Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 9, 2019
Certiorari to the Court of Appeals, 2018CA988 District Court, Broomfield County, 2005CR70	
Petitioner: Hazhar Sayed, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2019SC693
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 9, 2019.

PLAINTIFF'S EXHIBIT A

18CA0988 Peo v Sayed 09-05-2019

COLORADO COURT OF APPEALS

DATE FILED: September 5, 2019

Court of Appeals No. 18CA0988
City and County of Broomfield District Court No. 05CR70
Honorable F. Michael Goodbee, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Hazhar A. Sayed,

Defendant-Appellant.

ORDER AFFIRMED

Division V
Opinion by JUDGE HARRIS
Richman and Tow, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced September 5, 2019

Philip J. Weiser, Attorney General, Lisa K. Michaels, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Hazhar A. Sayed, Pro Se

¶ 1 Defendant, Hazhar A. Sayed, appeals the district court's order denying his motion for DNA testing under section 18-1-412, C.R.S. 2019. We affirm.

I. Background

¶ 2 In March 2005, the sixteen-year-old victim reported that Sayed had sexually assaulted her in the bedroom of his apartment. The People charged Sayed with sexual assault and kidnapping.

¶ 3 Within hours of the assault, the victim underwent a sexual assault examination at the hospital. A nurse collected swabs from the victim's vagina, cervix, naval, and naval jewelry. The swabs were sent to the Colorado Bureau of Investigation (CBI) for testing, and the results were admitted at Sayed's trial through the testimony of a CBI agent who was qualified as an expert in forensic serology and DNA analysis.

¶ 4 The expert testified that DNA analysis occurs in two steps. When an item of evidence arrives at the CBI, an analyst first performs a serology test to determine whether "there is any biological fluid on that particular item of evidence" that might contain DNA. According to the expert, the primary bodily fluids from which DNA can be extracted are blood, semen, and saliva.

¶ 5 If the serology test reveals the presence of bodily fluid, an analyst then conducts DNA analysis of the fluid with the goal of developing a DNA profile. That DNA profile is compared to the suspect's known profile to determine whether he is the source of the DNA recovered from the item of evidence.

¶ 6 The expert testified that, consistent with this two-step process, she first examined the vaginal and cervical swabs for useful bodily fluid. She explained that the vaginal swab would have yielded a DNA profile of the victim herself, but that the CBI was "not necessarily interested in the DNA from the person whose vaginal area [the swab] was taken from." Thus, the serology test was performed to determine whether the swabs contained semen or spermatozoa from which a third-party DNA profile could be developed.

¶ 7 The expert testified that the "presumptive serological examination" of the vaginal and cervical swabs "did not indicate the presence of semen" or spermatozoa. And, because "there was no semen indicated and no spermatozoa observed," the expert did not conduct DNA analysis on the swabs, as a profile could not have been developed.

¶ 8 However, the expert testified that the absence of semen or spermatozoa did not "mean that a sexual assault did not happen." She explained that even if a man and woman had sexual intercourse, semen and spermatozoa might not be present in the woman's vagina afterward, "especially if there was no ejaculation."

¶ 9 With respect to the navel and navel jewelry swabs, the expert said that serological testing did reveal the presence of saliva and so those swabs were forwarded for DNA analysis. The expert developed a major DNA profile from both swabs that matched Sayed. In other words, the expert testified "to a reasonable degree of scientific certainty" that Sayed's DNA was on the victim's navel and her navel jewelry just after the reported assault.

¶ 10 The victim testified that while she and her friends were at his apartment, Sayed, whom she had just met, dragged her into a bedroom, held her down with his forearm, took her clothes off, and penetrated her vagina with his penis. She did not think that he ejaculated.

¶ 11 Sayed's theory of defense was that the victim had fabricated the sexual assault and that he had not had sexual contact with the victim. Defense counsel emphasized that the expert did not detect

the presence of semen or sperm on the vaginal or cervical swabs and therefore the swabs could not be tested for DNA. And because the DNA on the victim's navel was derived from saliva, defense counsel argued, the evidence "does not indicate any genital contact at all."

¶ 12 The jury acquitted Sayed of kidnapping but convicted him of sexual assault. The court sentenced him to a term of imprisonment of twenty-four years to life.

