SUPREME COURT NO. 90035-3
COURT OF APPEALS NO. 42659-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DESHAN AKEEM WATSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Diane Woolard, Judge

PETITION FOR REVIEW

LISA E. TABBUT
Attorney for Petitioner
P. O. Box 1396
Longview, WA 98632
(360) 425-8155

FILED IN COA ON MARCH 13, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

A. IDENTIFY OF PETITIONER

Petitioner Deshan Akeem Watson asks this Court to review the decision of the Court of Appeals referred to in Section B.

B. COURT OF APPEALS DECISION

Petitioner Watson seeks review of the Court of Appeals' decision in *State v. Deshan Akeem Watson*, Court of Appeals No. 42659-5-II, filed February 11, 2014. Specifically, Mr. Watson asks this Court to review the opinion where the Court of Appeals misapplies the test for allowing post-conviction DNA testing and is thus in conflict with this Court's decision in *State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012) and *State v. Riofta*, 166 Wn.2d 358, 209 P.3d 467 (2009).

C. ISSUE PRESENTED FOR REVIEW

Should this Court review the decision of the Court of Appeals which is in direct conflict with this Court's decision in *State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012) and *State v. Riofta,* 166 Wn.2d 358, 209 P.3d 467 (2009).

D. STATEMENT OF CASE

In 2005, a jury found Deshan Watson guilty of first degree murder and second degree assault. CP 1-2, 3-6. In finding Watson guilty, the jury relied on two pieces of evidence (1) the highly impeached testimony of a witness who claimed to have heard Watson and another man plotting to

rob marijuana dealer Matthew Halligan and (2) results from a mixed sample DNA test taken from a neoprene mask left behind by the intruders. Court of Appeals' opinion at 1-4.

On the morning of February 14, 2003, Andrew Blaine woke to talking outside his bedroom door. RP March 21, 2005 at 147-49. Blaine opened his bedroom door and was "rushed" by someone wearing black clothing and a black mask with eye holes. RP March 21, 2005 at 149, 152-53. That someone hit Blaine above the eye with a gun. RP March 21, 2005 at 150. Blaine believed the person was African-American because the skin color seemed to match the mask color. RP March 21, 2005 at 155.

Blaine saw his roommate, Matthew Halligan, and another person swinging at each other and wrestling in Halligan's bedroom. RP March 21, 2005 at 146, 151-52. The person fighting with Halligan wore a full black ski mask with holes in it and appeared to have a corn row hair style. RP March 21, 2005 at 152-53. Blaine believed the person was African-American because of the corn rows and the color of the exposed skin on the intruder's neck. RP March 21, 2005 at 155.

Blaine left the house and ran toward the neighbors. RP March 21, 2005 at 152, 156. He had a change of heart though and returned to the house. RP March 21, 2005 at 158. Halligan was alone in the house and

had a "puncture" to his chest and was in "bad shape." RP March 21, 2005 at 159. Halligan later died at the hospital from multiple gunshot wounds. RP March 22, 2005 at 207, 267; RP March 23, 2005 at 450.

Police detectives canvassed the neighborhood for clues. RP March 21, 2005 at 134. During their search of Halligan's house, the police collected blood and hair samples, lifted finger and palm prints, and collected various other items to include a role of duct tape, a neoprene mask, and a wool cap. RP March 22, 2005 at 213-222, 239, 241, 243, 258, 283, 406.

Nothing in the neighborhood canvass linked Watson to the crime. RP March 21, 2005 at 134. No blood linked Watson to the crime. RP March 22, 2005 at 283. No fingerprints or palm prints linked Watson to the crime. RP March 22, 2005 at 374-389. Some of the hair collected at the scene did have Negroid characteristics. RP March 22, 2005 at 364.

The police got an AFIS hit from finger prints on the roll of duct tape. The prints returned to Tricia Jolene Stuckey. RP March 22, 2005 at 380-82. The parties agreed to certain stipulated facts in lieu of Stuckey's testimony. RP March 23, 2005 at 449-50. Before and on February 14, 2003, Stuckey was a clerk at the 24-hour food mart located on the corner of Fourth Plain and Grand in Vancouver. Stuckey was a fairly regular user of marijuana. Stuckey did not recall selling duct tape around or prior

to February 14, 2003 to any person in particular. Stuckey did not know the name Matthew Halligan although she may have purchased marijuana from him without knowing his name. RP March 23, 2005, at 450-51.

