

ORIGINAL

NO. 2011-0486

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 94413

STATE OF OHIO

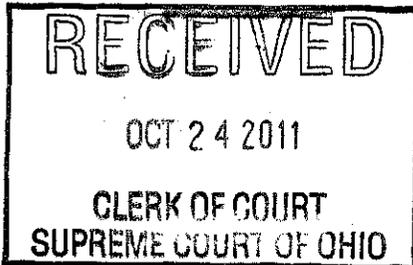
Plaintiff- Appellee

-vs-

DAJUAN EMERSON

Defendant-Appellant

MERIT BRIEF OF PLAINTIFF-APPELLEE



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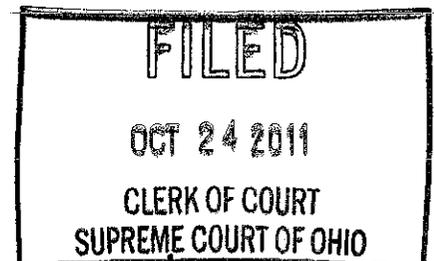


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INTRODUCTION AND SUMMARY OF ARGUMENT

This matter should be affirmed as Dajuan Emerson's Fourth Amendment rights were not violated. Emerson was indicted, convicted, and sentenced for aggravated murder and tampering with evidence. Emerson appealed and argued that the trial court erred in denying his motion to suppress DNA evidence. The Eighth District conducted a thorough and exhaustive analysis of the issue and affirmed Emerson's conviction. *State v. Emerson*, 192 Ohio App.3d 446, 949 N.E.2d 538, 2011-Ohio-593.

Emerson continues to argue that the trial court erred when it denied his motion to suppress. However, Emerson lacks standing to challenge the retention and subsequent use of his DNA. Under the statutory scheme during the time of Emerson's crimes and trial, he was required to request his DNA¹ sample be expunged from the Combined DNA Index System ("CODIS") after his acquittal for rape. See R.C. 2953.529(A)(1). Emerson never took any action to expunge his DNA. And, even if the onus was not on Emerson, a statutory violation by the State is not dispositive of this case. It is well established that a search violative of state statute, in and of itself, does not rise to the level of a Fourth Amendment violation. *State v. Jones*, 121 Ohio St.3d 103, 902 N.E.2d 464, 2009-Ohio-316, ¶15 citing *Virginia v. Moore* (2008), 553 U.S. 164, 128 S.Ct. 1598. Emerson's propositions have also been rendered largely meaningless due to the passage of Senate Bill 77 by the 128th General Assembly. Senate Bill 77 expanded the mandatory collection and retention of DNA for those arrested of certain offenses. As such, Emerson's propositions of law will have little impact on future cases.

¹ Deoxyribonucleic acid

Emerson's arguments have been rejected by courts throughout the country. The Eighth District Court of Appeals properly applied both controlling and persuasive authority and affirmed Emerson's conviction for aggravated murder and tampering with evidence. As such, the State respectfully requests this Court affirm the Eighth District's decision.

STATEMENT OF THE CASE AND RELEVANT FACTS

On March 9, 2009, a Cuyahoga County Grand Jury indicted Emerson for the brutal murder of victim Marnie Macon who, on July 4, 2007, was found half-naked and stabbed seventy-four times. Emerson was indicted with one count each of Aggravated Murder, Aggravated Burglary, and Tampering with Evidence.

On October 16, 2009, the trial court held a suppression hearing to determine the admissibility of the CODIS "search" and subsequent DNA tests that established Emerson as the murder suspect. While at the crime scene, members of the Cleveland Police Department collected swabs of blood found on or near the rear doorknob of the victim's home. (Tr. 29-31). Lisa Moore, a DNA analyst with the Cuyahoga County Coroner's Office, testified that the DNA profile obtained from the scene was entered into CODIS and a match report was generated. Emerson was listed as a suspect in the report. Pursuant to a warrant, officers obtained a recent DNA sample from Emerson for comparison purposes. Emerson's sample was compared with the blood samples and determined to be 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). She also testified that there are standards they must follow and that only certain types of samples are put into the database pursuant to R.C. 2901.07. In this case, Ms. Moore stated that she

notified the Cleveland Police Department of the match on September 4, 2008. The Coroner's Office received the buccal swab for comparison on March 2, 2009, and it created the hard copy profile on March 16, 2009. (Tr. 43-45). She testified that her office does not process DNA of convicted offenders. (Tr. 45). The Coroner's Office did not have any DNA available until it received the CODIS notification. Id.

Christopher Smith, a forensic scientist employed with the Ohio Bureau of Criminal Identification and Investigation ("BCI&I"), also testified during the hearing. (Tr. 50). Mr. Smith testified that he maintains the CODIS database as part of his duties with BCI&I. Mr. Smith explained that CODIS has three levels: local, state, and national. (Tr. 52). Mr. Smith testified that the Cuyahoga County Coroner's Office has one of ten local DNA databases and that there are different indexes for each level of the database including forensic unknowns, forensic mixtures, and missing persons. (Tr. 53-54).

Mr. Smith testified that a reference standard, which was obtained pursuant to a warrant, was submitted by Emerson on April 8, 2005 in connection with his rape case. (Tr. 57). In that case, the DNA results were ambiguous in that no male DNA was identified. As such, Emerson's DNA was placed into the suspect index. (Tr. 58). Mr. Smith then said he found the two profiles were consistent with each other in the Macon homicide. (Tr. 63). Mr. Smith explained that Emerson's 2005 sample was maintained in the database pursuant to the CODIS Methods Manual. (Tr. 64). Specifically, he reviewed the manual and testified that a "suspect index could be maintained where DNA records obtained from the listed suspect of a crime are maintainable at the state level." (Tr. 65). Mr. Smith clarified that the suspect is actually a "known suspect" as declared by the department. (Tr. 68). Emerson was the known suspect in the rape case. (Tr. 68). Mr. Smith did not know that Mr. Emerson was acquitted in the 2005 rape case. (Tr.

68). Mr. Smith testified that the retention policy for CODIS is that a suspect's standard/sample is only to be removed from the system when a request has been made through an expungement procedure listed in the Methods Manual. (Tr. 69-70). Emerson called Detective Joseph Chojnowski as a witness. (Tr. 88). Detective Chojnowski agreed that Emerson was not a suspect in the homicide until the 2008 CODIS hit. (Tr. 89).

