NOT DESIGNATED FOR PUBLICATION

No. 113,580

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee/Cross-appellant,

v.

JACK R. LAPOINTE,
Appellant/Cross-appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; KEVIN P. MORIARTY, judge. Opinion filed November 23, 2016. Affirmed and cross-appeal dismissed.

Richard Ney, of Ney & Adams, of Wichita, for appellant.

Steven J. Obermeier, senior deputy district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before PIERRON, P.J., ATCHESON and ARNOLD-BURGER, JJ.

Per Curiam: In 2004, Jack R. LaPointe was convicted of aggravated robbery and aggravated assault based on a robbery of a Payless Shoe store. Because he had a criminal history score of A, the district court sentenced LaPointe to 245 months' imprisonment. In 2014, LaPointe filed a motion for postconviction DNA testing under K.S.A. 2014 Supp. 21-2512. The district court granted the motion. Upon receiving favorable DNA test results, LaPointe filed a motion seeking relief under K.S.A. 2014 Supp. 21-2512. The district court denied the motion finding the jury would not have reached a different outcome in light of the evidence presented at the trial. LaPointe timely appeals. The State

also filed a cross-appeal. The State contends the district court lacked jurisdiction to grant LaPointe's motion for postconviction DNA testing because he was in federal custody when he filed the motion. The State contends the statute requires a person to be in state custody in order for the statute to apply. Additionally, the State argues the statute only applies to persons convicted of first-degree murder and rape and not to those who receive a comparable sentence due to their criminal history. Because we find that the district court did not err in denying LaPointe's motion for a new trial based on the DNA evidence, we need not reach the State's cross-appeal.

FACTUAL AND PROCEDURAL HISTORY

In March 2004, a jury convicted LaPointe of aggravated robbery and aggravated assault based on the robbery of a Payless Shoe store in October 2000. *State v. LaPointe* (*LaPointe I*), No. 93,709, 2006 WL 2936496, at *1 (Kan. App. 2006) (unpublished opinion). The facts are well known to the parties and to this court, thus we need not recite them here. See *LaPointe I*, 2006 WL 2936496; *LaPointe v. State* (*LaPointe II*), 42 Kan. App. 2d 522, 214 P.3d 684 (2009); *LaPointe v. State* (*LaPointe III*), No. 106,492, 2012 WL 4372995 (Kan. App. 2012) (unpublished opinion); *State v. LaPointe* (*LaPointe IV*), 51 Kan. App. 2d 742, 355 P.3d 694 (2015), *rev. granted* February 18, 2016 (oral argument heard September 13, 2016). Following his conviction, the district court sentenced LaPointe to 245 months' imprisonment. LaPointe had a criminal history score of A.

Since his sentencing, LaPointe has sought postconviction relief on multiple occasions. For purposes of this appeal, we will address only the motions that led to this appeal, which were filed in February 2014 and February 2015.

In February 2014, LaPointe filed a motion for postconviction DNA testing pursuant to K.S.A. 2014 Supp. 21-2512. Then, in May 2014, the district court granted

LaPointe's motion for DNA testing in light of our Supreme Court's decision in *State v. Cheeks*, 298 Kan. 1, 310 P.3d 346 (2013), where the Kansas Supreme Court determined the Equal Protection Clause of the United States Constitution dictates that DNA testing should be allowed for defendants who are similarly situated to those convicted of first-degree murder or rape—the convictions for which K.S.A. 2014 Supp. 21-2512 authorizes postconviction DNA testing. The district court found LaPointe was similarly situated to those convicted of first-degree murder or rape because he was sentenced to more than 20 years in prison, which was greater than potential sentences for those crimes. The State then filed an appeal of the district court's decision on a question reserved.

The State's appeal was addressed by this court in *LaPointe IV*, 51 Kan. App. 2d 742. This court dismissed the State's appeal, finding it lacked jurisdiction to consider the appeal because there was not a final judgment. 51 Kan. App. 2d at 743. This court reasoned that granting a motion for postconviction DNA testing created an ongoing proceeding in which K.S.A. 2014 Supp. 21-2512(f)(2) left open the possibility of a further order for a new trial. 51 Kan. App. 2d at 748. The Kansas Supreme Court granted a petition for review and heard oral arguments on that case, although at this time a decision has not been issued.

In the meantime, the DNA testing was completed. The results showed that LaPointe was not the source of one of the hairs that had been retained for testing. The results from a second hair were inconclusive, but the report stated that it was more likely that LaPointe was excluded as the source of the DNA than that the result was inconclusive.

