

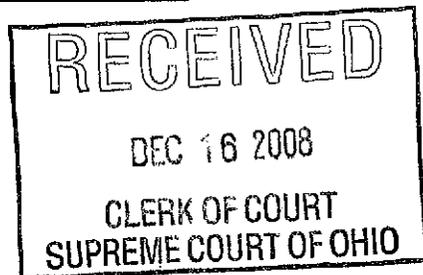
In the Supreme Court of Ohio

State of Ohio,)
Plaintiff-Appellee,)
-vs-)
Kenneth J. Smith,)
Defendant-Appellant,)

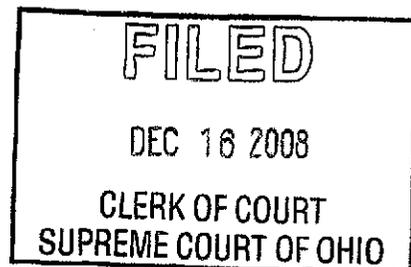
Case No. 08-2399
On Appeal from the
Cuyahoga County Court
of Appeals Eighth
Appellate District
C.A. Case No. 90749

Notice of Appeal of Appellant Kenneth J. Smith

Kenneth J. Smith #148-917
2500 S. Avon-Belden Rd.
Grafton, Ohio 44044
Defendant-Appellant, pro se



William D. Mason
Cuyahoga County Prosecutor
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1200 Ontario Street
Cleveland, Ohio 44113
Counsel for Appellee, State of Ohio



Notice of Appeal of Appellant Kenneth J. Smith

Appellant, Kenneth J. Smith hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals Eighth Appellate District, entered in Court of Appeals Case No. 90749 on Oct 30, 2008

This case raises a substantial constitutional question. Involves a felony, and is of public or great general interest.

Respectfully submitted,

Kenneth J. Smith

Kenneth J. Smith #148-917

Grafton Correctional Inst.

2500 S. Avon-Belden Rd.

Grafton, Ohio 44044

Defendant-Appellant, pro se

Attachment not scanned

In the Supreme Court of Ohio

State of Ohio,) Case No. _____
Plaintiff-Appellee,)
) On Appeal from the
-vs-) Cuyahoga County Court
) of Appeals Eighth
Kenneth J. Smith) Appellate District
Defendant-Appellant,) C.A. Case No. 90749

Memorandum in Support of Jurisdiction
of Appellant Kenneth J. Smith

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Judgement Entry and Opinion,Court of Appeals,Cuyahoga County
October 30,2008.

Explanation of why this is a case of public or great general interest and involves a substantial constitution question.

This is a case of public or great general interest and involves a substantial constitution question.

In 2003 the General Assembly passed, and Governor Taft signed into law, Senate Bill II, now codified at R.C. 2953.71 through 2953.83.

The statutes' intent is to allow those wrongfully convicted to prove their innocence through comparison DNA testing. To obtain testing, an applicant must demonstrate that his or her exclusion as the source of biological material collected from a crime scene or victim would have been outcome determinative at trial.

In 1977 Appellant was convicted of multiple charges stemming from a downtown kidnapping and subsequent gang rape of two young women who worked at the juvenile court in the city of Cleveland, Ohio.

The State's evidence against Appellant was the identification testimony of one of the women, Margaret Rhodes. Without additional direct evidence, and with circumstantial evidence in the case pointing away from appellant, the State relied on the presence of sperm in Ms. Rhodes body in order to corroborate Ms. Rhodes testimony.

The victims were taken to the hospital and biological material was recovered from both women, in rape kits and in clothing. Medical testimony at trial established the presence of sperm and seminal fluid in the clothing and in slides prepared from the rape kits. That sort of biological material is exactly the sort of potentially exonerating evidence envisioned by Senate Bill II. Yet the trial court denied Appellant application for DNA testing. The court finds Defendant failed to demonstrate that DNA testing would prove to be outcome

determinative as defined by R.C. 2953.71(L).

In fact, an exclusion result as to Appellant would cast strong doubt on his involvement in the crimes, as the evidence in the case with the exception of Ms. Rhoades identification testimony-failed to implicate Appellant in any way. No reasonable factfinder would have voted to convict Appellant if DNA testing proved that Appellant was not a source of the biological material found during Ms. Rhoades examination. Any reasonable factfinder armed with the DNA testing exclusion result would have concluded that Ms. Rhoades identification was erroneous, and understandably so, given the suggestive conditions under which her initial identification was made, and the numerous subsequent occasions Appellant was presented to her as one of the men who raped her.

