[Cite as *State v. Harris*, 2016-Ohio-4707.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103924

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DWAYNE HARRIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-89-236656-ZA

BEFORE: Celebrezze, J., E.A. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: June 30, 2016

FOR APPELLANT

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Dwayne Harris ("Harris"), brings this appeal challenging the trial court's denial of his 2015 application for DNA testing. Specifically, Harris argues that (1) the DNA testing would prove his actual innocence, (2) the trial court erred by ruling that he was ineligible for DNA testing under R.C. 2953.82(B), and (3) there was a break in the chain of custody of the evidence. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} In CR-89-236656-ZA, the Cuyahoga County Grand Jury returned a two-count indictment charging Harris with kidnapping, in violation of R.C. 2905.01, and rape, in violation of R.C. 2907.02. The offenses occurred on October 30, 1988. The victim did not file a police report until she learned that she was pregnant on January 6, 1989. A paternity test revealed that Harris was the father of the victim's child.

{¶3} The parties reached a plea agreement. Harris pled guilty to rape and the kidnapping count was nolled. The trial court sentenced Harris to a prison term of 10 to 25 years. The trial court ordered Harris's sentence to run concurrently with the sentences imposed in CR-89-235106-ZA and CR-89-236857-ZA.[1]

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[1] In CR-89-235106-ZA, the trial court sentenced Harris to a prison term of 13-25 years for kidnapping, 13-25 years for rape, 12-15 years for felonious assault, and three years for the underlying firearm specifications. The trial court order the three-year sentence for the firearm specifications to run consecutively. In CR-89-236857-ZA, the trial court sentenced Harris to a prison term of 18 months for aggravated assault.

{¶4} In *State v. Harris*, 8th Dist. Cuyahoga Nos. 57920, 57857, and 57855, 1990 Ohio App. LEXIS 5451 (Dec. 13, 1990), Harris challenged the jury trial proceedings in the aforementioned cases. Specifically, Harris alleged that: (1) the prosecutor's remarks during closing arguments constituted prosecutorial misconduct, (2) the prosecutor improperly introduced evidence of his prior conviction, (3) his convictions were against the manifest weight of the evidence, (4) his trial counsel provided ineffective assistance, and (5) his appellate counsel provided ineffective assistance. *Id*. This court consolidated Harris's three cases and, after review, affirmed his convictions. *Id*. at 1.

{¶5} In 2004, Harris filed an application for DNA testing in CR-89-236656-ZA and CR-89-235106-ZA. The trial court granted Harris's application in both cases. The state filed a statement in disagreement with Harris's application for DNA testing in CR-89-236656-ZA. The trial court clarified its ruling on Harris's application:

> Pursuant to R.C. 2953.82(D), the state's disagreement with [Harris's] application for DNA testing bars any further DNA test in case number CR[-89-]236656[-ZA]. The court's order granting [Harris's] application for DNA testing applies solely to case number CR[-89-]235106[-ZA].

{¶6} In September 2006, Harris filed a motion to have the lab report concerning his February 16, 1989 paternity test released. Harris argued that the test results would assist him in filing a petition for postconviction relief. The trial court denied Harris's motion.

{¶7} In *State v. Harris*, 8th Dist. Cuyahoga No. 88914, 2007-Ohio-3926, Harris challenged the trial court's denial of his motion to release the results of the paternity test.

Id. at _ 3. This court affirmed the trial court's judgment, finding that R.C. 2953.21 does not provide for discovery in preparation for filing a petition for postconviction relief. *Id*. at _ 4, citing *State v. Taylor*, 8th Dist. Cuyahoga No. 80271, 2002-Ohio-2742, and *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office*, 87 Ohio St.3d 158, 718 N.E.2d 426 (1999).

{¶8} In 2015, Harris filed a second application for DNA testing. Harris requested DNA testing of the rape kit from CR-89-236656-ZA and his 1989 paternity test. The state opposed Harris's application, arguing that because he pled guilty to rape, he was ineligible to request DNA testing under R.C. 2953.72(_)(2). The trial court denied Harris's application for DNA testing.

