

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE	)	
	)	ID No: 84005481DI
	)	
v.	)	
	)	Cr.A. No:IN84-09-0789
	)	
JACK W. WOLF	)	
	)	
	)	

Date Submitted: August 20, 2003  
Date Decided: November 17, 2003

*Upon Defendant's Motion for a Bill of Particulars: **DENIED.***  
*Upon Defendant's Motions for DNA Testing: **DENIED.***  
*Upon Defendant's Motion for a New Trial: **DENIED.***

**ORDER**

On August 7, 2003, Jack W. Wolf ("Defendant") filed a *pro se* motion for bill of particulars and DNA testing pursuant to Senate Bill No. 38. Defendant also filed a *pro se* motion for a new trial and DNA testing pursuant to Senate Bill No. 38 on August 15, 2003.

1. On September 14, 1984, Defendant was arrested on charges of Kidnaping in the first degree and Rape in the second degree. A jury found Defendant guilty as charged. Following the State's entry of a nolle prosequi on the charge of Kidnaping in the first degree, Defendant was sentenced to twenty-five (25) years imprisonment, suspended after serving twelve (12) years for thirteen (13) years of probation.<sup>1</sup>

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<sup>1</sup>Defendant was first paroled on August 23, 1989. He subsequently violated the terms of his parole and probation. Wolf was most recently sentenced for violation of probation on February 10, 2000 to serve twelve (12) years at Level V. After serving ten (10) years, the remainder of his sentence is suspended for six (6)

2. Defendant filed a notice of appeal with the Supreme Court of Delaware on August 8, 1985 citing the trial court's reversible error in handling the Defendant's reported dissatisfaction with his counsel's representation as his sole ground for relief. On June 13, 1986, the Supreme Court affirmed the judgment of this Court finding Defendant's appeal to be without merit.<sup>2</sup>

3. Defendant filed his first motion for post-conviction relief on April 14, 1988 citing the following grounds for relief: (1) the prosecutor failed to disclose exculpatory evidence; (2) ineffective assistance of his trial counsel; and, (3) Defendant reiterated various testimony from his trial. On April 21, 1988, Judge Stiftel indicated that Defendant's motion was a repetition of the events and facts as viewed by the Defendant and denied the motion as a previously decided matter.<sup>3</sup>

4. Defendant filed a second motion for post-conviction relief on March 20, 2000. This Court summarily dismissed Defendant's motion as procedurally barred pursuant to the three-year time limitation set forth in Superior Court Criminal Rule 61(i)(1) and the former adjudication proscription provided in Rule 61(i)(4).<sup>4</sup>

5. On August 10, 2001, Defendant filed a third motion for post-conviction relief repeating the same grounds he cited in his previous motions. As a result, Defendant's motion was summarily dismissed on August 27, 2001.<sup>5</sup> Defendant's most recent motion for post-

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months at Level IV work release. His current term of incarceration is due to expire on January 28, 2007.

<sup>2</sup>*Wolf v. State*, Del. Supr. No. 266, 1985, Horsey, J. (May 20, 1986) (ORDER) (finding no abuse of discretion as a result of no evidence of record to support a claim of ineffective assistance of counsel or his desire to discharge his attorney).

<sup>3</sup>*State v. Wolf*, Del. Super. CrA# IN84-09-0789, Stiftel, J. (Apr. 21, 1988) (Letter Op.).

<sup>4</sup>*State v. Wolf*, 2000 WL 710121 (Del. Super.).

<sup>5</sup>*State v. Wolf*, 2001 WL 1012185 (Del. Super.).

conviction relief was filed on August 28, 2002 and summarily dismissed on September 12, 2002.<sup>6</sup> The Delaware Supreme Court affirmed this Court's decision on November 25, 2002.<sup>7</sup>

6. Defendant now recasts many of the same arguments that have been previously adjudicated by this Court and affirmed by the Delaware Supreme Court as motions for a new trial, DNA testing and a bill of particulars. Because Defendant is a *pro se* litigant, the court has granted him more leniency in articulating his legal arguments in support of his grounds for relief.<sup>8</sup>

7. The purpose of a bill of particulars is to provide the defendant with more specific information about the allegations in the indictment.<sup>9</sup> It serves to protect a defendant against surprise at trial, and also precludes a second prosecution for an inadequately described offense.<sup>10</sup> In the instant case, Defendant's attorney filed a motion for a bill of particulars which was later withdrawn. Defendant does not provide any information regarding the additional specific knowledge he sought to acquire through a bill of particulars, nor does he allege prejudice due to a lack of information regarding the charges against him. Accordingly, the Court finds that Wolf is

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<sup>6</sup>*State v. Wolf*, 2002 WL 31111981 (Del. Super.).

