

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Case No. 2011-0486

vs.

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth Appellate
District

DAJUAN EMERSON

Appeals Case No. 94413

MERIT BRIEF OF APPELLANT DAJUAN EMERSON

BRIAN MORIARTY (0064128)

1370 Ontario Street (#2000)
Cleveland, Ohio 44113
(216) 566-8228
Fax – 216-623-7314

COUNSEL FOR APPELLANT, DAJUAN EMERSON

WILLIAM MASON

Cuyahoga County Prosecutor
1200 Ontario Street (9th Floor)
Cleveland, Ohio 44113

COUNSEL FOR APPELLEE

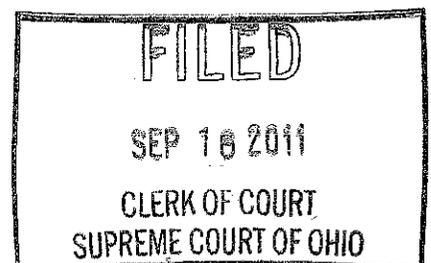
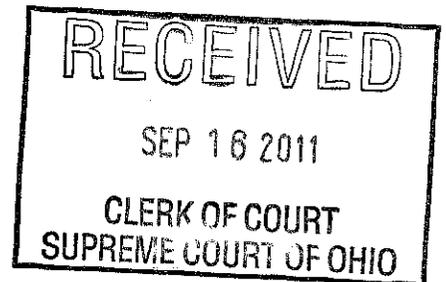


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	
<u>Proposition of Law No. I:</u> When DNA is obtained by the state in an investigation which results in the acquittal of the individual, that individual maintains standing to challenge the improper retention and subsequent use of his/her DNA in a subsequent proceeding. 7
<u>Proposition of Law No. II:</u> The State of Ohio does not have the authority to retain and/or subsequently use the DNA taken from an individual during a criminal investigation when that individual is acquitted of that crime. 9
CONCLUSION 11
CERTIFICATE OF SERVICE 11
APPENDIX	
Opinion of the Cuyahoga County Court of Appeals (February 10, 2011) 1
R.C. 109.573 26
R.C. 2901.07 27

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASE LAW:</u>	
<u>Katz v. United States</u> , 389 U.S. 347 (1967)	8
<u>Minnesota v. Olson</u> , 495 U.S. 91 (1990)	8
<u>Rakas v. Illinois</u> , 439 U.S. 128 (1978)	7, 8
<u>Rawlings v. Kentucky</u> (1980), 448 U.S. 98	6
<u>Smith v. Indiana</u> (2001), 744 N.E. 2d 437	7
<u>State v. Coleman</u> (1989), 45 Ohio St.3d 298	7
<u>State v. Williams</u> , 73 Ohio St.3d 153, 652 N.E.2d 721	7
<u>State v. Whitfield</u> , (May 9, 2005), 2005 Ohio 2255; 2005 Ohio App. LEXIS 2169	7

OHIO CONSTITUTION, STATUTES, RULES:

R.C. 109.573	5, 10
R.C. 2901.07	5, 10

STATEMENT OF FACTS AND CASE

On or about March 9, 2009, Defendant-appellant, Dajuan Emerson, was charged with a three count indictment. Count One was for Aggravated Murder in violation of R.C. 2903.01 (an unclassified felony); Count Two was for Aggravated Burglary in violation of R.C. 2911.11(a felony of the first degree); and Count Three for Tampering with Evidence in violation of R.C. 2921.12 (a felony of the third degree).

The transcript begins with a waiver from the defendant of his speedy trial rights until August 31, 2009. (Tr. 5). On August 19, 2009, the court acknowledged that defense counsel had recently received the DNA report from their expert. Defense counsel stated that they had received an oral report from their DNA expert but has yet to receive the written report. As such, they recommended another speedy trial extension. (Tr. 8-10). The State indicated on the record that they still needed to respond to Defendant's Motion to Suppress. (Tr. 8). However, Defendant stated on the record that he did not want to have another extension and that Defendant was ready to go to trial on the scheduled date. (Tr. 10-11). On August 24th, after discussions with counsel and family, the Defendant agreed to a 45 day extension of time. (Tr. 13-18).

On October 6, 2009, the Court informed the Defendant that one of his assigned counsel was ill and not able to be present for the upcoming trial date. As such, Defendant agreed to have other defense counsel appointed to assist in representing him on this matter without agreeing to another extension of time. (Tr. 19-21).

On October 13, 2009, it was noted that defense counsel recently filed a supplemental Motion to the previously filed Motion to Suppress. The State requested 2 days to respond. The trial court accepted said supplement and the parties agreed to give

the State of Ohio time to respond. (Tr. 22-25). On October 16, 2009, the trial court began the suppression hearing. (Tr. 28). The first witness called by the State of Ohio was Lisa Moore, a DNA analyst at the Cuyahoga County Coroner's office. (Tr. 28). She worked on a case concerning Marnie Macon. Item 42 from that file were two swabs of suspected blood on a rear doorknob which was received from the Cleveland Police Department in 2007. (Tr. 29-31). The DNA profile was entered into a database and a state detail match report was generated. That was printed August 20, 2008. (Tr. 34). The next step was to obtain a sample from the suspected individual for comparison purposes. They obtained the sample from Dajaun Emerson, compared it and determined it was a match. (Tr. 37-39).

On cross-examination, Ms. Moore acknowledged that the only thing entered into the database was DNA that was collected from the scene. (Tr. 40). Moreover, she testified that there are standards that they must follow. Only certain types of samples are put into the database due to the criteria that is used per the Ohio Revised Code 2901.07. In this case, Ms. Moore stated that they notified the Cleveland Police of the match on September 4, 2008, they received a buccal swab for comparison on March 2, 2009, and they created the hard copy profile on March 16, 2009. (Tr. 43-45). She testified that they do not process convicted offenders in their office. (Tr. 45). They did not have any DNA available for testing up until they received CODIS notification. (Tr. 45). In other words, until they received notice from CODIS concerning their "hit", they had no named/known samples to compare it with. (Tr. 46-47).

The next witness called was Christopher Smith who is a forensic scientist working for the Ohio Bureau of Criminal Identification and Investigation. (Tr. 50). As part of his

duties he maintains the Combined DNA Index System (“CODIS”) computer and database. There are three levels - local, state and national. (Tr. 52). The Cuyahoga County Coroner’s Office is one of ten local DNA Index systems. (Tr. 53). There are different indexes for each level including forensic unknowns, forensic mixtures, suspects and missing persons. (Tr. 53-54). One such index is “convicted felon.”

Concerning this case, he testified that a reference standard was submitted from Defendant-appellant on April 8, 2005 concerning a sexual assault case. (Tr. 57). The results were negative in that no male DNA was identified. As such, he was placed into the suspect index. (Tr. 58). Mr. Smith testified that he found two profiles were consistent with each other. (Tr. 62).

On cross-examination, he was asked under what authority he was maintaining the sample – he responded by and through the CODIS Methods manual. (Tr. 64). Specifically he reviewed two pages of the 80 age manual provided by the prosecutor and testified that a “suspect index could be maintained where the DNA records obtained from the listed suspect of a crime are maintainable at the state level.” (Tr. 65). However, upon closer examination of the two pages (actually indexes), Mr. Smith acknowledged that the suspect is actually a “known suspect” as declared by the department. (Tr. 68). The known suspect in the rape case was Defendant Dajuan Emerson. (Tr. 68). Importantly, he testified that he did not know that Dejuan Emerson was acquitted and no longer a suspect in that case. (Tr. 68).

He then testified that the retention policy for the CODIS system is that a suspect’s standard/sample will be removed when a request has been made through an expungement procedure listed in the methods manual. (Tr. 69-70). Although he has never had a

situation where the prosecutor has informed them of an acquittal – he knew that it happens at the state level. (Tr. 70).

Upon reviewing the 2005 rape kit analysis, he testified that a DNA profile was generated and there was no male DNA found. That can be determined without the use of a reference sample. (Tr. 71-72). As such, he acknowledged that they did not even need Dujaun Emerson's DNA sample in 2005. (Tr. 73). He was not aware that there was a search warrant that was based upon a comparison to a "known suspect." (Tr. 74).

Mr. Smith could not identify anything in the search warrant that allows him to enter the DNA information into CODIS. (Tr. 75). He again stated that they received the notification of a match from the larger Ohio State database. There is one state database with many indices such as missing persons, convicted felons, etc. (Tr. 76). Again, he testified that their protocol comes from the CODIS Manual. (Tr. 77). In sum, the only reason they had Dujuan Emerson in their database was as a reference standard for the 2005 case in which he was acquitted. (Tr. 79).

On re-cross, Mr. Smith acknowledged that Defendant was never notified that his DNA was placed in the CODIS database. As such, he would not have the knowledge necessary to request an expungement after he was acquitted. (Tr. 83). The State then stipulated that Defendant was not a "known suspect" or listed as a "person of interest." (Tr. 85-87). As argued by defense counsel, for purposes of the loosely termed "DNA retention policy", an acquitted person is in worse shape than an arrestee.

Defense counsel called Detective Joseph Chojnowski. (Tr. 88). He agreed that prior to the notification from the coroner's office that there had been a CODIS hit, Defendant had not been a suspect for the murder. (Tr. 89). He then testified that he

believed Defendant was classified as a “person of interest” in the CODIS database. He then examined his search warrant affidavit that was used to obtain Defendant’s buccal swab. (Tr. 90). He acknowledged that the search warrant affidavit stated that they received a hit from the database from “convicted felons” in the State of Ohio. (Tr. 91-92). He then re-phrased his classification of Defendant from a “person of interest” to a “convicted felon. He testified they considered Defendant to be a “convicted felon” at the time he made his sworn affidavit. (Tr. 92). He discovered Defendant was acquitted of the 2005 charge only after the CODIS hit and before Defendant’s buccal swab. (Tr. 94).

Defense counsel argued that pursuant to section 17.60 (page 70) of the CODIS Manual, the DNA record/profile taken in 2005 should have been removed if there was an acquittal. (Tr. 99). Moreover it was argued that under R.C. 109.573 and 2901.07, the State had no authority to maintain and subsequently use the DNA record/profile. (Tr. 99-101). That is why, he argued, the State of Ohio was currently amending said statutory law in Senate Bill 77 to *include* maintaining the DNA record/profile for “arrested person.” (Tr. 103). The State responded, among other things, that “even if there were a violation of 109.573, the State would argue that the exclusionary rule should not apply in this case.” (Tr. 106). The trial court denied said motion ruling “the State has the authority under 109.573.” (Tr. 110).

The trial court then considered a previously filed Motion to Suppress concerning the statements made by the Defendant. (Tr. 111). Detective Chojnowski testified that long after his investigation of the murder began, he was notified through the coroner’s office that there was a DNA match for Defendant. (Tr. 114). He testified that they made arrangements, picked up Defendant as a “suspect”, and took him down to the Homicide

Unit office at the Justice Center in downtown Cleveland and have an “opportunity to talk with him.” (Tr. 114). He testified that Defendant was then read his Miranda rights before the statement was taken. (Tr. 117-120).

On cross-examination, he acknowledged that they did not indicate in the police report when the interview with Defendant began or ended. (Tr. 124). He further testified that although they have the ability to record the “statement” at time, it was not done so in this case. (Tr. 124-125). He further agreed that although it is common practice to have the individual initial a separate waiver of rights form and each averment in the statement, it was not done in this case. (Tr. 125-126). Finally, the Detective testified that half way through the statement Defendant refused to continue and refused to answer the last question “[h]aving read this statement, do you find it to be true?” (Tr. 128). He refused to adopt the statement. (Tr. 128). Nowhere in the discovery materials is a signed waiver of rights by Defendant. (Tr. 141). The Court denied said Motion to Suppress. (Tr. 143).

As this Court accepted jurisdiction only on Propositions of Law I and II, the statement of facts as it relates to the subsequent jury trial will be omitted. Accordingly, on October 21, 2009, the jury returned with a verdict of guilty as to Count One – Aggravated Murder, and guilty as to Count Three – Tampering with Evidence. (Tr. 768). He was sentenced to life imprisonment with parole eligibility after 25 years on Count One and one year concurrent on Count Three. (Tr. 779).

On appeal the Eight District Court of Appeals found that Defendant-appellant did not have standing to file the Motion to Suppress challenging the use of his DNA. The Court relied upon out of state law finding once DNA has been lawfully removed from the

body, the analysis does not involve any further search and seizure of a defendant's person.

LAW AND ARGUMENT

Proposition of Law No. I: When DNA is obtained by the state in an investigation which results in the acquittal of the individual, that individual maintains standing to challenge the improper retention and subsequent use of his/her DNA in a subsequent proceeding.

Under the Fourth Amendment, the standing and search and seizure inquiries “merge into one: whether governmental officials violated any legitimate expectation of privacy help by petitioner.” See Rawlings v. Kentucky (1980), 448 U.S. 98, 106, 65 L.Ed.2d 633. In finding Mr. Emerson had no standing to make his Fourth Amendment challenge, the appellate court noted that “society does not recognize an expectation of privacy in records made for public purposes from legitimately obtained samples.” Smith v. State of Indiana (2001), 744 N.E. 2d 437.

However, the appellate court erred in finding the CODIS database to be a “public record.” Under this logic, any individual would be able to access any other individual DNA samples obtained in a criminal investigation – this is simply not the case. The fact that the sample was legally obtained does not mean that it is a “record made for public purposes.” In fact, the privacy implications are demonstrated by the need to obtain a search warrant before taking anyone's DNA.

It is well established that an individual must have standing to challenge the legality of a search or seizure. Rakas v. Illinois, 439 U.S. 128 (1978); State v. Coleman (1989), 45 Ohio St.3d 298, 544 N.E.2d 622. The person challenging the search bears the

burden of proving standing. State v. Williams, 73 Ohio St.3d 153, 1995 Ohio 275, 652 N.E.2d 721. That burden is met by establishing that the person has a expectation of privacy in the place searched that society is prepared to recognize as reasonable. Id.; Rakas v. Illinois, supra. In this case, there can be no question that one has a privacy interest in one's own DNA.

The case law is clear that to obtain one's DNA, law enforcement must either obtain consent from the individual and/or obtain an order/warrant from the Court. See, e.g. State v. Whitfield, (May 9, 2005), 2005 Ohio 2255; 2005 Ohio App. LEXIS 2169. This is also recognized in the necessity to obtain medical release forms for the production and/or use of medical records – including blood samples and DNA results. As such, at some point, the state recognizes the privacy interest in one's DNA. That privacy interest and/or expectations of an individual does not simply evaporate once the validly obtained DNA sample has been placed in the restricted state database which cannot be accessed by the public.

In Katz v. United States, 389 U.S. 347 (1967), it has been the law that the capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy. See, Rakas v. Illinois, 439 U.S. 128, 143 (1978). A subjective expectation of privacy is legitimate if it is "one that society is prepared to recognize as "reasonable,"" Id., at 143-144, n. 12, quoting Katz, supra, at 361 (Harlan, J., concurring). In Minnesota v. Olson, 495 U.S. 91 (1990), the United States Supreme Court applied its privacy analysis by relying on the privacy expectations of the general community, based on longstanding customs.

One's legitimate expectation of privacy to his/her own DNA does not extinguish simply because his/her DNA was obtained by the State. Appellant argues that when evidence – in this case DNA - is seized from the person of the Defendant, the expectation of privacy in the use of that DNA is beyond question. Whether the DNA was used improperly is a separate and distinct issue that whether one has standing to challenge that use.

Under the appellate court's rationale, either 1) an individual could not even challenge the initial taking of his/her DNA, or 2) once the DNA is taken in a constitutional manner, the State can use it for whatever purpose it wants and the individual would have no recourse. This rationale is untenable and if allowed to stand, would improperly diminish the individuals privacy expectations and lead to further abuses. For all of these reasons, the appellate court's finding that Appellant does not maintain standing to challenge the use of his own DNA by the State of Ohio must be reversed.

Proposition of Law No. II: The State of Ohio does not have the authority to retain and/or subsequently use the DNA taken from an individual during a criminal investigation when that individual is acquitted of that crime.

While the Court of appeals based its decision up-on the lack of standing to raise the challenge, it went on to opine that even if there was standing to challenge the use of his own DNA, the onus of removing one's DNA from the state controlled database is placed upon the individual acquitted of a crime. This reasoning completely misses the point that the Defendant's DNA should have never been retained in the first place as he did not qualify under statutory law and the CODIS Manual.

Pursuant to section 17.60 (page 70) of the CODIS Manual, the DNA record/profile taken of Defendant-appellant in 2005 should have been removed since there was an acquittal. Moreover, under R.C. 109.573 and 2901.07, the State had no authority to maintain and subsequently use the DNA record/profile. That is why the State of Ohio recently amended said statutory law in Senate Bill 77 *to include* maintaining the DNA record/profile for “arrested person.” We note that said amendment does not apply retroactively.

The trial court erred when it denied said motion ruling finding “the State has the authority under 109.573.” However, neither R.C. 109.573 nor any other statute provides for the retention of DNA samples from persons who were acquitted of crimes. While other categories of individuals exist such as “missing persons” and “convicted felons,” Mr. Emerson does not qualify under any of these categories.

Again, in this case, the random search in the database should never have been conducted because not only was the search warrant affidavit defective, but Defendant-appellant was not a “convicted felon” or “person of interest” on the case. His sample was improperly retained in the database AFTER he was acquitted in 2005 and the State is prohibited from using said DNA under these facts and circumstances.

The Court of Appeals acknowledged that “Ohio’s scheme does not specify what should happen to validly obtained samples maintained in the database after acquittal.” (See pg. 8, Appendix). We disagree. Ohio’s scheme allows for the retention of DNA for certain classes of individuals. If one does not fall within those classifications, the DNA cannot be retained let alone subsequently used. Again, the fact that the State subsequently amended the provisions to expand the classifications supports our position. The Appellate

Court erred when – without any supporting rationale – it placed the onus upon the individual to take his improperly retained DNA from a database it should have never been entered into in the first place.

CONCLUSION

For all of these reasons, we respectfully request this Court reverse the decision of the lower courts and either vacate the verdict and/or remand the case back for further proceedings consistent with this Court's opinion.

Respectfully submitted,



BRIAN MORIARTY (0064128)

2000 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
216-566-8228
Attorney for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Brief was served via ordinary U.S. Mail, postage prepaid, this ^{15th} 1st day of September 2011 to: William Mason and/or Member of Staff; 1200 Ontario Street, Justice Center (9th floor), Cleveland, Ohio 44113


Brian Moriarty

APPENDIX

REQUEST PUBLICATION

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94413

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAJUAN C. EMERSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521612-A

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

RELEASED AND JOURNALIZED: February 10, 2011

ATTORNEY FOR APPELLANT

R. Brian Moriarty
R. Brian Moriarty, L.L.C.
2000 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Tiffany Hill
 Brian M. McDonough
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FILED AND JOURNALIZED
PER APP.R. 22(C)

FEB 10 2011

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY Gerald E. Fuerst DEP.

FRANK D. CELEBREZZE, JR., J.:

Appellant, Dajuan Emerson, challenges his convictions for aggravated murder and tampering with evidence. Raising five assignments of error, appellant argues that his DNA¹ profile was impermissibly included in a state DNA database, that his convictions are against the sufficiency and manifest weight of the evidence, that his statements made to the police during interrogation should have been suppressed, and that defense counsel was constitutionally deficient. After a thorough review of the record and law, we affirm.

On July 4, 2007, the Cleveland police responded to the home of Marnie Macon on Elton Road in Cleveland, Ohio. Officers found Macon stabbed to death and naked from the waist down. The police began the task of collecting evidence, including a knife, a beer can, and samples from a spot of blood found on a door knob inside the home. The police also noted a bottle of household cleaner laying on or near the victim and evidence that the knife as well as the victim's body had been cleaned in an apparent attempt to destroy evidence.

The case remained unsolved until 2009 when a positive DNA profile match from the bloody doorknob to one contained in the state DNA database led the Cleveland police to bring appellant in for questioning. When questioned about

¹ Deoxyribonucleic acid.

his familiarity with the Elton Road home, he denied ever having been there. However, once he learned of the DNA evidence, he said that he had been there on July 3 or 4, 2007, after he had met a woman at a bar and paid her money for sex, but he left her unharmed. Officers prepared a written statement for appellant to sign detailing this discussion, but appellant refused to sign.

Appellant was indicted by a Cuyahoga County grand jury on charges of aggravated murder in violation of R.C. 2903.01, aggravated burglary in violation of R.C. 2911.11, and tampering with evidence in violation of R.C. 2921.12. He filed a motion to suppress his statements to the police and a supplementary motion seeking to suppress his DNA identification. On October 16, 2009, the trial court held a hearing on these motions. The evidence presented at the hearing demonstrated that, as a result of a 2005 rape investigation, a sample of appellant's DNA was lawfully obtained and entered into the state DNA database as a known suspect. Appellant was tried and acquitted of those 2005 charges, but his DNA profile remained in the state database.

Then, in 2009, a DNA profile was obtained from the blood left on the doorknob inside Macon's home. This profile of an unknown individual was entered into the state database and matched appellant's profile obtained from the 2005 investigation. Appellant argues that the statutory scheme establishing the state database did not allow for the retention of records of acquitted

individuals, and therefore, the identification and everything flowing therefrom must be suppressed. The trial court determined that the state had the authority to maintain the records and denied appellant's motion to suppress the DNA identification and his statements to the police.

A jury trial commenced on October 19, 2009 and resulted in appellant being found guilty of aggravated murder and tampering with evidence. The trial court dismissed the charge of aggravated burglary pursuant to appellant's Crim.R. 29 motion. Appellant was sentenced to an aggregate prison term of 25 years-to-life on November 18, 2009.² Appellant now timely appeals, citing five assignments of error.

Law and Analysis

Appellant first argues that "[t]he trial court erred and/or abused its discretion when it denied [his] motion to suppress." Within this assigned error are two issues: the first deals with the retention of appellant's DNA profile in the state database following his acquittal in 2005; the second deals with the voluntary waiver of his Miranda rights when giving a statement to the Cleveland police.

² Appellant was sentenced to a term of incarceration of life with parole eligibility after 25 years for the unclassified aggravated murder conviction and a concurrent term of incarceration of one year for tampering with evidence.

