

Affirmed and Opinion filed June 28, 2001.



In The

Fourteenth Court of Appeals

NO. 14-01-00015-CR

ESLAM ABDULLAH ABBAS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 860,408**

OPINION

Appellant, Eslam Abdullah Abbas, appeals the denial of habeas corpus relief. A jury found appellant guilty of murdering Albert Escareno by stabbing Escareno. Before hearing evidence relevant to punishment, the trial court granted appellant's motion for mistrial because the prosecutor withheld possible exculpatory evidence from appellant. Appellant subsequently filed an application seeking habeas corpus relief contending retrial was jeopardy barred. After a hearing, the trial court denied relief and issued findings of fact and conclusions of law. In one point of error, appellant contends a retrial is barred by the double jeopardy clause of the Texas Constitution because the prosecutor recklessly provoked a mistrial by failing to reveal

exculpatory evidence. We affirm.

Testimony at appellant's trial showed that police collected a pair of appellant's tennis shoes and a pair of jeans after arresting appellant. Katherine Kohl from the Harris County Medical Examiner's Office performed deoxyribonucleic acid (DNA) analysis on this evidence. Kohl testified that the blood on appellant's tennis shoe came from more than one contributor. She testified that neither the complainant, nor appellant could be excluded as possible donors to the blood stain on the tennis shoe. She further testified that appellant, but not the complainant, could be a possible contributor to the blood stain found on the jeans.

Two eyewitnesses testified that they had been riding in the car with appellant on the night of the incident. The first witness testified that appellant exited the car and began to "jab" and "punch" the complainant as the complainant lay in the street. When appellant returned to the car, the witness saw appellant with a knife and heard appellant say, "you know we can get in trouble for this." The second witness testified that he saw appellant fighting with the complainant after a verbal confrontation. The witness reported that when appellant returned to the car, he said, "hey, cuz, I stabbed him." This witness also saw a bloody knife in appellant's hand.

Appellant called a DNA expert who questioned the accuracy of the State's DNA test results. Appellant also called a witness who testified that approximately two months before the stabbing, he saw appellant fighting with Eric Tobias. This witness testified that he saw blood on appellant's tennis shoe after the fight. There was no testimony that the tennis shoes appellant wore during the alleged fight with Tobias were the same as the ones tested by the State's DNA expert. On Wednesday, March 1, appellant's trial attorney disclosed medical records of Eric Tobias that reflected that Tobias had received medical attention as a result of a fight. Prosecutors had spoken with Tobias prior to trial and Tobias denied fighting with appellant.

The jury convicted appellant of murder on Friday, March 3, 2000. On Monday, March 6, prosecutors informed the court they had additional DNA test results from Eric Tobias that

had not been previously disclosed to appellant. The DNA analysis on Eric Tobias revealed that he could not be excluded as a possible donor to the blood stain on the tennis shoe. Appellant moved for a mistrial, which the trial court granted.

On November 6, 2000, appellant filed an application for writ of habeas corpus alleging the double jeopardy clause of article I, section 14 of the Texas Constitution bars retrial of his case. At the hearing on appellant's application, Kohl testified that, prior to the start of appellant's trial, she informed the prosecutor that Eric Tobias could not be excluded as a possible contributor to the stain on the tennis shoe. The prosecutor testified that the offense report reflected that appellant had told police that the blood stain on his shoe came from a fight with Tobias. She also testified that her file contained an affidavit from Tobias in which he denied having been in a fight with appellant. During trial, the prosecutor received medical records that indicated Tobias had been treated as a result of a fight. Those medical records were not introduced into evidence. The prosecutor testified that she did not regard Tobias' DNA results as significant or exculpatory. She further testified that she did not intentionally withhold the test results. Waters testified that, after reflection, although the results were not necessarily exculpatory, she should have disclosed the information to the defense. The trial court denied appellant's application for writ of habeas corpus. Appellant appeals that denial to this court.