Emerson argued that pursuant to section 17.6 (page 70) of the CODIS Methods Manual, the DNA record taken in 2005 should have been removed if there was an acquittal. (Tr. 99). Further, he argued that under R.C. 109.573 and R.C. 2901.07 the State had no authority to maintain and subsequently use the DNA profile. (Tr. 99-101). The State argued, among other things, that the exclusionary rule would not apply in this situation. (Tr. 206). The trial court denied the motion to suppress finding that the State had authority to hold Emerson's profile pursuant to R.C. 109.573. (Tr. 210).

Emerson exercised his right to a jury trial. The trial court granted Emerson's Crim. R. 29 motion only to the count of Aggravated Burglary. The jury found Emerson guilty of the remaining counts. Emerson was sentenced to twenty-five years to life for the Aggravated Murder and one year for Tampering with Evidence.

Emerson filed a timely appeal in the Eighth District Court of Appeals and the Eighth District affirmed. *State v. Emerson*, 192 Ohio App.3d 446, 949 N.E.2d 538, 2011-Ohio-593. Emerson filed a Memorandum in Support of Jurisdiction with this Court on March 25, 2011. This Court granted a discretionary appeal on two of his eight propositions of law on June 27, 2011. The State respectfully requests this Court dismiss the instant appeal as improvidently allowed or affirm as Emerson's propositions of law lack merit and do not warrant this Court's jurisdiction.

LAW AND ARGUMENT

EMERSON'S PROPOSITION OF LAW 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.

EMERSON'S PROPOSITION OF LAW 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.

I. Summary of Argument

This appeal should be dismissed as improvidently granted or affirmed because Emerson's propositions of law fail to acknowledge that no relief would be available to him, even if this Court were to adopt his propositions. The use of Emerson's created DNA profile does not implicate the Fourth Amendment. Even if this Court adopts Emerson's propositions of law, Emerson's arguments surrounding the retention and subsequent use of the DNA profile through CODIS after his 2005 acquittal are meritless as the exclusionary rule does not apply to non-constitutional statutory violations. See *State v. Jones*, 121 Ohio St.3d 103, 902 N.E.2d 464, 2009-Ohio-316, ¶15. Nor would providing this relief be likely to affect his case or other cases in the future due to the recent legislative amendments in SB 77. Therefore, this Court should affirm the Eighth District's decision in this case.

II. Emerson Lacks Standing to Challenge the Retention/Use of in the DNA profile contained in the CODIS database.

Emerson does not have a possessory or privacy interest in the DNA profile contained in the State CODIS database. The primary question for any Fourth Amendment analysis asks "whether government officials violated any legitimate expectation of privacy held by petitioner." *State v. Emerson*, 192 Ohio App.3d 446, 949

N.E.2d 538, 2011-Ohio-593, ¶11 citing *Rawlings v. Kentucky* (1980), 448 U.S. 98, 106, 100 S.Ct. 2556. To establish that a legitimate expectation of privacy exists, Emerson must show both an actual expectation of privacy and that the expectation is one that society is prepared to recognize as reasonable. See *Katz v. United States* (1967), 389 U.S. 347, 361 (Harlan, J., concurring).

The first element of the *Katz* test concerns Emerson's subjective expectation of privacy. The second element regards the objectively identifiable social recognition of a privacy right. The burden is on Emerson to prove the capacity to challenge the legality of a search. *State v. Williams* (1995), 73 Ohio St.3d 153, 166; *State v. Pinson*, Montgomery App. No. 20927, 2005-Ohio-4532, at ¶ 8. To satisfy the second prong of the *Katz* test Emerson must appeal to "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois* (1978), 439 U.S. 128, 143, n.12. Whether analyzed as standing or substantive law, the Eighth District properly concluded that Emerson failed to satisfy the *Katz* requirements.

Courts throughout the country have held that a defendant does not have a legitimate expectation of privacy in lawfully obtained DNA. In *Wilson v. Collins* (C.A. 6, 2008), 517 F.3d 421, the Sixth Circuit stated that a "claim premised on the retention or disclosure of personal DNA information...does not implicate the Fourth Amendment." In *Smith v. State* (Ind. 2001), 744 N.E.2d 437, the Supreme Court of Indiana resolved an identical issue and upheld a trial court's denial of a motion to suppress. In *Smith* the defendant was arrested and charged with rape. He was ordered by the trial court to provide DNA samples. While the defendant's DNA was a match in the rape case, he was acquitted of the charge based on his defense that the intercourse was consensual.

According to the Indiana Crime Lab's routine procedures, the defendant's DNA profile from the rape case was compared with those from unsolved cases. This comparison resulted in a match in with an unrelated case. *Id.* at 439. The Supreme Court of Indiana agreed with several other courts and held that once DNA is used to create a profile, the profile becomes the property of the crime lab. Thus, the defendant had no possessory or ownership interest in the DNA profile. Furthermore, society does not recognize an expectation of privacy in records made for public purposes from legitimately obtained samples. Since the defendant had no possessory interest in the DNA profile record, the defendant lacked standing to challenge the crime lab's use of the DNA profile. *Id.*

In *State v. Barkley* (2001), 144 N.C.App. 514, 519, 551 S.E.2d 131, a North Carolina court held, "[i]t 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."

In *Washington v. State* (1994), 653 So.2d 362, a Florida court held that the state could use the defendant's voluntarily given and validly obtained blood sample from a previous, unrelated sexual assault case as evidence in a current rape and murder trial. In *Brickley v. State* (1997), 227 Ga.App 413, 489, S.E.2d 167, 170, a Georgia court held that a defendant's Fourth Amendment Rights were not violated when his blood was drawn for DNA testing pursuant to a warrant for one crime and then subsequently tested against DNA samples derived from other crimes absent another warrant. The court

analogized the DNA results to fingerprints and found that a second warrant was not required to test the defendant's already existing DNA profile.

