ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	CASE NO 2011-1882
Plaintiff-Appellee	On appeal from the Guernsey County Court of Appeals, Fifth District
Vs	Appellate Case No. 10CA000047
CLARENCE D. ROBERTS,	
Defendant-Appellant	

MERIT BRIEF OF THE STATE OF OHIO, APPELLEE

DANIEL G. PADDEN 0038781

Prosecuting Attorney Guernsey County Ohio

139 West Eighth Street

Cambridge, Ohio 43725

740-439-2082; FAX 740-439-7161

COUNSEL FOR PLAINTIFF-APPELLEE

KRISTOPHER HAINES 0080558 (counsel of record)

CRAIG JAQUITH 0052997

Assistant State Public Defenders

250 E. Broad Street, Suite 1400

Columbus, Ohio 43215

614-466-5394, fax 614 752-5167

COUNSEL FOR APPELLANT

SHARON KATZ N.Y. 1788090

450 Lexington Ave., New York, New York 10017

212-450-4508 FAX 212-701-5508

COUNSEL FOR AMICUS CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE AND FACTS.....1

ARGUMENT.....1

Proposition of Law: Because RC. 2933.82 contains no express intent to apply the law retroactively, the statute applies prospectively only 1

CONCLUSION.....4

CERTIFICATE OF SERVICE.....5

APPENDIX

R.C. 2933.81.....A-1

R.C. 2933.83.....A-3

TABLE OF AUTHORITIES

Nichols v. Villarreal, 113 Ohio App.3d 343, (1996).....2

State v. Consilio 114 Ohio St.3d 295,299(2007).....2, 3

State v. Humberto, 196 Ohio App. 3d 230.....3

Article II, Section 28 of the Ohio Constitution.....1

Ohio Revised Code Section 1.48.....1

R.C. 2933.81.....3

R.C. 2933.82.....2, 3

R.C. 2933.83.....3

R.C. 2953.21.....1

2953.71.....1

2953.81.....1

STATEMENT OF THE CASE AND FACTS

In September, 1997, a Guernsey County jury returned guilty verdicts against appellant of aggravated murder and aggravated robbery. The court sentenced him to life imprisonment. Appellant appealed and pursued all available appeals and motions.

On September 30, 2010, appellant filed a motion to order preservation and listing of evidence, relying on newly enacted R.C . 2933.82. The trial court denied that motion on November 30, 2010. Appellant appealed and the Fifth District Court of Appeals affirmed. Appellant filed a memorandum in support of jurisdiction in this court. This court granted review on February 1, 2012.

ARGUMENT

Proposition of Law: Because RC. 2933.82 contains no express intent to apply the law retroactively, the statute applies prospectively only

In 2002, the Ohio General Assembly amended the postconviction statutes, R.C. 2953.21, 2953.71 and 2953.81 to provide for DNA testing requested by prisoners. In 2010, the General Assembly passed R.C. 2933.82, providing requirements and standards for preservation of biological evidence in criminal cases. As the amendments to the postconviction petition statutes, R.C. 2953.21, 2953.71 and 2953.81, obviously applied to prisoners.DNA. The statute upon which appellant relies, R.C. 2933.82, however, is contained, not in the postconviction petition

statutes, but among statutes having to do with procedures to be followed in investigating current cases. For example, R.C. 2933.81 requires electronic recording of custodial interrogations; R.C. 2933.83 determines procedures to be used in line-ups for purposes of identification. The state cannot be faulted for failing to record an interview before the law required it or failing to conduct a line-up in accordance with procedures not extant when the state conducted the line-up. Appellant, however, would require procedures set forth in R.C. 2933.82 to apply to preservation of evidence in the possession of the prosecutor from appellant's 1997 conviction.

The Ohio General Assembly "shall have no power to pass retroactive laws[.]" Article II, Section 28 of the Ohio Constitution. Ohio Revised Code Section 1.48 provides "a statute is presumed to be prospective in its operation unless expressly made retrospective." Nothing in R.C. 2933.82 clearly indicates a purpose to apply the statute retroactively.

Appellant relies on the single word "was," in R.C. 2933.82(B)(2), which appellant claims shows a "specific intent" to apply the statute retroactively. However, section (B)(1)(c) says "If any person ***is*** convicted of or pleads guilty to the offense, or is adjudicated a delinquent child for committing the delinquent act..." evidence shall be preserved for specific periods of time. Moreover, R.C. 2933.82(B)(4) provides "Upon written request by the defendant in a criminal case or the alleged delinquent child in a delinquent child case...a governmental evidence-retention entity that possesses biological evidence shall prepare an inventory of the biological evidence that has been preserved..." That language suggests that only one who is not yet convicted or who is an alleged delinquent may apply for an inventory.