¶ 13 Sayed filed a direct appeal challenging his sentence (but not his conviction). A division of this court affirmed. *People v. Sayed*, (Colo. App. No. 06CA2267, Apr. 26, 2007) (not published pursuant to C.A.R. 35(f)).

¶ 14 Sayed later filed a series of postconviction motions under Crim. P. 35(c) asserting ineffective assistance of counsel and newly-discovered evidence claims. The district court denied the motions without a hearing, and a division of this court affirmed. *People v. Sayed*, (Colo. App. No. 13CA2044, Oct. 8, 2015) (not published pursuant to C.A.R. 35(f)).

¶ 15 In 2018, Sayed filed the postconviction motion at issue here, requesting an order for DNA testing pursuant to section 18-1-412

(the DNA motion). The statute permits the court to order postconviction DNA testing if the defendant shows, among other things, that favorable results of the testing will demonstrate his actual innocence. *See* § 18-1-413, C.R.S. 2019.

¶ 16 The postconviction court denied the DNA motion, concluding that further testing would not establish Sayed's actual innocence because (1) a favorable DNA test result, one that did not reveal Sayed's DNA on the vaginal or cervical swabs, would simply corroborate testimony already given at trial; and (2) a test result showing Sayed's DNA on the swabs would "be consistent and corroborative of penetration and guilt, not actual innocence."

II. Discussion

¶ 17 On appeal, Sayed contends that the district court erred in denying his DNA motion without a hearing. He says that DNA testing was not conducted on the vaginal and cervical swabs, that testing would reveal the absence of DNA, and that the absence of DNA would prove that he had not penetrated the victim, thereby demonstrating his actual innocence.

¶ 18 We disagree because (1) the evidence was tested and (2) favorable results of any further testing would not demonstrate Sayed's actual innocence.

A. Appellate Review of the Postconviction Court's Order

¶ 19 As a preliminary matter, the People contend that we should decline to review the district court's order because Sayed was procedurally barred from filing the DNA motion in the first instance. According to the People, Sayed could have requested DNA testing when he filed his Rule 35(c) motions, and his failure to do so renders the DNA motion successive under Crim. P. 35(c)(3)(VII).

¶ 20 We need not determine whether Rule 35's successiveness bar applies to motions filed under section 18-1-412 or whether section 18-1-412's separate successiveness bar applies instead because, in any event, Sayed's motion fails on the merits.

¶ 21 A request for postconviction DNA testing presents a mixed question of law and fact. *See People v. Young*, 2014 COA 169, ¶ 38. "[W]e review the court's factual findings for clear error and its legal conclusions de novo." *Id.*

B. Statutory Procedure for Postconviction DNA Testing

¶ 22 An incarcerated individual may "apply to the district court in the district where the conviction was secured for DNA testing concerning the conviction and sentence the person is currently serving." § 18-1-412(1). To apply, the defendant must file a motion that includes "specific facts sufficient to support a prima facie showing that post-conviction relief is warranted under the criteria set forth in section 18-1-413." § 18-1-412(2). Under section 18-1-413, a court shall not order postconviction DNA testing unless the defendant shows by a preponderance of the evidence that

> (a) Favorable results of the DNA testing will demonstrate the petitioner's actual innocence;
>
> (b) A law enforcement agency collected biological evidence pertaining to the offense and retains actual or constructive possession of the evidence that allows for reliable DNA testing;
>
> (c)(I) Conclusive DNA results were not available prior to the petitioner's conviction; and
>
> (II) The petitioner did not secure DNA testing prior to his or her conviction because DNA testing was not reasonably available or for reasons that constitute justifiable excuse, ineffective assistance of counsel, or excusable neglect; and

(d) The petitioner consents to provide a biological sample for DNA testing.

Actual innocence is defined as "clear and convincing evidence such that no reasonable juror would have convicted the defendant." § 18-1-411(1), C.R.S. 2019. And, if the court finds that the defendant has not made a prima facie showing of the above criteria, the court shall deny the motion without a hearing. § 18-1-412(3).

C. Analysis

1. The Swabs Were Tested

¶ 23 As a prerequisite to obtaining an order for DNA testing under section 18-1-412, the defendant must demonstrate, by a preponderance of the evidence, that he did not secure DNA testing prior to his conviction because DNA testing was not reasonably available or for some other justifiable reason. *See* § 18-1-413(1)(c)(II). In his briefing on appeal, Sayed claims that "it is clear that the sexual assault kit collected from the victim was never tested for DNA." His claim reveals a misapprehension of the testing process.

