[Cite as *State v. Wilson*, 2024-Ohio-4712.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Appellee	:	C.A. No. 30059
	:	
v.	:	Trial Court Case No. 2006 CR 04325
	:	
JOSHUA EUGENE WILSON	:	(Criminal Appeal from Common Pleas Court)
	:	
Appellant	:	
	:	

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O P I N I O N

Rendered on September 27, 2024

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JOSHUA EUGENE WILSON, Pro Se Appellant

MATHIAS H. HECK, JR., by MICHAEL P. ALLEN, Attorney for Appellee

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HUFFMAN, J.

{¶ 1} Defendant-Appellant Joshua Eugene Wilson appeals from the trial court's order denying his application for post-conviction DNA testing. For the reasons outlined below, we affirm the judgment of the trial court.

I. Background Facts and Procedural History

{¶ 2} The following facts are taken from our opinion in Wilson's direct appeal, *State v. Wilson*, 2008-Ohio-4130, ¶ 2-7 (2d Dist.).

{¶ 3} On October 8, 2006, D'Laquan Phillips and his uncle, Michael Phillips, were walking Michael's dog on West Third Street in Dayton, when two men confronted them; one was dressed in all black and wearing a hooded sweatshirt, and the other was wearing lighter-colored clothing. The two men accused D'Laquan Phillips of a trespassing offense, but D'Laquan insisted they had the wrong man. An argument ensued.

{¶ 4} D'Laquan Phillips dropped the dog's leash when confronted by the two men, and Michael Phillips overheard the argument between D'Laquan and the two men while he was untangling the dog from a bush into which it had run. Michael heard a gunshot and saw D'Laquan struggling with the man dressed in black, who was later identified as Wilson.

{¶ 5} D'Laquan attempted to flee from Wilson, but Wilson shot D'Laquan in the back. Michael watched as D'Laquan reached out and grabbed Wilson's pants leg while lying on the ground. Wilson responded by shooting D'Laquan in the head. Michael Phillips ran to a neighborhood store and called police. D'Laquan died at the scene.

{¶ 6} Detective Doyle Burke of the Dayton Police Department assembled a photospread that included Wilson's picture. Four days after the shooting, Michael Phillips identified Wilson from that photospread as the man who had shot and killed D'Laquan. Three other witnesses either heard and/or saw the shooting, although they could not identify the shooter.

{¶ 7} D'Laquan Phillips had been shot eight times: once in the thigh, once in the hand, twice in the back, and four times in the head. All of the bullets and shell casings recovered from his body or at the scene had been fired from the same gun, which police found in an alley near the crime scene. Five days after this shooting, police arrested Wilson, who still wore a black hooded sweatshirt and had blood on his right shoe.

{¶ 8} Wilson was indicted on one count of purposeful murder, R.C. 2903.02(A), one count of felony murder, R.C. 2903.02(B), one count of felonious assault involving serious physical harm, R.C. 2903.11(A)(1), and one count of felonious assault involving a deadly weapon, R.C. 2903.11(A)(2). A firearm specification was attached to each of the charges. Following a jury trial, Wilson was found guilty of all charges and specifications. At sentencing, the trial court merged the two murder charges and imposed one 15-year to life sentence. The court also sentenced Wilson to eight years on each count of felonious assault and ordered all of the sentences to be served consecutively. Finally, the court merged the firearm specifications and imposed one additional and consecutive three-year prison term for the firearm specification, for an aggregate sentence of 34 years to life.

