

ORIGINAL

IN THE SUPREME COURT OF OHIO 12-0424

STATE OF OHIO
Plaintiff/Appellee

-vs-

Wendell R. Lindsay
Defendant/Appellant

* T.C. Case No. 2010-CR-0419D

* On Appeal from the Richland
County court of Appeals
* Fifth Appellate District

* C.A. Case No. 2010-CA-~~034~~ 0134

MEMORANDUM IN SUPPORT OF JURISDICTION

Wendell R. Lindsay, A591-512
Mansfield Correctional Institution (ManCI)
1150 North Main Street
Mansfield, Ohio 44901

DEFENDANT-APPELLATE, PRO'SE

Attorney for the State:
James J. Mayer Jr.(0021148)
Richland County Prosecutor
38 South Park Street
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FILED
MAR 12 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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CASE LAW

EVID. R. 802, 403, 404(b).

R.C.2907.02(A)(1)(b), DEFINED; R.C. 2907.05(A)(4), & R.C 2907.03(A)(5)

14th AMENDMENT OF THE CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

6th AMENDMENT OF THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, AS WELL AS THE DUE PROCESS PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

IN THE SUPREME COURT OF OHIO

STATEMENT OF THE CASE

This matter comes before this court upon the response and decision rendered in appellant's motion to reopen and his appeal; 26(B) motion, to the Fifth District Appellate Court, alleging the ineffective assistance of appellate counsel's performance for not filing an Appeal of Right with winnable issues when it was obvious that the appellant had not had a fair trial.

The 26(B) motion was filed within the time frame permitting the appellant to do so, and brought out other discrepancies to the Fifth District Court of Appeal's attention; the matter of an unfair adjudication of the appellant by the Richland County Court Of Common Pleas, and does it matter if a defendant is believed to be guilty or innocent, or if his right to a fair trial, and equal right to a fair trial were protected by due process of the law? These were the questions raised, and the alleged unfairness administered through the court, prosecutor, and also through effective assistance of counsel and also effective assistance of appellate counsel to bring fourth these issues on appeal.

The appellant was incarcerated for a non related matter after the Richland County Common Pleas Court Judge, the honorable Judge James DeWeese sentenced the appellant to (15)Fifteen Months in prison after a plea agreement was breached promising the appellant (3)Three years probation. The appellant challenges the prison term and alleges that the court was entrapping the appellant, confiding appellant for the purpose of this case matter at hand; in where the appellant never had adequate representation. The arrest in this case at the start, has violations of constitutional proportion and had been a issue not brought up by either the court appointed trial counsel, nor the appeal counsel. This evidence that would have excluded evidence, if suppression, wasn't ignored:

Before evidence may be excluded, it must be derivative of police illegality that amounts to a constitutional violation. The justification for this abandonment of the general principle that seeks to expose juries to all probative evidence of a crime stems from the need to deter unlawful police conduct that violates constitutional right.

The arrest in this case was illegal, as it derived from circumstances from a prior case in where the appellant was falsely jailed for an alleged violation of pretrial supervision; explained in defendant's 26(B), concerning case No. 2009- CR-0727D; 11-CA-52. While being in custody after the illegal

arrest, a fictitious warrant to collect DNA was brought to the appellant, while his attorney was not informed due to the changing of defense counsels. This warrant was not in compliance with the rules of procedure, and when new counsel was appointed, the discovery was without this important information, also, the prosecution withheld 17 pages of the discovery from the appointed defense counsel until the day before trial. The DNA swab was obtained illegally, and the appellant had no legal representation due to the hearing to replace his prior counsel had not taken place; in violation of appellant's Fourteenth(14), and Sixteenth(16) Amendment rights.

The warrant, following the arrest was irreparably tainted, and evidence obtained pursuant of the warrant should have been suppressed. Trial counsel's failure to suppress in this matter, gave the police the incentive to violate constitutional rights in order to secure admissible derivative evidence even though through the primary evidence secured as a result of the constitutional violation, and the evidence was inadmissible. Clearly the arrest, and seizure of the DNA evidence was the result of a "poisonous tree" and should have been suppressed. Nardone v United States, 308 U.S. 338, 340, 60 S.Ct. 266, 84 L.Ed.307 (1939). The appellant's conviction was based on illegally obtained evidence, and even if a warrant would have eventually been justified, it does not change the fact that appellant's conviction was based on illegally obtained evidence. State v Williams, 1988 WL 131439, No. S-88-7(6th-Dist. Ct. App., Sandusky 12-9-88). Reversed by 51 Ohio St 3d, 58, 554 N.E. 2d, 108 (1990). On Direct Appeal, the appellate counsel never corresponded or visited with the appellant, to seek appellant's opinions in this matter that effected appellant's life. Appellate counsel filed the appeal on these grounds: ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND DEPRIVED THE DEFENANT-APPELLANT OF HIS EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY UPHOLDING THE PEREMPTORY CHALLENGES OF THE PROSECUTOR AGAINST TWO BLACK JURORS.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND DEPRIVED THE DEFENDANT-APPELLANT UNDER HIS DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND HIS SIX AMENDMENT RIGHTS TO CHANGE COUNSEL DURING THE TRIAL AND TO HAVE THE JUDGE RESCUSE HIMSELF IN VIOLATION OF THE

DEFENDANT APPELLANT'S SIXTH AMENDMENT RIGHT TO
COUNSEL AND THE FOURTEENTH AMENDMENT DUE PROCESS.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED IN FAILURE TO CONTINUE THE TRIAL BASED UPON
THE REQUEST OF THE DEFENDANT-APPELLANT'S ATTORNEY.

ASSIGNMENT OF ERROR NO. 4

THE DEFENDANT-APPELLANT WAS DENIED HIS RIGHTS TO DUE PROCESS UNDER
THE UNITED STATES CONSTITUTION AND BY RECEIVING INTO
EVIDENCE REGARDING DOMESTIC VIOLENCE AND ADULTERY REPORTEDLY
COMMITTED BY THE DEFENDANT-APPELLANT.

ASSIGNMENT OF ERROR NO. 5

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO EXCLUDE
OUT-OF-COURT STATEMENTS MADE BY THE ALLEGED VICTIM BEING
INTRODUCED THROUGH THE TESTIMONY OF OTHER WITNESSES, IN
VIOLATION OF EVIDENCE RULE 802 AND THE DEFENDANT-APPELLANT'S
RIGHT IS GUARANTEED TO HIM BY THE FIFTH, SIXTH, AND FOURTEENTH
TO THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR NO. 6

DEFENDANT-APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF
COUNSEL BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION,
ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, AS WELL AS THE DUE
PROCESS PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE
CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

These arguments were brought up in the direct appeal, by appellate counsel, but lacked the true
and crucial details of the facts that should have been considered along with the claims, and should have
mentioned that the charges were alleged to have happened in a plot to frame this appellant brought
about by the alleged victims family.

The appellant filed an Amendment to his Appellate Brief, only to have the Amendment turned
down by the Fifth District Court quoting; (Judgment Entry):

We note that Mr. Lindsay filed a pro'se "Amendment" to Defendant-Appellant's APPEAL Brief
on June 13, 2011. He did not request and was not granted leave to file a pro'se brief. This brief

was filed after the State had filed its brief. Appellant's pro'se brief does not show a proper Proof of Service as mandated by App. R. 13. Accordingly, the State had no opportunity to reply to appellant's pro'se brief. Additionally, Ohio law prohibits a defendant and his appointed counsel from acting as "co-counsel" See, State v. Martin, 103, Ohio St. 3d 385, 816 N.E.2d 227, 2004-Ohio-5471. Accordingly, we will not address appellant's pro'se arguments in the disposition of this appeal.

This Amendment Brief to the Fifth District Court of Appeals demonstrated the ineffectiveness of the appellate counsel and by bringing fourth the Amended Brief, appellant had brought out other arguments to aid in his quest to receive Due Process of Law. The arguments in the Appeal Brief, again, were incomplete and lacked the true depiction of what transpired during the trial and the preparation therein.

