

NO. 42659-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

DESHAN AKEEM WATSON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 04-1-01215-5

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

- I. This Court should find the trial court did not abuse its discretion when it denied the defendant's post-conviction motion for DNA testing.

B. STATEMENT OF THE CASE

I. Procedural History

The appellant (hereafter, "the defendant") was charged by Amended Information with Count One: Murder in the First Degree and Count Two: Assault in the Second Degree. (CP 1-2). Count One was charged under the Felony Murder Statute (RCW 9A.32.030(1)(c)) with Burglary in the First Degree listed as the predicate felony offense. (CP 1). The State charged a firearm enhancement for both counts. (CP 1-2). Trial commenced on March 21, 2005. (RP 122). The jury convicted the defendant of Counts One and Two and they found the State proved the presence of both firearm enhancements. (CP 3-6).

The defendant was sentenced before the Clark County Superior Court on March 31, 2005. (CP 7). With an offender score of 5 points, the defendant was sentenced to 484 months confinement. (CP 9, 11).

The defendant filed a direct appeal of his convictions, in which he did not contest that there was sufficient evidence to support his conviction for Count One: Murder in the First Degree. *State v. Watson*, 136 Wn.

App. 1024, 18, *fn.* 5, 2006 Wash. App. LEXIS 3042 (2006). The Court of Appeals found each of the defendant's claims on appeal were without merit and affirmed his convictions. *Id.*, at 30.

On May 12, 2011, the defendant filed a Motion Requesting Post-conviction DNA testing with the Clark County Superior Court. (CP 32-35). In his motion, the defendant conceded that a DNA test was conducted prior to his trial and that DNA test results were admitted in his trial; however, the defendant claimed the DNA test results were "inconclusive" because the results were "mixed" (meaning, the sample indicated more than one DNA contributor). (CP 33). The defendant argued a new DNA test would provide significant new information because it would be more "cutting edge." (CP 34-35). The defendant claimed a more "cutting edge" DNA test would rule him out as a contributor to the DNA sample and, therefore, it would show that he was "not the one who committed this crime 'on a more probable than not basis.'" (CP 34).

The trial court denied the defendant's motion for Post-Conviction DNA testing, finding a DNA test was completed prior to the defendant's trial and finding the defendant had an opportunity to challenge the results of the DNA test with its own DNA expert, who testified at trial. (CP 39, 46).

On September 12, 2011, the defendant filed an additional Motion Requesting Post-conviction DNA testing. (CP 22-24). The defendant did not provide any new authority or argument.¹ The trial court declined to take action on the defendant's additional Motion Requesting Post-conviction DNA testing. (CP 50). This appeal followed. (CP 27-28).

II. Summary of Facts

Andrew Blaine lived in a house in Clark County, Washington with Joshua Blaine (his brother), Ann Westelin, and Matthew Halligan. (RP 128, 148-49). Halligan commonly sold marijuana out of the house. (RP 162). On the morning of February 14, 2003, at approximately 7:00 a.m., Andrew Blaine ("Blaine"), awoke to hear voices coming from outside his bedroom. (RP 149). Only Blaine and Halligan were home at the time. (RP 183-84). As Blaine opened his bedroom door, he was "rushed" by a man in a black mask and black clothing. (RP 149). The man was approximately six feet tall and his skin appeared to be black. (RP 149, 154). The man struck Blaine just above Blaine's right eye with an object that appeared to be a gun. (RP 150). Blaine fell over his bed and onto his back. (RP 151, 168). As he lay on his back, Blaine could see through his door into Halligan's bedroom. (RP 151). Blaine could see Halligan

¹ In his brief, the defendant concedes his additional Motion for Post-conviction DNA testing was simply an "abbreviated version" of his original motion. *See* Brief of Appellant ("Brief") at p. 4.

wrestling with another man. (RP 151). The man in Halligan's room wore a black mask over his face and he had corn rows coming out of the back of his head. (RP 152). The man also wore a black hat, similar to a "beanie" that would be worn for skiing. (RP 154). The man's skin color also appeared to be black. (RP 154).