Statement of Facts

Magaret Rhoades and Lori Koss were kidnapped off a downtown Cleveland street just after midnight on a Thursday night in February 1977. Two men forced their way into Ms. Koss car (a green cutlass). Drove it toward the Eastside, and ultimately raped the two women. Eventually, these two men exited the car and allowed at least two and possibly three other men to enter the car and rape the women as well. TR. 220-236.

Cleveland police officers, who were in the area to investigate an unrelated matter, happened upon the green cutlass, finding the terrified, naked women inside. The police had witnessed two men leaving the car, and ultimately caught up to them, finding them in possession of physical evidence belonging to the women. Tr. 744-747.

Just a few minutes earlier, a different police cruiser had spotted a white Olds parked behind the green cutlass. Two men were standing near the open trunk; they got into the car as the cruiser approached and drove away. The cruiser tailed the white Olds away from the scene, the officer intending to serve an arrest warrant for the driver, Clarence Crain, who was previously known to him. Tr. 535-538.

After the white Olds pulled into a private driveway, the occupants were removed from the car, and the car was searched. The officers received a report about the discovery of the women in the green cutlass, and were asked to bring the occupants of the white Olds to the scene for purposes of identification. Tr. 549-552. The three men were stuffed into the backseat of the marked police car and returned to the area of the green cutlass. By the interior light of the

police car, both women were able to identify Appellant Co-defendant, Clarence Grain. Tr. 754. According to Officer Allerton, neither woman was able to identify Appellant at the time. Tr. 760.

Margaret Rhoades testified that she did identify Appellant, sitting in between the other two in the back of the police car, as her first assailant. Tr. 320. Ms. Rhoades also testified that she was only able to see Appellant for a couple of seconds. Tr.324-325. She further testified that she had given appellant money and jewelry. Tr. 325-326. However, nothing belonging to either woman was found on Appellant person when he was arrested. Nor was anything found in the white Olds from which he was taken. Tr. 715-718.

Ms. Rhoades testified that the first man to rape her did not ejaculate. Tr. 327-328. However, medical testimony established the presence of sperm and seminal fluid inside Ms. Rhoades vagina. Tr. 656. And medical testimony established the fact that ejaculation is not required to deposit sperm and seminal fluid. Tr. 685. During closing argument, in order to cement its argument that Ms. Rhoades had been raped, the State of Ohio referred directly to the presence of sperm as evidence corroborating tending to prove its charge that Appellant raped Margaret Rhoades. Tr. 1219-1220.

Statement of the Case

In May of 1977, Appellant was convicted of multiple criminal charges and sentenced to a lengthy, indeterminate prison sentence.

On October 29, 2004, Appellant filed an application for DNA testing, which the trial court denied on April 20, 2005. Appellant filed a Notice of Appeal on March 28, 2006. The Appeal was nonetheless dismissed on May 8, 2006. A timely Motion for Reconsideration was granted on July 20, 2006.

PROPOSITION OF LAW

The trial court's denial of Kenneth Smith application for DNA testing is contrary to law because comparison DNA testing that excludes Mr. Smith as the source of the biological matter found in the rape kit and on Margaret Rhoades' clothing would be outcome determinative.

Issue presented for review

Would a DNA test excluding Kenneth Smith as the source of biological material in question be outcome determinative in the instant case?

The State asserts that an exclusion result as to Appellant, "Would not serve to exonerate him", because an absence of evidence would be consistent with Margaret Rhoades claim that Appellant did not ejaculate. The State also asserts that an exclusion result would not exonerate Appellant as an aider and abettor.

Neither of these arguments provides a solid basis to reject Appellant application for DNA testing. The question is whether any reasonable juror would have voted to convict Appellant given the fact that Appellant had been excluded as a contributor of the biological evidence found inside of Margaret Rhoades. R.C. 2953.71(L). Here, the only evidence tying Appellant to the case is a two-second glance in a dark car under extreme conditional, psychological, and physical stress, coupled with the Cleveland police delivering Appellant to the traumatized victims in the back of a police car sandwiched between two suspects, one of whom was immediately and confidently identified by both women.

Margaret Rhoades identification of Appellant as her first attacker is far from solid, as her cross-examination testimony reveals. Tr. 316-359.