Whether the General Assembly intended a statute to apply retrospectively must be determined from the statute alone. ***Nichols v. Villarreal***, 113 Ohio App.3d 343, (1996); ***State v.***

Consilio 114 Ohio St.3d 295,299(2007). The opinions of a single member or a group of members are irrelevant. ***Nichols v. Villarreal***, supra. Appellant's resort to quoting The Columbus Dispatch adds nothing to his argument. The General Assembly knows that it must include specific, pellucid, retroactive language to render a statute retroactive. If the General Assembly fails to include that language, the presumption is that the statute applies prospectively only. ***Consilio***, supra at 299. If the statute fails to clearly indicate an intention to make a new statute retrospective, no further inquiry is required or permitted. ***Consilio***, supra.

A statute that attaches new burdens to past transactions is an ex post facto law. It would be unfair to expect the state to have collected evidence in 1997 in accordance with procedures adopted in 2010. The procedures on DNA testing under the postconviction petition statutes apply to those already convicted and have already resulted in some persons being released.

CONCLUSION

If R.C. 2933.82 applies retroactively, prisoners will next argue that the admission of evidence collected before its passage, not in accordance with the new standards, violated due process.

The General Assembly's including R.C. 2933.82 among other statutes having to do with procedures to be used during investigations indicates the General Assembly's intention that the statute apply henceforth, to future investigations only. For example, R.C. 2933.83 provides procedures to be used by police to conduct line-up identification. The Franklin County Court of Appeals held in ***State v. Humberto***, 196 Ohio App. 3d 230, 963 N.E.2d 162, 2011 Ohio App. LEXIS 2586, 2011 Ohio 3080, (2011) as follows: Although R.C. 2933.83 instructed law

enforcement agencies to use the double-blind method and showed a clear preference for the sequential method for photo arrays, because it became effective July 6, 2010, well after the pretrial identifications and defendant's trial, it did not control the identification procedures law enforcement utilized in defendant's case. Id at Para.50.

The postconviction statutes provide adequate protection for those such as appellant. The State of Ohio respectfully requests that this court affirm the appellate court's opinion below.

Respectfully Submitted

Dan Padden by Joyce Anderson

DANIEL G. PADDEN 0038781
Prosecuting Attorney Guernsey County Ohio
139 West Eighth Street
Cambridge, Ohio 43725
740-439-2082; FAX 740-439-7161
COUNSEL FOR PLAINTIFF-APPELLEE

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that he served a copy of the above upon Kristopher Haines, 250 East Broad Street, Columbus, Ohio 43215, counsel for appellant, and Sharon Katz, Counsel for amicus curiae, 450 Lexington Ave, New York, NY, 10017 by ordinary mail, postage prepaid this day, June, 12, 2012.

Daniel Padden by Joyce Anderson

DANIEL G. PADDEN 0038781

Prosecuting Attorney Guernsey County Ohio

ORC Ann. **2933.81** (2012)

§ **2933.81.** Electronic recording of custodial interrogations; presumption that recorded statements are voluntary

(A) As used in this section:

(1) "Custodial interrogation" means any interrogation involving a law enforcement officer's questioning that is reasonably likely to elicit incriminating responses and in which a reasonable person in the subject's position would consider self to be in custody, beginning when a person should have been advised of the person's right to counsel and right to remain silent and of the fact that anything the person says could be used against the person, as specified by the United States supreme court in *Miranda v. Arizona*(1966), 384 U.S. 436, and subsequent decisions, and ending when the questioning has completely finished.

(2) "Detention facility" has the same meaning as in section 2921.01 of the Revised Code.

(3) "Electronic recording" or "electronically recorded" means an audio and visual recording that is an authentic, accurate, unaltered record of a custodial interrogation.

(4) "Law enforcement agency" has the same meaning as in section 109.573 [109.57.3] of the Revised Code.

(5) "Law enforcement vehicle" means a vehicle primarily used by a law enforcement agency or by an employee of a law enforcement agency for official law enforcement purposes.

(6) "Local correctional facility" has the same meaning as in section 2903.13 of the Revised Code.

(7) "Place of detention" means a jail, police or sheriff's station, holding cell, state correctional institution, local correctional facility, detention facility, or department of youth services facility. "Place of detention" does not include a law enforcement vehicle.

(8) "State correctional institution" has the same meaning as in section 2967.01 of the Revised Code.

(9) "Statement" means an oral, written, sign language, or nonverbal communication.

(B) All statements made by a person who is the suspect of a violation of or possible violation of section 2903.01, 2903.02, or 2903.03, a violation of section 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907.03, or an attempt to commit a violation of section 2907.02 of the Revised Code during a custodial interrogation in a place of detention are presumed to be voluntary if the statements made by the person are electronically recorded. The person making the statements during the electronic recording of the custodial interrogation has the burden of proving that the statements made during the custodial interrogation were not voluntary. There shall be no penalty against the law enforcement agency that employs a law enforcement officer if the law enforcement officer fails to electronically record as required by this division a custodial interrogation. A law enforcement officer's failure to electronically record a custodial interrogation does not create a private cause of action against that law enforcement officer.

(C) A failure to electronically record a statement as required by this section shall not provide the basis to exclude or suppress the statement in any criminal proceeding, delinquent child proceeding, or other legal proceeding.

(D) (1) Law enforcement personnel shall clearly identify and catalog every electronic recording

A-1

of a custodial interrogation that is recorded pursuant to this section.

(2) If a criminal or delinquent child proceeding is brought against a person who was the subject of a custodial interrogation that was electronically recorded, law enforcement personnel shall preserve the recording until the later of when all appeals, post-conviction relief proceedings, and habeas corpus proceedings are final and concluded or the expiration of the period of time within which such appeals and proceedings must be brought.

(3) Upon motion by the defendant in a criminal proceeding or the alleged delinquent child in a delinquent child proceeding, the court may order that a copy of an electronic recording of a custodial interrogation of the person be preserved for any period beyond the expiration of all appeals, post-conviction relief proceedings, and habeas corpus proceedings.

(4) If no criminal or delinquent child proceeding is brought against a person who was the subject of a custodial interrogation that was electronically recorded pursuant to this section, law enforcement personnel are not required to preserve the related recording.

A-2

ORC Ann. **2933.83** (2012)

§ **2933.83.** Eyewitness identification procedures in lineups; adoption of other scientifically accepted procedures

(A) As used in this section:

(1) "Administrator" means the person conducting a photo lineup or live lineup.

(2) "Blind administrator" means the administrator does not know the identity of the suspect. "Blind administrator" includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system.

(3) "Blinded administrator" means the administrator may know who the suspect is, but does not know which lineup member is being viewed by the eyewitness. "Blinded administrator" includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system.

(4) "Eyewitness" means a person who observes another person at or near the scene of an offense.

(5) "Filler" means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure.

(6) "Folder system" means a system for conducting a photo lineup that satisfies all of the following:

(a) The investigating officer uses one "suspect photograph" that resembles the description of the suspected perpetrator of the offense provided by the eyewitness, five "filler photographs" of persons not suspected of the offense that match the description of the suspected perpetrator but do not cause the suspect photograph to unduly stand out, four "blank photographs" that contain no images of any person, and ten empty folders.

(b) The investigating officer places one "filler photograph" into one of the empty folders and numbers it as folder 1.

(c) The administrator places the "suspect photograph" and the other four "filler photographs" into five other empty folders, shuffles the five folders so that the administrator is unaware of which folder contains the "suspect photograph," and numbers the five shuffled folders as folders 2 through 6.

(d) The administrator places the four "blank photographs" in the four remaining empty folders and numbers these folders as folders 7 through 10, and these folders serve as "dummy folders."

(e) The administrator provides instructions to the eyewitness as to the lineup procedure and informs the eyewitness that a photograph of the alleged perpetrator of the offense may or may not be included in the photographs the eyewitness is about to see and that the administrator does not know which, if any, of the folders contains the photograph of the alleged perpetrator. The administrator also shall instruct the eyewitness that the administrator does not want to view any of the photographs and will not view any of the photographs and that the eyewitness may not show the administrator any of the photographs. The administrator shall inform the eyewitness that if the eyewitness identifies a photograph as being the person the eyewitness saw the eyewitness shall identify the photograph only by the number of the photograph's corresponding folder.

A-3

(f) The administrator hands each of the ten folders to the eyewitness individually without looking at the photograph in the folder. Each time the eyewitness has viewed a folder, the eyewitness indicates whether the photograph is of the person the eyewitness saw, indicates the degree of the eyewitness's confidence in this identification, and returns the folder and the photograph it contains to the administrator.

