[Cite as *State v. Bronczyk*, 2015-Ohio-2765.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102317

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH BRONCZYK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-10-540345-A

BEFORE: Laster Mays, J., Jones, P.J., and Keough, J.

RELEASED AND JOURNALIZED: July 9, 2015

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant Joseph Bronczyk ("Bronczyk"), proceeding pro se, appeals from the trial court order that denied his motion for DNA testing.

{¶2} Bronczyk presents three assignments of error. This court will not address his first and second, because they challenge his original convictions, which this court reviewed in *State v. Bronczyk*, 8th Dist. Cuyahoga No. 96326, 2011-Ohio-5924 ("*Bronczyk I*"). In his third assignment of error, Bronczyk asserts that the trial court wrongly concluded that DNA testing would not be "outcome determinative" in this case. Bronczyk's assertion is baseless; consequently, the trial court's order is affirmed.

{¶3} The relevant underlying facts of this case were stated in *Bronczyk I* in relevant part as follows:

> Angel Williams ("Williams") testified she lived in Parma on Theota Avenue. Her address was "four blocks" east of Bronczyk's residence. She went into her kitchen to "grab something to eat" and, as she looked out the window, she saw "a strange man," later identified as Bronczyk, enter her backyard.
>
> At first, Williams thought Bronczyk might be searching for a lost pet, but then she heard "the handle of [her] screen door in the back jiggle." She approached her rear door, and, looking through the glass panes, "saw this man trying to get into the window of [her] children's bedroom." Williams called 911.
>
> While she was on the telephone, Bronczyk returned to "the back stoop with a screwdriver in his hand." She stepped closer to her rear door, and she and Bronczyk "were face-to-face with the glass of the door between us." Bronczyk saw Williams standing there with a telephone; "he ran."
>
> * * *

Officer Thomas O'Grady ("O'Grady") drove to the street where Bronczyk resided. As O'Grady turned onto the street, he saw Bronczyk walking toward his home across a neighbor's lawn. Bronczyk approached the side door of his home as O'Grady drove into Bronczyk's driveway. Although O'Grady stopped and ordered Bronczyk to remain outside, Bronczyk replied "he's not going to jail," and entered his home. O'Grady and another responding officer eventually forced their way into the house to arrest Bronczyk. After the arrest, O'Grady observed a screwdriver on the driveway on "the right side of the side door"; he took the tool as evidence.

Parma police officers retrieved Williams and conducted a "cold stand." Williams asked the officers to move Bronczyk a little closer before she identified him as the man who attempted to enter her home.

Bronczyk subsequently was indicted * * * ; [He was charged with] 4) attempted burglary; 5) possession of criminal tools, to wit: a screwdriver, with a furthermore clause that the offense occurred in the commission of a felony; and, 6) tampering with evidence.

* * * [T]he case proceeded. After the court denied his Crim.R. 29 motions for acquittal, the jury found Bronczyk guilty on all counts. * * * The trial court subsequently imposed a total prison sentence of eight years for Bronczyk's convictions.

* * *

Bronczyk argues in his first assignment of error that his trial counsel provided ineffective assistance * * *. This court disagrees.

* * *

In his second assignment of error, Bronczyk argues that the trial court erred in denying his motions for acquittal, because his conviction [on] Count 4 [was] not supported by sufficient evidence. This court agrees with his argument in part, and also finds plain error occurred with respect to his conviction on Count 6.

The trial court acted appropriately in denying Bronczyk's motion for acquittal with respect to Count 4. Williams's testimony that Bronczyk was a stranger to her and that, after he entered her backyard, he tried to "get into the window of [her] children's bedroom" before he approached her door

"with a screwdriver in his hand" constituted sufficient circumstantial evidence to establish the elements of attempted burglary. *State v. Carson*, 9th Dist. Medina No. 10CA0094-M, 2011-Ohio-4989; *State v. Gibbs*, 8th Dist. Cuyahoga No. 94349, 2011-Ohio-76.

Although Bronczyk presents no argument with respect to his conviction on Count 6,this court finds plain error occurred when the trial court denied Bronczyk's motion for acquittal on that count. Bronczyk was charged therein with violating R.C. 2921.12(A)(1), [tampering with evidence] * * * .

According to O'Grady, as he approached Bronczyk's house he saw Bronczyk grab the side door handle, make "eye contact," and enter his home. After Bronczyk's arrest, O'Grady found a screwdriver on the driveway near the side door.

O'Grady *did not see Bronczyk either holding the tool, disposing of it, or even discarding it.* According to O'Grady, the screwdriver lay in plain view and displayed nothing unusual; *it was not even dirty*. A police officer's testimony that he retrieved an obvious item, without more, is insufficient to prove the defendant committed the crime of tampering with evidence. *State v. Spears*, 178 Ohio App.3d 580, 2008-Ohio-5181, 899 N.E.2d 188 (2d Dist.); *cf.*, *State v. Gosha*, 8th Dist. Cuyahoga No. 95290, 2011-Ohio-2278 (citing cases in which the defendant "threw" the item during a chase). Consequently, Bronczyk's conviction for that offense is reversed.

* * *

* * * Bronczyk presented testimony indicating * * * at the time Williams experienced the attempted break-in at her home, he was at home helping his mother, [however,] Bronczyk's mother was hardly an objective witness. During her testimony, she not only prevaricated at times, but also contradicted herself at some points. The jury reasonably could determine she provided an unreliable account of her son's actions. Therefore, Bronczyk's convictions are supported by the manifest weight of the evidence.

* * *

> *Bronczyk's convictions and sentences for * * * attempted burglary, and possession of criminal tools are affirmed.* * * * [H]is conviction for tampering with evidence in Count 6 is reversed and vacated. This case is remanded for resentencing consistent with this opinion.

Id. at ¶ 19. (Emphasis added; footnotes omitted.)

{¶4} This court noted in footnote 1 of the opinion that "Bronczyk presents no argument with respect to his conviction for possession of criminal tools * * *." *Id.* at ¶ 36, fn. 1. When the case was once again before the trial court, Bronczyk received a sentence that totaled six years.

{¶5} Three-and-a-half years after this court decided *Bronczyk I*, Bronczyk filed in the trial court an application for DNA testing of the screwdriver mentioned in that opinion. Bronczyk asserted that his conviction for attempted burglary would be affected by the results of the test. The trial court ultimately denied his application, stating that:

> The defendant * * * cannot demonstrate [a] test [of] the screwdriver in question * * * would have been "outcome determinative."
>
> * * * The presence or absence of DNA on a screwdriver is not dispositive of this defendant's guilt on any counts affirmed [in *Bronczyk I*.]
>
> In addition, defendant failed to request DNA testing of the screwdriver * * * at the trial stage although DNA testing was accepted, the results admissible in evidence, and DNA testing was available.

{¶6} Bronczyk appeals from the trial court's order with the following assignments of error.

> I. Court errored [sic] when it failed to review the record, denied appointment of counsel, and failed to hold an evidentiary hearing on the issue of prosecutorial misconduct and violation of due process.
>
> II. Ineffective assistance of counsel.
>
> III. The trial court has committed reversible error, violating Appellant's constitutional rights secured by the First, Fifth, and Fourteenth Amendments when it ruled that Appellant could not demonstrate that DNA testing would have been outcome determinative.

{¶7} This court will not consider the merits of the issues Bronczyk raises in his first and second assignments of error because they concern the original convictions that this court reviewed in *Bronczyk I*. Bronczyk filed the instant appeal only from the trial court order that denied his application for DNA testing. The issues he attempts to raise in his first and second assignments of error are barred by the doctrine of res judicata. *State v. Briscoe*, 8th Dist. Cuyahoga No. 98414, 2012-Ohio-4943; *State v. Caulley*, 10th Dist. Franklin No. 07AP-338, 2007-Ohio-7000, ¶ 10-13. Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial that resulted in that judgment of conviction or on an appeal from that judgment. *Briscoe* at ¶ 13. Consequently, those assignments of error are overruled.

{¶8} In his third assignment of error, Bronczyk argues that the trial court's decision was improper. He contends that DNA analysis of the screwdriver will support the testimony his mother gave in his defense and will undermine the testimony provided by the state's witnesses.

{¶9} R.C. 2953.74 provides in relevant part as follows:

> (B) If an eligible offender submits an application for DNA testing under section 2953.73 of the Revised Code, the court may accept the application only if * * * the following applies:
>
> > (1) 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.

(Emphasis added.)

{¶10} Because the foregoing statutory section is stated in the conjunctive, the offender must meet both parts of the test. *State v. Wilkins*, 163 Ohio App.3d 576, 2005-Ohio-5193, 839 N.E.2d 457, ¶ 10 (9th Dist.). This court reviews the trial court's decision to accept or reject an eligible inmate's application for DNA testing for only an abuse of discretion. R.C. 2953.74(A); *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654, ¶ 12 (8th Dist.). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). Reviewing the related facts of this case, it is determined that no abuse of discretion occurred in this case.

{¶11} The trial court concluded that DNA exclusion would not be "outcome determinative." R.C. 2953.71(L) defines that term as follows:

> (L) "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 * * *.

{¶12} The trial court's conclusion on this point finds support in the record. First, Bronczyk's convictions on Counts 4 and 5 were related. Bronczyk's argument is directed only to his conviction on Count 4 for attempted burglary, yet, even in *Bronczyk I*, he never challenged his conviction of possession of criminal tools, to wit: a screwdriver, as alleged in Count 5. Second, only a few minutes after the attempted burglary, the victim positively identified Bronczyk as the person who had tried to break into her house. *See State v. Broadnax*, 2d Dist. Montgomery No. 24121, 2011-Ohio-2182. The victim looked at Bronczyk face to face at her back door and then again during the cold stand. Third, the police officer who picked up the tool admitted he never observed Bronczyk holding it. However, the victim identified the screwdriver as the one the defendant had in his possession. Fourth, because Bronczyk lived with his mother, logically, she may have handled the screwdriver at some point. Thus, in the context of Bronczyk's trial, even had his mother's DNA been found on the screwdriver, that would not have amounted to a "strong probability that no reasonable factfinder would have found the

offender guilty" of the offense of attempted burglary. *State v. Swanson*, 5th Dist. Ashland No. 05 CA 13, 2005-Ohio-5471, ¶ 14. Nevertheless, the victim's eyewitness testimony was sufficient for attempted burglary.

{¶13} In light of Bronczyk's failure to meet the first requirement set forth in R.C. 2953.74(B)(1), this court need not address his failure to meet the second. *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, 863 N.E.2d 124, ¶ 34. Bronczyk's third assignment of error is overruled.

{¶14} The trial court's order is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANITA LASTER MAYS, JUDGE

LARRY A. JONES, SR., P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR