

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 09AP-172  
 : (C.P.C. No. 96CR12-6787)  
 Robert J. Caulley, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellant. :

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D E C I S I O N

Rendered on November 3, 2009

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*Ron O'Brien*, Prosecuting Attorney, and *Richard A. Termuhlen*, for appellee.

*Timothy Young*, Ohio Public Defender, *Gregory W. Meyers*, Senior Assistant Public Defender, and *Kimberly S. Rigby*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Robert J. Caulley, appeals from a judgment of the Franklin County Court of Common Pleas dismissing his second application for additional deoxyribonucleic acid ("DNA") testing and denying his motion for an order requiring "alternate suspects" to submit oral samples suitable for DNA testing. Because either (1) the further DNA testing defendant sought in post-conviction proceedings is barred by res

judicata or (2) defendant failed to establish it would be outcome determinative if presented at trial, we affirm.

### **I. Procedural History**

{¶2} Defendant's parents, Charles and Lois Caulley, were bludgeoned and stabbed to death in their home in Grove City, Ohio, on or about the night of January 14, 1994. Defendant purportedly discovered the bodies on the morning of January 16, 1994 and reported the crime. Investigators were unable to develop useful evidence at the scene, other than noting certain valuables and electronic equipment had been rearranged as though part of an attempted or staged burglary. Almost three years after the murders, two Franklin County sheriff deputies went to Houston, Texas, where defendant had relocated for employment. After a lengthy interview at a local police facility, defendant in a detailed confession admitted he killed his parents on the night of Friday, January 14, 1994, following an escalating confrontation with his father.

{¶3} Pursuant to jury trial, defendant was found guilty of manslaughter in the death of his father and murder in the death of his mother. We affirmed defendant's conviction after he appealed the admissibility of his confession. *State v. Caulley*, 10th Dist. No. 97AP-1590, 2002-Ohio-1078 ("*Caulley I*"), discretionary appeal not allowed, 96 Ohio St.3d 1467, 2002-Ohio-3910. We denied his subsequent application to reopen his appeal based upon ineffective assistance of appellate counsel. *State v. Caulley*, 10th Dist. No. 97AP-1590, 2002-Ohio-7039 ("*Caulley II*"), discretionary appeal not allowed, 98 Ohio St.3d 1515, 2003-Ohio-1572.

{¶4} Defendant filed a petition for post-conviction relief on July 27, 2001. Apparently due to failure of service, the state did not respond until March 19, 2004. Defendant then filed an application for DNA testing under R.C. 2953.71 et seq. The application requested DNA testing of "[a]ll of blood evidence and hair evidence that was collected at scene," while the supporting memorandum listed specific items for DNA testing, including hair samples, several crime scene items purportedly containing skin-cell slough-off, unexplained genetic material discovered on a pellet gun that had been stacked near the front door of the victims' residence, and human blood belonging to defendant's father found on swabs from a .410 caliber shotgun, also stacked near the front door of the crime scene. Granting in part defendant's application for DNA testing, the trial court ordered that the State Bureau of Criminal Investigation ("BCI") conduct DNA testing on ten items to be selected by defendant as his most promising among the numerous items on his list. BCI performed the DNA testing, but the results proved inconclusive. BCI did not conduct a DNA analysis on a hair, found in Lois Caulley's hand at the crime scene and selected by defendant for DNA testing, because the test tube purportedly containing the hair sample was empty when BCI received it.

{¶5} After receiving the test results, defendant filed a motion for leave to amend his post-conviction petition and a motion requesting additional DNA testing of several items not previously tested and retesting of some items that yielded inconclusive or no results in previous DNA testing. On March 21, 2007, the trial court dismissed defendant's pending motions and petition for post-conviction relief. We affirmed on appeal, determining res judicata barred the claims raised in defendant's post-conviction petition

and concluding the trial court did not err in refusing to order additional DNA testing. *State v. Caulley*, 10th Dist. No. 07AP-338, 2007-Ohio-7000 ("*Caulley III*"), discretionary appeal not allowed, 115 Ohio St.3d 1411, 2008-Ohio-2340.

{¶6} On February 6, 2008, defendant filed another application for DNA testing of "all of blood evidence and hair evidence that was collected at the scene," with a supporting memorandum listing 21 items for DNA testing. After the parties briefed the issue, the state filed a supplemental response stating that the hair found in Lois Caulley's hand at the crime scene, previously ordered to be DNA tested, had been discovered. The parties agreed further DNA testing was appropriate, and the state on May 8, 2008 filed a motion requesting an order for DNA testing of the discovered hair and "limited further testing of additional evidence in this case."

{¶7} Pursuant to the parties' agreement, the trial court on May 12, 2008 ordered Orchid Cellmark to conduct DNA testing on the discovered hair and up to four representative human hairs from a sweatshirt in evidence. The court further ordered, pursuant to the parties' agreement, that BCI conduct DNA analysis of six items on defendant's list: the sweatshirt, an H & R 20-gauge shotgun, a table leg, cartons or packs of cigarettes, or both, a White Castle cup, and swabs previously taken from an H & R .410 shotgun. Results from the tests were filed with the court on August 15, 2008 and October 2, 2008. The test results again were inconclusive but did reveal a partial DNA profile from an "unknown male" on the 20-gauge H & R shotgun, which had been found at the crime scene stacked with other items by the victims' front door.

{¶8} Based upon the test results, defendant on October 15, 2008 filed a "Motion for an Order Requiring Alternate Suspects to Submit Oral Samples Suitable for DNA Testing" in order to compare the DNA profiles of two individuals, who defendant claimed were potential suspects, to the "unknown male" DNA profile on the 20-gauge H & R shotgun. Defense counsel contended at trial that one or both of the individuals was involved in killing the victims in this case, but neither "alternate suspect" was a defendant in the action against defendant, and the trial court did not have personal jurisdiction over them.

{¶9} According to defendant, the first "suspect," who lived with his parents next door to the victims, exhibited suspicious behavior before and after the victims' murders; the second "suspect" purportedly bragged to several people about committing the murders and being a "burglar for a living" who broke into residences and stacked items in one spot before removing them. Defendant contended the "alternate suspects" would have touched or handled the shotgun in question only if one of them committed the murders. Thus, defendant argued, if the "unknown male" DNA profile on the 20-gauge H & R shotgun matches a DNA profile of one of the alternate suspects, it proves that individual was the real killer and exonerates defendant, notwithstanding his confession that he killed his parents. At the trial court's urging, defendant attempted to have the "alternate suspects" voluntarily submit oral samples for DNA testing. Although both of them verbally agreed to provide samples, neither individual submitted a biological sample for DNA testing.

{¶10} On December 9, 2008, defendant filed a supplemental memorandum with the trial court detailing his efforts to have the two alternate suspects submit samples for DNA testing and renewing his request for a court order requiring their cooperation. By judgment entry filed January 20, 2009, the trial court denied defendant's motion for an order requiring the alternate suspects to submit samples for DNA testing and dismissed defendant's second application for DNA testing.

## **II. Assignments of Error**

{¶11} Defendant appeals, assigning two errors:

### ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED BY DENYING CAULLEY'S MOTION FOR AN ORDER REQUIRING ALTERNATE SUSPECTS TO SUBMIT ORAL SAMPLES SUITABLE FOR DNA TESTING WHEN THESE ORAL SAMPLES WERE NECESSARY TO VINDICATE CAULLEY'S CONSTITUTIONAL RIGHT TO ESTABLISH HIS INNOCENCE THROUGH DNA TESTING.

### ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED BY DENYING CAULLEY'S SECOND APPLICATION FOR DNA TESTING WHEN ADDITIONAL DNA TESTING WOULD YIELD OUTCOME DETERMINATIVE RESULTS.

## **III. Dismissal of Second Application for Additional DNA Testing**

{¶12} To facilitate our analysis, we first discuss defendant's second assignment of error contending the trial court erred by denying, in part, his second post-conviction application for DNA testing. Defendant argues the trial court's refusal to order further DNA testing denied him a full and fair opportunity to avail himself of Ohio's DNA exoneration procedures, set forth in R.C. 2953.71 et seq.

{¶13} Defendant's current request seeks DNA testing of several items that were subjects of his previous motion for additional DNA testing, which the trial court denied and we affirmed on appeal in *Caulley III*. See *Caulley III* at ¶21 (concluding the trial court did not err in refusing to order the additional DNA testing defendant requested). To the extent defendant's instant request for additional DNA testing concerns items at issue in *Caulley III*, this court has determined his request is without merit, and it is thus barred by res judicata. *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, syllabus (holding that "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action").

{¶14} Even if defendant's current request for additional DNA testing were not barred, at least in part, by res judicata, he has not established his entitlement to further post-conviction DNA testing because he has not shown that the result of the additional testing would be "outcome determinative" as prescribed by the post-conviction DNA testing statutes. See R.C. 2953.71(L) and 2953.74.

{¶15} Ohio's statutory scheme set forth in R.C. 2953.71 et seq. for post-conviction DNA testing outlines certain factors that must be satisfied before a trial court "may accept" an eligible inmate's application for DNA testing. See R.C. 2953.73(D), 2953.74(B) and (C). A common pleas court has the sole discretion, subject to appeal, to determine whether an eligible inmate's application for DNA testing satisfies the acceptance criteria set forth in R.C. 2953.74 and whether the court should accept or reject the application. R.C. 2953.72(D)(8), 2953.73(D), and 2953.74.

{¶16} Before accepting a post-conviction application for DNA testing, the trial court must determine whether the results of the DNA testing, when analyzed in the context of and upon consideration of all available admissible evidence related to the case, would have been "outcome determinative" at trial. R.C. 2953.74(B) and (C). DNA test results are "outcome determinative" only when "there is a strong probability that no reasonable factfinder would have found the inmate guilty" if the DNA testing results had been presented at trial. R.C. 2953.71(L). The burden to establish that the DNA test results would have been "outcome determinative" is on the inmate submitting the application. R.C. 2953.74(B). 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); *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, ¶30; *State v. Carter*, 10th Dist. No. 07AP-323, 2007-Ohio-6858, ¶17.