In *People v. King* (1997), 232 A.D.2d 111, 663 N.Y.S.2d 610, the state tested a defendant's validly obtained DNA against DNA evidence from two different rapes. Only one test resulted in a conclusive match. The defendant's DNA was admitted in that case but had the charges in the other rape case dismissed. *Id.* 611-12. A New York court held that:

“[o]nce a person's blood sample has been obtained lawfully, he can no longer assert 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. In this regard we note a defendant could not plausibly assert any expectation of privacy with respect to the scientific analysis of a lawfully seized item of tangible property, such as a gun or a controlled substance. Although human blood, with its unique genetic properties, may initially be quantitatively different from such evidence, once constitutional concerns have been satisfied, a blood sample is not unlike other tangible property which can be subject to a battery of scientific tests.”

Id. at 614.

In *State v. Hauge* (2003), 103 Hawai'i 38, 79 P.3d 131, the police obtained blood and hair samples of the defendant with a valid warrant regarding to an unrelated robbery. *Id.* at 135. The DNA from these samples were tested against DNA evidence found at the scene of a burglary. *Id.* The Hawaii Supreme Court held the defendant's privacy interest in his blood and hair terminated when the sample was obtained pursuant to a lawful search and seizure. *Id.* at 141-42. The court held that the defendant's blood was drawn pursuant to a lawful warrant for DNA identification and

comparison purposes in relation to one crime and could be used in the same fashion in relation to another crime. *Id.* at 146.

In *Herman v. State* (2006), 122 Nev. 199, 128 P.3d 469, the police collected DNA evidence from the crime scene in 1997 and entered it into the database. No match was found in 1997. In 1999, the defendant voluntarily submitted a sample of his blood for DNA testing to acquit himself of a robbery charge. After his acquittal, his DNA results were entered into a criminal database without his knowledge or permission. In 2000, the DNA evidence from the 1997 murder was run through the database again. This time a positive match was made with the defendant's DNA. As a result of the new murder investigation surrounding the defendant police legally obtained his DNA with a valid search warrant to confirm the prior match results. *Id.* 470-471. The Supreme Court of Nevada held that the DNA evidence was properly admitted at trial because "a reasonable person would have understood that the resulting DNA profile, like fingerprints, could be available for general investigative purposes." *Id.* 473. Moreover, the defendant's DNA sample was not illegally retained. Consequently, there was no illegal conduct of any kind to justify suppression of the DNA evidence. *Id.* at 474.

The above cases show a nationwide rejection of Emerson's argument that he has standing to challenge the retention of a DNA profile created from a validly obtained DNA sample, whether given by a defendant voluntarily or compelled through a warrant. Here, a sample of Emerson's DNA was obtained in his 2005 rape case through the execution of a valid warrant. A DNA profile was then created for the State's use from the sample. Society does not recognize Emerson having any possessory rights in the created DNA profile. Because Emerson cannot assert any statutory or constitutional right to support his claim, this Court should affirm the Eighth District's decision.

III. Emerson was required to affirmatively request the DNA profile expunged.

Emerson argues that it was improper to retain his DNA profile. However, Emerson did not take the required steps to have the profile removed from the database. As the Eighth District found, had Emerson “desired records of his earlier, unsuccessful prosecution to be expunged, he could have requested expungement, and then any DNA profile would have been removed pursuant to [section 17.60 of the CODIS Manual].” *State v. Emerson*, 192 Ohio App.3d 446, 949 N.E.2d 538, 2011-Ohio-593, ¶16. Emerson’s failure does not amount to a Fourth Amendment violation.

In *Fortune v. State* (2009), 300 Ga.App. 550, 685 S.E.2d 466, a DNA sample was legally obtained from a carpet stain in a prior rape case of which the defendant was the primary suspect. The defendant was acquitted of the rape charge, but the carpet stain DNA profile was entered into the federal CODIS database. Two years later, a DNA profile obtained from lip balm found at the scene of another crime matched the previously logged carpet stain DNA profile. While the first DNA profile did not contain the defendant’s name, it did include the criminal case number that identified him. *Id.* at 554-55. The defendant argued that the DNA profile from the prior rape case should have been purged from the database due to his previous acquittal. Yet, the Georgia appellate court recognized that under Georgia law the defendant should have requested the expungement of his criminal records from the rape case, but did not. Therefore, the Georgia court found that the trial court did not err in denying the defendant’s motion to suppress. *Id.* at 555-56.

At the time of Emerson’s trial, both Ohio and Georgia’s DNA collection statutes had similar schemes that did not instruct state officials what to do with validly obtained

DNA profiles/samples maintained in CODIS after an acquittal. Both States' expungement statutes placed the burden of removing criminal records on the acquitted party. The Eighth District Court of Appeals, which relied on *Fortune*, also examined the procedures outlined in the Ohio CODIS Methods Manual. The court of appeals correctly observed that Section 17.60 of the CODIS Methods Manual does not require removal of DNA records after one's acquittal, but only upon the issuance of a certified court order. *Emerson* at ¶ 16. Emerson could have requested expungement after his 2005 acquittal. Under Ohio law at the time, expungement would have resulted in the DNA profile being removed from CODIS. Yet, he did not request expungement. Without the existence of a certified court order received by BCI&I, these statutes gave the State the authority to retain the DNA profile and use it in the CODIS database that later linked Emerson to a brutal homicide despite his previous acquittal for raping a seven-year old girl several years earlier.

Emerson did not have a legitimate expectation of privacy in the DNA profile. Emerson also failed to take affirmative steps to remove the profile from the database. The Eighth District properly applied both persuasive and controlling authority and overruled Emerson's claim. Therefore, this Court should affirm the Eighth District's decision as Emerson's Fourth Amendment rights were not implicated in the retention and use of his DNA profile.

IV. The exclusionary rule does not apply to an "illegal CODIS search."

Assuming *arguendo* that Ohio's DNA collection and expungement statutes require the State to remove one's DNA profile from CODIS upon acquittal, Emerson's argument that the DNA profile should have been suppressed still lacks merit. Even if

the State did violate R.C. 109.573 and R.C. 2901.07 such a violation is not dispositive of this case. This Court has recently recognized that the “United States Supreme Court’s decision in [*Virginia v.*] *Moore*...removed any room for finding that a violation of a state statute...in and of itself, could give rise to a Fourth Amendment violation and result in the suppression of evidence.” *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, ¶15. The exclusionary rule should not be applied in this case because there was no constitutional violation. See *Kettering v. Hollen* (1980), 64 Ohio St.2d 232, 234-235, 416 N.E.2d 598.

