

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

v.

ROBERT EGLI

Appellant.

Case No. 08-1351

On Appeal From the Portage  
County Court of Appeals,  
Eleventh Appellate District

Court of Appeals  
Case No. 2007-P-0052

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APPELLEE'S RESPONSE IN OPPOSITION TO  
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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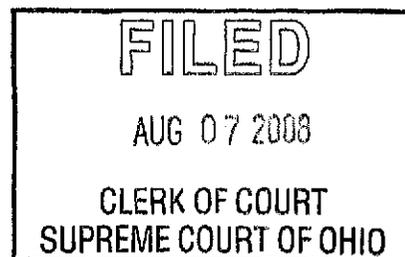


TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND WHY IT DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.....	1
STATEMENT OF THE CASE AND FACTS .....	2
I. STATEMENT OF FACTS .....	2
II. PROCEDURAL HISTORY .....	4
ARGUMENT OPPOSING JURISDICTION .....	5
<u>Response to Appellant's Proposition of Law No. 1</u> .....	5
<u>Response to Appellant's Proposition of Law No. 2</u> .....	11
CONCLUSION .....	13
CERTIFICATE OF SERVICE .....	14

**THIS CASE DOES NOT PRESENT AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION WARRANTING JURISDICTION FROM THIS**

This is not a case of public or great general interest. On appeal to the Eleventh District, the Appellant proposed that when the sole issue of dispute in a rape trial is the element of consent, a defendant's confrontation clause rights allow the admission of prior sexual conduct between the victim and defendant. The Eleventh District Court of Appeals disagreed when it recently affirmed the Appellant's rape and assault convictions. *State v. Egli* (May 27, 2008), Portage App. No. 2007-P-0052, 2008 -Ohio- 2507, at ¶¶65. Applying R.C. 2907.02(D), Ohio's rape shield law, the Eleventh District held that the trial court did not abuse its discretion in excluding certain evidence relating to the victim's prior sexual history with the Appellant that was offered in an attempt to show that the sexual conduct that occurred in the present case was consensual. *Id.* 2008 -Ohio- 2507, at ¶¶54.

The Appellant seeks jurisdiction from this Court asserting that his rights to confront witnesses and to receive the effective assistance of counsel were violated by the decisions of the trial court and Eleventh District Court of Appeals. The Appellant relied on the dissenting opinion from the Appellant Court and a recent decision from the Third District Court of Appeals as support for invoking this Court's discretionary jurisdiction to review his rape and assault convictions. See *Egli*, 2008-Ohio-2507 (O'Toole, J., dissenting) and *State v. Yenser* (2008), 176 Ohio App.3d 1, 2008-Ohio-1145.

The Appellant wants this Court to extend its decision in *State v. Williams* (1986), 21 Ohio St.3d 33, to eliminate a trial court's statutory responsibility under R.C.

2907.02(D), of finding "that the evidence [of 'victim's past sexual activity with the offender'] is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." R.C. 2907.02(D). Such an extension of *Williams* would in essence rewrite R.C. 2907.02(D) and an extension of *Williams* to the present case is neither warranted by the facts of this case nor legally justified. Contrary to the Appellant's assertions, this is not a case of public or great general interest. The Appellant has not presented any error with the decision of the Eleventh District Court of Appeals or any issue warranting jurisdiction from this Court.

### **STATEMENT OF THE CASE AND FACTS**

#### **STATEMENT OF FACTS**

This case is about the Appellant's sexual desires and the dominance he exerted over the Victim for a day and a half inside a motel room at the Alden Inn. The Appellant brutally raped and assaulted the Victim, his "on and off" girlfriend of five years and mother of his two children. (Jury Trial Proceedings hereinafter "T.p." 116).

