

[Cite as *State v. Smith*, 2008-Ohio-5581.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90749

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KENNETH J. SMITH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-030379

BEFORE: Gallagher, P.J., Dyke, J., and Celebrezze, J.

RELEASED: October 30, 2008

JOURNALIZED:

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ATTORNEYS FOR APPELLANT

Timothy Young
State Public Defender

BY: Sarah M. Schregardus
Assistant State Public Defender
Ohio Public Defenders Commission
8 East Long Street, 11th Floor
Columbus, Ohio 43215

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: T. Allan Regas
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

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SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant, Kenneth Smith (“Smith”), appeals the decision of the Cuyahoga County Court of Common Pleas denying his application for DNA testing pursuant to R.C. 2953.71 et seq. Finding no error in the proceedings below, we affirm.

{¶ 2} In 1977, a jury convicted Smith of multiple counts of rape, kidnapping, aggravated robbery, and carrying a concealed weapon. He was sentenced to 7 to 25 years in prison for rape, kidnapping, and aggravated robbery. He was also sentenced to 3 to 10 years on the charges of carrying a concealed weapon. All counts were ordered to be served consecutively. We reversed his convictions for kidnapping but affirmed the remainder of his convictions in *State v. Smith* (Aug. 16, 1979), Cuyahoga App. No. 38318.

{¶ 3} In 2004, Smith filed an application for DNA testing, pursuant to R.C. 2953.73. The state filed a brief in opposition to his application. The trial court subsequently denied Smith’s application. Smith appealed, and this court found that the trial court failed to comply with the requirements of R.C. 2953.73(D) because the court did not provide a statement that explained its reasons for the denial of the DNA testing application. *State v. Smith*, Cuyahoga App. No. 87937, 2007-Ohio-2369.

{¶ 4} On remand, the trial court again denied Smith’s application for DNA testing, finding as follows:

“* * * DNA testing would not be outcome determinative pursuant to the trial record of this case as [M.R.¹] had been raped by three different males. Should the defendant be excluded as a donor of any biological material that may have been found on the victim, it would not serve to exonerate him. It would only demonstrate that he did not deposit any biological material that may have been found on the victim when he raped her, which is consistent with the testimony of [M.R.] that the defendant did not reach climax. Further, the defendant was charged with seven counts of rape because he was complicit in the rapes of [M.R.] and [L.K.] as the offense relates to his four co-defendants. Therefore, a DNA test which excluded the defendant as a donor would not exonerate him of any of the rape offenses for which he was convicted as an aider and abettor. * * * ”

{¶ 5} Smith appeals, advancing two assignments of error for our review. In his first assignment of error, Smith argues that the trial court abused its discretion when it found that an “exclusion result” would not be outcome determinative.

{¶ 6} R.C. 2953.74(C) provides that a court may accept an application for DNA testing for an eligible inmate, as defined under R.C. 2953.72, when “[t]he 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 inmate.” R.C. 2953.74. See, also, R.C. 2953.72, 2953.73. The eligible inmate must demonstrate that an exclusion result of a DNA test would alter the trial result. *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, ¶30. If the proponent fails to convince the trial court that a DNA test exclusion result would change the verdict, the court is under no

¹ The parties are referred to herein by their initials or title in accordance with this court’s established policy regarding the nondisclosure of the identities of victims of sexual violence.

obligation to accept the application. *Id.*, ¶31. The trial court must, in its discretion, consider how to best use judicial resources. Thus, the trial court decides on whether it is appropriate to proceed with a DNA test. *Id.*

{¶ 7} For purposes of R.C. 2953.71 to 2953.83, an “exclusion result” is defined as an outcome of DNA testing that scientifically precludes or forecloses the applicant from being the contributor of the biological material recovered from the crime scene or crime victim. R.C. 2953.71(G). Additionally, “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. See R.C. 2953.71(L).

{¶ 8} Smith argues that an exclusion result would cast strong doubt on his involvement in the crimes because the only evidence implicating him was M.R.’s identification of him. He insists that with an exclusion result and his alibi witness, the jury would have concluded that M.R.’s identification was erroneous. We disagree.

{¶ 9} We note that the App.R. 9(A) record of this case does not contain the original trial transcript; this court’s review of the trial court’s decision is limited to what is contained in the file.

{¶ 10} The facts of this case were set forth in a co-defendant’s case.

“In the early morning hours of February 3, 1977, Patrolmen Crossland and Mauer of the Cleveland Police Department were in the area of Whittier Avenue and East 55th Street in the City of Cleveland. At approximately 1 a.m., Patrolman Crossland received a radio call concerning a robbery of a home on Linwood Avenue involving three males with shotguns. Patrolman Crossland

proceeded to a vacant field near 56th Place and Whittier Avenue. On Whittier Avenue he observed two black males standing near the rear of a white Oldsmobile parked behind a green Olds. They were searching what appeared to be a coat. Patrolman Crossland recognized one of the males as Clarence Crain, recognized the white car as belonging to Crain, and that Crain had an outstanding traffic warrant. Observing this 'suspicious activity,' the patrolmen drove toward the two males. As the patrolmen approached, Crain and the other male placed a coat or 'an object' in the back seat of the car, got in and drove away. The patrolmen followed. Crossland observed 'a lot of movement' in the car. He also ran a computer check on the license plate, MU 428. The readout indicated an outstanding traffic warrant.

"Within a few blocks, Crain drove into a driveway and got out of the car. Patrolman Crossland stopped and said to him: 'Clarence, we have a traffic warrant for you, an arrest warrant for you, you are under arrest.'

"Crain came toward Patrolman Crossland. Two other males, Kenneth Williams and Kenneth Smith, were taken from the car. They were searched and secured in the back of the police car. A check was run on Smith and Williams and Patrolman Crossland awaited a further description of the robbery suspects. Before further information was received, Patrolman Crossland returned to Crain's car to conduct an 'inventory search.' Immediately upon entering the car, he observed a 'tear gas pistol' and several .38 caliber bullets in the tray and on the front floor of the car. On the back seat he saw a leather coat. He removed the coat and underneath it saw a 'shiny object,' 'what appeared to be the barrel of a gun.' Patrolman Crossland then searched underneath the back seat and found two other guns. After the search a call came to return defendant, Smith, Williams and defendant's car to the point where they were first seen.

"During this time Patrolmen Ray Allerton and Boyce Sefcic, in a second police car responding to the same radio call about the robbery, observed two black males get out of a green Olds Cutlass parked on Whittier Avenue. Patrolman Allerton checked the car and found two females, [L.K.] and [M.R.]. [L.K.] told the police: '* * they had just been abducted and raped by five black males, and

that two males had just left the auto.’ A description of the two males was given. The police were also told the other males were driving a ‘white Oldsmobile with gangster whitewalls.’

“Patrolman Sefcic went to an adjoining street where he saw the two male suspects. He observed one of them throw something to the ground. He arrested both and then recovered the thrown objects, including a wallet and a payroll check belonging to [M.R.].

“When Patrolman Crossland returned Crain, Smith, and Williams to the scene of the rape, both women identified the three as persons who raped and robbed them.

“Smith and Williams were arrested.”

See *State v. Crain* (July 23, 1979), Cuyahoga App. No. 38268 (transcript citations omitted).

{¶ 11} We agree with the trial court that an exclusion result would not have been outcome determinative. On the record before us, the victims testified that they had been raped by five black males, three of whom left in a white Oldsmobile. The officers saw the white Oldsmobile at the scene and followed it a few blocks before pulling it over. Smith, Williams, and Crain were removed from the white Oldsmobile. Smith and the others were identified by the victims. Further, as the trial court noted, the victim, M.R., testified that Smith did not climax. Therefore, a lack of DNA would not be unusual, but would not mean Smith did not rape her. Finally, Smith was complicit in the rapes of both victims as it relates to his four co-defendants, which would not change with an exclusion result. Accordingly, Smith’s first assignment of error is overruled.

{¶ 12} In Smith's second assignment of error, he argues that the trial court used the incorrect standard of review. He argues that the court used the sufficiency standard instead of the prescribed outcome determinative standard. We find no merit to this argument.

{¶ 13} As stated previously, "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. R.C. 2953.71(L).

{¶ 14} Although the trial court did not reiterate the words of the statute, it is clear that the court determined that an exclusion result would not be outcome determinative. Specifically, the trial court found that an exclusion result would be consistent with the testimony of the victim, and that it would not exonerate Smith from the complicity convictions. We find that the trial court used the proper standard of review. Accordingly, Smith's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

SEAN C. GALLAGHER, PRESIDING JUDGE

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR