[Cite as *State v. Lindsay*, 2017-Ohio-594.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 16CA38
	:	
WENDELL LINDSAY	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 10-CR-419 D
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	January 30, 2017

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
BAMBI COUCH PAGE RICHLAND COUNTY PROSECUTOR DANIEL M. ROGERS 38 South Park Street Mansfield, OH 44902	WENDELL R. LINDSAY, PRO SE Inmate # A591-512 Richland Correctional Institution 1001 Olivesburg Road Mansfield, OH 44905

Delaney, J.

{¶1} Defendant-Appellant Wendell Lindsay appeals the May 24, 2016 judgment entry of the Richland County Court of Common Pleas denying his Application for DNA Testing. Plaintiff-Appellee is the State of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} On March 4, 2010, the ten-year-old victim approached her guidance counselor at school and told her "my mother's boyfriend has been raping me." (T. 197). During the investigation into the sexual assault, the victim disclosed that her mother's boyfriend, Lindsay, had come into the room that she shared with her younger sister on the morning of March 4th, pulled down her underwear and stuck his tongue in her vagina. (T. at 198; 269). This was not the first time a sexual incident had occurred. The victim told the social worker who interviewed her that Lindsay had placed his mouth on her vagina approximately six times and penetrated her vagina with his penis a total of seven times. (T. at 271).

{¶3} After the disclosures, the victim's father took her to the hospital for a sexual assault examination. The nurse who performed the exam found physical evidence consistent with the victim's allegations. As part of the examination, swabs were taken of the victim's pubic area and the underwear she was wearing at the time of the examination were collected. DNA collected from the underwear and the pubic area of the victim was consistent with Lindsay's DNA.

{¶4} Lindsay was indicted by the Richland County Grand Jury with five separate counts of rape, five separate counts of sexual battery, and five separate counts of gross sexual imposition.

{¶5} At trial, Dawn Fryback, a Mansfield Police Department DNA analyst, testified she performed analysis of the DNA evidence from swabs of the victim's pubic area and cuttings from the underwear worn by the victim on the day she reported the abuse to school authorities. (T. 396-399). Swabs from the victim's pubic area contained the DNA of both Lindsay and the victim, as well as a small amount of DNA from the victim's mother. (T. 426-427). Two of the three samples taken from the underwear contained the DNA of the victim, Lindsay, and the victim's mother. (T. 441-445). One of the samples, taken from the front crotch area of the underwear, contained the DNA of only Lindsay and the victim. (T. 441-443). Fryback testified her analysis did not reveal how the DNA came to be present in the swabs and the samples. (T. 451). A second expert from the Ohio Bureau of Criminal Investigation testified the swabs taken from the victim's pubic area contained amylase, a component of saliva. (T. 471-472, 474-475).

{¶6} Lindsay testified the night before the victim revealed the abuse to school officials, he performed cunnilingus on the victim's mother. (T. 551-552). According to Lindsay, the victim's mother put on underwear after their sexual encounter, which was the same underwear worn by the victim on March 4th and tested by the experts.

{¶7} Following the jury trial, appellant was convicted of one count of rape, one count of sexual battery and one count of gross sexual imposition. The jury returned verdicts of not guilty to the remaining charges.

{¶8} A sentencing hearing was held on October 27, 2010. The trial court found the three charges were allied offenses. The State elected to go forward on the charge of rape and requested that Lindsay be sentenced to ten years to life. The trial court merged the offenses for sentencing purposes and sentenced Lindsay to a term of ten years to life.

{¶9} Lindsay filed a direct appeal of his sentence and conviction for rape, sexual battery, and gross sexual imposition. The trial transcript was filed on March 7, 2011.

{¶10} We confirmed Lindsay's conviction and sentence in *State of Ohio v. Wendell Lindsay*, 5th Dist. Richland No. 2010-CA-0134, 2011-Ohio-4747. The Ohio Supreme Court did not accept Lindsay's appeal for review. *State v. Lindsay*, 131 Ohio St.3d 1555, 2012-Ohio-2263, 967 N.E.2d 765.

{¶11} On December 14, 2011, Lindsay filed an application to reopen his appeal. We denied the application on January 26, 2012. Lindsay filed a motion to reconsider, which we also denied. Lindsay appealed our denial to the Ohio Supreme Court, which the Court dismissed on June 7, 2012.

{¶12} On September 26, 2012, Lindsay filed an amended motion for acquittal pursuant to Crim.R. 29 with the trial court. Lindsay filed a motion for new trial on February 26, 2013.

{¶13} In February 2013, Lindsay filed a petition for writ of habeas corpus. Upon review, the magistrate judge recommended the petition be dismissed with prejudice. *Lindsay v. Tibbals*, N.D. Ohio No. 1:13-CV-00309, 2014 WL 11128199.

