

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE NO. 2012-0424
Plaintiff-Appellee, : **On Appeal from the**
vs. : **Richland County Court of Appeals,**
 : **Fifth Appellate District**
WENDELL R. LINDSAY, : Court of Appeals Case No. 2010-CA-0134
Defendant-Appellant. :

MEMORANDUM IN OPPOSITION TO JURISDICTION
OF PLAINTIFF-APPELLEE, STATE OF OHIO

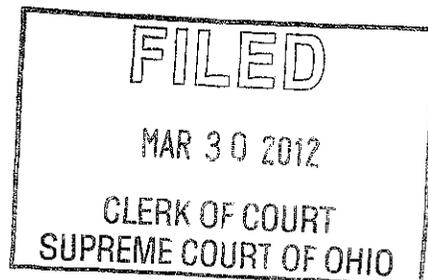
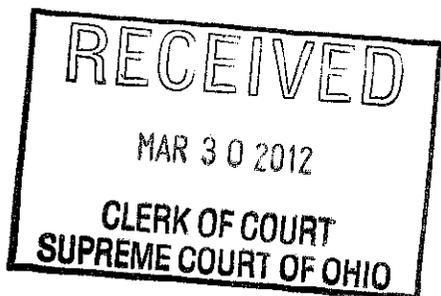
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Defendant-Appellant



Explanation why this case is not a case of public or great general concern and does not involve a substantial constitutional question:

The State of Ohio submits that this case presents absolutely no unique facts, rulings, or issues. Nor does this case raise any substantial constitutional questions worthy of review by this Court.

Procedural History

On March 4, 2010, ten-year-old N.J. approached her guidance counselor at school and told her “my mother’s boyfriend has been raping me.” (T. 197). During the investigation into the sexual assault, N.J. disclosed that her mother’s boyfriend, Wendell Raynard Lindsay (hereinafter Appellant) had come into the room that she shared with her younger sister on the morning of March 4th, pulled down her underwear and stuck his tongue in her vagina. (T. 198, 269). This was not the first time a sexual incident had occurred. All in all, N.J. told the social worker who interviewed her that the Appellant had placed his mouth on her vagina approximately six times and penetrated her vagina with his penis a total of seven times. (T. 271).

After the disclosures, N.J.’s father took her to the hospital for a sexual assault examination. (T. 201, 281, 348-350). The nurse who performed the exam found physical evidence consistent with N.J.’s allegations. (T. 490-495). As part of the examination, swabs were taken of the victim’s vaginal area and the panties she was wearing at the time of the examination were collected as evidence. (T. 396-441). DNA collected from the panties and the vaginal area of N.J. was consistent with the Appellant’s DNA. *Id.*

The Appellant was indicted by the Richland County Grand Jury for five counts of Rape, felonies of the first degree, five counts of sexual battery, felonies of the second

degree, and five counts of Gross Sexual Imposition, felonies of the third degree. The Appellant pled not guilty to all counts at his arraignment, and his case was set for trial.

The Appellant's trial began on October 21, and ended on October 26, 2010. The jury returned a guilty verdict on counts V, X, XV, all of these counts involving conduct that occurred on March 4, 2010, the date that N.J. reported the sexual conduct. The Appellant was found not guilty on the other twelve counts in the indictment. The Appellant was sentenced on October 27, 2010. The trial court sentenced the Appellant to ten years to life on Count V, for rape. The other two charges were merged into Count V for sentencing purposes.

The Appellant appealed the judgment of the trial court to the Fifth District Court of Appeals arguing six separate assignments of error, from jury challenges, to evidentiary issues, to ineffective assistance of counsel. These arguments were all valid, well-presented arguments based on the trial transcripts and the objections made below by trial counsel. The State filed a response on June 1, 2011. On June 13, 2011, the Appellant, dissatisfied with appellate counsel's brief, filed his own amended brief. The Appellant raised many of the exact same issues raised by his appellate counsel. Two issues were different, one arguing manifest weight and sufficiency of the evidence and one arguing that he was sentenced as a repeat violent offender which was not presented to the grand jury. The Appellant was not sentenced to life as a repeat violent offender but was properly sentenced under the rape statute which provides for a life sentence if the victim was under the age of thirteen (13) at the time of the rape. R.C. § 2909.02(B).

The appeals court ruled on September 19, 2011, affirming the decision of the trial court below. The court did not consider the Appellant's amended appeal finding that it was not properly submitted. Although the court found that some of the evidence

presented below was not properly admitted, the court found that the evidence of the Appellant's guilt regarding the acts for which he was convicted was sufficient for these errors to be harmless.

The Appellant then requested that his appeal be reopened in the Fifth District Court of Appeals, claiming his appellant counsel was ineffective. The Appellant argued that his appellant counsel was ineffective because he should have argued that the trial court erred for allowing credibility evidence of the victim, there was prosecutorial misconduct in allowing "true DNA facts" to be hidden from expert witnesses, the verdict was against the manifest weight and sufficiency of the evidence, that suppression motions were not filed, and that the charges should have been broken down into five separate trials.

The appeals court ruled on January 26, 2012. The court barred many of the Appellant's arguments by res judicata because they had been argued in his initial appeal. These arguments were: any issues regarding a prospective juror who was a former bailiff, admission of "other act's" evidence, admission of evidence as to the credibility of the victim, and ineffective assistance of trial counsel. The court then found the Appellant's other arguments not well taken. It found that the DNA expert did know about the facts the Appellant complained of, and testified regarding them. The court also found that there was sufficient evidence to convict the Appellant and joinder of offenses was proper. Overall, the appellate court found no merit to the claim of ineffective assistance of appellate counsel and denied Appellant's motion.

The Appellant then filed his notice to appeal the decision on his motion to re-open.

Argument of Appellee, State of Ohio

THE APPELLANT'S ARGUMENTS ARE REPETITIVE OF HIS APPELLATE COUNSEL'S ARGUMENTS, ARE NOT BASED ON THE RECORD BELOW AND ARE NOT BASED ON THE INEFFECTIVENESS OF HIS APPELLATE COUNSEL.

The Appellant's arguments are difficult to follow and jumbled. However, it appears that the Appellant is simply renewing many of the same arguments made in his initial motion to re-open. None of those arguments present a genuine issue of public concern or involve a substantial constitutional issue.

The Appellant argues that his appellate counsel was ineffective because he should have made the arguments that: the Appellant's conviction was against the manifest weight and sufficiency of the evidence, prosecutorial misconduct and a conspiracy with "friends-of-the-court," that the three types of crimes the Appellant was charged with have different elements that were not explained to the jury, that evidence was not delineated as to which crime it was describing, that judge's have discretion to determine which facts apply to which crimes, that the Appellant's conviction is over the statutory maximum, that there was prosecutorial misconduct when they withheld information, and insufficiency of the warrant used to collect the Appellant's DNA standard.

For simplicity, the State has divided these issues into arguments raised on the initial appeal, arguments raised on the motion to re-open that are still being raised, and new arguments on this appeal. Arguments that were raised by Appellant's first appeal are barred by res judicata. New arguments brought for the first time in this appeal are barred for not being properly raised below. For this appeal, this Court can only consider the issues properly raised below and not barred by res judicata.

Arguments Raised on Initial Appeal

Most of these arguments were properly raised in the Appellant's direct appeal, and are thus barred by res judicata. The Appellant's appellate counsel raised issues regarding the admission of improper character evidence and evidence of prior bad acts. Appellate counsel also brought up issues regarding bolstering of the victim by other witnesses of the State as well as other issues regarding the victim's creditability. The Appellant continues to argue that the trial court acted improperly due to fact that the court personally knew one of the witnesses and due to prior contact that the court had with the Appellant himself. These arguments were previously before the appeals court during the initial appeal. The court carefully considered the issues and held that there was sufficient evidence to convict the Appellant even if the trial court below erred in admitting some hearsay evidence and improper character evidence, finding the admission of the same to be harmless. Thus, res judicata applies on this appeal.

Arguments Made on the Motion to Re-Open

The arguments made by the Appellant that were unique on his motion to re-open that he continues to argue are that his appellate counsel was ineffective for failing to argue that – his convictions were against the manifest weight and sufficiency of the evidence, trial counsel was ineffective for failing to suppress evidence before trial and object to the court, and the State allowing facts to be hidden from expert witnesses. None of these issues raise a significant issue of public concern or constitutional question.

The Appellant once again argues that his conviction is against the manifest weight of the evidence and that his appellate counsel was ineffective for failing to raise this argument. On review for manifest weight, a reviewing court is to examine the entire

record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine “whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered.” *State v. Martin* (1983), 20 Ohio App.3d 172. See also, *State v. Thompkins* (1997), 78 Ohio St.3d 380.

The test for ineffective assistance of counsel, trial or appellate, is similar. The U.S. Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668 set out a two prong test for determining the effectiveness of trial counsel. The Appellant must show that (1) counsel’s performance was deficient and (2) that the deficient performance so prejudiced the Appellant that the Appellant was deprived of a fair trial. *Id.* at 687. In order to prove that the Appellant was prejudiced by the deficient performance of trial counsel, an appellant 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.” *Id.* at 694.

