

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	MEMORANDUM OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2014-P-0045
TYRONE LEE NOLING,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 95 CR 0220.

Judgment: Appeal dismissed.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Carrie E. Wood, Assistant Public Defender, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215 and *Mark Godsey*, Ohio Innocence Project, University of Cincinnati, P.O. Box 210040, Cincinnati, OH 45221 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This matter is before the court upon the timely notice of appeal filed by appellant, Tyrone Lee Noling, on July 24, 2014. Appellant appeals a June 27, 2014 judgment entry of the Portage County Court of Common Pleas, rejecting his amended application for DNA testing for failure to comply with R.C. 2953.74(C)(2)(c). Appellant also seeks review of the trial court’s June 27, 2014 judgment denying his motion for a copy of complete DNA test results. This court, in the course of reviewing the relevant

law, determined there was an issue regarding whether this court has jurisdiction to hear the underlying appeal. An order to show cause was issued as to why the underlying matter should not be dismissed for want of jurisdiction. Appellant filed no response. After thorough consideration of the jurisdictional issue, we conclude this court lacks subject matter jurisdiction over this appeal because, statutorily, appellate review of the underlying judgments rest exclusively with the Ohio Supreme Court. Appellant has, in fact, sought appellate review with the Supreme Court and the matter is currently pending. For the reasons that follow, we therefore dismiss this appeal sua sponte.

{¶2} With respect to the judgment rejecting appellant's application, R.C. 2953.73 governs the preliminary procedures for submitting an application for DNA testing; a trial court's determination as to whether it will accept or reject an application; and the manner in which an applicant may seek review on appeal of a court's rejection. R.C. 2953.73(E) provides:

{¶3} (E) A judgment and order of a court under division (D) of this section [setting forth the procedures for determining whether to accept or reject an application] is appealable only as provided in this division. If an eligible offender submits an application for DNA testing under section 2953.73 of the Revised Code and the court of common pleas rejects the application under division (D) of this section, one of the following applies:

{¶4} (1) If the offender was sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing, *the offender may seek leave of the supreme court to appeal the rejection to the supreme court. Courts of appeals do not have*

jurisdiction to review any rejection if the offender was sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing.

{¶5} (2) If the offender was not sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing, the rejection is a final appealable order, and the offender may appeal it to the court of appeals of the district in which is located that court of common pleas. (Emphasis added.)

{¶6} Appellant was sentenced to death. R.C. 2953.73(E)(1) specifically states that such an appellant may *only* seek review of a trial court’s rejection of DNA testing to the Supreme Court of Ohio. Indeed, the Supreme Court, in a recent case to which appellant was an appealing party, highlighted the exclusivity of its appellate jurisdiction relating to the rejection of DNA-testing applications in capital cases. To wit, in *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, observed:

{¶7} [T]he 1994 amendment to Article IV, Section 2(B)(2)(c) of the Ohio Constitution granted this court jurisdiction over the direct appeal of cases in which the death penalty is imposed. Thus, the General Assembly’s provision in R.C. 2953.73(E)(1) that we have direct appellate review of the denial of an application for postconviction DNA testing in cases where the offender was sentenced to death is within the constitutionally defined jurisdiction of this court. Nor is there a problem with *the statute’s exclusive grant of authority in such cases to review DNA-testing applications*. Because courts of appeals have such jurisdiction only “as may be provided by law,”

the General Assembly may limit that jurisdiction in cases in which the death penalty is imposed. The General Assembly acted within its authority when it limited a courts of appeals' review to the denial of DNA-testing applications in cases in which the death penalty was not imposed. We therefore hold that R.C. 2953.73(E)(1) is constitutional. (Emphasis added.) *Noling, supra*, at ¶27.

{¶8} We recognize that the court's conclusion upholding the constitutionality of R.C. 2953.73(E)(1) *did not* address potential due process or equal protection problems. We also point out that, subsequent to filing his notice of appeal in this case, appellant filed a "Motion to Determine the Constitutionality of R.C. 2953.73(E)(1)." In that motion, appellant argued the statutory section is unconstitutional because it violates the equal protection and due process clauses of the United States Constitution. The judgments on appeal, however, neither spoke to the issues raised in the motion nor does the record indicate the matter was ever raised before the trial court. In effect, therefore, the pleading was an "original motion," raising issues for the first time before this court that were never subject to litigation, let alone adjudication, in the trial court.

