

## **Summary of SC90332, *State of Missouri v. Antoine Terry***

Appeal from the Cole County circuit court, Judge Patricia S. Joyce  
Argued and submitted Jan. 28, 2009; opinion issued Feb. 10, 2010

**Attorneys:** Terry was represented by Kent Denzel of the public defender's office in Columbia, (573) 882-9855, and the state was represented by James B. Farnsworth of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A man was found guilty of statutory rape. At trial, the pregnant girl alleged to be the victim testified that the man was the only person with whom she had sex. DNA testing after sentencing determined that the man was not the father of the girl's child. The man seeks to file a motion for new trial out of time so that newly discovered evidence – the DNA test results – can be considered to conclude that the woman committed perjury and that a new trial is required. A remand to file an out of time new trial motion is permitted under limited circumstances. In a unanimous decision written by Judge Michael A. Wolff, the Supreme Court of Missouri dismisses the appeal and remands (sends back) the case to the trial court because the man's case meets all the elements required to permit such a remand.

**Facts:** Antoine Terry was convicted of first-degree statutory rape in 2008 for an alleged offense that occurred during the summer of 2007, when he was 17 years old and the alleged victim, A.W., was 12 years old. According to trial testimony, Terry met A.W. while he was in Jefferson City visiting his sister. One night in August 2007, A.W. and Terry were at the sister's house; A.W.'s mother called police when A.W. did not return home. A.W. told police Terry attempted to have sexual intercourse with her that night but denied she and Terry had a sexual relationship. According to a detective who interviewed Terry the next day, Terry denied having intercourse with A.W. during the night in question but said that a few days earlier, he had unprotected sex with her and that she was a willing participant. The detective's interview with Terry was not recorded; the detective testified as to his memory of the conversation. Terry, however, denied that he had sex with A.W.; he said he told the detective he "almost" had sex with A.W. a few days before the alleged rape. An examination A.W. underwent the day after the alleged rape revealed injuries indicating she had intercourse in the previous 72 hours. The examination also revealed that A.W. was pregnant. After the examination, A.W. changed her story and told police that she had an ongoing consensual sexual relationship with Terry from May through August 2007, that they had sex more than six times during that time period and that Terry was the only one with whom she had had sex and, therefore, the only one who could have fathered her unborn baby. The prosecutor argued to the jury that the case was not "he said she said" with no corroborating evidence because A.W. was visibly pregnant at trial and testified the only one with whom she had sex had been Terry. The jury convicted Terry, and the court sentenced him to seven years in prison. Between the time of trial and sentencing, A.W. gave birth. A subsequent DNA test shows there is no chance Terry could be the baby's father. Terry appeals his conviction and, based on the newly discovered evidence of the DNA results, asks this Court to remand his case to the trial court to consider a motion for new trial.

## REMAND TO CIRCUIT COURT. APPEAL DISMISSED.

**Court en banc holds:** The unusual circumstances of subsequently obtained DNA evidence in this case – where it appears the conviction is based largely on perjured testimony – cause this Court, in its discretion, to afford the parties and the circuit court an opportunity to consider the evidence in a motion for a new trial. The DNA test result, if verified as accurate, does not exonerate Terry but does cast serious doubt on the validity of his conviction. Generally, this Court will not remand a case before an appeal is concluded if the lone fact of newly discovered evidence is not enough to grant a new trial. But an appellate court has the inherent power, in its discretion, to prevent a miscarriage of justice or manifest injustice by remanding a case to the trial court for consideration of newly discovered evidence presented for the first time on appeal. Here, Terry’s motion for a new trial appears to satisfy each of the four elements necessary to obtain a new trial based on newly discovered evidence. The results of the DNA test did not become known to Terry until several months after trial, and he had no way of determining the paternity during trial because A.W. had not yet given birth. Further, the new evidence casts serious doubt on Terry’s conviction and is material to proving the key element of the crime of statutory rape – that Terry and A.W. had sex because the victim was pregnant and testified that she had sex only with Terry. Finally, although the DNA evidence would impeach A.W.’s testimony, it does not “merely” impeach – it conclusively shows that she perjured herself. Had Terry discovered the results of the DNA test within 15 days of the verdict, he could have filed a timely motion for a new trial based on newly discovered evidence. This Court agrees with *State v. Mooney*, 670 S.W.2d 510, 515-16 (Mo. App. 1984), that an appellate court has the “inherent power to prevent miscarriages of justice” and with *State v. Williams*, 673 S.W.2d 847, 848 (Mo. App. 1894), that it is the appellate court’s responsibility to avoid a “perversion of justice.” Here, A.W.’s testimony about not having sexual relations with anyone besides Terry appears to be false, and the jury had no opportunity to weight the evidence and determine the facts and credibility of the witnesses with the inclusion of the DNA test in evidence. Nor did the prosecutor, defense attorney and trial judge have the benefit of the DNA evidence at the time of the motion for new trial. It is appropriate for this Court to give Terry the relief he requests – a remand to the trial court so he can file a motion for new trial based on newly discovered evidence. If his motion is overruled, he can file a notice of appeal and ask that the appeal in this Court be reinstated.