Even though Halligan was a marijuana dealer and there were many short stay visitors at the house, Andrew Blaine did not recognize Watson as ever having been one of those visitors. RP March 21, 2005 at 162, 178-79. Blaine could not identify Watson as one of the two intruders. RP March 21, 2005 at 178. Blaine's other two roommates did not recognize Watson as ever having been at the house. RP March 21, 2005 at 182, 185, 191, 194.

What caused the police to turn their attention to Watson as a possible suspect was Brandon Lockwood. Lockwood testified that he went to the police with possible information about the shooting. RP March 22, 2005 at 330. That was not true. RP March 22, 2005 at 412, 416. The police actually had to track Lockwood down after hearing from sources that Lockwood might have information. RP March 22, 2005 at 412.

Lockwood testified he had a friend named Ray Suggs. RP March 22, 2005 at 313-14. In February 2003, he saw Suggs at a bus transit center. RP March 22, 2005 at 315. Suggs was with Watson. It was the first time Lockwood met Watson. RP March 22, 2005 at 315. Lockwood

claimed he met up with Suggs and Watson again. This time it was at the Vancouver Mall. RP March 22, 2005 at 316. The three of them rode the bus together. During the bus ride, Suggs talked about buying marijuana from Halligan. Suggs and Watson talked about how they could get into Halligan's house and rob Halligan of his marijuana at gunpoint. RP March 22, 2005 at 320. It was Watson's idea to take the marijuana and he knew where to get a revolver. RP March 22, 2005 at 321. Watson said something about wearing ski masks and that he could get them. RP March 22, 2005 at 321. Both Suggs and Watson wore their hair in corn rows at the time. RP March 22, 2005 at 335. Suggs and Watson got off the bus near Fourth Plain and Grand. RP March 22, 2005 at 325. It was only a day or two later that Lockwood heard Halligan had been killed. RP March 22, 2005 at 325.

Ray Suggs testified he knew Lockwood but he never saw him on a bus or at a transit center. RP March 24, 2005 at 675. Watson testified he did not know Lockwood and he never planned a robbery. RP March 25, 2005 at 817.

Washington State Patrol forensic scientist Will Dean tested the neoprene mask and the wool cap left at Halligan's house. RP March 23, 2005 at 452-467. The testing was done using the STR, or "short tandem repeat," method of DNA testing. RP March 23, 2005 at 456-58. The State

Patrol forensic laboratory adopted that form of DNA testing around 2000. RP March 23, 2005 at 456. Watson used the services of forensic scientist Chesterine Cwiklik to oversee and assess the State Patrol's DNA testing. RP March 23, 2005 at 619-622.

Dean found both the knit cap and the neoprene mask had a mixed sample of DNA on them. RP March 23, 2005 at 471. A mixed sample means there is more than one person's DNA on the tested object. RP March 23, 2005 at 471-72, 490. Mixed samples were common in Dean's work and dealing with them was just part of his job. RP March 23, 2005 at 475.

Dean could not match the DNA on either the knit cap or the neoprene mask to Watson. RP March 23, 2005 at 519. A "match' means the DNA matches only one specific person. RP March 23, 2005 at 518. 471-72. A "match" is also referred to as an "identity statement." RP March 23, 2005 at 519. With respect to the knit cap, Dean found approximately 1 in 690 people would have a matching DNA profile for the cap. RP March 23, 2005 at 501. That group included Watson's DNA profile. RP March 23, 2005 at 501. Dean concluded the number was statically insignificant. RP March 23, 2005 at 501, 541. With respect to the neoprene mask, Dean found Watson's DNA profile was a possible contributor. RP March 23, 2005 at 477. The statistical comparison was

one in 20 million. RP March 23, 2005 at 478. In practical terms, that meant about 1 in 20 million people's DNA profile could be included in the DNA mixture. Comparing that to the approximate 280 million person population of the United States, he would expect to see about 14 people who would share that DNA profile. RP March 23, 2005 at 478-79.

Watson testified he used to have a cap and a mask like those found at Halligan's house. He used to wear them in cold weather. In fact, it was possible the mask and cap in evidence were his mask and cap. RP March 25, 2005 at 819-20. He had not seen the mask or the cap since approximately November 2002. RP March 25, 2005 at 819-20

Watson unsuccessfully appealed his convictions. See *State v. Deshan Akeem Watson*, 136 Wn. App. 1024, WL 3734922 (2006). The Supreme Court denied further review. *State v. Deshan Akeem Watson*, 162 Wn.2d 1005, 175 P.3d 1094 (2007).

On May 12, 2011, pursuant to RCW 10.73.170, Watson filed his first Motion Requesting Post-Conviction DNA Testing in Clark County Superior Court. CP 32. Watson's motion asked that the neoprene mask receive additional DNA testing. CP 32. Per Watson, the DNA "test results produced an inconclusive mixed sample." CP 33. Watson argued the DNA test used to convict him did not actually identify any particular individual and did not rule out Watson as a suspect. CP 33. "[T]he mixed

sample was a combination of more than one contributor, and none of the DNA matched Watson's DNA." CP 33. Additionally, Watson argued further DNA testing would be more accurate than prior DNA testing or would provide significant new information. CP 33. Watson believed a more accurate "cutting edge" DNA test would not only determine whose DNA is on the mask, but would also be able to exclude him because it could be a match to someone who has subsequently been entered into the DNA Criminal Database. CP 34-35. Per Watson, the end result of the new DNA testing "would show the likelihood that Watson is not the one who committed this crime 'on a more probable than not basis.'" CP 34.

In a letter dated May 18, 2011, Judge Diane Woolard denied Watson's request noting, "[I]it appears the DNA testing was completed, and the defense had their own DNA expert at trial." CP 39.

On June 8, 2011, Watson appealed the trial court's ruling. Supp. Designation of Clerk's Papers (Notice of Appeal, sub. nom 147). CP 40. This Court declined to find the trial's court's May 18 letter a final order from which Watson could appeal. CP 41-42. Watson asked Judge Woolard to issue a "certificate of finality" from which he could appeal. CP 43-45. On July 6, 2011, Judge Woolard declined to do so. CP 46-49.

Consequently, Watson's "appeal" was dismissed for want of prosecution. (See Court of Appeals No. 42077-5-II, ACORDS entries

dated August 24 and 25, 2011.) This Court issued its mandate on October 11, 2011. CP 56-58. On September 12, 2011, Watson again filed a "Motion for Requesting Post-conviction DNA Testing" to the Clark County Superior Court. CP 22-26. This time, the motion was an abbreviated version of what Watson sent the trial court in May 2011. CP 22-26. Watson reiterated new DNA testing would be significantly more accurate than prior DNA testing and would provide significant new information. CP 22-26.

This time, Judge Woolard responded to Watson's motion by simply checking a "no action to be taken" box on a pre-printed form. CP 50-55. Watson again appealed the denial of his request for post-conviction DNA testing. CP 27-28. This time the Court of Appeals accepted Watson's appeal.

The Court of Appeals affirmed the trial court's denial of Watson's post-conviction motion for additional DNA testing. Court's Opinion 4-8. In denying Watson's appeal, the Court of Appeals misapplied the precedent this Court established in *State v. Riofta*, 166 Wn.2d 358, 209 P.3d 467 (2009) and *State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RCW 10.73.170 requires a motion requesting post-conviction DNA testing to state the following;

> (2)(a)(i) The court ruled that DNA testing did not meet acceptable scientific standards; or
> (ii) DNA testing technology was not sufficiently developed to test the DNA evidence in this case; or
> (iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information;
> (b) Explain why DNA evidence is material to the identity of the perpetrator or, or accomplice to, the crime, or the sentence enhancement; and
> (c) Comply with all other procedural requirements established by court rule.
> (3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.
> Sections (a) and (b) are both lenient procedural requirements.

Riofta, 166 Wn.2d at 367. Watson satisfied both requirements (a) and (b).

Under (2)(a)(iii), Watson asserted the DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information. CP 33-34. Watson pointed out the DNA on the mask was a mixed sample, meaning more than one person contributed to the sample. Although Watson was identified as a possible contributor to the mixed sample, he was not an absolute match for the sample. Watson believes more accurate "cutting edge" DNA testing

would identify the contributors to the mixed sample thereby eliminating him as a contributor and, consequently, as a suspect.