The Texas Constitution bars retrial if the trial court, with the defendant's consent, grants a mistrial as a result of reckless prosecutorial misconduct. *Bauder v. State*, 921 S.W.2d 696, 699 (Tex. Crim. App. 1996). In this regard, the Texas Constitution provides greater protection than the United States Constitution. *See Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416 (1982) (Circumstances under which a defendant may invoke the bar of double jeopardy in a second prosecution are limited to those cases in which the conduct giving rise to the successful motion for mistrial was intended to provoke the defendant into moving for a mistrial). Whether jeopardy bars a retrial when a mistrial is granted with the defendant's consent turns on whether the defendant truly consented to the mistrial. *Ex parte Bauder*, 974 S.W.2d 729, 731-32 (Tex. Crim. App. 1998). Whether a defendant truly consented depends

on whether the motion was simply a choice the defendant made in response to ordinary reversible error, or was required because of the prosecutor's deliberate or reckless conduct that rendered the trial incurably unfair. *Id.* at 732.

Appellant first argues that the threshold question in determining whether the prosecutor acted recklessly in failing to disclose Tobias' DNA evidence is whether the evidence was exculpatory and material. The failure to divulge potentially exculpatory evidence is a violation of an accused's due process right to a fair trial. *Ex parte Mitchell*, 977 S.W.2d 575, 578 (Tex. Crim. App. 1997). The remedy for such a violation is reversal of the conviction and remand to the trial court for further proceedings. *Id.* Therefore, appellant received the remedy proscribed for failure to disclose exculpatory evidence. *See Cook v. State*, 940 S.W.2d 623, 627 (Tex. Crim. App. 1996). The issue before us is whether the prosecutor acted recklessly in failing to disclose the evidence before the jury returned a verdict.

In its conclusions of law, the trial court acknowledged the prosecutor's affirmative duty to disclose exculpatory evidence that is material to the defendant's guilt or punishment under *Brady v. Maryland*, 373 U.S. 83 (1963). The trial court further acknowledged that the State must divulge evidence valuable to impeachment if the failure to do so would undermine confidence in the trial's outcome. *See U.S. v. Bagley*, 473 U.S. 667 (1985). In applying those rules to the disclosure of the DNA analysis, the court found:

[The DNA analysis evidence] did not tend to impeach any witness' testimony, nor does it negate applicant's guilt. At best, the evidence of Tobias as another possible donor to the shoe stain could have been used to corroborate appellant's previous assertion to the police and to support Andrade's testimony concerning a fight between applicant and Tobias. Indeed, [appellant's trial attorney] had other evidence in his possession (the medical records) that tended to support these assertions and apparently chose not to introduce it before the jury. The evidence that another person could have been a donor merely corroborates Kohl's trial testimony that there was more than one contributor to the bloodstain on the shoes.

The trial court further stated that while the better practice would have been to reveal the results at an earlier time, the failure to do so does not amount to reckless misconduct. The court

found that the prosecutor did not act in bad faith and did not intentionally withhold exculpatory information. The court held “that the late disclosure amounted to at most, trial error that was remedied by granting applicant’s motion for mistrial.” The court found the granting of the mistrial after the verdict of guilty to be the functional equivalent of an appellate court sustaining a ground of error or the grant of a new trial.

For a prosecutor's objectionable conduct to be viewed as intentional or reckless, the prosecutor must have either (1) believed the conduct would materially improve the chances of obtaining a conviction, and the prejudicial effect of the conduct cannot be cured by even a firm judicial admonishment to the jury; or (2) been aware but consciously disregarded the risk that an objectionable event for which the prosecutor was responsible would require a mistrial at the defendant’s request, or have been aware but consciously disregarded the risk that a mistrial would be reasonably certain to occur as a result. *State v. Lee*, 15 S.W.3d 921, 925 (Tex. Crim. App. 2000). Here, the prosecutor should have revealed the evidence at an earlier time, but her failure to do so did not violate appellant’s due process right to a fair trial. This is not a case where the defense was forced to request a mistrial because the prosecutor had recklessly crossed “the line between legitimate adversarial gamesmanship and manifestly improper methods.” *Bauder*, 974 S.W.2d at 733.

In reviewing a trial judge’s decision to grant or deny relief on a writ of habeas corpus, we afford almost total deference to a trial judge’s determination of the historical facts supported by the record, especially when the fact findings are based on an evaluation of credibility and demeanor. *See Ex parte Martin*, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999). Having reviewed the record of the habeas hearing and the record of appellant’s trial, we find the trial court’s conclusion that the prosecutor did not act recklessly is supported by the record. Appellant’s point of error is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed June 28, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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