[Cite as *State v. Curtis*, 2015-Ohio-2460.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-10-019
	:	O P I N I O N
- vs -		6/22/2015
	:	
RICHARD CURTIS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. CR20092041

Jessica A. Little, Brown County Prosecuting Attorney, Mary McMullen, 510 East State Street, Suite 2, Georgetown, Ohio 45121, for plaintiff-appellee

Richard Curtis, #A615995, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43301, defendant-appellant, pro se

HENDRICKSON, J.

{¶ 1} Defendant-appellant, Richard Curtis, appeals from the decision of the Brown County Court of Common Pleas denying his application for DNA testing. For the reasons discussed below, we affirm.

{¶ 2} Appellant was convicted of the aggravated murder of his wife, Linda Curtis. The relevant facts leading to appellant's conviction are provided in appellant's direct appeal,

State v. Curtis, 12th Dist. Brown No. CA2009-10-037, 2010-Ohio-4945.

On the evening of August 13, 1996, appellant contacted the private security staff at Lake Waynoka, the private gated community where appellant lived. Appellant stated that he needed help, claiming that his wife "Linda has shot herself again." Appellant then called 911. Officer Doug Henize, a ranger from the Lake Waynoka staff, was first on the scene. Officer Henize observed Linda Curtis in bed and bleeding from the side of her head. He noted that her bedroom was quite cold from the air conditioning unit. He determined that she had been shot in the left temple. She was positioned on her back with her legs pulled up to her body and her knees in the air. Henize testified that she was covered by a blanket which was tucked around her so her hands were not visible. No weapon was found near the body. He noted a pillow with a bullet hole in it "laying along side the bed." The pillow, which matched the bed linens from appellant's separate bedroom, had blast damage consistent with a firearm being held in direct contact with the pillow at the time of discharge. Henize left the bedroom, secured the residence, and awaited the arrival of officers from the Brown County Sheriff's Office ("BCSO").

Soon after, the life squad, officers from the BCSO, and coroner arrived at the scene. The BCSO conducted a search of the scene and found no signs of forced entry or burglary. A search of the house produced two shotguns and a rifle, but no handguns.

The coroner found that death was due to a contact range gunshot wound to the head. Because no weapon was found, the manner of death was listed as "undetermined." The coroner concluded the time of death as "morning." The Montgomery County Coroner's Office performed the forensic autopsy for Brown County, finding that the time of death to be "late morning to early afternoon." Subsequent lab analysis indicated no gunshot residue on Linda's hands or feet. The bullet fragment recovered from Linda's head was identified as a ".38 Special .357 Magnum caliber, hollow-point design, a nylon-coated lead."

The lead investigator from the BCSO and the coroner interviewed appellant on the night of Linda's death to gather information regarding the manner and time of death. Appellant stated that he had gone to bed a little before midnight in his bedroom, which was across the hall from Linda's room. He told the coroner that he had been awakened briefly around 3:30 a.m. by what sounded like Linda arguing on the phone with someone. When he left for work that morning at 7:30 a.m., Linda's bedroom door was closed and he did not look in on her. Before going to work, appellant went to his mother's home in New Vienna, about an hour away. Appellant saw his brother and family shortly after 9:00 a.m. outside a bank in New Vienna, inquiring as to where his mother was. He then went to work. Appellant arrived home

from work shortly after 7:30 p.m. He brought in groceries he had purchased and called for Linda. After hearing no response, he found her in bed. Appellant told the coroner that, because Linda had attempted suicide four months earlier by shooting herself twice in the stomach, he believed she had killed herself. Appellant denied ever seeing a gun. No arrests were made.

The investigation was re-opened in 2001. The coroner filed an amended death certificate indicating the manner of death as "homicide" after receiving information that there had been no gunshot residue on Linda's hands. Once again, no arrests were made.

In 2008, the BCSO re-opened the investigation, reviewing prior reports, retesting some items, checking the background of appellant, and interviewing about 50 individuals about the case. The coroner was asked to try to narrow the time of death. Noting that Linda's bedroom was very cool, combined with the fact that the body was in full rigor at the time he conducted the examination, the coroner estimated that death had occurred between 2:00 a.m. and 8:00 a.m. on August 13, 1996.

During the course of the investigation, the BCSO discovered that appellant had numerous civil judgments against him in the year before Linda's death. Appellant was listed as the beneficiary on Linda's life insurance policy, although she had made efforts to change the designation to her children before she died. Linda's children and others reported that Linda feared appellant would kill her. She had filed a domestic violence complaint against appellant in 1995, but dismissed it. The BCSO also received information that appellant had owned a Smith & Wesson .357 that was capable of firing a .38 round. The other potential suspect, Ruth Hunter, Linda's alleged lesbian lover, had died in the interim.

BCSO Detective Carl Smith and Chief Deputy John Schadle traveled to Florida in November 2008 to interview appellant at his home. Appellant was cooperative and spoke with them for 56 minutes, but maintained his innocence. Based upon the BCSO investigation, appellant was arrested in Marion County, Florida.

While waiting in the intake area of the Marion County jail, appellant allegedly struck up a conversation with Gerald Payne, an inmate at the jail awaiting an evidentiary hearing on the appeal of his 2007 sentence for burglary, kidnapping, and aggravated assault with a deadly weapon. Payne notified jail officers that he had information about appellant's case. According to Payne, appellant told him of his marriage to Linda; that she had been in an accident and was addicted to medication; she tried to kill herself twice before; she suffered from depression; one of her friends had died shortly before her death; and that he was tired of taking care of her and wanted away from her.

> Appellant allegedly told Payne that "he had disposed of the gun and no one would find it." Payne asked appellant if he relieved Linda of her suffering. Payne admitted that appellant did not outright confess to killing Linda, but hung his head down and shook his head in the affirmative.
>
> Appellant was charged with aggravated murder in violation of R.C. 2903.01(A) and murder in violation of R.C. 2903.02(A), both with a firearm specification. The case proceeded to jury trial.
>
> Officer Henize testified that when appellant returned from work around 7:30 p.m. on the evening of August 13, 1996, appellant drove into the Lake Waynoka community through the front gate, honked the horn of his car, and waived to the security personnel as he drove by. The officer testified that this was extremely rare because appellant always came through the unmanned gate on the other side of Lake Waynoka. The investigator testified that it was much closer and convenient for appellant to get to his residence from the grocery store using the back gate.
>
> Linda's daughter testified at trial. According to her, the Curtis' marriage was loveless. Appellant slept in a separate bedroom from Linda and the couple did not speak much. Linda's children also testified about several incidents of domestic violence by appellant against Linda in addition to the complaint filed in 1995. In the year preceding Linda's death, appellant moved to Florida for over six months. Linda's daughter testified that Linda was planning to divorce appellant. Following her attempted suicide, Linda told numerous people that she was afraid of appellant and she thought that he would kill her. She specifically told her friend, Teresa Enfinger, that if anything happened to her, "point your finger at Dick." Appellant returned to Florida following Linda's death.
>
> Appellant submitted two witnesses in defense, who claimed that Linda may have been seen at McDonald's drive-thru on the day or near the day she was killed and that she was afraid of Ruth Hunter. Hunter died years before and was at one time considered a possible suspect.
>
> The jury found appellant guilty as charged. Concluding that Count II was a lesser included offense of Count I, the trial court merged the offenses. Appellant was sentenced to life in prison with parole eligibility after 20 years with a consecutive three-year term for the gun specification.

Id. at ¶ 2-15.

{¶ 3} On August 7, 2014, appellant filed a motion for postconviction relief asserting claims of ineffective assistance of counsel and alleging that he was "unavoidably prevented

from discovery" of evidence. On August 14, 2014, appellant also filed an application for DNA testing. Specifically, appellant requested that the following items be preserved and tested: (1) beer cans located downstairs and in the upstairs bedroom, (2) cigarette butts located in the living room and upstairs bedroom, (3) the victim's underwear, (4) bed linens, (5) the victim's pubic skin swab, (6) finger nail clippings, (7) anal swabs, (8) combings of the victim's pubic area, (9) any other item that may be of value, and (10) the sex toy vibrator found in bed with the victim. In his motion, appellant argued that the DNA evidence would prove the identity of another male, possibly the killer, who was with the victim on the morning of her death, and:

> The DNA would prove that after the unidentified male and the victim had driven back to the home of Ms. Curtis, there after a couple of beers and a cigarette downstairs in the living room, they went upstairs, had sex, a couple more beers and another cigarette.

