

Report on the Exoneration of
Michael David Philips

Submitted by
The University of Texas School of Law
Actual Innocence Clinic

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Introduction

The Actual Innocence Clinic at The University of Texas School of Law is pleased to present this report on the exoneration of Michael David Phillips, who served approximately 12 years and 180 days in prison due to his wrongful conviction for sexual assault in 1990 and 2004 conviction for failure to register as a sex offender. In 2011, the Dallas County District Attorney's Office asked the Southwestern Institute of Forensic Sciences (SWIFS) to perform STR DNA testing on evidence collected at the time of the assault. The testing eventually revealed that the DNA profile of the assailant matched the DNA profile of Lee Marvin Banks, not Mr. Phillips. Mr. Phillips filed an Application for a Writ of Habeas Corpus on July 23, 2014. On August 6, 2014, the Texas Court of Criminal Appeals granted Mr. Phillips a writ of habeas corpus on the basis of actual innocence.

This report was prepared pursuant to Texas Government Code § 79.039, which requires all law school-affiliated innocence projects that receive legislatively-directed financial support through the Texas Indigent Defense Commission to submit a report detailing any cases leading to relief based on actual innocence. The Actual Innocence Clinic receives legislatively directed grant funds through the Texas Indigent Defense Commission. The statute states that the report should "identify each likely cause of a wrongful conviction" and "recommend to the judiciary and the legislature best practices, polices, and statutory changes to address or mitigate those likely causes with respect to future criminal cases."

Because Mr. Phillips entered a guilty plea, there is no reporter's record for this case. Accordingly, this report was prepared based on a review of the Dallas Police Department ("DPD") Incident Report and supplements, DNA reports, interviews, and other case documents.

Case Data Overview

Exoneree	Michael David Phillips
Offense Date	September 28, 1990
Jurisdiction	Dallas County
Offense	Sexual Assault
Plea	Guilty
Sentence	12 years confinement; \$500 fine
Years incarcerated	12 years
District Court Case No.	F9034845
State Prosecutor	John Nelms
Defense Counsel	Mike Marrow
Convicting Court	Dallas County Criminal District Court #3 The Honorable Mark Tolle
Evidence Used to Convict	Eyewitness identification by victim; guilty plea
Evidence of Innocence	STR DNA testing
Habeas Relief Granted	August 6, 2014
Habeas Attorney	Tiffany Dowling

Case Summary

On November 30, 1990, Michael David Phillips pleaded guilty to and was convicted of sexual assault. He was sentenced to twelve (12) years confinement in the Texas Department of Criminal Justice (“TDCJ”). A summary of the case follows.

In the early morning of September 28, 1990, B.J.S. contacted the police, and reported that she had been a victim of sexual assault. B.J.S. informed the responding officer that, around 3:30 a.m., she was sleeping next to her one-year-old niece in room 127 at the Royal Motel, when she was awakened by an unknown male wearing a black and white ski mask. She stated that the suspect grabbed her around the neck and told her to get out of bed and not say anything. While the suspect was choking and hitting her, B.J.S. bit the suspect’s hand several times. During this struggle, she and the suspect rolled onto the floor, whereupon the suspect removed her pants and panties and began to vaginally sexually assault her for about fifteen minutes. B.J.S. began struggling again when the suspect attempted to anally sexually assault her, at which point her niece began to cry. The suspect pulled up his pants and ran out of the front door. B.J.S. was unsure whether or not the suspect ejaculated.

B.J.S. described the suspect as a black male in his twenties. She stated that he had a goatee, and in addition to the black and white ski mask, was wearing gloves, a dark jacket, a tank top, and Wrangler blue jeans. She did not specify the suspect’s name at the time of her initial statement. The responding officers noted in the offense report that the unknown suspect had entered B.J.S.’s motel room by forcing his way through the front door.

After taking down her initial statement on the night of the offense, the police transported B.J.S. to Parkland Memorial Hospital for a sexual assault examination. The

treating physician noted bruises on her face and neck, and also noted the presence of spermatozoa in her vaginal vault. B.J.S. state that her most recent act of sexual intercourse had occurred two months earlier. Pursuant to the examination, the hospital collected a sexual assault kit, which included the victim's vaginal swab, vaginal smear, and blood sample. B.J.S.'s clothing, including panties, were collected as well.

