

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO)	CASE NO. CR 12 567674
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	
)	
AARON FREEZE)	<u>JOURNAL ENTRY</u>
)	
Defendant.)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Aaron Freeze was indicted on October 16, 2012. He is charged with a single count of felonious assault allegedly committed on July 14, 2011.

At his July 11, 2013, arraignment the defendant was deemed indigent and counsel was assigned to represent him at the state's expense. On July 25 the trial was scheduled for September 24. On August 26 the defendant filed a "motion for independent DNA test and authorization of funds with order to preserve sample." The plaintiff has not opposed the motion and this entry follows.

STATEMENT OF THE FACTS

The motion, and the record, are devoid of evidence. However, a handwritten Cleveland police "case information form" attached to the indictment describes the crime as follows:

On July 14, 2011, at 4704 Bragdon victim was attacked by several males after exiting his vehicle. Victim sustained severe injuries and confined to the hospital. Blood found at the scene of the incident was collected on 7-15-11 which DNA matched to Aaron Freeze.

The form was completed on September 12, 2012. The passage of more than a year from the crime to the preparation of the case information form suggests that it took that long before the DNA match was made, whereupon the indictment was sought. In his motion, Freeze confirms this inference by summarizing the evidence as “a Codis sample (*sic*) is alleged to be a DNA match to that of the defendant.”¹

The defendant is equally terse in describing the reasons justifying the appointment of an expert witness at the state’s expense. For a factual basis, he argues that the independent test should be done “in order to show that any DNA present when this incident occurred was not that of the defendant.”² Freeze goes on to describe the test he is seeking as “conclusive”³ and says that “it will raise more then (*sic*) a reasonable doubt as to defendant’s guilt.”⁴ Finally, although he asks that DNA Diagnostics Center⁵ be appointed as an expert, he provides no evidence about the expert’s qualifications or the kind and quality of the test he expects the expert to perform. As his legal basis for the motion, Freeze asserts that he will be denied the opportunity to meaningfully participate in this judicial proceeding if an expert is not appointed because “the ability of defense counsel to provide effective legal assistance is highly dependent on the availability of assistance in trial preparation and also with trial presentation.”⁶

LAW AND ANALYSIS

The United States Supreme Court recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the state proceeds against an indigent defendant

¹ Defendant’s unpaginated motion, second page. His reference to “Codis” appears to mean CODIS: the Combined DNA Index System managed by the Federal Bureau of Investigation.

² *Id.*

³ *Id.*, third page.

⁴ *Id.*

⁵ Also referred to in the motion as DNA Diagnostic Center. I do not know which name is correct.

⁶ Motion, third page.

without making certain that he has access to the raw materials integral to the building of an effective defense. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). But the Supreme Court has also said that the duty of the state is not to buy the same defense that a wealthy defendant may have, but only to assure the indigent defendant an adequate opportunity to present his claims fairly. *Ross v. Moffitt*, 417 U.S. 600, 616 (1974).

Therefore, in deciding an indigent defendant's claim to an entitlement to expert assistance at the state's expense a court should examine three factors: (1) the effect on the defendant's private interest in the accuracy of the trial if the requested service is not provided, (2) the burden on the government's interest if the service is provided and (3) the probable value of the additional service and the risk of error in the proceeding if the assistance is not provided. *Ake*, supra, 78-79. But none of these things can be meaningfully considered without reference to evidence and the state is not required to supply an indigent defendant with an expert upon mere demand. *State v. Mason*, 82 Ohio St. 3d 144, 150 (1998). Instead, constitutional guarantees of due process require that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense and (2) that denial of the requested expert assistance would result in an unfair trial. *Id.*, at syllabus. Undeveloped assertions that the proposed assistance would be useful to the defense are patently inadequate. *State v. Yancy*, 8th Dist. Nos. 96527 and 96528, 2011-Ohio-6274, ¶29.

Freeze has not provided any evidence, making it impossible to find either that there is a reasonable probability that the requested expert would aid in his defense or that denial of the requested expert assistance would result in an unfair trial. What biological material was collected and tested? Where was it found? Who tested it? What was it compared against?

What evidence that might have DNA was not tested? What expert witness is the state expected to call at trial? Will that expert's testimony inculpate Freeze? How much material is left that Freeze's expert could test? What is the weight of the non-DNA evidence against Freeze? These and every other question relevant to whether the proposed expert assistance would aid in Freeze's defense and whether denying that assistance would result in an unfair trial are left unanswered.

CONCLUSION

Because I cannot determine that there is a reasonable probability that the appointment of DNA Diagnostics Center as an expert at the state's expense would aid in Freeze's defense or that denial of the proposed expert assistance would result in an unfair trial, the defendant's August 26, 2013, motion is denied.⁷

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: _____

⁷ The motion is also denied on the independent basis that it is untimely under Rule 12(D) of the Ohio Rules of Criminal Procedure.

SERVICE

A copy of this journal entry was sent by email, this _____ day of September 2013, to
the following:

John Hirschauer, Esq.
jhirschauer@prosecutor.cuyahogacounty.us
Assistant prosecuting attorney for the State of Ohio

Vicki Lynn Ward, Esq.
VICKIWARD04@YAHOO.COM
Attorney for defendant Freeze

Judge John P. O'Donnell