{¶ 4} The trial court denied appellant's motions for postconviction relief and application for DNA testing in two separate entries dated September 16, 2014. Appellant now appeals the decision of the trial court denying his application for DNA testing, raising two assignments of error for review.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT DENIED HIS APPLICATION FOR DNA TESTING, AND FAILED TO REVIEW THE TRIAL TRANSCRIPTS DE NOVO AND TO REFAMILIARIZE ITSELF WITH THE CASE.

{¶ 7} In his first assignment of error, appellant argues the trial court erred by denying his application for DNA testing. As previously noted, appellant requested DNA testing on various items found inside the victim's house that he alleges would prove the identity of another male, possibly the killer, who was with the victim on the morning of her death.

{¶ 8} Postconviction DNA testing for eligible inmates is addressed in R.C. 2953.71 through R.C. 2953.81. Detailed grounds for accepting or rejecting applications can be found in R.C. 2953.74. *State v. Widmer*, 12th Dist. Warren No. CA2012-02-008, 2013-Ohio-62, ¶ 114. R.C. 2953.74(A) provides that the trial court "has the discretion, on a case-by-case basis" to accept or reject an eligible inmate's application for DNA testing.

{¶ 9} An abuse of discretion is more than an error of law or judgment, but instead connotes that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Castellon*, 12th Dist. Butler No. CA2013-03-047, 2014-Ohio-166, ¶ 10. When applying the abuse-of-discretion standard, an appellate court may not merely substitute its judgment for that of the trial court. *State v. Atkinson*, 12th Dist. Warren No. CA2009-10-129, 2010-Ohio-2825, ¶ 7

{¶ 10} In the present case, appellant's application for DNA testing relates to materials that were not tested during the trial stage of his case. Pursuant to R.C. 2953.74(B), a trial court "may accept" an application for DNA testing if:

> The offender did not have a DNA test taken at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing regarding the same biological evidence that the offender seeks to have tested, the offender shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject offender's case as described in division (D) of this section would have been outcome determinative at that trial stage in that case, and, at the time of the trial stage in that case, DNA testing was not generally accepted, the results of DNA testing were not generally admissible in evidence, or DNA testing was not yet available.

R.C. 2953.74(C) provides additional requirements that must be met before a trial court "may accept" an application for DNA testing. Unless the inmate meets that burden, the trial court is statutorily precluded from accepting the inmate's post-conviction application for DNA testing. R.C. 2953.74(B) and (C); *See State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-

1246, ¶ 30; *State v. Carter*, 10th Dist. Franklin No. 07AP-323, 2007-Ohio-6858, ¶ 17.

{¶ 11} As relevant to both R.C. 2953.74(B) and (C):

> "Outcome determinative" means that had the results of DNA testing of the subject offender been presented at the trial of the subject offender requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the offender is an eligible offender and 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 offender'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 offender guilty of that offense or, if the offender was sentenced to death relative to that offense, would have found the offender guilty of the aggravating circumstance or circumstances the offender was found guilty of committing and that is or are the basis of that sentence of death.

R.C. 2953.71(L).

{¶ 12} In its judgment entry, the trial court provided two independent reasons for denying appellant's application for DNA testing:

> Based on the Court's review of all pertinent documents and the criteria and procedures set forth in R.C. 2953.71 through R.C. 2953.81, the Court determines that even if DNA testing is conducted and an exclusion result is obtained, the results of the testing would not be outcome determinative regarding [appellant]. Additionally, although [appellant] did not have a DNA test at the trial stage of the case, at the time of the trial, DNA testing was generally accepted and the results of DNA testing were generally admissible in evidence. Therefore, the Court rejects [appellant's] Application.

{¶ 13} After review, we find the trial court did not err in denying appellant's application for DNA testing.[1] As noted by the plain language of the statute, the trial court could only accept appellant's application for DNA testing if the requirements of R.C. 2953.74 were met. Here, the trial court denied appellant's application for two independent reasons:

1. We also note that appellant separately argues the trial court erred by failing to "review the trial transcripts de novo and to refamiliarize itself with the case" [sic]. However, appellant's claims to the contrary are without merit. As specifically noted in its judgment entry, the trial court stated that it reviewed "all the filed and records pertaining to the proceedings against the [appellant], including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of court, and the court reporter's transcript."

(1) the results of the requested DNA material would not be outcome determinative, and (2) at the trial state of the case, DNA testing was generally accepted and the results of DNA testing were generally admissible in evidence. On appeal, appellant does not contest or otherwise challenge the trial court's finding that DNA testing was generally accepted and generally admissible in evidence, which is a required element that appellant must satisfy before the trial court "may accept" appellant's application for DNA testing. As appellant did not satisfy the requirement of R.C. 2953.74(B), we find the trial court did not err in denying appellant's application for DNA testing.

{¶ 14} Moreover, contrary to appellant's contentions argued in his brief, we also find that the results from the DNA testing would not be "outcome determinative." In the present case, appellant claims that DNA testing would establish that another male was present in the household at the approximate time of his wife's murder. However, even accepting that as true, the presence of another person's DNA would not exonerate appellant, nor would the DNA establish the time that the DNA was placed on the object. As such, appellant fails to establish that the DNA test results would be "outcome determinative." *See, e.g., Buehler*, 113 Ohio St. 3d 114 (denying an application for DNA testing where a reasonable factfinder would not be prevented from reaching a guilty verdict and a DNA test result would not be "outcome determinative"). Accordingly, we find appellant's first assignment of error is without merit and overruled.

{¶ 15} Assignment of Error No. 2:

{¶ 16} THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT FAILED TO PROVIDE A STATEMENT THAT EXPLAINED ITS REASON(S) FOR THE DENIAL OF THE DNA TESTING APPLICATION.

{¶ 17} In his second assignment of error, appellant agues the trial court erred by failing to provide a statement that explains its reasons for denying appellant's application for DNA

testing. "R.C. 2953.73(D) requires the trial court to '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 * * *.'" *State v. Galloway*, 10th Dist. Franklin No. 07AP-611, 2008-Ohio-3470, ¶ 14, citing *State v. Price*, 165 Ohio App.3d 198, 2006-Ohio-180, ¶ 13 (1st Dist.). "The statute only requires that the trial court provide the reasons for its decision." *Galloway* at ¶ 14.

{¶ 18} As noted above, the trial court provided two independent reasons for denying appellant's application for DNA testing. First, because the trial court found that DNA testing was generally acceptable and admissible at the trial stage, appellant cannot satisfy the requirements of R.C. 2953.74(B)(1). In addition, the trial court's judgment entry stated that the results of the DNA testing would not be outcome determinative. Thus, the trial court's entry provided two reasons why the trial court would not accept appellant's application for DNA testing and was sufficient to satisfy the statutory requirements. Although a more complete explanation might be preferable, the statute does not require it. *See, e.g., Galloway* at ¶ 16 ("[a]lthough the trial court could have stated the factual basis for its conclusion that the property at issue no longer exists, R.C. 2953.73(D) only requires the trial court to state its reasons for its acceptance or rejection of the application"); *but see State v. Ayers*, 8th Dist. Cuyahoga No. 86006, 2005-Ohio-6972, ¶ 6-8 (finding the term "outcome determinative" to be a conclusion and not a "reason" under R.C.2953.73[D]); *State v. Ayers*, 8th Dist. Cuyahoga No. 86006, 2007-Ohio-5939, ¶ 10 (expressing doubt in its prior precedent). Accordingly, contrary to appellant's claim otherwise, we find the trial court did set forth sufficient reasons for the denial of appellant's application for DNA testing. Therefore, appellant's second assignment of error is without merit and overruled.

{¶ 19} Judgment affirmed.

S. POWELL, P.J., and RINGLAND, J., concur.