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STATE OF WASHINGTON
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SUPREME COURT NO. 98424-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TONY KING,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 52747-2-II
Clark County No. 13-1-00310-4

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, TONY KING, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

King seeks review of the March 17, 2020, unpublished decision of Division Two of the Court of Appeals affirming the denial of his motion for post-conviction DNA testing.

C. ISSUE PRESENTED FOR REVIEW

Where King's motion for post-conviction DNA testing established that testing would provide significant new information which would demonstrate innocence on a more probable than not basis, did the court err in denying the motion?

D. STATEMENT OF THE CASE

In 2013 Tony King was charged in Clark County Superior Court with first degree assault, second degree rape, felony harassment, and unlawful imprisonment, with deadly weapon enhancements. CP 1-3. Ultimately, he accepted a plea deal and entered guilty pleas to charges of first degree assault, third degree rape, and felony harassment, all domestic violence offenses. CP 4-23. The probable cause declaration indicates S.C. was married to another man and having an affair with King. King acknowledged having sexual intercourse with S.C. but he reported that it

was consensual. CP 199-203. Although samples were gathered from King and S.C., no DNA testing was done prior to King's guilty plea. CP 191.

In 2017 King moved pro-se for post-conviction DNA testing, averring that testing would lead to significant new information relevant to his defense. CP 40-50. King asserted that during her relationship with him S.C. was having affairs with multiple men and made the false accusation of rape to conceal that fact from her husband. King argued that DNA testing was relevant to consent, because test results showing DNA from multiple sources would corroborate this claim and demonstrate his innocence on a more likely than not basis. *Id.* Counsel was appointed to represent King, and counsel filed a motion for post-conviction DNA testing. CP 51-54.

Following a hearing, the court denied the motion for DNA testing. CP 190-92. The court found that no DNA testing was done prior to King's guilty plea, but DNA testing was sufficiently developed at the time to test the evidence in this case, there has been no significant advancement in DNA testing since 2013, and there is no indication that DNA testing now would be significantly more accurate than if it had been done in 2013. CP 191. The court concluded that testing DNA evidence would not lead to any relevant information on the issue of consent, and it would not show King's innocence, because DNA testing cannot prove whether force was

used or consent was given. CP 191. The court determined that evidence of S.C.'s prior sexual acts with others would be irrelevant to consent and inadmissible. Finally, it concluded that King had not shown a likelihood that DNA evidence would demonstrate his innocence on a more probable than not basis. CP 192.

King appealed, and the Court of Appeals affirmed, holding he had not established the statutory requirements for post-conviction DNA testing.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

PROPER AND CONSISTENT APPLICATION OF THE POST-CONVICTION DNA TESTING STATUTE IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST WHICH THIS COURT SHOULD DECIDE. RAP 13.4(b)(1), (4).

By statute, a person convicted of a felony in Washington may obtain DNA testing of evidence on the ground that it would provide significant new information that would demonstrate innocence on a more probable than not basis:

(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.

RCW 10.73.170.

The person requesting testing must satisfy both the procedural basis set forth in subsection (2) and the substantive basis set forth in subsection (3). *State v. Riofta*, 166 Wn.2d 358, 364, 209 P.3d 467 (2009). The statute “allows DNA testing based on either advances in technology or the potential to produce significant new information.” *Id.* at 365. The “significant new information” statutory basis includes test results that did not exist at the time of conviction, regardless of whether DNA testing could have been done prior to trial. *Id.* at 362, 366.

The Court of Appeals assumed without deciding that King satisfied the procedural requirements of RCW 10.73.170. It affirmed based on its conclusion he had not met the substantive requirements. Opinion, at 4. The State argued below that King had not alleged a procedural basis for post-

conviction DNA testing because the testing he was requesting was previously available. Br. of Resp. at 8. This Court has held, however, that the “significant new information” need not result solely from advances in DNA technology. A request for testing is not precluded by the fact that the very testing being requested could have been done prior to conviction. *State v. Riofta*, 166 Wn.2d 358, 366, 209 P.3d 467 (2009). Because no DNA testing was done previously, and the requested testing would provide significant new information, the statute provides a means for King to obtain DNA evidence if he meets the substantive requirement. *Id.* Upon review, this Court should reiterate this application of the statute.

The substantive element of the statute requires the petitioner to establish a likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. RCW 10.73.170(3). In deciding whether to grant a motion for DNA testing, the trial court must presume that the testing would yield results favorable to the defense. *State v. Crumpton*, 181 Wn.2d 252, 260, 332 P.3d 448 (2014).

King’s primary contention is that testing which shows the presence of DNA from multiple sources would corroborate his version of events, which is that S.C. was having multiple affairs and made up the rape accusation to conceal that fact from her husband. RP 16-17. An alleged victim’s sexual activity may be admissible to show consent and may not

be excluded if essential to the defense. *See* RCW 9A.44.020(3); *State v. Jones*, 168 Wn.2d 713, 722, 230 P.3d 576 (2010) (rape shield statute applies only to sexual conduct in the past and does not exclude evidence regarding sexual activity contemporaneous with alleged rape).

