

IN THE SUPREME COURT OF FLORIDA

CASE NO.02-1

AMOS KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This brief is filed on behalf of the Appellant, Amos King, in reply to the Answer Brief of Appellee, the State of Florida. Appellant will rely upon his arguments in the Initial Brief of Appellant on issues II, III, IV, V, VI, VII and VIII.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S CLAIM THAT THE STATE COMMITTED FUNDAMENTAL ERROR BY DESTROYING EXCULPATORY EVIDENCE.

The State argues that the circuit court's factual findings regarding the destruction of the vaginal washings of the murder victim is supported by the testimony of Larry Bedore, an employee of the medical examiners office today. Such an argument fails to recognize that Mr. Bedore was not an employee of the medical examiner's office until seven years after Dr. Joan Wood had the samples in her possession. In addition, there is no record or log as to the destruction of this evidence. Thus, Mr. Bedore's testimony regarding what happened in that office in 1977 is pure speculation. This speculation is the underlying basis for the court's decision regarding the destruction. This Court must examine the basis for Judge Schaeffer's decision and ensure that it is supported by

competent, substantial evidence. Stephens v. State, 748 So.2d 1028 (Fla. 1999). An analysis of the basis of her findings based on the testimony of a person not involved with the evidence who did not even work at the medical examiner's office during the time period in question will find that her findings are not supportable. Dr. Joan Wood, the person who was last in possession of the evidence, was not interviewed by the state. Further, a defense motion to take her deposition was denied by the circuit court. Thus, a conclusion that she threw the evidence out cannot be obtained.

An equally plausible scenario would be that Dr. Wood, following the language of the only statute in place at the time, turned the vaginal washings and the rectal swab over to a detective at the Pinellas County Sheriff's Office, who then destroyed the evidence without following procedures in place regarding the destruction of evidence. Fla. Stat. ch. 406.13 (1977). The circuit court's finding that such evidence was not turned over to the Sheriff's Office is not supported by competent, substantial evidence. To the contrary, a review of the property record held by the Sheriff's Office shows that two pieces of evidence in their possession were destroyed in 1987 and 1988. The only two pieces of evidence not accounted for in this case are the vaginal washings and the rectal swab taken

from the victim. As shown in King's motion for post-conviction relief, all of the other evidence can be traced to, or located in, the Sheriff's Office today. There is no Court order in evidence nor is there a Property Release Receipt/Disposition Order to demonstrate that this evidence was properly destroyed in accordance with policies in effect in 1987 and 1988. (EX. 9). Not one person could explain why there appear two entries in the evidence log which show evidence was destroyed. An employee of the Sheriff's Office, Lieutenant Colcord, speculates that such an entry was a "computer glitch." Colcord further testified that there was no computer system in 1977. (HR.84). The Lieutenant was not the person who made the entries of the destroyed evidence in 1987 and 1988 as he was not even employed by the office at that time. (HR.88). Such a speculation cannot be relied upon as a basis for a factual finding that the Sheriff's Office did not possess and destroy the evidence in this case in 1987 and 1988.

The exculpatory value of the vaginal washings and the rectal swab which contained evidence of the perpetrator was obvious in 1977, 1987 and 1988. However, because DNA testing became available in 1985, the exculpatory nature of the samples was more than evident by 1987 and 1988.

The following cases have been cited in State's response to

Defendant's 3.850 motion and distinguished from the case at bar in Appellant's initial brief: Arizona v Youngblood¹, 488 U.S. 51 (1988), Kelley v State, 569 So. 2d 754 (Fla. 1990), United States v Deaner, 1 F.3d 192 (3d Cir. 1993), Holdren v Legursky, 16 F.3d 57 (4th Cir. 1994), Rogers v State, 511 So. 2d 526 (Fla. 1987), United States v Vera, 2001 U.S. Dist. LEXIS 9337 (D. Oregon, June 26, 2001).