Evidence from the sexual assault kit was examined at SWIFS. On October 11, 1990, SWIFS reported the presence of acid phosphatase on B.J.S.'s panties, indicating the presence of seminal fluid. No further forensic testing was done at the time.

At some point during the investigation, B.J.S. named Mr. Phillips as the suspect. When detectives talked with Mr. Phillips, who also resided at the Royal Motel, he denied having sex with B.J.S. Mr. Phillips stated that he had known B.J.S. for a while, and the she was angry at him as a result of a previous argument.

B.J.S. initially told detectives that she barely knew Mr. Phillips, and that they had only greeted each other a few times. She later said that she and Mr. Phillips had once engaged in an hour-long conversation. Weeks after the offense, B.J.S. told detectives that, during the incident, she pulled up the suspect's ski mask, and had recognized the assailant as Mr. Phillips.

On October 20, 1990, B.J.S. was shown a six-photo lineup, and she identified Mr. Phillips as the man who had sexually assaulted her. Mr. Phillips was arrested on November 2, 1990. On November 11, 1990, police obtained Mr. Phillips's consent to search his residence, but police were unable to locate dark gloves, or a black and white ski mask. On November 14, 1990, a grand jury indicted Mr. Phillips for the sexual assault of B.J.S. On November 30, 1990, Mr. Phillips pleaded guilty to the offense. Mr. Phillips discharged his sentence and was released from confinement on November 2, 2002.

On March 10, 2004, Mr. Phillips was charged with failure to register as a sex offender, pursuant to Texas Code of Criminal Procedure article 62.051. He pleaded nolo contendere on May 6, 2014, and was sentenced to 180 days in state jail. His sentence was subsequently discharged on July 16, 2004.

On June 14, 2004, Mr. Phillips filed a *pro se* Application for a Writ of Habeas Corpus. This application was denied on December 22, 2004.

In 2011, the Dallas County District Attorney's Office asked SWIFS to perform STR DNA testing on the B.J.S.'s vaginal swab and panties. The testing revealed the DNA profile of an unknown male on the vaginal swab and panties. This DNA profile was uploaded into the Combined DNA Index System (CODIS). Mr. Phillips was not informed about the testing.

On April 8, 2014, a routine CODIS search run by the Texas Department of Public Safety (TX DPS) identified a CODIS match between the DNA profile obtained from B.J.S.'s vaginal swab and panties, and the DNA profile of Lee Marvin Banks.

An agent of the state subsequently collected buccal swab reference samples from Lee Marvin Banks, B.J.S., and Mr. Phillips, and sent them to SWIFS. On June 11, 2014, SWIFS issued a final written report concluding that, after developing and comparing the known DNA profiles of Lee Marvin Banks, B.J.S. and Mr. Phillips against the profile previously obtained from the vaginal swab and panties, Mr. Phillips was excluded as a contributor to that profile. The report further established that Banks's DNA matched the single male profile of B.J.S.'s vaginal swab at a ratio of 1 in 299 quadrillion. Further, all of Banks's genetic markers were observed in the epithelial and sperm cell fractions on the victim's panties.

During the state's recent reinvestigation of the case, B.J.S. stated that she did not know Lee Marvin Banks, nor had she had consensual sexual intercourse with him. The state also investigated Mr. Banks, who, when confronted with the DNA results, admitted to being a resident at the Royal Motel during the time the offense took place, but denied committing the sexual assault.

The Criminal District Court Number 3 of Dallas County, Texas, entered Agreed Findings of Fact and Conclusions of Law on July 25, 2014, finding Mr. Phillips to be actually innocent of his convictions for sexual assault and failure to register as a sex offender. On August 6, 2014, the Court of Criminal Appeals granted Mr. Phillips a writ of habeas corpus based on actual innocence.

Analysis of Factors Leading to Wrongful Conviction

There are four main factors that lead to Mr. Phillips's wrongful conviction: (1) unreliable eyewitness identification; (2) exculpatory evidence that went untested for over two decades; (3) lack of zealous representation from appointed defense counsel; and (4) an overly-broad sentencing structure. These are discussed below.