The Retention of DNA Records

Appellant raises an issue not previously addressed by appellate courts in Ohio. Arguing that R.C. 2901.07 and 109.573 do not authorize the continued retention of the DNA profile of one acquitted of a crime, appellant asserts his identification should have been suppressed.

“In a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. However, without deference to the trial court’s conclusion, it must be determined independently whether, as a matter of law, the facts meet the appropriate legal standard.” (Internal citations omitted.) *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172.

The Combined DNA Index System (“CODIS”) “is a computerized program designed to house DNA profiles from convicted offenders, forensic samples, suspects, missing persons, unidentified remains and relatives of missing persons in various searchable databases.” Baringer, *CODIS Methods Manual* (Rev. 5 2009), 3. These profiles are generated using DNA samples that are processed to create a DNA profile unique to the individual.³ CODIS has three levels — local, state, and national, with the Cuyahoga County Coroner’s Office controlling the

³ Except, possibly, in the case of identical twins.

local database, the Ohio Bureau of Criminal Identification and Investigation ("BCI") controlling the state database, and the Federal Bureau of Investigation maintaining the federal database. *Id.* Former R.C. 2901.07, as it existed prior to its amendment in 2010, authorized the creation and maintenance of a DNA profile database populated with DNA profiles from convicted persons. Current R.C. 2901.07 adds authority to collect and store the profiles of those arrested on felony charges as well as those convicted of a felony. R.C. 2901.07(B)(1). R.C. 109.573 is a similar statute dealing with records from "forensic casework or from crime scenes, specimens from anonymous and unidentified sources[,] and missing persons and their relatives. All 50 states have such legislation. *State v. Gaines*, Cuyahoga App. No. 91179, 2009-Ohio-622, ¶58.

A DNA profile is a record separate and distinct from the DNA sample from which it is created. Therefore, we must address the state's contention that appellant lacks standing to challenge the search. More specifically, the state alleges that appellant has no ownership interest in the DNA profile created from his validly collected DNA sample. "Under Fourth Amendment law, the standing and search and seizure inquiries 'merge into one: whether governmental officials violated any legitimate expectation of privacy held by petitioner.' *Rawlings v. Kentucky*, 448 U.S. 98, 106, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). Fourth Amendment rights are personal and may not be vicariously asserted. *Rakas v.*

Illinois, 439 U.S. 128, 133-34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).” *Smith v. State* (Ind. 2001), 744 N.E.2d 437, 439.

In *Smith*, a defendant challenged a DNA search and match involving Indiana’s DNA database using a DNA profile that remained in the state database after acquittal of the crimes for which the sample was taken. The Indiana Supreme Court ruled that the trial court properly denied a motion to suppress based on the Fourth Amendment because the sample was lawfully obtained during the first investigation. That court held, “once DNA is used to create a profile, the profile becomes the property of the Crime Lab. Thus, [a defendant] had no possessory or ownership interest in it. Nor does society recognize an expectation of privacy in records made for public purposes from legitimately obtained samples.” *Id.* at 439. See, also, *State v. Barkley* (2001), 144 N.C.App. 514, 519, 551 S.E.2d 131 (“It is also clear that once a person’s blood sample has been obtained lawfully, he can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the use of that sample. Privacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant’s person.”).

Analogizing the taking of a DNA sample with the taking of fingerprints, this court has previously noted that a convicted individual’s privacy interest in

these identifying records is particularly weak. *Gaines*, supra, at ¶58, citing *In re Nicholson* (1999), 132 Ohio App.3d 303, 724 N.E.2d 1217, and *Davis v. Mississippi* (1969), 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676.

The state also sees similarity in a Georgia appellate case, *Fortune v. State* (2009), 300 Ga.App. 550, 685 S.E.2d 466, and argues that its analysis and holding should apply here. In *Fortune*, a DNA sample was collected from seminal fluid found on carpeting at a crime scene, and a DNA profile was prepared and entered into Georgia's state database. This DNA profile of an unknown individual was entered into the federal CODIS database and labeled with a Georgia criminal case number related to the crime. This criminal case number and related information showed that Fortune was the main suspect and was tried and acquitted in that case. Later, a DNA profile obtained from lip balm found at a crime scene involving a separate criminal investigation was matched to the unknown DNA profile generated from the sample collected from the carpet stain. *Id.* at 554. However, because this profile contained a criminal case number that identified Fortune, he argued that it was not of an "unknown" individual and should have been purged from the database after his acquittal. The Georgia appellate court noted that the defendant could have requested expungement of the criminal records from the first case pursuant to Georgia's

expungement statute. The expungement statute is similar to Ohio's statutory scheme.

Like Georgia's DNA collection statutes, Ohio's scheme does not specify what should happen to validly obtained samples maintained in the database after acquittal. Citing *Smith*, supra, the *Fortune* court declined to adopt an exclusionary rule in the case, noting that "[e]xclusion of extremely valuable evidence in crimes that often leave little other trace is a major social cost,' and 'the potential for abuse in the future is not sufficiently clear to warrant adopting a rule excluding evidence from the database on the ground that it was obtained or retained beyond the authorized classifications.'" *Id.* at 556, quoting *Smith*, at 440.

Citing to Section 17.60 of the CODIS Manual, appellant claims the record should have been removed. However, this section dealing with expungement does not require removal of records after acquittal. Had appellant desired records of this earlier unsuccessful prosecution to be expunged, he could have requested expungement, and then any DNA profile would have been removed pursuant to this section. Although not clear, Ohio appears to place the onus of removal from the state database on those acquitted of a crime. At the very least, the exclusionary rule should not be applied to this case where the DNA profile was validly obtained from the first case, appellant had no possessory or privacy

interest in the profile, and the federal CODIS regulations offer a significant deterrent in the form of exclusion from the federal database. See *Smith* at 440.

Here, because appellant has no possessory interest in his DNA profile generated from a lawfully obtained DNA sample, he lacks standing to challenge the later CODIS records search as a violation of his Fourth Amendment rights. This view is also shared by Maryland. See *Williamson v. State* (2010), 413 Md. 521, 993 A.2d 626.

Appellant also argues that the search warrant issued to obtain a sample of appellant's DNA used to confirm the match already obtained from the CODIS system was defective and should also result in the exclusion of the evidence.

Detective Joseph Chojnowski testified at the suppression hearing that he received a report of a DNA profile match from the Cuyahoga County Coroner's office. He then applied for and received a search warrant to obtain a DNA sample from appellant via buccal swab. Appellant argued this warrant was defective because the attached affidavit described CODIS as a "database that stores sample DNA from convicted felons in the State of Ohio." In reality, CODIS stores DNA profiles from several classes of individuals, including convicted felons.

"An affidavit supporting a search warrant enjoys a presumption of validity. To successfully attack the veracity of a facially sufficient affidavit, a

defendant must show by a preponderance of the evidence that the affiant made a false statement either 'intentionally or with a reckless disregard for the truth.' 'Reckless disregard' means that the affiant had serious doubts about an allegation's truth. Further, even if the affidavit contains false statements made intentionally or recklessly, a warrant based on the affidavit is still valid unless, 'with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause * * *.'" *State v. Taylor*, 174 Ohio App.3d 477, 482, 2007-Ohio-7066, 882 N.E.2d 945.

Here, if the statement is removed, the warrant still establishes probable cause to compel a DNA sample to confirm the match obtained from a search of the CODIS system. This warrant was not invalid.

The trial court ruled that the state had authority to collect and retain appellant's DNA profile under R.C. 109.573. The court also indicated that the sample obtained by Det. Chojnowski was taken in good faith. While the language used in R.C. 109.573, which allows for collection and storage of DNA profiles from "forensic casework," may be so broad as to encompass the facts before us, appellant lacks standing to challenge the search as violative of his Fourth Amendment right, and the exclusionary rule should not be applied to this case even if the DNA database search was beyond the scope of the statute.