The Fourth Amendment’s meaning does not depend on the differing DNA retention policies of particular states. Therefore any violation of R.C. 109.573 and R.C. 2901.07 is irrelevant to the Federal Constitution. The rule in *Kettering* applies unless there is a legislative mandate requiring the application of the exclusionary rule. There is no statutory requirement that requires the exclusion of a DNA profile that was retained after acquittal. Therefore, exclusion is not the proper remedy in this case.

The goals of the exclusionary rule would not be met here and suppression comes at a substantial social cost. In this case, application of the exclusionary rule would bar the admissibility of reliable evidence of Emerson’s guilt. Exclusion of evidence is not an automatic right and the benefits of deterrence must outweigh the costs. *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695, 700, citing *U.S. v. Leon*, 468 U.S. 897, 910, 104 S.Ct. 3405. “We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.”*Id.* citing *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 368, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998). “[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its]

substantial social costs.” *Id.* citing *Illinois v. Krull*, 480 U.S. 340, 352-353, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) (internal quotation marks omitted). The “principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that ‘offends basic concepts of the criminal justice system.’” *Id.* citing *Leon*, *supra*, at 908, 104 S.Ct. 3405. “[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” *Id.* citing *Scott*, *supra*, at 364-365, 118 S.Ct. 2014 (internal quotation marks omitted); see also *United States v. Havens*, 446 U.S. 620, 626-627, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980); *United States v. Payner*, 447 U.S. 727, 734, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980). In this case, the principle cost would be to let a guilty and dangerous defendant go free.

Courts throughout the country have rejected applying the exclusionary rule in similar circumstances. The Georgia court of appeals noted 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.” *Fortune*, 300 Ga.App. at 556, quoting *Smith*, 744 N.E.2d at 440. Consistent with other courts, the Eighth District refused to apply the exclusionary rule in this case. Because “any deterrent effect that could be achieved by the application of the exclusionary rule in this case would be vastly outweighed by the costs that would be incurred by suppression of the powerfully inculpatory and reliable DNA evidence” this Court should affirm the Eighth District’s decision. See *U.S. v. Davis* (D. Md. 2009), 657 F.Supp.2d 630, 666.

V. Emerson's claims are unlikely to arise again due to the legislative amendments enacted in Senate Bill 77.

Emerson's propositions of law are not likely to have a meaningful impact going forward as the recently enacted legislative changes in Senate Bill 77 have dramatically altered the collection and retention of DNA in Ohio. In response to calls from the Ohio Innocence Project, the 128th General Assembly passed Senate Bill 77. The law amended twenty-three sections of the Ohio Revised Code and enacted nine new provisions while eliminating one code section. The purpose of this law was to streamline the mechanism for the DNA testing of Ohio's prisoners. It also provided for a more extensive DNA retention system and database of all those that had ever been convicted of a crime. Consequently, Senate Bill 77 broadened the amount of DNA profiles retained in CODIS.

Not only did Senate Bill 77 increase Ohio's DNA database, but it changed the statutory scheme for expungement of DNA evidence. Several code sections now allow a BCI&I employee to disseminate information regarding DNA evidence of sealed records to members of law enforcement to help with criminal investigations. See R.C. 2953.321(C)(3); 2953.35(C); 2953.54(C); 2953.55(C). Furthermore, even if a record is properly sealed in accordance with R.C. 2953.52, it does not remove certain evidence from state criminal databases, including DNA evidence. R.C. 2953.56 states:

Violations of sections 295.31 to 2953.61 of the Revised Code shall not provide the basis to exclude or suppress any of the following evidence that is otherwise admissible in a criminal proceeding, delinquent child proceeding, or other legal proceeding:

(A) DNA records collected in the DNA database;

(B) Fingerprints filed for record by the superintendent of the bureau of criminal identification and investigation;

(C) Other evidence that was obtained for discovered as the direct or indirect result of divulging or otherwise using the records described in divisions (A) and (B) of this section.

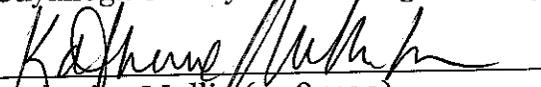
While most of the bill went into effect during the summer of 2010, one of the most crucial components of the bill took effect on July 1, 2011. R.C. 2901.07(B)(1) requires all persons over the age of eighteen arrested for a felony, or certain enumerated misdemeanors, to submit a sample of their DNA to BCI&I. A DNA profile is then created by and maintained in CODIS with accordance to R.C. 109.573. With this amendment to R.C. 2901.07, CODIS will maintain a DNA profile for nearly every person processed through Ohio's criminal justice system in order to help solve countless crimes, ensure those falsely convicted are acquitted, and continue to achieve justice for victims.

Senate Bill 77 is clear evidence of the General Assembly's intent going forward with the collection and retention of DNA evidence. In light of the legislative amendments, a ruling in favor of Emerson's propositions would have little impact on future cases.

CONCLUSION

The State respectfully requests this Honorable Court affirm the Eighth District Court of Appeals decision in this case.

Respectfully submitted,
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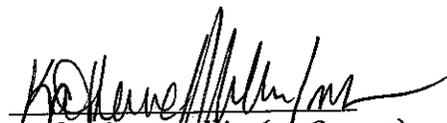
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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94413

The STATE OF OHIO,

APPELLEE,

v.

EMERSON,

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

William D. Mason, Cuyahoga County Prosecuting Attorney, and Tiffany Hill and Brian M. McDonough, Assistant Prosecuting Attorneys, for appellee.

R. Brian Moriarty, L.L.C. and R. Brian Moriarty, for appellant.

FRANK D. CELEBREZZE JR., Presiding Judge.

{¶ 1} 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.

{¶ 2} 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

¹ Deoxyribonucleic acid.

blood found on a door knob inside the home. The police also noted a bottle of household cleaner lying 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.

