NO. 09-2117

IN THE SUPREME COURT OF OHIO

ORIGINAL

APPEAL FROM
THE COURT OF COMMON PLEAS FOR CUYAHOGA COUNTY, OHIO
NOS. CR 229934, CR 231206 AND CR 231670

DEATH PENALTY CASE
SET FOR EXECUTION APRIL 2, 2010

STATE OF OHIO,
Plaintiff-Appellee

-vs-

DARRYL DURR,
Defendant-Appellant

MEMORANDUM IN RESPONSE TO JURISDICTION

FILED
DEC 08 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS FELONY CASE DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC OR GENERAL INTEREST

Nearly on the eve of execution, defendant-appellant Darryl Durr filed a statutory request for post-conviction DNA testing before the Cuyahoga County Court of Common Pleas. Durr stands convicted of raping and murdering Angel Vincent. Shortly after the filing, the State agreed to test oral, anal, and vaginal swabs taken from the victim at autopsy. These results showed that no DNA whatsoever—either male or female—could be found. Evidence indicated that this result was likely due to natural decomposition during the nearly three months that the victim's body was exposed to the weather.

Nevertheless, Durr proceed to request that the trial court order testing of a necklace taken from the victim's body. This necklace had been kept by the Cuyahoga County Clerk of Courts in an unsealed manila envelope since the time of trial. The trial court found that the condition of this evidence showed a break in the chain of custody. As such, it denied Durr's request to conduct post-conviction DNA testing of the necklace. Because it was supported by competent and credible evidence, the trial court did not err in its decision.

Finally, Durr argues that R.C. 2953.73(E)(1) is unconstitutional because it requires capital inmates to first seek leave from this Honorable Court before appealing a trial court's rejection of a statutory post-conviction DNA test, whereas the statute gives non-capital inmates an appeal of right to an intermediate appellate court. Whether such appeals are permissive or mandatory, however, the

actual evidence in this case remains the same. The trial court properly denied Durr's application to conduct post-conviction DNA testing of the victim's necklace.

STATEMENT OF THE CASE AND RELEVANT FACTS

Darryl Durr is a capital inmate currently scheduled for execution on April 20, 2010. Durr's execution date arises from a warrant of reprieve issued by Governor Ted Strickland on October 5, 2009. (Case No. 1990-0291). On June 3, 2009, this Honorable Court had previously scheduled Durr's execution date for November 10, 2009. *Id.*

On August 6, 2009, Durr filed an application for DNA Testing pursuant to R.C. 2953.71 *et seq.* before the Cuyahoga County Court of Common Pleas. In his application, Durr requested DNA testing of "[r]ape kits in the two prior rape cases, blond hairs found on the victim's body, my clothing that was collected, the blanket that the body was wrapped in, the clothing found on the victim, and any blood or other evidence found on or around the victim's body." (August 6, 2009 Application at 2).

Durr's request for DNA testing included three separate convictions (each conviction pertaining to a separate female victim). Two weeks prior to the commencement of the underlying capital murder trial, Durr pled guilty to two separate rape offenses. The procedural circumstances of these cases are recited in *State v. Durr* (Aug. 16, 1990), Cuyahoga App. Nos. 56913 & 56914, 1990 WL 118120:

> In Case No. 229934 Durr was originally charged with two counts of rape and one count each of kidnapping, aggravated robbery, carrying a

> concealed weapon and having a weapon under disability, each with firearm and aggravated felony specifications. In Case No. 231206 he was charged with kidnapping, rape, felonious assault and aggravated robbery, each with two violence specifications and one aggravated felony specification. Durr pled guilty to one count of rape in each case in exchange for a nolle prosequi of the remaining counts, a deletion of the firearm specification attached to the rape charge in Case No. 229934, and an agreement not to reference these convictions in his impending murder trial.

Id., at *1.