Since the 2004 DNA testing in Watson's case, the Washington State Patrol Crime Lab has adopted a more cutting edge DNA technology. Starting in October 2009, the Washington State Patrol added DNA Y-STR analysis technology to its arsenal of DNA testing technology. See http://www.wsp.wa.gov.forensics/docs.crimelab_news_0610.pdf. According to WSP's June 2010 Forensic Laboratory Services Bureau newsletter at page 2, "This testing is male-specific and more sensitive than standard DNA testing."

As Watson also explains in his motion as it pertains to RCW 10.73.170(2)(b), DNA evidence is material to the identity of one of the intruders because that person wore the mask and left it behind at the scene. If Watson were excluded as a contributor to the mask's DNA sample, the State's evidence would consist exclusively of the heavily impeached testimony of Brandon Lockwood who lied when he testified he went to the police with information about Watson. The opposite was true; the police had to seek out Lockwood. RP March 2005 at 412, 416.

DNA testing has the capability of exonerating a wrongly convicted defendant. For this reason, Washington's statute focuses not on the probabilities of the testing but on the force of the evidence if it should

come back exculpatory. RCW 10.73.170 provides that, as noted above, upon a petition from a convicted person for DNA testing:

> (3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

The standard for DNA testing has always been the convicted person must simply show there is the "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3) (emphasis added).

The plain meaning of RCW 10.73.170 shows that a strict burden is not to be placed on a convicted person who requests DNA testing; the standard for obtaining testing is intentionally less stringent then the standard requited to obtain a new trial. See *Riofta*, 166 Wn.2d at 368 ("The purpose of the [Washington statute and federal statutes} is to provide a means for a convicted person to obtain DNA evidence that would support a petition for post-conviction relief."). This means the courts are to presume favorable DNA tests results when considering their impact on an eventual claim of innocence. *See id.*, at 367-68.

This Court has twice recognized the fundamental need to presume exculpatory DNA test results in considering petitions for post-conviction

DNA testing. In *Riofta*, this Court construed the burden on petitioners as follows:

> In determining whether a convicted person "has shown the likelihood that DNA evidence would demonstrate innocence on a more probably than not basis," a court must look to whether, viewed in light of all the evidence presented at trial or newly discovered, favorable DNA test results would raise the likelihood that the person is innocent on a more probable than not basis. The statute requires a trial court to grant a motion for post-conviction testing when exculpatory results would, in combination with the other evidence, raise a reasonable probability that petitioner was not the perpetrator.

Riofta, 166 Wn.2d at 367-68.

This Court reaffirmed this standard in *Thompson*, 173 Wn.2d 864, stating that "a court must look to whether, viewed in light of all the evidence presented at trial or newly discovered, favorable DNA test results would raise the likelihood that the person is innocent on a more probable than not basis." *Id.* at 872-73; see also *State v. Gray*, 151 Wn. App. 762, 773-75, 215 P.3d 961 (2009) (applying *Riofta* to grant petition). Thus in Washington, a court must presume that DNA testing would yield exculpatory results when determining whether the petitioner is entitled to DNA testing. Courts are not permitted to speculate whether the testing being requested will produce exculpatory results, but rather only whether such exculpatory results, if they are obtained, might change the outcome of the trial.

This is precisely where the Court of Appeals departed from this Court's precedent. To support its conclusion that Watson is not entitled to DNA testing, the Court of Appeals evaluated the *likelihood* of a favorable test result, not the *likelihood* of innocence based on a favorable test result, as the statue and this Court require. Court's Opinion at 7-8.

The Court of Appeals' speculation about what a jury might do with DNA evidence ignores completely the substantial weight that juries typically accord to biological evidence. *See, e.g. Duncan v. Kentucky*, 322 S.W.3d, 81, 93 (Ky. 2010) (holding that jurors are apt to accord DNA evidence "immense weight"). It also ignores the statutes purpose as a vehicle to obtain DNA evidence that would support a petition for post-conviction relief. *See Riofta*, 166 Wn.2d at 368. One of the reasons the Legislature intended that a permissible standard apply to requests for post-conviction DNA testing is because it is only the first step in the petitioner's exoneration process. The next step is a motion for a new trial based on "newly discovered evidence." See RCW 10.73.100 (allowing petitioners with newly discovered evidence to file collateral attacks after the one year period imposed by RCW 10.73.090 has expired).

