UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2200

United States of America

Plaintiff - Appellee

v.

Reginald S. Carr

Defendant - Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:93-cr-00265-CDP-1)

JUDGMENT

Before COLLOTON, MURPHY and SHEPHERD, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

Appellant's motion for appointment of counsel is denied as moot.

October 27, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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v.

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Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:93-cr-00265-CDP-1)

ORDER

The petition for rehearing by the panel is denied.

January 09, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:93 CR 265 CDP
	)	
REGINALD CARR,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Reginald Carr seeks to compel DNA testing of evidence from his 1993 murder trial under the Innocence Protection Act, 18 U.S.C. § 3600 ("the Act"). Because Carr cannot meet the requirements for DNA testing under the Act, the motion will be denied.

Background Facts

In 1993, a jury convicted Carr for the first degree murder of Alice Knop.[1] He was sentenced to life in prison, and his conviction was affirmed on appeal. *United States v. Carr*, 67 F.3d 171 (8th Cir.), *cert. denied*, 516 U.S. 1182 (1996). At trial, Carr was identified as Knop's killer by his accomplice and an eyewitness who was sitting next to Knop when she was shot. The jury also saw incriminating

[1] The Honorable George F. Gunn, Jr., United States District Judge, presided over Carr's trial and sentencing. The case was reassigned to the Honorable Donald J. Stohr following Carr's unsuccessful appeal. Judge Stohr denied Carr's motion for a new trial under Fed. R. Crim. P. 33. [108]. The case was later reassigned to me for ruling on the instant motion. [126].

notes Carr wrote to his accomplice while awaiting trial and physical evidence (a t-shirt and a head wrap) recovered from the crime scene.[2] The t-shirt and head wrap were tested by the FBI, but the DNA test results were inconclusive and did not exclude Carr as a match.[3] The DNA test results were not introduced as evidence at trial. During closing arguments, defense counsel argued that the lack of DNA evidence established Carr's innocence. The jury disagreed.

Carr filed the instant motion to compel DNA testing of the t-shirt and head wrap under the Act.[4] In response, the government contends that Carr does not meet the requirements of the Act because the motion is untimely and the evidence has been destroyed.

Discussion

The Act permits DNA testing of evidence in very limited circumstances. 18 U.S.C. § 3600. To obtain DNA testing, a prisoner must meet all ten requirements of the Act, including that the motion be made in a timely fashion and the evidence

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[2] Immediately after the shooting, an eyewitness saw a man matching Carr's description discard the t-shirt, head wrap, and gun used to kill Knop in a trash can.

[3] At trial, Carr argued that he was innocent and the real murderer was Gregory Belger. Although Carr presented the alibi testimony of his girlfriend, her testimony was impeached by the testimony of her father. While the DNA test results did not exclude Carr as a match, they did exclude Belger as a match for the head wrap.

[4] This is the seventh post-conviction motion Carr has filed, including a motion for habeas relief, retention of evidence and a motion for new DNA testing under 21 U.S.C. § 848(q)(4)(A) with the Eighth Circuit Court of Appeals, which denied relief in April of 2009. *Carr v. United States*, No. 09-1457, (8th Cir. Apr. 17, 2009). This is Carr's first motion for DNA testing under the Act.

be in the possession of the government. 18 U.S.C. § 3600(a).[5] Because Carr's motion is untimely and the evidence has been destroyed, the motion will be denied.

Carr's Motion is Untimely

A motion for DNA testing under the Act must be made in a "timely fashion." 18 U.S.C. § 3600(a)(10). The Act provides for a "rebuttable presumption of timeliness if the motion is made within [sixty] months of enactment of the Justice For All Act of 2004 or within [thirty-six] months of conviction, whichever comes later." 18 U.S.C. § 3600(a)(10)(A). Any motions made after that time are subject to a rebuttable presumption of untimeliness. 18 U.S.C. § 3600(a)(10)(B). The Justice for All Act was passed in October of 2004. Justice for All Act, Pub. L. 108-405, Title IV, § 411(a)(1). Carr filed this motion on June 6, 2016. Because Carr was convicted in 1993 and this motion was filed 139 months after the enactment of the Justice for All Act, it is presumptively untimely.