In the underlying aggravated murder case, Durr had been charged with the aggravated murder of Angel Vincent in violation of R.C. 2903.01, with a felony murder specification of rape, a felony murder specification of kidnapping and a felony murder specification of robbery. Count two charged Durr with kidnapping Angel Vincent, January 31, 1988) in violation of R.C. 2905.01. Count three charged Durr with aggravated robbery (Angel Vincent, January 31, 1988) in violation of R.C. 2911.01. Count four charged Durr with rape (Angel Vincent, January 31, 1988) in violation of R.C. 2907.02. A jury found Durr guilty of the charges on December 5, 1988. A mitigation hearing took place on December 12, 1988, and the jury recommended a death sentence on the same day. The trial court agreed with the jury's recommendation and on sentenced Durr to death on December 19, 1988.

On September 1, 2009, counsel for both Durr and the State submitted to the trial court an agreed order for conducting post-conviction DNA testing, in which both parties agreed to test any DNA from oral, rectal, and vaginal smears (taken from the victim at the time of autopsy and retained by the Cuyahoga County Coroner) against a DNA sample taken from Durr. Working with the assistance of

the Ohio Attorney General and the Ohio Bureau of Criminal Identification and Investigation, the parties agreed to have the DNA testing conducted by the Laboratory Corporation of America ("LabCorp"). Because the upcoming execution date warranted immediate testing on agreed-upon evidence items that were already available and accounted for, this agreed order was submitted prior to any other responsive pleadings. The trial court signed the order on September 1, 2009.

On September 16, 2009, the State of Ohio filed a Consolidated Evidence Report and Response to Request for DNA Testing ("Consolidated Report"). The Consolidated Report contained an inventory of any evidence items retained in both the rape and aggravated murder cases from: (1) the Cleveland Police Property Room, (2) the Cuyahoga County Coroner's Office, (3) the Cleveland Police Scientific Investigation Unit, (4) the Eighth District Court of Appeals, (5) the Cuyahoga County Metroparks, (6) the Cuyahoga County Prosecutor's Office, (7) the Cuyahoga County Court Reporter, (8) the Cleveland Police Homicide Unit, and (9) the Cleveland Police Records Department.

The State's investigation, as reflected in the September 16, 2009 Consolidated Report, revealed that no evidence remained from the two separate rape cases. The Cuyahoga County Coroner's Office had preserved the oral, rectal, and vaginal smears from the victim. These smears were sent to LabCorp for DNA testing on September 5, 2009. The Cleveland Police Department Special Investigations Unit had retained scrapings in their custody that had originally been taken from shovels. The Cleveland Police Department Property Room had retained

custody of the shovels as well as the bag those shovels had been found in. Finally, the Clerk of Courts for the Eighth District Court of Appeals retained a necklace found on the victim's body, which was contained in an unsealed envelope in a box of record exhibits that had been stored with the trial transcript.

In its Consolidated Report, the State did not object to testing of the shovels and any scrapings taken from the shovels, but Durr elected not to pursue testing of these items. As explained in Durr's Memorandum in Support, the parties disagreed on whether the victim's necklace should be subjected to DNA testing. (Memorandum in Support at 3). As a result, the trial court scheduled an evidentiary hearing on October 5, 2009.

On October 1, 2009, the State filed a Motion to Permit Evidence Custodian to Transport Exhibits to Evidentiary Hearing, seeking the Court's permission to have Cuyahoga County Deputy Clerk of Courts Frank Kost transport exhibits in the record, maintained by the clerk, to the October 5 hearing. Attached to (and described in) the motion to transport were the DNA results from Laboratory Corporation of America, documenting the fact that no DNA could be found on oral, rectal and vaginal smears previously submitted for testing.

During the October 5, 2009 hearing, counsel for Durr requested that the trial court order the victim's necklace tested for DNA, and that any DNA profile found on the necklace "be tested against CODIS," a government database of offender DNA profiles maintained by the Federal Bureau of Investigation. (October 5, 2009 Hearing Transcript, "HTR.," at 5, 39-40). The State opposed Durr's request to test

the necklace because the storage of the necklace since the time of trial did not ensure an intact chain of custody, "so even if we test it today and get a results[sic] back, there's no way of knowing if this is even crime scene DNA." (HTR. 10). The State called two witnesses.