{¶14} The trial court considered Lindsay's motion for acquittal as a petition for post-conviction relief. On March 18, 2013, the trial court found the motion untimely and his arguments were barred by the doctrine of res judicata. Lindsay appealed the trial court's judgment entry to this court and we affirmed in *State v. Lindsay*, 5th Dist. Richland No. 13CA28, 2013-Ohio-3332.

{¶15} On January 17, 2014, the trial court denied Lindsay's motion for new trial. Lindsay appealed the judgment to this court, but the appeal was dismissed for failure to prosecute.

{¶16} On April 5, 2016, Lindsay filed an Application for DNA Testing. The State filed a response, arguing that pursuant to R.C. 2953.74(A), the DNA test conducted on the biological evidence in the case was a definitive DNA test; therefore, the trial court was statutorily required to reject Lindsay's application.

{¶17} Also on April 5, 2016, Lindsay filed a Motion for Resentencing/Sentence Reduction. The State responded that Lindsay's motion should be denied as an untimely and successive petition for post-conviction relief.

{¶18} On March 24, 2016, the trial court denied both motions. Lindsay appealed both judgments. In Case No. 16CA38, Lindsay appeals the trial court's judgment denying his Application for DNA Testing. In Case No. 16CA39, Lindsay appeals the trial court's judgment denying his Motion for Resentencing/Sentence Reduction.

{¶19} This opinion addresses Lindsay's Application for DNA Testing.

ASSIGNMENTS OF ERROR

{¶20} Lindsay raises two Assignments of Error:

{¶21} "I. THE TRIAL COURT VIOLATED THE DEFENDANT-APPELLANT'S DUE PROCESS RIGHTS UNDER THE SIXTH AND THE FOURTEENTH AMENDMENT GUARANTEE, OF THE UNITED STATES CONSTITUTION, ARTICLE 1, SECTION 16 TO THE OHIO CONSTITUTION, WHEN THE DETERMINATIVE FACTS OF THE ALLEGED DNA EVIDENCE PRESENTED AT TRIAL, WERE INCONCLUSIVE IN WHERE THE DNA FAILED TO PROVE AS BEING EVIDENCE OF A SEXUAL

ASSAULT, AND THE FALSE DETERMINATIVE OUTCOME AS DEFINED BY R.C. 2953.71(L), CAUSED AN ABUSE OF DISCRETION, WHEN THE TRIAL COURT WOULD NOT GRANT A RETESTING OF THE DNA WHEN A CONFLICT EXISTS, WHERE THE PRIOR DNA TEST IS NOT DEFINITIVE WITH THE MEANING PURSUANT TO R.C. 2953.74(A); STATE V. JOHNSON, 2014-OHIO-2646, 14 N.E.3D 482 LEXIS 2585; STATE V. PRADE, 126 OHIO ST.3D 27 2010-OHIO-1842 930 N.E.2D 287 LEXIS 1038. VIOLATING EVIDENCE RULE 803(6); AND 402.

{¶22} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EXPERT TESTIMONY OF THE DNA EVIDENCE, DUE TO SUCH EVIDENCE WAS NEVER PROVED TO BE RELIABLE OR MATERIAL TO THE THREE (3) OFFENSES FOUND GUILTY BY THE JURY; GROSS SEXUAL IMPOSITION, SEXUAL BATTERY, AND TAPE, IN WHERE ALL THREE (3) OFFENSES WERE ALLEGED FROM A SINGLE ACT OF CUNNILINGUS, AND WHEN THE DNA FOUND WAS NOT IN THE AREA OF THE SEXUAL ORGAN; VAGINA, (AND WHEN THE DNA FOUND WAS SALIVA, SO ANY TEST FOR SALIVA IDENTIFICATION CAN ONLY BE PRESUMPTIVE, WHILE AMYLASE, IN THIS CASE, WAS NEVER CONFIRMED AS BEING FROM THE ACT, CONTACT OR CONDUCT PERFORMED ON THE ALLEGED VICTIM, AND BECAUSE THE DNA WAS NEVER OPPOSED OR CHALLENGED FOR ITS ADMISSIBILITY, A VIOLATION OF EVIDENCE RULE 803(6); AND 402 WAS ALLOWED VIOLATING THE STATUS OF THE DNA BECAUSE ALL THE EVIDENCE OF DNA WAS FALSELY ADMINISTERED, AND THE SALIVA TESTING WAS ONLY PRESUMPTIVE."

ANALYSIS

I. DNA Testing

{¶23} Lindsay argues in his first Assignment of Error that the trial court erred in denying his Application for DNA Testing. We disagree.

