NOT DESIGNATED FOR PUBLICATION

No. 124,486

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

OTIS WILLIAMS,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; DAVID J. KAUFMAN, judge. Submitted without oral argument. Opinion filed October 6, 2023. Affirmed.

Sam S. Kepfield, of Hutchinson, for appellant.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before COBLE, P.J., MALONE and WARNER, JJ.

PER CURIAM: More than 12 years after his 2006 conviction of aggravated criminal sodomy, Otis Williams sought the postconviction deoxyribonucleic acid (DNA) testing of previously untested evidence. Although the district court granted Williams' uncontested motions for testing, the court ultimately denied Williams' petition for further hearing on the DNA results, finding that even if the results were favorable, they were not of such materiality that use of the evidence would result in a different outcome at a hearing or new trial. Williams now appeals. Following a review of the record, we affirm the district court's ruling.

FACTUAL AND PROCEDURAL BACKGROUND

The facts pertaining to the underlying charges are addressed briefly and added where necessary to the analysis. Essentially, Williams was convicted by a jury in February 2006 on three counts of aggravated criminal sodomy as to Victim 1. Williams was acquitted on a separate count of the rape of alleged Victim 2. The district court sentenced Williams to 493 months in prison. Williams filed a direct appeal of the district court's decision. A panel of this court affirmed the conviction and sentencing but vacated the district's court's imposition of BIDS attorney fees and remanded with instructions to redetermine the fees. *State v. Williams*, No. 96,576, 2007 WL 4577862 (Kan. App. 2007) (unpublished opinion).

In December 2018, Williams filed a K.S.A. 60-1507 motion that included a K.S.A. 21-2512 request seeking postconviction DNA testing. The district court approved the agreed order for posttrial DNA testing submitted by both parties, specifically asking that "a pair of blue shorts, grey sweatpants and a white t-shirt," be tested for DNA. The DNA testing of the clothing is not at issue in this appeal. But then, about a year later, the parties filed an amended order requesting additional DNA testing of a rectal swab from Victim 1 and a vaginal swab from Victim 2 collected from exams conducted during the 2005 criminal investigation.

In June 2021, the district court held an initial hearing on the DNA testing results. The district court confirmed the result from Victim 1's rectal swab showed no signs of male DNA, but the DNA was consistent with Victim 1. A month later, the district court held another hearing where it ultimately denied Williams' K.S.A. 21-2512 petition. The district court held: "[E]ven assuming that the DNA testing results [from Victim 1] are favorable, they are not of such materiality that a reasonable probability exists that new evidence would result in a different outcome at trial, so, the petition is dismissed or denied in full," in accordance with K.S.A. 21-2512(f)(2). The district court also found,

with the agreement of defense counsel, that the DNA testing results from Victim 2's vaginal swab was not relevant to the petition because Williams was found not guilty on the counts related to Victim 2. The parties present no argument regarding the result from Victim 2, and we do not consider it an issue in this appeal.

Williams timely appeals the district court's denial of his petition under K.S.A. 21-2512(f)(2) to conduct further proceedings based on the postconviction DNA testing result from Victim 1.

DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT DENIED WILLIAMS' K.S.A. 21-2512 PETITION?

Williams argues on appeal that the DNA test results were favorable to him because the rectal swab from Victim 1 did not contain his DNA. He claims that the district court erred by denying his K.S.A. 21-2512 petition after finding the DNA result was not of such materiality that a reasonable probability exists it would result in a different outcome at trial.

The State does not debate whether the new DNA testing result was favorable to Williams. But the State asserts that a reasonable person would agree with the district court's denial of Williams' petition. In particular, the State claims that the new DNA testing result, considered in conjunction with the evidence during trial, did not meet the standard of materiality under K.S.A. 21-2512(f)(2).

Petitions under K.S.A. 21-2512

We first examine the statutory backdrop of Williams' petition. K.S.A. 2022 Supp. 21-2512 provides grounds for a defendant to petition the court for a forensic DNA testing and addresses the possible impact of this posttrial evidence on the earlier jury verdict.

Subsection (f) provides different actions the district courts may or must take when determining whether the test results are unfavorable to the petitioner, favorable to the petitioner, or inconclusive. Here, in denying William's petition, the district court relied on subsection (f)(2), finding that "even assuming that the DNA testing results were favorable, they are not of such materiality that a reasonable probability exists that new evidence would result in a different outcome at trial." In pertinent part, K.S.A. 2022 Supp. 21-2512(f)(2) provides:

> "(2) If the results of DNA testing conducted under this section are favorable to the petitioner and are of such materiality that a reasonable probability exists that the new evidence would result in a different outcome at a trial or sentencing, the court shall:
>
> (A) Order a hearing, notwithstanding any provision of law that would bar such a hearing; and
>
> (B) enter any order that serves the interests of justice, including, but not limited to, an order:
>
> (i) Vacating and setting aside the judgment;
>
> (ii) discharging the petitioner if the petitioner is in custody;
>
> (iii) resentencing the petitioner; or
>
> (iv) granting a new trial."