Miranda Violation

Appellant also argued in his suppression motions that his statements made to the Cleveland police during an interview should be suppressed, and the trial court erred in not so holding. "Pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694, statements 'stemming from custodial interrogation of the defendant' must be suppressed unless the defendant had been informed of his Fifth and Sixth Amendment rights before being questioned. 'Custodial interrogation' means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' *Id.*" *State v. Preztak*, 181 Ohio App.3d 106, 2009-Ohio-621, 907 N.E.2d 1254, ¶23. "The State bears the burden of establishing, by a preponderance of the evidence, that the defendant knowingly, intelligently, and voluntarily waived his Miranda rights based on the totality of the circumstances surrounding the investigation. *State v. Gumm* (1995), 73 Ohio St.3d 413, 429, 653 N.E.2d 253." *Id.* at ¶26, quoting *State v. Williams*, Cuyahoga App. No. 82094, 2003-Ohio-4811, ¶12.

With regard to the suppression of appellant's oral statements made to the police officers, Det. Chojnowski testified that he and another officer interviewed appellant without recording the interview. However, Det. Chojnowski did type the statements appellant made. During the interview, appellant requested

counsel and the interview ceased. Appellant refused to sign the typed statement. The first thing evidenced in the statement was that appellant was read his Miranda rights and voluntarily waived them. Det. Chojnowski testified that appellant was read his Miranda rights and voluntarily waived them. He also testified that the standard Miranda warnings were posted in large font on the wall appellant was facing for the entire duration of the interview. From the entirety of the evidence offered on this issue,⁴ the trial court did not err in finding that appellant validly waived his Miranda rights and voluntarily gave the Cleveland police an oral statement.

Sufficiency and Manifest Weight

In his second and third assignments of error, appellant argues that “[t]he guilty verdict is based upon insufficient evidence[,]” and “[t]he guilty verdicts are against the manifest weight of the evidence.”

Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148. A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs*

⁴ Appellant never claimed in his written suppression motion or at the suppression hearing that he was not read his Miranda rights, but that he did not knowingly and voluntarily waive them. The fact that appellant invoked his right to counsel indicates that appellant was made aware of these rights at the time of interrogation.

v. Florida (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

Where there is substantial evidence upon which the trier of fact has based its verdict, a reviewing court abuses its discretion in substituting its judgment for that of the trier of fact as to the weight and sufficiency of the evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 156, 529 N.E.2d 1236.

The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. On review, the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492; *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

Sufficiency of the evidence is subjected to a different standard than is manifest weight of the evidence. Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the factfinder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and duty to weigh the evidence and to determine whether the findings of * * * the trier of

facts were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

The United States Supreme Court recognized the distinction in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The court held in *Tibbs*, supra, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. *Id.* at 43. Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated:

"The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.* at 720.

Aggravated murder, as it relates to this case, prohibits purposely, and with prior calculation and design, causing the death of another. R.C. 2903.01(A).

Appellant argues there was no evidence that he acted with prior calculation and design. "The section employs the phrase, 'prior calculation and design,' to indicate studied care in planning or analyzing the means of the crime, as well as a scheme compassing the death of the victim. Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves, but they must amount to more than momentary deliberation." See *State v. Keenan*, 81 Ohio St.3d 133, 157, 1998-Ohio-459, 689 N.E.2d 929. "Prior calculation and design requires something more than instantaneous deliberation. However, prior calculation and design can be found even when the killer quickly conceived and executed the plan to kill 'within a few minutes.' It is not required that a prolonged thought process be present. There is no bright line test to determine whether prior calculation and design are present, rather each case must be decided on a case-by-case basis." (Internal citations omitted.) *State v. Torres*, Cuyahoga App. No. 86530, 2006-Ohio-3696, ¶46.

"Some of the important factors to be examined and considered in deciding whether a homicide was committed with prior calculation and design include: whether the accused knew the victim prior to the crime, as opposed to a random meeting, and if the victim was known to him whether the relationship had been strained; whether thought and preparation were given by the accused to the

weapon he used to kill and/or the site on which the homicide was to be committed as compared to no such thought or preparation; and *whether the act was drawn out over a period of time as against an almost instantaneous eruption of events*. These factors must be considered and weighed together and viewed under the totality of all circumstances of the homicide.” (Emphasis added.) *State v. Jenkins* (1976), 48 Ohio App.2d 99, 102, 355 N.E.2d 825, citing *State v. Channer* (1926), 115 Ohio St. 350, 154 N.E. 728; *State v. Manago* (1974), 38 Ohio St.2d 223, 313 N.E.2d 10.

In *Torres*, we held that a “jury could find prior calculation and design, necessary for an aggravated murder conviction, based on the protracted nature of the murders.” *Id.* at ¶47. In that case, two people were discovered stabbed and bludgeoned to death in the basement of a home. One body contained 37 stab wounds and blunt force trauma to the head, and the other had 20 stab wounds and blunt force trauma. In the present case, the victim was stabbed 74 times including several defensive wounds.

In *State v. Jones*, Cuyahoga App. No. 88134, 2007-Ohio-1301, ¶38, this court found sufficient evidence of prior calculation and design, noting the victim “suffered over twenty-five blows. Further, it is clear from the gruesome crime scene that [the victim’s] beating occurred throughout the entire house. The massive amount of blood in several rooms of the house indicate that [the

victim's] murder was not a single, isolated event, but rather an elongated, deliberate attack. Jones used several different weapons throughout his attack on [the victim] and carried the attack through several different rooms of the house. It is also apparent that the attack took place over time and was not instantaneous, since Jones took the time to drag [the victim] through several rooms of the home, strip off the majority of his clothing, urinate on him, and then dump the contents of a mop bucket on him." (Internal citations omitted.)

Similar events took place in this case. The attack was protracted, occurring in several rooms of the victim's home. Also significant was the testimony of the coroner, Dr. Daniel Galita, indicating that the victim survived for as long as an hour after the stab wounds were inflicted, but was unable to move because her spinal cord had been damaged. While the victim lay bleeding to death, appellant was cleaning her body and the murder weapon. Sufficient evidence exists in the record to allow a jury to determine that appellant acted with prior calculation and design.

Appellant also argues that there was no evidence that he tampered with evidence. R.C. 2921.12(A)(1) criminalizes the alteration, destruction, concealment, or removal of any thing "with purpose to impair its value or availability as evidence in [a] proceeding" by one "knowing that an official proceeding or investigation is in progress, or is about to be or likely to be

instituted, * * * [.]” Here, there is significant evidence that appellant attempted to sanitize the crime scene in an effort to hinder investigation. An empty bottle of cleaning solution was found next to the victim’s body. The coroner’s report and testimony also noted the victim’s body had been cleaned with a household cleaning product. The knife collected at the scene, believed to be the murder weapon, also had been cleaned. This demonstrates that sufficient evidence existed to convict appellant of tampering with evidence.

Appellant’s convictions are also not against the manifest weight of the evidence. Appellant’s blood, along with the blood of the victim, was found on the knife believed to be the murder weapon. Appellant’s DNA was also found on a beverage can, and his blood was on an interior doorknob in victim’s home. Appellant admitted to being at the victim’s home around the time of her killing after first denying ever having visiting her there. While several other DNA samples collected from the crime scene were not matches to appellant, the sample collected from the knife was a match. Appellant has failed to convince this court that a manifest miscarriage of justice has occurred in this case. Therefore, this assignment of error is overruled.

