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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

BLAIR SHELTON,
Plaintiff,

Case No. 95-1994 NZ

vs.

Hon. Kurtis T. Wilder

THE POLICE DEPARTMENT OF THE CITY
OF ANN ARBOR; THE CITY OF ANN ARBOR;
and DETECTIVE MICK SCHUBRING,

Defendants.

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NATIONAL LAWYERS GUILD
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PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT
AND AN INJUNCTION ORDERING THE RETURN OF
PLAINTIFF'S BLOOD SAMPLE AND DNA RECORDS

Plaintiff, Blair Shelton, by counsel, moves this Court,
pursuant to MCR 2.605 and MCR 3.310(H), to issue a declaratory
judgment and an injunction ordering Defendants to return
plaintiff's blood sample and DNA records for the following reasons:

1. On or about March 31, 1995, Plaintiff Blair Shelton filed a verified complaint against Defendants for the manner in which they conducted the Ann Arbor serial rapist investigation, and on November 9, 1995, he filed his first amended complaint (see First Amended Complaint, attached to accompanying brief as Exhibit A).

2. Defendants' description of the suspected rapist during the serial rapist investigation, although it varied from time to time, was essentially a black man, between 5'7" and 6'2", and between 25 and 35 years old.

3. Plaintiff, who is African-American, alleged that Defendants used this vague description to randomly stop African-American men in Ann Arbor and to intimidate or coerce them into giving blood samples for DNA testing.

4. Plaintiff alleged in his complaint that he was randomly stopped by Defendants in public places without reasonable suspicion at least eight times between October and December, 1994, as part of the investigation;

5. Plaintiff also alleged that he lost his job when a detective came to his place of employment and indicated to Plaintiff's manager that Plaintiff was a suspect in the serial rapist investigation.

6. Plaintiff further alleged that on October 28, 199'4, he was unlawfully coerced, intimidated and deceived into giving blood for DNA analysis.

7. The DNA profile developed from Plaintiff's blood did not match the DNA of the semen collected from the rape victims and

1 i -therefore Defendants excluded Plaintiff as a suspect.

8. Part of the relief sought by Plaintiff in his lawsuit is the return of his blood sample and DNA records.

9. The Michigan DNA Identification Profiling System Act provides that DNA identification profiles collected during a criminal investigation "shall be retained only as long as it is needed for a criminal investigation or criminal prosecution." MCL 28.176; MSA 4.484(6).

10. Plaintiff's blood sample and DNA records are no longer needed for the criminal investigation of the Ann Arbor serial rapist.

11. Defendants excluded Plaintiff as a suspect in the serial rapist investigation based on the analysis of his blood and DNA profile.

12. In June, 1995, a unanimous Washtenaw County jury found a man named Ervin Mitchell, Jr. guilty beyond a reasonable doubt of committing the series of rapes and one rape/murder in Ann Arbor.

13. Evidence was presented at Ervin Mitchell's trial that Ervin Mitchell's DNA matched the DNA of the semen collected from the rape victims and that there was only a one in two trillion chance that another African-American would have the same genetic markings.

14. Plaintiff's blood sample and DNA records are no longer needed for the prosecution of the Ann Arbor serial rapist case.

15. Neither Plaintiff's blood or Plaintiff's DNA analysis were introduced as evidence or even mentioned at Ervin Mitchell's

- trial.

16. Plaintiff's blood sample and DNA records have no apparent or obvious exculpatory value for Ervin Mitchell, and therefore Ervin Mitchell has no constitutional right to have them preserved. See California v Trombetta, 467 US 479, 488-489 (1987); People v Stoney, 157 Mich App 721, 727 (1987).

17. Plaintiff's blood sample and DNA records are currently being held for the Ann Arbor Police Department and/or the City of Ann Arbor by the Michigan State Police.

18. Upon information and belief, the Michigan State Police is waiting for instructions from the Ann Arbor Police Department and/or City of Ann Arbor on what to do with blood samples and DNA records of the approximately 160 innocent African-American men from whom blood was taken as part of the serial rapist investigation.

19. In July, 1995, a public hearing was held before the Ann Arbor City Council where dozens of Ann Arbor residents urged the City to immediately return the blood and DNA records of the approximately 160 innocent African-American men. Following the public hearing, the City Council passed a resolution ordering the Police Chief to devise a plan for returning or destroying the blood samples and DNA records.

20. Upon information and belief, the City, the Police Chief and the Washtenaw County Prosecutor would like to return the blood samples and DNA records to the 160 innocent African-American men, but are reluctant to do so on their own without guidance from this Court.

I -. -I- 21. The failure to return or destroy the blood samples and DNA records of the 160 innocent African-American men has led many Washtenaw County residents -- particularly among the African-American 'community -- to distrust the police (see Ann Arbor News articles, attached to accompanying brief as Exhibit B).

22. Under the DNA Identification Profile System Act, Plaintiff is entitled to have his blood sample and DNA records returned.

23. A copy of this motion has been served upon not only Defendants, but also the Michigan State Police (through the Attorney General's office), the Washtenaw County Prosecutor, and Ervin Mitchell, Jr. (through his attorney) so that they may have the opportunity to intervene in this matter if they so choose.

WHEREFORE, for the reasons stated above and in the attached brief, Plaintiff respectfully requests that this Honorable Court: (1) enter a declaratory judgment declaring Plaintiff's right to the return of his blood sample, DNA profile, and all other police records compiled on him in connection with the Ann Arbor serial rapist investigation; and (2) issue an injunction ordering Defendants to return such items to Plaintiff immediately.

Respectfully submitted,

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Dated: 11/13/95

STATE OF MICHIGAN

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THE POLICE DEPARTMENT OF THE CITY
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Hon. Kurtis T. Wilder

Defendants.

**BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT
AND AN INJUNCTION ORDERING THE RETURN OF
PLAINTIFF'S BLOOD SAMPLE AND DNA RECORDS**

STATEMENT OF FACTS

Plaintiff Blair Shelton is a thirty-seven-year-old lifetime resident of Washtenaw County. He owns a home in Ann Arbor and, with the exception of one short period, has been continuously employed for the last twenty years -- often working more than one job at a time. He has no criminal record. (See First Amended Complaint, attached as Exhibit A, nfi, 1-3).

Shelton filed this lawsuit against Defendants Police Department of the City of Ann Arbor, City of Ann Arbor, and Detective Mick Schubring for the manner in which they conducted the Ann Arbor serial rapist investigation. Shelton seeks both compensation for the damages he suffered as well as declaratory and

'Plaintiff's original complaint, which contained the same factual allegations as the First Amended Complaint, is a verified complaint and thus is tantamount to an affidavit supporting this motion. The amended complaint added Counts VIII and IX.

injunctive relief. The present motion addresses solely the declaratory and injunctive relief aspects of the case regarding the return of Shelton's blood sample and DNA records.

From 1992 to 1994, a serial rapist sexually assaulted several women and killed one woman in Ann Arbor. During the police investigation of these crimes, defendants only had a very vague physical description of the suspect. While varying from time to time, defendants' general description of the suspect was a black male, between 5'7" and 6'2" tall, and between 25 and 35 years old. Although the physical description of the rapist was vague, defendants knew the precise genetic markings of the serial rapist through DNA testing of semen collected from the victims. (Exhibit A, ¶¶ 6-7.)

Shelton alleges in his lawsuit that during the investigation defendants embarked on a policy of randomly stopping and harassing African-American men and intimidating or coercing them into give blood for DNA testing (Exhibit A, 11 73, 78). Shelton, who is African-American, further alleges that he was a victim of this policy in at least three respects.

First, Shelton lost one of his jobs when Defendant Detective Mick Schubring came to the store where Shelton worked and indicated to the management that Shelton was a suspect in the serial rapist investigation. Defendant Schubring went to the store based on an anonymous tip from a person who stated that, although she or he did not think that plaintiff was the rapist, plaintiff fit the physical

"description."² (Exhibit A, Fiji 14-21, 47-51.)

Second, Detective Schubring intimidated, coerced and deceived Shelton into giving a blood sample for DNA testing. Detective Schubring told Shelton that the only way he could clear himself as being a suspect was to give blood. After Shelton said that he did not want to give blood, Detective Schubring threatened to obtain a search warrant to extract a blood sample even though Schubring lacked probable cause to obtain a search warrant. Based on the duress he was under, and based on the false representation by Schubring about the search warrant, Shelton eventually submitted to having blood drawn. The DNA testing of the blood, of course, excluded Shelton as a suspect in the case. (Exhibit A, nq 24-33.)

Third, Shelton was randomly stopped and questioned on eight separate occasions by Ann Arbor police officers in public places over a two month period in late 1994. He was stopped while he was: boarding a bus; in a bagel shop; going into and coming out of stores; in line for the movies; jogging in the park in the morning; on his way to work; and waiting at a bus stop. The officers did not have reasonable, articulable suspicion to believe that plaintiff had been, or was about to become, involved in criminal activity for any of these stops, The officers would cease questioning Shelton and give him permission to leave when he showed

²It should be noted that a \$100,000.00 reward was offered for a tip leading to the arrest and conviction of the rapist. A system was set up whereby a person could give an anonymous tip and still collect the reward. As a result of the large reward, the ability to give anonymous tips, and a general fear of the rapist, among other factors, the police obtained over 1000 tips identifying over 730 African-American men in Ann Arbor as potential suspects.

c - them the papers proving that he had already given blood for DNA testing. (Exhibit A, 3% 39-46, 52-60).

In December, 1994, the Ann Arbor police arrested a man named Erwin Mitchell, Jr. In June, 1995, Mitchell was convicted as being the Ann Arbor serial rapist. Evidence was presented at trial that Ervin Mitchell's DNA matched the DNA found in the semen collected from the rape victims. Additionally, there was evidence presented that there was- only a one in two trillion chance that another African-American would have the same genetic markings. Plaintiff's blood and DNA records were not introduced or even mentioned in Mitchell's trial, nor were the blood and DNA records of approximately 159 other African-American men who were excluded as suspects through DNA testing. (Exhibit A, ql 127-130.)

Shelton has asked for the return of his blood and all records associated with the testing of the blood. Defendants, through resolutions and public pronouncements, have indicated that they would like to return the blood samples and DNA records to the innocent men such as plaintiff. However, as of this date, neither the blood nor any records have been returned. Upon information and belief, defendants would like guidance and direction from this Court.

As set forth below, Blair Shelton is entitled by state law to the immediate return of his blood and DNA records.

ARGUMENT

- I. PLAINTIFF IS ENTITLED TO THE RETURN OF HIS BLOOD SAMPLE AND DNA RECORDS UNDER THE MICHIGAN DNA IDENTIFICATION PROFILING SYSTEM ACT SINCE HIS BLOOD AND DNA RECORDS ARE NO LONGER NEEDED FOR THE CRIMINAL INVESTIGATION OR PROSECUTION OF THE ANN ARBOR SERIAL RAPIST.

The Michigan Legislature enacted the DNA Identification Profiling System. Act to regulate the retention of DNA identification profiles. MCL 28.171 et seq.; MSA 4.484.³ The act requires that the Michigan State Police permanently retain the DNA profile of a person that is convicted of criminal sexual assault. The statute further provides that:

Any other DNA identification profile obtained by the department shall not be permanently retained by the department but shall -be retained only as long as it is needed for a criminal investigation or criminal prosecution. [MCL 28.176; MSA 4.484(6) (emphasis added).]

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. Gross v General Motors Corp, 448 Mich 147, 158-159 (1995). The first step in ascertaining such intent is to focus on the language of the statute itself. Turner v Auto Club Ins Ass/n, 448 Mich 22, 27 (1995). Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning. MCL 8.3a; MSA 2.212(1); People v Fields 448 Mich 58, 67 (1995).

³ A "DNA identification profile" is defined as the "results of the DNA identification profiling of a blood, saliva, or tissue sample taken from an individual." "DNA identification profiling" is defined as 'Ia valid scientific method of analyzing components of [DNA] molecules for the purpose of identifying the pattern of the components' chemical. structure that is unique to an individual." MCL 28.172; MCL 4.484(2).

-Reference to a dictionary is appropriate to ascertain what the ordinary meaning of a word is. Id. I Pompa v Auto Club Ins Ass'n, 446 Mich 460, 470 (1994).

As noted above, under state law, a person's DNA profile may not be retained unless it is needed for a criminal investigation or prosecution. The word "needed" is defined in Black's Law Dictionary (6th ed., p 1031, as, "to have an urgent or essential use for." Similarly, "needed" is defined as "necessary, requisite, essential, indispensable." Id. Thus, in deciding whether the DNA records and blood samples are still needed, this Court must determine whether plaintiff's DNA records and blood sample are essential, required, necessary or indispensable for the investigation or prosecution of the Ann Arbor serial rapist criminal case.

A. Plaintiff's Blood and DNA Records are Not Needed for the Criminal Investigation of the Ann Arbor Serial Rapist.

It is undisputed that Blair Shelton's blood and DNA records are not needed for or essential to the criminal investigation of the serial rapist. There is no doubt in the mind of the police, the prosecution, and now a jury that Ervin Mitchell, Jr. is the serial rapist. Mitchell's DNA matched the DNA of the semen collected from the rape victims. Plaintiff's DNA did not. There is no investigatory use for plaintiff's blood or DNA records in the Ann Arbor serial rapist case and, therefore, plaintiff's blood and DNA records are not needed or essential to the investigation.

B. Plaintiff's Blood and DNA Records are Not Needed for the Criminal Prosecution of the Ann Arbor Serial Rapist.

Similarly, plaintiff's blood and DNA records were not, and are not, essential, required, necessary or indispensable to the criminal prosecution. First, the blood samples and DNA records of plaintiff and the other innocent men who "gave" blood during the investigation were never introduced as evidence or even mentioned at Ervin Mitchell, Jr.'s trial. Accordingly, they were not needed by the prosecution to obtain a conviction, and they were not viewed -- for obvious reasons' -- as necessary to Mitchell's defense.

Second, Mitchell has no right to have plaintiff's blood sample or DNA records preserved. The test for whether the prosecution must retain evidence is whether the evidence has apparent or obvious exculpatory value at the time it is destroyed. California v Trombetta 467 US 479, 488-489 (1984); People v Stoney, 157 Mich App 721, 727 (1987). Since plaintiff's blood sample and DNA records have no obvious or apparent exculpatory value, they need not be retained.

The present case is controlled by Trombetta, supra, the leading case on the preservation of potential evidence. In Trombetta, the U.S. Supreme Court addressed the question of whether

⁴Had the jury known that the DNA profile of 160 other potential suspects did not match the DNA of the semen samples) then it would have been more likely, not less likely, to convict Mitchell. With such evidence, the jury would have known both (1) that there was only a one in 2 trillion chance of another black man besides Mitchell having DNA that matched the DNA of the semen collected from the victims, & (2) that 160 black men in the Ann Arbor area that the police believed to be potential suspects could not have been the rapist.

any constitutional rights were violated when law enforcement agencies destroyed the breath samples of suspected drunk drivers before trial. The defendants in Trombetta claimed that if the breath samples had been preserved, they would have been able to impeach the results of the incriminating breath-analysis tests.

In a unanimous decision authored by Justice Thurgood Marshall, the Supreme Court rejected the defendants' argument. The Court first noted that the record contained no allegation of "official animus towards [the defendants] or of a conscious effort to suppress exculpatory evidence." *Id.*, 467 US at 488. The Court then held:

More importantly, California's policy of not preserving breath samples is without constitutional defect. Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality . . . evidence must . . . possess an exculpatory value that was apparent before the evidence was destroyed

Although the preservation of breath samples might conceivably have contributed to respondents' defenses, a dispassionate review of the Intoxilyzer and the California testing procedures can only lead one to conclude that the chances are extremely low that preserved samples would have been exculpatory. . . . In all but a tiny fraction of cases, preserved breath samples would simply confirm the Intoxilyzer's determination that the defendant had a high level of blood-alcohol concentration at the time of the test. Once the Intoxilyzer indicated that respondents were legally drunk, breath samples were much more likely to provide inculpatory than exculpatory evidence. [*Id.*, 467 US at 488-489 (emphasis added and footnote deleted).]

The argument that Mitchell has no right to force defendants to retain plaintiff's blood and DNA records in this case is much stronger than the argument made by the defendants in Trombetta. In

Trombetta, it was the defendants' own breath samples which were destroyed. In the present case, plaintiff does not seek the destruction of Mitchell's blood sample or DNA records.⁵ Rather, all that is sought is the return of a blood sample of a man who was excluded by DNA testing as a potential suspect. Additionally, .in Trombetta, the breath samples were destroyed before trial and before the defendant even had a chance to request access to them. In the present case, plaintiff seeks the return of his blood sample and DNA records after trial.

Given the test for the destruction of evidence articulated in California v Trombetta, any potential argument by Mitchell that the return of plaintiff's blood or DNA records somehow violated his rights would be frivolous. Under Trombetta, the return or destruction of evidence is only prohibited if the evidence might be expected to play "a significant role in the suspect's defense." 467 US at 480-489. If the chances of the evidence being exculpatory are extremely low then the police are not required to retain it. a. In the present case, plaintiff's blood and DNA records, like the breath samples in Trombetta, are "much more likely to provide inculpatory than exculpatory evidence" because they tend to show that another person considered by the police as a potential suspect was cleared by the testing. Trombetta, 467 US - at 489. Accordingly, Mitchell has no right to force defendants to retain the evidence. Id. ; also see People v Stoney, 157 Mich App

!jIn fact, under state law, since Mitchell was convicted of criminal sexual assault, his profile cannot be destroyed. MCL 28.176; MSA 4.484(6).

721, 727 (1987) (Destruction of the defendant's blood sample before trial did not constitute a constitutional violation where it was not obviously exculpatory^I and where it was "highly unlikely that an independent expert could obtain exculpatory results from the blood sample if it had been saved.")

In short, given that plaintiff's blood sample and DNA records were not introduced in the Ann Arbor serial rapist trial, and given that Ervin Mitchell has no constitutional right to have these materials preserved, they are no longer "needed for a criminal investigation or criminal prosecution^B within the meaning of the DNA Profiling Act. MCL 28.176; MSA 4.484(6)., Therefore, pursuant to state law, they may not be retained.

C. The Court may: Issue a Permanent Injunction and a Declaratory Judgment in this Pending Action.

The Michigan Court Rules specifically provide that the trial court may issue a permanent injunction in an action such as this case prior to final judgment. MCR 3.310(H) states:

(H) Motion for Injunction in Pending Actions. An injunction may also be granted before or in connection with a final judgment on a motion filed after an action is commenced.

Also see 4 Martin, Dean + Webster, Michigan Court Rules and Practice (3d ed), Rule 31310, Authors' Comment, p 490 ("an injunctive order, either preliminary or permanent, may be obtained by application and motion in connection with a pending action.")

Similarly MCR 2.605 vests power in the trial court to declare the rights of a party in an ongoing case, whether or not another remedy is available:

(A) Power to Enter Declaratory Judgment.

(1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

f* * *

(F) Other Relief. Further necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against a party whose rights have been determined by the declaratory judgment. [MCR 2.605.1

The granting of injunctive and declaratory relief is within the sound discretion of the court, and the decision must be based on the facts of the particular case.' Soergel v Preston, 141 Mich APP 585, 590 (1985) (injunctive relief); Allstate Ins Co v Hayes, 442 Mich 56, 74 (1993) (declaratory relief). Although questions of fact remain regarding the damages portion of plaintiff's lawsuit, there seems to be no material dispute over the critical facts relevant to the injunctive and declaratory relief sought' by plaintiff. Rather, the question of whether the blood sample and DNA records are still "needed for a criminal investigation or criminal prosecution" within the meaning of MCL 28.176, is a question of law that should be determined now.

All individuals or organizations that could possibly have an interest in this issue have been served with a copy of this motion and brief -- including the Washtenaw County Prosecutor, the State Police (through the Attorney General's office), and Ervin Mitchell, Jr. (through his attorney). They have the opportunity to intervene in the case and file briefs either concurring with or opposing the relief sought.

Over a year has passed since blood was extracted from Blair Shelton's arm for DNA testing in connection with the serial rapist investigation. Approximately, five months have passed since Ervin Mitchell was convicted. There is no need to delay the return of the blood and the DNA records any longer.

CONCLUSION

For the reasons stated: above and ,in Plaintiff's Motion, Plaintiff respectfully requests that this Honorable Court: (1) enter a declaratory judgment! declaring Plaintiff's right to the return of his blood sample,! DNA profile, and all other police records compiled on him in connection with the Ann Arbor serial rapist -investigation; and ~ (2) issue an injunction ordering Defendants to return such items to Plaintiff immediately.

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