The Court of Appeals held that the superior court properly concluded that King failed to show DNA results would demonstrate his innocence on a more probable than not basis. It held that whether S.C. had intercourse with other men had no bearing on whether she consented to sexual intercourse with King, and DNA results which undermined her credibility would not sufficiently demonstrate King's innocence. Opinion, at 5.

Innocence does not have to be established on the basis of test results alone, however. Rather, the statute requires the trial court to grant a motion for post-conviction testing when exculpatory results, together with other evidence, would raise a reasonable probability of innocence. *Riofta*, 166 Wn.2d at 367-68. Moreover, in deciding a motion for post-conviction DNA testing, the court should not focus on the weight or sufficiency of the evidence used to convict the petitioner. There will always be strong evidence against a person convicted beyond a reasonable doubt. Instead, the court must focus on the likelihood that DNA evidence could

demonstrate innocence, despite the multitude of other evidence against them. *Crumpton*, 181 Wn.2d at 262.

The Court of Appeals' decision fails to apply the statute consistently with this Court's prior decisions in *Riofta* and *Compton*. The proper application of the statute is an issue of substantial public importance. This Court should grant review. RAP 13.4(b)(1), (4).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse the order denying King's motion for post-conviction DNA testing.

DATED this 16th day of April, 2020.

Respectfully submitted,

GLINSKI LAW FIRM PLLC



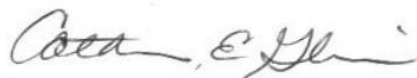
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in
State v. Tony King, Court of Appeals Cause No. 52747-2-II, as follows:

Tony King/DOC#332846
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
April 16, 2020

March 17, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TONY MICHAEL KING,

Appellant.

NO. 52747-2-II

UNPUBLISHED OPINION

GLASGOW, J.—In 2013, Tony Michael King pleaded guilty to first degree assault, third degree rape, and felony harassment—all domestic violence offenses. King’s victim was a woman who was married to another man and having an affair with King. DNA evidence was collected from the victim but never tested.

In 2017, King filed a motion for postconviction DNA testing. King acknowledged having sexual intercourse with the victim but contended the sex acts were consensual. He argued that the postconviction DNA test would likely show the presence of other DNA, as well as his, supporting his theory that the victim lied about the sex being nonconsensual in order to cover up her multiple extramarital affairs.

The superior court denied King’s motion for postconviction DNA testing, concluding that DNA testing would not provide significant new, relevant, or admissible information because DNA testing cannot prove whether force was used or whether the sexual intercourse was consensual. The superior court further concluded that whether the DNA testing showed the presence of another

person's DNA, the absence of any DNA, or only King's DNA, the results would not demonstrate King's innocence on a more probable than not basis.

King appeals arguing that the superior court abused its discretion when it denied his motion for postconviction DNA testing. We disagree and affirm.

FACTS

In 2013, the State charged King with first degree assault, second degree rape, felony harassment, and unlawful imprisonment, with deadly weapon enhancements. The probable cause declaration reflects that King was having an affair with a married woman. When the woman refused to leave her husband for King, he became upset, threatened her with a knife, duct taped her wrists, ankles, and mouth, and locked her in his bedroom. While the victim was locked in the bedroom, King had sexual intercourse with her three times. King squirted a mixture of acid and poison into the victim's eye.

King then took the victim to Walgreens for her injured eye. While there, the victim approached several people seeking help. Law enforcement responded, and when they attempted to contact King, he ran but was ultimately apprehended. The victim was taken to the hospital for treatment of her injuries. Hospital staff performed a sexual assault examination, and law enforcement took the victim's clothes into evidence. King contended that the sexual intercourse with the victim was consensual, he duct taped her to "try a new sexual experience," and he "accidentally" squirted acid into her eye. Suppl. Clerk's Papers (CP) at 200.

King ultimately pleaded guilty to first degree assault, third degree rape, and felony harassment—all domestic violence offenses. No DNA testing was done prior to King's guilty plea.

In 2018, King filed a motion for postconviction DNA testing under RCW 10.73.170. King argued that he had consensual sex with the victim and that postconviction DNA testing would more than likely show that the victim was having multiple extramarital affairs. King argued that if the DNA test results showed mixed DNA, it would “corroborate [his] contention it was consensual sex and that [the victim] was routinely having sex with multiple partners, thus she made false accusations against [King] to cover up her affairs from her husband.” CP at 52. He also argued that if the test identified only his DNA, that would prove he allowed her to change her clothes “support[ing] an inference to consensual sex and no imprisonment.” CP at 53-54.

The superior court denied King’s motion for postconviction DNA testing, concluding that because there was no factual dispute that sexual intercourse occurred between the victim and King, DNA evidence would not lead to any more relevant information on the issue of consent. The superior court concluded that the DNA testing would not demonstrate King’s innocence on a more probable than not basis because “DNA testing cannot prove whether force was used or whether sexual intercourse was consensual.” CP at 191. The superior court further concluded that whether the DNA testing showed the presence of another person’s DNA, the absence of any DNA, or only King’s DNA, the results would not demonstrate King’s innocence on a more probable than not basis.

King appeals.

ANALYSIS

King argues that the superior court abused its discretion when it denied his motion for postconviction DNA testing under RCW 10.73.170. We disagree.

We review a trial court's ruling on a motion for postconviction DNA testing for 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). A discretionary decision is based on untenable or unreasonable grounds if it rests on facts unsupported by the record or was reached by applying an incorrect legal standard. *Thompson*, 173 Wn.2d at 870.

RCW 10.73.170 allows a convicted person serving a prison sentence to request postconviction DNA testing. The postconviction DNA testing statute imposes both substantive and procedural requirements. *State v. Riofta*, 166 Wn.2d 358, 364, 209 P.3d 467 (2009). The motion for DNA testing must state that (1) “[t]he court ruled that DNA testing did not meet acceptable scientific standards,” (2) the DNA testing technology was not sufficiently developed to test the relevant DNA, or (3) new DNA testing could be significantly more accurate or would “provide significant new information.” RCW 10.73.170(2)(a)(i)-(iii). The motion must also “[e]xplain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement.” RCW 10.73.170(2)(b). The motion must further “[c]omply with all other procedural requirements established by court rule.” RCW 10.73.170(2)(c). Once these requirements are met, the superior court must grant the motion if “the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3).

Assuming without deciding that King satisfies the procedural requirements of RCW 10.73.170, we hold that the superior court did not abuse its discretion by concluding that King failed to satisfy the substantive requirement of RCW 10.73.170(3). 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 reviewing whether a motion for postconviction DNA satisfies the substantive requirement, we presume the DNA test results would be favorable to the convicted person and ask whether the newly discovered, favorable DNA test results, in light of all of the evidence presented at trial, would raise the likelihood that the convicted person is innocent on a more probable than not basis. *Riofta*, 166 Wn.2d at 367-68. King fails to meet this burden.

The superior court properly concluded that King failed to show that DNA test results would demonstrate his innocence on a more probable than not basis. King does not dispute that he had sexual intercourse with the victim and assumes in his motion that the postconviction DNA test would show the presence of his DNA. He contends that the DNA test results may show the presence of other DNA, as well as his, thus supporting his theory that the victim was having sexual intercourse with other men and lied about King raping her to cover up her affairs.¹ But whether the victim had sexual intercourse with other men has no bearing on whether she consented to sexual intercourse with King. At best, King could attempt to use a mixed DNA sample to undermine the victim’s credibility.² But RCW 10.73.170(3) requires more than a showing that a DNA test may result in evidence favorable to the convicted person. To receive a postconviction DNA test, the convicted person must show that the “DNA evidence would demonstrate *innocence* on a more probable than not basis.” RCW 10.73.170(3) (emphasis added).

¹ In his appeal, King seems to have abandoned his argument that if the DNA test showed only his DNA it would demonstrate his innocence because it would “show Defendant allowed [the victim] to change her clothes which supports an inference to consensual sex.” CP at 53.

² It is doubtful whether such evidence would be admissible for that purpose under RCW 9A.44.020, the rape shield statute.

Although we presume the DNA evidence will be favorable to the convicted person, we also evaluate the presumed favorable DNA evidence in the context of all the evidence. *Riofta*, 166 Wn.2d at 369. Given the strength of the evidence and the limited probative value of even favorable DNA test results, King cannot show that the DNA evidence would demonstrate innocence on a more probable than not basis. The arresting officer's declaration of probable cause stated that the victim approached multiple people at Walgreens seeking help. When law enforcement contacted King, he ran. The victim recalled that King duct taped her wrists, ankles, and mouth to restrain and silence her while he raped her. The victim and King both recalled that King squirted acid in the victim's eye while she was bound with duct tape. King's account of the events differed only in that he claimed the sexual intercourse was consensual, he duct taped the victim to "try a new sexual experience," and he accidentally squirted acid in her eye. Suppl. CP at 200.

Assuming a favorable DNA test result and considering all of the evidence, the record supports the superior court's conclusion that King did not establish his innocence on a more probable than not basis.³ We affirm.

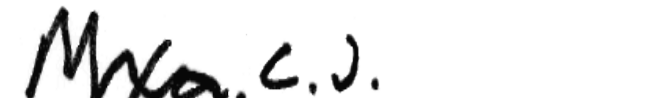
³ The State seems to suggest that King's guilty plea, including his waiver of his right to present a defense, would preclude him from obtaining a new trial even if DNA test results were favorable to him. Because we conclude that King is not entitled to DNA testing under RCW 10.73.170, we do not address this argument.


No. 52747-2-II

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.


Glasgow, J.

We concur:


Maxa, C.J.


Sutton, J.

GLINSKI LAW FIRM PLLC

April 16, 2020 - 11:28 AM

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