[5] The other eight requirements are as follows: (1) the applicant must submit a written motion setting forth, under penalty of perjury, that he is "actually innocent"; (2) the specific evidence to be tested must have been secured in relation to the investigation or prosecution of the offense for which the applicant is serving his sentence; (3) if the evidence was previously subjected to DNA testing, the applicant is requesting DNA testing using a new method or technology that is substantially more probative; (5) proposed DNA testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices; (6) the applicant identifies a defense theory that will show actual innocence not inconsistent with an affirmative defense raised at trial; (7) the identity of the perpetrator was at issue in the trial; (8) the proposed testing "may produce new material evidence" supporting the defense theory identified and "raise a reasonable probability that the applicant did not commit the offense"; and (9) the applicant certifies that he will provide a DNA sample for comparison purposes. § 3600(a)(1)-(3), (5)-(9).

Carr can overcome the presumption of untimeliness if he can demonstrate that his case falls into one of the four following exceptions:

> i) that the applicant was or is incompetent and such incompetence substantially contributed to the delay in the applicant's motion for a DNA test;
>
> (ii) the evidence to be tested is newly discovered DNA evidence;
>
> (iii) that the applicant's motion is not based solely upon the applicant's own assertion of innocence and, after considering all relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice; or
>
> (iv) upon good cause shown.

18 U.S.C. § 3600(a)(10)(B)(i)-(iv). Carr does not allege that he is or was incompetent. Instead, he argues that "new" types of testing such as touch DNA testing[6] will reveal DNA that could qualify as newly discovered evidence. Because Carr cannot rebut the presumption of untimeliness under any of these exceptions, his motion will be denied as untimely.

The t-shirt and head wrap do not qualify as newly discovered evidence as they were available (and DNA tested) during Carr's trial in 1993. Moreover, Carr has been raising claims related to the DNA testing of this evidence since his direct appeal in 1995. A new method of DNA testing can in some cases qualify as newly discovered evidence. S*ee United States v. DeWatson*, 792 F.3d 1174, 1182 (9th

[6] Touch DNA testing permits technicians to obtain a DNA profile from very small, degraded, and compromised samples. *State v. Reynolds*, 926 N.E.2d 315, 318 (Ohio Ct. App. 2009).

Cir. 2015). However, if the testing method was available when the prisoner was able to timely file a motion the "newly discovered evidence" exception cannot rebut the presumption of untimeliness under the Act. *United States v. MacDonald*, 37 F. Supp. 3d 782, 792 (E.D.N.C. 2014) (cannot rebut presumption of untimeliness where allegedly "new" DNA testing technologies such as touch DNA, mitochondrial DNA, and Y-chromosome DNA testing had been available at the time defendant could have filed a timely motion). The touch DNA testing requested by Carr has been available and in use by the courts since at least 2009. *See State v. Reynolds*, 926 N.E.2d 315, 318 (Ohio Ct. App. 2009); *Swearingen v. State*, 303 S.W.3d 728, 733 (Texas Crim. App. 2010).[7] As in *MacDonald*, this type of testing was readily available when Carr could have filed an earlier motion under the Act and therefore does not qualify as newly discovered evidence sufficient to rebut the presumption of untimeliness in this case.

Moreover, the denial of DNA testing cannot be considered a manifest injustice in this case. "Manifest means that which is unmistakable, clear, plain, or indisputable and requires that the opposite conclusion be clearly evident." 18 U.S.C. § 3600(a)(10)(C)(ii). If DNA testing does not raise a reasonable possibility that the defendant did not commit the crime by outweighing or explaining other

[7] Carr admits that mitochondrial DNA and Y-chromosome DNA are not at issue here. Y-chromosome testing is used to identify paternally related men, while mitochondrial testing is primarily used for teeth or bone.

