IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO	**CASE NO. CR 98 02 0463**
Plaintiff	**JUDGE CHRISTINE CROCE**
v.	
DOUGLAS E. PRADE	
Defendant	**STATE'S MOTION FOR RECONSIDERATION OF INTERLOCUTORY ORDER GRANTING A NEW TRIAL**

The State moves the Court for an order reconsidering the interlocutory order dated January 29, 2013 granting defendant Prade a conditional new trial.

FACTS AND ARGUMENT

A. Introduction

Defendant Prade filed a petition for post-conviction relief and a motion for new trial after DNA tests ordered by the trial court. After an evidentiary hearing in October 2012 on both the petition and the motion, the trial court, Judge Judy Hunter, both discharged Prade and granted a conditional new trial.

The trial court incorporated its findings concerning the discharge analysis and found as a matter of law that Prade was entitled to a new trial.

The State appealed the discharge order and the Court of Appeals reversed in *State v. Prade*, 9th Dist. No. 26775, 2014-Ohio-1035. The Supreme Court of Ohio declined to hear Prade's appeal from the reversal.

Subsequent to the reversal, the State filed two motions with the Court of Appeals. First, the State filed a Motion for Leave to Appeal Judge Hunter's Order granting a new trial. Second, the State filed a motion requesting the Court of Appeals to determine its jurisdiction in the matter. Specifically, the State requested the Court of Appeals to determine if Judge Hunter's order was now final because the condition on which was based had come to fruition, e.g. the exoneration order had been reversed, or whether the new trial order was, as seemingly implied by the Court of Appeals, void. A copy of the Motion to Determine Jurisdiction is attached as A.

By entry dated August 14, 2014, the Court of Appeals determined that the order granting Prade a new trial is not a final order. The Court of Appeals stated, "Thus, in order to make its decision to grant the motion for new trial a final order, the trial court must simply reenter its order granting the motion for new trial on an unconditional basis." The Entry dated August 14, 2014 is attached as B.

B. This Court Is Under No Duty To Simply Reenter

The Order Granting A New Trial

Prade unsurprisingly takes the position that the Court of Appeals directed this Court to reenter the non-final order without condition. See Motion For Reentry Of New Trial Order, attached as C. That simply is not true.

The language in the Court of Appeals entry dated August 14, 2014 certainly and correctly means that in order for this Court to make the prior conditional order final, all this Court must do is simply reenter the order without condition. The action required to make the order final is directory – reenter the order without condition, but taking that action is not one ordered by the Court of Appeals.

Since the order is interlocutory and not final, there is no question that this Court may reconsider it. *State v. Ford*, 9th Dist. No. 23269, 2006-Ohio-6961, ¶5, citations omitted ("interlocutory orders are the proper subject of motions for reconsideration"); *ERS Construction Co., Inc. v. Adolph Johnson & Son Co.*, 9th Dist. No. 23405, 2007-Ohio-1427, ¶21, citations omitted. The decision whether to reconsider an interlocutory order is discretionary with the court. *Id.*

Accordingly, the State recognizes that this Court may reenter the interlocutory order without condition but that due to the utter destruction

of Prade's alleged evidence resulting from the Y-STR DNA tests, the better course is to reconsider the interlocutory order and deny it.

The reasons for denying the motion for new trial follow. References to the transcript are to the transcript of the evidentiary hearing conducted by Judge Hunter after conclusion of the Y-STR DNA tests. References to Judge Hunter's Judgment are to the Judgment dated January 29, 2013 granting Prade's petition for post-conviction relief.

C. Crim.R. 33

A new trial based on newly discovered evidence requires evidence that it:

> (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.

State v. Petro, 148 Ohio St. 505, (1947), syllabus.

Whether to grant a new trial based on newly discovered evidence is discretionary with the trial court. *State v. Covender*, 9th Dist. No. 09CA009637, 2010-Ohio-2808, ¶12 (citations omitted.)

A probability means "more likely than not"; something greater than a 50% chance. *Miller v. Paulson*, 97 Ohio App.3d 217, 222 (1994). The trial

court disputed that a probability means over 50%, in the context of Crim.R. 33. Judgment, 22. A probability means likelihood. Probable means likely to occur. Ballentine's Law Dictionary, 1016 (3rd. Ed. 1969). In the context of Crim.R. 33, the Court of Appeals cited *State v. Luckett*, 144 Ohio App.3d 648, 661 (2001) as standing for the proposition that newly discovered evidence must demonstrate a strong probability of a different result. *State v. Holmes*, 9th Dist. No. 05CA008711, 2006-Ohio-1310, ¶15.

Luckett, in turn, stated that *Petro* requires that it is "strongly probable" that new evidence would change the result of the trial. *Id.* 661. Probable means likely to occur. *See State v. Walker*, 9th Dist. No. 08CA0059, 2009-Ohio-6702, ¶16 ("preponderance of the evidence is defined in terms of probabilities: *** the greater weight of then evidence;***."); *State v. Hover*, 12th Dist. No. CA2004-12-150, ¶31 (probability has been defined as a "'greater than fifty percent chance.'"); *State v. Jones*, 9th Dist. No. 26568, 2013-Ohio-2986, ¶7 ("substantial probability of a different result").

Accordingly, Prade has to inspire a level of confidence far more than 50%, a strong or substantial probability, that the new evidence would change the result of the trial. There is no discretion to find anything less.

The State contends that Prade's evidence fails under points one and five of the *Petro* test; primarily point one.

The *Petro* test requires consideration of the evidence at trial because the new evidence may merely impeach or contradict the evidence or be cumulative to it. *Petro, supra*. The State acknowledges that the Court of Appeals puts emphasis on the "substantial probability of a different result" and that the test does not foreclose impeaching or contradicting evidence from consideration. *Jones*, 2013-Ohio-2986, ¶7.

The decision in *Prade*, 2014-Ohio-1035 provides a blueprint for evaluation of the new DNA evidence and is in sharp contrast with *Jones*, 2013-Ohio-2986 where the Court of Appeals granted the State leave to appeal and affirmed a grant of a new trial based on new DNA evidence. The State acknowledges that Prade's burden in the discharge order appeal, to demonstrate actual innocence, is greater than that to secure a new trial. However, the determinations of the Court of Appeals concerning the new DNA tests in the discharge order appeal indicate that Prade cannot meet the lesser but still substantial burden *Petro* places on him.

D. The New DNA Evidence Does Not Support the Order

The crux of the case but by no means the only important consideration is the conflicting testimony from Prade's DNA experts and

the State's BCI DNA experts. The primary focus of the tests and testimony is the bite mark cutting, Exhibit 123. This is the "most significant" biological evidence. *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, ¶17.

1.

Building on speculation by one of Prade's witnesses at the jury trial, Prade put on testimony that the killer probably slobbered all over the lab coat while inflicting the bite. (T. 66-67, 345-346). Further, the male DNA that DDC found should be from saliva. (T. 81, 466). A slobbering person would deposit a "male profile of strong significant signal." (T. 824, 1091). Saliva should produce many cells. (T. 64, 66, 84).

The Court of Appeals conducted an exhaustive review of the evidence and found that the tests in 1998 rebutted "any assertion that there was a 'slobbering killer." *Prade*, 2014-Ohio-1035, ¶117. Moreover, the State believes common sense teaches that a person biting an object including an arm encased in clothing, does not necessarily slobber all over the object like some dog might. In addition, and crucially, the Court of Appeals found that, "there was never a shred of evidence in this case that the killer actually deposited saliva on the lab coat." *Id.* ¶117. That goes far to destroy the entire foundation of Prade's arguments; Prade has to have saliva on the

cutting for there to be even a filament of an argument that the killer left DNA there. With no saliva, the cutting provides no evidence whatsoever concerning the killer. It is true that Prade's experts speculated that saliva was present. However, their test results severely undercut their opinions.

2.

The State put on substantial evidence that the DNA test results were the result of contamination.

The Court of Appeals found that transfer/contamination explained the DNA found by Prade's team was just as likely as degradation of the DNA over time. *Prade*, 2014-Ohio-1035, ¶119.

The State contends that it is a fact that some contamination or transfer occurred on Exhibit 123 after the 1998 trial, producing the results in 19.A.1 and 19.A.2. (T. 420). Otherwise, there would not be more than one profile and a shifting of the major/minor profile, (T. 420), as explained below.

3.

DDC cut a section from the bite mark cutting. This cutting is 19.A.1. (T. 326). There is a partial male profile in 19.A.1. DDC excluded Prade as the contributor. (T. 328). DDC took three more cuttings from the bite mark cutting, extracted DNA, and combined it with the extract from 19.A.1

to form 19.A.2. (T. 331-332, 409). DDC found a major and a minor partial male profile in 19.A.2. DDC excluded Prade. (T. 329). DDC also found alleles that were below thresholds where comparisons were possible. DDC stated that the below threshold might be "spurious" DNA from a third individual. (T. 333).

