FILED
Court of Appeals
Division III
State of Washington
4/5/2024 4:28 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
4/8/2024
BY ERIN L. LENNON
CLERK

Supreme Court No. ____
(COA No. 39338-1-III)

Case #: 1029365

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY LUCIOUS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Timothy Lucious asks this Court to accept review of the Court of Appeals decision under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Lucious appealed the trial court's denial of his motion for postconviction DNA testing. The Court of Appeals affirmed. *State v. Lucious*, No. 39338-1-III, 2024 WL 1070154 (Wash. Ct. App. Mar. 12, 2024).

C. ISSUE PRESENTED FOR REVIEW

The legislature has provided access to postconviction DNA testing to protect against wrongful convictions. RCW 10.73.170 requires the trial court to grant a person's motion for postconviction DNA testing where the person shows a "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." When assessing the motion, the court must presume favorable DNA results and consider those results in the context of all the evidence presented at trial. Here, the trial court denied Mr. Lucious's

motion without considering the impact of favorable DNA evidence in his case, which rests entirely on unreliable eyewitness testimony. The Court of Appeals decision affirming the trial court's ruling conflicts with decisions by this Court and is an issue of substantial public interest, warranting this Court's review. RAP 13.4(b).

D. STATEMENT OF THE CASE

Mr. Lucious is serving a life sentence[1] after a jury found him guilty of drive-by shooting and six counts of second-degree assault. CP 23. The allegations arose from a late-night street brawl in 2009 in Spokane that involved over 15 people. CP 40. When gunshots rang out, everyone panicked and scattered.

Mr. Lucious maintained he was not the shooter and had left before the shooting began. At trial, he presented evidence that he and another woman were driving to someone's house when they saw some people fighting in the street. CP 46. They

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[1] Because he had two prior strikes, Mr. Lucious was sentenced as a persistent offender. CP 21, 23.

briefly stopped at the intersection, but they quickly left when they saw people had knives. CP 46, 222-23. They were in the car leaving when they heard gunshots. CP 46, 224.

The events leading up to the street brawl revolved around six women who had an altercation with another woman at a bar earlier that night. CP 44-45. Mr. Lucious had no connection to any of these women, and none of them had ever seen him before. CP 49. But several of them identified Mr. Lucious in a photo array and said they saw him at the fight that night with a gun. CP 43.

The six women presented different accounts of the street fight, which was "pretty much a blur." CP 48, 175. Many of the women were heavily intoxicated after a long night of drinking. CP 40, 43, 47. By the time the street fight began, there were numerous people involved and things escalated quickly—some people fought with their fists, some with knives, and there was more than one man present with a gun. CP 44, 46, 48.

One woman testified she saw Mr. Lucious at the intersection during the fight but he did not have a gun. CP 48. Another woman who was knocked unconscious by someone else testified that, when she regained consciousness, she saw Mr. Lucious with a gun. CP 48. Some of the women testified they saw Mr. Lucious tap on the window of their car holding a gun, and some testified he shot at them while they were in their car. CP 48-49.

But the women purposefully lied to the police. CP 44. They agreed not to disclose that another man, Antonio Cook, was with them that night. CP 44. Mr. Cook was at the fight, and he had a gun with him. CP 44. The women lied to cover up Mr. Cook's involvement in the events that night to protect him from the police. CP 44.

An eyewitness who lived near the intersection testified she saw people fighting in the street and heard gunshots. CP 41-42, 114. She said she saw two Black men and believed the shorter man was the shooter. CP 42, 116. But Mr. Lucious is

over six feet tall—at least five inches taller than another Black man who was seen at the fight with a gun. CP 17, 46.

No physical evidence ever connected Mr. Lucious to the scene. CP 50-51. The State also never identified a motive. CP 61, 324. Based entirely on eyewitness testimony, the jury found him guilty. CP 51.

Mr. Lucious has consistently maintained his innocence. CP 41. In 2022, he filed a motion requesting DNA testing of five matching shell casings that were collected at the intersection but never tested. CP 38-234. A DNA scientist at the Washington State Patrol Crime Lab filed a declaration confirming DNA testing of the casings was viable and would potentially reveal evidence identifying the shooter. CP 64-70. The trial court denied Mr. Lucious's motion. CP 334-39.

The Court of Appeals affirmed. *Lucious*, 2024 WL 1070154 at *1. It concluded that, even if the court presumes favorable DNA results, someone else's DNA on the casings would not tend to show Mr. Lucious was not the shooter. *Id.* at

*3. The Court of Appeals also failed to consider favorable DNA results in the context of all of the evidence, which lacked any motive or physical evidence and only consisted of weak eyewitness testimony.

E. ARGUMENT

The Court of Appeals decision affirming the trial court's denial of Mr. Lucious's request for postconviction DNA testing conflicts with binding precedent and is an issue of substantial public interest requiring this Court's guidance.

Mr. Lucious requested DNA testing that could identify someone else as the person responsible for the shooting for which he is serving a life sentence. The Court of Appeals decision affirming the trial court's denial of Mr. Lucious's motion misconstrues the substantive requirements for a motion for postconviction DNA testing. It also fails to consider the impact of exculpatory DNA evidence in the context of all the evidence of this case, where there was no physical evidence, no motive, and which rested entirely on unreliable eyewitness identification. This Court should grant review. RAP 13.4(b).

1. *Postconviction DNA testing is a critical check on the reliability of a conviction, and the legislature has broadened access to this important tool.*

The Washington Legislature has provided persons convicted of crimes a vehicle to prove their innocence through DNA testing. RCW 10.73.170. DNA testing is a powerful tool to reverse unjust convictions, and "many innocent individuals have been exonerated through postconviction DNA testing." *State v. Crumpton*, 181 Wn.2d 252, 262, 332 P.3d 448 (2014). As of 2024, postconviction DNA testing has contributed to the exoneration of at least 593 people, including 7 people in Washington State. National Registry of Exonerations Database.[2]

The statute is intended to use scientific advancements "to ensure an innocent person is not in jail" as a result of a wrongful conviction. *Crumpton*, 181 Wn.2d at 258. Since its original enactment, the legislature has amended the statute

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[2] Available at: https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Mar. 29, 2024).

several times to broaden access to DNA testing. *State v. Riofta*, 166 Wn.2d 358, 365, 209 P.3d 467 (2009).

The court must grant a motion for postconviction DNA testing where two components are met: a procedural one and a substantive one. RCW 10.73.170(2), (3); *see State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (the word “shall” imposes a mandatory obligation). The procedural component is satisfied here, and it is not at issue in this appeal.[3]

The substantive component requires the person to show there is a “likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3). For the purposes of the motion, the court must assume DNA testing would produce favorable results. *Crumpton*, 181 Wn.2d at 260.

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[3] The State concedes Mr. Lucious has satisfied the procedural component. CP 332. The Court of Appeals agreed: “The only contested issue in this case is the substantive component of the statute.” *Lucious*, 2024 WL 1070154 at *2.

To determine whether presumptively exculpatory DNA evidence "might demonstrate innocence," the court must consider it in the context of all the evidence presented at trial. *Id.* at 262. In its analysis, the court should not focus on the weight of the other evidence. *Id.* This is because the person has already been convicted, so there will necessarily already be strong evidence of guilt. *Id.* Rather, the court "must focus on the likelihood that DNA evidence could demonstrate the individual's innocence in spite of the multitude of other evidence against them." *Id.*

If favorable DNA results would raise a reasonable probability the person did not commit the crime as alleged, the court must grant the motion and order DNA testing. *Id.* at 260-61. A reasonable probability does not mean the evidence would definitively prove innocence; rather, this standard is met where DNA testing "may produce new material evidence" that would "support a theory" of innocence. *Riofta*, 166 Wn.2d at 366.

To be clear, a motion for postconviction DNA testing is a preliminary issue and does not necessarily entitle a person to a new trial. *Crumpton*, 181 Wn.2d at 263. "The intent of [RCW 10.73.170] is to provide for testing." *Riofta*, 166 Wn.2d at 374 (Johnson, J., dissenting). A later motion for a new trial in light of new DNA evidence is a separate question with a separate, higher standard. *Id.*; *see* CrR 7.5. But for the purposes of the motion, the person must only demonstrate a reasonable probability of innocence. *Id.* at 367-68.

2. *In this case, favorable DNA results would demonstrate someone other than Mr. Lucious loaded the gun. In light of the absence of any motive or physical evidence, this would raise a reasonable probability that Mr. Lucious is innocent.*

In this case, there was no physical evidence connecting Mr. Lucious to the shooting that night. There was also no evidence of motive. Indeed, Mr. Lucious had no connection to any of the women at the center of the events that night. Instead, his convictions were based entirely on unreliable eyewitness testimony. In light of all the evidence, if the casings revealed

DNA belonging to another person that Mr. Lucious had no connection to, it would demonstrate a reasonable probability of his innocence.

DNA evidence is critical in cases that rely on eyewitness evidence. This is because "mistaken eyewitness identification is a leading cause of wrongful conviction." *Riofta*, 166 Wn.2d at 371 (citing Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60 (2008)); *see State v. Derri*, 199 Wn.2d 658, 662, 511 P.3d 1267 (2022). The unreliability of eyewitness identification is further complicated when witnesses are intoxicated and in a high-stress situation such as a street fight. Jonathan M. Fawett, et al., *Of Guns and Geese: A Meta-Analytic Review of the "Weapon Focus" Literature*, 19 Psychol. Crim. & L. 35, 36-38 (2013). In situations where a gun is present, the phenomenon known as "weapon focus" also impairs a person's mental function and attention. *Id.* Under such circumstances, the eyewitness identifications are tenuous at best.

On the other hand, postconviction DNA evidence may not have any impact on a case where the conviction is based on reliable eyewitness testimony and clear motive evidence. In *Riofta*, the victim knew the defendant. 166 Wn.2d at 371. When a person wearing a hat approached the victim with a gun, the victim clearly saw the defendant's face and heard his voice, and immediately recognized him. *Id.* The victim identified the defendant by name. *Id.* They had known each other for years, lived in the same neighborhood, played basketball together, and the defendant spent time at the victim's house. *Id.* at 363, 371-72. The defendant had accused the victim's brother of being a "'‘snitch[]'" and wanted to intimidate the brother by assaulting the victim. *Id.* at 372. Given the strong identification and motive evidence, this Court concluded that favorable DNA results from testing the hat would not raise a reasonable probability of the defendant's innocence.

But the eyewitness identification in this case was extremely weak, and there was no motive evidence whatsoever.

None of the witnesses knew Mr. Lucious. CP 49. They were strangers and had never seen him before. CP 49. Most of them were heavily intoxicated during the street fight that involved over 15 people. Even though some of them identified Mr. Lucious as the shooter, there were multiple men at the fight with a gun, including one man all the women purposefully lied to the police about. CP 44. In light of all the evidence, DNA results showing someone else loaded the gun would support Mr. Lucious's theory that he was not the shooter.

But the trial court refused to allow DNA testing because it concluded the bullet casings could have been handled by someone other than the person who fired the gun that night, so DNA testing would not demonstrate Mr. Lucious's probable innocence. CP 332. The Court of Appeals followed the same reasoning and affirmed. *Lucious*, 2024 WL 1070154 at *3.

The Court of Appeals decision is wrong for two reasons. First, the Court of Appeals failed to presume exculpatory DNA results. It stated, "Mr. Lucious is not entitled to a presumption

that the source of any DNA on the ammunition is the person who loaded the firearm." *Id.* at *3 n.4. This is an absurd and improper narrowing of the court's requirement to presume favorable results. *Cf. Crumpton*, 181 Wn.2d at 260. Then, the Court of Appeals stated that, even if it granted Mr. Lucious that presumption, "[t]he fact that Mr. Lucious might not have loaded the gun does not tend to show he was not the shooter." *Lucious*, 2024 WL 1070154 at *3. While this may be true, the Court of Appeals failed to presume that favorable test results would show not just *any* other person's DNA, but DNA belonging *a person Mr. Lucious had no connection to.* In other words, if the gun was loaded by somebody who was a stranger to Mr. Lucious, or even somebody else who was at the fight, such results would tend to show Mr. Lucious was not the shooter.

Second, the Court of Appeals failed to adequately consider presumptively exculpatory DNA evidence in light of all the evidence. *See Crumpton*, 181 Wn.2d at 260-61. In this case, the State presented no physical evidence connecting Mr.

Lucious to the shooting. The State also presented no motive evidence. Rather, Mr. Lucious was convicted entirely based on unreliable eyewitness testimony. Instead of considering the impact of exculpatory DNA results in the entire context of this weak case, the Court of Appeals improperly credited the weak evidence supporting the convictions. *Lucious*, 2024 WL 1070154 at *3; *cf. Crumpton*, 181 Wn.2d at 262. But in this context, DNA evidence from someone Mr. Lucious has no connection to would support his theory of innocence.

The Court of Appeals decision affirming the trial court's failure to consider presumptively exculpatory DNA evidence in the context of all the evidence conflicts with the legislative directive to allow DNA testing in cases like Mr. Lucious's case. Instead, the Court of Appeals effectively required Mr. Lucious to prove his actual innocence. This is the wrong standard, and it conflicts with decisions by this Court interpreting RCW 10.73.170 to require DNA testing when favorable results could

support a theory of innocence. *Riofta*, 166 Wn.2d at 367-68. This Court should grant review. RAP 13.4(b)(1).

In addition, the Court of Appeals narrowed the standards governing a motion for postconviction DNA testing under RCW 10.73.170. The proper application of those standards is an issue of substantial public interest. This Court should grant review to provide guidance to lower courts. RAP 13.4(b)(4).

F. CONCLUSION

Based on the preceding, Mr. Lucious respectfully requests that this Court grant review pursuant to RAP 13.4(b).

This brief is in 14-point Times New Roman, contains 2,628 words, and complies with RAP 18.17.

Respectfully submitted this 5th day of April 2024.

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APPENDIX

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FILED
MARCH 12, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 39338-1-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
TIMOTHY LUCIOUS,	)	
	)	
Appellant.	)	

PENNELL, J. — In 2010, a jury convicted Timothy Lucious of one count of drive-by shooting and six counts of second degree assault with a deadly weapon. In 2022, Mr. Lucious filed a motion for postconviction DNA testing of ammunition evidence. The trial court denied the motion. We affirm.

BACKGROUND

The incident leading to Mr. Lucious's criminal charges took place in July 2009 when a group of friends went out in Spokane for a birthday celebration. While out at a bar—and then later at a house party—the friends ran into a woman previously unknown to them who was confrontational and aggressive. The woman appeared to be an acquaintance of Mr. Lucious. Eventually, one of the friends arranged to fight the woman at a local park.

When the group encountered the woman near the park, she was with several other people, including Mr. Lucious. The fight began with a physical altercation but things escalated when the woman wielded a razor blade and later a knife. At some point, Mr. Lucious pulled out a handgun and waved it around. The friends got back in their car to leave and Mr. Lucious tapped on the car window with his pistol. Mr. Lucious asked the car's occupants if they remembered him. Mr. Lucious also said, "'Bitch, I'll shoot you'" to one of the friends. 2 Rep. of Proc. (Sept. 13, 2010) at 246, *State v. Lucious*, No. 29545-1-III.

The group started to flee, but soon discovered they had left two of their members behind. As they turned around to retrieve their friends, gunshots rang out. At least one of the group members was hit by a bullet and the group drove off to a hospital. One of the friends was critically injured and required eight days of hospitalization.

Police responded to the hospital and conducted interviews. Several of the group members were shown a photo array and identified Mr. Lucious as the shooter. Law enforcement investigated the scene of the shooting and recovered several 9-millimeter shell casings. They did not find a firearm.

Mr. Lucious was charged with six counts of attempted first degree murder and one count of drive-by shooting.

At trial, the group members testified against Mr. Lucious. All identified Mr. Lucious as their assailant with varying degrees of specificity. Some said they observed him shoot the gun. Others merely testified that they saw Mr. Lucious wielding the gun. Only one of the group members said they knew Mr. Lucious before the night of the shooting. The defense impeached group members with evidence of intoxication and prior false statements.

The jury convicted Mr. Lucious of one count of drive-by shooting and six counts of the lesser-included offense of second degree assault with a deadly weapon. He received a sentence of life in prison as a persistent offender. The convictions were affirmed on appeal. *State v. Lucious*, No. 29545-1-III, slip op. at 1 (Wash. Ct. App. May 23, 2013) (unpublished), https://www.courts.wa.gov/opinions/pdf/295451.pdf.

In July 2022, Mr. Lucious filed a motion under RCW 10.73.170 for postconviction DNA testing of the shell casings. In support of the motion, he submitted a declaration from Carol Vo, a forensic scientist at the Washington State Patrol Crime Laboratory. Ms. Vo declared that she had reviewed the incident report from Mr. Lucious's case and determined no prior DNA testing had been performed. According to Ms. Vo, the shell casings recovered from the crime scene could have yielded DNA evidence pertaining to the individual who had loaded the ammunition into the gun.

The State opposed Mr. Lucious's motion. According to the State, even if testing produced a result favorable to Mr. Lucious, it would merely mean that someone else had handled the ammunition at some point in time. The State argued such a result would not reasonably undermine the jury's verdict.