{¶9} We acknowledge that the waiver doctrine is discretionary and an appellate court may review constitutional issues not raised in the trial court for plain error. *See In re M.D.*, 38 Ohio St.3d 149 (1988), syllabus. Nevertheless, appellant's motion was filed pursuant to an appeal over which this court lacks statutory jurisdiction. We are aware of no authority or procedure that permits a party to, by virtue of filing a motion, vest original jurisdiction in an appellate court for purposes of resolving a unique constitutional question. To the extent this court lacks jurisdiction to address the merits of the judgment rejecting his DNA application, appellant has similarly failed to invoke our

jurisdiction to analyze the constitutionality of R.C. 2953.73(E)(1) under the doctrine of plain error.

{¶10} Both parties appear to acknowledge the underlying jurisdictional problem. Appellant concedes, in his motion challenging the constitutionality of R.C. 2953.73(E)(1), that he has filed a memorandum in support of jurisdiction with the Supreme Court; moreover, even though the state did not move to dismiss the instant appeal, its brief also recognizes appellant sought leave from the Supreme Court to appeal the very same judgment. And a review of the Supreme Court's docket reveals the matter is currently pending, awaiting decision. Appellant has accordingly pursued the proper statutory channels for obtaining review in the Supreme Court of Ohio. In light of the foregoing considerations, we hold this court is without subject matter jurisdiction to review the trial court's judgment rejecting his application for DNA testing.

{¶11} Further, as discussed at the outset of this opinion, appellant also appeals the trial court's order denying appellant's motion for a complete copy of the DNA test results. With respect to this issue, R.C. 2953.72 provides that any potential applicant for DNA testing must make various written statutory "acknowledgments" in a form prescribed by the Attorney General. One such acknowledgment, set forth under R.C. 2953.72(A)(8) provides:

{¶12} That the acknowledgment memorializes the provisions of sections 2953.71 to 2953.81 of the Revised Code with respect to the application of postconviction DNA testing to offenders, that those provisions do not give any offender any additional constitutional right that the offender did not already have, that the court has no duty or obligation to provide postconviction DNA testing to

offenders, that the court of common pleas has the sole discretion subject to an appeal as described in this division to determine whether an offender is an eligible offender and whether an eligible offender's application for DNA testing satisfies the acceptance criteria described in division (A)(4) of this section and whether the application should be accepted or rejected, that if the court of common pleas rejects an eligible offender's application, *the offender may seek leave of the supreme court to appeal the rejection to that court if the offender was sentenced to death for the offense for which the offender is requesting the DNA testing and, if the offender was not sentenced to death for that offense, may appeal the rejection to the court of appeals, and that no determination otherwise made by the court of common pleas in the exercise of its discretion regarding the eligibility of an offender or regarding postconviction DNA testing under those provisions is reviewable by or appealable to any court[.]* (Emphasis added.)

{¶13} Furthermore, R.C. 2953.72(A)(9) provides:

{¶14} That the manner in which sections 2953.71 to 2953.81 of the Revised Code with respect to the offering of postconviction DNA testing to offenders are carried out does not confer any constitutional right upon any offender, that the state has established guidelines and procedures relative to those provisions to ensure that they are carried out with both justice and efficiency in mind, and that an offender who participates in any phase of the

mechanism contained in those provisions, including, but not limited to, applying for DNA testing and being rejected, having an application for DNA testing accepted and not receiving the test, or having DNA testing conducted and receiving unfavorable results, *does not gain as a result of the participation any constitutional right to challenge, or, except as provided in division (A)(8) of this section, any right to any review or appeal of, the manner in which those provisions are carried out[.]* (Emphasis added.)

{¶15} The foregoing subsections provide additional foundation for our conclusion that this court lacks jurisdiction to review the lower court's rejection of appellant's application. They further indicate that a party is precluded from seeking review of any ancillary exercise of a trial court's discretion in the course of proceedings relating to an application for DNA testing, e.g., the denial of a motion for a complete copy of DNA test results. To the extent, however, any such issue is subject to appellate review in a death penalty case, we conclude that R.C. 2953.73(E)(1) confers specific subject matter jurisdiction with the Supreme Court of Ohio. We therefore hold this court additionally lacks jurisdiction to review the trial court's denial of appellant's request for a complete copy of the DNA test results.

{¶16} For the reasons discussed in this memorandum opinion, the instant appeal is sua sponte dismissed.

DIANE V. GRENDALL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.