**[Cite as *State v. Hayden*, 2010-Ohio-3908.]**

**IN THE COURT OF APPEALS OF OHIO**
**SECOND APPELLATE DISTRICT**
**MONTGOMERY COUNTY**

| | | |
|---|---|---|
| STATE OF OHIO | : | |
| | : | Appellate Case No. 23620 |
| Plaintiff-Appellee | : | |
| | : | Trial Court Case No. 90-CR-308 |
| v. | : | |
| | : | (Criminal Appeal from Common |
| ROBERT O. HAYDEN | : | Pleas Court) |
| | : | |
| Defendant-Appellant | : | |
| | : | |

. . . . . .

O P I N I O N

Rendered on the 20th day of August, 2010

. . . . . .

MATHIAS H. HECK, JR., by JOHNNA M. SHIA, Atty. Reg. #0067685, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

ROBERT O. HAYDEN, #226-375, Chillicothe Correctional Institution, Post Office Box 5500, Chillicothe, Ohio 45601
Attorney for Defendant-Appellant

. . . . . .

VUKOVICH, J.

**{¶ 1}** Appellant Robert O. Hayden appeals the decision of the Montgomery County Common Pleas Court, which denied his request for DNA testing. The trial court found that the issue was previously decided and that the prior decision had res judicata effect. For the following reasons, the trial

court's denial of appellant's application for DNA testing is affirmed.

## STATEMENT OF THE CASE

**{¶ 2}** In May of 1990, appellant was convicted of rape with a prior aggravated felony specification and sentenced to ten to twenty-five years in prison. At trial, his former girlfriend testified that the day after she asked appellant to move out, he forced her to have sex with him after she rejected his sexual advances. Samples from the vaginal swab of a rape kit were forensically examined, but the results of a sperm fraction were said to be inconclusive because the victim and appellant had similar blood types. See *State v. Hayden* (Sept. 27, 1991), 2d Dist. No. 12220.

**{¶ 3}** Thereafter, DNA tests were ordered upon appellant's request for post-conviction relief. The May of 1998 forensic report stated that no conclusion could be made regarding the vaginal swab. Specifically, appellant could be excluded as the source of DNA obtained from the non-sperm fraction of the vaginal sample; however, neither the victim nor appellant could be excluded as a source of the DNA obtained from the sperm fraction of the vaginal sample.

**{¶ 4}** Thus, on February 2, 1999, the trial court denied appellant's post-conviction petition, quoting the report's DNA results and finding that due to the inconclusive results, trial counsel was not ineffective for failing to seek DNA testing. The DNA test results were also restated in this court's opinion,

affirming the trial court's decision. See *State v. Hayden* (July 16, 1999), 2d Dist. No. 17649.

**{¶ 5}** In 2001, appellant filed a petition for post-conviction relief requesting relief from judgment on the grounds of fraud upon the court. This petition was denied in 2002 as the DNA test was inconclusive and this result would not have changed the outcome of his trial. In 2004, appellant filed a motion for a rehearing and for post-conviction relief, asking to reconvene the 1998-1999 hearings on DNA testing. The trial court denied this request, and this court affirmed. *State v. Hayden*, 2d Dist. No. 20657, 2005-Ohio-4024.

**{¶ 6}** On September 22, 2004, appellant filed an application for DNA testing. The trial court rejected the application stating that the 2002 order already stated that the DNA results were inconclusive and that the court had already held that the DNA test result would not change the outcome of the trial. Appellant did not appeal this portion of the court's decision and focused his appeal only on pubic hair evidence. See *State v. Hayden*, 2d Dist. No. 20747, 2005-Ohio-4025, ¶18.

**{¶ 7}** In 2006, appellant filed a post-conviction relief petition to contest the DNA results. The trial court denied the petition. This court affirmed, noting in part that appellant's argument regarding the September 2004 application for DNA testing had been previously addressed. See *State v. Hayden*, 2d Dist. No. 21764, 2007-Ohio-5572, ¶18. This court specified that it had been previously found that even an exclusion result would not be outcome determinative of his guilt, pointing out that the critical question was credibility, not the origin of semen. Id. at ¶18-19.

**{¶ 8}** Appellant then filed a *pro se* federal lawsuit against various state actors regarding the DNA testing. His complaint was dismissed in February 2008. Upon receiving this decision and focusing on two statements in the entry that he believes are holdings in his favor, he filed a post-conviction relief petition on March 13, 2008 alleging that the forensic scientist withheld DNA evidence from the court. In pertinent part, his motion stated that the scientist told the court that the results were inconclusive.