The second prong of the *Strickland* test is the same as the test for plain error, i.e., that the result of the proceeding would have been different but for the error. If the result would not have been different, then the error is harmless. The appellate court has already found that there were some errors below but held those errors to be harmless. *State v. Lindsay*, 2011 Ohio 4747, PP74, 77, 89-90. The court found that there was sufficient evidence presented to sustain the Appellant’s convictions in spite of any alleged errors. As the standard is the same for the ineffectiveness of appellate counsel, and the Appellant has not raised any new issues that would put in doubt any of the evidence relied upon by the court in finding any court errors to be harmless, then this

Court should continue to hold that the Appellant has not been prejudiced by any of the alleged errors. Thus, there is no issue of great public concern or constitutional question raised.

In regards to whether evidence should have been suppressed, "It is well-settled that '[m]atters outside the record do not provide a basis for reopening.' *State v. Hicks*, 2005 Ohio 1842, P7. More properly, 'any allegations of ineffectiveness based on facts not appearing in the [trial] record should be reviewed through the post-conviction remedies.'" *State v. Carmon* (Nov. 18, 1999), Cuyahoga App. No. 75377, reopening disallowed, 2005 Ohio 5463, P29, citing *State v. Coleman* (1999), 85 Ohio St.3d 129. The Appellant's arguments regarding what could or should have been suppressed are not supported by the trial transcript or anything in the record and therefore do not provide a basis for reopening the Appellant's appeal.

Further, there is nothing in the record to support the contention that anyone hid facts from the expert witnesses in this case. 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. The Appellant asserts that facts that were alleged to have been hidden from the experts was that the victim washed her vaginal area before putting on "dirty" panties. Even if this were true, it would not have any effect on the DNA experts' testimony regarding where the DNA was located and to whom it belonged. The Appellant was presented with the opportunity to testify about his theory as to how his DNA came to be found in the victim's vaginal area. The jury, who had the opportunity to view all of the testimony and consider the evidence, found the Appellant's explanation to be lacking.

The Appellant argues it was proven that the victim bathed prior to putting on her mother's "dirty" underwear, which was the "proven" source of his DNA found near the victim's vaginal area. This is a mischaracterization of the evidence presented at trial and is the Appellant's version of how he believed the testimony came out in court.

The evidence was presented that the victim was found to be wearing her mother's underwear. However, the testimony did not "prove" that the underwear was dirty. 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). This goes against Appellant's assertions that the panties had been worn by Ms. James after she and the Appellant had engaged in sexual relations and that the victim had then gotten the Appellant's DNA on her vaginal area when she put on the panties her mother had discarded before going to bed.

The Appellant's DNA was found on the vaginal area of the victim in this case. The jury was presented with this evidence and two conflicting theories as to how the DNA got on the victim's body. The State's theory was that the 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 and by the victim's mother who testified that she seldom wore panties, did not normally engage in cunnilingus with the Appellant and had not had sexual relations with the 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, the 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).

The 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. The 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 the Appellant's DNA. This happened to be on the very same day that she accused the Appellant of sexually abusing her. Not only is this version of events unbelievable and very self-serving on the part of the Appellant, it is not substantiated by any of the evidence.

The Appellant's arguments are based on his testimony and the inference that he was a more reliable witness than the victim and therefore the conviction is against the manifest weight of the evidence that he presented. Issues of creditability are for the jury to decide. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of syllabus. The jury in this case decided to believe the victim and the DNA evidence that supported her version of events rather than the Appellant and the extraordinary coincidence that the victim put on dirty panties that had the Appellant's DNA on the very same day she accused him of rape.

Therefore, appellate counsel was not ineffective for failing to argue manifest weight of the evidence. Furthermore, the lack of this argument failed to prejudice the Appellant, as it would not have succeeded.

Therefore, for the reasons stated above, the Fifth District Appellate Court ruled properly on these issues. Furthermore, none of these issues are a case for public concern or raise constitutional questions. Thus, jurisdiction should be denied.

New Arguments on This Appeal

The new arguments the Appellant makes in this request for jurisdiction are – the three types of crimes the Appellant was charged with have different elements that were not explained to the jury, evidence was not delineated as to which crime it was describing, judge’s have discretion to determine which facts apply to which crime, and the Appellant’s conviction is over the statutory maximum.

Issues not properly presented to the appeals court for its consideration will not be reviewed by the Supreme Court. This is true even if the issue was argued before the trial court. *Thirty-Four Corp. v. Sixty-Seven Corp.* (1984), 15 Ohio St.3d 350 at 362. As the issues above were not properly presented below, it is not now reviewable by this Honorable Court.

Conclusion

Wherefore, for the foregoing reasons, the State of Ohio respectfully requests this Honorable Court deny Appellant jurisdiction to pursue his appeal.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of Plaintiff-Appellee, State of Ohio, was sent to Wendell Lindsay, A591-512, Mansfield Correctional Institution, 1150 North Main Street, Mansfield, Ohio 44901, by regular U.S. mail, this 29th day of March, 2012.



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