Jury Instructions

Appellant also claims that “[t]he trial court abused its discretion in failing to give jury instructions for a lesser included offense.”

“When reviewing a trial court’s jury instructions, the proper standard of review for an appellate court is whether the trial court’s refusal to give a requested instruction or giving an instruction constituted an abuse of discretion under the facts and circumstances of the case. See *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. In addition, jury instructions are reviewed in their entirety to determine if they contain prejudicial error. *State v. Porter* (1968), 14 Ohio St.2d 10, 235 N.E.2d 520.” *State v. Williams*, Cuyahoga App. No. 90845, 2009-Ohio-2026, ¶ 50.

Here, appellant agreed to the jury instructions as proposed by the trial court and never requested a lesser-included-offense instruction. Appellant has waived all but plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332, at the syllabus. Plain error “should be applied with utmost caution and should be invoked only to prevent a clear miscarriage of justice.” *Id.* at 14. Plain error exists only where it is clear that the verdict would have been otherwise but for the error. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

We find no error in the jury charge here. A trial court must charge the jury on a lesser included offense “only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.” *State v. Thomas* (1988), 40 Ohio

St.3d 213, 216, 533 N.E.2d 286. Here, there is no dearth of evidence that would support an acquittal. Therefore, the trial court did not err in not sua sponte giving an instruction on a lesser included offense. This assignment of error is overruled.

Ineffective Assistance of Counsel

Finally, appellant argues that he was "denied effective assistance of counsel." In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, that, "[w]hen considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial

violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 2 O.O.3d 495, 498, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668 * * *."

"Even assuming that counsel's performance was ineffective, this is not sufficient to warrant reversal of a conviction. 'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365 [101 S.Ct. 665, 66 L.Ed.2d 564] (1981).' *Strickland*, supra, 466 U.S. at 691, 104 S.Ct. at 2066. To warrant reversal, [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Strickland*, supra, at 694, 104 S.Ct. at 2068. In adopting this standard, it is important to note that the court specifically rejected lesser standards for demonstrating prejudice." *Bradley* at 142.

“Accordingly, to show that a defendant has been prejudiced by counsel’s deficient performance, 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.” *Id.* at 143.

Here, appellant argues that trial counsel was deficient for failing to file a motion to investigate and invalidate the warrant used to compel appellant to submit a DNA sample based on the language in its attached affidavit that described the CODIS database as a “database that stores sample DNA from convicted felons in the State of Ohio.” Appellant has not shown that a challenge of the inclusion of this statement in the warrant would have changed the outcome of the matter. Appellant argues that he was not a convicted felon, and the warrant would not have been issued without this mistaken reference. The challenged line does not state that appellant was a convicted felon or that his DNA profile was stored in the database as a result of being a convicted felon. The challenged averment merely inaccurately describes the CODIS database by leaving out all the other classes of profiles that are stored therein. Removing this sentence would likely have had no impact on the issuance of the warrant. Therefore, appellant has failed to demonstrate that a *Franks*⁵ hearing to challenge the validity of the warrant would have been successful, especially

⁵ See *Franks v. Delaware* (1978), 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667.

given the ruling of the trial court that the state had the authority to maintain appellant's DNA profile under R.C. 109.573.

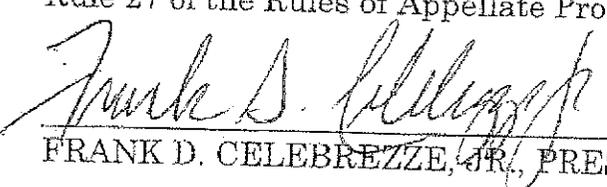
Having overruled all of appellant's assigned errors, we affirm his convictions.

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 convictions 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.


FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

JAMES J. SWEENEY, J., and
SEAN C. GALLAGHER, J., CONCUR

ORC Ann. 109.573 (2011)

§ 109.573. DNA laboratory and database; unidentified person database; relatives of missing persons database

(A) As used in this section:

(1) "DNA" means human deoxyribonucleic acid.

(2) "DNA analysis" means a laboratory analysis of a DNA specimen to identify DNA characteristics and to create a DNA record.

(3) "DNA database" means a collection of DNA records from forensic casework or from crime scenes, specimens from anonymous and unidentified sources, and records collected pursuant to sections 2152.74 and 2901.07 of the Revised Code and a population statistics database for determining the frequency of occurrence of characteristics in DNA records.

(4) "DNA record" means the objective result of a DNA analysis of a DNA specimen, including representations of DNA fragment lengths, digital images of autoradiographs, discrete allele assignment numbers, and other DNA specimen characteristics that aid in establishing the identity of an individual.

(5) "DNA specimen" includes human blood cells or physiological tissues or body fluids.

(6) "Unidentified person database" means a collection of DNA records, and, on and after May 21, 1998, of fingerprint and photograph records, of unidentified human corpses, human remains, or living individuals.

(7) "Relatives of missing persons database" means a collection of DNA records of persons related by consanguinity to a missing person.

(8) "Law enforcement agency" means a police department, the office of a sheriff, the state highway patrol, a county prosecuting attorney, or a federal, state, or local governmental body that enforces criminal laws and that has employees who have a statutory power of arrest.

(9) "Administration of criminal justice" means the performance of detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. "Administration of criminal justice" also includes criminal identification activities and the collection, storage, and dissemination of criminal history record information.

(B) (1) The superintendent of the bureau of criminal identification and investigation may do all of the following:

(a) Establish and maintain a state DNA laboratory to perform DNA analyses of DNA specimens;

(b) Establish and maintain a DNA database;

(c) Establish and maintain an unidentified person database to aid in the establishment of the identity of unknown human corpses, human remains, or living individuals;

(d) Establish and maintain a relatives of missing persons database for comparison with the unidentified person database to aid in the establishment of the identity of unknown human corpses, human remains, and living individuals.

(2) If the bureau of criminal identification and investigation establishes and maintains a DNA laboratory and a DNA database, the bureau may use or disclose information regarding DNA records for the following purposes:

(a) The bureau may disclose information to a law enforcement agency for the administration of criminal justice.

(b) The bureau shall disclose pursuant to a court order issued under section 3111.09 of the Revised Code any information necessary to determine the existence of a parent and child relationship in an action brought under sections 3111.01 to 3111.18 of the Revised Code.

(c) The bureau may use or disclose information from the population statistics database, for identification research and protocol development, or for quality control purposes.

(3) If the bureau of criminal identification and investigation establishes and maintains a relatives of missing persons database, all of the following apply:

(a) If a person has disappeared and has been continuously absent from the person's place of last domicile for a thirty-day or longer period of time without being heard from during the period, persons related by consanguinity to the missing person may submit to the bureau a DNA specimen, the bureau may include the DNA record of the specimen in the relatives of missing persons database, and, if the bureau does not include the DNA record of the specimen in the relatives of missing persons database, the bureau shall retain the DNA record for future reference and inclusion as appropriate in that database.

(b) The bureau shall not charge a fee for the submission of a DNA specimen pursuant to division (B)(3)(a) of this section.

(c) If the DNA specimen submitted pursuant to division (B)(3)(a) of this section is collected by withdrawing blood from the person or a similarly invasive procedure, a physician, registered nurse, licensed practical nurse, duly licensed clinical laboratory technician, or other qualified medical practitioner shall conduct the collection procedure for the DNA specimen submitted pursuant to division (B)(3)(a) of this section and shall collect the DNA specimen in a medically approved manner. If the DNA specimen is collected by swabbing for buccal cells or a similarly noninvasive procedure, division (B)(3)(c) of this section does not require that the DNA specimen be collected by a qualified medical practitioner of that nature. No later than fifteen days after the date of the collection of the DNA specimen, the person conducting the DNA specimen collection procedure shall cause the DNA specimen to be forwarded to the bureau of criminal identification and investigation in accordance with procedures established by the superintendent of the bureau under division (H) of this section. The bureau may provide the specimen vials, mailing tubes, labels, postage, and instruction needed for the collection and forwarding of the DNA specimen to the bureau.