{¶ 9} On July 17, 2023, Wilson filed a pro se application for post-conviction DNA testing, asserting that DNA testing had improved with respect to the type of evidence that could be tested and seeking DNA testing on "any biological evidence retained in this case." On September 19, 2023, before the trial court had ruled on Wilson's initial application, he filed a second application for DNA testing; this application sought DNA testing on "any cotton swabs or samples from analysis of shoe, black hooded sweatshirt, 4 spent casing [sic], victim's clothing, fingernail scrapings, misc. clothes, Bic lighter, 9mm

handgun, 4 live rounds, 1 pair of Bha-ku shoes, 1 fired bullet, 1mm magazine, 1 fired bullet core, 1 plastic bag containing 1 plastic vial containing 1 fired bullet, thermal undershir [sic].” Wilson contended that the sample of blood on his right shoe had been too small to get a DNA profile before his trial and that new advancements in DNA testing would allow the very small sample of blood to show that the victim’s DNA was not on his shoes or other personal items confiscated during his arrest. He contended that the perpetrator’s identity had been contested at trial and that DNA testing would, therefore, be outcome determinative.

{¶ 10} The trial court rejected Wilson’s application, finding that, while Wilson was an eligible offender under R.C. 2953.71(F) and R.C. 2953.72(C), he had failed to satisfy the criteria set forth in R.C. 2953.74(B) and (C). The trial court explained that, when Wilson was tried in 2007, DNA testing was accepted, the results of DNA testing were generally admissible, and DNA testing was readily available. The trial court found that, even though Wilson claimed that the most recent advances in DNA testing, including touch DNA and mini-STR, had not been available at the time of his trial, neither the State nor Wilson had presented evidence regarding when mini-STR or touch DNA became available, and, thus, Wilson had not satisfied the R.C. 2953.74(B) criteria. The trial court further found that, even if each of the items listed on Wilson’s application were tested, Wilson’s clothing had been found not to contain the victim’s DNA, and the victim’s clothing and the bullets and casings had been found not to contain Wilson’s DNA, so the DNA testing would not be outcome determinative as required under R.C. 2953.74(C). The court reasoned that, in light of the strong eyewitness testimony in this case, Wilson had not

demonstrated how the presence or absence of DNA would have created "a strong probability that no reasonable factfinder would have found the offender guilty of that offense."

{¶ 11} Wilson appeals.

II. Assignments of Error

{¶ 12} Wilson asserts the following two assignments of error:

> THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPLICATION FOR POST-CONVICTION DNA TESTING PURSUANT TO R.C. 2953.74(B)(1) AND 2953.74(C).
>
> THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPLICATION FOR POST-CONVICTION DNA TESTING PURSUANT TO R.C. 2953.74(C)(4) AND (5).

{¶ 13} Post-conviction DNA testing is governed by R.C. Chapter 2953. "A trial court has discretion to accept or reject an application for DNA testing." *State v. Bell*, 2023-Ohio-3813, ¶ 20, citing R.C. 2953.74(A). "Thus, absent an abuse of discretion, we will not reverse the decision of the trial court." *Id*. "Abuse of discretion" is defined as "an attitude that is unreasonable, arbitrary or unconscionable." *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St. 3d 157, 161 (1990), citing *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87 (1985).

{¶ 14} Ohio has "established a set of criteria set forth in section 2953.74 of the Revised Code by which eligible offender applications for DNA testing will be screened

and that a judge of a court of common pleas upon receipt of a properly filed application and accompanying acknowledgment will apply those criteria to determine whether to accept or reject the application . . .” R.C. 2953.72(A)(4). “Eligible offender” means an offender who is eligible under division (C) of section 2953.72 of the Revised Code to request DNA testing to be conducted under sections 2953.71 to 2953.81 of the Revised Code. R.C. 2953.71(F). An offender is eligible to request DNA testing to be conducted under R.C. 2953.71 to 2953.81 only if all of the following apply:

> (a) The offense for which the offender claims to be an eligible offender is a felony, and the offender was convicted by a judge or jury of that offense.
>
> (b) One of the following applies:
>
> (i) The offender was sentenced to a prison term or sentence of death for the felony described in division (C)(1)(a) of this section, and the offender is in prison serving that prison term or under that sentence of death, has been paroled or is on probation regarding that felony, is under post-release control regarding that felony, or has been released from that prison term and is under a community control sanction regarding that felony.
>
> (ii) The offender was not sentenced to a prison term or sentence of death for the felony described in division (C)(1)(a) of this section, but was sentenced to a community control sanction for that felony and is under that community control sanction.
>
> (iii) The felony described in division (C)(1)(a) of this section was a sexually oriented offense or child-victim oriented offense, and the offender has a duty

> to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code relative to that felony.

