

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLINTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-12-020
- vs -	:	<u>OPINION</u>
	:	8/8/2011
TYRONE J. HUSTON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI 2010-5055

Richard W. Moyer, Clinton County Prosecuting Attorney, Brian Shidaker, 103 East Main Street, Wilmington, Ohio 45177, for plaintiff-appellee

Rose & Dobyns Co., L.P.A., Scott B. Evans, 97 North South Street, Wilmington, Ohio 45177, for defendant-appellant

POWELL, P.J.

{¶1} Defendant-appellant, Tyrone J. Huston, asks this court to overturn a trial court decision that denied his request for funds for additional genetic (DNA) testing and ordered him to pay restitution to the victim's mother to reimburse her for the cost of the victim's medical screening. The judgment of the Clinton County Common Pleas Court is affirmed as the trial court did not abuse its discretion by denying the additional DNA

testing funds and imposing the restitution award.

{¶2} Huston was found guilty by a jury for the offense of unlawful sexual conduct with a minor, a felony of the fourth degree, for allegedly having sexual intercourse with a 15-year-old girl in an abandoned school building. Huston's sentence included an order to pay restitution in the amount of \$1,057.20 to the victim's mother for laboratory fees incurred by the victim for sexually-transmitted disease testing. Huston appeals his conviction, raising two assignments of error for our review.

{¶3} Assignment of Error No. 1:

{¶4} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ABUSING ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR FUNDS TO PROVIDE ADDITIONAL GENETIC TESTING."

{¶5} Huston claims that he did not have sexual intercourse with the victim, and wasn't given the opportunity to present his defense when the court denied the funds for the DNA expert.

{¶6} The record shows that shortly before trial, the parties stipulated to the introduction of evidence that Huston's DNA was found at the location in the abandoned school where the incident allegedly took place. During the months leading up to the trial, Huston moved the trial court to provide funds to retain an expert witness "to independently evaluate and re-test the DNA evidence in the above-captioned case." Counsel requested \$13,000, indicating the expert "is crucial to mounting a zealous defense, or fully exploring any plea negotiations."

{¶7} The trial court granted the request for \$1,550 to employ a specific organization to assist counsel in "reviewing DNA specimens" and to provide "general consulting services" in its field. By a subsequent entry, the trial court said the state wanted this issue revisited because it claimed Huston was seeking the additional testing

to demonstrate that he engaged in sexual activity at the scene with someone other than the alleged victim, not whether his DNA was found there.

{¶8} The trial court found the "fact Defendant may have had sexual activity with another individual does not exclude the fact Defendant may have had sexual activity with the alleged victim in this case as alleged by the state of Ohio. Under Defendant's theory, it is clear the DNA report sought by Defendant is not outcome determinative of the case. Further, there is nothing of record to indicate the alleged other sexual partner of Defendant would not testify in support of his claim. (Emphasis sic.)

{¶9} "If the DNA report produces the result Defendant expects, defense counsel agrees the DNA expert would be called upon to testify at trial. The Court would not be so liberal in approving funds of \$1,450.00 per day plus expenses for such testimony under these circumstances. In balancing the expected benefit to defendant to be received from the expert, the expected adverse impact on the accuracy of the trial if the expert is not retained to testify at trial, and the probable cost to retain such an expert, the balance weighs against the Defendant under these facts." (Emphasis sic.) The trial court concluded by vacating its order for expert funds because it was "not persuaded that the accuracy of the trial will be affected if the DNA funds are not authorized."

{¶10} Due process requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial. *State v. Mason*, 82 Ohio St.3d 144, 1998-Ohio-370, syllabus; see, also, *Ake v. Oklahoma* (1985), 470 U.S. 68, 77, 105 S.Ct. 1087. A trial court can legitimately refuse funds for an expert absent a showing of demonstrable prejudice. See *Mason* at 151.

{¶11} We have previously outlined how the trial court handled Huston's request for funds for additional DNA testing. Having reviewed the record, we find no particularized showing by Huston that denial of the requested expert assistance would result or did result in an unfair trial. The trial court did not abuse its discretion in its determination. See *State v. Cole*, Warren App. No. CA2004-01-007, 2005-Ohio-2274, ¶23-25. Huston's first assignment of error is overruled.

{¶12} Assignment of Error No. 2:

{¶13} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ERRED AT LAW WHEN IT ORDERED APPELLANT TO PAY RESTITUTION OF \$1,057.20 TO THE MOTHER OF THE ALLEGED VICTIM."

{¶14} As previously noted, the trial court ordered Huston to pay restitution to the victim's mother for the cost of STD testing for the victim. Huston argues the trial court lacked the authority to order restitution paid to the mother, a third party.

{¶15} R.C. 2929.18(A)(1) states, in pertinent part, that a trial court imposing a sentence may order "[r]estitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, * * *." See, also, *State v. Bartholomew*, 119 Ohio St.3d 359, 2008-Ohio-4080.

{¶16} Huston was ordered to pay the cost of testing the victim for sexually transmitted diseases, which was an economic loss incurred by the victim as a direct and proximate result of the commission of the offense. The victim's parent was responsible for the medical costs incurred by her minor daughter; therefore, we do not view the trial court's decision as being the equivalent to ordering restitution to an improper third party, and will not overturn the trial court's order. See R.C. 2929.01(L) (economic loss includes medical cost); see R.C. 3103.03 (duty of support of minor child); cf. *Fender v. Miles*, 185 Ohio App.3d 136, 2009-Ohio-6043 (parent bringing action on behalf of minor). Huston's second assignment of error is overruled.

{¶17} Judgment affirmed.

HENDRICKSON and PIPER, JJ., concur.