¶ 24 In fact, the expert testified that the evidence collected by the nurse during the sexual assault examination was sent to the CBI

for testing. The expert performed serology testing — the first step in the DNA testing process — on the vaginal, cervical, navel, and navel jewelry swabs. But because only the navel and navel jewelry swabs had bodily fluid from which DNA could be extracted and a profile developed, the vaginal and cervical swabs did not undergo second-step testing. Under these circumstances, Sayed has not demonstrated that "testing" did not occur.

¶ 25 Even if Sayed is right, though, and the statute contemplates second-step "testing," the record establishes (and Sayed has not introduced any evidence to the contrary) that the reason "DNA testing" was not performed on the vaginal and cervical swabs was not because testing was "not reasonably available," but because there was no bodily fluid to submit for testing. Indeed, DNA testing was clearly available at the time of trial, as it revealed the presence of Sayed's DNA on the victim's navel and her navel jewelry.

2. Further Testing Would Not Demonstrate Actual Innocence

¶ 26 Still, Sayed insists that further testing is warranted because "there are now advanced DNA testing procedures" that will show "the absence of his DNA in the victim" thereby proving, "beyond a reasonable doubt, that he is actually innocent" of sexual assault.

Sayed does not identify any of these advanced DNA testing procedures (the People hypothesize that he is referring to "touch DNA" analysis[1]), but even assuming they exist, the new procedures would, as Sayed acknowledges, yield precisely the same results as those submitted to the jury at his trial: "the absence of his DNA in the victim."

¶ 27 The prosecution did not rely on the presence of Sayed's DNA in the victim's vagina to tie him to the crime. Instead, it relied on the victim's testimony, the presence of Sayed's DNA on her navel and navel jewelry, her friend's account of the circumstances leading up to the assault, and the expert's testimony that the absence of Sayed's DNA on the vaginal and cervical swabs did not exclude him as the perpetrator. So, if after additional testing, Sayed's DNA is not detectable on the vaginal and cervical swabs, as he hopes, that result would not undermine or call into question any aspect of the prosecution's case against him because vaginal DNA evidence was not used to support the prosecution's theory of guilt. *See United*

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[1] Touch DNA analysis is a technique developed in the mid-2000s that allows DNA analysis of just a few cells from the outermost layer of skin. *See United States v. Thomas*, 597 F. App'x 882, 884 (7th Cir. 2015).

States v. Thomas, 597 F. App'x. 882, 885 (7th Cir. 2015) (The defendant was not entitled to additional DNA testing to show the absence of his DNA on baggies he supposedly handled during drug transactions because "the government never relied on forensic evidence to tie [the defendant] to the scenes of the crimes or to the drugs."); *United States v. Jordan*, 594 F.3d 1265, 1268 (10th Cir. 2010) (The defendant was not entitled to additional DNA testing to show the absence of his DNA, and the presence of another inmate's DNA, on the murder weapon because that evidence would not "undermine the strength of the government's" theory that the defendant and the other inmate had committed the crime.).

¶ 28 Consequently, we agree with the district court that additional test results showing the absence of Sayed's DNA on the swabs would not demonstrate "actual innocence" as required by the statute — that is, the negative results would not amount to evidence of such a clear and convincing nature that no reasonable juror would have convicted Sayed of sexual assault. *See* § 18-1-411(1).

III. Conclusion

¶ 29 The order is affirmed.

JUDGE RICHMAN and JUDGE TOW concur.

SUPREME COURT OF THE UNITED STATES

Supreme Court Case No. _____

Hazhar A. Sayed.

Petitioner,

v.

The State of Colorado,

Respondent.

Motion for Appointment of Counsel

COMES NOW, Hazhar A. Sayed, and respectfully moves this Court to appoint counsel to assist him in the above captioned action. In support of this request, Mr. Sayed states:

1) Mr. Sayed is indigent and without the necessary funds with which to retain private counsel to assist him with his petition for writ of certiorari. This Court has previously determined Mr. Sayed to be indigent and due to his incarceration, the circumstances have not changed.

2) Mr. Sayed currently incarcerated, and unskilled in the law, and does not have access to sufficient legal resources to prosecute his own appeal.

Respectfully submitted this 23rd day of December, 2019.

Hazhar A. Sayed, #133608

Cc: Colorado Atty. General's Office