{¶9} Harris filed the instant appeal assigning three errors for review:

> I. Appellant, Dwayne Harris is actual [sic] innocence of the crime of rape in Case No. CR-89-236656[-ZA].
>
> II. Trial court and prosecutor attorney was [sic] in error to rule that appellant is ineligible for DNA testing, pursuant to Ohio Revised Code 2953.82(B).
>
> III. To challenged [sic] the chain of custody of the paternity results.

We address the assignments of error out of order for ease of discussion.

II. Law and Analysis

A. Eligible Offender

{¶10} In his second assignment of error, Harris argues that the trial court erred by determining that he was ineligible for DNA testing. Specifically, Harris argues that he was entitled to DNA testing under R.C. 2953.82(B).

{¶11} R.C. 2953.82 authorized an inmate who pleaded guilty or no contest to a felony to request DNA testing. However, on July 6, 2010, Am.Sub.S.B. No. 77 became effective and operated to repeal R.C. 2953.82. It is undisputed that Harris's 2015 application for DNA testing was filed after R.C. 2953.82 had already been repealed. Thus, R.C. 2953.82 cannot support Harris's request for DNA testing. *See State v. Lucas*, 9th Dist. Lorain No. 11CA100050, 2012-Ohio-2826, ¶ 7, citing *State v. Broadnax*, 2d Dist. Montgomery No. 24121, 2011-Ohio-2182, ¶ 17. Accordingly, we turn to R.C. 2953.71 et seq. to determine whether the trial court erred in finding that Harris was ineligible to request DNA testing and denying his application.

{¶12} An eligible offender can file a request for postconviction relief, called an "application for DNA testing," on a form prescribed by the attorney general, requesting the state to do DNA testing on biological material from the case in which the offender was convicted. *See* R.C. 2953.71(A), (F); R.C. 2953.73(A); *State v. Bunch*, 7th Dist. Mahoning No. 14 MA 168, 2015-Ohio-4151, ¶ 50. R.C. 2953.72(C)(2) provides that an offender is not eligible to request DNA testing under R.C. 2953.71 to 2953.81 regarding any offense to which the offender pleaded guilty or no contest.

{¶13} In the instant matter, Harris pled guilty to the rape charge. Thus, Harris is not eligible to request DNA testing as required by R.C. 2953.72(C)(1).

{¶14} Harris emphasizes that at his change of plea hearing in CR-89-236656-ZA, he did not admit that he committed the rape and only pled guilty because of "the pressure of the jury verdict [in CR-89-235106-ZA] and the imminent sentence." Harris contends that, had he been "cleared" of the kidnapping, rape, and felonious assault charges in CR-89-235106-ZA, he never would have pled guilty to rape in CR-89-236656-ZA.

{¶15} In support of his assertion that his guilty plea was not entered intelligently and voluntarily, Harris references the following colloquy that took place at his change of plea hearing:

> The Court: Is it a fact that on or about the 30 of October, 1988 that you unlawfully and purposely engaged in sexual conduct with [the victim], by use of force or threat of force? How do you plead to that?
>
> Harris: Guilty.
>
> The Court: Did you do that?
> Harris: I don't admit it, but I'm guilty.
>
> The Court: Did you have sexual conduct with [the victim]?
>
> Harris: No, I did not. This was the one that they were saying she supposedly came over to my house and somehow she is supposed — come to find out three months later she finds out she is pregnant and then she pressed charges.
>
> The Court: Is it your desire to accept a lesser penalty as opposed to the possibility of a higher penalty?
>
> Harris: Yes.
>
> The Court: The range of penalties for a first degree felony are five, six, seven, eight, nine or ten years and up to a maximum of 25 years and a fine up to and not exceeding $10,000. Do you understand that?
>
> Harris: Yes.

The Court: How do you plead to the rape?

Harris: Guilty.

The Court: Is that plea offered freely and voluntarily?

Harris: Yes.

