

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 09CA4
 :
 vs. : **Released: March 19, 2010**
 :
 MARTIN L. HATTON, : DECISION AND JUDGMENT
 : ENTRY
 Defendant-Appellant. :

APPEARANCES:

Mark Godsey and David Laing, The Ohio Innocence Project, Cincinnati, Ohio, for Defendant-Appellant.

Judy C. Wolford, Pickaway County Prosecutor, and Jayme Hartley Fountain, Pickaway County Assistant Prosecutor, Circleville, Ohio, for Plaintiff-Appellee.

McFarland, P. J.:

{¶1} Defendant-Appellant, Martin L. Hatton, appeals the decision of the Pickaway County Court of Common Pleas, denying his request for post-conviction DNA testing. Hatton argues that due to amendments to the relevant Revised Code sections, the trial court erred in determining DNA testing would not be outcome determinative. We do not find Hatton’s argument persuasive, because even if Hatton is excluded as a source of the DNA evidence, a reasonable factfinder could still find him guilty of rape.

Accordingly, we overrule his assignment of error and affirm the decision of the court below.

I. Facts

{¶2} On January 18, 1997, at approximately 1:17 a.m., the victim in this case, a minor, awoke to the sound of footsteps in her bedroom. She then felt a gloved hand covering her mouth and saw a stranger's face inches away from her own. The man held a knife to her neck and told her that if she made any noise he would kill her family. He then raped the victim in her own bedroom and, afterward, took her downstairs to the family room. Once downstairs, the victim saw that another man was present. The victim was made to lie down on a couch and the second man also raped the victim.

{¶3} Hearing noise, the victim's father woke up to investigate. As he proceeded down the stairs, he heard someone say, "Let's get the hell out of here. Someone's coming." The victim's father caught only a glimpse of the first man as he fled the residence. However, he confronted the second man who was still in the home. During the ensuing struggle, the second man, calling to the first man, repeatedly yelled, "Marty, Marty, Marty!" He also told the victim's father, "My buddy's got a gun, he will come in and kill you all." The victim's father subdued the second man and questioned him

about his presence in the home. The second man stated, “I don't know why I am here. I came with Marty Hatton.”

{¶4} Circleville Police Sergeant Wayne Gray and Officer David Haynes were the first officers on the scene. As Sergeant Gray entered the front door, he saw the victim's father standing over the second man, who was lying on the floor yelling, “Where's Marty?” Sergeant Gray told the man that he did not know who “Marty” was. The man stated he was referring to “Marty Hatton.” After questioning, the second man told the officers his name was Ricky Dunn. The officers arrested Dunn, but were unable to immediately locate Hatton. Dunn subsequently explained the events surrounding the break-in and the rape of the victim, claiming Hatton forced him to participate through threat of force.

{¶5} The following morning, investigators went to Hatton's house to question him about his whereabouts during the preceding night and about Dunn's allegations. After the officers informed Hatton that Dunn had been involved in a burglary and a rape the previous night, Hatton told them he had no idea what they were talking about. He claimed he had not seen Dunn for approximately two weeks. He further stated that on the previous evening, he returned home shortly before midnight, watched a movie with his wife, and went to bed.

{¶6} The officers asked for the clothes he had been wearing the previous evening, and he gave them a pair of jeans, a sweater, a shirt, and a pair of underwear. However, he did not turn over the dark colored sweatshirt that Dunn told the officers Hatton had been wearing during the incident. The officers then asked Hatton to accompany them to the police station to participate in a line-up.

{¶7} During the line-up, the victim was unable to positively identify Hatton as the perpetrator. Hatton then agreed to provide blood and pubic hair samples and to let investigators search his home. During the search, the officers found the dark colored sweatshirt Hatton had not turned over previously. The sweatshirt had a dried white substance on it which the officers suspected to be semen. Hatton's wife confirmed that Hatton had been wearing the sweatshirt on the night in question.

