

IN THE SUPREME COURT OF OHIO

Supreme Court Case Number 14-0432

STATE OF OHIO

Appellee

v.

DOUGLAS PRADE

Appellant

On Appeal from the Summit
County Court of Appeals
Ninth Appellate District
Court of Appeals No. 26775

MEMORANDUM IN OPPOSITION
STATE OF OHIO

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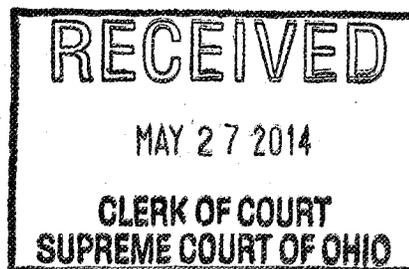
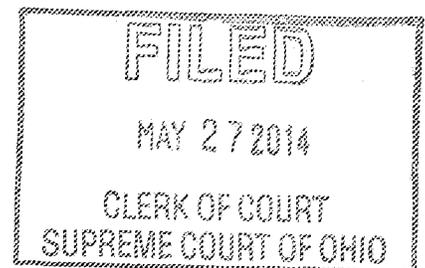


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PROPOSITION OF LAW I

A PETITIONER SEEKING TO ESTABLISH “ACTUAL INNOCENCE” UNDER R.C. 2953.21(A) BASED ON NEW DNA TEST RESULTS NEED NOT RULE OUT THE POSSIBILITY OF “CONTAMINATION” AND, INSTEAD, MUST PROVIDE CLEAR AND CONVINCING EVIDENCE THAT A REASONABLE JUROR, WHEN CONSIDERING THE NEW DNA EVIDENCE IN THE CONTEXT OF ALL OTHER ADMISSIBLE EVIDENCE, WOULD HAVE REASONABLE DOUBT AS TO THE PETITIONER’S GUILT.

PROPOSITION OF LAW II

A TRIAL COURT DOES NOT ABUSE ITS DISCRETION IN GRANTING A PETITION FOR POSTCONVICTION RELIEF AND EXONERATING THE PETITIONER WHEN NEW DNA TESTING OF CRITICAL PHYSICAL EVIDENCE THAT WAS LIKELY TO HAVE THE PERPETRATOR’S DNA PRODUCES RESULTS THAT DEFINITELY EXCLUDE THE PETITIONER.

LAW AND ARGUMENT

A. Appellant Douglas Prade set himself the task to prove by clear and convincing evidence that not one reasonable factfinder would have found him guilty of aggravated murder.

Prade’s petition for post-conviction relief was untimely. Prade had to satisfy the jurisdictional requirements of R.C. 2953.23. *Prade*, 2014-Ohio-1035, ¶16.

R.C. 2953.23 has two prongs. The second prong applies here: the defendant may show by clear and convincing evidence that the results of a DNA test considered with all available admissible evidence require the conclusion that the defendant is actually innocent of the offense, or of the aggravating circumstance(s) underlying a death sentence. R.C. 2953.23(A)(2). Absent compliance with R.C. 2953.23, the trial court has no jurisdiction and must dismiss the petition. *State v. Hartman*, 9th Dist. No. 25055, 2010-Ohio-5734, ¶20. Proof of actual innocence justifies relief under a timely petition, either a discharge or a new trial. R.C. 2953.21(A)(1)(a); R.C. 2953.21(G). Accordingly, where in an untimely petition the defendant proves actual innocence the court treats the petition as timely filed for choice of remedy.

The standard of review for a timely petition for post-conviction relief is abuse of discretion, *State v. Craig*, 9th Dist. No. 24580, 2010-Ohio-1169, ¶12 (citing *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶45). *Gondor* involved a timely petition: “a trial court’s decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion.” *Id.* ¶58. The Ninth District Court of Appeals reviewed under an abuse of discretion standard. *Prade*, 2014-Ohio-1035, ¶17-¶18. The State accepts that standard for an untimely petition where the trial court conducts an evidentiary hearing. An abuse of discretion means that the decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

R.C. 2953.23(A)(2) requires proof by clear and convincing evidence of actual innocence:

“actual innocence” means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Ohio Revised Code or under former section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted ***.

R.C. 2953.21(A)(1)(b); R.C. 2953.23(A)(2) (incorporating definition.)

Clear and convincing evidence provides “in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

B. The New DNA Evidence Is Wholly Opaque And Does Not Come Close To Supporting A Finding of Actual Innocence.

The crux of the case but by no means the only important consideration is the conflicting testimony from Prade's DNA experts and the State's BCI DNA experts. The primary focus of the tests and testimony is the bite mark cutting, Exhibit 123. This is the "most significant" biological evidence. *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, ¶17.

1.

Building on speculation by one of Prade's witnesses at the jury trial, Prade put on testimony that the killer probably slobbered all over the lab coat while inflicting the bite. (T. 66-67, 345-346). There is no evidence why this conclusion that the biter slobbered over the lab coat as a dog might is true. Prade's witnesses posited that the male DNA that DDC found should be from saliva. (T. 81, 466). A slobbering person would deposit a "male profile of strong significant signal." (T. 824, 1091). Saliva should produce many cells. (T. 64, 66, 84).

The Ninth District Court of Appeals conducted an exhaustive review of the evidence and found that the tests in 1998 rebutted "any assertion that there was a 'slobbering killer.'" *Prade*, 2014-Ohio-1035, ¶117.

In addition, and crucially, the court of appeals found that, "there was never a shred of evidence in this case that the killer actually deposited saliva on the lab coat." *Id.* ¶117. That goes far to destroy the entire foundation of Prade's arguments; Prade has to have saliva on the cutting for there to be even a filament of an argument that the killer left DNA there. With no saliva, the cutting provides no evidence whatsoever concerning

the killer. It is true that Prade's experts speculated that saliva was present. However, their test results severely undercut their opinions.

2.

The State put on substantial evidence that the DNA test results were the result of contamination. The court of appeals found that transfer/contamination explained the DNA found by Prade's team was just as likely as degradation of the DNA over time. *Prade*, 2014-Ohio-1035, ¶119.

The State contends that it is a fact that some contamination or transfer occurred on Exhibit 123 producing the results in 19.A.1 and 19.A.2. (T. 420). Otherwise, there would not be more than one profile and a shifting of the major/minor profile, (T. 420), as explained below.

3.

DDC cut a section from the bite mark cutting. This cutting is 19.A.1. (T. 326). There is a partial male profile in 19.A.1. DDC excluded Prade as the contributor. (T. 328). DDC took three more cuttings from the bite mark cutting, extracted DNA, and combined it with the extract from 19.A.1 to form 19.A.2. (T. 331-332, 409). DDC found a major and a minor partial male profile in 19.A.2. DDC excluded Prade. (T. 329). DDC also found alleles that were below thresholds where comparisons were possible. DDC stated that the below threshold might be "spurious" DNA from a third individual. (T. 333).

In 19.A.1 at DYS 437 DDC found a 15 marker at 130 RFUs. In 19.A.2 at DYS 437 DDC found a 14 marker at 110 RFUs and a 15 marker at 54 RFUs. Exhibit 60. What happened is that the major profile in 19.A.1 is not the major profile in 19.A.2 but has

become the minor profile at a much lower RFU level. (T. 412). Prade's expert, Dr. Heinig confirmed that the 14 and 15 markers are from two different people. (T. 411).

Additionally, examination of the results show at least two male contributors to the bite mark DNA and perhaps five. Prade's expert Dr. Heinig admitted that assuming DDC results were good some contamination or transfer had to occur. (T. 420).

Dr. Heinig could not explain, in the context of her opinion that the killer was on the tested fabric, whether it was the major or minor contributor who was the killer. (T. 421.) Then she said that the major profile was from saliva and the minor alleles could be from contact from one or more persons. (T. 421-422). In other words, the killer is on there somewhere.

Dr. Heinig's stubborn adherence to her conclusion faces the insurmountable problem that DDC found two persons to be major contributors. Exhibit 60, DYS 437. There is no claim or evidence that two males killed and/or bit Margo Prade. Ultimately, Dr. Heinig opined that three or more profiles are in 19.A.1 and 19.A.2. (T. 422). Undeterred, the trial court acknowledged that DDC partial profiles of at least two men. Judgment, 8. The trial court then states that Prade argues that "the more significant partial male profiles from 19.A.1 and 19.A. 2 are more likely than not from Dr. Prade's killer." Judgment, 8 (emphasis added). So again, we have two killers. Bending facts to justify a conclusion is truly an abuse of discretion.

The court of appeals noted that DDC's tests showed at least two partial male profiles and that the major profile was not consistent, between 19.A1 and 19.A2. *Prade*, 2014-Ohio-1035, ¶115. Further, Dr. Heinig's conclusion that the "major DNA" [was from saliva], T. 421-422, was "difficult to understand." *Id.* ¶116.

4.

The court of appeals concluded its analysis of the new DNA evidence with the observation that “their true meaning will never be known.” *Id.* ¶120. The exclusion result “is wholly questionable.” *Id.* ¶120

C. The Former Evidence Does Not Support The Exoneration Order.

The Ninth District Court of Appeals exhaustively listed the evidence against Prade at the jury trial. *Prade*, 2014-Ohio-1035, ¶20-¶70. The conclusion was that the circumstantial evidence “was overwhelming.” *Id.* ¶121. Prade was truly painted as “an abusive, domineering husband who became accustomed to a certain standard of living and who spiraled out of control after his successful wife finally divorced him, forced him out of the house, found happiness with another man, and threatened his dwindling finances.” *Id.* ¶121. The alleged problems with the identification testimony were for the jury. *Id.* ¶128. The jury heard the entire spectrum of opinions on the bite mark from various experts. *Id.* ¶129.

D. The Concurring Judge Offers A Solution In Search Of A Problem.

Concurring Judge Belfance gleaned from the trial court decision that the trial court erred by first determining that Prade’s DNA experts were more logical and then considering only that evidence along with the trial testimony and other post-conviction relief evidence instead of considering all of the evidence together as would a juror. *Prade*, 2014-Ohio-1035, ¶135 (Belfance, Judge concurring).

Judge Belfance also accused the majority of pretending to apply an abuse of discretion standard but in reality using a de novo standard of review. *Id.* ¶135, ¶144.

Examination of Judge Hunter’s Order does not indicate that Judge Hunter fell into the trap discerned by Judge Belfance. Judge Hunter first evaluated the DNA

evidence (concluding that Prade's DNA test results were reliable), then described the bite-mark evidence, then described the eyewitness evidence, and then described the circumstantial evidence from the jury trial. Order dated January 29, 2013, 6-18. Then Judge Hunter evaluated all of the evidence in light of her determination that Prade's DNA evidence was reliable. Order dated January 29, 2013, 18-21.

Judge Hunter's duty was to analyze and consider the DNA evidence "in the context of and upon consideration of all available admissible evidence related to the person's case". R.C. 2953.21(A)(1)(b). The statute makes the DNA evidence the starting point.

Any court applying that standard must make the initial determination whether the DNA test results are reliable or not. If the results are not reliable, it is a certainty that the defendant will fail to prove actual innocence. If the results are reliable, proof of actual innocence may or may not follow. *See State v. King*, 8th Dist. No. 97683, 2012-Ohio-4398, ¶15 (the denial of a petition alleging actual innocence was upheld because the exclusion of the defendant as a contributor to semen in the victim's vagina did not exonerate the defendant as there was evidence that the semen was not deposited at the time of the murder).

There must be a starting point and perceived reliability of the DNA results is the starting point. The court is only conducting a hearing because of the new DNA results; accordingly, the results should certainly be the first issue.

Moreover, there is no reason to suppose that a jury or juror cannot focus on any particular item of evidence or block of evidence, make a determination that the evidence is or is not reliable and evaluate the impact of the remaining evidence accordingly. Common sense teaches that a jury can begin at any beginning the jury chooses. It is

highly likely that a jury would begin with the evidence put forth as most important by one or both of the parties. Prade would almost certainly argue the DNA evidence and the State probably would as well. That would lead the jury to begin there.

Second, the majority expressly determined that an abuse of discretion standard applied. A trial court abuses its discretion when it bases a decision on evidence that is largely unreliable, not probative, and without weight, importance, and value. *Serednesky v. Ohio State Board of Psychology*, 10th Dist. No. 05AP-633, 2006-Ohio-3146, ¶123, ¶27.

The Ninth District Court of Appeals found that the true meaning of the DNA test results “will never be known.” Further, the exclusion of Prade is “wholly questionable.” *Prade*, 2014-Ohio-1035, ¶120. An exhaustive review of the record generated “more questions than answers” concerning Prade’s innocence. *Id.* ¶112. Further, “there was never a shred of evidence in this case that the killer actually deposited saliva on the lab coat.” *Id.* ¶117. In addition, “Even Dr. Heinig admitted [that for there to be two partial male profiles in the bite mark] there had to have been either contamination or transfer.” *Id.* ¶118.

Prade’s DNA evidence is not reliable, it is not probative on the question whether the killer left DNA on the bite mark, and it has no value in proving Prade’s innocence. The court of appeals properly applied the abuse of discretion standard and these propositions do not merit further review.

PROPOSITION OF LAW III

A TRIAL COURT ORDER GRANTING A PETITION FOR POSTCONVICTION RELIEF AND FINDING THE PETITIONER "ACTUALLY INNOCENT" UNDER R.C. 2953.21(A) IS A "FINAL VERDICT" FROM WHICH THE STATE CANNOT APPEAL UNDER R.C. 2945.67(A).

LAW AND ARGUMENT

Prade recently discovered that the State could not appeal the discharge order. He came to this knowledge after the court of appeals decision because he did not raise the issue there.

The statutes tell a different story. R.C. 2945.67(A) states in part:

A prosecuting attorney, ***may appeal as a matter of right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case.

R.C. 2953.23(B) states:

An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.

R.C. 2967.45(A) allows an appeal of right from certain decisions in a criminal case or delinquency case, and decisions granting post-conviction relief. Lumping post-conviction relief cases together with criminal cases makes no more sense than saying a post-conviction relief case is a delinquency case. The statute forbids any appeal from the final verdict of the trial court in a criminal or delinquency case.

R.C. 2953.23(B) states that an order granting relief pursuant to R.C. 2953.21 is a final order and appealable pursuant to Chapter 2953. Accordingly, R.C. 2953.23(B) complements R.C. 2945.67(A) and makes clear that the State can appeal of right orders granting a petition for post-conviction relief.

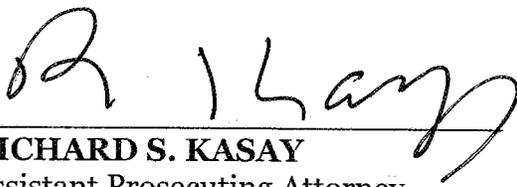
A petition for post-conviction relief is not an appeal of a criminal conviction, but a collateral civil attack on the criminal judgment. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶48, quoting *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111. A post-conviction hearing is a civil proceeding. *State v. Nichols*, 11 Ohio St.3d 40, 42 (1984); *State v. Milanovich*, 42 Ohio St.2d 46, 49 (1975). This proposition too presents no grounds for further review.

WHY LEAVE TO APPEAL SHOULD BE DENIED

Pursuant to the argument offered, the State respectfully contends that leave to appeal should be denied, as the defendant has failed to present a substantial constitutional issue, or indicate this case is of great public or general interest.

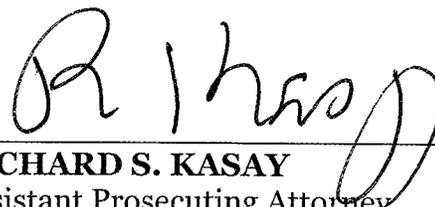
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum In Opposition was sent by regular U.S. mail to Attorneys David Booth Alden and Lisa B. Gates, Jones Day, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114; and to Mark A. Godsey, Ohio Innocence Project, University of Cincinnati College of Law, P.O. Box 210040, Cincinnati, Ohio 45221; to David B. Hennes, Fried, Frank, Harris, Shriver & Jacobson LLP, One New York Plaza, New York, New York, 10004; and to Nathan M. Erickson, Fried, Frank, Harris, Shriver & Jacobson LLP, 801 17th Street NW, Washington, DC 20006-3912, on the 22nd day of May, 2014.



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