In United States v Boyd, 961 F. 2d 434,435 (3d Cir. 1992), the Court stated:

A urine sample taken from Boyd on April 19, 1991 tested positive for cocaine metabolite. The sample was retested, and again the results indicated drug use. By standard procedure, the positive urine specimen was to be maintained by a private laboratory for two months and then destroyed on June 28, 1991.

Id. at 435

The facts in *Boyd* differ from the facts in the case at bar due to the fact that the procedure in place in *Boyd* were followed. The only "standard procedure" governing the

¹ In 1988, the United States Supreme Court denied relief to Mr. Youngblood on the basis that evidence was not destroyed in bad faith. Arizona v Youngblood, 488 U.S. 51 (1988). However, in August of the year 2000, after seventeen years, DNA analysis showed that Mr. Youngblood was not the perpetrator of the crime. Interestingly, the DNA evidence was then linked to the actual perpetrator who was incarcerated in the State of Texas. Barbara Whitaker, DNA Frees Inmate Years After Justices Rejected Plea, N.Y. Times, August 11, 2000.

destruction of evidence by the medical examiner in 1977 was one statute, Fla. Stat. ch. 406.13 (1977). Under this statute, Assistant Medical Examiner Joan Wood was permitted to keep the sample or turn it over to law enforcement. The trial court found that she did neither. She destroyed it; Contrary to statute and contrary to the common sense assessment of evidence reasonably expected of a trained medical examiner.

Counsel for the State also relies on United States v Crouch, 84 F. 3d 1497, 1506 (5th Cir. 1996). The *Crouch* court held:

The Court also noted "we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution" and indicated such a determination "will necessarily involve a delicate judgement based on the circumstances of each case." (citing United States v Marion, 404 U.S. 307, 92 S. Ct. 455 (1971) *Id.* at 325, 92 S. Ct. at 466. The Court then proceeded to reverse the order of dismissal, holding there was no Sixth Amendment violation and that, as to due process: "nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them" *Id.* at 325, 92 S. Ct. at 466. The opinion's final sentence noted that "events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature."

Id. at 1506.

The above case should not be applied to the case at bar in that the case at bar has nothing to do with pre-accusation delay.

Furthermore the actual prejudice to Mr. King's case can be demonstrated by the lab report dated March 17, 1977. (See EX. 4). This report states that the vaginal wash was "very bloody, grossly hemologized very difficult to read." (EX. 4). Dr. Wood, as a trained medical examiner, knew that the vaginal wash was subject to attack either by trial counsel or post-conviction counsel, yet she destroyed it in direct violation of statute and demonstrated a flagrant disregard for the common sense assessment of evidence reasonably expected of a trained medical examiner.

Counsel for the State contends that there was no reason to believe in 1977 that the vaginal washings could be subject to any further testing, or could provide any exculpatory value. (See Answer Brief of Appellee p. 25). Such an argument must fail in light of the nature of the sample and its obvious exculpatory value. Due to the questionable nature of the vaginal wash, known through the notations on the lab report, a prudent medical examiner would have tested it again or at least followed the law and kept the vaginal wash so it could be tested by another

examiner. The exculpatory value of the vaginal wash was obvious and the act of destruction was willful.

On page 22 of Appellee's Answer Brief, counsel argues that by placing emphasis on the word "may" in the statute, and "shall" in the 1981 Administrative Code, somehow Dr. Wood was authorized to destroy the vaginal wash. The language of the statute is clear, Wood was permitted to keep the vaginal wash or she may turn it over to law enforcement. The statute does not state that a medical examiner may keep it and destroy if she feels the urge to destroy it. Mr. King contends that the discussion of the 1981 code is irrelevant in that the trial court found that the vaginal wash was destroyed between 1977-1979. In addition, if the medical examiner had not destroyed it, and turned it over to law enforcement pursuant to statute, the Sheriff's Office would have had possession of the samples in 1981. Thus, the law enforcement agency's destruction policies would have to be followed, not the administrative code applying to the medical examiner. As argued previously, the Sheriff's Office destroyed two pieces of evidence in 1987 and 1988 without following their own procedures.