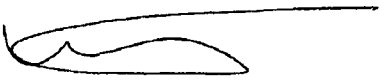
Watson asked the trial court to order additional DNA testing on the mask because he is confident improvements in testing will eliminate him as a donor to the mask's mixed DNA sample. If Watson's DNA was

eliminated from the mask, what the results of the DNA retesting would do is eliminate Watson as a DNA donor in the mind of the jurors. DNA testing eliminating Watson as a contributor would absolve Watson from being considered a person who wore the mask. That would leave the jury with only Brandon Lockwood's credibility-challenged testimony, and a much weaker case against Watson.

F. CONCLUSION

This Court should remand to the trial court with instruction to order the additional DNA testing requested by Watson.

Respectfully submitted this 13th day of March 2014.



LISA E. TABBUT/WSBA #21344
Attorney for Deshan Akeem Watson

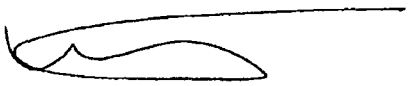
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Petition for Review to (1) Abigail E. Bartlett, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it Deshan Watson, DOC#851054, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed March 13, 2014, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Deshan Akeem Watson

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DESHAN AKEEM WATSON, Appellant.	No. 42659-5-II UNPUBLISHED OPINION

BJORGEN, J. — Deshan Akeem Watson appeals the trial court's denial of his motions for post-conviction deoxyribonucleic acid (DNA) testing. He asserts that the trial court erred in denying his motions, because they satisfied the requirements of the post-conviction DNA testing statute, RCW 10.73.170. Because any error in the trial court's consideration of Watson's post-conviction DNA testing motions is harmless, we affirm.

FACTS

Andrew Blaine lived in a house in Clark County, Washington with his brother, Joshua Blaine, Ann Westelin, and Matthew Halligan. Halligan sold marijuana out of the home. Watson denied knowing Halligan, but admitted that he may have purchased marijuana at his house.

On the morning of February 14, 2003, Andrew[1] and Halligan were at home when Andrew woke up and heard voices outside his closed bedroom door. Andrew opened his door and was "rushed" by a man in a black mask and black clothing. Report of Proceedings (RP) at 149. The man struck Andrew in the face with an object that appeared to be a firearm and pushed him onto the floor. Andrew saw a different man, wearing a black ski mask and with corn rows in his hair, wrestling with Halligan in Halligan's bedroom. When the man who attacked Andrew walked over to Halligan's room, Andrew fled the house. Once outside, Andrew decided to return to the house to help Halligan and found him on his bed with a puncture wound in his chest. Halligan later died at the hospital. Officers found digital scales and sandwich bags containing green vegetable matter in Halligan's bedroom.[2] Officers also found a stocking cap, a neoprene face mask and a handgun magazine in the house. Watson acknowledged that he used to own a cap and face mask like those found in Halligan's house, but stated that he had not seen the items since November 2002. Watson further acknowledged that it was possible that the cap and face mask found by police could be the same ones that he had owned. Neither Andrew, Joshua nor Westelin recognized the mask.

[1] We refer to Andrew Blaine and Joshua Blaine by their first names. We intend no disrespect.

[2] They additionally recovered a roll of duct tape. Fingerprints on the duct tape were traced to Tricia Jolene Stuckey, who did not testify. Based on stipulated facts presented to the jury, Stuckey was a clerk at a local 24-hour food market and regularly smoked marijuana. She did not recall selling the roll of duct tape and she did not recognize Halligan's name, although she "may have purchased marijuana from [him] without knowing who he was." Report of Proceedings at 451.

Washington State Patrol forensic scientist Will Dean tested the neoprene mask and wool cap using short tandem repeat (STR) testing. Dean found more than one person's DNA on each tested object, called a "mixed sample." RP at 471-72. With respect to the mask, Dean concluded that Watson's DNA profile was a possible contributor to the mixed DNA sample. Dean set the statistical comparison at 1 in 20 million, meaning approximately 14 people in the United States would share that DNA profile. Dean classified Watson's DNA profile as one of two "major contributors" of DNA evidence on the mask. RP at 471-72, 525. Vanora Kean, a defense DNA expert, acknowledged that Watson's DNA profile was a contributor to the mixed DNA sample found on the mask, but set a statistical comparison of 1 in 2 million.

Brandon Lockwood testified that a few days before February 14, he, Watson, and Ray Suggs boarded a bus together and that, while riding the bus, Suggs told Watson that he had purchased marijuana from Halligan and knew where Halligan stored his marijuana. Lockwood also stated that Watson and Suggs discussed how they "could go into [Halligan's] house and . . . hold him at gunpoint and scare him and just take his weed." RP at 320. Lockwood testified that Watson told Suggs that he could obtain a revolver and ski masks. Lockwood further testified that both Suggs and Watson had corn row style hair at the time he rode the bus with them. A day or two later, Lockwood learned of Halligan's murder and spoke to the police.[3]

On February 3, 2005, the State charged Watson by amended information with first degree murder and second degree assault. The State also alleged that Watson was armed with a firearm

[3] Lockwood initially testified that he recalled officers "coming and talking to" him about the bus ride. RP at 326, 412. On cross-examination, he testified that he initiated a call to the police after speaking with his mother and sister.

during the commission of both offenses. A jury returned verdicts finding Watson guilty of first degree murder and second degree assault and returned special verdicts finding that he was armed with a firearm during the commission of both offenses.

On May 12, 2011, Watson filed a motion pursuant to RCW 10.73.170 for post-conviction DNA testing of the face mask found at the crime scene. Watson argued that a more accurate form of DNA testing was available and that retesting the mixed DNA sample from the mask could eliminate him as a potential match. The trial court denied Watson's motion in a letter ruling on May 18, 2011, on the ground that "DNA testing was completed, and the defense had their own DNA expert at trial." Supp. CP at 39. After Watson filed an appeal, we advised him that the trial court's letter denying his request for post-conviction DNA testing "[was] not a decision of the trial court appealable as a matter of right" and that he needed a final order from the trial court denying his motion in order to proceed with his appeal. Supp. CP at 41.

On July 5, 2011, the trial court denied Watson's request to enter a final order, and we subsequently dismissed his appeal. On September 12, 2011, Watson filed a second request for post-conviction DNA testing with the trial court for the same reasons set out in his original motion. The trial court responded that "[n]o action" would be taken on the motion. Supp. CP at 50. On October 6, 2011, Watson again appealed the trial court's response to his motion, and we accepted his appeal. Watson timely appeals the trial court's denial of his motion for post-conviction DNA testing.

ANALYSIS

Watson contends that the trial court abused its discretion by denying his motions for post-conviction DNA testing. Because Watson's motions failed to satisfy the substantive

requirements of the post-conviction DNA statute, RCW 10.73.170, any error in the trial court's consideration of his motions was harmless and, thus, we affirm the trial court's ruling.

We review a trial court's ruling on a motion for post-conviction DNA testing for an abuse of discretion. *State v. Thompson*, 173 Wn.2d 865, 870, 271 P.3d 204 (2012). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

RCW 10.73.170 allows a convicted person serving a prison sentence to request post-conviction DNA testing, stating in relevant part:

> (1) A person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.
>
> (2) The motion shall:
>
> (a) State that:
>
> (i) The court ruled that DNA testing did not meet acceptable scientific standards; or
>
> (ii) DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or
>
> (iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information;
>
> (b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and
>
> (c) Comply with all other procedural requirements established by court rule.
>
> (3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

To be entitled to post-conviction DNA testing under RCW 10.73.170, the "person requesting testing must satisfy both procedural and substantive requirements." *State v. Riofta*, 166 Wn.2d 358, 364, 209 P.3d 467 (2009). Specifically,

> The motion must state the basis for the request, explain the relevance of the DNA evidence sought, and comply with applicable court rules. RCW 10.73.170(2)(a)-(c). If the petitioner satisfies these procedural requirements, the court must grant the motion if it concludes the petitioner has shown the "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3).

Riofta, 166 Wn.2d at 364.

Because it is determinative of the issues before us, we address only the substantive requirement of RCW 10.73.170. In contrast with the "lenient" procedural requirements of RCW 10.73.170(2), the substantive requirement of RCW 10.73.170(3) is "onerous." *Riofta*, 166 Wn.2d at 367.

> In determining whether a convicted person "has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis," a court must look to whether, viewed in light of all of the evidence presented at trial or newly discovered, favorable DNA test results would raise the likelihood that the person is innocent on a more probable than not basis. The statute requires a trial court to grant a motion for postconviction testing when exculpatory results would, *in combination with the other evidence*, raise a reasonable probability the petitioner was not the perpetrator.

Riofta, 166 Wn.2d at 367-68.

Here, the trial court denied Watson's first motion for post-conviction DNA testing in a letter ruling that stated, "DNA testing was completed, and the defense had their own DNA expert at trial." Supp. CP at 39. In response to Watson's second motion, the trial court merely responded that "[n]o action" would be taken. Supp. CP at 50. The trial court's letter ruling and its response to Watson's second motion are unclear as to whether it had properly evaluated the likelihood that a favorable DNA test would demonstrate Watson's innocence by a preponderance of the evidence. However, even assuming without deciding that the trial court's stated reasons for denying Watson's motion were inadequate under the statute, we hold that any error would be

harmless. Nonconstitutional error requires reversal only if, "within reasonable probabilities," the outcome of the proceeding "would have been materially affected had the error not occurred." *State v. Crenshaw*, 98 Wn.2d 789, 800, 659 P.2d 488 (1983) (citing *State v. Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981)). Here, Watson cannot demonstrate that the outcome of his proceeding would have differed had the trial court made a proper inquiry because, even if a new Y-STR[4] test eliminated Watson as a possible contributor to the DNA sample taken from the mask, it would not demonstrate his innocence on a more probable than not basis.

At trial, the State presented Lockwood's testimony that he had heard Suggs and Watson plan to steal marijuana from Halligan using a revolver and face masks. Lockwood's description of Suggs's and Watson's hair matched Andrew's description of one of the men who had attacked him and Halligan. Additionally, Watson admitted that he may have purchased marijuana at Halligan's house in the past. Watson also admitted that he had owned a mask and cap that resembled those found by the police at Halligan's home and that the mask and cap found by police could have been the same cap and mask that he owned. This all constitutes evidence of Watson's guilt that would not be undermined by a new DNA test eliminating him as a contributor to the DNA found on the mask.

In his brief on appeal, Watson concedes that even if his "DNA was eliminated from the mask, it would not preclude him being the second person in the house." Br. of Appellant at 16. He nonetheless argues that he meets the substantive requirement of RCW 10.73.170(3) because a

[4] In October 2009, the Washington State Patrol added Y-STR analysis technology to its DNA testing technology. *See* http://www.wsp.wa.gov.forensics/docs.crimelab_news_0610.pdf.

favorable DNA test would "eliminate [him] as a donor in the mind of the jurors." Br. of Appellant at 16. RCW 10.73.170(3), however, requires more than a showing that a DNA test may result in evidence favorable to the petitioner; to receive a new DNA test, the petitioner must show that the "DNA evidence would demonstrate *innocence* on a more probable than not basis." RCW 10.73.170(3) (emphasis added). As our Supreme Court has noted, "The legislature's use of the word 'innocence' indicates legislative intent to restrict the availability of postconviction DNA testing to a limited class of extraordinary cases where the results could exonerate a person who was wrongfully convicted of a crime." *Riofta*, 166 Wn.2d at 369 n.4. In light of all the evidence presented at trial, and by Watson's own concession on appeal, a favorable DNA test would not exonerate him of his convictions. Accordingly, we hold that any error in the trial court's consideration of Watson's motion for post-conviction DNA testing was harmless and we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

BJORGEN, J.

We concur:

JOHANSON, A.C.J.

MAXA, J.

COWLITZ COUNTY ASSIGNED COUNSEL

March 13, 2014 - 4:19 PM

Transmittal Letter

Document Uploaded: 426595-Petition for Review.pdf

Case Name: State v. Deshan Akeem Watson

Court of Appeals Case Number: 42659-5

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lisa E Tabbut - Email: **lisa.tabbut@comcast.net**

A copy of this document has been emailed to the following addresses:
prosecutor@clark.wa.gov