1) She testified that she gave the first man in the backseat a ten and a five-dollar bill, Tr. 326, and her two rings, Tr. 325. None of these items were found on or around Appellant person. Tr. 715-718.

2) She testified that she only saw her assailant for "a minute, or something like that, a couple seconds", while getting into the green cutlass, and again while climbing over into the backseat. Tr. 324-325.

3) She testified that she did not see the man's face again until the police brought him to her in the backseat of a marked police car for the show-up, immediately prior to which the police told her that they had "found three of them", Tr. 316, and that "we got three in a car". Tr. 335.

None of the physical evidence taken from the victims was found on or anywhere near Appellant. Tr. 715-718.

The State forensic witness also established that Appellant underwear did not test positive for Ms. Rhoades blood. Tr. 641, 824. This stands in contrast to Appellant co-defendant's Kenneth Williams Tr. 832 and Clayton Ranshaw Tr. 834 both whom underwear tested positive for Ms. Rhoades blood type, both whom pleaded guilty.

The results of the forensic testing are as follow:

1) Margaret Rhoades underclothing test positive for seminal fluid and positive for blood. Tr. 818-820.

2) Kenneth Williams and Clayton Ranshaw underclothing positive for seminal

fluid and positive for blood of the same blood type as Ms. Rhoades type. Tr. 832-834.

3) Lori Koss underclothing positive for seminal fluid, negative for blood. Tr. 818-820.

4) Clarence Crain's and David Tillman's underclothing positive for seminal fluid, negative for blood. 823, 835.

5) Kenneth Smith underclothing positive for seminal fluid, negative for blood. Tr. 641, 824.

The results point strongly to the conclusion that Appellant did not, in fact, rape Margaret Rhoades. And if Appellant had been able to show a jury a DNA exclusion result as to the sperm from inside of Ms. Rhoades, in addition to the presence of Ms. Rhoades blood on the underwear of Appellant two co-defendant-Appellant would have been acquitted. Indeed, if DNA testing had been available at the time of trial, it could have implicated Appellant co-defendants while exonerating him. The State argument that an exclusion result as to Appellant would not exonerate him necessarily assumes that the identity of the contributor(s) of sperm found inside Margaret Rhoades is irrelevant to establishing the identity of the person or persons who raped her. See States closing arguments. Tr. 1219-1220. Without the medical testimony concerning the sperm from in the victim, the State could not have made the quoted argument to the jury. The State's 2005 argument that the identity of the contributor of the sperm would not be outcome determinative ignores the reality established by the State at the 1977 trial. The State's belated argument to irrelevance is particularly inappropriate given that it was the State that pointed to the

presence of sperm as corroboration of Appellant involvement. The State's case against Appellant depended entirely on the Ms. Rhoades identification certain constitutional prohibition against nconvicting and punishing innocent person are identified in a series of cases. See, generally, Schlup v. DeLo (1995) 513 U.S.298; Sawyer v. Whitley (1992) 505 U.S.333; Murray v. Carrier (1986) 477 U.S.478;

See also, U.S.Const.Amend.VIII,IX,XIV; Ohio Const. Section 1, 2, 5, 9, 10, 16, and Article 1.

When this precedent is stripped of the references relating only to the unique and complex jurisprudence of habeas corpus litigation. What remains is a constitutional command that States must not convict and punish legally innocent person. As the court emphasized in Schlup:

In this case, as in any criminal case, there is no reason to look beyond the concept of guilty beyond a reasonable doubt. A jury armed with conclusive proof that Appellant was not the source of the biological material recovered from Margaret Rhoades would never have convicted him.

The exclusion of Appellant as a contributor would have provided all doubt any reasonable juror would require in order to vote to acquit.

Conclusion

DNA testing of the evidence in this case will prove Appellant innocence of the crime for which he was convicted and is currently incarcerated.

Respectfully submitted,

Kenneth J. Smith

Certificate of Service

I herby certify that a copy of the foregoing Notice of Appeal was forwarded by regular U.S. Mail to William D. Mason, Cuyahoga County Prosecutor, The Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, on December 14, 2008.

Kenneth J. Smith

Defendant-Appellant, pro se

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

Defendant-Appellant.

Case No. _____

On Appeal from the Cuyahoga
County Court of Appeals
_____ Appellate District

C.A. Case No. 90749

APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT Kenneth J. Smith

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90749

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KENNETH J. SMITH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-030379

BEFORE: Gallagher, P.J., Dyke, J., and Celebrezze, J.

RELEASED: October 30, 2008

JOURNALIZED: NOV 10 2008

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**FILED AND JOURNALIZED
PER APP. R. 22(E)**

NOV 10 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

OCT 30 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

SEAN C. GALLAGHER, P.J.:

Appellant, Kenneth Smith ("Smith"), appeals the decision of the Cuyahoga County Court of Common Pleas denying his application for DNA testing pursuant to R.C. 2953.71 et seq. Finding no error in the proceedings below, we affirm.

In 1977, a jury convicted Smith of multiple counts of rape, kidnapping, aggravated robbery, and carrying a concealed weapon. He was sentenced to 7 to 25 years in prison for rape, kidnapping, and aggravated robbery. He was also sentenced to 3 to 10 years on the charges of carrying a concealed weapon. All counts were ordered to be served consecutively. We reversed his convictions for kidnapping but affirmed the remainder of his convictions in *State v. Smith* (Aug. 16, 1979), Cuyahoga App. No. 38318.

In 2004, Smith filed an application for DNA testing, pursuant to R.C. 2953.73. The state filed a brief in opposition to his application. The trial court subsequently denied Smith's application. Smith appealed, and this court found that the trial court failed to comply with the requirements of R.C. 2953.73(D) because the court did not provide a statement that explained its reasons for the denial of the DNA testing application. *State v. Smith*, Cuyahoga App. No. 87937, 2007-Ohio-2369.

On remand, the trial court again denied Smith's application for DNA testing, finding as follows:

“* * * DNA testing would not be outcome determinative pursuant to the trial record of this case as [M.R.¹] had been raped by three different males. Should the defendant be excluded as a donor of any biological material that may have been found on the victim, it would not serve to exonerate him. It would only demonstrate that he did not deposit any biological material that may have been found on the victim when he raped her, which is consistent with the testimony of [M.R.] that the defendant did not reach climax. Further, the defendant was charged with seven counts of rape because he was complicit in the rapes of [M.R.] and [L.K.] as the offense relates to his four co-defendants. Therefore, a DNA test which excluded the defendant as a donor would not exonerate him of any of the rape offenses for which he was convicted as an aider and abettor. * * * ”

Smith appeals, advancing two assignments of error for our review. In his first assignment of error, Smith argues that the trial court abused its discretion when it found that an “exclusion result” would not be outcome determinative.

R.C. 2953.74(C) provides that a court may accept an application for DNA testing for an eligible inmate, as defined under R.C. 2953.72, when “[t]he court determines that, if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding that inmate.”

¹ The parties are referred to herein by their initials or title in accordance with this court's established policy regarding the nondisclosure of the identities of victims of sexual violence.

R.C. 2953.74. See, also, R.C. 2953.72, 2953.73. The eligible inmate must demonstrate that an exclusion result of a DNA test would alter the trial result. *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, ¶30. If the proponent fails to convince the trial court that a DNA test exclusion result would change the verdict, the court is under no obligation to accept the application. *Id.*, ¶31. The trial court must, in its discretion, consider how to best use judicial resources. Thus, the trial court decides on whether it is appropriate to proceed with a DNA test. *Id.*

For purposes of R.C. 2953.71 to 2953.83, an “exclusion result” is defined as an outcome of DNA testing that scientifically precludes or forecloses the applicant from being the contributor of the biological material recovered from the crime scene or crime victim. R.C. 2953.71(G). Additionally, “outcome determinative” means that had the results of DNA testing been presented at trial, there is a strong probability that no reasonable fact-finder would have found the inmate guilty. See R.C. 2953.71(L).

Smith argues that an exclusion result would cast strong doubt on his involvement in the crimes because the only evidence implicating him was M.R.’s identification of him. He insists that with an exclusion result and his alibi witness, the jury would have concluded that M.R.’s identification was erroneous. We disagree.

We note that the App.R. 9(A) record of this case does not contain the original trial transcript; this court's review of the trial court's decision is limited to what is contained in the file.

The facts of this case were set forth in a co-defendant's case.

