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7/21/55 P.D.

SAY NO TO DR. SAM ON NEW TRIAL

Appeals Judges Blast Hopes 2d Time; Slayer May Go to Ohio Pen Today

BY SANFORD WATZMAN

Dr. Samuel H. Sheppard's hopes for a new trial were again blasted by the Court of Appeals late yesterday, with all three judges frowning on the defendant's "newly discovered evidence."

This second and final ruling by the reviewing court opened the way for Dr. Sam's transfer to Ohio Penitentiary, perhaps today.

"If I get the commitment papers in time," Sheriff Joseph M. Sweeney said last night, "my County Jail deputies might make the trip with him to Columbus tomorrow afternoon."

Year Doesn't Count

Through his brothers, the osteopath has already indicated that he wanted "a little more fresh air" and "some freedom of movement."

When he arrives at the state prison he will officially begin the serving of his life sentence. Although he has spent almost a year in County Jail, that time does not count toward the 10-year minimum which must be served before parole is possible.

"We shall certainly appeal the ruling to the Ohio Supreme Court," Defense Attorney Fred W. Garmone said. "But we will not request another stay of execution of the sentence."

Denied New Trial

Last week the Court of Appeals, also unanimously, turned down Dr. Sam's first bid for a new trial. That was demanded on the grounds of 37 procedural errors allegedly committed at his jury hearing.

The latest opinion was written by Presiding Judge Julius M. Kovachy, with Judges Joy Seth Hurd and Lee E. Skeel concurring.

Employing vigorous language, the judges assailed an affidavit submitted by Dr. Paul L. Kirk of California, whose post-trial investigation formed the basis of the "newly discovered evidence."

At one point Dr. Kirk's document was characterized as "sheer supposition." The "most extraordinary and unusual" paper, the judges said, did indicate that the defense-hired criminologist had an extensive "imagination."

Findings "Interesting"

But they added: "It must be said that (Dr. Kirk's findings) are interesting and no doubt would be of value in a textbook . . . but clearly they would have no probative value in the trial of this case."

This is the way the court viewed the various issues raised by Dr. Kirk, who is professor of criminalistics at the University of California:

1—HIS EXPERIMENTS. "These could not have been admitted in evidence" because they were performed with materials that were not exhibits in the case and under circumstances that did not approximate the occurrences of July 4 last year.

Commenting on one of the Dr. Kirk's 10 laboratory tests, in which he used a wooden block to represent the head of Marilyn Sheppard, the murder victim, the judges said:

"(The head) was simulated by
(Continued on Page 3, Column 2)

DR. SAM LOSES NEW TRIAL PLEA

Hopes Blasted 2d Time, May Go to Pen Today

(Continued From First Page)

a contraption conjured up by Dr. Kirk without any scientific correlation to the original body whatever."

2—THEORY OF THE LEFT-HANDED MURDERER. "The wounds on Marilyn Sheppard's face and head show a vicious attack with great force directed to vital spots," the court observed.

"Because of their character, number and location, the jury may well have concluded that the wielder of the weapon, being impelled by consuming rage and sudden animosity, had a definite purpose to kill, and further that a person so motivated would strike from any direction necessary to accomplish his purpose."

3—DR. SAM'S TESTIMONY. Here, the judges said, Dr. Kirk "gives his own version of the murder from the standpoint of his interpretation of the physical facts, and then adroitly fits in

Kirk Disagrees

Reached for comment at Berkeley, Cal., Dr. Paul L. Kirk said of the Court of Appeals decision: "The judges weren't able to distinguish legal verbiage from simple justice.

"If they knew anything about criminal investigation," Dr. Kirk told the Plain Dealer by telephone, "they'd know they're talking through their hats.

"I'm just as positive as I am of my own name that Dr. Sam didn't do it. I still want a chance to prove my case before a jury, rather than a group of legal minds."

the defendant's story to conform to the same."

4—BLOOD EVIDENCE. In this section of the opinion, the court quoted at length from Dr. Kirk's paper, from a textbook that he wrote earlier, from another scientific work that Dr. Kirk cited as an authority and from a rebuttal affidavit submitted by Dr. Roger W. Marssters, blood specialist at University Hospitals.

The other sources were cited as contradicting the criminologist's assertion that he was able to find, through scientific investigation, the blood of an unknown person in the murder bedroom.

Dr. Kirk had contended that a blood spot on the wardrobe door was not Mrs. Sheppard's because the specimen behaved differently under laboratory analysis when compared to another specimen that was known to have come from her.

Scraped From Door

The strange blood sample used by Dr. Kirk was scraped from the wardrobe door in January and mailed to him in California.

In his own textbook, the judges observed, the criminologist had written: "A test which depends only on testing for agglutinin is to be trusted completely only when the blood is comparatively fresh."

"The weight of the expert opinion," the court continued, "seems to be that such differences (as Dr. Kirk found) may be attributed to factors of contamination.

"It must be remembered that this large blood spot was on the door some eight months during changes of temperature, humidity, and in a room that had had many persons milling about.

"Moreover, it was scraped from a door covered with coats of paint. How much of this paint was removed at the time of the scraping no one knows.

"What bacterial or chemical contamination befell it is not known.

"Fingerprint dusting powder, ultraviolet light, dust, detergent deposits, perspiration or body oils of human origin were present in the room."

The judges continued: "No Court, to our knowledge, has accepted such findings as proof of blood from different persons."

On the subject of whether Dr. Sam was on firm ground in claiming "newly discovered evi-

dence," the judges pointed out that such evidence must be of such a nature, according to law, that it could not have been discovered or produced at the original trial.

Most of Dr. Kirk's efforts, they held, were directed toward issues which had already been thoroughly debated before the jury.

The court also asserted there was conclusive evidence that the murder home had been available to the defense, had it desired to conduct experiments before or during the trial.

If the courts permitted investigators to "reconsider" evidence later, the judges said, such a practice would destroy the "inherent certainty" of a trial by jury, and the jury system would "ultimately disintegrate and disappear."

"Right to Disregard"

"Yet a major part of Dr. Kirk's affidavit deals with evidence presented at the trial and ventures his opinion and conclusions," the opinion went on.

"This, of course, was entirely beyond the scope of (the affidavit), and the trial court had the indisputable right to totally disregard every particle of it, which it did.

"We believe that Dr. Kirk could have spared himself much effort and time had he been told by the attorney for the defendant the narrow scope allowed him under the law for further investigation.