{¶16} Insofar as Harris argues that the trial court pressured him into pleading guilty to rape, this court will not consider the merits of his argument because they concern the original conviction that this court reviewed in *Harris*, 8th Dist. Cuyahoga Nos. 57920, 57857, and 57855, 1990 Ohio App. LEXIS 5451 (Dec. 13, 1990). Harris filed the instant appeal challenging the trial court's judgment denying his application for DNA testing. The issue he attempts to raise regarding his guilty plea is barred by the doctrine of res judicata. *State v. Briscoe*, 8th Dist. Cuyahoga No. 98414, 2012-Ohio-4943. 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. *Id*. at ¶ 13. Thus, because Harris failed to argue that he did not intelligently and voluntarily enter his guilty plea on direct appeal, his argument is barred by res judicata.

{¶17} Harris directs this court to *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, 864 N.E.2d 630. In *Sterling*, the Ohio Supreme Court held that R.C. 2953.82(D) is unconstitutional:

> Because R.C. 2953.82(D) provides that a prosecuting attorney's decision to disagree with an inmate's request for DNA testing is final and not appealable by any person to any court and further directs that no court shall have authority, without agreement of the prosecutor, to order DNA testing, it interferes with the exercise of judicial authority, violates the doctrine of separation of powers, and is unconstitutional.

Id. at paragraph one of the syllabus. The court further concluded that R.C. 2953.82(D) is "capable of being severed from the rest of the statute." *Id*. at paragraph two of the syllabus.

{¶18} Harris's reliance on *Sterling* is misplaced. As previously noted, Harris's September 2015 application for DNA testing was filed after R.C. 2953.82 had already been repealed.

{¶19} After reviewing the record, we find that the trial court did not abuse its discretion in denying Harris's application for DNA testing. Under 2953.72(C), a prerequisite to obtaining DNA testing is that the applicant is an eligible offender. R.C. 2953.72(C)(2) provides that "[a]n offender is not an eligible offender under division (C)(1) of this section regarding any offense to which the offender pleaded guilty or no contest." Thus, because Harris's application for DNA testing involved a rape offense to which he pled guilty, he was not an eligible offender as defined by the statute. At the time that Harris submitted his application, R.C. 2953.82 was repealed. Accordingly, the trial court could not grant Harris's application.

{¶20} Harris's second assignment of error is overruled.

B. Actual Innocence

{¶21} In his first assignment of error, Harris argues that DNA testing of his

paternity test would prove his actual innocence of the rape offense in CR-89-236656-ZA. Because Harris was not an eligible offender to submit an application for DNA testing, we need not address the merits of his actual innocence claim. Nevertheless, we note that the standard for accepting an application for DNA testing is "outcome determinative," not actual innocence. Under R.C. 2953.74, the trial court may accept an application for DNA testing only if:

> The offender had 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 test was not a prior definitive DNA test that is subject to division (A) of this section, and 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 the trial stage* in that case.

(Emphasis added.) In the instant matter, the paternity test confirmed that Harris was the father of the victim's child. Thus, even if Harris had been eligible to request DNA testing, his request would fail under the "outcome determinative" standard.

{¶22} Harris's first assignment of error is overruled.

C. Chain of Custody

{¶23} In his third assignment of error, Harris challenges the chain of custody of his paternity test. First, Harris argues that the results of the paternity test are neither accurate nor reliable. Second, Harris alleges that the lab report documenting the results of the paternity test does not exist. Third, Harris claims that the chain of custody of his paternity test "was questionable."

{¶24} After reviewing the record, we find that Harris's assertions about the chain of custody are not supported by any reference to the record. Harris merely attacks the credibility of the Cleveland Police Department's scientific examiner who conducted his paternity test and the prosecutor who handled the matter in the trial court. Furthermore, because Harris failed to challenge the chain of custody on direct appeal, his argument is barred by res judicata. *See Briscoe*, 8th Dist. Cuyahoga No. 98414, 2012-Ohio-4943, ¶ 13.

{¶25} Harris's third assignment of error is overruled.

III. Conclusion

{¶26} Pursuant to R.C. 2953.72(C)(2), Harris was not eligible to request DNA testing because he pled guilty to the rape offense. Accordingly, the trial court did not abuse its discretion in denying Harris's application. Furthermore, Harris's challenge to the chain of custody of his paternity test is entirely unsupported by the record and barred by res judicata because Harris failed to raise the issue on direct appeal.

{¶27} Judgment affirmed.

It is ordered that appellee recover of 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.

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN A. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR