

ENTERED

DEC 1 2005

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
22ND JUDICIAL CIRCUIT

RODNEY LINCOLN,)
)
Movant/Defendant,)
)
vs.)
)
STATE OF MISSOURI,)
)
Respondent.)

Cause No. 821-2021

Division 22

FILED
DEC - 1 2005
MARIANO V. FAVAZZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY

**SUGGESTIONS IN OPPOSITION TO
MOTION TO DISMISS**

Comes now Movant and in opposition to Respondent's motion to dismiss alleges and states that:

1. Post-conviction DNA testing is available to Movant to the extent he has complied with the pleading provisions of 547.035. The statute provides that the court should afford Movant a hearing on the allegations in the (amended) motion unless after an examination of the motion, files and records of the case it is "conclusively shown" that Movant is not entitled to relief. Movant respectfully suggests that the Motion to Dismiss filed by Respondent does not in any way "conclusively show" that Movant is not entitled to relief.

2. The Respondent identifies only one area in which there is any reasonable dispute regarding Movant's compliance with this statute. Respondent suggests that "DNA testing in the present case would not be relevant to establishing a claim of

innocence.” In essence, the state is arguing that an examination of the motion, files and records of the case conclusively show that there is no “reasonable probability . . . that the Movant would not have been convicted if . . . exculpatory results were obtained” from the requested DNA testing. In making this argument, the Respondent urges the Court to dismiss the amended motion for DNA testing without a hearing. Movant suggests that, at the very least, an evidentiary hearing must be held to give the court an opportunity to fully develop the factual issues regarding this element of the statute.

3. The jury that convicted Movant heard that a pubic hair consistent with Movant’s pubic hair was found on a blanket in the bedroom where a young girl was sexually assaulted, suffered life-threatening physical injuries and was left for dead by her attacker. The state carefully presented evidence with the intention of excluding dozens of other men who had an opportunity to be present in that home, but not necessarily in that bedroom. DNA testing of the hair might exclude Rodney Lincoln as the source of the pubic hair. The first jury that heard this evidence could not reach a unanimous verdict. Can this court, without an evidentiary hearing, say that if the jury that convicted Movant had heard that DNA testing proved that none of Movant’s pubic hair was in that bedroom or in that home, but someone else’s was, that there is no reasonable probability that Movant would not have been convicted? Can it be said, on the basis of the pleadings before the Court alone, that the State has conclusively shown

that no juror would have found there to be reasonable doubt about Movant's guilt if someone's pubic hair other than his, or the victim's, or the other occupants of the home was found on a blanket just inches away from where the girl was sexually attacked? If not, a hearing on these issues must be ordered. Similarly, what if the results of the DNA testing show that the pubic hair was not Movant's, and with further testing, it was determined that the hair found on the blanket matched pubic hair seized from other suspects? That result is possible and clearly exonerating.

4. With respect to the hair located near the perineum, the same argument applies. A hair found in that location following the events of that evening is likely to have been deposited there by the perpetrator of a sexual assault. If DNA testing establishes that it belongs to someone other than the Movant, such results would be a powerful inducement of reasonable doubt about Movant's guilt in the minds of the jurors. Can it be said, on the basis of the pleadings before the Court alone, that the State has conclusively shown that no juror would have found there to be reasonable doubt about Movant's guilt if someone's pubic hair other than his, or the victim's, or the other occupants of the home was found in the sub-pubic region of the body of a girl who was sexually attacked? Movant respectfully suggests that such evidence would be highly exonerating.

5. With respect to the vaginal smear (Q23e), anal smear (Q23g), and rectal swab (Q23a), the Movant argues that the state has failed to conduct testing sensitive enough to determine the presence of semen in these samples. It is not sufficient for the state to assert that it has looked for semen and not found any in order to defeat this motion. Short of an evidentiary hearing on these issues, involving competing expert witnesses, the state cannot conclusively show that these samples do not contain any trace of semen. The Movant suggests that a hearing of this type must be held on this issue in order for the court to make an informed decision on the advisability of DNA testing of the samples.

Conclusion

In short, the state has in its possession incriminating evidence that was left at the crime scene that it knows contains identifying human DNA. The state does not want anyone doing any DNA testing to make a positive identification of who left that biological evidence there. The Movant does want it tested and urges this Court to find that the State has not conclusively showed that there is some reason not to identify who left that evidence at that horrible crime scene.

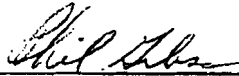


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was faxed to Ed Postawko, Assistant Circuit Attorney, 1210 Tucker, St. Louis, MO 64136, on this 25th day of November, 2005.



Attorney for Movant