{¶ 3} 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 appellant. When questioned about 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 had paid her for sex, but he left her unharmed. Officers prepared a written statement for appellant to sign detailing this discussion, but appellant refused to sign.

{¶ 4} 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.

{¶ 5} 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 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.

{¶ 6} A jury trial commenced on October 19, 2009, and resulted in appellant's 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

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.

{¶ 7} Appellant first argues, “The 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.

The Retention of DNA Records

{¶ 8} 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 that his identification should have been suppressed.

{¶ 9} “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.” (Citations omitted.) *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172.

{¶ 10} 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 (5th Rev.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 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. 151 Ohio Laws, Part II, 2868, 3308-3312. 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.

{¶ 11} 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

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

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.

{¶ 12} 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, “[O]nce 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").

{¶ 13} 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*, 2009-Ohio-622, 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.

{¶ 14} 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.

{¶ 15} 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*, 744 N.E.2d 437, *Fortune* declined to adopt an exclusionary rule in the case, noting, “ ‘Exclusion 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.

{¶ 16} Citing Section 17.60 of the CODIS Manual, appellant claims that 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*, 744 N.E.2d at 440.

{¶ 17} 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.

{¶ 18} 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.

~~{¶ 19} Detective Joseph Chojnowski testified at the suppression hearing that he had 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 that 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.

{¶ 20} “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 * * *.’” (Ellipsis sic.) *State v. Taylor*, 174 Ohio App.3d 477, 2007-Ohio-7066, 882 N.E.2d 945, ¶ 21.

{¶ 21} 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.

{¶ 22} 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 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 were beyond the scope of the statute.

Miranda Violation

{¶ 23} 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.

{¶ 24} With regard to the suppression of appellant’s oral statements made to the police officers, Chojnowski testified that he and another officer interviewed appellant without recording the interview. However, 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 had been read his Miranda rights and had voluntarily waived them. 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 we conclude that the trial court did not err in finding that appellant had validly waived his Miranda rights and voluntarily gave the Cleveland police an oral statement.

Sufficiency and Manifest Weight

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.

{¶ 25} 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.”

{¶ 26} 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 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.

{¶ 27} When 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.

{¶ 28} 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.

{¶ 29} Sufficiency of the evidence is subjected to a standard different from manifest weight of the evidence. Section 3(B)(3), Article IV of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the fact-finder. 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 the 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.

{¶ 30} 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*, 457 U.S. at 43, 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. Upon application of the standards enunciated in *Tibbs*, *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test for addressing the issue of manifest weight of the evidence. *Martin* stated:

{¶ 31} “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 175.

{¶ 32} 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* (1998), 81 Ohio St.3d 133, 157, 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.” (Footnotes omitted.) *State v. Torres*, Cuyahoga App. No. 86530, 2006-Ohio-3696, ¶ 46.

{¶ 33} “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.

{¶ 34} 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 had 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.

{¶ 35} In *State v. Jones*, Cuyahoga App. No. 88134, 2007-Ohio-1301, ¶ 38, this court found sufficient evidence of prior calculation and design, noting that 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.” (Citations omitted.)

{¶ 36} 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.

{¶ 37} 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 anything “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 that 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.

{¶ 38} 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 the victim’s home. Appellant admitted 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

{¶ 39} Appellant also claims, “The trial court abused its discretion in failing to give jury instructions for a lesser included offense.”

{¶ 40} “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.

{¶ 41} 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, 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 when 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.

{¶ 42} 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 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

{¶ 43} 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.

{¶ 44} 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.

{¶ 45} The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373: “ ‘When 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, 104 S.Ct. 2052, 80 L.Ed.2d 674.”

{¶ 46} “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 [80 L.Ed.2d 674]. 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.

{¶ 47} “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.

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

{¶ 49} Having overruled all of appellant's assigned errors, we affirm his convictions.

Judgment affirmed.

SWEENEY and GALLAGHER, JJ., concur.

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

C
Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
 Chapter 2901. General Provisions
 General Provisions
 → → 2901.07 DNA testing of certain prisoners

(A) As used in this section:

(1) "DNA analysis" and "DNA specimen" have the same meanings as in section 109.573 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 offense, 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 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.

CREDIT(S)

(2010 S 77, eff. 7-6-10; 2007 S 10, eff. 1-1-08; 2006 S 262, eff. 7-11-06; 2005 H 66, eff. 6-30-05 (LSC opinion issued stating section repealed prior to attempted amendment); 2004 H 525, eff. 5-18-05; 2003 S 5, eff. 7-31-03; 2002 H 427, eff. 8-29-02; 1998 H 526, eff. 9-1-98; 1997 S 111, eff. 3-17-98; 1996 H 124, eff. 3-31-97; 1996 H

R.C. § 2901.07.

180, eff. 1-1-97; 1996 S 269, eff. 7-1-96; 1995 H 5, eff. 8-30-95)

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Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2953. Appeals; Other Postconviction Remedies (Refs & Annos)

Sealing of Records

→ → 2953.321 Confidentiality of investigatory work product; violations; exceptions

(A) As used in this section, "investigatory work product" means any records or reports of a law enforcement officer or agency that are excepted from the definition of "official records" contained in section 2953.51 of the Revised Code and that pertain to a case the records of which have been ordered sealed pursuant to division (C)(2) of section 2953.32 of the Revised Code or have been ordered expunged pursuant to division (D)(2) of section 2953.37 of the Revised Code.

(B) Upon the issuance of an order by a court pursuant to division (C)(2) of section 2953.32 of the Revised Code directing that all official records pertaining to a case be sealed or an order by a court pursuant to division (D)(2) of section 2953.37 of the Revised Code directing that all official records pertaining to a case be expunged:

(1) Every law enforcement officer who possesses investigatory work product immediately shall deliver that work product to the law enforcement officer's employing law enforcement agency.

(2) Except as provided in division (B)(3) of this section, every law enforcement agency that possesses investigatory work product shall close that work product to all persons who are not directly employed by the law enforcement agency and shall treat that work product, in relation to all persons other than those who are directly employed by the law enforcement agency, as if it did not exist and never had existed.

(3) A law enforcement agency that possesses investigatory work product may permit another law enforcement agency to use that work product in the investigation of another offense if the facts incident to the offense being investigated by the other law enforcement agency and the facts incident to an offense that is the subject of the case are reasonably similar. The agency that permits the use of investigatory work product may provide the other agency with the name of the person who is the subject of the case if it believes that the name of the person is necessary to the conduct of the investigation by the other agency.

(C)(1) Except as provided in division (B)(3) of this section, no law enforcement officer or other person employed by a law enforcement agency shall knowingly release, disseminate, or otherwise make the investigatory work product or any information contained in that work product available to, or discuss any information contained in it with, any person not employed by the employing law enforcement agency.

(2) No law enforcement agency, or person employed by a law enforcement agency, that receives investigatory work product pursuant to division (B)(3) of this section shall use that work product for any purpose other than

the investigation of the offense for which it was obtained from the other law enforcement agency, or disclose the name of the person who is the subject of the work product except when necessary for the conduct of the investigation of the offense, or the prosecution of the person for committing the offense, for which it was obtained from the other law enforcement agency.

(3) It is not a violation of division (C)(1) or (2) of this section for the bureau of criminal identification and investigation or any authorized employee of the bureau participating in the investigation of criminal activity to release, disseminate, or otherwise make available to, or discuss with, a person directly employed by a law enforcement agency DNA records collected in the DNA database or fingerprints filed for record by the superintendent of the bureau of criminal identification and investigation.

(D) Whoever violates division (C)(1) or (2) of this section is guilty of divulging confidential investigatory work product, a misdemeanor of the fourth degree.

CREDIT(S)

(2011 S 17, eff. 9-30-11; 2010 S 77, eff. 7-6-10; 1988 H 175, eff. 6-29-88)

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Title XXIX. Crimes--Procedure (Refs & Annos)

▣ Chapter 2953. Appeals; Other Postconviction Remedies (Refs & Annos)

▣ Sealing of Records

→→ **2953.35 Divulging sealed records prohibited**

(A) Except as authorized by divisions (D), (E), and (F) of section 2953.32 of the Revised Code or by Chapter 2950. of the Revised Code, any officer or employee of the state, or a political subdivision of the state, who releases or otherwise disseminates or makes available for any purpose involving employment, bonding, or licensing in connection with any business, trade, or profession to any person, or to any department, agency, or other instrumentality of the state, or any political subdivision of the state, any information or other data concerning any arrest, complaint, indictment, trial, hearing, adjudication, conviction, or correctional supervision the records with respect to which the officer or employee had knowledge of were sealed by an existing order issued pursuant to sections 2953.31 to 2953.36 of the Revised Code, were expunged by an order issued pursuant to section 2953.37 of the Revised Code, or were expunged by an order issued pursuant to section 2953.42 of the Revised Code as it existed prior to June 29, 1988, is guilty of divulging confidential information, a misdemeanor of the fourth degree.

(B) Any person who, in violation of section 2953.32 of the Revised Code, uses, disseminates, or otherwise makes available any index prepared pursuant to division (F) of section 2953.32 of the Revised Code is guilty of a misdemeanor of the fourth degree.

(C) It is not a violation of this section for the bureau of criminal identification and investigation or any authorized employee of the bureau participating in the investigation of criminal activity to release, disseminate, or otherwise make available to, or discuss with, a person directly employed by a law enforcement agency DNA records collected in the DNA database or fingerprints filed for record by the superintendent of the bureau of criminal identification and investigation.

CREDIT(S)

(2011 S 17, eff. 9-30-11; 2010 S 77, eff. 7-6-10; 1996 H 180, eff. 7-1-97; 1988 H 175, eff. 6-29-88; 1979 H 105; 1975 H 1; 1973 S 5)

UNCODIFIED LAW

1996 H 180, § 5, eff. 10-16-96, reads: Sections 109.57, 2935.36, 2950.02, 2950.04, 2950.05, 2950.06, 2950.07, 2950.08, 2950.10, 2950.11, 2950.12, 2950.13, 2950.99, 2953.35, and 2953.54 of the Revised Code, as amended or enacted in Sections 1 and 2 of this act, shall take effect on July 1, 1997. The repeal of existing sections

109.57, 2935.36, 2950.08, 2950.99, 2953.35, and 2953.54 and sections 2950.02, 2950.04, 2950.05, 2950.06, and 2950.07 of the Revised Code by Section 2 of this act shall take effect on July 1, 1997, and the provisions of those sections shall remain in effect and shall be applicable to habitual sex offenders, as defined in the version of section 2950.01 of the Revised Code that is repealed by Section 2 of this act, until that date. Notwithstanding the repeal of existing sections 2950.01 and 2950.03 of the Revised Code by Section 2 of this act, the definitions and the duty to provide notice to habitual sex offenders who are being released from correctional institutions that are contained in the versions of those sections that are so repealed shall remain applicable to habitual sex offenders, as defined in the version of section 2950.01 of the Revised Code that is so repealed, until July 1, 1997.

HISTORICAL AND STATUTORY NOTES

Ed. Note: 2953.35 contains provisions analogous to former 2953.43, repealed by 1988 H 175, eff. 6-29-88.

Amendment Note: 2011 S 17 inserted “were expunged by an order issued pursuant to section 2953.37 of the Revised Code,” in division (A).

Amendment Note: 2010 S 77 substituted “June 29, 1988” for “the effective date of this amendment” in division (A); and added division (C).

Amendment Note: 1996 H 180 inserted “or by Chapter 2950. of the Revised Code” in division (A); and made changes to reflect gender neutral language.

CROSS REFERENCES

Application, license, denial, appeal, duplicate license, renewal, see 2923.125
 Juvenile records, sealing or expunging; penalty for divulging, see 2151.358
 Suspension, revocation, notice, see 2923.128
 Temporary emergency licenses, see 2923.1213

LIBRARY REFERENCES

Criminal Law  1226(2).
 Westlaw Topic No. 110.
 C.J.S. Criminal Law § 1734.
 Records  32.
 Westlaw Topic No. 326.
 C.J.S. Records §§ 65, 67 to 75.

RESEARCH REFERENCES

Encyclopedias

OH Jur. 3d Criminal Law § 1964, Divulging Confidential Information.

OH Jur. 3d Criminal Law § 3959, Exception.

Treatises and Practice Aids

Markus, Baldwin's Ohio Handbook Series--Trial Handbook § 39:27, Expungement or Sealing Criminal Record.

NOTES OF DECISIONS

Confidentiality 1
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 Violations 3, 4
 Violations - Damages 3
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1. Confidentiality

No provision in RC 2953.321, RC 2953.35, RC 2953.54, or RC 2953.55 prohibits a prosecuting attorney from disclosing to a defendant during discovery under Ohio R. Crim. P. 16 statements made by the defendant or co-defendants, any record of a witness's prior felony convictions, and evidence favorable to the defendant that are included in a record that has been ordered sealed or expunged pursuant to RC 2953.31-.61. OAG 03-025.

To the extent that records maintained by the Ohio state board of psychology contain information or other data the release of which is prohibited by RC 2953.35(A), such records are not "public records" within the meaning of RC 149.43(A)(1); therefore, the board may seal such information or data or otherwise segregate it from its public records in order to comply with RC 2953.35(A); the board does not have the authority to "expunge," or actually destroy, its official records, except as provided by law or pursuant to a schedule or application approved by the state records commission. OAG 83-100.

2. Public officer or employee construed

State dental board was subject to the expungement statutes; statute provided that a court could seal records of adjudications involving professional licenses, the statute governing the sealing of records for first offenders ordered "all official records" sealed, official records included "all records that are possessed by a public office or agency that relate to a criminal case," and records of the board's adjudication hearings, were subject to an order sealing records if the records related to a criminal case. In re T.F.K. (Ohio Com.Pl., 04-13-2005) 136 Ohio Misc.2d 9, 845 N.E.2d 591, 2005-Ohio-7143. Health ~~§~~ 223(1)

Defendant in trademark infringement action did not have private right of action, under Ohio statute making it a criminal offense for a state officer or employee to release or disseminate sealed criminal information, against plaintiff's attorney, as to attorney's conduct in challenging defendant's credibility by submitting to the court evidence of defendant's prior bribery conviction; attorney was private individual rather than state officer or em-

ployee. *Boyd v. Bressler* (C.A.6 (Ohio), 09-04-2001) No. 00-3318, 18 Fed.Appx. 360, 2001 WL 1070940, Unreported. Action ↪ 5; Records ↪ 31

3. Violations--damages

Plaintiff does not have standing to sue and obtain judgment for compensatory damages against county when employee of county prosecuting attorney's office divulges plaintiff's expunged conviction to third party. *Poe v. Trumbull Cty.* (Ohio, 06-24-1998) 82 Ohio St.3d 192, 694 N.E.2d 1324, 1998-Ohio-246. Counties ↪ 146

Conduct of plaintiff in trademark infringement case and plaintiff's attorney in challenging defendant's credibility by submitting to the court evidence of defendant's prior bribery conviction was not "outrageous," as element for claim under Ohio law of intentional infliction of emotional distress, even if plaintiff and attorney violated Ohio statutes allowing the sealing of a first-time offender's conviction; defendant could have limited his injuries by objecting to the information's use and requesting its removal from the record. *Boyd v. Bressler* (C.A.6 (Ohio), 09-04-2001) No. 00-3318, 18 Fed.Appx. 360, 2001 WL 1070940, Unreported. Damages ↪ 57.25(1)

4. --- Privilege, violations

The public policy supporting the Ohio statutes allowing the sealing of a first-time offender's conviction does not outweigh Ohio's absolute judicial privilege doctrine. *Boyd v. Bressler* (C.A.6 (Ohio), 09-04-2001) No. 00-3318, 18 Fed.Appx. 360, 2001 WL 1070940, Unreported. Libel And Slander ↪ 38(1)

5. Disclosure by private party

Ohio statute making it a criminal offense for a state officer or employee to release or disseminate sealed criminal information does not prohibit a private individual from disseminating expunged information. *Boyd v. Bressler* (C.A.6 (Ohio), 09-04-2001) No. 00-3318, 18 Fed.Appx. 360, 2001 WL 1070940, Unreported. Records ↪ 31

R.C. § 2953.35, OH ST § 2953.35

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Title XXIX. Crimes--Procedure (Refs & Annos)

▣ Chapter 2953. Appeals; Other Postconviction Remedies (Refs & Annos)

▣ Sealing of Records--Further Provisions

→ → **2953.52 Application to have records sealed; grounds; order**

(A)(1) Any person, who is found not guilty of an offense by a jury or a court or who is the defendant named in a dismissed complaint, indictment, or information, may apply to the court for an order to seal his official records in the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the finding of not guilty or the dismissal of the complaint, indictment, or information is entered upon the minutes of the court or the journal, whichever entry occurs first.

(2) Any person, against whom a no bill is entered by a grand jury, may apply to the court for an order to seal his official records in the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the expiration of two years after the date on which the foreman or deputy foreman of the grand jury reports to the court that the grand jury has reported a no bill.

(B)(1) Upon the filing of an application pursuant to division (A) of this section, the court shall set a date for a hearing and shall notify the prosecutor in the case of the hearing on the application. The prosecutor may object to the granting of the application by filing an objection with the court prior to the date set for the hearing. The prosecutor shall specify in the objection the reasons he believes justify a denial of the application.

(2) The court shall do each of the following:

(a) Determine whether the person was found not guilty in the case, or the complaint, indictment, or information in the case was dismissed, or a no bill was returned in the case and a period of two years or a longer period as required by section 2953.61 of the Revised Code has expired from the date of the report to the court of that no bill by the foreman or deputy foreman of the grand jury;

(b) Determine whether criminal proceedings are pending against the person;

(c) If the prosecutor has filed an objection in accordance with division (B)(1) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;

(d) Weigh the interests of the person in having the official records pertaining to the case sealed against the legitimate needs, if any, of the government to maintain those records.

(3) If the court determines, after complying with division (B)(2) of this section, that the person was found not guilty in the case, that the complaint, indictment, or information in the case was dismissed, or that a no bill was returned in the case and that the appropriate period of time has expired from the date of the report to the court of the no bill by the foreman or deputy foreman of the grand jury; that no criminal proceedings are pending against the person; and the interests of the person in having the records pertaining to the case sealed are not outweighed by any legitimate governmental needs to maintain such records, or if division (E)(2)(b) of section 4301.69 of the Revised Code applies, the court shall issue an order directing that all official records pertaining to the case be sealed and that, except as provided in section 2953.53 of the Revised Code, the proceedings in the case be deemed not to have occurred.