{¶17} In affirming the trial court's judgment denying defendant's first post-conviction motion for additional DNA testing, we noted in *Caulley III* that defendant "selected his most promising evidence pursuant to the trial court's previous order for DNA testing, \* \* \* [but] BCI's testing produced inconclusive results" and defendant "did not demonstrate how further testing could be potentially 'outcome determinative,' as R.C. 2953.71(L) requires." *Id.* at ¶21. We concluded "[n]either the overall circumstances of the case, nor the results of the prior testing, mandated the additional testing defendant sought." *Id.* Defendant's current request for a third round of DNA testing shares the same deficiency: after his most promising evidence was DNA tested pursuant to the trial court's May 12, 2008 agreed entry and the testing produced inclusive results, defendant failed,

once again, to demonstrate further DNA testing would be "outcome determinative" such that there is a strong probability that no reasonable fact finder would have believed his confession and found him guilty if the DNA test results had been presented at trial.

{¶18} The trial court did not abuse its discretion in refusing to order further DNA testing in this case. Accordingly, defendant's second assignment of error is overruled.

#### **IV. Denial of Motion for Order Requiring Alternate Suspects to Submit Oral Samples Suitable for DNA Testing**

{¶19} In his first assignment of error, defendant asserts the trial court violated his constitutional right to establish his innocence when it denied his motion for an order requiring "alternate suspects" to submit oral samples for DNA testing so their DNA profiles could be compared to the DNA profile of the "unknown male" on the 20-gauge H & R shotgun found at the crime scene. Defendant contends Ohio's post-conviction statutes contemplate DNA testing of third parties, arguing "the fact that taking DNA from alternate suspects is not affirmatively addressed in Ohio's DNA statute \* \* \* does not in any way mean that the statute prohibits it." (Defendant's brief, 14.) Defendant maintains that "Ohio's DNA statute sets only a basement, not a ceiling." (Defendant's brief, 14.)

{¶20} Defendant does not challenge the constitutionality of Ohio's post-conviction statutes set forth in R.C. 2953.71 et seq. Pertinently, R.C. 2953.74(E) provides that an eligible inmate who submits an application for DNA testing under R.C. 2953.73 "may request the court to order, or the court on its own initiative may order, [BCI] to compare the results of DNA testing of biological material from an unidentified person other than the inmate that was obtained from the crime scene \* \* \* to the combined DNA index system maintained by the federal bureau of investigation" and, if no match is found, to then

"compare the test results to other *previously obtained and acceptable DNA test results of any person whose identity is known* other than the eligible inmate." (Emphasis added.) R.C. 2953.74(E) thus authorizes a trial court to order an unknown DNA profile on a crime scene item to be compared to a DNA profile of a third party, not including the victim, only when (a) the third party's DNA profile is in the combined DNA index system maintained by the federal bureau of investigation or (b) the third party's DNA profile has been "previously obtained." The post-conviction DNA testing statutes do not authorize a trial court to order, either on its own initiative or by request of an eligible inmate, "any person whose identity is known" to submit a biological sample for DNA testing. Because a post-conviction petitioner receives no more rights than those granted by statute, *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, defendant is not entitled to a court order requiring the "alternate suspects" to submit a biological sample suitable for DNA testing. Contrary to defendant's contention, changing the word "inmate" to "offender" in R.C. 2953.74 would not change the result.

{¶21} Regardless, even if the trial court was statutorily authorized to order the "alternate suspects" to submit biological samples for DNA testing, defendant has failed to demonstrate that the testing results would have been "outcome determinative" at trial. The victims died from a combination of stab wounds and blunt instrument trauma to the head, and the precise cause of death could not be isolated. Although the 20-gauge H & R shotgun was found at the crime scene stacked by the victims' front door, the "unknown male" DNA profile on the shotgun could have preceded the crime, and defendant has not shown that the donor of that DNA profile had anything to do with the crime. Even if DNA

test results showed that one of the alternate suspects was the donor of the DNA profile on the H & R shotgun, a reasonable fact finder still could have found defendant guilty based upon his detailed confession in which he admitted killing his parents and using a baseball bat, not a shotgun, to inflict blunt force trauma on them.

{¶22} Because the trial court lacks statutory authority in post-conviction proceedings to order third parties to submit biological samples for DNA testing, and defendant did not demonstrate that DNA testing results of the "alternate suspects" would have been outcome determinative if presented at trial, the court properly denied defendant's Motion for an Order Requiring Alternate Suspects to Submit Oral Samples Suitable for DNA Testing. Accordingly, defendant's first assignment of error is overruled.

{¶23} Having overruled defendant's two assignments of error, we affirm the judgment of the trial court.

*Judgment affirmed.*

FRENCH, P.J., and TYACK, J., concur.

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