

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 108885
 v. :
 :
 ANTHONY CONNER, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: September 3, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-12-566159-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney,
and Daniel Van and Katherine Mullin, Assistant Prosecuting
Attorneys, *for appellee.*

Ohio Innocence Project and Donald R. Caster, *for appellant.*

ON RECONSIDERATION¹

MICHELLE J. SHEEHAN, J.:

{¶ 1} Pursuant to App.R. 26(A)(1)(a), defendant-appellant Anthony Conner has filed an application for reconsideration of this court’s opinion in *State v. Conner*, 8th Dist. Cuyahoga No. 108885, 2020-Ohio-3720. The state filed a “response” to Conner’s motion, stating that it agrees with the basis of the motion for reconsideration.

{¶ 2} The test regarding whether to grant a motion for reconsideration under App.R. 26(A)(1)(a) “is whether the motion * * * calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by [the court] when it should have been.” *State v. Dunbar*, 8th Dist. Cuyahoga No. 87317, 2007-Ohio-3261, ¶ 182, quoting *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist.1982). Conner argues that the Ohio Supreme Court’s recent decision in *State ex rel. Penland v. Dinkelacker*, Slip Opinion No. 2020-Ohio-3774, released only days after this court dismissed his appeal, justifies reconsideration. We agree.

{¶ 3} On July 16, 2020, we determined that because the trial court’s entry did not include any explanation for the denial of Conner’s application for DNA

¹ The original decision in this appeal, *State v. Conner*, 8th Dist. Cuyahoga No. 108885, 2020-Ohio-3720, released on July 16, 2020, is hereby vacated. This opinion, issued upon reconsideration, is the court’s journalized decision in this appeal. See App.R. 22(C); see also S.Ct.Prac.R. 7.01.

testing, this court's precedent dictated that we dismiss Conner's appeal for lack of a final appealable order. *Conner* at ¶ 13, citing *State v. Newell*, 8th Dist. Cuyahoga No. 85280, 2005-Ohio-2853. This court in *Newell* relied on *State v. Mapson*, 1 Ohio St.3d 217, 438 N.E.2d 910 (1982), in which the Ohio Supreme Court held that a judgment entry that does not include statutorily mandated findings does not constitute a final appealable order. *Newell* at ¶ 6, citing *Mapson*.

{¶ 4} On July 20, 2020, the Ohio Supreme Court released *Dinkelacker* in which it explicitly overruled *Mapson* "to the extent that *Mapson* * * * hold[s] that a petitioner seeking postconviction relief may not appeal an adverse judgment unless the judgment entry contains findings of fact and conclusions of law." *Dinkelacker* at ¶ 3. The Supreme Court held that a trial court's failure to issue findings of fact and conclusions of law when ruling on a postconviction petition does not deprive an appellate court of jurisdiction, but rather, the failure to issue findings of fact and conclusions of law is an error that may be raised on appeal. *Id.*

{¶ 5} In light of the timely decision in *Dinkelacker*, Slip Opinion No. 2020-Ohio-3774, overruling *Mapson*, we grant Conner's motion for reconsideration. We therefore vacate the earlier opinion and issue this opinion in its place. *See* App.R. 22(C); *see also* S.Ct.Prac.R. 7.01.

Background

{¶ 6} In September 2012, Conner was charged in a multiple-count indictment for a shooting that occurred outside of a local nightclub and resulted in an individual's death. In January 2013, a jury convicted Conner of aggravated

murder, murder, felonious assault, and discharge of a firearm on or near prohibited premises. The trial court found him guilty on the bifurcated charge of having a weapon while under disability. Subsequently, the court sentenced Conner to 39 ½ years in prison. This court affirmed his conviction on direct appeal in *State v. Conner*, 8th Dist. Cuyahoga No. 99557, 2014-Ohio-601.