<sup>7</sup>*Wolf v. State*, 2002 WL 31684962 (Del. Supr.).

<sup>8</sup>*See Vick v. Haller*, 1987 WL 36716 (Del. Supr.) (holding that a *pro se* complaint, however inartfully pleaded, may be held to a less stringent technical standard than formal pleadings drafted by lawyers). *See also Jackson v. Unemployment Ins. Appeal Board*, 1986 WL 11546 (holding that Superior Court may give a *pro se* litigant leniency to allow the case to be fully and fairly heard). The Court notes that Defendant's legal arguments are very difficult to discern. It also appears that, in its entirety, Defendant's motion consists of largely of his recitation of the facts and events surrounding the case that have already been considered and ruled upon by this Court and the Supreme Court in prior proceedings.

<sup>9</sup>*Smith v. State*, 1998 WL 255395 (Del. Supr.).

<sup>10</sup>*Lovett v. State*, 516 A.2d 455, 467 (Del. 1986), *cert. denied*, 481 U.S. 1018 (1987) (citing *United States v. Cantu*, 557 F.2d 1173, 1178 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978)).

merely utilizing his attorney's act of withdrawing his previous motion for a bill of particulars to revisit his previously adjudicated claim of ineffective assistance of counsel. Consequently, Defendant's motion for a bill of particulars is misplaced and without merit.

8. Wolf has filed a motion for a new trial under Senate Bill No. 38<sup>11</sup> which amended the effectiveness of the time constraints imposed by the previously existing post-conviction DNA testing statute.<sup>12</sup> Enacted on September 1, 2000, the statute sets forth six criteria governing an inmate's entitlement to post-conviction DNA testing.<sup>13</sup> For those who were convicted before the statute was enacted, there was a two-year window during which motions for DNA testing could be timely filed. The original window expired on September 1, 2002.<sup>14</sup> On June 30, 2003, Senate Bill No. 38 was enacted effectively amending Chapter 320 of Volume 72 of the laws of Delaware relating to post-conviction remedies.<sup>15</sup> The act extended the time for DNA testing motions for those whose judgment of conviction was final prior to September 1, 2000 to September 1, 2004.<sup>16</sup>

9. In his instant motion, Defendant is seeking the post-conviction remedies of a new trial and DNA testing. A motion for DNA testing may be granted if the petitioner establishes that: (1) the testing is to be performed on evidence secured in relation to the trial which resulted in the conviction; (2) the evidence was not previously subject to testing because the technology for

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<sup>11</sup>S.B. 38, 142<sup>nd</sup> Gen. Assem., Reg. Sess. (Del. 2003).

<sup>12</sup>See DEL. CODE ANN. tit. 11, § 4504 (2001).

<sup>13</sup>*Id.*

<sup>14</sup>Section 4 of 72 Del. Laws, c. 320, provides that: "Any motion filed pursuant to the provisions of § 4504(a) of Title 11 as promulgated by § 3 of this act by any person whose judgement (sic) of conviction is final prior to September 1, 2000, may not be filed after September 1, 2002."

<sup>15</sup>S.B. 38, 142<sup>nd</sup> Gen. Assem., Reg. Sess. (Del. 2003).

<sup>16</sup>*Id.*

testing was not available at the time of the trial; (3) the movant presents a prima facie case that identity was an issue in the trial; (4) the movant presents a prima facie case that the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered or replaced in any material aspect; (5) the requested testing has the scientific potential to produce new, noncumulative evidence materially relevant to the person's assertion of actual innocence; and, (6) the requested testing employs a scientific method which is generally accepted within the relevant scientific community, and which satisfies the pertinent Delaware Rules of Evidence concerning the admission of scientific testimony or evidence.<sup>17</sup> Failure to satisfy any one of the six requirements of § 4504(a) precludes the requested remedy of DNA testing because the statute's requirements are stated in a conjunctive manner.<sup>18</sup> To effectuate its remedial purpose, section 4504(a) should be liberally construed to allow post-conviction DNA testing whenever a defendant has complied with a reasonable reading of its requirements.<sup>19</sup> Nevertheless, "a liberal construction does not mean that relief should be awarded at the cost of twisting or misreading the statutory language."<sup>20</sup>

10. Defendant is alleging that the State Police Detective contaminated the evidence in this case by adding additional clothing to taint the FBI test. Because Defendant received a copy

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<sup>17</sup> DEL. CODE ANN. tit. 11, § 4504(a) (2001).

<sup>18</sup> *Id.* See also *State v. Klosowski*, 310 A.2d 656, 657 (1973) (indicating that "[a]nd" is conjunctive, in its commonly accepted meaning, and is not generally used to express an alternative unless it is followed by words which clearly indicate that intent).

<sup>19</sup> *Anderson v. State*, 831 A.2d 858, 864 (Del. 2003). See also *State v. Cephas*, 637 A.2d 20, 25 (Del.1994).

<sup>20</sup> *Id.*

of the lab report on July 18, 2003, he argues that this is newly discovered evidence. Wolf is requesting DNA testing of the semen found on the extra pair of underwear and the semen found on the victim's pantyhose.

11. In response, the State argues that the FBI lab reports are not "new evidence" because they were used by the defense during Wolf's trial. The State also contends that Defendant has failed to satisfy any of the statutory requirements for DNA testing as set forth in section 4504(a). Furthermore, the State claims that DNA testing would not show anything that was not known at trial. The hairs found on Wolf's clothing were of no evidentiary value at trial because they did not come from the victim. In response to Defendant's argument that the FBI test was contaminated as a result of a detective adding an additional set of clothing, the State attached as exhibits the search warrant application and affidavit in addition to the search warrant return form that details the items that were seized from Wolf's apartment.<sup>21</sup>

12. In his instant motion, Defendant fails to clearly present a *prima facie* case, as required by statute, that: (1) identity was an issue at trial,<sup>22</sup> and (2) that the evidence to be tested has been subject to a chain of custody sufficient to comply with section 4504(a)(4).<sup>23</sup> Because Defendant has not met his statutory burden, his motion for DNA testing should be denied on its face. However, Wolf is a *pro se* litigant; therefore, the Court will further address Defendant's

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<sup>21</sup>State's Response, Exhibit D, in pertinent part, indicates that two pairs of white men's brief style underwear, two pairs of blue jeans, and two black t-shirts were seized and viewed by a judge in connection with the executed search warrant.

<sup>22</sup>See DEL. CODE ANN. tit 11, § 4504(a)(3) (2001).

<sup>23</sup>DEL. CODE ANN. tit 11, § 4504(a)(4) (2001) indicates that the movant must present a *prima facie* case that the evidence has been "subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered or replaced in any material aspect."

claims to ensure that he has been fully and fairly heard.

13. In addition to failing to satisfy section 4504(a)(3) and (4), Defendant has not shown that DNA testing has the scientific potential to produce new, non-cumulative evidence that is materially relevant to his claim of innocence.<sup>24</sup> Upon review of the trial transcript, it is clear that defense counsel had the FBI test results and corresponding documentation available at the time of trial. In fact, Defendant called the FBI agent who performed the tests as a witness for the defense. The hair that Defendant wishes to have DNA testing performed on was unlike that of the victim or Defendant. In addition, the enzyme and blood samples taken from the semen found on the victim's panties did not match that of Wolf. Therefore, any additional testing would produce cumulative evidence further demonstrating that the hair and semen found do not match the Defendant and would not be materially relevant to his assertion of actual innocence.

14. Pursuant to the provisions set forth in section 4504(b), "a person convicted of a crime who claims that DNA evidence not available at trial establishes the petitioner's actual innocence may commence a proceeding to secure relief by filing a motion for a new trial..."<sup>25</sup> In order for the court to grant a new trial, the petitioner must establish by clear and convincing evidence that no reasonable trier of fact would have convicted him considering: (1) the evidence presented at trial; (2) evidence that was available at trial but was not presented or was excluded; and, (3) the evidence that was obtained pursuant to subsection (a) of section 4504. Defendant has made no claim that evidence available at the time of trial was excluded or not presented, he merely indicates that he just recently received a copy of the FBI report. The Court finds that

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<sup>24</sup>DEL. CODE ANN. tit 11, § 4504(a)(5) (2001).

<sup>25</sup>DEL. CODE ANN. tit. 11, § 4504(b) (2001).

Defendant has not met his burden of showing by clear and convincing evidence that a reasonable trier of fact would not have convicted him considering he has not introduced any new evidence or satisfied the requirements set forth in section 4504(a) to obtain DNA testing.

For the above stated reasons, Defendant's motion for a bill of particulars, motions for DNA testing, and motion for a new trial are **DENIED**.

**IT IS SO ORDERED.**

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The Honorable Richard S. Gebelein

Orig: Prothonotary  
cc: Jack W. Wolf - DCC