After the intruders left, Blaine went into Halligan's bedroom. (RP 159). Blaine saw a puncture wound on Halligan's chest. (RP 159). Halligan was gasping for air. (RP 175). Blood covered Halligan's body as well as the walls of Halligan's bedroom. (RP 213). Halligan sustained a bullet wound to his torso and to his inner left forearm. (RP 207, 265-66). Halligan was rushed to the hospital, where he died on the operating table. (RP 207).

Officers discovered an intact .380 bullet at the foot of Halligan's bed. (RP 220). Inside Halligan's bedroom, officers also discovered two digital scales, a box of clear sandwich bags, two sandwich bags containing green vegetable matter, and a backpack containing sandwich bags with green vegetable matter. (RP 223-24, 236-37).

A stocking cap and a handgun magazine were located on the top of a laundry basket, inside Halligan's bedroom. (RP 218). A black neoprene mask was located on the floor of the dining room, approximately one foot from the sliding glass door. (RP 239-40, 243-43, 248). The sliding glass

door had a blood stain on it that appeared to have been transferred by a handprint. (RP 240, 242).

Andrew Blaine, Joshua Blaine, Ann Westelin were each shown the black neoprene mask that was collected from their home immediately after the home invasion. (RP 179, 186, 194-95). None of them recognized the mask and each told officers that the mask was not associated with their home. (RP 179, 186, 194-95).

Brandon Lockwood testified that he was with the defendant and Ray Suggs one or two days before Matthew Halligan was murdered. (RP 318, 325). Lockwood is nineteen years old. (RP 339). Lockwood said he and Suggs took the Number 4 bus from the Vancouver Mall towards downtown Vancouver on that day. (RP 318-19, 328). Lockwood said the defendant also boarded the Number 4 bus at the Vancouver Mall bus stop. (RP 318). Lockwood had met the defendant on one prior occasion. (RP 318). The three sat together at the back of the bus, where they were alone. (RP 319). Suggs was an African American male, he was approximately five feet and four or five inches tall, and he wore his hair in corn rows. (RP 323). The defendant was also an African American male who wore his hair in corn rows. (RP 324). Suggs told Lockwood and the defendant that he had purchased marijuana from Matthew Halligan in the past. (RP 320). Suggs said he knew where Halligan kept his marijuana. (RP 320).

Lockwood testified that the defendant and Suggs started talking about how the two of them could go to Halligan's house, they could hold him up at gunpoint, "scare him," and they could "just take his weed." (RP 320). Lockwood said it was the defendant's idea to steal Halligan's marijuana. (RP 329). Lockwood said it was also the defendant's idea to bring guns to Halligan's house. (RP 321). According to Lockwood, the defendant said he knew where they could get a revolver. (RP 321). The defendant talked about getting a ".387" gun that was "chromed out." (RP 334-35). The defendant said they should wear ski masks and he said he knew where to get the masks. (RP 322).

Lockwood testified that he talked to Ray Suggs and to his brother, Michael Suggs, after he learned Halligan had been murdered. (RP 325-26). Lockwood said Michael Suggs told him he should not talk to the police. (RP 325-26). Lockwood said he eventually came forward after talking to his mother. (RP 336). Lockwood said he had "no beef" with either Rays Suggs or with the defendant. (RP 352). Lockwood said he knew nothing about the details of the police investigation when he decided to come forward. (RP 352). There was no evidence that Lockwood was offered, or received, any favorable treatment in exchange for his testimony. (RP 313-353).

The black ski hat and the black neoprene mask that were discovered at the crime scene were submitted to the Washington State Patrol (“WSP”) Crime Lab for DNA analysis. (RP 452). These items were tested by Will Dean, who is a forensic scientist for the Crime Lab. (RP 452). Will Dean is an expert in DNA analysis and he had worked exclusively in the DNA section of the WSP Crime Lab for the five years leading up to the defendant’s trial. (RP 452-53).

The WSP Crime Lab is accredited through the American Society of Crime Lab Directors. (RP 460). In addition, the Lab is audited annually. (RP 459). The Lab’s rules, regulations, and protocols must be consistent with those across the state and across the country. (RP 460-61). The testing methods and the test results of each DNA analyst at the Crime Lab are subjected to peer-review. (RP 462-63).

The WSP Crime Lab employs “STR” testing to conduct DNA tests. (RP 456). “STR” stands for “short tandem repeat.” (RP 456). With STR testing, the crime lab is able to “amplify” the amount of DNA contained in a particular evidentiary sample by, in essence, photocopying the DNA contained in the sample until the Lab has millions of copies of it. (RP 454-55). The Crime Lab moved to “STR” testing in 2000 because it required a smaller sample than “RFLP” testing (“restriction fragment

polymorphisms”) and because the results were much more precise and the statistics were more accurate. (RP 458).

Dean used STR testing to analyze the black ski hat and the black neoprene mask that were collected from the crime scene. (RP 467-68, 471). Dean took a cutting from the mouth area of the black neoprene mask, where he would most expect to find DNA. (RP 468). Dean discovered DNA profiles for “two major contributors” on the control sample from the mask. (RP 471-72). At trial, Dean explained that, when DNA from two or more people is discovered on a sample, it is called a “mixed” DNA sample. (RP 471). Dean testified that it is not uncommon to obtain a “mixed” sample. (RP 473). For example, if one person held this portion of the mask, that person may leave behind a DNA sample from the sloughing of his skin cells. If another person wore the mask, that person may leave behind a DNA sample from his saliva. (RP 473). Dean explained that he would expect to find a “single source” of DNA only if he was testing a blood sample. (RP 475). Dean commonly tests samples that contain the DNA of more than one person and he has received training validation to test mixed samples. (RP 475).

Dean tested the control sample of the neoprene mask against a reference sample that he was provided with for the defendant (to wit: two vials of the defendant’s blood). (RP 476-77). Dean determined that the

defendant's DNA profile was one of the two "major contributors" of DNA evidence on the mask. (RP 471-72, 525). By using a data bank of statistical probabilities that has been created by the FBI, Dean analyzed the "frequency" or the "rate of occurrence" that the defendant's reference sample would appear on the control sample. (RP 478). Dean determined there was a one in twenty million chance that the defendant's DNA profile would appear on the mask. (RP 478). This statistic was "forensically significant." (RP 525).

Dean explained that the United States has a population of two hundred and eighty million people. (RP 479). Out of the entire population of the United States, you would expect to see only fourteen people that would share the DNA profile contained on the sample from the neoprene mask. (RP 479). The defendant was one of those fourteen people. (RP 479).

Dean also analyzed a blood stain on the neoprene mask. (RP 495). The blood stain included a "single profile" of DNA, for which Mr. Halligan was a "match." (RP 498).

Dean was also able to obtain a DNA profile from the black ski hat. (RP 490). Dean found a statistical probability of one in six hundred and ninety that the defendant's DNA profile would share the profile contained in the sample from the hat. (RP 500-01).

Dean spent approximately one and one half years analyzing the DNA samples obtained in the case of *State v. Watson*. (RP 500). Dean worked on the case for approximately 400 hours. (RP 505). Dean typically spends fifty hours working on a case. (RP 507).

The defense also retained an expert (Vanora Kean) to analyze the evidence for DNA. (RP 689). Kean also testified at trial. (RP 689). Kean is a forensic biologist with a Ph.D. in genetics. (RP 689-90). Kean agreed that Will Dean followed the proper protocol when analyzing the DNA evidence in the defendant's case. (RP 769). Further, Kean agreed that two DNA profiles could be obtained from the neoprene mask. (RP 708). In addition, Kean agreed that the defendant should be included as a contributor to the DNA profiles that were obtained from the mask. (RP 739). However, Kean opined that the WSP Crime Lab should take a more expansive view when making its statistical calculations. (RP 740). Kean testified that, if the WSP Crime Lab employed her method of calculating statistical probabilities, then the chance that the defendant's DNA profile would have appeared on the mouth portion of the neoprene mask would have been reduced from one in twenty million to one in two million. (RP 740). Kean made clear that, based on her recommended DNA testing methods, the defendant would still be included as a DNA contributor to the mask. (RP 741).

When the defendant testified at trial, he admitted that he knew the named victim, Matthew Halligan, because he had purchased marijuana from Halligan in the past. (RP 817-18). Defense counsel showed the defendant a photograph of Halligan's home. (RP 818). The defendant said it looked familiar. (RP 818). The defendant said it was possible that he had been at Mr. Halligan's house at some time in his life. (RP 817). The defendant admitted that, when he was questioned by the police, he told them he had never been to Halligan's home. (RP 818).

Defense counsel showed the defendant the black neoprene mask that was collected from Halligan's home, on which the defendant's DNA profile appeared. (RP 819). The defendant admitted that he previously owned a face mask like that one. (RP 819). He said "I could relate to having some similar to that, yes." (RP 819). When asked by his trial counsel whether the black neoprene mask that was found at the scene could be his, he responded "[y]es, it is." (RP 820).

Defense counsel asked the defendant whether he ever owned a black stocking/ski hat. (RP 820). The defendant responded "[y]es, I can say I have." (RP 820). Defense counsel showed the defendant the black ski hat that was collected from Halligan's home immediately following the home invasion. (RP 820). Defense counsel asked his client "[d]oes this look like a cap you've owned" (RP 820). The defendant responded

“[y]eah, I can say it does.” (RP 820). The defendant claimed he lost track of both his neoprene face mask and his ski hat around November of 2000. (RP 820).

C. ARGUMENT

I. The trial court did not abuse its discretion when it denied the defendant’s motion for post-conviction DNA testing.

Under RCW 10.73.170(1), a convicted person currently serving a prison sentence may file a motion requesting DNA testing with the court that entered the judgment and conviction. *State v. Riofta*, 166 Wn.2d 358, 364, 209 P.3d 467 (2009). “[D]efendants seeking postconviction relief face a heavy burden and are in a significantly different situation than a person facing trial.” *Riofta*, 166 Wn.2d at 369. RCW 10.73.170 contains both a procedural requirement and a substantive requirement. A trial court should grant a defendant’s motion for post-conviction DNA testing only if the defendant can satisfy both statutory requirements. *Riofta*, at 364.

A trial court’s decision on a motion for post-conviction DNA testing is reviewed for abused of discretion. *State v. Thompson*, 173 Wn.2d 865, 870, 271 P.3d 204 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Thompson*, 173 Wn.2d at 870. The reviewing court should find the trial court abused its discretion only when “no reasonable judge

would have reached the same conclusion.” *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989)).

- a. *The defendant failed to satisfy his procedural burden under RCW 10.73.170 for DNA re-testing.*

To satisfy his or her procedural burden under RCW 10.73.170, the defendant must show (i) [t]he court ruled that DNA testing did not meet acceptable scientific standards; (ii) DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or (iii) [t]he DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information. RCW 10.73.170(2)(a)(i)-(iii).

In his motion, the defendant claimed new DNA testing would provide significant new information because “cutting edge” technology now existed, which would rule him out as a contributor, and because there may now be additional people in the national criminal database who would be a “match” to the DNA profiles that were discovered in his case. (CP 34-35). In addition, the defendant claimed the DNA test results for the neoprene mask were inaccurate because they resulted in a “mixed sample,” which was “inconclusive.” (CP 34-35). Each of the defendant’s claims was without merit.