The State cannot sufficiently distinguish State v. Elliot, 83 F.Supp 2d 637 (E.D. Va. 1999). The District Court in Elliott held:

Where, as here, there is no evidence of an established practice which was relied upon to effectuate the destruction, where the applicable documents teach that destruction should not have occurred, and where the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the *Trombetta/Youngblood* test.

Id. at 647-648. An attempt is made to lessen the ruling in that case by pointing out that one jurist in Oregon "suggests" that Elliot does not follow Youngblood. (See Answer Brief of the Appellee p. 25). In fact, under Elliot, Mr. King is entitled to relief. The evidence destroyed in this case meets the standard put forth in Elliot. Given that the evidence was vitally important in securing a conviction in an otherwise weak circumstantial case, and given that the medical examiner knew this, the destruction of such evidence by her in contravention of the statute in place at the time constituted objective bad faith.

Counsel's argument that Mr. King should be denied relief on the basis of laches is an attempt to divert this Court from the real issue at bar. As of October 1, 2001, the legislature of the State of Florida has specifically granted prisoners the

right to have DNA testing done on any case where certain criteria are met. Fla. Stat. ch. 925.11 (2001). Mr. King meets all of the criteria necessary under this statute and is therefore granted a right to have DNA tests performed on evidence at this time. To say that his request to have DNA testing is barred ignores the Florida State Legislature's intention to provide testing on DNA evidence no matter how old the case is as long as certain criteria are met under the statute. It should be noted that nowhere in the statute are persons denied the right for this testing because their case is too old. Fla. Stat. ch. 925.11 (2001). Any further argument as to the DNA testing is another attempt to divert this Court from the issue at bar, to wit: whether the destruction of evidence which could be used to exonerate Mr. King was done in bad faith.

The State relies on Zeigler v. State, 654 So.2d 1162 (Fla. 1995) in arguing that Mr. King's claim for DNA testing is now procedurally barred. In Zeigler, there was no statute available allowing a prisoner to challenge evidence through DNA analysis. Thus, the claim should have been raised as newly discovered evidence within two years of 1988, when DNA was first recognized as a valid test. See, Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988). That is not the case here. In Mr. King's case there is a statute specifically giving him an additional two years

from October 1, 2001, in which to make a DNA claim. Fla. Stat. ch. 925.11 (2001).

The State argues that Mr. King has never requested DNA analysis prior to this date, and thus he should be barred from raising it at this time. Again, such reasoning overlooks the plain language of the statute providing this avenue of relief. In addition, Mr. King asked repeatedly for any and all forms of scientific testing from his lawyers throughout the pendency of his case. Attached is an affidavit from William Noles, attorney for Mr. King during the time period a claim could have been raised for DNA as newly discovered evidence. The affidavit clearly states that Mr. King repeatedly requested any scientific test of the evidence in this case. Mr. Nolas, who was without the resources necessary to conduct such an inquiry, failed to request DNA testing. Thus, Mr. King should not be accountable for a request which he made which was never acted on. Nevertheless, DNA testing is clearly available to Mr. King under the new statute, so the State's argument is meritless.

Finally, the State argues that Mr. King has not made a statement as to why this claim was not raised previously pursuant to Fla. R. Crim. Proc. 3.851(e)(2)(B). Mr. King has made such a statement repeatedly. Florida Statute 925.11 (2001), effective October 1, 2001, gave prisoners the ability to request

DNA testing as long as the criteria of the statute were met. Before this time, there was no statutory provision allowing this request. Thus, Mr. King's request is timely, anticipated, and intended by the legislature of the State of Florida.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. King's Motion for Postconviction Relief. This Court should order that his conviction and sentence be vacated and remand the case for a new trial, new evidentiary hearing, or such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been has been furnished by United States Mail, first class postage prepaid, hand-delivery and/or by electronic mail to all counsel of record on this _____ day of January, 2002.

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