R.C. 2953.72(C)(1).

{¶ 15} If an eligible offender submits an application for DNA testing under R.C. 2953.73, the court may accept the application only if one of the following applies:

> (1) *The offender did not have a DNA test taken at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing regarding the same biological evidence that the offender seeks to have tested, the offender shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject offender's case as described in division (D) of this section would have been outcome determinative at that trial stage in that case, and, at the time of the trial stage in that case, DNA testing was not generally accepted, the results of DNA testing were not generally admissible in evidence, or DNA testing was not yet available.*
>
> (2) The offender had a DNA test taken at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing regarding the same biological evidence that the offender seeks to have tested, the test was not a prior definitive DNA test that is subject to division (A) of this section, and the offender shows that DNA exclusion when analyzed in the context of and

> upon consideration of all available admissible evidence related to the subject offender's case as described in division (D) of this section would have been outcome determinative at the trial stage in that case.

(Emphasis added.) R.C. 2953.74(B). "R.C. 2953.74(B)(1) applies when DNA testing was not utilized at trial." *State v. Harwell*, 2022-Ohio-2706, ¶ 30 (2d Dist.).

{¶ 16} In his first assignment of error, Wilson argues that the trial court erred when it failed to grant his application for post-conviction DNA testing due to the availability and admissibility of DNA testing at the time of his trial. Defendant contends that, because of scientific advancements in DNA testing, his request for DNA testing should have been granted. We disagree.

{¶ 17} We note that Wilson did not request DNA testing before his trial in this matter, and thus he was permitted to apply for post-conviction DNA testing under R.C. 2953.74(B)(1) because he had *not* previously had a DNA test taken at the trial stage. *Harwell* at ¶ 28. The trial court could have accepted Wilson's application only if he showed that DNA exclusion, when analyzed in the context of and in consideration of all available admissible evidence related to his case, would have been outcome determinative at the trial stage and that, at the time of his trial, DNA testing was not generally accepted, the results of DNA testing were not generally admissible in evidence, or DNA testing was not yet available. *Id*., citing R.C. 2953.74(B)(1).

{¶ 18} It is undisputed that DNA testing was generally accepted, admissible, and available at the time of Wilson's trial. However, Wilson specifically argues that, even though DNA testing was available at the time of his trial, the most recent advances in

DNA testing, including mini-STR and touch DNA, were not, and thus his application for post-conviction DNA testing should have been granted.

{¶ 19} In support of his argument, Wilson cites *State v. Reynolds*, 2009-Ohio-5532 (2d Dist.), in which we concluded that the defendant's failure to request DNA testing during his aggravated robbery and felonious assault trial, even though such testing was available, did not preclude him from filing a post-conviction relief petition requesting DNA testing when there had been several advancements in DNA testing since the trial. Similarly, we agreed with the defendant in *State v. Emerick*, 2007-Ohio-1334 (2d Dist.), in which the defendant sought post-conviction DNA testing by arguing that the available technology in DNA testing in 1996 had been insufficient to reach the definitive results currently possible using Y-Chromosome Short Tandem Repeat ("Y-STR") DNA Analysis. *Id*. at ¶ 18. In *Emerick*, we explained:

> It is undisputed that Y-STR analysis was not available at the time of Emerick's trial. Moreover, it was partially the development of Y-STR technology that prompted the General Assembly to enact R.C. 2953.71 through 2953.83 in order to allow otherwise qualified inmates the opportunity to take advantage of advances in technology that were not available at the time of their trials. Emerick's case falls squarely under that category. While it is true that DNA testing was an accepted practice at the time of his trial, the technology has advanced to such a degree that Emerick is entitled to additional testing using the new technique. Because Y-STR DNA analysis was not available at the time of his prosecution, the biological

> materials Emerick seeks to be tested are eligible for analysis pursuant to R.C. 2953.74(B)(1).

Id. at ¶ 18.

{¶ 20} However, we no longer agree with the reasoning in *Reynolds* and *Emerick*. The plain language in R.C. 2953.74(B)(1) provides that an application for post-conviction DNA testing by an offender who did not have a DNA test taken at the trial stage may only be accepted when, *at the time of the trial*, DNA testing was not generally accepted or available or the results were not generally admissible. The statute does not provide that future advances in DNA technology could result in acceptance of a post-conviction DNA testing application. If the legislature had wanted to expand DNA testing to be available because of future advancements in DNA technology, it could have provided such in the statutory language, but it did not. It is not up to us to infer that the legislature intended for future advances in DNA technology to offer additional grounds for post-conviction DNA testing or to add language to the statute that is not there. For these reasons, we overrule the holdings in *Reynolds* and *Emrick* to the extent that advances in DNA technology entitle an offender to post-conviction DNA testing under R.C. 2953.74(B)(1).

{¶ 21} In consideration of the plain language in R.C. 2953.74(B)(1), Wilson was unable to satisfy the requirements. Wilson's crimes occurred on October 8, 2006, and his trial proceeded in March 2007. Although Wilson argued that there had been several advancements in DNA testing since his trial, it is undisputed that DNA testing was available, accepted, and admissible at the time of his trial. Therefore, under R.C. 2953.74(B)(1), Wilson is barred from receiving DNA testing at this stage.

{¶ 22} Still, even if Wilson had initially established his eligibility for post-conviction DNA testing under R.C. 2953.74(B)(1) (which he did not), R.C. 2953.74(C) then sets forth additional criteria under which the trial court may accept a post-conviction application for DNA testing, but only if *all* of the criteria apply, including:

> (1) The court determines pursuant to section 2953.75 of the Revised Code that biological material was collected from the crime scene or the victim of the offense for which the offender is an eligible offender and is requesting the DNA testing and that the parent sample of that biological material against which a sample from the offender can be compared still exists at that point in time.
>
> (2) The testing authority determines all of the following pursuant to section 2953.76 of the Revised Code regarding the parent sample of the biological material described in division (C)(1) of this section:
>
> (a) The parent sample of the biological material so collected contains scientifically sufficient material to extract a test sample.
>
> (b) The parent sample of the biological material so collected is not so minute or fragile as to risk destruction of the parent sample by the extraction described in division (C)(2)(a) of this section; provided that the court may determine in its discretion, on a case-by-case basis, that, even if the parent sample of the biological material so collected is so minute or fragile as to risk destruction of the parent sample by the extraction, the application should not be rejected solely on the basis of that risk.

(c) The parent sample of the biological material so collected has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing, and the parent sample otherwise has been preserved, and remains, in a condition that is scientifically suitable for testing.

(3) The court determines that, at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing, the identity of the person who committed the offense was an issue.

(4) *The court determines that one or more of the defense theories asserted by the offender at the trial stage in the case described in division (C)(3) of this section or in a retrial of that case in a court of this state was of such a nature that, if DNA testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative.*

(5) *The court determines that, if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding that offender.*

(6) The court determines pursuant to section 2953.76 of the Revised Code from the chain of custody of the parent sample of the biological material to be tested and of any test sample extracted from the parent sample, and from the totality of circumstances involved, that the parent sample and the extracted test sample are the same sample as collected and that there is

> no reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected.

(Emphasis added.) R.C. 2953.74(C).

{¶ 23} "Exclusion" or "exclusion result" means "a result of DNA testing that scientifically precludes or forecloses the subject offender as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the offender is an eligible offender and for which the sentence of death or prison term was imposed upon the offender." R.C. 2953.71(G). "Outcome determinative" means that "had the results of DNA testing of the subject offender been presented at the trial of the subject offender requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the offender is an eligible offender and is requesting the DNA testing, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the offender's case as described in division (D) of section 2953.74 of the Revised Code, there is a strong probability that no reasonable factfinder would have found the offender guilty of that offense . . ." R.C. 2953.71(L).

