

FEATURED

Appeals process underway for man twice convicted of rape and murder of Annie McSween

By Andrew Cass ACass@News-Herald.com [@AndrewCassNH on Twitter](#) Jul 4, 2020 [Comments](#)



Joseph L. Thomas is escorted out of the courtroom after being found guilty on 10 of 11 charges in Annie McSween's Nov. 26, 2010, death. He was sentenced to life in prison without the possibility of parole plus 36 years.

Andrew Cass - The News-Herald

It's been almost a year since Joe Thomas stood trial and was [found guilty for the second time](#) of the Nov. 26, 2010, rape and murder of Annie McSween. The appeals process is underway and the former Perry Township resident is seeking a third trial.

McSween's body was found hours after her murder in a wooded area outside the Mentor-on-the-Lake bar where she worked as a bartender. Thomas was arrested and charged with her death in June 2011.

The arrest was made after law enforcement in April 2011 discovered clothing and other items belonging to McSween found in a burn barrel in the backyard of a home where Thomas was staying during the time of the murder.

Thomas, now 35, was first found guilty on all 11 charges against him in 2012 and was sentenced to death, but he appealed and the Ohio Supreme Court overturned the conviction and ordered a new trial.

Although Thomas had frequently been seen carrying a blue pocketknife before that night, it was not recovered during the criminal investigation. At trial, prosecutors introduced five other knives Thomas owned, describing them as "full Rambo combat knives."

Ohio Supreme Court Justice Terrence O'Donnell wrote the court's lead opinion, which determined the trial court committed plain error by admitting those five knives that prosecutors knew were not used in the crime into evidence. The majority found a reasonable probability that the error affected the outcome of the trial, and that reversal was necessary to prevent a manifest miscarriage of justice.

The second trial was held in July 2019 and Lake County jurors found Thomas guilty on 10 of the 11 charges against him. He was sentenced to life without the possibility of parole plus 36 years immediately following the July 25 verdict. The death penalty was taken off the table prior to trial.

"The state, as well as the family, feels there is a need for a more immediate finality to this case," Assistant Lake County Prosecutor Paul Kaplan previously told The News-Herald.

If Thomas was convicted a second time and again received the death penalty, the appeals process could take nearly 20 years, Lake County Prosecutor Charles Coulson said. With the death penalty off the table, the appeals process will be significantly shorter.

That process is now underway. Thomas filed his appeal in April, listing 10 assignments of error to be reviewed by the 11th District Court of Appeals. The Lake County Prosecutor's Office responded to Thomas' brief in late June. Thomas is being represented in his appeal by the Ohio Public Defender's Office.

Thomas argues in his appeal that the Lake County Common Pleas Court Judge Eugene A. Lucci erred when he excluded evidence from polygraph and EyeDetect tests at trial. He argues that denied him his constitutional right to a complete defense.

EyeDetect is billed as a "next-generation lie detector test on its website. The site states the product detects deception by measuring subtle changes in the eye. Thomas' appellate attorneys stated that the use of EyeDetect has never been ruled upon in Ohio. They argued that as such, the appropriate standard of review is abuse of discretion ("a term of art describing a judgement neither comporting with the record, nor reason").

Thomas argued in the appeal that the results from EyeDetect and polygraph tests would have bolstered his argument that he did not kill McSween and did not have motive to do so. Without presenting those tests, the "jury could not fully understand the scope of the investigation," he argued.

In their response, the Lake County Prosecutor's office wrote that Lucci did not abuse his discretion in excluding the lie detector tests, citing the reasoning given by the judge. That included, among other things, that of the lie detector examinations were inadmissible hearsay. The judge also found that lie detection tests must be excluded because "probative value is minimal and is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury."

Thomas also argues the judge allowed prosecutors to "ambush the defense by testing biological evidence and introducing new DNA evidence midtrial." Appellate attorneys stated in the brief that prosecutors failed to provide new DNA evidence to Thomas' defense counsel within the required 21-day pretrial window. This evidence undermined the defense's theory that an alternate suspect killed McSween, the appellate attorneys argued.

In its response, the Lake County Prosecutor's Office stated the judge "merely modified the 21-day requirement for good cause."

"(Lucci) permitted the defense to articulate a theory of several alternative suspects with the understanding they had good faith to make such claims," the prosecutor's office argued.

The prosecutor's office argued it's unclear how the DNA evidence impacted the verdict. The jury had no evidence before them that any of the alternative suspects were in the vicinity of the bar, the office stated in its brief.

Thomas also argues in another assignment of error that the judge erred when he failed to suppress evidence "obtained through law enforcement's warrantless seizure" of Thomas' boots.

The boots were seized in April 2011, after the discovery of the burn barrel had been made.

His appellate attorneys argued that the fact that Thomas only owned one pair of shoes, "cannot serve as the basis for a finding that the 'incriminating nature of the evidence was immediately apparent.'"

"Had law enforcement observed blood stains or known the treads were similar to those found at the scene, this inquiry may be different," the appellate attorneys argued in the brief. "However there was nothing apparently incriminating about Mr. Thomas' shoes until they were seized and compared to shoe casts taken from the scene."

The Lake County Prosecutor's Office argued that law enforcement's seizure of the boots on plain view and exigent circumstances exemptions.

"(Thomas) was the main suspect at the time of the seizure, and officers had learned the boots that (he) was wearing in the interview room were the boots he was wearing on the night of the murder," the prosecutor's office stated in its brief. "He did not identify himself as someone who was at the bar at the beginning of the investigation, and a burn barrel containing the victims' belongings was found at the residence where he was residing at the time of the murder."

Thomas now has the opportunity to reply to the prosecutor's office's brief. His reply is due July 20, according to court records.

In the alternative to a new trial, Thomas is seeking a modified sentence that would allow him the possibility of eventual release through parole.