In February 2015, LaPointe filed a motion for hearing with the district court based on the test results. LaPointe asked that he either be discharged from custody or granted a new trial. Before ruling on the motion, the district court addressed whether it had jurisdiction to grant LaPointe's motion for postconviction DNA testing because LaPointe

was in federal custody when he filed the motion. The State argued that K.S.A. 2014 Supp. 21-2512(a) applied only to an inmate currently serving a sentence in state custody in Kansas, and not federal custody. The district court held that because Kansas had lodged a detainer against LaPointe, the detainer effectively meant Kansas had a hold on him; therefore, LaPointe was in state custody and could attack his sentence in Kansas. After finding it had jurisdiction to grant LaPointe's motion for postconviction DNA testing, the district court addressed LaPointe's request for relief. The district court denied the motion, finding the jury did not convict LaPointe based on physical evidence. The district court found the DNA tests 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.'"

LaPointe timely appealed, arguing the district court erred by denying his motion to a new trial pursuant to K.S.A. 2014 Supp. 21-2512. The State also filed a cross-appeal, arguing the district court erred by finding it had jurisdiction to grant LaPointe's motion for postconviction DNA testing and that the district court erred by finding LaPointe was similarly situated to persons convicted of first-degree murder and rape.

ANALYSIS

On appeal, LaPointe argues the district court erred in denying his motion for a hearing pursuant to K.S.A. 2014 Supp. 21-2512(f)(2). He contends the postconviction DNA testing results are of such materiality that a reasonable probability exists that the new evidence would result in a different outcome at trial. He further addresses the unreliability of eyewitness identification, as well as the unreliability of a "career criminal who received immunity." In his reply brief, he argues the DNA results undermine the confidence in the verdict and it is appropriate to consider credibility issues when making "a holistic judgment on all of the evidence." While LaPointe raises these points, the issue in this case is whether the district court erred in denying him a new trial in light of the

postconviction DNA results. It is not the role of this court to assess the credibility of witnesses. *State v. Daws*, 303 Kan. 785, 789, 368 P.3d 1074 (2016).

After LaPointe received favorable DNA test results, he filed a motion for relief pursuant to K.S.A. 2014 Supp. 21-2512(f)(2) which provides:

> "If the results of DNA testing conducted under this section are favorable to petitioner and are of such materiality that a reasonable probability exists that the new evidence would result in a different outcome at 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:
>
> . . . .
>
> (iv) granting a new trial."

Here, LaPointe asks this court to focus on the materiality aspect of the statute. He contends that because the DNA test results concluded the hair was not his, this is of such materiality that if the jury had heard this information, it would have reached a different conclusion.

This court applies a de novo standard of review "to the analysis if evidence is material to a determination of whether postconviction DNA test results are favorable or unfavorable under K.S.A. 21-2512(f)." *Haddock v. State*, 295 Kan. 738, Syl. ¶ 4, 286 P.3d 837 (2012). Upon review, deference is given to the district court's factual findings. 295 Kan. 738, Syl. ¶ 4. In this case, the results are clearly favorable to LaPointe; however, the entire analysis is not reviewed de novo.

In *Haddock*, our Supreme Court examined the same question presented by LaPointe. Haddock appealed the district court's denial of his motion for a new trial based

on postconviction DNA testing. Our Supreme Court affirmed the district court, holding "reasonable people could agree with the district court that the postconviction DNA test evidence was not so material as to make it reasonably probable there would be a different outcome if there were a new trial." 295 Kan. at 740. In reaching its conclusion, our Supreme Court applied the following analysis:

> "A district court's order regarding whether a petitioner is entitled to a new trial under K.S.A. 21-2512(f)(2) is reviewed on appeal to determine if a reasonable person would agree with a district court's decision regarding whether postconviction DNA test results are of such materiality that a reasonable probability exists that the new evidence would result in a different outcome at trial."
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> "The materiality component of the test for granting a new trial under K.S.A. 21-2512(f)(2) is not a sufficiency standard. Instead, the petitioner must establish that the favorable evidence is so material there is a reasonable probability the new evidence would have led to a different result. The potential impact of the evidence should not be examined piece by piece but should be examined as a whole and in light of all the evidence, old and new, incriminating and exculpatory. Based on this total record, the court's function is not to make an independent factual determination about what likely occurred, but rather to make a probabilistic determination about the likely impact of the new evidence on reasonable, properly instructed jurors."
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> "Under the facts of this case, the district court did not abuse its discretion in determining new evidence resulting from postconviction DNA testing under K.S.A. 21-2512, while favorable to the defendant, did not make it reasonably probable that the outcome of the jury trial would have been different with the new evidence." 295 Kan. 738, Syl. ¶¶ 5-7.

In LaPointe's case, the district court found:

> "[I]t was made clear during the trial that there was 'no physical evidence linking LaPointe to the robbery and assault' and that 'the most likely outcome' was that the hairs found on

> the bandana and clothing were not LaPointe's. Defense counsel even 'emphasized during closing argument that there was no fingerprint or hair match or DNA evidence placing LaPointe at the Payless store on the night of October 30, 2000.'"

Nevertheless, LaPointe was convicted by the jury. Accordingly, it is clear that LaPointe was not convicted based on physical evidence.

> "Unfortunately for Defendant, the most current DNA test results fail to substantially change the basis upon which Defendant was convicted. Stated another way, Defendant was convicted from the totality of the evidence presented to the jury, which included the testimony of the eye witnesses and Norton. The DNA test results have little to no impact on such testimony; the DNA test results are not 'of such materiality that a reasonable probability exists that the new evidence would result in a different outcome at a trial or sentence.' Rather, the DNA test results simply confirm what was already presented to the jury at trial—that the hair found on the clothing did not belong to Defendant. The fact that the jury knew this information yet still convicted Defendant, leads to the conclusion that the Defendant is not entitled to relief."

The testimony at trial supports the district court's finding:

- Carrie Wellman was working as a cashier at the Payless Shoe store on October 30, 2000—the night it was robbed. A man walked in and yelled, "No one move." Wellman looked up and saw a man carrying a long gun. She said he was wearing a plaid jacket and had a bandana over the bottom part of his face. She could see his eyes, forehead, and the top of his head. She said his hair was short and appeared to be dyed blond. She said the roots of his spikey-style hair actually looked a little bit more yellow than blonde. Wellman looked at the robber for about 20 seconds while he was in the store. Wellman later reviewed a photographic lineup where she identified the robber as someone other than LaPointe.

- Monica Ortiz was a customer in the store. She was with her three children the night of the robbery. She testified she saw a man enter the store, place a handkerchief over his face, and commit a robbery. Ortiz said the man had blond hair and wore a cap. She believed he was of slender build and was about 26 or 27 years old.
- Brandy Loveall was a passenger in a car driving around the strip mall where the Payless store was located. Loveall observed a man carrying a gun and walking fast on the sidewalk to her right. She described the man as a white male, 6 feet tall, with a slender build. He was wearing a blue and white "do rag" and a blue and white flannel shirt. She could see blond hair around the man's ears. Loveall was unable to identify anyone in the initial lineup because she believed the individuals were too young. When she was provided a second lineup, Loveall identified LaPointe as the man who committed the robbery. She also identified him during the trial.
- Michael Norton testified in exchange for immunity. He also testified to an extensive criminal history, including many crimes involving dishonesty and false statements. He testified that he and LaPointe had an agreement regarding the monies stolen. He further testified he supplied the sawed-off shotgun used in the robbery, but that he had received it from LaPointe. He said the plan was for him to wait in the car while LaPointe robbed the Payless store. Norton testified that LaPointe had on blue jeans, a pull-over sweater, a ball cap and a bandana. Norton said he drove while LaPointe committed the robbery. Norton was bald on the top of his head.
- Loretta LaPointe testified she married LaPointe in 2001. She said during the summer or fall of 2000, she saw LaPointe in possession of a sawed-off shotgun that he told her belonged to Norton. She also said LaPointe never had color-treated hair. She displayed a photograph of LaPointe taken a few days before the robbery. In the photograph, LaPointe's hair was "short, dark brown, almost black." She testified that LaPointe was with her the evening

of the robbery. She first revealed this alibi to the police over 3 years after the robbery.

- LaPointe testified that he did not see Norton on October 30, 2000, and did not participate in the robbery in any way.
- When law enforcement officers investigated the scene, they searched a nearby apartment complex. The suspect was seen heading toward the complex. The officers recovered a blue and white bandana, a men's large plaid shirt, a baseball hat, and a pair of gloves from the area. Later, Norton alerted law enforcement to the location of the sawed-off shotgun, stating that LaPointe told Norton that he had thrown it on top of the roof after the robbery.
- Lila Thompson, a deputy latent print examiner with the Wyandotte County Sheriff's Office, processed the shotgun for latent prints. The barrel of the gun appeared to be very rusty. She was unable to develop any latent prints. She testified that temperature and humidity could certainly be a factor in whether latent prints were developed.
- Sally Lane, a forensic chemist at the crime lab, examined the plaid shirt, the baseball cap, a white bandana, and a pair of gloves for trace evidence and possible DNA. She pulled two hairs from the bandana and collected approximately five hairs from the shirt, cap, and gloves. She attempted to extract DNA from those items. Due to a lack of cells, she was unable to test for DNA.
- Robert Frank Booth, the Chief Criminalist at the Kansas City, Missouri, Police Department Crime Laboratory also testified. He compared LaPointe's hairs with the unknown hairs seized from the items of evidence. He testified that none of the head hairs recovered matched LaPointe's hairs. When asked if he could say with certainty that those head hairs could not have come from LaPointe, Book said, "Directly, no. But the probability is, it's not his hair. But there is some remote explanation that he could actually

be the source of the hair." Booth then provided two possible explanations and concluded, "Those two explanations are rather remote in occurrence. They rarely happen. The explanation that it's not his hair is the most likely outcome."

- William Willis, Latent Fingerprint Examiner for the Johnson County Sheriff's Office testified that he was not able to examine many prints that had sufficient detail for comparison purposes, and those he was able to examine did not match Norton or LaPointe.
- Finally, the court gave the jury an aiding and abetting instruction as well as an eyewitness identification instruction and an accomplice instruction.

In sum, a careful review of the record reveals that LaPointe's jury heard evidence that one eyewitness identified LaPointe, Norton testified he conspired with LaPointe to commit this robbery, and the experts did not believe that it was LaPointe's hair found in the recovered clothing. In addition no fingerprints were recovered matching LaPointe's fingerprints. In light of the fact that there was no forensic evidence connecting LaPointe to the crime during the first trial, the district court did not err in holding that the DNA test results were not of such materiality that there was a reasonable probability a jury would have reached a different outcome had it considered the test results. See K.S.A. 2014 Supp. 21-2512(f)(2). Therefore, the district court did not abuse its discretion in denying LaPointe's motion for a new trial, "*i.e.*, it cannot be said no reasonable person would have taken the view adopted by the court. [Citations omitted.]" *State v. Rodriguez*, 302 Kan. 85, 98, 350 P.3d 1083 (2015). Accordingly, we affirm the district court's decision denying LaPointe's motion for a hearing pursuant to K.S.A. 2014 Supp. 21-2512(f)(2).

Because we are affirming the district court's denial of LaPointe's request for a new trial, we need not reach the State's cross-appeal. First, the State is not an aggrieved party. The district court denied LaPointe's request for a new trial and affirmed his conviction, thus the State prevailed. "A party prevailing in the district court typically cannot appeal

some aspect of how a favorable ruling or judgment was reached." *Morgan v. State*, No. 109,099, 2014 WL 5609935, at *3 (Kan. App. 2014) (unpublished opinion), *rev. denied* 302 Kan. 1011 (2015). Therefore, the State's cross-appeal is dismissed.

Second, if the jurisdictional questions raised by the State are properly raised here, and we decline to determine whether they are, they present very close legal questions regarding the applicability of K.S.A. 2014 Supp. 21-2512 to this case. In these circumstances, it is not inappropriate for an appellate court to simply rule on the merits of the claim. See *Alvarado v. Holder*, 743 F.3d 271, 276 (1st Cir. 2014) (holding that court may "put aside ambiguous jurisdictional questions" under a statute "when precedent clearly dictates the result on the merits"); *Sherrod v. Breitbart*, 720 F.3d 932, 936-37 (D.C. Cir. 2013) (holding that a court may presume jurisdiction and reach the merits when the answer to the merits issue is especially clear); *Starkey ex rel. A.B. v. Boulder County Social Services*, 569 F.3d 1244, 1262-63 (10th Cir. 2009) (declining to consider a jurisdictional question where the party claiming jurisdiction would clearly lose on the merits); accord *In re Todd*, No. 110,958, 2014 WL 7152357, at *3 (Kan. App. 2014) (unpublished opinion) (Leben, J., concurring), *rev. denied* 302 Kan. 1010 (2015).

Therefore, the State's cross-appeal is dismissed.

Affirmed and cross-appeal dismissed.

* * *

ATCHESON, J., concurring: I concur in the result.