**{¶ 9}** On September 25, 2008, appellant filed the within application for DNA testing, stating that the forensic scientist withheld DNA evidence and intentionally misled the trial court thereon. The state reviewed the history of the case and opposed the motion. On August 20, 2009, the trial court denied appellant's petition for post-conviction relief and his application for DNA testing, stating that the issues had been previously decided and that such decision had res judicata effect.

**{¶ 10}** Appellant filed timely notice of appeal. His appellate brief contains the following assignment of error: "The Trial Court Abused Its Discretion When It Denied Defendant's Motion For DNA Testing As Barred By The Doctrine of Res Judicata And That The Motion Was Not Well Taken." Appellant states that the forensic scientist misled the court by suggesting that the test results were inconclusive, and he argues that factual statements within a federal judgment entry support his new application for DNA testing.

## ANALYSIS

**{¶ 11}** We begin by pointing out a procedural problem. An application for DNA testing must be submitted on a form prescribed by the attorney general, and it must be accompanied by a signed acknowledgment of various items, which acknowledgment must also be on a form prescribed by the attorney general. R.C. 2953.72(A). Appellant failed to fulfill either requirement here. His application is not on the proper form. In addition, his application was not accompanied by the signed acknowledgment. As such, the trial court was not statutorily required to accept his application. In any event, as will be demonstrated below, appellant's arguments are without merit.

**{¶ 12}** An application for DNA testing is governed by statute. If DNA testing has been granted and an "inclusion" result is obtained, the state will not retest the DNA as the legislature has stated that it would create an atmosphere in which endless testing could occur. R.C. 2953.72(A)(6). If the court rejects a request for DNA testing due to the failure to meet the proper criteria, the court will not accept or consider similar applications. R.C. 2953.72(A)(7).

**{¶ 13}** In this case, DNA testing was granted, and an inclusion result was obtained in 1998. See R.C. 2953.71(I) (DNA testing that scientifically cannot exclude the subject inmate is an inclusion result). Thus, the trial court did not find the test results to require a new trial. Appellant already proceeded through an appeal from that decision. As demonstrated above, appellant has been litigating the issue of DNA testing for years in various manners. Most notably, the trial court specifically rejected appellant's request for DNA testing in 2004 due to the failure to

meet the proper criteria.

**{¶ 14}** Additionally, this court has advised appellant that he cannot relitigate the propriety of the denial of his application for retesting and that even an exclusion result would not be outcome determinative under the facts of his case. See *State v. Hayden*, 2d Dist. No. 21764, 2007-Ohio-5572, ¶18-19. See, also, R.C. 2953.74(C)(3)-(5) (trial court cannot accept application for DNA testing unless identity was an issue at trial, a defense theory was that an exclusion result would be outcome determinative, and an exclusion result would be outcome determinative). The propriety of the trial court's past decisions on this matter cannot be continually re-litigated.

**{¶ 15}** Contrary to appellant's suggestions, the trial court was not misled by the forensic scientist in 1998 when she reported in part that she could not reach a conclusion regarding the vaginal swab. The trial court was aware that the scientist was not using the legal definition of “inconclusive” contained in R.C. 2953.71(J). Her statement that she could not reach a conclusion was merely one statement among other more relevant ones that established that the results were “inclusive” as that term is used in R.C. 2953.71(I). Clearly, the trial court was aware of the entire contents of the 1998 forensic report. The trial court quoted the relevant portions of the report in its 1999 decision stating that appellant was excluded as the source of the non-sperm fraction and that neither the victim nor appellant could be excluded as the source of the sperm fraction of the sample. This court also specified the results when affirming the trial court's decision. See *State v. Hayden*

(July 16, 1999), 2d Dist. No. 17649.

**{¶ 16}** Finally, contrary to appellant's argument, statements in a federal judgment entry dismissing his lawsuit against the forensic scientist do not require new DNA testing. These statements were mere reiterations of appellant's arguments within his *pro se* complaint. The federal court's first footnote specifically advised that its statement of facts was taken from the plaintiff's complaint, and the court even provided citations to his complaint after various sentences. Regardless, in deciding whether to dismiss a complaint on its face because the plaintiff failed to state a valid claim, a trial court is required to take the statements within a complaint as true. See, e.g., *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, ¶11. See, also, *Heck v. Humphrey* (1994), 512 U.S. 477 (which the federal district court here applied in finding that appellant's lawsuit failed to state a valid claim). Thus, the federal decision does not provide new support for appellant's application for DNA testing.

**{¶ 17}** For all of these reasons, the decision denying appellant's application for DNA testing is affirmed.

. . . . . .

DONOVAN, P.J., and FAIN, J., concur.
(Hon. Joseph J. Vukovich, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Mathias H. Heck
Johnna M. Shia

Robert O. Hayden
Hon. Frances E. McGee