(d) The superintendent, in the superintendent's discretion, may compare DNA records in the relatives of missing persons database with the DNA records in the unidentified person database.

(4) If the bureau of criminal identification and investigation establishes and maintains an unidentified person database and if the superintendent of the bureau identifies a matching DNA record for the DNA record of a person or deceased person whose DNA record is contained in the unidentified person database, the superintendent shall inform the coroner who submitted or the law enforcement agency that submitted the DNA specimen to the bureau of the match and, if possible, of the identity of the unidentified person.

(5) The bureau of criminal identification and investigation may enter into a contract with a qualified public or private laboratory to perform DNA analyses, DNA specimen maintenance, preservation, and storage, DNA record keeping, and other duties required of the bureau under this section. A public or private laboratory under contract with the bureau shall follow quality assurance and privacy requirements established by the superintendent of the bureau.

(C) The superintendent of the bureau of criminal identification and investigation shall establish procedures for entering into the DNA database the DNA records submitted pursuant to sections 2152.74 and 2901.07 of the Revised Code and for determining an order of priority for entry of the DNA records based on the types of offenses committed by the persons whose records are submitted and the available resources of the bureau.

(D) When a DNA record is derived from a DNA specimen provided pursuant to section 2152.74 or 2901.07 of the Revised Code, the bureau of criminal

identification and investigation shall attach to the DNA record personal identification information that identifies the person from whom the DNA specimen was taken. The personal identification information may include the subject person's fingerprints and any other information the bureau determines necessary. The DNA record and personal identification information attached to it shall be used only for the purpose of personal identification or for a purpose specified in this section.

(E) DNA records, DNA specimens, fingerprints, and photographs that the bureau of criminal identification and investigation receives pursuant to this section and sections 313.08, 2152.74, and 2901.07 of the Revised Code and personal identification information attached to a DNA record are not public records under section 149.43 of the Revised Code.

(F) The bureau of criminal identification and investigation may charge a reasonable fee for providing information pursuant to this section to any law enforcement agency located in another state.

(G) (1) No person who because of the person's employment or official position has access to a DNA specimen, a DNA record, or other information contained in the DNA database that identifies an individual shall knowingly disclose that specimen, record, or information to any person or agency not entitled to receive it or otherwise shall misuse that specimen, record, or information.

(2) No person without authorization or privilege to obtain information contained in the DNA database that identifies an individual person shall purposely obtain that information.

(H) The superintendent of the bureau of criminal identification and investigation shall establish procedures for all of the following:

(1) The forwarding to the bureau of DNA specimens collected pursuant to division (H) of this section and sections 313.08, 2152.74, and 2901.07 of the Revised Code and of fingerprints and photographs collected pursuant to section 313.08 of the Revised Code;

(2) The collection, maintenance, preservation, and analysis of DNA specimens;

(3) The creation, maintenance, and operation of the DNA database;

(4) The use and dissemination of information from the DNA database;

(5) The creation, maintenance, and operation of the unidentified person database;

(6) The use and dissemination of information from the unidentified person database;

(7) The creation, maintenance, and operation of the relatives of missing persons database;

(8) The use and dissemination of information from the relatives of missing persons database;

(9) The verification of entities requesting DNA records and other DNA information from the bureau and the authority of the entity to receive the information;

(10) The operation of the bureau and responsibilities of employees of the bureau with respect to the activities described in this section.

(I) In conducting DNA analyses of DNA specimens, the state DNA laboratory and any laboratory with which the bureau has entered into a contract pursuant to division (B)(5) of this section shall give DNA analyses of DNA specimens that relate to ongoing criminal investigations or prosecutions priority over DNA analyses of DNA specimens that relate to applications made pursuant to section 2953.73 of the Revised Code.

(J) The attorney general may develop procedures for entering into the national DNA index system the DNA records submitted pursuant to division (B)(1) of section 2901.07 of the Revised Code.

Return to Practitioner's Toolbox History:

146 v H 5 (Eff 8-30-95); 146 v H 124 (Eff 3-31-97); 147 v S 140 (Eff 5-21-98); 148 v S 180 (Eff 3-22-2001); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 427. Eff 8-29-2002; 150 v S 11, § 1, eff. 10-29-03; 150 v H 525, § 1, eff. 5-18-05; 153 v S 77, § 1, eff. 7-6-10.

Return to Practitioner's Toolbox Section Notes:

EFFECT OF AMENDMENTS

153 v S 77, effective July 6, 2010, deleted "or 2953.82" following "section 2953.73" in (I); and added (J).

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

Go to the Ohio Code Archive Directory

ORC Ann. 2901.07 (2011)

§ 2901.07. Collection of DNA specimen from adult arrested for felony offense; collection of DNA specimen from felony offenders and certain misdemeanor offenders

(A) As used in this section:

(1) "DNA analysis" and "DNA specimen" have the same meanings as in section 109.573 [109.57.3] of the Revised Code.

(2) "Jail" and "community-based correctional facility" have the same meanings as in section 2929.01 of the Revised Code.

(3) "Post-release control" has the same meaning as in section 2967.01 of the Revised Code.

(4) "Head of the arresting law enforcement agency" means whichever of the following is applicable regarding the arrest in question:

(a) If the arrest was made by a sheriff or a deputy sheriff, the sheriff who made the arrest or who employs the deputy sheriff who made the arrest;

(b) If the arrest was made by a law enforcement officer of a law enforcement agency of a municipal corporation, the chief of police, marshal, or other chief law enforcement officer of the agency that employs the officer who made the arrest;

(c) If the arrest was made by a constable or a law enforcement officer of a township police department or police district police force, the constable who made the arrest or the chief law enforcement officer of the department or agency that employs the officer who made the arrest;

(d) If the arrest was made by the superintendent or a trooper of the state highway patrol, the superintendent of the state highway patrol;

(e) If the arrest was made by a law enforcement officer not identified in division (A)(4)(a), (b), (c), or (d) of this section, the chief law enforcement officer of the law enforcement agency that employs the officer who made the arrest.

(B) (1) On and after July 1, 2011, a person who is eighteen years of age or older and who is arrested on or after July 1, 2011, for a felony offense shall submit to a DNA specimen collection procedure administered by the head of the arresting law enforcement agency. The head of the arresting law enforcement agency shall cause the DNA specimen to be collected from the person during the intake process at the jail, community-based correctional facility, detention facility, or law enforcement agency office or station to which the arrested person is taken after the arrest. The head of the arresting law enforcement agency shall cause the DNA specimen to be collected in accordance with division (C) of this section.

(2) Regardless of when the conviction occurred or the guilty plea was entered, a person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a felony, who is sentenced to a prison term or to a community residential sanction in a jail or community-based correctional facility for that offense pursuant to section 2929.16 of the Revised Code, and who does not provide a DNA specimen pursuant to division (B)(1) of this section, and a person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a misdemeanor offense listed in division (D) of this section, who is sentenced to a term of imprisonment for that offense, and who does not provide a DNA specimen pursuant to division (B)(1) of this section, shall submit to a DNA specimen collection procedure administered by the director of rehabilitation and correction or the chief administrative officer of the jail or other detention facility in which the person is serving the term of imprisonment. If the person serves the prison term in a state correctional institution, the director of rehabilitation and correction shall cause the DNA specimen to be collected from the person during the intake process at the reception facility designated by the director. If the person serves the community residential sanction or term of imprisonment in a jail, a community-based correctional facility, or another county, multicounty, municipal, municipal-county, or multicounty-municipal detention facility, the chief administrative officer of the jail, community-based correctional facility, or detention facility shall cause the DNA specimen to be collected from the person during the intake process at the jail, community-based correctional facility, or detention facility. The DNA specimen shall be collected in accordance with division (C) of this section.