In 19.A.1 at DYS 437 DDC found a 15 marker at 130 RFUs. In 19.A.2 at DYS 437 DDC found a 14 marker at 110 RFUs and a 15 marker at 54 RFUs. Exhibit 60. What happened is that the major profile in 19.A.1 is not the major profile in 19.A.2 but has become the minor profile at a much lower RFU level. (T. 412). Prade's expert, Dr. Heinig confirmed that the 14 and 15 markers are from two different people. (T. 411).

Additionally, examination of the results show at least two male contributors to the bite mark DNA and perhaps five. Dr. Heinig admitted that assuming DDC results were good some contamination or transfer **had** to occur. (T. 420).

Dr. Heinig could not explain, in the context of her opinion that the killer was on the tested fabric, whether it was the major or minor contributor who was the killer. (T. 421.) Then she said that the major profile was from saliva and the minor alleles could be from contact from one or more persons. (T. 421-422).

Dr. Heinig's adherence to her conclusion faces the insurmountable problem that DDC found two persons to be major contributors. Exhibit 60, DYS 437. There is no claim or evidence that two males killed and/or bit Margo Prade. Ultimately, Dr. Heinig opined that three or more profiles are in 19.A.1 and 19.A.2. (T. 422). Undeterred, Judge Hunter acknowledged that DDC partial profiles of at least two men. Judge Hunter then states that Prade argues that "the more significant partial male profiles from 19.A.1 and 19.A. 2 are more likely than not from Dr. Prade's killer." Judgment, 8 (emphasis added). So again, we have two killers.

This Court noted that DDC's tests showed at least two partial male profiles and that the major profile was not consistent, between 19.A1 and 19.A2. *Prade*, 2014-Ohio-1035, ¶115. Further, Dr. Heinig's conclusion that the "major DNA" [was from saliva], T. 421-422, was "difficult to understand." *Id.* ¶116.

4.

The Court of Appeals concluded its analysis of the new DNA evidence with the observation that "their true meaning will never be known." *Id.* ¶120. The exclusion result "is wholly questionable." *Id.* ¶120

E. The Former Evidence Does Not Support The new Trial Order

The Court of Appeals exhaustively listed the evidence against Prade at the jury trial. *Prade*, 2014-Ohio-1035, ¶20-¶70. The conclusion was that the circumstantial evidence "was overwhelming." *Id*. ¶121. Prade was truly painted as "an abusive, domineering husband who became accustomed to a certain standard of living and who spiraled out of control after his successful wife finally divorced him, forced him out of the house, found happiness with another man, and threatened his dwindling finances." *Id.* ¶121. The alleged problems with the identification testimony were for the jury. *Id*. ¶128. The jury heard the entire spectrum of opinions on the bite mark from various experts. *Id*. ¶129.

F. There Is No Strong Probability That The New Evidence Would Change The Result Of The Trial

It is useful at this point to compare the decision in *Prade*, 2014-Ohio-1035, with that in *Jones*, 2013-Ohio-2986. A jury convicted Jones of aggravated murder and the Court of Appeals affirmed.

The trial evidence implicating Jones came from one witness who selected Jones' photograph from an array, after first picking another man. Another witness selected Jones' photograph after picking two other persons and picked Jones after "what the police officers told me." Other testimony came from a jail inmate seeking to better his lot. *Jones*, ¶12-¶14. Not surprisingly, the Court of Appeals did not term the evidence overwhelming.

Nor is there one word in the decision even hinting that the DNA test results were unreliable or that the State ever claimed that the results were unreliable. The DNA tests showed that Jones was excluded in "every sample taken from the crime scene***that yielded a result other than 'inconclusive'". *Id.* ¶21. The results adversely affected the testimony from the inmate. *Id.* ¶21.

Here on the other hand the new DNA tests results cannot reliably exclude Prade simply because it "will never be known" whether the DNA came from the killer. *Prade*, 2014-Ohio-1035, ¶120. Moreover, the State's trial evidence pointing to guilt was overwhelming. *Id.* ¶121.

G. Conclusion

Accordingly, since we now know that Prade's new DNA evidence simply does not exculpate him in any rational way there is no reason at all to permit him to take that meaningless and irrelevant evidence to a jury. This Court should reconsider the interlocutory order and deny the motion for new trial.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been sent by regular U.S. Mail and email to- David Booth Alden and Lisa B. Gates, Jones Day, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114 ; and to Mark Godsey, University of Cincinnati College of Law, P.O. Box 210040, Cincinnati, Ohio 45220-0040, on this 15th day of August, 2014.

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