

ORIGINAL

NO. 2013-0166

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 97683

STATE OF OHIO

Plaintiff-Appellee,

-vs-

EVIN KING

Defendant-Appellant

MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO

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**WHY THIS FELONY CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST  
AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Defendant-Appellant Evin King presents two propositions of law that are essentially vehicles for this Court to review his fact-intensive actual innocence claim. King first argues that the trial court abused its discretion in denying his post-conviction petition after DNA testing, claiming that its earlier decision to grant testing required it to grant his petition if the testing was favorable. King's first proposition has no support under Ohio law. The trial court's decision to grant or deny a post-conviction petition is always discretionary and must be made on the basis of the entire record in the case. King next argues that the court erred by relying on its holding from King's direct appeal that his conviction was supported by the manifest weight of the evidence. He claims that the Eighth District's factual recitation in his direct appeal was inaccurate in several places. What King truly seeks is a de novo review of all his factual claims. King had that opportunity in his hearing in front of the trial court. The court listened to all of King's arguments, reviewed all the evidence from trial and the hearing in his case, and found he failed to prove his innocence.

This Court should not accept jurisdiction of this case as King simply iterates the same claim that both the trial and appellate courts considered and rejected. King has done nothing to show that the trial court abused its discretion or that the Eighth District somehow erred by affirming that conclusion. He is simply dissatisfied with the Eighth District's opinion, but that does not merit review where the opinion is based on well-established legal principles and sound reasoning.

**STATEMENT OF THE CASE**

A Cuyahoga County Jury convicted Evin King on one count of murder relating to the June 21, 1994 strangulation death of his girlfriend, Crystal Hudson. On direct appeal, the

Eighth District rejected King's assignments of error and affirmed his convictions. *State v. King*, 8th Dist. No. 68726, 1996 WL 661033 (*King I*). On October 25, 2004, King filed an application for DNA testing pursuant to R.C. 2953.72. The trial court adopted King's proposed findings of fact and conclusions of law and ordered additional DNA testing. After obtaining the results of that testing, King filed a petition for post-conviction relief in the trial court pursuant to R.C. 2953.21 alleging his actual innocence. On November 15, 2011, after a full hearing, the trial court found that King's petition failed to establish his actual innocence by clear and convincing evidence and dismissed King's petition. The Eighth District affirmed the trial court's judgment. *State v. King*, 8th Dist. No. 97683, 2012-Ohio-4398 (*King II*). King filed an application for en banc reconsideration, which the Eighth District denied.

#### **STATEMENT OF THE FACTS**

At approximately 10:45 a.m. on June 22, 1994, 13-year old Brandi Hudson discovered the body of her mother Crystal Hudson in the bedroom closet of her apartment. The body emitted a powerful odor that led Brandi to its location. Crystal Hudson's live-in boyfriend Evin King had been in the apartment overnight with the body but claimed never to have noticed the smell. His jacket was on top of Hudson's body where it lay in the closet. When Brandi discovered the body, she began to scream and call her mother's name, telling King that her mother was dead. King walked halfway towards the closet from where he sat but did not look in the closet, instead going back to the living room and pacing the floor. Brandi immediately accused King of killing Hudson because he had been the only one in the apartment with her that day. King replied, "I ain't do it I ain't do it." King and Hudson were both drug addicts who frequently argued over money.

The coroner found that Hudson's death was a result of ligature strangulation applied from behind. She had also been beaten in the face and head and had shallow injuries to her rectum. There was no sign of forced entry to the apartment, nothing had been taken, and there were no signs of a struggle of any kind. None of the furniture had been disturbed and there was no visible damage anywhere. All of the sheets from Hudson's bed were also missing at the time investigators arrived. Hudson had no fingernail marks on her neck where the ligature was applied. Her nails were also undamaged. Her body was nude, sitting upright in the closet when her daughter Brandi discovered her. Brandi had last seen her mother alive at 11:00 a.m. on June 21, approximately 24 hours prior to discovering her body at 10:45 a.m. on June 22.

King behaved strangely before and after the discovery of Hudson's body. Crystal Hudson's friend Jean Hester came over to the apartment at 7:30 p.m. on June 21 and asked King where Hudson was. He replied that "she was gone." Hudson's mother accused King of killing Hudson when she came to the apartment looking for her at 11:00. King made a strange face and did not answer her for a long time before denying that he killed Hudson. When Brandi discovered the body on June 22 and began to scream that her mother was dead, King did not try to help Hudson or even check to see if she was dead. Several people had noticed a foul odor in the apartment during the 24 hours prior to when Hudson's daughter found her body. Although he was in the apartment all day and all night, King insisted he had never noticed a smell. The smell was so powerful that officers who responded to the scene testified it was noticeable on entry and that they had to wait outside while the coroner's staff removed the body. Although King admitted to seeing

Hudson's shoes on the floor and her keys on the table, he did not go looking for her at any point until Brandi Hudson discovered the body the next day.

King also lied repeatedly as to where he was and what he was doing over those 24 hours. King first changed his story as to how his jacket came to be on Hudson's body. He initially told police that he had put his jacket in the closet the night of June 21, without knowing her body was in the closet at the time. He then claimed that he had actually put it there two-and-a-half weeks earlier, even though he said he had only known Hudson for two weeks. Police who responded to the scene described King as nervous and agitated. They also said he appeared to have been drinking or high and that his speech was slurred. King attempted to provide an alibi defense in which he claimed that he had been on an all-night crack binge with friends and came back to Hudson's apartment at 3:00 p.m. on June 22. He claimed that Hudson's younger daughter Tiiya let him into the apartment at that time. Tiiya denied ever letting King into the apartment. King insisted at trial that Brandi was lying when she testified that he had never checked on Hudson's body, that a police officer was lying when he testified that King told him "the sheet was off the body," and that the police were lying when they said they had not found any beer bottles in the trash where King said they would be after his all-night binge.

King argued at trial that Hudson had been killed in a rape-murder committed by an unknown third person. Both the State and King agreed that sperm found in Crystal Hudson's vagina did not match King's DNA and instead came back to an unknown third person. But the semen was too old to have been related to Hudson's murder. The coroner, Dr. Robert Challener, testified that it was "[v]ery unlikely to be placed at the time of death." Both the coroner and coroner's serologist who testified at trial agreed that this semen was

deposited anywhere from two days to seven days prior to Hudson's murder. The State thus argued that the sex had been prior and unrelated to the murder. The jury heard and considered this evidence establishing that Hudson had engaged in a sexual encounter with another male sometime prior to her death. The jury found King guilty of murder. Although fingernail scrapings were also recovered from the victim, there were no means by which to test them for DNA material in 1994.

In 2004, King filed an application with the trial court for DNA testing of the material under Hudson's fingernail. King submitted proposed findings of fact and conclusions of law to the trial court in which he wrote that, "DNA testing results would be outcome determinative" and "[i]f the results of the DNA testing establish that someone other than King was the assailant, a reasonable factfinder may find him not guilty of the murder of Ms. Hudson." On April 23, 2008, the trial court adopted King's proposed findings of fact and conclusions of law and approved the additional testing. That testing revealed that a speck of material containing DNA recovered from under the fingernail on Hudson's right ring finger was consistent with the semen deposited in Hudson's rectum two to seven days prior to her murder.

After the testing was done, King filed a post-conviction petition in the trial court alleging that the DNA under Hudson's fingernail proved his actual innocence by clear and convincing evidence. The State opposed King's request on the grounds that, because the jury had already known that Hudson had engaged in intercourse with another male sometime prior to her death, the small amount of DNA under her fingernail was merely cumulative to the existing evidence. On November 15, 2011, the same trial court that

presided over King's 1995 trial found King's petition failed to establish actual innocence by clear and convincing evidence and dismissed the petition.

### **LAW AND ARGUMENT**

***Proposition Of Law No. I: Ohio Revised Code Section 2953.21(A)(1) Requires a Trial Court to Review the Results of DNA Testing Conducted Under R.C. 2953.71 Through R.C. 2953.81 In the Context of and Upon Consideration of All Available Admissible Evidence Related to the Petitioner's Case. When a Petitioner Has Demonstrated By Clear and Convincing Evidence His or Her Actual Innocence Under R.C. 2953.21(A)(1)(a)-(b), a Trial Court Abuses Its Discretion and Denies the Petitioner Due Process When It Fails to Adhere to Its Statutory Duties and Arbitrarily Determines That Relief is Unwarranted.***

In his First Proposition of Law, King argues that the trial court abused its discretion by denying his petition for post-conviction relief based on his claim of actual innocence. King's first proposition essentially asks this Court to find that he is actually innocent as a matter of fact and to then find that the trial court abused its discretion in hindsight by coming to a contrary conclusion.

#### **1. Legal Standard.**

A trial court's decision granting or denying a post-conviction petition filed pursuant to R.C. 2953.21 will be upheld absent an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, at ¶ 58. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. As this Court has noted:

"[A]n abuse of discretion involves far more than a difference in \* \* \* opinion \* \* \*. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will

but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias.”

*State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264.

**A. The Trial Court Properly Exercised its Discretion In Finding that King Failed to Establish Clear and Convincing Evidence of His Innocence.**

***i. The DNA Under Hudson’s Fingernail is Cumulative to the State’s Evidence at Trial That She Had Engaged in Intercourse With Another Male Several Days Prior to Her Death.***

The trial court found that the new evidence King presented – a speck of DNA under the ring finger of Hudson’s right hand – did not establish his actual innocence by clear and convincing evidence because, “the evidence presented at trial already excluded [King] as the donor with respect to the vaginal swabs \* \* \*.” The jury in King’s 1995 trial knew and considered the fact that the sperm heads in Hudson’s vagina did not match Evin King’s DNA. The jury found King guilty of murder. The new evidence does not undermine the verdict.

The State’s theory at King’s trial was that the victim had a sexual encounter with another man days prior to her death. That fact that the victim had a minute amount of that person’s DNA under one fingernail is not in any way inconsistent with that theory because it is readily apparent that many types of contact, including consensual and non-consensual sex, could produce a small amount of DNA under a person’s fingernail. See *Cunningham v. District Attorney’s Office for Escambia County*, 592 F.3d 1237, 1256 (11th Cir.2010) (“Other combinations of test results are unlikely to prove innocence. \* \* \* A non-match from the fingernail scrapings might simply indicate that she had contact, sexual or otherwise, with someone else”); *Turner v. Thaler*, W.D. Texas No. A-08-CA-811-SS, 2009 WL 3838847, at \*3 (Nov. 13, 2009) (state’s DNA expert testified that the presence of DNA underneath one of

the victim's fingernails "was not unusual because 'your hands come in contact with so many different things'"); *Larue v. State*, Tex.App.-Beaumont No. No. 09-05-145 CR, 2007 WL 1501646, at \*7 (Oct. 3, 2007) ("Finding DNA samples under someone's fingernails would also not necessarily indicate whether it was deposited by a consensual or a non-consensual act").

The DNA under Hudson's fingernail also contradicts King's rape-murder theory for two reasons. First, the DNA is present only in a small amount under the fingernail of Hudson's right ring finger. Second, the coroner's report noted that Hudson's nails "show no evidence of injury." Both of these facts are inconsistent with Hudson scratching at her attacker in the violent sexual encounter that King asks this Court to accept. And while the victim had injuries to her face and to her rectum, there is no evidence of any connection between those injuries and the sperm from 2-7 days earlier.

This result neither bolsters nor contradicts the State's theory because there is no way to determine how such a small amount of DNA may have come to be under the victim's fingernail. DNA testing "is not a magic bullet in post-conviction cases." *State ex rel. Richey v. Hill*, 216 W.Va. 155, 165, 603 S.E.2d 177 (2004), citing Jennifer Boemer, Note, *In the Interest of Justice: Granting Post-Conviction Deoxyribonucleic Acid (DNA) Testing to Inmates*, 27 Wm. Mitchell L. Rev. 1971, 1985 (2001), quoting Chris Asplen, Executive Director of the National Commission on the Future of DNA Evidence. It "is only as powerful as it is relevant in a given scenario." *Id.* As many times as King might point to the results of his DNA testing, he cannot explain why such testing undermines any part of the State's case against him. As such, it does not establish King's actual innocence by clear and convincing evidence.

King's argument rests upon the assumption that the DNA evidence under his victim's fingernail is somehow probative on the issue of timing between the sexual contact that produced the sperm and the murder. King has provided no evidence as to why that might be the case. The DNA under the victim's fingernail only proves that she had contact with an undetermined third person at an undetermined time prior to her death. In a case where the State argued to the jury and the trial court that she had engaged in intercourse with another man days preceding her murder, this evidence is merely cumulative to that theory.

The jury in King's 1995 trial considered the DNA evidence from the semen that excluded King. The DNA under the victim's fingernail is certainly less probative than that evidence. The jury, after considering the DNA evidence from the sperm and hearing King's attorneys argue that the victim had been killed in a rape-murder nevertheless found King guilty. For this new evidence to establish King's innocence, he would have had to demonstrate a timing nexus between the fingernail DNA and the murder. This is a hurdle King has never been able to surpass. There is no evidence in this case that supports any inference of timing.

***ii. The State's Evidence at Trial Demonstrated That the Unknown Sperm Was Unconnected to the Murder Because it Was Days Old.***

King's theory is also in conflict with the uncontroverted testimony of the forensic serologist and the coroner at his 1995 trial that the semen that investigators recovered from the victim was "deposited anywhere from two days to seven days *prior* to her murder." *King II*, at ¶ 27 (Gallagher, J., concurring) (emphasis in original). King focuses on Dr. Challener's statement that it was "very difficult to give any reliable estimate" as to precisely when the sperm had been deposited. King's attempt to take this statement out-

of-context is misleading. Dr. Challener was clear that the sperm had been deposited somewhere between 2 days and 5 days before Hudson's body was found. It was difficult to give a reliable estimate as to when it was deposited only to the extent that it was during that timeframe. Moreover, Dr. Challener immediately followed up by saying that it was "very unlikely" that any sperm cells were contemporaneous with anal penetration. There has never been any suggestion by any expert witness who has testified in this case that the sperm could have been deposited at the time of Hudson's murder.

The reason Dr. Challener was so confident that the sperm were not deposited contemporaneously with Hudson's death was that there were almost no intact sperm heads. He explained that "if the sperm were just recently deposited, you would - you expect them to be well-formed, numerous, intact, and if death occurred relatively shortly after that, then you would expect them to persist in the body for some time." This was because a living female body would actively break down sperm more quickly than a dead body. Dr. Challener, however, found that there were "very, very few intact sperm" present as there would be if Hudson had died immediately afterwards, and that "most of them had broken down already." Kay May, a forensic serologist, likewise testified that she observed only a few sperm heads and had found "no intact sperm" in the samples from Hudson's body. She stated affirmatively that "they were deposited sometime before her death," possibly as much as seven days beforehand.

This is the only evidence related to the DNA and evidence and the time of the murder. It directly refutes any purported nexus King may try to establish between the DNA evidence in this case and the murder. "[I]t would take a hearing with an expert or a report that can reasonably question or refute both Challener's and May's claims that the sperm

was deposited *prior* to the murder, to make a more compelling argument that the origin of the fingernail scrapings is ‘outcome determinative’ in this case.” *King II*, at ¶ 31 (Gallagher, J., concurring) (emphasis in original). King has never undermined the evidence against him and his new evidence does nothing to change any fact of consequence from his trial.

***iii. A Trial Court Is Not Automatically Required to Grant a Petition for Post-Conviction Based Solely on the Outcome of DNA Testing.***

King claims that the trial court further abused its discretion by finding that he did not satisfy the clear and convincing evidence standard required to grant him post-conviction relief based on his claim of actual innocence after it had approved DNA testing. The trial court was free to find, in its discretion, that King had not met the standard for post-conviction relief regardless of whether he had met the standard for the application.

The decision to grant an application for DNA testing is based only on the court’s finding that such testing would be “outcome determinative” under R.C. 2953.73. “Outcome determinative” means that “there is a strong probability that no reasonable factfinder would have found the offender guilty” had the results been presented at trial. R.C. 2953.71(L). The standard for granting the offender’s petition, however, is higher. The results of the testing must “establish, by clear and convincing evidence, actual innocence of [the] felony offense[.]” R.C. 2953.21(A)(1)(a). Actual innocence means that “no reasonable factfinder would have found petitioner guilty of the offense” had the results been presented at trial. R.C. 2953.21(A)(1)(b). The standard thus shifts from probability to certainty. *King II*, at ¶ 13. A defendant might meet the first criteria but not the second.

King’s argument that the trial court had to find he was actually innocent after granting his application, solely because he believes the DNA results were favorable to him, would remove all discretion from the trial court in the post-conviction phase after

approving the application for additional testing. This contradicts the repeated statements of appellate courts across Ohio that the granting or denial of a post-conviction petition is discretionary in the trial court and will be reviewed only for an abuse of that discretion. See *Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77 at ¶ 58. It would also require the trial court to base its decision to grant post-conviction relief solely on the outcome of the DNA testing. This is explicitly contrary to the language of R.C. 2953.71(L) that requires the trial court to consider the results of any DNA testing “in the context of and upon consideration of all available admissible evidence related to the offender's case \* \* \*.” King’s argument would turn the trial court’s decision on the post-conviction petition following DNA testing into a mere formality.

King also claims that the trial court abused its discretion because it did not abide by certain statements it made in its order granting testing. It was actually King who drafted these proposed findings, and that the trial court simply adopted them verbatim. Moreover, as the Eighth District correctly found, the findings made in the court’s order granting King’s application - under a different standard - did not bind the court. *King II*, at ¶ 13. Further, there was nothing that prevented the trial court from reconsidering any part of its prior ruling. *King*, at ¶ 29 (Gallagher, J., concurring). The trial court’s decision to grant King’s application for DNA testing pursuant to R.C. 2953.71 was not a final, appealable order. *Id.* As a result, it was not binding as the final outcome of his post-conviction petition. See *Javidan-Nejad v. Navadeh*, 8th Dist. No. 95406, 2011-Ohio-2283, at ¶ 62. (Interlocutory orders are subject to modification.) Further, the trial court is required to consider everything in ruling on the petition and King cannot argue that it erred by doing so.

- iv. *The Record Clearly Demonstrates That the Trial Court Complied With R.C. 2953.21(A)(1) by Considering All Available Admissible Evidence.***

King also argues briefly that the trial court did not comply with the mandate of R.C. 2953.21(A)(1) to consider the DNA under Hudson’s fingernail “in the context of and upon consideration of all available admissible evidence related to the person's case \* \* \*.” King did not raise this issue in either the trial court or in the Eighth District and thus forfeited the issue for this Court’s review. “The Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court.” *City of Toledo v. Reasonover*, 5 Ohio St.2d 22, 213 N.E.2d 179 (1965), paragraph two of the syllabus.

The record reveals that the trial court did consider the full record in this case. The trial court found that the DNA under Hudson’s fingernail was cumulative to the State’s evidence at trial that King was not the source of the semen. It did this by considering “the evidence presented at trial” and noting that R.C. 2953.21 required the court to consider the new DNA evidence in the context and consideration of all the other evidence in the case. The trial court also explicitly stated during the hearing on King’s petition that “I’ll review the pleadings for this portion of the case, as well as the trial transcript and what’s been said here today \* \* \*.” The trial court was also familiar with the facts of this case because it was the same court that presided over King’s trial.

The trial court’s statement in its order that it “has chosen to look at the new DNA report and the coroner’s report” did not mean that court deliberately ignored everything else. The record reflects that the trial court looked at the new evidence in conjunction with the pleadings, the transcript, and the stipulations and arguments by the parties at the hearing. Moreover, this Court must presume that a trial court considered all relevant, material, and competent evidence absent explicit evidence to the contrary. *State v. Hughes*,

8th Dist. No. 62884, 1993 WL 453699, at \*14. King's allegation that the court disregarded its statutory mandate has no basis in fact. His first Proposition lacks merit and warrants no further review by this Honorable Court.

***Proposition of Law II: An Appellate Court's Review of a Trial Court's Compliance With the Mandates of R.C. 2953.21(A)(1) Under the Abuse-of-Discretion Standard Necessitates the Appellate Court's Careful Consideration of That Same Evidence. The Law-of-the-Case Doctrine Cannot Be Used to Insulate From Review an Appellate Court's Previous, Erroneous Factual Determinations Made on Direct Appeal.***

In King's Second Proposition of Law, he argues that the Eighth District erred by relying on the law-of-the-case doctrine for certain factual findings he claims now were erroneous. None of the alleged factual errors King points to in *King I* were errors at all and they did not cause any prejudice to King in this case. For example, King claims that the Eighth District erred in *King I* by stating that King "was with his girlfriend, the victim, the last time she was seen alive \* \* \*." *Id.* at 15. Brandi Hudson did tell police that King was present in the apartment at 11:00 a.m. on June 21 when she last saw her mother alive. At trial, Brandi recanted that statement, although she had no explanation for why she had changed her mind. The State argued in closing that Brandi had changed her statement because she was scared of King. Whether the jury believed Brandi's statement to police or her trial testimony was therefore a question of fact for the jury to decide. It was not error for the jury and the court to believe Brandi's statement to police and King's insistence that the jury should have found otherwise is not a basis to invoke this Court's discretionary jurisdiction.

What King truly seeks is a complete de novo review in the appellate court of everything related to his case, with no deference to factual findings made by the jury, the trial court, or the Eighth District at any point. There is no rule or caselaw that entitles King

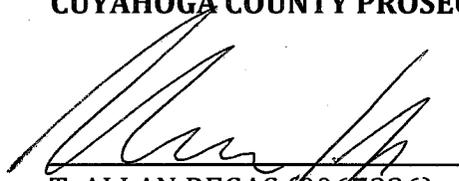
to wipe the slate clean. Additionally, the trial court cured any error by examining directly the transcript of King's trial and reading exactly what each witness said to clear up any discrepancies. There was therefore no possibility of prejudice to King. Based on the foregoing, King's second proposition of law lacks merit and warrants no further review by this Honorable Court.

**CONCLUSION**

The State of Ohio respectfully submits that King's Memorandum in Support of Jurisdiction fails to present a substantial constitutional question or an issue of public or great general interest. The Eighth District properly rejected King's claims based on the particular facts of this case and reasoned application of established precedent. As such, this Honorable Court's discretionary jurisdiction is not warranted.

Respectfully submitted,

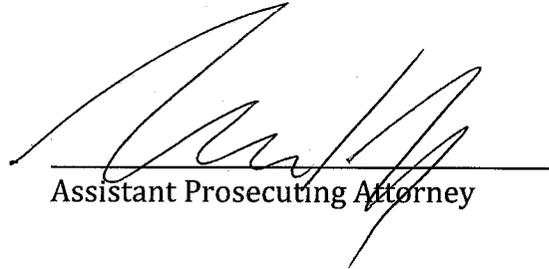
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Response of Appellee State of Ohio has been mailed by regular U.S. mail this 22<sup>nd</sup> day of January, 2013, to Kristopher A. Haines, 250 East Broad Street, Suite 1400, Columbus, OH 43215, counsel for Defendant-Appellant.



Assistant Prosecuting Attorney