CREDIT(S)

(2002 H 17, eff. 10-11-02; 1988 H 175, eff. 6-29-88; 1984 H 227)

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▣ Chapter 2953. Appeals; Other Postconviction Remedies (Refs & Annos)

▣ Sealing of Records--Further Provisions

→→ **2953.54 Exceptions; offense of divulging confidential information**

(A) Except as otherwise provided in Chapter 2950. of the Revised Code, upon the issuance of an order by a court under division (B) of section 2953.52 of the Revised Code directing that all official records pertaining to a case be sealed and that the proceedings in the case be deemed not to have occurred:

(1) Every law enforcement officer possessing records or reports pertaining to the case that are the officer's specific investigatory work product and that are excepted from the definition of "official records" contained in section 2953.51 of the Revised Code shall immediately deliver the records and reports to the officer's employing law enforcement agency. Except as provided in division (A)(3) of this section, no such officer shall knowingly release, disseminate, or otherwise make the records and reports or any information contained in them available to, or discuss any information contained in them with, any person not employed by the officer's employing law enforcement agency.

(2) Every law enforcement agency that possesses records or reports pertaining to the case that are its specific investigatory work product and that are excepted from the definition of "official records" contained in section 2953.51 of the Revised Code, or that are the specific investigatory work product of a law enforcement officer it employs and that were delivered to it under division (A)(1) of this section shall, except as provided in division (A)(3) of this section, close the records and reports to all persons who are not directly employed by the law enforcement agency and shall, except as provided in division (A)(3) of this section, treat the records and reports, in relation to all persons other than those who are directly employed by the law enforcement agency, as if they did not exist and had never existed. Except as provided in division (A)(3) of this section, no person who is employed by the law enforcement agency shall knowingly release, disseminate, or otherwise make the records and reports in the possession of the employing law enforcement agency or any information contained in them available to, or discuss any information contained in them with, any person not employed by the employing law enforcement agency.

(3) A law enforcement agency that possesses records or reports pertaining to the case that are its specific investigatory work product and that are excepted from the definition of "official records" contained in division (D) of section 2953.51 of the Revised Code, or that are the specific investigatory work product of a law enforcement officer it employs and that were delivered to it under division (A)(1) of this section may permit another law enforcement agency to use the records or reports in the investigation of another offense, if the facts incident to the offense being investigated by the other law enforcement agency and the facts incident to an offense that is the subject of the case are reasonably similar. The agency that provides the records and reports may provide the other agency with the name of the person who is the subject of the case, if it believes that the name of the person is

necessary to the conduct of the investigation by the other agency.

No law enforcement agency, or person employed by a law enforcement agency, that receives from another law enforcement agency records or reports pertaining to a case the records of which have been ordered sealed pursuant to division (B) of section 2953.52 of the Revised Code shall use the records and reports for any purpose other than the investigation of the offense for which they were obtained from the other law enforcement agency, or disclose the name of the person who is the subject of the records or reports except when necessary for the conduct of the investigation of the offense, or the prosecution of the person for committing the offense, for which they were obtained from the other law enforcement agency.

(B) Whoever violates division (A)(1), (2), or (3) of this section is guilty of divulging confidential information, a misdemeanor of the fourth degree.

(C) It is not a violation of this section for the bureau of criminal identification and investigation or any authorized employee of the bureau participating in the investigation of criminal activity to release, disseminate, or otherwise make available to, or discuss with, a person directly employed by a law enforcement agency DNA records collected in the DNA database or fingerprints filed for record by the superintendent of the bureau of criminal identification and investigation.

CREDIT(S)

(2010 S 77, eff. 7-6-10; 1996 H 180, eff. 7-1-97; 1984 H 227, eff. 9-26-84)

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Title XXIX. Crimes--Procedure (Refs & Annos)

▣ Chapter 2953. Appeals; Other Postconviction Remedies (Refs & Annos)

▣ Sealing of Records--Further Provisions

→ → **2953.55 Effects of order; offense**

(A) In any application for employment, license, or any other right or privilege, any appearance as a witness, or any other inquiry, a person may not be questioned with respect to any record that has been sealed pursuant to section 2953.52 of the Revised Code. If an inquiry is made in violation of this section, the person whose official record was sealed may respond as if the arrest underlying the case to which the sealed official records pertain and all other proceedings in that case did not occur, and the person whose official record was sealed shall not be subject to any adverse action because of the arrest, the proceedings, or the person's response.

(B) An officer or employee of the state or any of its political subdivisions who knowingly releases, disseminates, or makes available for any purpose involving employment, bonding, licensing, or education to any person or to any department, agency, or other instrumentality of the state, or of any of its political subdivisions, any information or other data concerning any arrest, complaint, indictment, information, trial, adjudication, or correctional supervision, the records of which have been sealed pursuant to section 2953.52 of the Revised Code, is guilty of divulging confidential information, a misdemeanor of the fourth degree.

(C) It is not a violation of this section for the bureau of criminal identification and investigation or any authorized employee of the bureau participating in the investigation of criminal activity to release, disseminate, or otherwise make available to, or discuss with, a person directly employed by a law enforcement agency DNA records collected in the DNA database or fingerprints filed for record by the superintendent of the bureau of criminal identification and investigation.

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→ → **2953.56 Violations no basis for exclusion or suppression of evidence**

Violations of sections 2953.31 to 2953.61 of the Revised Code shall not provide the basis to exclude or suppress any of the following evidence that is otherwise admissible in a criminal proceeding, delinquent child proceeding, or other legal proceeding:

(A) DNA records collected in the DNA database;

(B) Fingerprints filed for record by the superintendent of the bureau of criminal identification and investigation;

(C) Other evidence that was obtained or discovered as the direct or indirect result of divulging or otherwise using the records described in divisions (A) and (B) of this section.

CREDIT(S)

(2010 S 77, eff. 7-6-10)

R.C. § 2953.56, OH ST § 2953.56

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