While the Victim was cleaning the motel room on the evening of November 7, 2006, the Appellant came up behind her, squeezed her shoulders and screamed, "you are a whore" and "you like to be hurt, don't you." (T.p. 118). The Appellant pushed the Victim to the bathroom floor and proceeded to hit, kick, poke, punch and step on her. (T.p. 118). Despite her cries to stop, the Appellant ordered her to undress and threatened to hurt her if she refused. (T.p. 121).

Once undressed, the Appellant ordered the Victim into the shower and demanded she "suck his dick." (T.p. 122). When the Victim hesitated, the Appellant grabbed her head by the hair, slammed her head against the wall and pushed her

down onto the floor of the shower. (T.p. 122). After threatening the urinate on the Victim if she did not perform oral sex, the Appellant made good on his threat and urinated on the Victim. (T.p. 124). To end the beating, the Victim performed oral sex on the Appellant until the Appellant ordered her to stand up, turn around and bend over. (T.p. 124). The Appellant inserted his penis into her vagina and then went limp. (T.p. 125). Angered, the Appellant ordered her to again perform oral sex, inserted his penis into her vagina and went limp. (T.p. 126). This cycle repeated for about thirty minutes. (T.p. 126).

The sexual assault continued the following morning. The Appellant awoke and threatened that he would hurt her if the Victim refused to have sex with him in his bed. The Appellant undressed the Victim, rolled her over and engaged in rough vaginal intercourse for approximately thirty minutes. (T.p. 129). The Appellant briefly left the room to purchase some cigarettes at a store across the street from the motel.

The Appellant returned, demanded sex, hit the Victim and told her to put the kids in the bathtub so they could be alone. (T.p. 131). After the children were placed in the tub, the Appellant grabbed the Victim's head and thrust his penis into her mouth and ordered her to perform oral sex. (T.p. 132). Despite her cries of pain and pleas to stop, the Appellant engaged in rough vaginal intercourse and then inserted his penis into the Victim's anus. (T.p. 133). The Victim screamed out in pain.

The Victim's body started shaking and she was unable to breathe. (T.p. 134). The Appellant got off of her and she fell to the ground. Unable to stand, the Appellant picked up the Victim, carried her into the bathroom, dropped her in a tub of cold water and ordered her to clam down. (T.p. 134). The Victim eventually emerged from the

bathroom, but needed her daughter's assistance to put on a pair of underwear because the Victim's right side was numb. (T.p. 135).

With the children in the room, the Appellant again ripped off the Victim's pants and underwear, engaged in vaginal intercourse and threatened, "[s]hut up or I'm going to hurt you really bad" and "if you don't shut up I'm going to fuck you in the ass and it's going to be eight hundred times worse." (T.p. 137). The Appellant ejaculated inside the Victim, dressed and exited the room.

#### I. STATEMENT OF PROCEDURAL HISTORY

On November 30, 2006, the Portage County Grand Jury indicted the Appellant on two counts of rape in violation of R.C. 2907.02(A)(2) and two counts of assault in violation of R.C. 2903.13. (Transcript of the docket, journal entries and original papers hereinafter "T.d." 1). The Appellant entered a not guilty plea and moved the trial court to permit evidence of specific instances of the Victim's past sexual activity at trial. (T.d. 8, 10). The trial court conducted a R.C. 2907.02(E), rape shield hearing and excluded the evidence finding that the inflammatory and prejudicial nature of such evidence outweighed its probative value. The matter proceeded to a jury trial.

The jury returned a verdict of guilty as to Count 3 - rape and Count 4 – assault and was unable to reach a unanimous verdict regarding Counts 1 and 2. (T.d. 22). The trial court declared a mistrial as to Counts 1 and 2 and ordered a presentence investigation report from the Adult Probation Department. (T.d. 22). On June 1, 2007, the trial court adjudicated the Appellant a sexual predator and sentenced him to five years in prison for the rape and a concurrent term of eighteen months in prison for the

assault. (T.d. 25, 26). The trial court and the Eleventh District Court of Appeals both denied requests to stay the sentence pending appeal.

On May 27, 2008, the Eleventh District affirmed the Appellant's rape and assault convictions. *State v. Egli* (May 27, 2008), Portage App. No. 2007-P-0052, 2008 -Ohio- 2507, at ¶65. Recently, the Eleventh District denied the Appellant's motion to certify this case as a conflict with the Third District Court of Appeals decision in *State v. Yenser* (2008), 176 Ohio App.3d 1, 2008-Ohio-1145. Eleventh District Court of Appeals Judgment Entry dated July 31, 2008. This matter is now before the Supreme Court of Ohio on the Appellant's memorandum in support of jurisdiction.

### **ARGUMENT OPPOSING JURISDICTION**

**Response to Appellant's Proposition of Law No. 1:** A trial court must engage in the statutory findings that "the evidence [wa]s material to a fact at issue in the case and that its inflammatory or prejudicial nature d[id] not outweigh its probative value" pursuant to R.C. 2907.02(D), before allowing evidence of a victim's prior sexual conduct with the defendant in a rape case.

#### **Standard of Review**

The evidentiary determination of a trial court under R.C. 2907.02(D) should not be disturbed upon appeal absent a showing of an abuse of discretion which amounts to prejudicial error. *State v. Graham* (1979), 58 Ohio St.2d 350, 352. The abuse of discretion standard is also used when reviewing a determination by the trial court weighing the probative value of evidence with its danger of unfair prejudice under Evid.R. 403. *State v. Morales* (1987), 32 Ohio St.3d 252, 258.

An abuse of discretion is "more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. When applying the abuse of discretion

standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

Abuse of discretion means a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence. *State v. Hancock* (2006), 108 Ohio St.3d 57, 2006-Ohio-160, at ¶130. In other words, a reviewing court may not override the trial court's determination that a particular item of evidence is relevant or irrelevant simply because it disagrees with the trial court. "The issue of whether testimony or evidence is relevant or irrelevant, confusing or misleading, is best decided by the trial judge, who is in a significantly better position to analyze the impact of the evidence on the jury." *Renfro v. Black* (1990), 52 Ohio St.3d 27, 31.

### **ANALYSIS**

In the present case, the Eleventh District Court of Appeals held that the trial court did not abuse its discretion in excluding certain evidence relating to the victim's prior sexual history with the Appellant that was offered in an attempt to show that the sexual conduct that occurred in the present case was consensual. *Id.* 2008 -Ohio-2507, at ¶54. The Eleventh District found that the trial court properly conducted a rape shield hearing, determined that the evidence at issue qualified as an exception to R.C. 2907.02(D), and then engaged in the statutory inquiry whether, "the evidence [wa]s material to a fact at issue in the case and that its inflammatory or prejudicial nature d[id] not outweigh its probative value." R.C. 2907.02(D); *Id.*

In his first proposition of law, the Appellant challenged the Eleventh District's review of the trial court's application of R.C. 2907.02(D), to his case. Specifically, the Appellant argued that the Eleventh District's decision was contrary to this Court's

decision in *State v. Williams* (1986), 21 Ohio St.3d 33. As support for this position, the Appellant relied on a recent decision from the Third district Court of Appeals that cited *Williams* as authority for holding that evidence regarding a victim's prior sexual conduct with her alleged rapist was probative of the sole issue at trial, whether the victim consented to the sexual act. *State v. Yenser* (2008), 176 Ohio App.3d 1, 2008-Ohio-1145, at ¶4.

The Appellant's reliance on *Williams* is misplaced. In *Williams*, the victim testified at trial that she would have never voluntarily consented to sexual intercourse with a man because she was a lesbian. *Williams*, 21 Ohio St.3d at 33-34. Following this testimony, defense counsel offered but was prohibited from presenting testimony to demonstrate the victim engaged in consensual sexual activity with men from a defense witness who would have testified regarding his past sexual activity with the victim and another witness who would have testified regarding the victim's reputation for being a prostitute. As the evidence at issue in the case was "undeniably inadmissible under the rape shield law," the defendant claimed that the application of the rape shield law in his case violated his Sixth Amendment right to confront witnesses. *Id.* at 34.

