

IN THE SUPREME COURT OF FLORIDA

LORAN COLE,

Appellant,

vs.

CASE NO. SC03-2204

STATE OF FLORIDA,

Appellee.

-----/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

On February 19, 1994, John Edwards was kidnaped, robbed and murdered in Ocala National Forest. His sister, Pam, was kidnaped, robbed, and repeatedly raped. Cole was tried and convicted of first degree murder, two counts of armed kidnaping, two counts of armed robbery, and two counts of armed sexual battery. The co-defendant, William Paul, was convicted of the same charges with the exception of the sexual batteries. The jury recommended a death sentence for Cole by a vote of 12-0. The trial court found the following aggravators: (1) Cole had previously been convicted of another felony; (2) the murder was committed during the course of a kidnapping; (3) the murder was committed for pecuniary gain; and (4) the murder was heinous, atrocious, or cruel.

The trial court found and weighed the following nonstatutory mitigators: (1) Cole suffered from organic brain damage and mental illness, slight to moderate weight; (2) Cole suffered an abused and deprived childhood, slight weight.

Cole appealed the convictions and sentence. This Court made the following factual findings on direct appeal:

On February 18, 1994, Pam Edwards, a senior at Eckerd College in St. Petersburg, Florida, drove to the Ocala National Forest, where she met her brother, John

Edwards, a freshman at Florida State University in Tallahassee, Florida. The two planned on camping in the forest for the weekend and eventually decided to camp in Hopkins Prairie. They were setting up camp when Loran Cole briefly stopped by their campsite. Cole soon returned to the campsite, introduced himself as "Kevin," and helped them set up camp. After John and Pam ate dinner, Cole and William Paul came to the Edwards' campsite. Paul was carrying a walking stick and was introduced to the Edwards as Cole's brother. The four sat around the campfire, and at about 10:45 p.m., they decided to walk to a pond.

The four walked for a while but never found the pond. Instead, Cole jumped on Pam and knocked her to the ground. She got up and tried to run; however, Cole caught her, hit her on the back of the head, handcuffed her, and threw her down on the ground. Meanwhile, John had taken Paul's walking stick and was hitting him with it. Cole then helped Paul subdue John and moved John on the ground next to Pam. While they lay close to each other on the ground, John apologized to Pam for having exposed them to the dangers of these two strangers. Cole told the Edwards that he wanted to take their cars, and he went through their pockets and took their personal property, including their jewelry.

Paul took Pam up the trail, and he was complaining about his hand and head, which were injured in the altercation with John. Pam could hear Cole asking John why he hurt Cole's brother and could hear John grunt a few times. Cole then came to where Pam and Paul were sitting and told them that they were going to wait until John passed out. Cole called back to John several times, and John responded by moaning. Eventually, Cole told Pam he was going to move John off the trail and tie him up. Pam then heard something that resembled a gagging sound. When Cole returned, he said that John must be having trouble with his dinner, hinting that John was vomiting. John died that night from a slashed throat and three blows to the head, which fractured his skull. The injury to the throat caused a loss of blood externally and internally into John's lungs.

Pam, Paul, and Cole then started walking back to Cole's campsite. On the way, they walked past John, and he was not moving. At the campsite, Cole forced Pam to sleep naked by threatening her that unless she cooperated, she and John would be killed. Cole then forced her to have sexual intercourse with him.

The next morning, Cole went to check on John and told Pam that John was fine. Cole left the campsite to purchase marijuana. When he returned, the three smoked marijuana, and Cole again forced Pam to have intercourse with him. After eating dinner, they packed up as much of the camp as would fit into the backpacks carried by Cole and Paul. Cole then gagged Pam and tied her to two trees. Cole and Paul left in Pam's car and went to a friend's trailer, where they spent the night. The two left several items of John Edwards' personal property at the trailer. Thereafter, Cole and Paul returned Pam's car to the Ocala National Forest and took John's car, a Geo Metro.

By the early morning on Sunday, Pam was able to free herself of the ropes. She did not move because she was afraid that if Cole and Paul returned and she was not there, they would hurt John. She stayed in that spot until daylight and tried to find John. When she was unable to find him, she flagged down a motorist, who took her to call the police. The police returned with Pam to the scene, and the police located John's body. The body was face down and was covered with pine needles, sand, debris, and small, freshly cut palm fronds. Both of his hands were in an upward fetal position; there was a shoestring ligature around his left wrist and a shoestring partially wrapped around his right wrist.

Cole v. State, 701 So.2d 845, 848-850 (Fla. 1997).

Cole filed a Rule 3.850 Motion to Vacate Judgement and Conviction. Claim 7 of the motion alleged that the trial court erred in refusing to allow a DNA test. This Court held:

In his seventh claim on appeal, Cole seeks a DNA test. Cole did not include this claim in his rule 3.850

motion; instead, Cole made an oral request for the DNA testing at the Huff hearing. The trial court summarily denied Cole's request without explanation. We note that the trial court's denial of Cole's DNA request came prior to the effective date of section 925.11, Florida Statutes (2001), and Florida Rule of Criminal Procedure 3.853 (DNA testing). We do not address Cole's request for relief at this time except to state that our decision should not be read to prohibit Cole from seeking such testing pursuant to the mandates of section 925.11 and rule 3.853.

Cole v. State and Crosby, 841 So.2d 409, 419 (Fla. 2003).

On September 30, 2003, Cole filed a Motion for PostConviction DNA Testing (R 1-5). He requested DNA testing on the following items:

- (1) All physical evidence, including swabs, slides, and hair, contained in the sexual assault kit taken from Pamela Edwards;
- (2) Blood Sample taken from William Paul;
- (3) Blood sample taken from Loran Cole;
- (4) "Panties" identified as having come from Pamela Edwards; "blue seat pants" identified as having come from Pamela Edwards.

(R 1). As grounds for testing the items, Cole alleged that testing would reveal whether Paul had sexual relations with Pam Edwards. If Paul did have sexual relations, that would allegedly show Pam Edwards' recollection was unclear and Cole was innocent of both the murder and the death penalty (R 2). Cole also claimed that "any impeachment of Ms. Edwards' testimony would establish a reasonable doubt that Mr. Cole was

the killer and that he premeditated the murder." (R 5). The impeachment would also provide mitigation regarding his culpability for the first degree murder (R 5). Cole argued that the jury would have sentenced him to life if evidence revealed Ms. Edwards' memory was not accurate (R 5).

The trial judge ordered the State to respond (R 35). The State responded that the allegations were insufficient and the effect of testing speculative (R 41-44). Cole filed a Reply to the State's response, re-alleging the claims in the initial motion (R 45-51).

A hearing was held October 31, 2003, at which time counsel for both parties argued the DNA motion(R 80-101). The trial judge denied the motion for DNA testing for the following reasons:

- (1) The claim that Paul "might have" had sexual relations with Pamela Edwards is highly speculative;
- (2) It is clear from the evidence at trial that Cole killed John Edwards prior to the sexual assaults on Pam Edwards;
- (3) The DNA evidence from the sexual assaults would not exonerate Cole of John Edward's murder;
- (4) The DNA evidence would not affect Cole's sentence because it would not affect the Court's findings regarding the statutory aggravators or proportionality analysis;
- (5) The prior felony aggravator would still be applicable because Cole does not contest the robbery, assault and kidnaping;

(6) The DNA test results would not affect the Court's finding that the murder was especially heinous, atrocious and cruel because the sexual assaults were not considered by the Court in its analysis on this aggravating factor;

(7) The sexual assaults were not committed against John Edwards, the murder victim;

(8) Cole does not contest the sexual assaults;

(9) Cole was the major criminal participant in the murder; therefore, the DNA results on the related, but subsequent, sexual assault would have no impact on a proportionality analysis;

(10) That Paul "may have" also had sexual relations with Pamela Edwards is pure conjecture; and

(11) There is no reasonable probability that the testing would exonerate Cole or mitigate his sentence (R 112-113). Cole appealed.

SUMMARY OF THE ARGUMENT

ISSUE I--Cole's motion did not meet the requirements set forth under Florida Rule of Criminal Procedure 3.853. The motion did not clearly set forth the evidentiary value of each item on which DNA testing was requested. Cole failed to demonstrate how that testing would exonerate him or lead to a lesser sentence. Cole merely claimed that testing *might* reveal evidence which *might* have been used to impeach the surviving victim, Pam Edwards. The order denying release of evidence for DNA testing is supported by competent, substantial evidence, and should be affirmed on appeal. The trial court's order clearly states its rationale for denying the requested DNA testing under Rule 3.853. Nothing more is required. Even a cursory review of the record reveals that the requested testing would not tend to exonerate Cole or lead to a lesser sentence.

ISSUE II--Cole's argument below was not based upon assertion of a constitutional right to DNA testing. Nor did Cole claim below that he was seeking habeas corpus relief. Consequently, this issue has been waived on appeal.

ARGUMENT

I.

**WHETHER THE TRIAL COURT ERRED IN DENYING
COLE'S MOTION FOR DNA TESTING UNDER FLORIDA
RULE OF CRIMINAL PROCEDURE 3.853 AND SECTION
925.11 OF THE FLORIDA STATUTES? (STATED BY
APPELLEE)**

The denial of Cole's Motion for DNA Testing is supported by competent, substantial evidence, and should not be disturbed on appeal. *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997); *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998). The circuit court, having familiarized itself with the record in this case, found that Cole failed to show a reasonable probability of acquittal on retrial or that he would receive a lesser sentence. Even a cursory review of the record in this case supports the trial court's decision.

This Court recently affirmed the denial of postconviction DNA testing under similar circumstances in *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004). Hitchcock sought DNA testing pursuant to Florida Rule of Criminal Procedure asserting that the requested DNA testing would establish his innocence. Hitchcock admitted to having sex with his 13 year-old niece (corroborated by DNA testing), but asserted the true murderer was his brother, a position that he took at trial when he testified. Hitchcock requested DNA analysis which he claimed

would show that hair analysis conducted at trial improperly included him as the source of the hair, and, improperly excluded his brother, Richard. Hitchcock also asserted that DNA testing on the hair "may" show that Hitchcock's brother strangled the victim and that his hair or blood was at the scene of the murder. Hitchcock then went on to list 24 items that he sought to be tested by an independent lab for DNA. *Id.*

The trial court denied the motion, stating the allegation that DNA testing may exonerate the defendant was too "speculative" to grant postconviction DNA testing. The court noted that the defendant confessed to having sexual intercourse with the victim and that he failed to establish a reasonable probability that DNA testing would exonerate him of the victim's subsequent murder. The court noted that the presence of physical evidence linked to his brother Richard (who lived in the house with the victim), would "not establish that Defendant was not at the scene or that he did not commit the murder." *Id.* at 27.

This Court affirmed the trial court's denial of DNA testing under Rule 3.853, noting the defendant has the burden of meeting the requirements of the rule:

The clear requirement of these provisions is that a movant, in pleading the requirements of *rule 3.853*, must lay out with specificity how the DNA testing of

each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case.

Hitchcock, at 27. This Court noted that Rule 3.853 does not authorize a speculative "fishing expedition" stating that "[i]t was Hitchcock's burden to explain, with reference to specific facts about the crime and the items he wished to have tested, 'how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or . . . will mitigate the sentence received by the movant for that crime.'" *Id.* at 27-28 (quoting Rule 3.853)(emphasis in original).

Similarly, in *Robinson v. State*, 865 So.2d 1259 (Fla. 2004), this Court affirmed the trial court findings that the results of any DNA test would not exonerate Robinson or mitigate his sentence. In so finding, this court stated:

Pursuant to Florida Rule of Criminal Procedure 3.853, the defendant must allege with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. See *Fla. R.Crim. P.* 3.853(b)(1)-(6); *Hitchcock v. State*, 29 Fla. L. Weekly S13, --- So.2d ---, 2003 WL 23162540 (Fla. Jan. 15, 2004). It is the defendant's burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence. *Id.*

However, Robinson failed to state in the motion how DNA testing of all the items listed would exonerate him of or even mitigate his sentences for robbery, sexual battery, and first-degree murder.

Robinson v. State, 865 So.2d 1259, 1264 -1265 (Fla. 2004). This Court then held that Robinson failed to meet his burden under Rule 3.853 to allege with specificity how DNA testing of each item would give rise to a reasonable probability of acquittal or a lesser sentence.

In this case, Cole has clearly failed to meet his burden of showing that the DNA testing would somehow exonerate him or lead to a lesser sentence. Cole has simply embarked upon a "fishing expedition" of the type this Court condemned in *Hitchcock*. Moreover, as in *Hitchcock*, Cole has failed to give any credible explanation as to how evidence Paul raped Pam Edwards would exonerate Cole for the murder of John Edwards or mitigate the death sentence. The only suggested use for the evidence was to possibly impeach Pam Edwards on whether Paul also raped her. This supposedly would show Pam's memory was clouded regarding the events. This reasoning is so attenuated, it is difficult to follow. As the trial judge held, the death penalty was imposed on the murder of John Edwards, and the murder occurred well before the rapes. Cole has failed to establish the evidence

would be admissible since it is impeachment on a collateral matter.

Even if the highly speculative assertions regarding whether Paul raped Pam were proved true by DNA testing, nothing would change. The evidence was overwhelming that Cole murdered John Edwards. There is no scintilla of doubt the verdict of guilt would change. The aggravating factors of prior felony, during the course of a kidnaping, pecuniary gain, and heinous, atrocious, or cruel apply to the murder of **John Edwards** and Cole has failed to explain how the rape of Pam Edwards by Paul would weaken any aggravating factor.

DNA testing of the type requested in this case does not create a reasonable probability of a different result at trial. Accordingly, the trial court's order denying such testing must be affirmed. See § 925.11(2)(f), *Fla. Stat.* (2002); *Fla. R.Crim. P.* 3.853; *Tompkins v. State*, 28 Fla. L. Weekly S767 (Fla. Oct. 9, 2003)(even if DNA analysis indicated a source other than victim or defendant, there is no reasonable probability that defendant would have been acquitted or received a life sentence); *King v. State*, 808 So. 2d 1237, 1247-49 (Fla. 2002) (affirming trial court's denial of defendant's motion for mitochondrial DNA testing, where trial court found that even if test showed that hair found on victim's body did not come from

victim or defendant, there was no reasonable probability that defendant would have been acquitted or have received a life sentence).

II.

WHETHER DENIAL OF COLE'S MOTION FOR DNA TESTING VIOLATED HIS RIGHT TO HABEAS CORPUS IN VIOLATION OF THE UNITED STATES AND FLORIDA CONSTITUTIONS? (STATED BY APPELLEE)

Cole clearly pursued his claim for DNA testing below under Florida Statute and criminal procedure rules. Cole's argument was not based upon an assertion that he has a constitutional right to DNA testing in this case. Nor did Cole claim below that he was seeking habeas corpus relief. Consequently, this issue has not been preserved for review on appeal. See §924.051 (1)(b), *Fla. Stat.* (1996) ("Preserved' means that an issue, legal argument, or objection to evidence was **timely raised before, and ruled on by, the trial court**, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor."); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) ("except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court.").

Under the same circumstances in *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004), this Court declined to discuss assertions that the circuit court's rejection of DNA testing violated the constitution or Hitchcock's right to habeas relief. This Court

stated: "Additionally, Hitchcock raised before this Court a constitutional argument that the circuit court's denial of his motion violated his right to habeas corpus relief. We conclude, as the State correctly noted, that this argument was not preserved because Hitchcock did not claim a constitutional right to DNA testing before the circuit court below." *Hitchcock* at 28, n. 3. This Court should similarly find that the issue is not preserved for appeal here.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that this Honorable Court affirm the order of the trial court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Leslie Anne Scalley**, Assistant CCRC, and **Marie-Louise Samuels Parmer**, Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this _____ day of April, 2004.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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