{¶ 24} In his second assignment of error, Wilson contends that the trial court erred when it found his requested DNA testing would not be outcome determinative. Wilson essentially asserts that, with an exclusion result, he would have been exonerated if another DNA profile were to be found on the items for which he sought DNA testing, as the results of the DNA testing would then be outcome determinative. Wilson also contends that there were alternative suspects in this matter, specifically asserting that

Michael Phillips had accused two other men of killing D'Laquan and that those two other men had no connection to Wilson.

{¶ 25} "Under the current DNA testing scheme, offenders may apply to have their own DNA compared against biological evidence recovered from the victim or the crime scene, for the purpose of scientifically precluding the offender as a 'contributor of biological material from the crime scene or victim in question . . .' " *State v. Widmer*, 2013-Ohio-62, ¶ 115 (12th Dist.), citing R.C. 2953.71(G); *see also* R.C. 2953.74(C). "In essence, the DNA testing statutes provide an opportunity for the accused to establish that another individual committed the crime in question." *Id*. "[T]he statutes do not embrace victims as the subjects of DNA testing . . ." *Id*. at ¶ 129.

{¶ 26} First, Wilson argues that the blood on his shoe should be tested to prove that the *victim's* DNA was not present on his shoe. However, the purpose of DNA testing is to test Wilson's DNA against samples found, not the victim's, and Wilson's DNA would obviously be present on his own shoe. The same analysis would apply to any of Wilson's clothing.

{¶ 27} Next, Wilson requests DNA testing of several fired bullets and shell casings, but we held in *Harwell* that the presence of DNA on a shell casing is not, by itself, outcome determinative regarding who may have fired the gun. *Harwell,* 2022-Ohio-2706, at ¶ 37 (2d Dist.) (even if testing the casings would have yielded a result establishing the presence of another's DNA, the result would not have been outcome determinative but, rather, would have merely established that someone else touched the casings); *see* also *State v. Moten*, 2021-Ohio-233 (2d Dist.); *State v. Sells*, 2017-Ohio-987 (2d Dist.); *State*

v. Mason, 2020-Ohio-6895, ¶ 47-48 (5th Dist.) ("[I]n order for the trial court to find that touch DNA evidence on the clothing would be outcome determinative, it would have to disregard all the evidence provided at trial."); *State v. Ridley*, 2020-Ohio-2779, ¶ 60 (3d Dist.) ("Given the high degree of flexibility in the State's theory of the case, a DNA testing result proving that another person interacted with [the] items would not foreclose Ridley as a perpetrator[.]").

{¶ 28} Lastly, Wilson contends that there were alternative suspects in this matter, specifically asserting that Michael Phillips had accused two other men who had no connection to Wilson of killing D'Laquan and that the perpetrator's identity was, therefore, contested. However, given the eyewitness testimony at Wilson's trial, we cannot say that Wilson met the requirements of R.C. 2953.74(C) because his identity was not at issue at trial and, thus, any exclusion results would not have been outcome determinative. Wilson was identified as the shooter by Michael Phillips, the victim's uncle, who observed the murder from only a few feet away. It was also established at trial that there were *two* individuals who confronted D'Laquan on the street when he was murdered. Thus, even if DNA testing were done on the remaining items, another person's DNA were found on them, and Wilson's DNA were excluded as being present, Wilson still could have been the second person who attacked the victim. Accordingly, we cannot say that the outcome of Wilson's trial would have been different or that the trial court abused its discretion in finding that, even if it could have excluded Wilson's DNA from the scene and could have revealed the presence of an unknown third party, Wilson's request for DNA testing would not have been outcome determinative.

{¶ 29} The trial court was statutorily precluded from accepting Wilson's post-conviction application for DNA testing unless Wilson established all of the required criteria in R.C. 2953.74(B) and (C), which he did not do. Wilson's two assignments of error are overruled.

III. Conclusion

{¶ 30} The judgment of the trial court is affirmed.

. . . . . .

EPLEY, P.J. and LEWIS, J., concur.