The trial court agreed with the State and denied Mr. Lucious's motion. In a letter ruling, the court explained:

> . . . [T]he Court is called upon to presume that another individual's DNA would be found on the bullet casings and Mr. Lucious's DNA would not. Mr. Lucious argues that whoever loaded the gun may be the individual responsible for firing the gun the night of the street brawl . . . . However, this theory is weakened by the fact that a gun can be loaded by one individual and fired by another. More compelling, even . . . assuming favorable DNA testing for Mr. Lucious, the favorable DNA testing would not demonstrate his innocence on a more probable than not basis in light of the evidence produced at trial.
>
> At trial, evidence was admitted that Mr. Lucious was seen holding a firearm by six different witnesses, with five of the witnesses identifying him as the shooter. Even though eye-witness testimony may not be too reliable, the testimony is bolstered in this case due to the number of witnesses who saw Mr. Lucious with a gun. More importantly, it would be improper for the Court to assume the role of the jury and reweigh the credibility of the eye-witness testimony. Credibility determinations of each witness are left to the trier of fact as they are able to observe each witness while subject to direct examination and cross-examination.
>
> . . . [T]he presumptively favorable DNA results would not demonstrate Mr. Lucious's innocence on a more probable than not basis.

Clerk's Papers at 332. The trial court's written order incorporated the letter ruling. Mr. Lucious timely appeals.

ANALYSIS

Under RCW 10.73.170, an individual incarcerated for a felony offense may file a postconviction motion requesting DNA testing of evidence. The statute imposes procedural[1] and substantive[2] requirements. The procedural components are fairly "lenient," but the substantive requirement is "onerous." *State v. Riofta*, 166 Wn.2d 358, 367, 209 P.3d 467 (2009). We review a trial court's decision on a motion for postconviction DNA testing for abuse of discretion. *State v. Thompson*, 173 Wn.2d 865, 870, 271 P.3d 204 (2012).

The only contested issue in this case is the substantive component of the statute. This provision requires the applicant to show a "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). Well-established rules govern whether an applicant has satisfied the substantive component. In considering a request for postconviction DNA testing, a court must afford the movant the presumption that further testing will indicate the absence of the defendant's DNA and

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[1] *See* RCW 10.73.170(2).
[2] *See* RCW 10.73.170(3).

the presence of some other person's DNA. *Riofta*, 166 Wn.2d at 370.[3] The court must assess whether an exculpatory result would so offset the remaining inculpatory evidence that innocence becomes not merely possible, but probable. *See id.* at 369 ("[C]ourts must consider . . . the impact that an exculpatory DNA test could have in light of [the remaining] evidence.").

Applying the foregoing standards, the trial court did not abuse its discretion in concluding Mr. Lucious did not meet the substantive requirement for postconviction DNA testing. The most favorable outcome of testing for Mr. Lucious would be a result revealing the DNA of one or more other persons on the shell casings to the exclusion of Mr. Lucious. But this best-case scenario would not tend to show probable innocence. Loading a gun and firing a gun are two distinct and separate acts that necessarily take place at different points in time. The fact that Mr. Lucious might not have loaded the gun does not tend to show he was not the shooter.[4] Furthermore, given the context of the

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[3] This standard does not mandate further inferences beyond the presumption of an exculpatory test result. *See State v. Braa*, 2 Wn. App. 2d 510, 521, 410 P.3d 1176 (2018) ("[N]either our Supreme Court nor this [appellate] court has held that a petitioner is entitled to additional inferences in [their] favor beyond the assumption of a favorable DNA test result.").

[4] Mr. Lucious is not entitled to a presumption that the source of any DNA on the ammunition is the person who loaded the firearm. Nevertheless, even giving Mr. Lucious the benefit of that reasoning, he has not satisfied the substantive requirement for DNA testing.

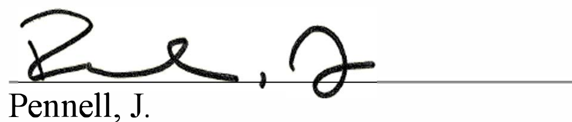
State's inculpatory evidence, a DNA result favorable to Mr. Lucious would be of little value. Numerous witnesses identified Mr. Lucious as the shooter. While the eyewitnesses' testimony was not unimpeachable, DNA evidence suggesting Mr. Lucious may not have loaded the firearm would not have contradicted the testimony in any way. No witness ever claimed they saw Mr. Lucious load the gun. Nor would an exculpatory DNA test have augmented any areas of impeachment.

The trial court acted well within its discretion in denying Mr. Lucious's motion for postconviction DNA testing. We therefore affirm the trial court's ruling.

CONCLUSION

The order denying Mr. Lucious's motion for postconviction DNA testing is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Pennell, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Staab, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

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☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: April 5, 2024
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

April 05, 2024 - 4:28 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	39338-1
Appellate Court Case Title:	State of Washington v. Timothy Lucious
Superior Court Case Number:	09-1-02931-9

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