing. Although there is no rule which "requires" additional testing, Fla. R. Crim. Proc. 3.853(c)(7), does give the court authority to have an additional test so long as good cause is shown. The Circuit Court found that good cause had not been shown to warrant another testing by an additional laboratory pursuant to Fla. R. Crim. Proc. 3.853(c)(7). This ruling was erroneous because good cause was shown due to the fact

that FDLE does not perform the more sensitive DNA tests which would produce a definitive result. This fact in and of itself is good cause to allow another laboratory to perform an additional DNA test. Because FDLE does not have the capacity to perform the necessary test, good cause has been shown and the court should have released the evidence to another laboratory.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing, Mr. King submits that the purpose of Fla. Stat. ch. 925.11 (2001) has been thwarted by the lower court's refusal to release the evidence for mitochondrial DNA testing. Thus, Mr. King requests the following relief:

1. That the Court vacate and set aside the lower court's order denying the release evidence for additional DNA testing and allow the release of such evidence to a laboratory to perform mitochondrial DNA testing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of January, 2002.

Richard E. Kiley
Florida Bar No. 0558893
Assistant CCC

April E. Haughey
Florida Bar No. 0119180
Assistant CCC

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

Counsel for Appellant

Copies furnished to:

Carol M. Dittmar
Assistant Attorney General
Office of the Attorney General
Westwood Building, 7th Floor
2002 N. Lois Avenue
Tampa, FL 33607

C. Marie King
Assistant State Attorney
Office of the State Attorney
P.O. Box 5028
Clearwater, FL 33758-5028

Commission on Capital Cases
ATTN: Mary Jean
402 S. Monroe Street
Tallahassee, FL 32399-1300

Susan Schwartz
Assistant General Counsel
Florida Department of Corrections
2601 Blair Stone Road
Tallahassee, FL 32399-2500

The Honorable Thomas D. Hall
Clerk, Supreme Court of Florida
ATTN: Tanya Carroll
Supreme Court Building
500 S. Duval Street
Tallahassee, FL 32399-1927

United States Court of Appeals for the
Eleventh Circuit
ATTN: Joyce Pope
56 Forsyth Street N.W.
Atlanta, GA 30303

United States Supreme Court
ATTN: Cynthia Rapp
One 1st Avenue N.E.
Washington, D.C. 20543

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief, was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

Richard E. Kiley
Florida Bar No. 0558893
Assistant CCC

April E. Haughey
Florida Bar No. 0119180
Assistant CCC

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

Counsel for Appellant