(3) Regardless of when the conviction occurred or the guilty plea was entered, if a person has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a felony offense or a misdemeanor offense listed in division (D) of this section, is serving a prison term, community residential sanction, or term of imprisonment for that offense, and does not provide a DNA specimen pursuant to division (B)(1) or (2) of this section, prior to the person's release from the prison term, community residential sanction, or imprisonment, the person shall submit to, and the director of rehabilitation and correction or the chief administrative officer of the jail, community-based correctional facility, or detention facility in which the person is serving the prison term, community residential sanction, or term of imprisonment shall administer, a DNA specimen collection procedure at the state correctional

institution, jail, community-based correctional facility, or detention facility in which the person is serving the prison term, community residential sanction, or term of imprisonment. The DNA specimen shall be collected in accordance with division (C) of this section.

(4) (a) Regardless of when the conviction occurred or the guilty plea was entered, if a person has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a felony offense or a misdemeanor offense listed in division (D) of this section and the person is on probation, released on parole, under transitional control, on community control, on post-release control, or under any other type of supervised release under the supervision of a probation department or the adult parole authority for that offense, and did not provide a DNA specimen pursuant to division (B)(1), (2), or (3) of this section, the person shall submit to a DNA specimen collection procedure administered by the chief administrative officer of the probation department or the adult parole authority. The DNA specimen shall be collected in accordance with division (C) of this section. If the person refuses to submit to a DNA specimen collection procedure as provided in this division, the person may be subject to the provisions of section 2967.15 of the Revised Code.

(b) If a person to whom division (B)(4)(a) of this section applies is sent to jail or is returned to a jail, community-based correctional facility, or state correctional institution for a violation of the terms and conditions of the probation, parole, transitional control, other release, or post-release control, if the person was or will be serving a term of imprisonment, prison term, or community residential sanction for committing a felony offense or for committing a misdemeanor offense listed in division (D) of this section, and if the person did not provide a DNA specimen pursuant to division (B)(1), (2), (3), or (4)(a) of this section, the person shall submit to, and the director of rehabilitation and correction or the chief administrative officer of the jail or community-based correctional facility shall administer, a DNA specimen collection procedure at the jail, community-based correctional facility, or state correctional institution in which the person is serving the term of imprisonment, prison term, or community residential sanction. The DNA specimen shall be collected from the person in accordance with division (C) of this section.

(5) Regardless of when the conviction occurred or the guilty plea was entered, if a person has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a felony offense or a misdemeanor offense listed in division (D) of this section, the person is not sentenced to a prison term, a community residential sanction in a jail or community-based correctional facility, a term of imprisonment, or any type of supervised release under the supervision of a probation department or the adult parole authority, and the person does not provide a DNA specimen pursuant to division (B)(1), (2), (3), (4)(a), or (4)(b) of this section, the sentencing court shall order the person to report to the county probation department immediately after sentencing to submit to a DNA specimen collection procedure administered by the chief administrative officer of the county probation office. If the person is incarcerated at the time of sentencing, the person shall submit to a DNA specimen

collection procedure administered by the director of rehabilitation and correction or the chief administrative officer of the jail or other detention facility in which the person is incarcerated. The DNA specimen shall be collected in accordance with division (C) of this section.

(C) If the DNA specimen is collected by withdrawing blood from the person or a similarly invasive procedure, a physician, registered nurse, licensed practical nurse, duly licensed clinical laboratory technician, or other qualified medical practitioner shall collect in a medically approved manner the DNA specimen required to be collected pursuant to division (B) of this section. If the DNA specimen is collected by swabbing for buccal cells or a similarly noninvasive procedure, this section does not require that the DNA specimen be collected by a qualified medical practitioner of that nature. No later than fifteen days after the date of the collection of the DNA specimen, the head of the arresting law enforcement agency regarding a DNA specimen taken pursuant to division (B)(1) of this section, the director of rehabilitation and correction or the chief administrative officer of the jail, community-based correctional facility, or other county, multicounty, municipal, municipal-county, or multicounty-municipal detention facility, in which the person is serving the prison term, community residential sanction, or term of imprisonment regarding a DNA specimen taken pursuant to division (B)(2), (3), or (4)(b) of this section, the chief administrative officer of the probation department or the adult parole authority regarding a DNA specimen taken pursuant to division (B)(4)(a) of this section, or the chief administrative officer of the county probation office, the director of rehabilitation and correction, or the chief administrative officer of the jail or other detention facility in which the person is incarcerated regarding a DNA specimen taken pursuant to division (B)(5) of this section, whichever is applicable, shall cause the DNA specimen to be forwarded to the bureau of criminal identification and investigation in accordance with procedures established by the superintendent of the bureau under division (H) of section 109.573 [109.57.3] of the Revised Code. The bureau shall provide the specimen vials, mailing tubes, labels, postage, and instructions needed for the collection and forwarding of the DNA specimen to the bureau.

(D) The DNA specimen collection duty set forth in division (B)(1) of this section applies to any person who is eighteen years of age or older and who is arrested on or after July 1, 2011, for any felony offense. The DNA specimen collection duties set forth in divisions (B)(2), (3), (4)(a), (4)(b), and (5) of this section apply to any person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to any felony offense or any of the following misdemeanor offenses:

(1) A misdemeanor violation, an attempt to commit a misdemeanor violation, or complicity in committing a misdemeanor violation of section 2907.04 of the Revised Code;

(2) A misdemeanor violation of any law that arose out of the same facts and circumstances and same act as did a charge against the person of a violation of

section 2903.01, 2903.02, 2905.01, 2907.02, 2907.03, 2907.04, 2907.05, or 2911.11 of the Revised Code that previously was dismissed or amended or as did a charge against the person of a violation of section 2907.12 of the Revised Code as it existed prior to September 3, 1996, that previously was dismissed or amended;

(3) A misdemeanor violation of section 2919.23 of the Revised Code that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had it been committed prior to that date;

(4) A sexually oriented offense or a child-victim oriented offense, both as defined in section 2950.01 of the Revised Code, that is a misdemeanor, if, in relation to that offense, the offender is a tier III sex offender/child-victim offender, as defined in section 2950.01 of the Revised Code.

(E) The director of rehabilitation and correction may prescribe rules in accordance with Chapter 119. of the Revised Code to collect a DNA specimen, as provided in this section, from an offender whose supervision is transferred from another state to this state in accordance with the interstate compact for adult offender supervision described in section 5149.21 of the Revised Code.

Return to Practioner's Toolbox History:

146 v H 5 (Eff 8-30-95); 146 v S 269 (Eff 7-1-96); 146 v H 180 (Eff 1-1-97); 146 v H 124 (Eff 3-31-97); 147 v S 111 (Eff 3-17-98); 147 v H 526 (Eff 9-1-98); 149 v H 427. Eff 8-29-2002; 150 v S 5, § 1, Eff 7-31-03; 150 v H 525, § 1, eff. 5-18-05; 151 v H 66, § 101.01, eff. 6-30-05*; 151 v S 262, § 1, eff. 7-11-06; 152 v S 10, § 1, eff. 1-1-08; 153 v S 77, § 1, eff. 7-6-10.