First, it is clear from the record that the only evidence produced in support of Mr. Phillips's guilty plea was the B.J.S.'s eyewitness identification, which occurred several weeks after the crim. No physical evidence tied Mr. Phillips to the crime.

Decades of scientific research have shown that the circumstances under which an eyewitness identifies a suspect have a highly significant effect on the identification's reliability and evidentiary value. In Mr. Phillips's case, B.J.S. initially gave no indication of knowing who her assailant was; however, several weeks later, she told police that she had managed to see the assailant's face during the assault by lifting up his ski mask. She then ID'd Mr. Phillips, a man she knew living in the same motel. Such a long delay between the offense and ID, coupled with a significant change in the victim's story, are inherently untrustworthy.

Second, the state had access to potentially exculpatory evidence, i.e. the rape kit that was collected right after the assault, but failed to test it until 21 years after assault. Initial testing on the kit showed the presence of acid phosphatase on the victim's panties. Although DNA testing was not in common usage in criminal prosecutions in 1990, it was common in 2004, when Mr. Phillips filed his first application for a writ of habeas corpus based on actual innocence. His writ was denied. Although the rape kit was eventually tested in 2011, Mr. Phillips was not alerted of this testing until 2014, when the DNA profile from the rape kit found a match to Lee Marvin Banks during a routine CODIS search. It was only at that point that the state contacted Mr. Phillips and collected a sample of his DNA in order to compare it to the DNA collected from the rape kit. The delay between Mr. Phillips's first habeas corpus application and the final exculpatory DNA results was 10 years.

Third, Mr. Phillips's appointed defense counsel did not zealously represent him against the criminal charges. Faced with an eyewitness ID, Mr. Phillips pleaded guilty sixteen (16) days after he was indicted for sexual assault, despite the case's obvious flaws, i.e. that there was no physical evidence that tied Mr. Phillips to the crime scene and that the victim had ID'd Mr. Phillips under very unreliable circumstances.

Fourth, not only did Mr. Phillips not have access to an attorney who zealously represented him, he was also faced with the prospect of a judge or jury sentencing him from anywhere from 2 to 20 years in prison. Accordingly in pleading guilty, he was able to minimize his exposure to a very long prison sentence.

In some respect, this case shows why innocent people often plead guilty to crimes they did not commit: the cumulative pressure of defending oneself against unreliable evidence with inadequate representation, against the spectre of an unpredictable sentencing structure

Recommendations

1. Training

In recent years Texas has responded to the series of wrongful convictions that have been uncovered in part by expanded training opportunities on issues related to wrongful convictions. For example, the Court of Criminal Appeals receives legislative funding for a grant program to train judges, prosecutors, defense attorneys, and law enforcement personnel on the causes of wrongful convictions and solutions to reduce the risk. Many of these trainings have focused on eyewitness identification procedures that improve reliability. The Actual Innocence Clinic recommends that future trainings focus on the issues present in Mr. Phillips's case, e.g. the inherent unreliability of a delayed eyewitness identification that also rests in part on the victim's change of story.

2. Requirement for Corroboration

While properly composed and administered identification procedures have a higher degree of reliability compared to identifications without proper controls, eyewitness evidence

is still highly imperfect. The Texas Legislature should require corroborating evidence so that eyewitness evidence alone cannot serve as the basis for conviction. Further, if eyewitness testimony is going to be presented, expert testimony on the evidentiary value of eyewitness testimony should also be expressly permitted.

3. Test All Untested Rape Kits

While there have been legislative measures passed to address the backlog of untested sexual assault kits, this effort needs to be more aggressive. For instance, in Mr. Phillips's case, his initial request for DNA testing in 2004 was denied. Further, after the Dallas County DA requested SWIFS test the kit in 2011, Mr. Phillips was not alerted of this until 2014, when the DNA profile from the kit unexpectedly matched the profile of Lee Marvin Banks in CODIS. It was only after this very fortuitous series of events that Mr. Phillips's DNA was tested, and his innocence ultimately established.

The state must not only test all untested sexual assault kits but also inform the defendants about the testing immediately.