{¶8} Hatton was later arrested and the matter proceeded to trial. At trial, the jury heard the testimony of Dunn, the investigating officers and other witnesses, including expert testimony regarding DNA. Though semen was present on vaginal swabs from the victim's rape kit and panties, the expert witnesses for both the prosecution and the defense stated that the DNA results were inconclusive. Because the results were inclusive, neither Hatton nor Dun could be positively included or excluded as contributors.

But Hatton's expert did state to the jury that, in his opinion, the DNA evidence showed that an individual other than Hatton, Dunn or the victim contributed to one of the DNA samples. At the conclusion of the four-day trial, the jury found Hatton guilty of aggravated burglary, kidnapping, felonious assault, rape, and theft. The trial court subsequently sentenced Hatton to a total of 39 years in prison.¹

{¶9} Following his conviction, Hatton has filed numerous appeals. In his direct appeal, he raised six assignments of error. We found his arguments meritless and affirmed the trial court's decision. *State v. Hatton* (Apr. 19, 1999), 4th Dist. No. 97CA34. The Ohio Supreme Court rejected his appeal of that decision. *State v. Hatton* (1999), 86 Ohio St.3d 1461, 715 N.E.2d 565 (Table).

{¶10} During the pendency of his direct appeal, Hatton filed a petition for post-conviction relief, claiming that his convictions and sentences were void or voidable. The trial court denied his petition, and we again affirmed. *State v. Hatton* (Aug. 4, 2000), 4th Dist. No. 00CA10.

{¶11} In February 2005, Hatton requested the court to order the release of all evidence susceptible to DNA testing. Under R.C. 2953.71 to

¹ In 2002, Hatton was indicted in Franklin County, Ohio, for aggravated burglary, rape, gross sexual imposition, and kidnapping for another incident, which occurred in August of 1996. He pleaded guilty to rape and was sentenced to three years of incarceration, to be served consecutively with the sentence in the case sub judice, resulting in a total of 42 years in prison.

2953.83, Hatton sought to have a newly available DNA test performed on the evidence, specifically Y-chromosome short tandem repeat (“Y-STR”) testing. He claimed that a Y-STR DNA test result would be outcome determinative because it would prove that his DNA was not present and, thus, that he was not involved in the crimes.

{¶12} The trial court denied Hatton's request, stating that new test results would not be outcome determinative. The court reasoned that “even if ‘new and improved’ DNA testing would conclusively exclude the Defendant as a ‘donor,’ a reasonable jury could still find the Defendant 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.” We agreed with the trial court and affirmed its decision. *State v. Hatton*, 4th Dist. No. 05CA38, 2006-Ohio-5121.

{¶13} In October 2008, based on changes to the applicable Revised Code sections, Hatton again moved for Y-STR DNA testing. Despite the statutory amendments, the trial court again found such testing would not be outcome determinative and the court denied his request. That decision is the basis of Hatton’s current appeal.

II. Assignment of Error

THE TRIAL COURT ERRED WHEN IT HELD THAT DNA TESTING IN APPELLANT'S CASE WOULD NOT BE OUTCOME DETERMINATIVE AS REQUIRED BY R.C. 2953.74(B), BECAUSE SUCH A TEST COULD DEFINITELY ESTABLISH HIS INNOCENCE OR CREATE A STRONG PROBABILITY THAT A REASONABLE FACTFINDER WOULD FIND REASONABLE DOUBT AS TO HIS GUILT.

III. Assignment of Error

{¶14} Hatton's assignment of error is based upon changes to the Revised Code sections regarding post-conviction DNA testing. Specifically, Hatton argues that because the definition of "outcome determinative" in R.C. 295371.(L) has been altered, the trial court erred in not granting his request for post-conviction DNA testing.

{¶15} Under R.C. 2953.74, a trial court may only grant a post-conviction application for DNA testing if an exclusion result of such testing would be "outcome determinative." Outcome determinative is defined in R.C. 2953.71:

{¶16} "Outcome determinative" means 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 or for which the inmate 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 inmate'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 inmate guilty of that offense * * *.” R.C. 2953.71(L) (Emphasis added.)

{¶17} In February 2005, when Hatton originally applied to the trial court for post-conviction DNA testing, R.C. 2953.71(L) did not contain the “there is a strong probability” language. Thus, the previous standard, stating that no reasonable factfinder would have found the inmate guilty was stricter than the current standard, where there must only be a strong probability that no reasonable factfinder would have found the inmate guilty.

{¶18} Accordingly, the relevant inquiry is whether the trial court erred in determining that Y-STR DNA testing would still not be outcome determinative, despite the less stringent standard of amended R.C. 2953.71(L). We find that, because of the very strong circumstantial evidence presented to the jury, even if Y-STR DNA testing would result in excluding Hatton as a DNA contributor, we cannot say there is a strong probability that no reasonable factfinder would find him guilty.

{¶19} At trial, the jury was presented with an abundance of evidence implicating Hatton. It is undisputed that two men were involved in the attack upon the victim and that one of the men was Ricky Dunn. Dunn

immediately implicated Marty Hatton, calling out, “Marty, Marty!” to the other man who escaped, even as Dunn was being subdued by the victim’s father. When police arrived, Dunn immediately told them that he was referring to Marty Hatton.

{¶20} Further, the jury heard evidence that Hatton intentionally attempted to mislead the investigation. It is undisputed that Dunn and Hatton were together at a bar, and left that bar together, less than an hour before the crimes in question occurred. But when questioned by the police, Hatton initially denied that fact, stating that he hadn’t seen Dunn for several weeks. Only when confronted by eye-witness reports to the contrary did he change his story.

{¶21} Additionally, despite saying he wanted to fully cooperate with the investigation, he did not provide the correct clothing for testing. Both Hatton’s wife and Dunn told investigators that Hatton was wearing a dark sweatshirt the night of the incident. But when Hatton gave police the clothes he said he was wearing, the sweatshirt was not included. Police obtained the sweatshirt only upon a subsequent search of Hatton’s home. The jury also heard testimony that Hatton attempted to sell his truck the day after the crimes took place. Hatton told the sales manager that he was in trouble and had been “at the wrong place at the wrong time.”

{¶22} Importantly, though the DNA evidence was inconclusive and Hatton could neither be included nor excluded as a contributor, the jury also heard testimony from Hatton's expert witness which could be viewed as exculpatory. Hatton's expert witness testified that the evidence showed that a person other than Hatton, Dunn or the victim contributed to the DNA sample. Further, he testified that a foreign pubic hair found on the victim had not been accounted for. He stated that the pubic hair was black, and Hatton's pubic hair was reddish blond in color. Despite this evidence, the jury still found Hatton guilty.

{¶23} The State did not rely upon DNA evidence to prove its case. Instead, the State relied upon Dunn's testimony implicating Hatton, other witness testimony, and Hatton's actions in misleading the investigation. Despite the inconclusive DNA results at trial, the jury was apparently convinced by the strong circumstantial evidence presented by the State.

{¶24} In light of the specific facts and circumstances of this case and the evidence presented by the State, we find that a DNA test result excluding Hatton as a contributor to the semen specimen would not be outcome determinative. We cannot say that, if Hatton was excluded by such testing, there is a strong probability that no reasonable factfinder would find him guilty.

{¶25} Hatton states in his brief that if he is excluded as a contributor to the DNA evidence, he could not have raped the victim. This is incorrect. Based solely on the circumstantial evidence presented at trial, a reasonable jury could still conclude that Hatton raped the victim, but that he did not ejaculate or leave semen. And the presence of semen, or ejaculation, is not an element of rape. *State v. Wilkins*, 163 Ohio App.3d 576, 2005-Ohio-5193, 839 N.E.2d 457, at ¶14. Accordingly, we overrule Hatton's assignment of error and affirm the decision of the court below.

IV. Conclusion

{¶26} After reviewing the entire record, we agree with the trial court's conclusion that an exclusion DNA test result would not be outcome determinative. Here, even if DNA testing excluded Hatton as a contributor, we cannot say that, after considering all the other evidence, there is a strong probability that no reasonable factfinder would have found him guilty of rape. As such, the trial court's decision to deny post-conviction DNA testing was correct.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Abele, J. & Kline, J.: Concur in Judgment and Opinion.
For the Court,

BY: _____
Judge Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.