Cuyahoga County Deputy Clerk of Courts Frank Kost testified that he is the supervisor of what is commonly known as the "dead files" area of the Cuyahoga County Clerk of Courts, where transcripts and trial exhibits are stored after an appeal. (HTR. 11-12). Dead files is located in the basement of the Old County Courthouse on Lakeside Avenue in Cleveland. (HTR. 12). Kost testified that transcripts and trial exhibits are a public record, and it is permissible for lawyers and members of the public to personally examine both. (HTR. 12-13). In Kost's experience, trial exhibits within his control can occasionally consist of physical evidence from murder cases, usually in envelopes. (HTR. 15-16). A member of the public wishing to inspect trial exhibits would be required by policy to sign a log book, then could take the exhibits out into the hallway and inspect them at a table. (HTR. 13-14). The hallway is a high traffic public area within the courthouse. (HTR. 14). Members of the public inspecting trial exhibits may do so unsupervised, using the "honor system." (HTR. 14).

Kost testified that he had brought with him an envelope marked "State's Exhibit 8" to the hearing, which he opened in the presence of the trial court. (HTR. 16-17). Kost testified that the envelope was not sealed, and he was able to look inside and describe its contents as being a small silver chain necklace. (HTR. 17-

18). Kost identified the contents of State's Exhibit 8 as being the same item depicted in a photograph submitted to the trial court as a documentary exhibit, Slide Number 4. (HTR 16-17). Kost testified that he had no reason to believe that the condition of State's Exhibit 8 had been altered since trial, and that anyone who had accessed that exhibit since that time would have found it in the same condition. (HTR 18).

Kost testified that in 2004, a couple asked to sign out transcripts and exhibits from dead files in the case of *State of Ohio v. Christopher Miller*, and subsequently took the exhibits. (HTR. 18). The deputy clerk who provided the exhibits did not have the couple sign the log book. (HTR. 18). As recently as October 2, 2009, Kost had discovered in another case that students from the Innocence Project of Ohio had inadvertently signed out and taken trial exhibits back to Cincinnati. (HTR. 20).

Kost testified that the log book policy has been place since 1995. (HTR. 21). Before 1995, there was no documentation of this type. (HTR. 21). Kost testified that unless someone happened to be walking by at the time, there would have no way of knowing whether someone had physical contact with a trial exhibit in the hallway. (HTR. 29).

Dr. Elizabeth Benzinger testified that she is the DNA Quality Assurance Administrator for the Ohio Bureau of Criminal Identification and Investigation. (HTR. 32). Both parties stipulated to Dr. Benzinger being an expert in the field of forensic DNA analysis. (HTR. 31). Dr. Benzinger has worked or consulted on thousands of cases during her career. (HTR. 33). Dr. Benzinger testified that she

had reviewed the Durr case and had been involved in facilitating the DNA testing of vaginal, anal and oral samples in this case. (HTR. 33). Dr. Benzinger had knowledge of the items Durr sought to test for DNA, and had examined photographs of the items. Specifically, Dr. Benzinger knew that jewelry had been found on the victim's body, which itself had been exposed to the elements in a public park for approximately three months. (HTR. 34). Dr. Benzinger testified that she was aware that the item Durr sought for DNA testing "was not sealed in a manner that would protect it from DNA being applied to it." (HTR. 35).

Dr. Benzinger testified that she was familiar with Ohio's legal requirements for post-conviction DNA testing. (HTR. 35). Dr. Benzinger stated that a "parent sample would be the original item that one would obtain a DNA sample from." (HTR. 35). In Dr. Benzinger's opinion, "the quality of what would be on it, the chain that was on the body of Angel Vincent which was somewhat decomposed and as such we wouldn't expect to find DNA that would have been applied during the offense. We wouldn't expect to find that on the chain because the bacteria and fungi from that decomposed body would have destroyed that DNA as well." (HTR. 36). "It's telling that the vaginal, anal and oral samples, no DNA at all was obtained from those. We went ahead and tested for Y-STRs, but the quantity testing showed us that *not even any DNA from the victim was obtained.*" (HTR. 37, emphasis added). Dr. Benzinger explained:

> Q. So if I understand your testimony, swabs of biological material from Angel's body taken at the same time this chain was taken off of her body were tested and the results showed that there was no DNA whatsoever?