"In the early morning hours of February 3, 1977, Patrolmen Crossland and Mauer of the Cleveland Police Department were in the area of Whittier Avenue and East 55th Street in the City of Cleveland. At approximately 1 a.m., Patrolman Crossland received a radio call concerning a robbery of a home on Linwood Avenue involving three males with shotguns. Patrolman Crossland proceeded to a vacant field near 56th Place and Whittier Avenue. On Whittier Avenue he observed two black males standing near the rear of a white Oldsmobile parked behind a green Olds. They were searching what appeared to be a coat. Patrolman Crossland recognized one of the males as Clarence Crain, recognized the white car as belonging to Crain, and that Crain had an outstanding traffic warrant. Observing this 'suspicious activity,' the patrolmen drove toward the two males. As the patrolmen approached, Crain and the other male placed a coat or 'an object' in the back seat of the car, got in and drove away. The patrolmen followed. Crossland observed 'a lot of movement' in the car. He also ran a computer check on the license plate, MU 428. The readout indicated an outstanding traffic warrant.

"Within a few blocks, Crain drove into a driveway and got out of the car. Patrolman Crossland stopped and said to him: 'Clarence, we have a traffic warrant for you, an arrest warrant for you, you are under arrest.'

"Crain came toward Patrolman Crossland. Two other males, Kenneth Williams and Kenneth Smith, were taken from the car. They were searched and secured in the back of the police car. A check was run on Smith and Williams and

Patrolman Crossland awaited a further description of the robbery suspects. Before further information was received, Patrolman Crossland returned to Crain's car to conduct an 'inventory search.' Immediately upon entering the car, he observed a 'tear gas pistol' and several .38 caliber bullets in the tray and on the front floor of the car. On the back seat he saw a leather coat. He removed the coat and underneath it saw a 'shiny object,' 'what appeared to be the barrel of a gun.' Patrolman Crossland then searched underneath the back seat and found two other guns. After the search a call came to return defendant, Smith, Williams and defendant's car to the point where they were first seen.

"During this time Patrolmen Ray Allerton and Boyce Sefcic, in a second police car responding to the same radio call about the robbery, observed two black males get out of a green Olds Cutlass parked on Whittier Avenue. Patrolman Allerton checked the car and found two females, [L.K.] and [M.R.]. [L.K.] told the police: '* * * they had just been abducted and raped by five black males, and that two males had just left the auto.' A description of the two males was given. The police were also told the other males were driving a 'white Oldsmobile with gangster whitewalls.'

"Patrolman Sefcic went to an adjoining street where he saw the two male suspects. He observed one of them throw something to the ground. He arrested both and then recovered the thrown objects, including a wallet and a payroll check belonging to [M.R.].

"When Patrolman Crossland returned Crain, Smith, and Williams to the scene of the rape, both women identified the three as persons who raped and robbed them.

"Smith and Williams were arrested."

See *State v. Crain* (July 23, 1979), Cuyahoga App. No. 38268 (transcript citations omitted).

We agree with the trial court that an exclusion result would not have been outcome determinative. On the record before us, the victims testified that they had been raped by five black males, three of whom left in a white Oldsmobile. The officers saw the white Oldsmobile at the scene and followed it a few blocks before pulling it over. Smith, Williams, and Crain were removed from the white Oldsmobile. Smith and the others were identified by the victims. Further, as the trial court noted, the victim, M.R., testified that Smith did not climax. Therefore, a lack of DNA would not be unusual, but would not mean Smith did not rape her. Finally, Smith was complicit in the rapes of both victims as it relates to his four co-defendants, which would not change with an exclusion result. Accordingly, Smith's first assignment of error is overruled.

In Smith's second assignment of error, he argues that the trial court used the incorrect standard of review. He argues that the court used the sufficiency standard instead of the prescribed outcome determinative standard. We find no merit to this argument.

As stated previously, "outcome determinative" means that had the results of DNA testing been presented at trial, there is a strong probability that no reasonable fact-finder would have found the inmate guilty. R.C. 2953.71(L).

Although the trial court did not reiterate the words of the statute, it is clear that the court determined that an exclusion result would not be outcome

determinative. Specifically, the trial court found that an exclusion result would be consistent with the testimony of the victim, and that it would not exonerate Smith from the complicity convictions. We find that the trial court used the proper standard of review. Accordingly, Smith's second assignment of error is overruled.

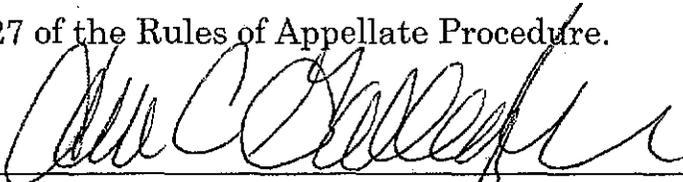
Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



SEAN C. GALLAGHER, PRESIDING JUDGE

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR