[Cite as *State v. Constant,* 2009-Ohio-3936.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-100**
- vs -	:	
ANTHONY P. CONSTANT,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 86 CR 000228.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Mark Godsey and *David M. Laing*, Ohio Innocence Project, University of Cincinnati, P.O. Box 210040, Cincinnati, OH 45221 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Anthony P. Constant, appeals the Judgment Entry of the Lake County Court of Common Pleas, in which the trial court denied his second application for DNA testing. For the following reasons, we affirm the decision of the trial court.

{¶2} In May of 1986, Constant was indicted on one count of Aggravated Robbery, in violation of R.C. 2911.01, one count of Kidnapping, in violation of R.C.

2905.01, and two counts of Rape, in violation of R.C. 2907.02. The charges stem from a robbery of a convenience store, Lawson's Market, in Madison County, and subsequent kidnapping and rape of the store's clerk. Afterward, the clerk was left naked on the side of the road by her assailant and walked approximately a quarter of a mile down the road to a truck stop in order to get help. Constant was later recognized by several people after a composite sketch was displayed on the local news and in the local newspaper. He was also identified by the victim from a photo array.

{¶3} Constant was convicted on all charges after a jury trial and sentenced to serve an indefinite term of imprisonment of 10 to 20 years on each count, to be served concurrently. He is presently out on parole.

{¶4} This court denied Constant's direct appeal in *State v. Constant*, 11th Dist. No. 12-082, 1988 Ohio App. LEXIS 1696, and his petition for postconviction relief was denied as well in *State v. Constant*, 11th Dist. No. 97-L-097, 1998 Ohio App. LEXIS 2931.

{¶5} Furthermore, Constant filed an application for DNA testing in 2005, which was also denied after a finding that some of the evidence he sought to have tested was destroyed and the evidence remaining was not outcome determinative. Constant later filed a motion with this court for delayed appeal, pursuant to App.R. 5(A), which was subsequently denied.

{¶6} In 2008, Constant filed a second application for DNA testing pursuant to R.C. 2953.72 et. seq. In this application, Constant maintained that the outcome determinative standard had been lowered from his initial application, pursuant to the passage of S.B. 262. He also alleged that one of the items he was now requesting for DNA testing was not included in his original application. Constant argued that DNA

testing should be conducted on the contents of the rape kit, including a pubic hair found in the victim's saliva, and one hair collected from the victim's smock.

{¶7} Upon review, the trial court denied his application, finding that Constant did not qualify as an eligible inmate because he had been released on parole. Further, even assuming arguendo that Constant did qualify as an eligible inmate, the trial court found that some of the evidence which Constant sought to test, no longer existed. Moreover, the trial court found that "any DNA testing of the remaining pieces of evidence *** would not be outcome determinative."

{¶8} Constant timely appeals and raises the following assignments of error:

{¶9} "[1.] The trial court erred to the prejudice of appellant in holding that the appellant did not qualify for DNA testing because he is currently out on parole.

{¶10} "[2.] The trial court erred to the prejudice of appellant in denying the appellant's application for DNA testing, where appellant demonstrated that biological material was collected at the crime scene and this evidence still exists (or a search must be conducted to determine if it still exists).

{¶11} "[3.] The trial court erred to the prejudice of appellant in denying the appellant's application for DNA testing by ruling that appellant failed to show DNA testing of the evidence would be outcome determinative."

{¶12} "[A] trial court should exercise its discretion in determining its best course of action when considering an application for DNA testing in an effort to best utilize judicial resources. The decision on how to proceed is left to the court's discretion." *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, at ¶31. "The term '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 (citations omitted). When applying the abuse of discretion standard, an appellate court may not merely substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶13} Constant first argues that the trial court erred in holding that he did not qualify for DNA testing because he is currently out on parole. Specifically, he argues that his status as a parolee does not preclude postconviction DNA testing in his case because he is not asking the state to pay for testing; he is simply asking for the evidence to be released so that it may be tested.

{¶14} R.C. 2953.72(C)(1) states that "[a]n inmate is eligible to request DNA testing to be conducted under sections 2953.71 to 2953.81 of the Revised Code only if all of the following apply:

{¶15} "(a) The offense for which the inmate claims to be an eligible inmate is a felony, and the inmate was convicted by a judge or jury of that offense.

{¶16} "(b) The inmate was sentenced to a prison term or sentence of death for the felony *** and is in prison serving that prison term or under that sentence of death.

{¶17} "(c) On the date on which the application is filed, the inmate has at least one year remaining on the prison term ***, or the inmate is in prison under a sentence of death ***."