A. Right. No human DNA was obtained.
Q. So is it a fair inference, then, to make that just as there was no DNA on the swabs that came out of this girl's body orifices, there's not likely any DNA from this body that's preserved on this chain given the exposure and the circumstances of collection?
A. Yes, I believe that to be the case.
Q. Now, assuming that at some point there had been blood or skin or tissue or some sort of fluid on this chain, could you explain to the Court what three months of exposure to the weather would do that DNA?
A. It would be broken down into individual molecules that – and the DNA molecule we'd test would no longer be present.

(HTR. 37-38). Dr. Benzinger explained that she had observed photographs of the body collection, and could see that portions of the victim's body had been exposed to the weather, had blackened, and had been exposed to animal scavenging. (HTR. 55-6).

When asked whether Dr. Benzinger had an opinion about the quality of the necklace as a parent sample under the circumstances of the storage environment, Dr. Benzinger replied: "Given that any DNA that is contemporaneous with the offense would be broken down to the point of not being testable. Any contact, for instance, like we saw today with the witness looking in the envelope and speaking, that is enough contact to apply modern DNA to it, so if we were to obtain any results by DNA testing, I would expect that to be DNA that has been applied since the offense." (HTR. 39). The following colloquy took place:

Q. In reviewing cases for suitability for DNA testing, is it important to know whether or not you actually got DNA that could be traced directly to a crime scene or criminal activity?
A. That's correct. As such, this would not be eligible for entry into CODIS because any profile we could not connect to the crime.
* * *
Q. All right, Doctor.

Now, you heard the testimony of Mr. Kost earlier?

A. Yes.

Q. Given his testimony that they don't even have records from 1988 to 1995, do you have an opinion about whether any inferences could be drawn if we tested this evidence and obtained a DNA profile?

A. If we were to find a profile, I would expect it to be someone who has handled the chain more recently.

Q. If someone had handled it for instance at trial, is it possible that DNA from trial handling could be preserved on this piece of jewelry?

A. Yes, it is.

Q. So that could include defense lawyers, bailiffs, prosecutors, court reporters?

A. That's correct.

Q. For purposes of the appeal, if it had been handled during the appellate process by a law clerk or appellate judge, is it possible that body fluids or tissues could have been left behind during the handling?

A. That's correct. *Simply by talking over it.*

Q. As Mr. Kost did earlier?

A. Yes.

Q. If some member of the public had taken out this evidence into the hallway that we heard about, just as with the trial and appellate situations, is it possible to have DNA left behind from that handling?

A. Yes.

Q. Without any understanding of the circumstances of that handling, we would be unable to make any conclusions for the usefulness of this evidence in terms of CODIS?

A. That's correct.

* * *

Q, In terms of whether this exposure to the elements and degradation and storage of this necklace in a facility where members of the public have access to it, I'll ask you again, Doctor, in very simple terms, can we rely today, on October 5th, 2009, on a DNA test of this necklace? Can we rely on that test to even show us whether we've got crime scene DNA?

A. I do not believe we can.

Q. Is that because we can't rule out the possibility of other people leaving their DNA behind while it was stored in a public location?

A. That's correct.

Q. The fact that three months of exposure to the elements or however long it was to produce this substantial evidence of degradation likely contaminated the DNA?

A. Or destroyed it.

Q. Is that your expert opinion?

A. Yes, it is.

(HTR. 37-41, 56-7, emphasis added).

Durr did not call any witnesses on his behalf during the October 5, 2009 hearing.