When seeking relief through a K.S.A. 21-2512 petition, a petitioner has the burden of establishing both prongs of the statute to succeed on his petition: (1) the postconviction DNA test results are *favorable* to the petitioner; and (2) the new DNA evidence is of such *materiality* that a reasonable probability exists that it would cause a different result at trial. *State v. Rodriguez*, 302 Kan. 85, 94-95, 350 P.3d 1083 (2015).

As a threshold issue, we note the express language of K.S.A. 21-2512 only allows defendants convicted of murder in the first degree or rape to petition the court for forensic DNA testing of any biological material. K.S.A. 2022 Supp. 21-2512(a). But though the statute does not include aggravated criminal sodomy as a crime for which

K.S.A. 21-2512 applies, our Supreme Court has found that aggravated criminal sodomy is a qualifying conviction for postconviction DNA testing. *State v. Denney*, 278 Kan. 643, 653-54 101 P.3d 1257 (2004) (holding the elements of rape and aggravated criminal sodomy are arguably indistinguishable and it would be unconstitutional to exclude aggravated criminal sodomy from relief under K.S.A. 21-2512). So, Williams' claim for relief under K.S.A. 2022 Supp. 21-2512(f) is proper under Kansas law.

Standards of Review

As an appellate court, we conduct a de novo review of the district court's legal determination of whether the results of the postconviction DNA testing following a K.S.A. 21-2512 petition were favorable or unfavorable and whether the evidence was material. *Haddock v. State*, 295 Kan. 738, 764-65, 286 P.3d 837 (2012). The reviewing court gives deference to the district court's factual findings. 295 Kan. at 765.

In the event a postconviction DNA result is favorable to the petitioner, we review the district court's decision whether to grant an evidentiary hearing or new trial under K.S.A. 21-2512(f)(2) for abuse of discretion. *State v. LaPointe*, 309 Kan. 299, 306, 434 P.3d 850 (2019); *Haddock*, 295 Kan. at 763. A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Bilbrey*, 317 Kan. 57, 63, 523 P.3d 1078 (2023); *LaPointe*, 309 Kan. at 306.

The district court did not err in denying Williams' K.S.A. 21-2512 petition.

As the party asserting the district court abused its discretion, Williams bears the burden of showing such abuse. *State v. Keys*, 315 Kan. 690, 708, 510 P.3d 706 (2022). "'A decision [regarding a motion for new trial] will not be reversed on appeal "if a

reasonable person could agree with the district court's decision.'" [Citations omitted.]" *Haddock*, 295 Kan. at 763.

Williams does not allege on appeal how the district court abused its discretion, aside from confusing the issues by claiming both that the district court erred by dismissing Williams' petition and that the district "court abused its discretion in denying the order" to permit DNA testing. But the DNA tests were the result of agreed orders signed by the district court. Nowhere in Williams' brief does he claim the district court's determination was based on an error of fact. And, reviewing the statute at issue, the court did not commit an error of law because the court has the legal discretion to not order a hearing under K.S.A. 2022 Supp. 21-2512(f), even when a postconviction DNA test is favorable to the petitioner. See *LaPointe*, 309 Kan. at 305. Our decision, then, is based on whether no reasonable person would agree with the district court's discretionary decision to deny Williams' petition, and whether our de novo review concludes the DNA result was not of such materiality that a reasonable probability exists that the evidence would result in a different outcome at trial.

To be clear, the district court did not engage in any analysis to find the DNA testing result to be favorable to Williams. Instead, the court simply assumed the result was favorable then dove directly into the materiality of the result. The district court presumed one could construe the test results to be favorable to the extent that no male DNA was found on the rectal swabs from Victim 1, and such evidence had not been previously presented at trial.

We find no error in the district court's presumption. "To be 'favorable,' the test result need not completely exonerate the petitioner." *Goldsmith v. State*, 292 Kan. 398, 402, 255 P.3d 14 (2011). The DNA testing results from the rectal swabs showing no male DNA was not entirely exonerating, but it could be exculpatory. For evidence to be exculpatory, it must only tend to prove a fact in issue and material to guilt or punishment.

State v. Hernandez, 303 Kan. 609, Syl. ¶ 4, 366 P.3d 200 (2016). This is because even if DNA evidence does not conclusively establish guilt or innocence, it may still have significant probative value. *Haddock*, 295 Kan. at 759. So, evidence may be exculpatory without being exonerating. *Hernandez*, 303 Kan. at 617. Applied here, the fact that no male DNA was present could suggest that Williams did not touch Victim 1 the night of the crime, thus tending to prove a disputed fact. As a result, it is reasonable to conclude that the district court could have found the DNA testing result favorable to Williams.

Whether presuming or finding favorability, we then move to the second prong of the analysis—to determine whether the "new DNA evidence is of such materiality that a reasonable probability exists that it would cause a different result at trial." *Rodriguez*, 302 Kan. at 94-95; see K.S.A. 2022 Supp. 21-2512(f)(2).

Although the laboratory test of the postconviction DNA is not itself a part of the appellate record, the parties and district court discuss the test results at length in both hearings. There is no dispute between the parties that the result of the new DNA testing of the rectal swab from Victim 1 revealed no male DNA. In reaching its decision that the results did not have materiality that a reasonable probability existed to alter the outcome of trial, the district court examined the forensic expert's testimony at trial, which focused solely on Victim 2 and contained no testimony about Victim 1. The primary testimony against Williams during trial was from Victim 1 and the nurse who performed the sexual assault examination on Victim 1, discussing the injuries she located during the exam. There was no blood or semen found in the 2005 DNA report, and "no biological material of [Williams] was presented that tied [him] to the crimes [against Victim 1]." The district judge explained:

> "So, the jury, at the original trial, there's no forensic evidence, it was utter evidence, it was [Victim 1's] testimony making the accusation, it was the relationship between the parties, it was some of the physical injuries that she had, and so the DNA

> testing, as I've already stated, showed no male DNA or rectal swabs. So, if there's no evidence at the trial presented and the DNA testing shows no evidence linking the defendant to the crime, what's the change? In fact, by inference, a jury could certainly consider a trial, the fact there was DNA evidence presented regarding [Victim 2], the absence of the same, the inference would be there was no DNA evidence regarding [Victim 1]. The point is that the jury of 12 on the trial had no DNA evidence tying defendant to the crimes regarding [Victim 1], and the results of our current DNA testing, pursuant to the defendant's motion, showed no DNA evidence tying defendant to crimes regarding [Victim 1]. So, that's why I phrase my ruling, assuming that it's favorable, it still, under the law, does not have materiality that a reasonable probability exists that would result in a different outcome at trial. So, respectfully, the petition is denied, no relief is given."

We agree. The evidence presented during trial supports the district court's finding that the postconviction DNA testing does not have such materiality that it would shift the outcome of Williams' conviction. At trial, the State presented Victim 1's testimony that Williams was in her apartment when her roommate was gone and that she was asleep from taking medication. Victim 1 testified that she awoke from her sleep with her pants removed and Williams' finger in her rectum. The State also presented testimony from the sexual assault nurse who examined Victim 1. The nurse testified Victim 1 told her that a man, later confirmed as Williams, penetrated her anus with his fingers and that Victim 1 had a bruise on her left shoulder. The nurse testified that she observed a tear in the posterior fourchette area, general tenderness, and swelling in the anus, and that these injuries were consistent with blunt force trauma. The nurse also commented that the area was purplish in color, but that could also be attributed to the fact that Victim 1 was a large woman and lying on her back for a while could cause pooling or an enlarging of the vascularity in the area.

Reviewing the new DNA testing results in concert with the evidence presented at trial, the district court's determination that the results of the new DNA test would not have resulted in a different outcome at trial is sound. The jury was provided with no

DNA evidence or testimony from the forensic specialist regarding DNA findings pointing to Williams. Since the new DNA test results showed no male DNA was present, the jury would not have been presented with new evidence or evidence not already heard during trial. The new DNA result would not have advanced Williams' defense because the jury had already heard the testimonies of the State's witnesses and weighed their credibility. It is likely the new DNA testing results would not have added much weight at trial. Therefore, the district court did not err by finding that the new DNA testing results were not of such materiality that a reasonable probability exists that the new evidence would result in a different outcome at a trial or sentencing.

Likewise, Williams' argument that the evidence during trial was not overwhelming and that the negative DNA result could cast some scientific doubt on the victim's testimony is unpersuasive. Mere speculation that the new DNA test results could cast doubt on the evidence provided during trial is not enough to satisfy Williams' burden to show that the new DNA evidence is of such materiality that a reasonable probability exists that it would cause a different result at trial. And fact-finding is simply not the role of appellate courts. *State v. Gutierrez-Fuentes*, 315 Kan. 341, 347, 508 P.3d 378 (2022).

Accordingly, the district court did not err in finding that although the new DNA result could have been favorable to Williams, the result did not have such materiality that a reasonable probability exists that the new DNA result would have altered the jury's verdict. A reasonable fact-finder could agree with the district court's decision to deny Williams' K.S.A. 21-2512(f) petition based on these findings. As a result, we affirm the district court's decision to dismiss the petition.

Affirmed.