

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual and Procedural Background

One morning in December of 1991, the owner of the CBS Lounge in Phoenix found Kim Ancona's nude body in the men's room of the lounge.¹ Ms. Ancona had suffered a fatal stab wound to the back, non-fatal knife wounds to her neck, bite wounds to her breast, and other injuries, including a contusion and laceration to her vaginal area. Ms. Ancona's shoes and pants had been removed, and her blouse, tank top and underclothes had been cut off. Cuts in Ms. Ancona's clothing indicated that she had been stabbed in the back before her clothing was removed.

A friend of Ms. Ancona's had offered to help her close the bar on the night she was murdered, but Ms. Ancona declined, stating that "Ray," whom the witness presumed to be Petitioner/Defendant Ray Milton Krone, was going to help her close the bar that night.

When police first questioned Defendant, he stated that he only knew Ms. Ancona from the bar. Several witnesses contradicted this statement, however, telling police that Defendant and the victim had a "budding romance." Later, when confronted with the inconsistencies between his statement and the statements of other witnesses, Defendant admitted that he had been out with the victim on Christmas night.

At trial, the State presented expert testimony that Defendant's teeth matched the bite mark injury to the victim's breast. Defendant presented expert testimony to the contrary. The jury also heard evidence that a "mixed" substance found on the victim's bra had yielded DNA results which could not rule out Defendant as a contributor. Footprints

¹For a fuller accounting of the facts, see *State v. Krone*, 7/2/98 Memorandum Decision.

found at the crime scene were made by someone wearing shoes of approximately the same size as those worn by Defendant.

After a jury convicted of First Degree Murder and Kidnapping, the Court sentenced Krone to life imprisonment with parole eligibility after twenty-five years for the murder conviction, and to a consecutive sentence of twenty-one years imprisonment for the Kidnapping conviction.

Defendant appealed, and the Arizona Court of Appeals affirmed his convictions and sentences. Defendant then filed a Notice of Post-Conviction Relief, followed by an Application for DNA Testing pursuant to A.R.S. § 13-4240.

II. Argument

Defendant requests this Court to order DNA testing of the biological evidence gathered in this case, specifically samples from the victim's bra, the victim's jeans, a beer bottle, a bar glass, and a "glob" from the men's room floor where the victim was found. According to Defendant, newer DNA testing methods might yield more conclusive results than those originally obtained in this case.

a. Requirements of A.R.S. § 13-4240

A.R.S. § 13-4240 provides that in certain instances, a court may order that evidence retained post-conviction be subjected to DNA testing:

A. At any time, a person who was convicted of and sentenced for a felony offense and who meets the requirements of this section may request the forensic deoxyribonucleic acid testing of any evidence that is in the possession or control of the court or the state, that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence.

A.R.S. § 13-4240(A).

Before the court is required to order such testing, it must make several findings:

1. A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through deoxyribonucleic acid testing.
2. The evidence is still in existence and is in a condition that allows deoxyribonucleic acid testing to be conducted.
3. The evidence was not previously subjected to deoxyribonucleic acid testing or was not subjected to the testing that is now requested and that my resolve an issue not previously resolved by the previous testing.

A.R.S. § 13-4240(B).

If the Court orders testing pursuant to subsection B, the Court must also order "the method and responsibility for payment." A.R.S. § 13-4240(D).

b. Reasonable Probability

This Court must first determine whether there is a reasonable probability that Defendant would not have been prosecuted or convicted if DNA testing had yielded exculpatory results.

When determining whether such a reasonable probability exists, the court should consider several factors:

With biological evidence, courts have generally found post-conviction testing most suitable when (a) identity of a single perpetrator is at issue; (b) evidence against the defendant is so weak as to suggest real doubt of guilt; (c) the scientific evidence, if any, used to obtain the conviction has been impugned; and (d) the nature of the biological evidence makes testing results on the issue of identity virtually dispositive.

Jenner v. Dooley, 590 N.W.2d 463, 472.

Here, the evidence produced at trial does not suggest "real doubt of guilt." Instead, the evidence strongly supports the jury's finding of guilt. That evidence included testimony

that Defendant's teeth matched the bite wound to the victim's breast, the victim's statement that Ray was helping her close the bar on the night of her murder, Defendant's inconsistent statements to the police, and beads found on the victim that matched beads found in Defendant's car.²

Moreover, none of the scientific evidence used to obtain the conviction has been impugned or questioned. None of the scientific methods used to analyze the evidence in this case have been found invalid or unreliable.

Finally, the nature of the evidence cited by does not "make testing results on the issue of identity virtually dispositive." *Jenner v. Dooley*, 590 N.W.2d at 472. While Defendant claims that additional DNA testing "might" change Dr. Rawson's opinion that Defendant inflicted the bite wound to the victim, the letter written by Dr. Rawson to which Defendant refers shows only that Dr. Rawson believed that DNA testing might confirm his already formed opinion that Defendant bit the victim. It does not establish that Dr. Rawson is likely to change his opinion that "the teeth represented to me as belonging to Ray Krone did cause the injuries on the left breast of Kim Ancona." See March 19, 1996 Reporter's Transcript of Proceedings at 82.

c. Condition of Evidence

Defendant also fails to establish that the evidence cited is in a condition which would allow for DNA testing. While Defendant avows that the evidence is still available for testing, he has not established that the available evidence is suitable for DNA testing. Testimony at trial established that the DNA testing utilized in this case was "destructive testing" which consumed the material tested. See March 13, 1996 Reporter's Transcript of Proceedings

²See Memorandum Decision; March 5, 1996 Reporter's Transcript of Proceedings at 56-57.

at 34-35. Thus, while the victim's garments may still be available, the portions of those garments which yielded biological evidence may not be. Moreover, Defendant fails to establish that the items to be tested have been stored in a manner which would render them suitable for further DNA testing.

Before this Court enters an order for additional testing, Defendant is obligated to show that the material to be tested is available, and is in a suitable condition for testing. He has not done so here.

III. Conclusion

Defendant has failed to show that DNA testing of the cited evidence would have a reasonable probability of yielding exculpatory evidence which would have changed the verdict at trial, nor has he demonstrated that the evidence which he claims should be tested is in a suitable condition for such testing. Therefore, the State requests that this Court deny his motion for DNA testing.

Submitted March 23rd, 2001.


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BY 
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Copy of the foregoing
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23rd day of March 2001,
to:

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