{¶24} Pursuant to R.C. 2953.73, an eligible offender who wishes to request DNA testing to be conducted under R.C. 2953.71 to 2953.81 shall submit an application to the court of common pleas that sentenced the offender for the offense for which the offender is an eligible offender and is requesting DNA testing. In this case, Lindsay submitted an application for DNA testing to the Richland County Court of Common Pleas, the trial court that sentenced Lindsay. The trial court then examines the criteria of R.C. 2953.74 to determine whether the offender is eligible for DNA testing. The statute reads:

> (A) If an eligible offender submits an application for DNA testing under section 2953.73 of the Revised Code and a prior definitive DNA test has been conducted regarding the same biological evidence that the offender seeks to have tested, the court shall reject the offender's application. If an eligible offender files an application for DNA testing and a prior inconclusive DNA test has been conducted regarding the same biological evidence that the offender seeks to have tested, the court shall review the application and has the discretion, on a case-by-case basis, to either accept or reject the application. The court may direct a testing authority to provide the court with information that the court may use in determining whether prior DNA test results were definitive or inconclusive and whether to accept or reject an

application in relation to which there were prior inconclusive DNA test results.

{¶25} A "definitive DNA test" is defined as:

a DNA test that clearly establishes that biological material from the perpetrator of the crime was recovered from the crime scene and also clearly establishes whether or not the biological material is that of the eligible offender. A prior DNA test is not definitive if the eligible offender proves by a preponderance of the evidence that because of advances in DNA technology there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may have failed to discover. Prior testing may have been a prior "definitive DNA test" as to some biological evidence but may not have been a prior "definitive DNA test" as to other biological evidence.

R.C. 2953.71(U).

{¶26} The trial court determined Lindsay's application for DNA testing did not meet the criteria set forth in R.C. 2953.74 and rejected the application. The trial court found the DNA test presented in the original trial established the biological material recovered from the victim's underwear and pubic area shortly after the commission of the crime belonged to Lindsay, the victim, and the victim's mother. The jury determined Lindsay was the perpetrator of the crime and the conviction was affirmed on appeal.

{¶27} A review of Lindsay's repeated DNA evidence arguments to the trial court, the federal court, and this court shows that Lindsay does not contest his DNA was present

on the victim's body and underwear. Lindsay's arguments focus on *how* his DNA came to be present on the victim's body and underwear.

{¶28} The expert testimony at trial did not establish how the DNA came to be present. At trial, Lindsay presented his theory as to how his DNA was found on the victim's underwear and body. This testimony, however, did not contradict the evidence that Lindsay's DNA was present. As the trial court noted, there is no test available that would demonstrate how the DNA came to be present on the victim's body and underwear.

{¶29} We find the trial court did not err in rejecting Lindsay's application for DNA testing pursuant to R.C. 2953.74(A).

{¶30} Lindsay's first Assignment of Error is overruled.

II. Testimony About the Presence of Saliva

{¶31} Lindsay argues in his second Assignment of Error that the trial court erred when it allowed testimony from the State's DNA experts that swabs taken from the victim's pubic area contained amylase, a component of saliva. We disagree.

{¶32} The State argues Lindsay's argument is barred by the doctrine of res judicata. "Under the doctrine of res judicata, a final judgment of conviction bars the defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that the defendant raised or could have raised at the trial which resulted in that judgment of conviction or on appeal from that judgment." *State v. Snyder*, 5th Dist. Tuscarawas No.2015AP070043, 2016–Ohio–832, ¶ 26 quoting *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

{¶33} In Lindsay's direct appeal, Lindsay raised six Assignments of Error. *State of Ohio v. Wendell Lindsay*, 5th Dist. Richland No. 2010-CA-0134, 2011-Ohio-4747. The

Assignments of Error, however, did not refer to the testimony of the DNA experts. Lindsay first raised the issue in his Application for Reopening. We denied the application on January 26, 2012. Lindsay raised the issue again in his motion for reconsideration, which we denied. Lindsay appealed our decision to the Ohio Supreme Court and the Court dismissed the appeal.

{¶34} Lindsay raised the issue before the trial court in his untimely petition for post-conviction relief, which was denied by the trial court on March 18, 2013. We affirmed the trial court's decision in *State v. Lindsay*, 5th Dist. Richland No. 13CA28, 2013-Ohio-3332. Lindsay filed a motion for new trial, but he did not raise the issue of the DNA expert testimony. The trial court denied the motion and Lindsay appealed the judgment to this court. The appeal was dismissed for failure to prosecute.

{¶35} Lindsay could have raised his claim as to the expert's testimony regarding the presence of amylase in his direct appeal. Lindsay has unsuccessfully raised the issue in multiple post-convictions filings. Accordingly, Lindsay's claim is barred by the doctrine of res judicata.

{¶36} Lindsay's second Assignment of Error is overruled.

CONCLUSION

{¶37} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, P.J. and

Baldwin, J., concur.