STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 26, 2012
v	No. 303593 Wayne Circuit Court
KARL FREDERICK VINSON, Defendant-Appellant.	LC No. 86-000214-01-FC

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendant Karl Frederick Vinson appeals by leave granted the denial of his motion for relief from judgment premised on his claim of newly discovered evidence. We affirm.

A jury convicted Vinson in 1986 of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) (victim under 13 years of age), and breaking and entering a building with the intent to commit a felony (CSC) therein, MCL 750.110.[1] The trial court sentenced Vinson to serve 10 to 50 years' imprisonment for the CSC conviction and to concurrently serve 5 to 15 years in prison for the breaking and entering conviction. This Court denied Vinson's first appeal, which was premised solely on prosecutorial misconduct. *People v Vinson*, unpublished opinion per curiam of the court of Appeals, issued October 25, 1988 (Docket No. 94565). The current appeal stems from Vinson's filing of a third motion for relief from judgment in 2009, asserting that he had newly discovered evidence that would support an acquittal upon retrial. Vinson also argued ineffective assistance of his trial and appellate counsel. Following an evidentiary hearing, the trial court denied Vinson's motion, and this appeal ensued.

This matter arises from the brutal rape of a nine-year-old female victim in her own bed. The victim was asleep when she awoke to find a man in her bedroom. She indicated that she was able to see his facial features because lights, both within the home and outside, provided

[1] We note that the jury also determined that Vinson was guilty of sexual penetration occurring under circumstances involving the commission of another felony, MCL 750.520b(c), and causing personal injury to victim with use of force or coercion to accomplish sexual penetration, MCL 750.520b(f).

illumination within the room. The victim identified Vinson, claiming that she had seen him previously and she recognized his voice, although she could not immediately recall his name. She was further able to identify Vinson as her assailant because she was familiar with him since his wife had babysat her and her younger sister. Vinson's mother and her husband provided an alibi for him at trial, indicating that he was sleeping on their couch at the time of the assault.

Following the assault, the victim was taken to the hospital. She experienced a bloody discharge and a deep cut requiring surgical repair. A specimen of vaginal secretions was obtained from the victim revealing the presence of nonmoving sperm; however, the specimen was not provided for forensic testing.

Fingerprints were not able to be recovered from the window casing where the perpetrator entered the victim's bedroom. The victim's bed sheet, containing a "kind of wet" bloodstain, was taken into evidence. The bed sheet was examined by Sergeant Ronald Badascewski of the Crime Lab Serology and Trace Evidence Unit. Sergeant Badascewski performed an acid phosphatase test on the stained area with a positive result for blood and seminal fluid. After washing the stain from the portion of the sheet, Sergeant Badascewski placed the washing on a microscope slide and found one complete sperm. He then turned over a portion of the stain to Paula Lytle, a registered medical technologist, in order to determine the blood type of the stained area. Lytle detected the presence of blood type O from the sample, which was consistent with the victim. At trial, Lytle acknowledged that she only received one sample from the bed sheet stain and that she did not receive the sperm recovered by Sergeant Badascewski for testing. When questioned by the prosecutor, Lytle opined that the sample she examined contained a mixture or combination of blood and seminal fluid.

Lytle also obtained a blood and saliva sample from the victim and determined that her blood type was O and that she was a secretor. A secretor is defined as:

> An individual whose bodily fluids (saliva, semen, vaginal secretions) contain a water-soluble form of the antigens of the ABO blood group. Secretors constitute 80% of the population. In forensic medicine, the examination of fluids has enhanced the ability of law enforcement officials to develop identifying information about perpetrators and narrow a field of suspects. [See mediLexicon, http://www.medilexicon.com/medicaldictionary.php?t=80515 (accessed May 24, 2012).]

Blood and saliva samples were also obtained from Vinson. Lytle determined at that time that Vinson's blood type was AB and that he was a nonsecretor, defined as "[a]n individual [whose bodily fluids] and saliva that do[] not contain antigens of the ABO blood group." *Id.*

During closing argument at trial, the prosecutor stated that the bed sheet contained a mixture of blood and seminal fluid and argued that the stain came from Vinson and the victim. The prosecution stated that Vinson was a nonsecretor "along with 20 percent of the population." The implication of this statement was that Vinson's status as a nonsecretor explained the absence of any detectable AB antigens from the stained bed sheet. The prosecutor also noted that the victim knew Vinson and had no motivation to lie regarding his identity as the perpetrator and questioned the veracity of Vinson's alibi defense.

Although the jury initially requested the testimony of all the expert witnesses, they rescinded the request and subsequently found Vinson guilty of first-degree CSC and breaking and entering. Along with the denial of Vinson's initial appeal to this Court following his convictions, he also subsequently filed three motions for relief from judgment and a federal petition for habeas corpus, all of which were unsuccessful. Vinson later learned that the physical evidence, including the bed sheet, was destroyed by police. In 2009, Vinson obtained retesting and analysis confirmed that his blood type is AB. Contrary to the evidence at trial, the 2009 analysis revealed that Vinson actually is a secretor. These results were confirmed by an independent laboratory.

In September 2009, Vinson again sought relief from judgment premised on prosecutorial misconduct, ineffective assistance by his trial and appellate counsel, and newly discovered evidence of his status as an AB secretor. The matter came back before the original trial judge, who questioned the ability to demonstrate Vinson's innocence. The trial judge speculated that Vinson could have been using a condom at the time of the assault, but defense counsel responded that, at trial, the prosecution had argued that the semen had come from the rapist. The trial judge ordered the Michigan State Police (MSP) to determine Vinson's blood type and secretor status, and on August 20, 2010, the MSP report confirmed that Vinson is an AB secretor of ABO antigens.

At the ensuing evidentiary hearing, Lytle was called to testify. Following her confirmation of her trial testimony along with the testing originally conducted and results, she acknowledged recent testing demonstrating Vinson's secretor status. Following questioning, Lytle opined that testing on a semen stain differed from the testing performed on a blood stain to determine blood type. Lytle affirmed that the sample tested contained a mixture of semen and blood and, when asked where the type O in the stain originated, Lytle replied that it could not have come from Vinson, but that it could have come from the semen donor and/or the victim. Further, if the type O detected in the stain originated from the victim, then it would have come from her bodily fluid and not her blood. Lytle further opined, on the basis of the results obtained through the acid phosphatase test performed by Sergeant Badascewski, that there was a very high presence of semen in the stain that she tested. She deemed it unlikely that the victim, due to her young age, would have vaginal secretions. Lytle confirmed that she did not detect any AB antigenic substances.

On cross-examination, Lytle acknowledged she did not test the "exact same piece of material" that Sergeant Badascewski tested and detected the presence of seminal fluid. As Lytle did not repeat the test performed by Sergeant Badascewski or examine the section of the bed sheet she received for sperm cells, she could not determine if the material she received contained semen. Lytle further admitted that she might have cut additional samples from the bed sheet and performed additional testing had she known Vinson's status as a secretor. Upon questioning by the trial judge, Lytle indicated that she had originally testified that Vinson was a nonsecretor and that she now believed that the O antigen detected could have been from a male donor of the semen. When asked if she had known Vinson was a secretor during the original trial, Lytle indicated she "would testify that his blood type was not detected . . . and he could not be the donor of the O substance in that stain."

Additional hearings were conducted, with defense counsel presenting Arthur Young, an expert in forensic serology, who confirmed Vinson's status as an "ABO type AB secretor" and that Vinson was a "very strong secretor." Young further testified that he would have expected semen to be mixed in with the blood on the bed sheet and that the O antigens detected were more probably from semen rather than the victim's vaginal secretions. In contrast, the prosecution's witness Connie Swander of the MSP laboratory indicated that it was possible that the O antigen detected was derived from the victim's blood. Swander opined that the only known fact was the presence of an O antigen but that its origin could not be ascertained. She further opined that, despite the victim's young age, vaginal fluid could be in the stain. Swander did admit that she could not rule out the possibility that the blood type of the perpetrator of the assault was O.

The trial judge denied Vinson's request for relief from judgment and his claim of ineffective assistance of counsel, questioning whether Vinson knew of his secretor status based on his prior army enlistment and suggesting that Vinson may have purposefully failed to provide an effective sample for the determination of his secretor status. The trial judge further opined that the bed sheet stain could have come from another source, such as an adult in the household having engaged in sexual intercourse on the bed sheet at an earlier time. The trial judge emphasized the victim's identification of Vinson as the perpetrator as the primary basis for his conviction and indicated that the forensic evidence served only to bolster her identification.

On appeal, Vinson argues that the trial court abused its discretion when it dismissed the newly discovered evidence based purely on speculation. Vinson contends that the prosecution's original case was highly dependent on the now-discredited determination that he was a nonsecretor. In the alternative, Vinson contends that his prior counsel was ineffective for failing during trial or the initial appeal to obtain independent testing and confirmation of his secretor status, for failing to effectively cross-examine Lytle, and for failing to object to misstatements of the forensic evidence by the prosecutor. Vinson alternatively contends that the new evidence establishes his innocence and, therefore, constitutionally entitles him to a new trial.

This Court reviews for an abuse of discretion a trial court's decision on a motion for relief from judgment. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). We review findings of fact by the trial court for clear error. *Id.* We determine that a trial court has abused its discretion when "its decision falls outside the range of reasonable and principled outcomes." *Id.*

Vinson contends that he presented compelling new scientific evidence that resolves any reasonable doubt about whether he could have left the semen stain detected on the bed sheet. He further points out that Lytle testified at the subsequent evidentiary hearing that if he had been correctly identified as a secretor at the time of his original trial, she would have informed the jury that he was excluded as a donor of the semen stain on the bed sheet. As a result, Vinson claims that this newly discovered evidence would have made a different result reasonably likely on retrial.

Our Supreme Court has determined:

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was

> newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (citations omitted).]

As our Supreme Court recently emphasized in *People v Rao*, 491 Mich 271, 279-280; ___ NW2d ___ (2012):

> It is equally well established that "motions for a new trial on the ground of newly-discovered evidence are looked upon with disfavor, and the cases where this court has held that there was an abuse of discretion in denying a motion based on such grounds are few and far between." [Citation omitted.]

The rationales underlying such disfavor are premised on both "the principle of finality" and "the policy of the law . . . to require of parties care, diligence, and vigilance in securing and presenting evidence." *Id.* at 280. Specifically:

> [I]n fairness to both parties and the overall justice system, the law requires that parties secure evidence and prepare for trial with the full understanding that, absent unusual circumstances, the trial will be the one and only opportunity to present their case. It is the obligation of the parties to undertake all reasonable efforts to marshal all the relevant evidence for that trial. Evidence will not ordinarily be allowed in installments. *Cress* set forth the showing that a defendant must make in order to satisfy the exception to this rule and struck a balance between upholding the finality of judgments and unsettling judgments in the unusual case in which justice under the law requires a new trial. [*Id.*]

Similar to the defendant in *Rao*:

> Whether defendant is entitled to a new trial on the basis of [his] proffered evidence is governed by *Cress*, and specifically [his] case is resolved by applying the interrelated first and third parts of the *Cress* test, which require that defendant demonstrate that the evidence is "newly discovered" and that [he] "could not, using reasonable diligence, have discovered and produced the evidence at trial[.]" *Cress*, 468 Mich at 692; 664 NW2d 174. After applying the *Cress* test, we conclude that defendant did not carry [his] burden of satisfying this test and thus is not entitled to a new trial. [*Rao*, 491 Mich at 281.]

Our Supreme Court has determined that evidence cannot be deemed newly discovered "if the defendant or defense counsel was aware of the evidence at the time of trial." *Id.* At the time of the original trial, Vinson was aware of the prosecution's evidence that ostensibly established he was a nonsecretor and thus could not be ruled out as the perpetrator. Vinson asserts that he is only now aware that the earlier testing was inaccurate and that he is actually a secretor. But we construe Vinson's claim as actually being one for newly available evidence rather than newly discovered evidence. See *id.* at 282-283, 288; *People v Terrell*, 289 Mich App 553; 797 NW2d 684 (2010). As Vinson himself points out, his actual status as a secretor has not changed over

time. Therefore, his status as a secretor was, and has always been, *potentially available* evidence. See *Rao*, 491 Mich at 285 n 2. That he did not realize he should have sought to question the test results does not vitiate that the *Cress* test requires that the defendant prove that he *could not* have discovered the evidence.

The burden is on Vinson, "on all parts of the *Cress* test, . . . to make an affirmative showing that [he] "could not, using reasonable diligence, have discovered and produced the evidence at trial[.]" *Rao*, 491 Mich at 289, citing *Cress*, 468 Mich at 692. As our Supreme Court noted, even if a defendant is not aware "of the *actual* medical information" it "begs the question *why* defendant lacked awareness at the time of trial[.]" *Rao*, 491 Mich at 287 (emphasis in original). If testing of his secretor status was as pivotal at trial as is now claimed on appeal, reasonable diligence would have required, at the very least, that Vinson request independent laboratory testing. *Id.* at 290. He was certainly aware of the evidence, the manner of testing, and that results contrary to those obtained by the prosecution's witness could have provided him with support for his defense that he was not the perpetrator. Yet, Vinson fails to offer any viable reason to explain why he did not seek independent testing at the time of trial. When viewed in the context of reasonable diligence, Vinson should have minimally procured independent testing or sought the trial court's assistance in procuring such testing. "Michigan courts have held that a defendant's awareness of the evidence at the time of trial precludes a finding that the evidence is newly discovered, even if the evidence is claimed to have been 'unavailable' at the time of trial." *Id.* at 282.

Additionally, not only were elements one and three not satisfied, but we also hold that this new evidence would not make a different result probable on remand. Our review of the original trial transcripts does not support Vinson's contention that the prosecution's case hinged on the forensic evidence. Rather, the prosecutor placed significant emphasis on the victim's identification of Vinson as the perpetrator of the rape. In actuality, very little testimony was elicited regarding Vinson's alleged status as a nonsecretor and its possible relationship to the physical evidence.

It is necessary to recognize that we are not concerned with how the alleged new evidence would have impacted the jury's determination at the original trial. Rather, we are required to determine whether the evidence of Vinson's status as a secretor would make a different result probable upon retrial. Lytle acknowledged at the evidentiary hearing that she was uncertain whether the material or sample she tested actually contained seminal fluid. The portion of the bed sheet that Sergeant Badascewski provided to Lytle was different from the section he tested, and Lytle did not sample for seminal fluid before conducting the test to determine blood type. The intact sperm sample that Sergeant Badascewski recovered was never tested. In addition, we cannot ignore that the victim positively identified Vinson as the rapist on the basis of her prior familiarity with him and her ability to observe him during the assault and identify his features and voice. This identification is not refuted by the scientific evidence as it is no longer possible to ascertain with certainty what substance in the sample resulted in the detection of the O antigen. For these reasons, the trial court did not abuse its discretion in denying defendant's motion to the extent it was based upon newly discovered evidence.

In the alternative, Vinson asserts entitlement to relief from judgment premised on ineffective assistance of counsel and prosecutorial misconduct. It is at this point that the prosecution's jurisdictional challenge comes into play. In accordance with MCR 6.502(G)(1):

> Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.

The exception, contained in MCR 6.502(G)(2), permits a successive motion for relief from judgment premised on a claim of newly discovered evidence. Because we have determined that the evidence relied on is not newly discovered, we cannot consider his other claims as they are not subject to the exception contained in MCR 6.502(G)(2) or MCR 6.508(D)(3). See *Swain*, 288 Mich App at 632-633. Therefore, Vinson's claims of ineffective assistance of counsel and prosecutorial misconduct cannot be sustained because they are precluded by MCR 6.502(G)(1).

Finally, we reject Vinson's alternative argument that he is entitled to relief from judgment and is constitutionally entitled to a new trial because the newly discovered evidence establishes his innocence. This Court has suggested that a defendant may have a constitutional claim in a federal habeas action if he can make a "gateway showing" of actual innocence. *Swain*, 288 Mich App at 636-37; see also *Schlup v Delo*, 513 US 298, 314-315; 115 S Ct 851; 130 L Ed 2d 808 (1995). Integral to such a claim is a "showing of actual innocence." *Swain*, 288 Mich App at 637. In this instance, we are unconvinced that Vinson is able to demonstrate the "requisite gateway showing of actual innocence." *Id.* The evidence that Vinson is actually a secretor does not result in exonerating him from the crimes for which he was charged and convicted or definitively establish his innocence. As noted, the scientific evidence does not obviate the victim's steadfast identification of Vinson as the perpetrator of the rape. While the scientific evidence raises questions regarding the absence of AB antigens in the materials tested and the source of the O antigen identified, it does not serve to establish Vinson's "actual innocence." *Id.* at 636-637.

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Riordan