IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	OSC CASE NO. 2008-1351
	)	
Plaintiff-Appellee,	)	On appeal from the Eleventh District Court
v.	)	of Appeals, Summit County Ohio, CA 07 P 0052
	)	
ROBERT EGLI,	)	Trial Court Case CR 2006 CR 0666
	)	
Defendant-Appellant.	)	**NOTICE OF RULING ON MOTION**
	)	**TO CERTIFY CONFLICT,**
	)	
	)	Supreme Court Rule IV, 4(A).

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Counsel for Defendant-Appellant Robert Egli now notifies this Honorable Court, as required by Supreme Court Rule of Practice IV, 4(A), that on July 31, 2008, the Eleventh District Court of Appeals, by a 2-1 decision, overruled Appellant's motion to certify a conflict between *State v. Egli*, 2008-Ohio-2507 and the Third District decision *State v. Yenser*, 2008-Ohio-1145. A copy of that 2-1 ruling is attached to this notice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this Notice of Ruling was sent via regular U.S. mail to the Office of to Portage County Prosecutor 466 South Chestnut Street, Ravenna, Ohio 44226 on this fourth day of August, 2008.

DONALD GALLICK (OH - 0073421)
ATTORNEY FOR APPELLANT

FILED
AUG 07 2008
CLERK OF COURT
SUPREME COURT OF OHIO

STATE OF OHIO)
)SS.
COUNTY OF PORTAGE)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

FILED
COURT OF APPEALS
JUL 31 2008
LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

STATE OF OHIO ,

Plaintiff-Appellee,

- vs -

ROBERT EGLI ,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2007-P-0052

This case is presently before this court upon the motion of appellant, Robert Egli, to certify this case to the Supreme Court of Ohio on the basis of a conflict pursuant to App.R. 25 and Section 3(B)(4), Article IV, of the Ohio Constitution.

Appellant contends that our decision in *State v. Egli*, 11th Dist. No. 2007-P-0052, 2008-Ohio-2507, is in conflict with the Third Appellate District's decision in *State v. Yenser*, 3rd. Dist. No. 10-07-19, 2008-Ohio-1145, regarding the following question:

"Does a defendant's right to confrontation require that evidence of prior sexual contact with an alleged [rapist] be admitted or does R.C. 2907.02(D) bar its introduction to the jury, if consent is the sole issue of dispute in a trial for rape?"

On May 23, 2008, this court issued its opinion in *Egli*, in which this court applied R.C. 2907.02(D), which states, in part: "Evidence of specific instances of

the victim's sexual activity *** shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual history with the victim, *** 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."

Applying R.C. 2907.02(D), we concluded the trial court did not abuse its discretion in excluding certain evidence relating to the victim's prior sexual history with Mr. Egli proffered by him in an attempt to show that the sexual conduct that occurred in this case was consensual.

We reached this conclusion because our review of the evidence in this case in its totality indicates that Mr. Egli's purpose for the proffered evidence was not to show consent, but actually "to impeach the victim's credibility or more precisely, her character for truthfulness, with extrinsic evidence that she bragged to others about engaging in violent sex." Id. at ¶54. We also explained that Evid.R. 608 "does not provide for impeachment of reputation for truth-telling by evidence of a victim's past sexual conduct which tends to show that the victim may have the ability to fabricate a new but fictitious story." Id.

Because "the proposed method of attack on the credibility of the victim falls outside the scope of the rules of evidence" and because the trial court in this case could have found the prejudicial nature of the proffered testimony to have outweighed its probative nature pursuant to R.C. 2907.02(D), we were unwilling to find an abuse of discretion by the trial court in this case. Id. at ¶56.

In the proposed conflict case, the Third Appellate District determined evidence regarding the victim's prior engagement in anal sex with the defendant

had probative value to the determinative issue of fact, i.e., whether the victim consented to the sexual act. Applying *State v. Williams* (1986), 21 Ohio St.3d 33,[1] the Third Appellate District stated: "If the evidence in question is merely being used to impeach the victim's credibility, it is not of probative value as to the alleged rape itself and should not be admitted. However, if the evidence has probative value to the determinative issue of fact, i.e. whether the victim was raped by the defendant on the date alleged, then the probative value of the testimony outweighs any interest the state has in exclusion. Id. at ¶4 (citations omitted). Because the Third Appellate District determined the victim's prior sexual conduct with the defendant in that case was proffered to show consent, a material issue of fact, and therefore its probative value outweighed any interest that the state had in exclusion, the court concluded the trial court should have admitted the evidence.

Given our interpretation of the evidence in *Egli*, namely, the evidence proffered is to impeach the victim's credibility, rather than to show consent, *Egli* is not in inflict with the Third Appellate District's ruling in *Yenser* on the question posited by Appellant.

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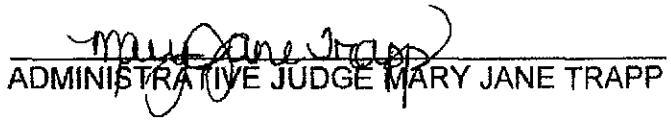
1. We note that in *Williams*, the disputed evidence involved the victim's prior sexual conduct with a third party, not defendant. *Yenser* and the instant case, however, involve the victim's sexual conduct with the defendant himself, one of the statutory exceptions, and therefore the proper test should be the balancing test set forth in R.C. 2907.02(D) ("Evidence 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 this section 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." The Third Appellate District, however, applied *Williams* (in determining whether R.C. 2907.02(D) was unconstitutionally applied, the court balances the state interest which the statute is designed to protect against the probative value of the excluded evidence.)

Appellant's motion to certify is overruled.



ADMINISTRATIVE JUDGE MARY JANE TRAPP

TIMOTHY P. CANNON, J., concurs.

COLLEEN MARY O'TOOLE, J., dissents.