First, in *Riofta*, the Court made it clear that it is only relevant whether DNA testing “will provide significant new information” when “testing is requested for the first time.” *Riofta*, at 366 (finding post-conviction DNA testing of white hat would likely provide significant new information when hat was worn by the shooter, when it was left behind at the crime scene, and when it was never tested for DNA). Here, in contrast to *Riofta*, the evidence that was collected from the crime scene was tested for DNA evidence prior to the defendant’s trial. The results of the DNA testing were admitted at the defendant’s trial and the defendant retained a DNA expert who had the opportunity to challenge the DNA testing and its results at trial. Therefore, it is irrelevant whether new DNA testing would provide significant new information because the defendant was never deprived of the opportunity to have the evidence tested for DNA prior to his trial.

In addition, there is no reason to believe new testing would be significantly more accurate or that new testing would provide significant new information. The WSP Crime Lab is nationally accredited and its testing methods are consistent with state-wide and national testing methods. Will Dean (forensic scientist for the WSP Crime Lab) spent one and one-half years and over four hundred hours analyzing the evidence in the defendant’s case. Dean’s testing methods and his results were

subjected to peer-review. Dean employed “STR” testing. STR testing is the most advanced method for testing DNA evidence and it yields the most accurate results. STR testing revealed that the defendant was a “major contributor” to the DNA profiles on the neoprene mask. Even the defendant’s own DNA expert (Vanora Kean) agreed with the testing methods that were employed by the WSP Crime Lab. Kean also agreed with the test results that were attained by the WSP Crime Lab, which identified the defendant as a major contributor to the neoprene mask. Kean argued that the Crime Lab should employ more “inclusive” testing methods; however, she conceded that, even with her proposed testing methods, the defendant’s DNA profile would still be included as a contributor to the neoprene mask. Consequently, a new DNA test of the neoprene mask, even following the standards espoused by the defendant’s expert, would not necessarily yield significantly more accurate results or provide significant new information.

In his motion, the defendant argued there was new “cutting edge” technology that would rule him out as a contributor to the DNA sample. However, the defendant did not explain the nature of this new “cutting edge” technology; he did not explain how it was different than STR technology; he did not explain whether it was available at the time of his trial; and he did not explain how or why it would provide different results.

Consequently, the defendant failed to show his proposed “cutting edge” technology would be significantly more accurate or that it would provide significant new information.²

Next, the fact that the DNA testing of the neoprene mask resulted in a “mixed sample,” does not mean the test results were “inconclusive.” Rather, a “mixed sample,” simply means there was evidence of more than one DNA profile on the portion of the mask that was tested the WSP Crime Lab. Will Dean explained that it is not uncommon for an object such as a mask to result in a mixed sample because it is likely that more than one person has handled or worn the mask. Dean also explained that the WSP Crime Lab has protocols and procedures for analyzing mixed samples and he said he is familiar with analyzing mixed samples. With the “mixed sample” from the neoprene mask, Dean identified two major DNA contributors. The defendant was identified as one of the two major DNA contributors. Dean testified that there was a one in twenty million

² In his brief on appeal, the defendant argues new DNA testing would yield more accurate results because the WSP Crime Lab now employs “Y-STR” testing. *See* Brief, at p. 13-14. This argument was not made by the defendant in his Motion for Post-Conviction DNA testing and it should not be considered by this Court. However, it is worth noting that the defendant makes no showing that Y-STR testing is new or that it was not available at the time of his trial. Further, Y-STR testing is not different from STR testing. *Shabazz v. State*, 265 Ga. App. 64, 65, 592 S.E.2d 876, 879 (2004) (holding that the trial court did not err when it ruled that a *Frye* hearing was unnecessary because Y-STR testing is merely one specific type of STR DNA testing). Consequently, it is not reasonable to believe Y-STR testing would yield significantly more accurate results or that it would provide significant new information.

chance that the defendant's DNA profile would match one of the two DNA profiles discovered on the mask. Dean also said, out of the entire population of the United States, only fourteen people would match one of the two DNA profiles that were discovered on the mask. The defendant was one of these fourteen people. Dean explained that these statistics were "forensically significant." Consequently, the DNA test was neither inconclusive nor inaccurate. Also, there is no reason to believe new DNA testing would be "significantly more accurate," because new testing would not change the fact that more than one person wore or handled the mask.