(g) The administrator follows the procedures specified in this division for a second viewing if the eyewitness requests to view each of the folders a second time, handing them to the eyewitness in the same order as during the first viewing; the eyewitness is not permitted to have more than two viewings of the folders; and the administrator preserves the order of the folders and the photographs they contain in a facedown position in order to document the steps specified in division (A)(6)(h) of this section.

(h) The administrator documents and records the results of the procedure described in divisions (A)(6)(a) to (f) of this section before the eyewitness views each of the folders a second time and before the administrator views any photograph that the eyewitness identifies as being of the person the eyewitness saw. The documentation and record includes the date, time, and location of the lineup procedure; the name of the administrator; the names of all of the individuals present during the lineup; the number of photographs shown to the eyewitness; copies of each photograph shown to the eyewitness; the order in which the folders were presented to the witness; the source of each photograph that was used in the procedure; a statement of the eyewitness's confidence in the eyewitness's own words as to the certainty of the eyewitness's identification of the photographs as being of the person the eyewitness saw that is taken immediately upon the reaction of the eyewitness to viewing the photograph; and any additional information the administrator considers pertinent to the lineup procedure. If the eyewitness views each of the folders a second time, the administrator shall document and record the statement of the eyewitness's confidence in the eyewitness's own words as to the certainty of the eyewitness's identification of a photograph as being of the person the eyewitness saw and document that the identification was made during a second viewing of each of the folders by the eyewitness.

(i) The administrator shall not say anything to the eyewitness or give any oral or nonverbal cues as to whether or not the eyewitness identified the "suspect photograph" until the administrator documents and records the results of the procedure described in divisions (A)(6)(a) to (g) of this section and the photo lineup has concluded.

(7) "Live lineup" means an identification procedure in which a group of persons, including the suspected perpetrator of an offense and other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator of the offense.

(8) "Photo lineup" means an identification procedure in which an array of photographs, including a photograph of the suspected perpetrator of an offense and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator of the offense.

(9) "Perpetrator" means the person who committed the offense.

(10) "Suspect" means the person believed by law enforcement to be the possible perpetrator of the offense.

(B) Prior to conducting any live lineup or photo lineup on or after the effective date of this section, any law enforcement agency or criminal justice entity in this state that conducts live lineups or photo lineups shall adopt specific procedures for conducting the lineups. The procedures, at a minimum, shall impose the following requirements:

(1) Unless impracticable, a blind or blinded administrator shall conduct the live lineup or

photo lineup.

(2) When it is impracticable for a blind administrator to conduct the live lineup or photo lineup, the administrator shall state in writing the reason for that impracticability.

(3) When it is impracticable for either a blind or blinded administrator to conduct the live lineup or photo lineup, the administrator shall state in writing the reason for that impracticability.

(4) The administrator conducting the lineup shall make a written record that includes all of the following information:

(a) All identification and nonidentification results obtained during the lineup, signed by the eyewitnesses, including the eyewitnesses' confidence statements made immediately at the time of the identification;

(b) The names of all persons present at the lineup;

(c) The date and time of the lineup;

(d) Any eyewitness identification of one or more fillers in the lineup;

(e) The names of the lineup members and other relevant identifying information, and the sources of all photographs or persons used in the lineup.

(5) If a blind administrator is conducting the live lineup or the photo lineup, the administrator shall inform the eyewitness that the suspect may or may not be in the lineup and that the administrator does not know who the suspect is.

(C) For any photo lineup or live lineup that is administered on or after the effective date of this section, all of the following apply:

(1) Evidence of a failure to comply with any of the provisions of this section or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section shall be considered by trial courts in adjudicating motions to suppress eyewitness identification resulting from or related to the lineup.

(2) Evidence of a failure to comply with any of the provisions of this section or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section shall be admissible in support of any claim of eyewitness misidentification resulting from or related to the lineup as long as that evidence otherwise is admissible.

(3) When evidence of a failure to comply with any of the provisions of this section, or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section, is presented at trial, the jury shall be instructed that it may consider credible evidence of noncompliance in determining the reliability of any eyewitness identification resulting from or related to the lineup.

(D) The requirements in this section regarding the procedures for live lineups or photo lineups conducted by a law enforcement agency or criminal justice entity do not prohibit a law enforcement agency or criminal justice entity from adopting other scientifically accepted procedures for conducting live lineups or photo lineups that the scientific community considers

A-5

more effective.