{¶ 7} In May 2019, Conner filed an application for DNA testing, asserting that he has met all of the requirements for postconviction DNA testing under R.C. 2953.74. In his application, Conner argued as follows: (1) prior DNA testing was not a “prior definitive test”; (2) biological material was collected from the crime scene or victim of the offense and this evidence still exists; (3) the sample is suitable for DNA testing and an upload to CODIS; (4) at the trial stage, the identity of the person who committed the offense was an issue because the applicant’s DNA was not on the gun, there was no gunshot residue on his clothes or hands, and no blood splatter on his person; (5) a CODIS hit(s), coupled with Conner’s exclusion, will be outcome determinative under R.C. 2953.71(L); and (6) from the chain of custody of the parent sample, there is no reason to believe that the parent sample and the extracted test sample are not the same, or that they have been out of state custody or would have been tampered with or contaminated since they were collected.

{¶ 8} Conner therefore requested the court (1) order the upload of the DNA profile already developed from the murder weapon to the Combined Index DNA System (“CODIS”); (2) order the testing of the shell casings collected at the crime scene for DNA, the development of DNA profiles from such evidence, and the upload

of any profiles developed to CODIS; and (3) provide the complete results, including underlying bench notes and electropherograms, of all testing to defense counsel and counsel for the state. On July 17, 2019, the state opposed Conner's application, arguing that DNA testing would not be outcome determinative.

{¶ 9} On July 26, 2019, the trial court denied the application. The journal entry stated in its entirety, "Defendant's motion for application of DNA testing filed 5/02/19 is denied."

{¶ 10} On August 9, 2019, Conner appealed the trial court's denial of his application for DNA testing, raising two assignments of error for our review: (1) the trial court erred in denying Appellant's application for postconviction DNA testing; and (2) the trial court erred when it failed to explain the reasons for its decision. In support of his first assignment of error, Conner argued that prior testing was not definitive, biological material that was collected from the crime scene still exists, the sample is suitable for DNA testing and uploading to CODIS, there was no physical evidence linking Conner to the victim's death, and a CODIS match would be outcome determinative. In his second assignment of error, Conner argued that because the trial court failed to state its reasons for denying his application, as mandated by R.C. 2953.73(D), this court should, "at a minimum," remand the case with instructions for the trial court to comply with the statute. In the interest of judicial economy, we address Conner's assignments of error out of order.

Law and Analysis

{¶ 11} Conner contends in his second assignment of error that the trial court erred in failing to state its reasons for denying his application in violation of R.C. 2953.73(D).

{¶ 12} We review the trial court's denial of an eligible offender's application for DNA testing for an abuse of discretion. R.C. 2953.74(A); *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654, ¶ 12 (8th Dist). A trial court abuses its discretion "where its decision is clearly erroneous and based on either a disregard for the law or a misapplication of the law to undisputed facts." *State v. Richard*, 8th Dist. Cuyahoga No. 99449, 2013-Ohio-3918, ¶ 5, citing *Ohio Civ. Rights Comm. v. Case W. Res. Univ.*, 76 Ohio St.3d 168, 666 N.E.2d 1376 (1996).

{¶ 13} R.C. 2953.71 through 2953.83 governs postconviction DNA testing for eligible inmates. R.C. 2953.73(D) provides as follows:

If an eligible offender submits an application for DNA testing under division (A) of this section, the court shall make the determination as to whether the application should be accepted or rejected. * * * The court shall make the determination in accordance with the criteria and procedures set forth in sections 2953.74 to 2953.81 of the Revised Code and, in making the determination, shall consider the application, the supporting affidavits, and the documentary evidence and, in addition to those materials, shall consider all the files and records pertaining to the proceedings against the applicant, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript and all responses to the application filed under division (C) of this section by a prosecuting attorney or the attorney general, unless the application and the files and records show the applicant is not entitled to DNA testing, in which case the application may be denied. * * * *Upon making its determination, the court shall enter a judgment and order that either accepts or rejects the application and that includes within the*

judgment and order the reasons for the acceptance or rejection as applied to the criteria and procedures set forth in sections 2953.71 to 2953.81 of the Revised Code.

(Emphasis added.)

{¶ 14} This court has repeatedly held that the failure to provide an explanation for rejecting a defendant’s application under R.C. 2953.73(D) is contrary to law and constitutes an abuse of discretion.² *State v. Rawls*, 2016-Ohio-7962, 76 N.E.3d 674, ¶ 25 (8th Dist.) (remanding to the trial court to provide its reasons for reaching its conclusion that DNA testing would not be outcome determinative where the court stated in its journal entry, “without further explanation, that even if the evidence were to exist, the results of DNA testing would not be outcome determinative under R.C. 2953.74(C)(5)”); *Richard* at ¶ 9 (remanding to the trial court to state its reasons for finding that DNA testing would not be outcome determinative where the court’s journal entry stated, “Defendant’s application for DNA testing * * * is denied, as it does not fulfill the requirement of the statute as to being ‘outcome determinative’”); *State v. Smith*, 8th Dist. Cuyahoga No. 87937, 2007-Ohio-2369, ¶ 10 (remanding for further explanation where the trial court stated that it was denying the application because DNA testing would not

² In *State v. King*, 8th Dist. Cuyahoga Nos. 103947, 103948, and 103949, 2017-Ohio-181, the trial court’s journal entry denying the appellant’s application for DNA testing failed to delineate any reasons for the court’s denial. This court, however, analyzed the substance of the appellant’s application for DNA testing without first addressing the apparent deficiency of the trial court’s journal entry. To the extent that the majority in *King* did not address the law in this district regarding the failure to provide reasons for denying an application for DNA testing in compliance with R.C. 2953.73(D), we find *King* to be an aberration and decline to follow it.

be outcome determinative); *see also State v. Upton*, 8th Dist. Cuyahoga No. 101815, 2015-Ohio-3341, ¶ 23 (Stewart, J., dissenting) (disagreeing with the majority’s affirming the trial court’s judgment and stating that “established precedent” demonstrates that where the trial court summarily denied the application for DNA testing by stating only that the defendant failed to meet the prerequisites for testing under the statute, and “the court never explained its reasons for finding that the prerequisites were not met under the criteria and procedures of the statute,” the failure to provide an explanation in such instances is contrary to law and constitutes an abuse of discretion).

{¶ 15} In *Richard*, the trial court denied the defendant’s application for postconviction DNA testing, stating in its judgment entry, “Defendant’s application for DNA testing * * * is denied, as it does not fulfill the requirement of the statute as to being outcome determinative.” *Id.*, 8th Dist. Cuyahoga No. 99449, 2013-Ohio-3918, at ¶ 9. This court found the trial court’s judgment failed to “provide any reasons explaining how the court reached this conclusion” and is therefore contrary to law and constitutes an abuse of discretion. *Id.* We explained that “the term ‘outcome determinative’ is a conclusion based upon consideration of all the available evidence. It is not a reason in and of itself. Therefore, the court is bound by R.C. 2953.73(D) to provide reasons explaining how the court reached the ‘outcome determinative’ conclusion.” *Id.* at ¶ 8, citing *Smith* at ¶ 8 (stating that when a trial court does not engage in an analysis of

defense theories or provide the reasons on which it relied in reaching its conclusion that the DNA test would not be outcome determinative, its order is insufficient).

{¶ 16} Here, in its judgment entry, the trial court summarily denied Conner's application for DNA testing by stating only that "Defendant's motion for application of DNA testing filed 5/02/19 is denied." The court failed to provide *any* reasons for its denial, or "rejection," of Conner's application, much less the "outcome determinative" conclusion. Because the trial court's judgment in this case provides no basis for this court to review the trial court's decision — neither analysis nor conclusion, it is contrary to law and therefore constitutes an abuse of discretion. *Smith* at ¶ 9.

{¶ 17} In light of the foregoing, Conner's second assignment of error is sustained. We reverse the judgment of the trial court and remand this cause for further proceedings consistent with this decision.

{¶ 18} Having sustained the second assignment of error, Conner's first assignment of error is hereby rendered moot.

{¶ 19} Judgment reversed and remanded.

It is ordered that appellant recover of appellee 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.

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

MICHELLE J. SHEEHAN, JUDGE

SEAN C. GALLAGHER, P.J., and
RAYMOND C. HEADEN, J., CONCUR