{¶18} While Constant was convicted of felony offenses by a jury and was sentenced to prison, currently, Constant is out of prison on parole. Thus, he is ineligible for DNA testing. While the statutory language is clear, Constant argues that he is eligible for DNA testing pursuant to R.C. 2953.84 because he seeks to have the DNA tests conducted paid for by a private lab. However, Constant filed his application for

DNA testing pursuant to R.C. 2953.72 et. seq., and he is simply not eligible to apply for DNA testing under the code sections which he applied.

{¶19} Citing to Attorney General Opinion No. 2005-009, in support of his proposition, Constant argues that the Attorney General also noted that R.C. 2953.71 to R.C. 2953.82 "are not the sole avenues by which an offender may procure DNA testing of evidence." In that opinion, the Attorney General was interpreting former R.C. 2953.71 to R.C. 2953.82, which was enacted pursuant to S.B. 11. The Attorney General opined that "an inmate is not foreclosed from obtaining DNA testing through a properly filed post-conviction motion or petition." 2005 Ohio Atty.Gen.Ops No. 2005-009, 2005 Ohio AG LEXIS 14, at *40. These statutes were replaced by S.B. 262, rendering this advisory opinion moot. The former provisions did not contain the language found at R.C. 2953.84, which clarified that R.C. 2953.71 to R.C. 2953.82 are not the only means by which an inmate may seek to have DNA testing.

{¶20} We are limited to the four corners of his "application for DNA testing," and its statutory restrictions.

{¶21} Constant's first assignment of error is without merit.

{¶22} In his second assignment of error, Constant asserts that the trial court erred in denying his application for DNA testing because certain evidence still existed and the prosecutor failed to use reasonable diligence to locate it. Specifically, he argues that "there is no evidence or documentation to indicate that the rape kit or any other evidence was actually destroyed" and "a reasonable search has never been undertaken to discover whether this evidence still exists."

{¶23} R.C. 2953.75 requires that the prosecuting attorney use "reasonable diligence" to determine whether biological material from the crime still exists.

"'Reasonable diligence' means a degree of diligence that is comparable to the diligence a reasonable person would employ in searching for information regarding an important matter in the person's own life." R.C. 2953.71(Q). Furthermore, in using reasonable diligence to make those determinations, the prosecuting attorney must investigate all relevant sources, including: (1) all prosecuting authorities from the original case, (2) all law enforcement authorities involved in the original investigation, (3) all custodial agencies involved at any time with the biological material, (4) the custodian of all agencies involved at any time with the biological material, (5) all crime laboratories involved at any time with the biological material, and (6) all other reasonable resources. See R.C. 2953.75(A)(1)-(6). "Ultimately, what constitutes reasonable diligence will depend on the facts and circumstances of each particular case." *State v. Carter*, 10th Dist. No. 07AP-323, 2007-Ohio-6858, at ¶11 (citation omitted).

{¶24} Constant cites to *State v. Ustaszewski*, 6th Dist. No. L-05-1226, 2006-Ohio-329, arguing "that an affidavit by an investigator stating that biological material no longer exists was insufficient for the trial court to determine if the reasonable diligence standard" had been met. Constant further argues that the reasonable diligence standard requires the state to "demonstrate that it has explored all possible locations of the potentially exculpatory evidence and provide documentation of this search."

{¶25} *Ustaszewski* is distinguishable from the instant case. In *Ustaszewski*, the court held that "[s]peculation alone is insufficient. Guessing is not diligence." Id. at ¶23. Unlike *Ustaszewsk*, in Constant's case, there is neither guesswork nor speculation as to whether the evidence may exist.

{¶26} "If, after employing reasonable diligence in determining [the location of the evidence], the [prosecutor] determines that those locations do not possess the

requested biological evidence, the [prosecutor] will have exercised reasonable diligence supporting her contention that the evidence no longer exists." *State v. Collier*, 10th Dist. No. 05AP-716, 2006-Ohio-2605, at ¶16. Although the state cannot produce any physical receipt demonstrating the actual destruction of evidence, which is the crux of Constant's argument, the state did employ reasonable diligence in searching for the evidence. Chain of custody documentation can trace the final location of the evidence to the police department. The Chief of Police submitted a letter which stated that he believed the evidence was disposed of in 1992 when "a great deal of evidence, authorized to be disposed of, in fact was disposed of at that time." Furthermore, the assistant prosecutor stated that she personally searched the files and can confirm that certain samples no longer exist.

{¶27} It is clear from the record that certain pieces of evidence which Constant requested, including the pubic hair found in the victim's saliva and the hair found on the victim's smock, are no longer available for testing. Moreover, "the State is not required to preserve evidence indefinitely." *State v. Hamilton*, 2nd Dist. No. 2006 CA 24, 2007-Ohio-434, at ¶10 (citation omitted). Therefore, the trial court did not abuse its discretion.

{¶28} Constant's second assignment of error is without merit.

{¶29} In his third assignment of error, Constant maintained that the trial court erred in denying his application by ruling that he failed to show DNA testing of the evidence would be outcome determinative. However, there is still not a strong probability, as the statute requires, that no reasonable factfinder would have found Constant guilty.

{¶30} "Outcome determinative" is defined in R.C. 2953.71(L) as meaning "that had the results of DNA testing of the subject inmate been presented at the trial of the subject inmate requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the inmate is an eligible inmate and is requesting the DNA testing ***, and *** there is a strong probability that no reasonable factfinder would have found the inmate guilty of that offense ***." See *State v. Smith*, 8th Dist. No. 90749, 2008-Ohio-5581, at ¶13 ("'outcome determinative' means that had the results of DNA testing been presented at trial, there is a strong probability that no reasonable fact-finder would have found the inmate guilty") (citation omitted).

{¶31} At trial, there was powerful testimony from the victim identifying Constant as her attacker; she was able to see his face, hair, and clothing in the store. Additionally, she had a brief conversation with Constant on the night in question; she stated that she had the opportunity to observe him in the store for about five to ten minutes. She further testified that Constant had been in the store where she worked on other occasions prior to her attack.

{¶32} The victim testimony alone negates any strong probability that the jury would not have found Constant guilty. See *State v. Roberts*, 5th Dist. No. 2006-CA-02, 2006-Ohio-5018, at ¶56 ("Even if DNA testing excluded the appellant as the source of the hair in the hands of the victim or the fingerprint found in the home a reasonable jury could still find appellant guilty of the charges set forth in the indictment. A reasonable jury could come to this conclusion based solely upon circumstantial evidence, and testimony of the other witnesses.") (citation omitted); *State v. Nalls*, 2nd Dist. No. 21558, 2007-Ohio-1676, at ¶30 ("An exclusion result at this juncture would only demonstrate what the trial court was aware of at trial, namely, that there was no

physical evidence linking Nalls to the rape. Thus, the trial court did not abuse its discretion when it overruled Nalls' application for post-conviction DNA testing without affording him a hearing.").

{¶33} Constant's third assignment of error is without merit.

{¶34} For the foregoing reasons, the Judgment Entry of the Lake County Court of Common Pleas, denying Constant's second application for DNA testing, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J., concurs.

MARY JANE TRAPP, P.J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

MARY JANE TRAPP, P.J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

{¶35} I write separately, respectfully concurring in part and dissenting in part because I believe the majority addresses issues that are not yet ripe for review.

{¶36} I concur with the majority's determination that Mr. Constant's first assignment of error is without merit. Clearly, the procedural vehicle Mr. Constant chose to obtain DNA testing, by way of R.C. 2953.72, is not available to him because he is a parolee. Thus, I would affirm the trial court on this limited basis insofar as the trial court's judgment related to the procedural vehicle chosen by Mr. Constant; nothing more, nothing less.

{¶37} I respectfully dissent from the remainder of the majority's opinion, which addresses Mr. Constant's remaining two assignments of error, finding the trial court and

the majority decisions are premature and not yet ripe for review. Thus, I would reverse and vacate the trial court's judgment as to whether the prosecutor used reasonable diligence in searching for the evidence requested, and whether the testing of the evidence is outcome determinative.

{¶38} Because Mr. Constant does not qualify for testing pursuant to R.C. 2953.72, any determination of the issues of reasonable diligence and whether the testing of evidence would be outcome determinative would be merely advisory, and thus, speculative. "[O]ur duty is 'to decide actual controversies between parties *** [and] to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.'" *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶22, quoting *Fortner v. Thomas* (1970), 22 Ohio St.2d 13.

{¶39} These two issues considered by the trial court simply pose hypothetical questions that are inappropriate for review. *Kalish* at ¶25, citing *Cascioli v. Centr. Mut. Ins. Co.* (1983), 4 Ohio St.3d 179, 183. I would decline to answer these propositions because doing so would result in an improper advisory opinion. Id. Thus, I would vacate the trial court's judgment to the extent it ruled on such issues.