evidence in the case, then the denial of testing does not constitute manifest injustice. *United States v. Jordan*, 594 F.3d 1265, 1267-68 (10th Cir. 2010) (denying DNA testing because the results could not explain away defendant's motive, the eyewitness testimony used to convict him, or the incriminating statements he made after committing the crime); *United States v. Crosby*, 515 Fed. Appx. 771, 772 (10th Cir. 2013) (no reasonable probability that DNA testing would result in different outcome at trial where three eyewitnesses positively identified defendant at trial); *United States v. Roberts*, 417 Fed. Appx. 812, 824 (10th Cir. 2011) (denying DNA testing because the absence of defendant's fingerprints on a gun thrown into a trash can near the scene would not prove eyewitnesses who saw him throw the gun were mistaken); *United States v. Martin*, 377 Fed. Appx. 395, 396 (5th Cir. 2010) (no DNA testing where defendant made no attempt to explain how DNA testing would explain his innocence in the face of testimony from multiple co-defendants and letters from defendant amounting to a confession); *Espinosa v. United States*, 2012 WL 5464139, at *2 (D.S.D. Nov. 7, 2012) (no manifest injustice in denying testing where DNA evidence had limited probative value and would not be dispositive as eyewitness testimony was used to convict defendant); *MacDonald*, 37 F. Supp. 3d at 793 (no manifest injustice in denying DNA testing where defendant offered only "unreliable and specious" evidence of innocence to combat eyewitness evidence against him).

Here, further DNA testing of the t-shirt and head wrap will not reveal exculpatory evidence which can outweigh the overwhelming evidence of Carr's guilt. Carr was convicted on the basis of eyewitness identification, accomplice testimony, and his own incriminating notes. Even if Carr's DNA cannot be detected on the t-shirt or head wrap, this absence of evidence is inconclusive and does not outweigh the eyewitness or accomplice testimony or explain away the incriminating notes Carr sent while awaiting trial.

Courts have also found no manifest injustice when the DNA evidence was not a basis for conviction at trial. *United States v. Thomas*, 597 Fed. Appx. 882, 885-86 (7th Cir. 2015) (denying DNA testing because DNA evidence was never used to support eyewitness testimony); *Jordan*, 594 F.3d at 1267-68 (testing denied where government told jury unidentified third party DNA was found on murder weapon). The DNA test results of the t-shirt and head wrap were not introduced as evidence in this case, and Carr's attorney argued in closing arguments that the absence of DNA evidence established Carr's innocence. The jury considered – and ultimately rejected – this argument. Because the jury already weighed the lack of DNA evidence against the credibility of the witnesses and still found Carr guilty, Carr cannot demonstrate a manifest injustice will result if DNA testing is denied in this case.

Finally, Carr has advanced no specific reason – no less the requisite "good cause" – for the untimeliness of his motion. Although Carr argues generally that new DNA testing methods are available, as discussed above, this method was available when Carr could have timely filed this motion. As such, he cannot demonstrate there is sufficient "good cause" to rebut the presumption that his motion is untimely.

The Evidence Has Been Destroyed

Carr's motion also fails because the evidence he seeks to test has been destroyed by the government as outlined in the affidavit of William Woods, Special Agent in Charge of the FBI's St. Louis field office. [Doc. # 145-1]. Even if the evidence was not properly preserved as required by The Justice for All Act, *see* 18 U.S.C. § 3600A(a), Carr is not entitled to relief. To obtain DNA testing, the Act requires the evidence to be in the possession of the government. *See* 18 U.S.C. § 3600(a)(4). If the evidence has been destroyed – whether properly or improperly – courts routinely deny motions for DNA testing for failing to meet the requirements of the Act. The Justice for All Act and the Act do not offer any type of civil remedy in situations where DNA evidence has been destroyed. *See*, 18 U.S.C. § 3600A(g) (the Justice for All Act does not provide "an independent basis for relief in any federal habeas corpus proceeding."); *United States v. Nance,* 2006 WL 5845651, at *2 (W.D.Va. Jan. 10, 2006) (denying DNA testing where evidence has been destroyed and otherwise denying relief, as the Act "is not a cornucopia of new rights or a panacea to challenge any and all grievances an individual may have against the Government. Its purview is procedural in scope . . . It grants no authority for the court to grant relief based on the Government's conduct, whether negligent, reckless, or intentional."); *United States v. Curry*, 641 Fed. Appx. 607, 609 n. 1 (7th Cir. 2016) (holding motion to preserve claim under § 3600A was improper as § 3600A does not provide for a civil remedy, and was inapplicable when evidence had been destroyed.

Conclusion

As Carr has failed to meet the requirements for DNA testing under the Act, the motion will be denied.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for DNA testing [130] is denied.

Catherine D Perry

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 12th day of May, 2017.