

[Cite as *State v. Bolling*, 2009-Ohio-4400.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 22880
Plaintiff-Appellee	:	
	:	Trial Court Case No. 03-CR-73
v.	:	
	:	(Criminal Appeal from
ANTHONY K. BOLLING	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 28th day of August, 2009.

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ANTHONY K. BOLLING, Inmate #458-436, Lebanon Correctional Institution, P.O.
Box 56, Lebanon, Ohio 45036-0056
Defendant-Appellant, *pro se*

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FAIN, J.

{¶ 1} Defendant-appellant Anthony K. Bolling appeals from an order of the
Common Pleas Court of Montgomery County overruling his “Motion for Order

Granting Access to Evidence for Expert Forensic Analysis,” in which Bolling sought leave to obtain access to audiotapes presented by the State at his criminal trial. Bolling contends that he presented a justiciable claim upon which the trial court should have relied in determining that he should be permitted access to the tapes pursuant to R.C. 149.43 – the Public Records Act.

{¶ 2} We conclude that Bolling is precluded from seeking these records under R.C. 149.43, by reason of the holding in *State ex rel. Sawyer v. Cuyahoga Cty. Dept. Of Children & Family Servs.*, 110 Ohio St. 3d 343, 2006-Ohio-4574.

{¶ 3} Accordingly, the order of the trial court from which this appeal is taken is Affirmed.

I

{¶ 4} In 2003, Bolling was convicted on four counts of Rape of a Child Under Thirteen and one count of Felonious Sexual Penetration. Bolling appealed his conviction and sentence to this court. We affirmed. *State v. Bolling*, Montgomery App. No. 20225, 2005-Ohio-2509. Bolling appealed our decision to the Supreme Court of Ohio, which dismissed the appeal. See *In re Ohio Criminal Sentencing Statute Cases*, 109 Ohio St. 3d 313, 2006-Ohio-2109, ¶¶174, 179.

{¶ 5} In 2006 Bolling moved for a new trial, based upon a claim of newly discovered evidence. The trial court overruled the motion, and we affirmed. *State v. Bolling*, Montgomery App. No. 21874, 2007-Ohio-5976.

{¶ 6} Thereafter, Bolling filed a motion to preserve an audiotape, as well as an enhanced copy of the audiotape, both of which were submitted at his trial. The

tapes are a recording of telephone conversations between Bolling and his victim following the instigation of an investigation of the child's allegations. In the tapes, Bolling is heard apologizing for his conduct and also attempting to convince the witness not to pursue the matter. The State did not oppose the motion, which was sustained by the trial court.

{¶ 7} Bolling concurrently filed a motion in which he cited R.C. 149.43 as the basis for permitting him access to public records – the audiotapes – for the stated purpose of having them examined by a forensic audio analyst. In support of the motion, he stated that the proposed analysis could determine whether portions of the audiotapes had been tampered with – specifically, whether the evidence had been erased or taped over. In other words, Bolling sought access to the tapes in order to determine whether they would reveal, or lead to, exculpatory evidence. Bolling also asserted that “[his trial] counsel failed to request such forensic analysis prior to trial due, presumably, in part to the fact that he was unaware that the complaining witness would partially admit to having created the recording from several conversations. Further, Defendant is personally financially unable to retain the forensic tape analysts and the instant analysis is being funded by family members.”

{¶ 8} The State did oppose this motion, on the basis that Bolling had not presented a “justiciable issue” for review, since the tapes had been available to, and had been provided to, defense counsel before trial. The trial court overruled the motion, stating that it found the State's analysis persuasive. Bolling appeals from the order of the trial court denying his motion.

II

{¶ 9} Bolling's sole assignment of error states as follows:

{¶ 10} "THE TRIAL COURT ERRED AND ABUSED IT DISCRETION IN HOLDING THAT APPELLANT FAILED TO RAISE A JUSTICIABLE CLAIM TO ENTITLE HIM TO ACCESS EVIDENCE FOR EXPERT FORENSIC ANALYSIS."

{¶ 11} Bolling contends that he presented a justiciable claim entitling him to access to the requested evidence. Specifically, he claims that he was unaware, prior to trial, that the victim had erased previous conversations on the tape by recording over them with her own conversation with Bolling. Thus, he contends that he was denied the opportunity to obtain an expert to examine the audiotapes in order to determine whether they had been altered in a manner that made it appear that he had confessed to the crime.

{¶ 12} R.C. 149.43(B)(8) states, "a public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person."

{¶ 13} Although Bolling contends that he presented a justiciable claim, as noted by the State, “[a] defendant in a criminal case who has exhausted the direct appeals of her or his conviction may not avail herself or himself of R.C. 149.43 to support a petition for postconviction relief.” *State ex rel. Sawyer v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 110 Ohio St. 3d 343, 2006-Ohio-4574, ¶ 11, citing *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, paragraph six of the syllabus.

{¶ 14} It is clear from his brief that Bolling essentially seeks the audiotapes to support a post-conviction attempt to exonerate himself. Unfortunately, *State, ex rel. Sawyer v. Cuyahoga Cty. Dept. of Children and Family Servs.*, supra, he is barred from doing so.¹

{¶ 15} Bolling’s sole assignment of error is overruled.

III

{¶ 16} Bolling’s sole assignment of error being overruled, the judgment of the trial court is affirmed.

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DONOVAN, P.J., and BROGAN, J., concur.

Copies mailed to:

Mathias H. Heck
Kirsten A. Brandt
Anthony K. Bolling
Hon. Dennis J. Langer

¹We take no position whether persons other than Bolling might be able to obtain the tapes, or copies of the tapes, or to inspect and copy them, under R.C. 149.43.