Lastly, whether new DNA profiles now exist in the criminal database has nothing to do with advancements in DNA-testing-technology and it is not a basis for the court to order re-testing of DNA evidence under RCW 10.73.170. In addition, even if another person could now be identified as the second "major contributor" to the DNA sample on the neoprene mask, it would not change the fact that the defendant was also identified as a "major contributor" to the DNA sample on the mask.

For each of these reasons, the defendant failed to satisfy his procedural burden under RCW 10.73.170. Therefore, the trial court did not abuse its discretion when it denied the defendant's motion for post-conviction DNA testing.

- b. *In addition, the defendant failed to satisfy his substantive burden under RCW 10.73.170 for DNA re-testing.*

To satisfy his or her substantive burden under RCW 10.73.170, the defendant must show a “likelihood that DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3). “[A] convicted person claiming innocence as the basis for postconviction relief must overcome a strong presumption of guilt.” *Riofia*, at 370, *citing Schlup v. Delo*, 513 U.S. 298, 326 n.42, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); *Herrera v. Collins*, 506 U.S. 390, 399-400, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) (stating a defendant who claims innocence “does not come before the Court as one who is ‘innocent,’ but, on the contrary, as one who has been convicted by due process”). The court considers the evidence that was admitted at trial and any newly discovered evidence when considering whether DNA testing would establish the defendant’s actual innocence by a preponderance of the evidence. *State v. Thompson*, 173 Wn.2d 865, 872-73, 271 P.3d 204 (2012).

In his motion, the defendant argued that new DNA testing would “show the likelihood that [he] [was] not the one who committed this crime ‘on a more probable than not basis,’” because it would rule him out as a contributor to the DNA sample. (CP 34). However, the defendant never

explained how new DNA evidence would counteract the other evidence that was admitted at trial, which clearly evinced his guilt.

For example, Brandon Lockwood testified that he heard the defendant and Ray Suggs plot the home invasion of Matthew Halligan one or two days before Halligan was murdered. Lockwood testified that he knew nothing about the police investigation when he came forward; however, Lockwood was able to provide details about the home invasion, including details about who would be robbed (Matthew Halligan), about what items would be taken (Halligan's marijuana), about what the perpetrators would wear (ski masks), and about what kind of gun would be used (a .380 or a .387 pistol). Lockwood would have known this information only if he was present for the conversation between the defendant and Lockwood.

In addition, the general profile of the defendant and the general profile of Suggs matched the description that Andrew Blaine provided of the two men he found in his house immediately before Halligan was murdered.

Further, the defendant's own testimony firmly established his guilt. For example, the defendant established his motive and opportunity when he testified that he knew Halligan, when he testified that he knew where Halligan lived because he had purchased marijuana from him in the past,

and when he testified that he lied to the police about his knowledge of Halligan. More importantly, the defendant testified that he owned a black neoprene mask and a black ski hat similar to the ones that were left behind at the crime scene. The defendant went on to testify that the mask and the hat, which were left behind at the crime scene, likely belonged to him. Consequently, notwithstanding the results of any DNA testing, the defendant placed his DNA on both the mask and the ski hat when he said both items were likely his.

In his motion, the defendant failed to explain how new DNA evidence would establish his actual innocence. Further, based on the evidence that was presented at trial, new DNA evidence would not establish the defendant's actual innocence by a preponderance of the evidence. Therefore, the defendant failed to satisfy his substantive burden under RCW 10.73.170 and the trial court did not abuse its discretion when it denied the defendant's post-conviction motion for DNA testing.

D. CONCLUSION


Because the defendant failed to satisfy both his procedural and his substantive burden under RCW 10.73.170, this Court should find the trial court did not abuse its discretion when it denied the defendant's post-

conviction motion for DNA testing. The defendant's convictions should be affirmed.

DATED this 6th day of November, 2012.

Respectfully submitted:

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