On October 6, 2009, the trial court issued an opinion granting in part and denying in part Durr's request for DNA testing. Regarding the swabs taken from the victim at the time of autopsy, the trial court granted Durr's request pursuant to the earlier stipulation.[1] (October 6, 2009 Opinion at 3, attached to Durr's Memorandum in Support). Citing R.C. 2953.76(C) and R.C. 2953.73, the trial court found that "based upon the testimony presented at the evidentiary hearing, that there is reason to believe that the evidence has been out of the State's custody and/or been contaminated since its collection and during its storage in dead files." (October 6, 2009 Opinion at 3, attached to Durr's Memorandum in Support).

LAW AND ARGUMENT

PROPOSITION OF LAW I (AS FORMULATED BY DEFENDANT-APPELLANT): REVISED CODE § 2953.73(E)(1) IS FACIALLY UNCONSTITUTIONAL. IT VIOLATES A CAPITAL DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, § 28 AND IV, § 3(B)(2) OF THE OHIO CONSTITUTION.

In his first proposition of law, Durr argues that R.C. 2953.73(E)(1) is unconstitutional because it allows for appeals of denial of DNA applications to go directly to this Court as opposed to the intermediate appellate courts. Durr's

[1]The trial court also listed a "lab coat" in the items approved for testing, which the trial court deleted as a clerical error, nunc pro tunc, in a November 5, 2009 agreed journal entry.

argument fails and does not warrant the jurisdiction of this Court. In *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355, this Honorable Court stated that the amendments to the Ohio Constitution and the corresponding statute providing for direct appeal of death penalty cases from Common Pleas courts to the Supreme Court are constitutional. In light of this Court's holding in *Smith*, that it is constitutional to have a capital defendant's direct appeal be presented directly to the Ohio Supreme Court as opposed to the Eighth District, it surely must be constitutional to have an appeal from a collateral proceeding such as an appeal from a denial of DNA application be presented directly to the Ohio Supreme Court.

In 2006, this Honorable Court addressed an identical argument in another capital case, *State v. Bonnell*, Case No. 2006-1739. In *Bonnell*, the inmate challenged R.C. 2953.71(E)(1) for requiring him to seek leave of this Honorable Court in order to appeal a trial court's acceptance or rejection of a post-conviction application for DNA Testing. This Honorable Court ultimately declined to accept jurisdiction over Bonnell's appeal.

The State submits that regardless of whether Durr's appeal is permissive or mandatory, the evidence concerning the substantive DNA dispute is clear. As more fully explained below, Durr's request simply did not meet the mandatory statutory criteria for post-conviction DNA testing because there was no intact chain of custody.

Accordingly, the State respectfully asks that this Court decline jurisdiction over Durr's challenge to R.C. 2953.73 (E)(1).

PROPOSITION OF LAW II (AS FORMULATED BY DEFENDANT-APPELLANT): A POST-CONVICTION PETITIONER'S CONSTITUTIONAL RIGHTS ARE VIOLATED WHEN THE TRIAL COURT DENIES AN APPLICATION FOR DNA TESTING WHEN THAT TESTING IS WARRANTED UNDER OHIO REVISED CODE § 2953.74.

In his second Proposition of Law, Durr argues that the trial court erred when it denied his request for DNA testing of the victim's necklace under R.C. 2953.74. Durr's argument lacks merit and should be overruled.

1. Standard of review.

Many Courts reviewing a trial court's acceptance or rejection of an Application for DNA Testing under R.C. 2953.74 have employed a *de novo* standard of review, while some have utilized an abuse of discretion standard. See *State v. Hatton,* Pickaway App. No. 05CA38, 2006-Ohio-5121, at ¶ 26, citing *State v. Lemke,* Columbiana App. No. 05CO42, 2006-Ohio-3481; *State v. Wilkins,* 163 Ohio App.3d 576, 2005-Ohio-5193, ¶ 6; *State v. McCall,* Muskingum App. No. CT2005-6, 2006-Ohio-225; *State v. Hayden,* Montgomery App. No. 20747, 2005-Ohio-4025; R.C. 2953.74(A) (stating that the court "has the discretion" to grant or deny the application). Even if this Honorable Court employs the more stringent *de novo* standard, however, it is clear that the trial court did not err when it denied Durr's request to test the victim's necklace.

2. Relevant statutory provisions.

R.C. 2953.74(C) provides in relevant part:

> (C) If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code, the court may accept the application only if *all* of the following apply:
> * * *

(2) The testing authority determines all of the following pursuant to section 2953.76 of the Revised Code regarding the parent sample of the biological material described in division (C)(1) of this section:

(a) The parent sample of the biological material so collected contains scientifically sufficient material to extract a test sample.

(b) The parent sample of the biological material so collected is not so minute or fragile as to risk destruction of the parent sample by the extraction described in division (C)(2)(a) of this section; provided that the court may determine in its discretion, on a case-by-case basis, that, even if the parent sample of the biological material so collected is so minute or fragile as to risk destruction of the parent sample by the extraction, the application should not be rejected solely on the basis of that risk.

(c) The parent sample of the biological material so collected has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing, **and the parent sample otherwise has been preserved, and remains, in a condition that is scientifically suitable for testing.**

(Emphasis added). Similarly, R.C. 2953.76(B) and (C) provide:

(B) The testing authority shall determine whether the parent sample has degraded or been contaminated to the extent that it has become scientifically unsuitable for testing and whether the parent sample otherwise has been preserved, and remains, in a condition that is suitable for testing. Upon making its determination under this division, the testing authority shall prepare a written document that contains its determination and the reasoning and rationale for that determination and shall provide a copy to the court, the eligible inmate, the prosecuting attorney, and the attorney general.

(C) The court shall determine, from the chain of custody of the parent sample of the biological material to be tested and of any test sample extracted from the parent sample and from the totality of circumstances involved, whether the parent sample and the extracted test sample are the same sample as collected and whether there is any reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected. Upon making its determination under this division, the court shall prepare and retain a written document that contains its determination and the reasoning and rationale for that determination.

(Emphasis added). Finally, R.C. 2953.71 provides the operational definition for "chain of custody":

> (C) "Chain of custody" means a record or other evidence that tracks a subject sample of biological material from the time the biological material was first obtained until the time it currently exists in its place of storage and, in relation to a DNA sample, a record or other evidence that tracks the DNA sample **from the time it was first obtained until it currently exists in its place of storage.** For purposes of this division, examples of when biological material or a DNA sample is first obtained include, but are not limited to, obtaining the material or sample at the scene of a crime, from a victim, from an inmate, **or in any other manner or time as is appropriate in the facts and circumstances present.**

(Emphasis added).

3. The victim's necklace did not meet the mandatory criteria of R.C. 2953.74 because the evidence was out of state custody and the evidence was kept unsealed in a publicly accessible place.

Durr argues that in spite of the ample evidence that the victim's necklace had not been collected or stored in a manner suitable for post-conviction DNA testing, the trial court should have ordered testing of any DNA thereon, and then ordered that DNA compared against the CODIS index. (MISJ at 20-26).

After listening to the evidence, the trial court specifically found that the necklace had not been stored in a manner sufficient to show an intact chain of custody, explaining:

> [D]eputy Clerk and Evidence Custodian, Frank Kost (hereinafter "Kost"), testified as to the condition of the trial exhibits, including the necklace. Kost testified that the evidence Defendant's case was easily accessible to the public. He further testified that the process for accessing the evidence would be to go to the Dead Files room, sign a general log book, and then one would be granted unsupervised access to the evidence and file.

> Kost stated that on more than one occasion evidence has gone missing from a case file during one of the aforementioned unsupervised reviews of a file. Finally, Kost was asked to show the Court the necklace in question. Kost showed the Court that the necklace had been stored in an unsealed, opened manila envelope in the Dead Files room.
> * * *
> [Dr. Elizabeth Benzinger] defined "parent sample" as the original item from which DNA is taken and tested. She continued on to testify that the necklace in question in this matter could contain the DNA of anyone who had recently come into contact with it, including anyone who examined the necklace by checking the file out of the Dead files room. She further testified that even if the necklace were to be tested, it would not qualify for CODIS, the Combined DNA Index System.
>
> Finally, [Benzinger] testified that in her expert opinion, she believed to a reasonable degree of medical certainty that the necklace in question would be an unreliable parent sample due to the high likelihood of contamination and the lack of an established chain of custody.

(October 6, 2009 Opinion at 3, attached to Durr's Memorandum in Support). "It is therefore the finding of this Honorable Court, based upon the testimony presented at the evidentiary hearing, that there is reason to believe that the evidence has been out of the State's custody and/or been contaminated since its collection and during its storage in Dead Files. *Id.*

With this record, there is no reasonable dispute that the statutory criteria for establishing chain of custody under R.C. 2953.74(C)(2)(c), R.C. 2953.76(B) and (C), and R.C. 2953.71(C) are not met. Further, the General Assembly explicitly conditioned acceptance of a DNA Application on meeting *all* of the mandatory criteria in R.C. 2953.74(C). The failure to do so requires denying an inmate's application, as the trial court did here.

In his appeal, Durr attacks Dr. Benzinger's opinion because she did not actually work for the testing authority, LabCorp. (MISJ at 21-2). Close scrutiny does not support this argument. First, Durr stipulated to Dr. Benzinger's expertise as a forensic DNA analyst. (HTR. 31). Dr. Benzinger's experience qualified her to give opinions about the disputed issue in this case, having been involved in several thousand prior cases in the field of forensic DNA testing. (HTR. 33). Durr also did not call any witnesses on his behalf. It is highly inconsistent with Durr's stipulation to now argue that Dr. Benzinger's testimony should be discounted because she didn't do the earlier DNA testing procedure.

Second, while it is technically correct that Dr. Benzinger was not an employee of LabCorp, a different statutory testing authority than BCI&I, Dr. Benzinger testified that BCI&I is also a certified testing authority and has the same qualifications to conduct post-conviction DNA testing. (HTR. at 59; see also Authorized Testing Labs, available for download at http://www.ohioattorneygeneral.gov/Enforcement/BCI/Laboratory-Division/Authorized-DNA-Labs (last viewed December 7, 2009)). In fact, BCI&I coordinated the LabCorp DNA testing that was done in this case by using a grant awarded by the Ohio Attorney General. Durr quotes a portion of the September 1, 2009 Agreed Order for DNA Testing describing LabCorp as the testing authority. (MISJ at 22). Elsewhere in that same order, however, it is clear that Dr. Benzinger was intended *by all parties* to work alongside LabCorp in facilitating the testing:

> The Court further orders that prior to sending the aforementioned evidence to Laboratory Corporation of America, the Cuyahoga County

> Coroner shall individually photograph any and all items of evidence that it transmits to Laboratory Corporation of America and promptly provide copies of the photographs to counsel for the State, counsel for the defendant, and the Ohio Attorney General and/or Dr. Elizabeth A. Benzinger, Ohio BCI&I 1560 SR 56 SW, P.O. Box 365, London, OH 43140.
> * * *
> Upon receipt of the aforementioned evidence items in paragraph 7 of this order, Laboratory Corporation of America shall evaluate these items and determine the most appropriate testing method for obtaining a suitable DNA profile. Prior to consuming the evidence described in paragraph 7 of this order, Laboratory Corporation shall contact by telephone the parties to advise them of their recommendation for the appropriate testing method. Laboratory Corporation of America shall contact and inform the following individuals or their designees of their recommended procedure for conducting DNA testing before consuming any DNA samples:
> * * *
> Dr. Elizabeth A. Benzinger, (740) 845-2508, Ohio BCI&I 1560 SR 56 SW, P.O. Box 365, London, OH 43140.

(September 1, 2009 Agreed Journal Entry, at para. 8, 12).

In sum, criticizing Dr. Benzinger's work on this case as invalid due to not being employed by the testing authority is not persuasive. It is clear from the record that Dr. Benzinger had knowledge of the case itself to give an informed opinion, and could draw upon her unchallenged expertise in the subject of forensic DNA analysis.

Durr next argues that there is no actual evidence that someone has contaminated the necklace during storage to make it unsuitable for testing. (MISJ at 23-4). The record does not support the challenge. Evidence custodian Frank Kost displayed the open, unsealed envelope containing the necklace to the trial court during the hearing. Dr. Benzinger, who herself witnessed Kost's testimony, testified that just by breathing over the item a person can contaminate the evidence

with his or her own DNA. (HTR. 37-41, 56-7). And while it is technically true that there were no eyewitnesses account or videotape of a public hallway contamination, circumstantial evidence nevertheless shows a break in chain of custody. It is undisputed that from 1988 to 1995 no records were kept of public access, and from 1988 to the present public access was unmonitored. This clearly shows that the evidence would have been out of State custody sufficient to cause a break within the meaning of R.C. 2953.74(C)(2)(c).

Indeed, the fact that the exhibit would have been passed around during trial and during the appellate proceedings created a serious question about whether trial or appellate handling contaminated the item. (HTR. 37-41, 56-7). Again, Dr. Benzinger testified the mere act of breathing on an item can contaminate an item for modern DNA testing. For Durr to proceed to test this item and come up with some unknown third-party DNA profile helpful to his case would require the following inferences: (1) the Killer deposited his DNA profile on the necklace at the time he raped and murdered Angel Vincent, (2) the DNA survived approximately three months of exposure to the weather before the two boys found Angel's body in the Metroparks, which Dr. Benzinger testified is unlikely given that recent testing of Angel's oral, vaginal, and anal swabs revealed no DNA whatsoever, (3) that police officers, prosecutors, defense attorneys, bailiffs, court reporters, jurors, and the judge had no contact with the unsealed exhibit sufficient to transfer any tissues or body fluids during the trial proceedings, (4) that no court clerks, law clerks, appellate bailiffs, or appellate jurists had any contact with the unsealed exhibit

sufficient to transfer any tissues or body fluids during appellate proceedings, (5) and that no court clerks, attorneys, journalists, or members of the general public had any contact with the unsealed exhibit during the approximately 20 years it sat in Dead Files as a public record (seven of which were without documentation). There are simply too many inferences stacked upon inferences to arrive at any other conclusion than the trial court: this is not an evidence item with an intact chain of custody.

Even assuming that the trial court found that this evidence did not show a break in the chain of custody and chose to order testing of the necklace, the following steps would have to take place upon finding an unknown third-party DNA profile on the necklace. Due to the likelihood of an inadvertent contamination of this unsealed exhibit, the testing authority would have to then obtain reference samples for comparison from all of the following: any witnesses who had contact with the body (including pathologists and forensic examiners who handled this evidence before the advent of DNA testing), police officers, prosecutors, defense attorneys, court reporters, bailiffs, jurors, the trial judge, court clerks, law clerks, appellate bailiffs, appellate jurists, as well as any journalists, attorneys, and members of the general public who had accessed the Durr court record in the last 20 years. To conclude, as the trial court did, that it is highly doubtful whether or not any DNA profile on the necklace could be viewed as crime scene DNA, is no great stretch.

The condition of this evidence today should not reflect poorly on the various governmental agencies who have handled the evidence since it was collected. (HTR. 67). The Durr case arose before the advent of modern forensic DNA analysis, and the (lack of) preservation of physical evidence from the trial proceeding reflects that fact. Regardless, R.C. 2953.74 requires a straightforward evaluation of the condition of the evidence when and where it is found. Here, the condition of the evidence clearly did not allow for post-conviction DNA testing under the mandatory statutory criteria.

CONCLUSION

For the foregoing reasons, the State submits that the grounds for appeal raised in defendant-appellant Darryl Durr's appeal from the trial court's rejection of his Application for DNA testing are unmeritorious. The State requests that this Honorable Court affirm the judgment of the trial court. Respectfully submitted

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response to Jurisdiction was served by regular U.S. Mail this 7th day of December, 2009 to Kimberly S. Rigby, Esq. Assistant State Public Defender, Office of the Ohio Public Defender, 8 East Long St., 11th Floor, Columbus, Ohio 43215, and Carrie L. Davis, Esq., and Angela Barstow, Esq., 4506 Chester Ave., Cleveland, Ohio 44103.

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