This Court held, "[i]n determining whether R.C. 2907.02(D) was unconstitutionally applied in the instance, we must thus balance the state interest which the statute is designed to protect against the probative value of the excluded evidence." *Id.* at 35. Applying the above test, the *Williams* Court found that the evidence of the prior sexual activity between the victim and the third party, which the rape shield law would render inadmissible, would nevertheless be admissible in

furtherance of the defendant's constitutional rights. *Id.* at 35. This Court reasoned that the evidence directly refuted the victim's testimony that she never consented to sex with men and therefore the proffered evidence was probative of the factual issue of consent and offered for more than mere impeachment of credibility of the victim. *Id.* at 36. This Court found, "[t]he probative value of the testimony outweighs any interest the state has in its exclusion." *Id.*

The rape shield statute provides:

[e]vidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under [R.C. 2907.02] unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

R.C. 2907.02(D). In *Williams*, the disputed evidence involved the victim's prior sexual conduct with a third party, not the defendant. Accordingly, the evidence did not meet one of the statutory exceptions of the rape shield law, "evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender[.]" R.C. 2907.02(D). The *Williams* trial court applied the rape shield law as an automatic bar to the admissibility of the disputed evidence.

Unlike *Williams*, the disputed evidence in the present case involved the victim's prior sexual conduct with the offender. This is one of the exceptions to the rape shield law "only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." R.C. 2907.02(D). Therefore, in the present case, the trial court then engaged in the statutory inquiry of whether the evidence was material to a fact in issue

and then conducted the prejudicial versus probative weighing of the disputed evidence as required in the statute. The *Williams* trial court never engaged in this statutory inquiry or balancing test because the evidence at issue was not among the exceptions to the statute. Accordingly, the *Williams* test of weighing the probative nature of the disputed evidence against the interests of the State in enacting the rape shield statute was inapplicable to the present case.

The foregoing analysis of *Williams* reveals that the Eleventh District properly reviewed the trial court's application of the rape shield law to the evidence at issue in this present case, an exception to R.C. 2907.02(D), for an abuse of discretion. Although Appellant urges this Court to accept the reasoning of the Third District Court of Appeals in *Yenser* as an extension of its *Williams* holding, a closer look at *Yenser* reveals that the Third District inappropriately relied on *Williams* as authority to dismiss the trial court's statutory responsibility of finding "that the evidence [of 'victim's past sexual activity with the offender'] is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." R.C. 2907.02(D).

In *Yenser*, like the present case, the disputed evidence involved prior sexual conduct of the victim and defendant. Accordingly, it qualified as an exception to the rape shield law. The *Yenser* trial court conducted a rape shield hearing and determined that evidence that the victim and defendant had previously engaged in consensual anal sex that resulted physical injuries similar to the physical injuries that the victim presented with following the rape would not be admitted at trial. *Yenser*, 2008-Ohio-1145, at ¶5. However, the Third District then applied the *Williams* test and

held that the material issue of fact in the case was consent and the excluded evidence was probative of that issue, “[f]or this reason, the probative value of the testimony outweighs any interest the state has in exclusion.” *Id.*, 2008-Ohio-1145, at ¶6.

The Third District’s analysis is flawed. While an application of the *Williams*’ test to the facts of *Yenser* may have yielded a finding that the probative value of the disputed evidence outweighed the State’s interest in exclusion, it failed to address the trial court’s statutory determination that the “inflammatory or prejudicial nature does not outweigh its probative value.” R.C. 2907.02(D). The *Williams* test is inapplicable in cases like *Yenser* and the present case, because *Williams* involved the relevancy of a specific instance of prior sexual activity by the victim with a third party, not the defendant. Furthermore, *Yenser* and the present case involved couples with long histories of prior consensual sexual activity within a marriage or that resulted in children respectively. *Williams* however, involved a victim who denied any prior consensual, sexual history with men.

The Eleventh District properly reviewed the trial court’s exclusion of the disputed evidence in the present case under an abuse of discretion standard. *Egli*, 2008 -Ohio- 2507, at ¶65. As the Appellant’s reliance on *Yenser* and the dissenting opinion as authority to extend *Williams* to the present case is misplaced, the Appellant’s first proposition of law is without merit and does not present grounds warranting jurisdiction from this Court.

**Response to Appellant's Proposition of Law No. 2:** The proper venue to pursue an ineffective assistance of counsel claim based on evidence dehors the record is a petition for postconviction relief.

In his second proposition of law, the Appellant contends that his trial counsel's failure to proffer at trial the substance of excluded defense witness testimony was deficient performance rising to the level of ineffective assistance of counsel.

### Standard of Review

A two-step process is employed in determining whether the right to effective counsel has been violated.

[1] First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. [2] Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 693.

In demonstrating prejudice, the defendant must prove that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. In addition, the court must evaluate "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-695.

It is not the role of this Court to second-guess the strategic decisions of trial counsel. *State v. Carter* (1995), 72 Ohio St.3d 545, 558. Furthermore, hindsight may not be used to distort the assessment of what was reasonable in light of trial counsel's perspective at the time. *State v. Cook* (1992), 65 Ohio St.3d 516, 524-525.

### Analysis

A review of the record reveals that the trial court conducted the rape shield hearing before trial commenced. (T.p. 4-21). At this hearing, defense counsel requested permission to inquire into specific instances of the victim's past sexual conduct with the Appellant stating, "we believe that she has, in fact bragged to other that she and Mr. Egli engaged in what could be described as rough sex." (T.p. 5). Defense counsel referred to this sexual history in general terms, "[t]hat consensually they had described acts that might be somewhat out of the mainstream" and "we have certain witnesses who would come in and say she bragged about having rough sex with Mr. Egli." (T.p. 5, 7). Defense counsel did not identify witnesses who would testify. (T.p. 4-21).

On appeal to the Eleventh District, the Appellant asserted "there were numerous witnesses who could have testified to statements made by the victim about her sexual history with the defendant including her 'bragging' about rough sex, anal and oral sex." (Appellant's Appellate Brief, p.g. 12). Although the Appellant admitted that "[s]ome of this was proffered at the Rape Shield hearing held prior to the trial" he further asserted that nothing was proffered at trial. (Appellant's Appellate Brief, p.g. 12). The Eleventh District held that trial counsel's performance was not ineffective and that to the extent that the Appellant's ineffective assistance of counsel claim was

based on evidence dehors the record, "Mr. Egli is still able to raise such a claim in a petition for postconviction relief and will not be barred by res judicata principles." *Egli*, 2008 -Ohio- 2507, at ¶63. Accordingly, the proper avenue to address trial counsel's alleged ineffective assistance of counsel claims regarding evidence dehors the record is a petition for postconviction relief and not review by this Court.

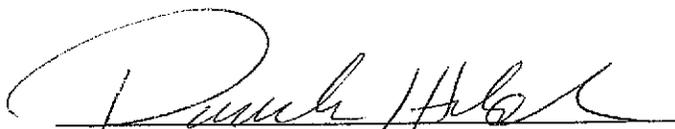
The Appellant's second proposition of law is without merit and does not present grounds warranting jurisdiction from this Court.

### **CONCLUSION**

For the foregoing reasons, this State of Ohio respectfully moves this Court to refuse jurisdiction to hear this discretionary appeal.

Respectfully submitted, .

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Response in Opposition to Memorandum in Support of Jurisdiction has been sent via regular U.S. mail to Donald Gallick at 159 South Main Street, Suite 300, Lakewood, Ohio 44107, on this <sup>psr</sup> 6 day of August 2008.

  
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