The appellant filed his re-opening under the rules governing 26(B), and based on the facts of the response to his Appeal Judgment Entry that did not accurately depict the circumstances of the case at hand; and therefore the understanding of what did accrue was lost allowing the prosecution to, "again" manipulate the facts, and interpret a story that was fabricated from allegations made by a child, and pieced together, like a puzzle/game, in where assumptions of the facts were altered and changed, or used out of the context of the way the information was meant to be used and understood, and without effective assistance of counsel, by trial counsel in not filing the necessary suppression motions, or challenging the validity of the alleged allegations, counsel deprived appellant the chance to be heard, therefore, violating the appellant's Due process, and Equal Protection Rights.

The arguments presented on 26(B): Argument One;

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO EXCLUDE TESTIMONY AS TO THE CREDIBILITY AND/OR BELIEVABILITY OF THE ALLEGED VICTIM'S ALLEGATION AGAINST THE DEFENDANT; INEFFECTIV ASSISTANCE OF COUNSEL FOR NOT FILING INEFFECTIVENESS ASSISTANCE OF TRIAL COUNSEL WHO FAILED TO OBJECT DURING THE TRIAL, TO COURT AND PROSECUTION'S MISCONDUCT ALLOWING TRUE DNA FACTS TO BE HIDDEN FROM THE EXPERT WITNESSES WHEN THE OUTCOME OF THE VERDICT RELIED ON THAT INFORMATION, AND RESULTED IN A VERDIC T THAT WAS AGAINST THE PROPOUND PROPONDER-ANCE; BASED ON INSUFFICIENT EVIDENCE PRESENTED AT TRIAL. VIOLATING RULES OF EVIDENCE RULE 404(b), AND 403, ALSO VIOLATIONS OF DEFENDANT'S POST-MIRANDA RIGHTS, AND DUE PROCESS RIGHTS BY NOT SUPPRESSING EVIDENCE BEFORE TRIAL.

Argument Two;

THE TRIAL COURT COMMITTED PREJUDICE ERROR BY FAILING TO EXCLUDE FROM EVIDENCE PRIOR ALLLEGATIONS OF SEXUAL ACTS; ALSO BY FAILING TO EXCLUDE OPINION TESTIMONY AS TO THE CREDIBILITY AND/OR BELIEVABILITY OF THE STATE WITNESSES. INEFFECTIVE ASSISTANCE OF THE STATE WITNESSES. INEFFECTIVE ASSISTANCE OF ALLELLATE COUNSEL FOR NOT FILING INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHO NEGLECTED TO OBJECT TO THE TRIAL COURT WHEN IT ALLOWED TESTIMONY FROM FRIENDS-OF-THE-COURT, PREJUDICING THE DEFENDANT WHEN THIS FACT WAS OBVIOUS; ALSO, RESULTING IN A PREJUDICE OUTCOME IN THE TRIAL, VIOLATING DEFENDANT'S SIXTH AMENDMENT [WORLEY'S] OR CONFRONTATION, EQUAL PROTECTION AND DUE PROCESS OF THE LAW; AND NOT PROTECTING AGAINST PROSECUTOR MISCONDUCT.

Argument Three:

THE EVIDENCE OF THE FIVE DIFFERENT GROUPS OF CHARGES SHOULD HAVE BEEN SEPERATED DUE TO THE EVIDENCE OF THE CHARGES COULD ONLY CONFUSE THE JURY, THUS RESULTING IN A CONFUSING VERDICT BAISED ON EVIDENCE NOT SUPPORTING THE CONVICTION; AND RESULTED IN A SENTENCE OUTSIDE THE STATUTORY GUIDELINES, AND IS VOID.

The Judgment Entry/Opinion attached hereto never mentions the void sentence due to the claim that the sentence was out of the statutory guidelines allowed for the circumstances of this conviction; (R.C.2907.02(A)(1)(b), states that a victim must be under the age of 10 years old to receive a life sentence, or if there was violence, restraint, threat, force, or threat of force. This appellant was sentenced to 10-to-life, when the jury was not instructed of lesser included charges as being the possibilities.

CONSTITUTIONAL QUESTIONS FROM THE FACTS

The defendant was convicted of performing cunnilingus on the alleged victim without adequate or sufficient evidence, and without defense assistance from his trial counsel to establish if the accusations alleged constituted the crimes charged, and if indeed were true from the facts presented, or if the prosecution had fabricated facts from opinions of the accomplices within the structure of alleged

victims supporters and family members who were friends-of-the-court.

Sufficiency is a test of adequacy, whether evidence is legally sufficient to sustain a verdict is a question of law, State v. Robinson (1955), 162 Ohio St. 486; Additionally, a conviction based on legally insufficient evidence constitutes a denial of Due Process. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.E.2d. S 60 (1979).

The Constitutional issue in this case is based on the distinction between the characteristics of the three charges, and how they differ, (i.e), the elements of an alleged rape under 2907.02 states that specific elements must be satisfied based on the evidence corroborating with the allegations, and it would be assumed that the distinctions are clear facts guided by the rules governing the O.R.C. This also would state that 2907.05, sexual battery, would also be committed by a shift in the circumstances, and would be clearly stated and confirmed because the O.R.C distinguished the different element that would be needed to change, or add constituting the charge, and confirming the conviction. Lastly, the charge under O.R.C 2907.03, gross sexual imposition would again be distinguished; also, how all three charges could be confirmed from the same set of circumstances when no evidence is separated and to describe what detail. These issues are not defined clearly in this case due to they are not defined for the Ohio Courts, and leaving the Judges to make personal decisions, and these rulings vary between opinions from one court to another.

During appellant's trial, it was obvious that no sexual knowledge was described by the alleged victim who did not testify accurately to the allegations claimed by the State witnesses. The charges alleged that the appellant pulled off the alleged victims underwear, opened her legs (holding them in the air while she pretended to be asleep), in the daylight morning, 8:00A.M, in a fill size bed that she shared with her sister, (who was in the bed), while her mother was in her bedroom laying down just 8 feet away (awake); also the mother testified that it was her who woke the girls up for school that morning, and the appellant testified that he never went into the bedroom. The testimony of the alleged victim suggested little if any of the elements of the charges convicted. There were no signs of sexual penetration, although the allegations suggest several incidents; even though no area of her body contained evidence to support ANY of her allegations; there was no saliva found inside the vaginal area. Also, the allegations never mentioned restraint, force threats of force, intimidation, pain, bleeding, or any of the frequent descriptive allegations associated with sex crimes involving a child; and are the requirements under the Ohio R.C.2907.02(A)(1)(b), that would give the judge the authority to

sentence the appellant to a sentence of 10-to-life. The allegations were alleged after a heated fight between the appellant and N.J's mother, and only a few months after the appellant filed a complaint with the Sheriffs Department against Patrica Smith, the alleged victim's aunt, who filed a false report implicating the appellant in a domestic dispute.

Patrica Smith serves as a Sheriff Deputy, with 21 years on the department in Richland County, Mansfield, Ohio, and is the older sister of the alleged victim's mother, Khianti James. They have the same mother, Ms. Sharleen Thomas, who is the retired Bailiff for the Richland County Court of Common Pleas and under the honorable James DeWeese; the judge in this case. Also, Ms. Thomas served as a probation officer for approximately 10 years before becoming a bailiff, so therefore she was very well known by the judge, prosecutor, and everyone prosecuting this case, and hindered the chances for the appellant to have fare justice; due to it was Ms. Thomas' granddaughter who was being protected, and who alleged this crime.

The appellant states in his claim, that the allegations are false, and were brought up because of the circumstances concerning Patrica Smith and the false allegations, Khianti James and the constant fighting, the child who was up all night witnessing the conflict of the evening before the allegations, and a police department who was in constant conflict with the appellant, and had him under investigation at the time from a crime 25 years in the past, that was brought up during this case. The appellant was being held on numerous occasions for petty crimes involving his driving privileges, and was filing a complaint against the police department during the time before these charges were alleged.

Also, the alleged victim was removed from her mothers home months before the trial in where she was further indoctrinated by her father and her aunt Patrica Smith, who visited often, even though she knew her presents could have destroyed the integrity of the case; yet and still, she brought her tainted testimony to the presents of the jury, destroying the integrity of this case anyway.

This information became a huge influence during the trial of this case; and during jury instructions given to the jury before their deliberation, the judge never distinguished what was the elements of cunnilingus, and how the jury would separate and distinguish Rape from Sexual Battery and Gross Sexual Imposition from the allegations when the descriptive value, and the evidence of the allegations do not support sexual conduct of any kind; and only suggest sexual contact due to the wording and not the proven conduct.

The evidence of the conviction: The allegations made suggested sexual contact, but in itself

could not establish sexual conduct. The evidence corroborating was DNA saliva found to be from the appellant "on" the underwear worn by the victim, and DNA saliva "on" the pubic area of the victim that also matched as being from the appellant, after it was determined that the alleged victim wore her mothers dirty underwear to school that morning. The State witnesses testified to what was relayed to them by the alleged victim, but in there testimonies, the substance of the allegation were not matched.

The state brought DNA expert witnesses to bring opinions further corroborating the allegation, trying to create conformation that a believable conclusions backed the prosecutions case. There are no misunderstandings of this information, and as it was established that the crime would have been found to be true "if the jury was bound only by opinion as fact," but the reality is that their wasn't efficient evidence to convict the appellant of the charge of rape; their could only be suggestive evidence that only suggested that a situation needed explained involving the appellant's saliva, "nothing about sex".

In the pages of the 26(B) judgment entry, a misstatement was rendered as truth; the DNA from Ms. James was said to have been left over from the wash; in truth, (T. Page 450, Line(s) 21-24) states:

(Q) Now, given that you found a small amount of mom in the underwear, is it possible that what you found of mom survived the wash?

(A) I really don't think so....She went on to say (T. Page 451, Line(s) 3-5); I think if it was in a washer full water that that probably would have been diluted out.

(T. Page 461,Line 8--), (Q) Now, there has been some reference, I guess, on State's Exhibit(s) 18; like item 1.4 and 1.5 that say swab from the pubic area "is the pubic area different from the vaginal area?

(A) When I think vaginal area, I think inside.

(Q) But when you think pubic, that means outside area of the vagina.

(T. Page 462, Line 1), (Q) So the only test on the vaginal swab was for semen?

(A) Correct.

(Q) Not for any other form of DNA?

(A) Correctional.

The pubic area was found to have the mixture of DNA from N.J., the appellant and N.J's mother, Ms. James.

Misquotes cited; Page 5, form the Judgment Entry, answerer by the Fifth District Court of Appeals from the 26(B), was the direct misquote referring to pages (T. 469-477), in where there was an attempt to confirm the information that was the base of their decision. But, the pages mentioned said nothing of the sort, and only introduced Ms. Christine Hammett; who was the expert who introduced Amylase, and dismissed Amylase as evidence belonging or coming from the appellant, and therefore no sufficient evidence exist to draw an opinion of the charges.

(T. Page 464-465), clears up other misinformed information alleged by the Fifth District Court

concerning the transferring of the DNA from the underwear on to the alleged victim:

(Q) And then I think you and Mr. Tunnell talked at the end about the possibility of the transfer from the pubic area to the underwear. You said that could be possible.

(A) Yes.

(Q) And could it be possible to transfer from the underwear to the pubic area?

(A) I think so

(Q) And I think you told us at the very end, DNA tells us a lot, but it doesn't tell us how it got there?

(A) Yes.

The trial attorney for the appellant never produced an opposition to any of the allegations when <http://www.terriwoodlawoffice.com/pdfdocs/Forensics-Rape-Exam.pdf> provides a standard.

It seems that the Fifth District Court further violated this appellant's due process, and equal protection rights by citing untruths on the record to how it came to its conclusions.

The prosecutor, and the investigating detectives withheld the fact that N.J., the alleged victim, had washed her private area before she was examined for DNA examiners. This is important when the expert witnesses for the state were the DNA examiners; they testified of conclusive opinion possibilities of the circumstantial evidence without the true knowledge that the alleged victim had indeed washed her private area before the exam. With this information, the jury would not have been introduced with the possibility that the DNA could have transferred from the pubic area on to the underwear, thus, a reasonable likelihood would be; that the jury would not have considered that as one option of the circumstances. *Brady v. Maryland* 373, U.S. 83,86 S.Ct.1194, 10 L.E d (2d)215(1963). , and presents the applying of the Bagley's test; First, that requirement did not mean that the defendant had to show that the undisclosed evidence would have resulted in an acquittal, but a reasonable probability of a different result, and the adjective is important; Second, the Bagley materiality requirement is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence; Third, once a reviewing court has found constitutional error "there is no need for further harm-less-error review; Fourth, the materiality standard focuses on the "suppressed evidence considered collectively, not item-by-item. The

This appellant never brought up Manifest weight of evidence, but the "**Propound Preponderance of the Evidence**", but the Fifth District Court ruled on the **Manifest weight**. In this case the appellant was charged with RAPE; alleging that he had cumnilingus with N.J.,but no evidence confirms sexual gratification attempted, no kidnapping charges; (that would have had to accrue), or

even that a crime was committed. The allegations, "again" were alleged after a heated fight between the defendant and N.J's mother, and allegedly accrued in the daytime, and while every one was home (awoke), and also less than 10 feet from her mother; and in bed beside her sister.

The appellant was not able to file a Notice of Appeal to the Supreme Court of Ohio due to the moving from one institution to the other, and the rules of different institutions changing the way inmates can utilize the "Law Library." Therefore the appellant was forced to concentrate on the errors during his trial and appeal through his filing of the 26(B) motion.

Furthermore; the arrest in this case was with Violations of Constitutional proportion, and had been a issue not brought up by either the court appointed trial counsel, nor the appeal counsel, but was brought up by the appellant. This evidence, that would have excluded evidence if suppressed, was ignored: Before evidence may be excluded, it must be derivative of police illegality that amounts to a constitutional violation. The justification for this abandonment of the general principle that seeks to expose juries to all probative evidence of a crime stems from the need to deter unlawful police conduct that violates constitutional right. The arrest, in this case, was illegal as it derived from circumstances from a prior case in where the appellant was falsely jailed for an alleged violation of pretrial supervision; explained in appellant's 26(B), concerning case No. 2009- CR-0727D. While being in custody, after the illegal arrest, a fictitious warrant to collect DNA was brought to the appellant while his attorney being available, and was not informed due to the changing of defense counsel. This warrant was not in compliance with the rules of procedure, and when new counsel was appointed, the discovery was without this important information, and while the prosecution withheld 17 pages of the discovery from the defense attorney until the day before trial. The DNA swab was obtained illegally, and the appellant had no legal representation due to a hearing to replace his prior counsel had not taken place; in violation of defendant's Fourteenth(14), and Sixteenth(16) Amendment rights. A conviction based on legally insufficient evidence constitutes a denial of Due Process.

Respectfully Submitted,

Wendell R. Lindsay 591-512
Wendell R. Lindsay, pro'se, 591-512

Sworn to, or affirmed, and subscribed in my presence this 5th day of MARCH 2012.

John O. Babajide
NOTARY



JOHN O.
BABAJIDE
NOTARY PUBLIC, 12
STATE OF OHIO
My Commission
Expires
May 31, 2016

IN THE SUPREME COURT OF OHIO

CERTIFICATE OF SERVICE

I hereby note that a copy of the forgoing was sent to James J. Mayer, the Richland County
Prosecutor of Mansfield Ohio, 38 South Park Street, Mansfield Ohio, 44902 by regular U.S. mail

this 5th day of March 2012. Wendell F. Juckey 591512

Sworn to me this 5th day of MARCH, 2012, in my presents.

John O. Babajide
NOTARY



JOHN O.
BABAJIDE
NOTARY PUBLIC,
STATE OF OHIO
My Commission
Expires
May 31, 2016

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

COURT OF APPEALS
RICHLAND COUNTY OHIO
FILED

2012 JAN 26 AM 8:43

LINDA H. FRARY
CLERK OF COURTS

STATE OF OHIO

Plaintiff-Appellee

-vs-

WENDELL R. LINDSAY

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2010-CA-0134

This matter comes before this Court pursuant to appellant Wendell Lindsay's motion to re-open his direct appeal pursuant to App.R. 26(B). This Court recently upheld appellant's conviction and sentences for one count of raping a minor (R.C. 2907.02(A)(1)(b)), one count of gross sexual imposition (R.C. 2907.05(A)(4)), and one count of sexual battery (R.C. 2907.03(A)(5)). See, *State v. Lindsay*, 5th Dist. No. 2010-CA-134, 2011-Ohio-4747, 2011 WL 4361632.

App. R. 26 (B) states:

(B) Application for reopening

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

SCANNED

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B) (2) (c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

Our original judgment was filed on September 19, 2011, and appellant's application was filed December 14, 2011. Accordingly, appellant's application was timely filed within ninety (90) days of the journalization of our opinion in appellant's case.

In his present motion to re-open, appellant maintains he received ineffective assistance of appellate counsel on direct appeal. The standard for reviewing claims for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984). Ohio adopted this standard in the case of

State v. Bradley, 42 Ohio St.3d 136, 538 N.E.2d 373(1989). These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel.

First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and violation of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. We apply the *Strickland* test to all claims of ineffective assistance of counsel, either trial counsel, or appellate counsel. *State v. Blacker*, Guernsey App. No. 2005-CA-41, 2006-Ohio-5214, 2006 WL 2846967.

Appellant bears the burden of establishing there is a genuine issue as to whether he has a colorable claim of ineffective assistance of appellate counsel, see, e.g. *State v. Spivey*, 84 Ohio St. 3d 24, 1998-Ohio-704, 701 NE 2d 696.

Appellant contends that his appellate counsel, on direct appeal, was ineffective for failing to raise two assignments of error claiming ineffective assistance of trial counsel.

Appellant contends appellate counsel should have assigned as error on his direct appeal the following: the trial court erred by allowing evidence as to the credibility of the victim's allegations against the defendant; that trial counsel was ineffective for failing to object to court and prosecutorial misconduct in allowing "true DNA facts" to be hidden from expert witnesses; that the verdict was against the manifest weight and sufficiency

of the evidence; that the trial court erred by allowing improper character evidence to be admitted; that the appellant's post-Miranda and Due Process rights were violated by not filing suppression motions concerning the DNA evidence; that the trial court erred in failing to exclude prior bad acts evidence; that the trial court failed to exclude opinion evidence as to the credibility of the State's witnesses; that trial counsel was ineffective for allowing testimony from "friends-of-the-court"; that the appellant's right of confrontation, Equal Protection and Due Process were violated; that the prosecutor committed misconduct; and that the charges should have been broken down into five trials to prevent evidence of one act from contaminating the jury regarding other acts.

In his direct appeal this Court reviewed appellant's arguments concerning the trial judge and a prospective juror who was a former bailiff [Assignment of Error II]; the admission of "other acts" evidence [Assignment of Error IV]; evidence as to the credibility of the victim's allegations against appellant [Assignment of Error V] and ineffective assistance of trial counsel [Assignment of Error VI].

Accordingly, we find that this issue is res judicata and further raise "no genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal***" *State v. Smith* 95 Ohio St. 3d 127, 2002-Ohio-1753.

Appellant next argues that his appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to suppress evidence before trial and object to the court and the State allowing "true" DNA facts to be hidden from expert witnesses; that his case should have been broken down into five trials; and that his convictions were against the manifest weight of the evidence.

The expert witnesses testified to the finding and identifying of DNA from swabs of the victim and from the underwear that the victim was wearing at the time she came forward about the abuse. They did not testify about how the DNA ended up in the locations where it was found. Appellant asserts that the "true" DNA facts that were alleged to have been hidden from the experts was that the victim washed her vaginal area before putting on "dirty" panties.

In fact, the forensic testimony was that the DNA from Ms. James that was on the underwear appeared to be remnants from the last time that panties were worn prior to being laundered and that there were no indication in the collected DNA samples of the presence of sperm. (T. 396-441, 469-477).

Appellant's DNA was found on the vaginal area of the victim in this case. The jury was presented with evidence and two conflicting theories as to how the DNA got on the victim's body. The State's theory was that appellant engaged in oral intercourse with the victim and left behind DNA from his saliva that was then transferred to the panties that the victim was wearing that day. This theory was based on evidence presented by the victim who testified that the appellant licked her vaginal area the morning of March 4, 2010 before she went to school and reported the abuse. Further, the victim's mother testified that she seldom wore panties, did not normally engage in cunnilingus with the appellant and had not had sexual relations with appellant for at least two days prior to the victim coming forward to police. (T. 168-169, 225-227). Further, the DNA analysis of the swabs from the victim and the underwear that she was wearing at the time indicated the presence of DNA from the victim, appellant and a faded DNA signature from the

victim's mother. There were also no sperm cells found in the panties. (T. 396-441, 469-477).

Appellant's theory, evidenced only by his own testimony, was that he had engaged in oral intercourse with the victim's mother on the evening of March 3, 2010 and that the victim's mother had put on the panties in question when they were interrupted by the children. (T. 552- 553). The victim's mother later discarded the panties on the floor when she went to bed. Appellant, the next morning when getting the girls ready for school, gathered clothes for the victim to wear and she put on the clothes that he gave to her. (T. 555-556). The victim inexplicably put on her mother's "dirty" underwear, which contained her mother's DNA and appellant's DNA. This happened to be on the very same day that she accused appellant of sexually abusing her.

Thus, the jury did hear evidence that the victim had washed and put the "dirty panties" on before the examination.

Accordingly, we find that this issue raises "no genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal****" *State v. Smith* 95 Ohio St. 3d 127, 2002-Ohio-1753.

Crim.R. 8(A) governs joinder of offenses and states the following:

"Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct."

"It is well-established that the law favors joinder because the avoidance of multiple trials conserves time and expense and minimizes the potentially incongruous outcomes that can result from successive trials before different juries." *State v. Glass* (March 9, 2001), Greene App. No.2000 CA 74, at 2, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 86-87; *State v. Torres* (1981), 66 Ohio St.2d 340, 343; and *State v. Thomas* (1980), 61 Ohio St.2d 223, 225.

As appellant was convicted on three counts, all three of which involved the March 4, 2010 incident, and all of which had the DNA evidence to substantiate the accusations, appellant cannot show how he was prejudiced by the joinder of the incidents. The jury found appellant not guilty on twelve counts, which demonstrated that the jury was able to separate its analysis of the individual charges and impartially decide each count.

Accordingly, we find that this issue raises "no genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal****" *State v. Smith* 95 Ohio St. 3d 127, 2002-Ohio-1753.

As noted in our discussion of appellant's arguments, sufficient evidence was presented by the state to support appellant's convictions.

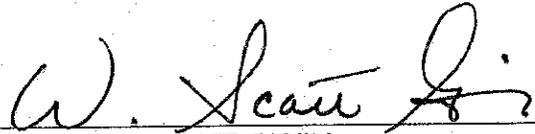
"Corroboration of victim testimony in rape cases is not required. See *State v. Sklenar* (1991), 71 Ohio App.3d 444, 447, 594 N.E.2d 88; *State v. Banks* (1991), 71 Ohio App.3d 214, 220, 593 N.E.2d 346; *State v. Lewis* (1990), 70 Ohio App.3d 624, 638, 591 N.E.2d 854; *State v. Gingell* (1982), 7 Ohio App.3d 364, 365, 7 OBR 464, 455 N.E.2d 1066." *State v. Johnson*, 112 Ohio St.3d 210, 217, 2006-Ohio-6404 at ¶53, 858 N.E.2d 1144, 1158. As the child was ten years old, she was presumed competent to

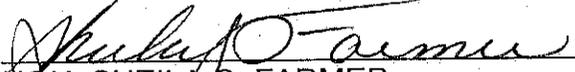
testify. R.C. 2317.01. However, in the case at bar, additional evidence in the form of expert testimony and DNA evidence was presented.

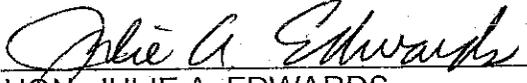
Accordingly, we find that this issue raises "no genuine issue as to whether [he] was deprived of the effective assistance of counsel****" *State v. Smith* 95 Ohio St. 3d 127, 2002-Ohio-1753.

For the foregoing reasons, appellant's motion to re-open his appeal is hereby DENIED.

IT IS SO ORDERED.


HON. W. SCOTT GWIN


HON. SHEILA G. FARMER


HON. JULIE A. EDWARDS