

**NO. 42659-5-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**DESHAN AKEEM WATSON,**

Appellant.

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

The Honorable Diane Woolard, Judge

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**CORRECTED BRIEF OF APPELLANT**

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

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**A. ASSIGNMENT OF ERROR**

The trial court abused its discretion in denying Watson's motion for post-conviction DNA testing.

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

A person convicted of a crime who is currently serving a term of imprisonment is entitled to post-conviction DNA testing if his motion to the trial court satisfies the procedural and substantive requirements of RCW 10.73.170. Here Watson's motion satisfied the requirements yet the trial court denied Watson's motion. Did the trial court err?

**C. STATEMENT OF THE CASE**

**1. Procedural History**

In 2005, a jury found Appellant Deshan Akeem Watson guilty of first degree felony murder (first degree burglary) and second degree assault both with firearm enhancements. CP ("Clerk's Papers") 1-2, 3-6. Watson received a 484 month sentence. CP 11. He unsuccessfully appealed both convictions. See unpublished opinion at *State v. Deshan Akeem Watson*, 136 Wn.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. Supp. Designation of Clerk's Papers (Motion Requesting Post-Conviction DNA Testing, sub. nom 145, page 1). Watson's motion asked that a mask found at the crime scene receive additional DNA testing. Supp. Designation of Clerk's Papers (Motion Requesting Post-Conviction DNA Testing, sub. nom 145, page 1). Per Watson's motion, the mask was tested and the results used at trial but the DNA "test results produced an inconclusive mixed sample." Supp. Designation of Clerk's Papers (Motion Requesting Post-Conviction DNA Testing, sub. nom 145, page 2). 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. Supp. Designation of Clerk's Papers (Motion Requesting Post-Conviction DNA Testing, sub. nom 145, page 2). "[T]he mixed sample was a combination of more than one contributor, and none of the DNA matched Watson's DNA." Supp. Designation of Clerk's Papers (Motion Requesting Post-Conviction DNA Testing, sub. nom 145, page 2).

Additionally, Watson argued further DNA testing would be more accurate than prior DNA testing or would provide significant new information. Supp. Designation of Clerk's Papers (Motion Requesting Post-Conviction DNA Testing, sub. nom 145, page 2). 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. Supp. Designation of Clerk's Papers (Motion Requesting Post-Conviction DNA Testing, sub. nom 145, page 3-4). 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.'" Supp. Designation of Clerk's Papers (Motion Requesting Post-Conviction DNA Testing, sub. nom 145, page 3).

In a letter dated May 18, 2011, Judge Diane Woolard denied Watson's request noting, "[I]t appears the DNA testing was completed, and the defense had their own DNA expert at trial." Supp. Designation of Clerk's Papers (Letter from Dept. #8 to Defendant, sub. nom 146).

On June 8, 2011, Watson appealed the trial court's ruling. Supp. Designation of Clerk's Papers (Notice of Appeal, sub. nom 147). This Court declined to find the trial's court's May 18 letter a final order from which Watson could appeal. Supp. Designation of Clerk's Papers (June 9, 2011, Letter to Watson from Court of Appeals, sub. nom 154). Watson then asked Judge Woolard to issue a "certificate of finality" from which he could appeal. Supp. Designation of Clerk's Papers (Motion Requesting a Certificate of Finality, Denying Motion for Post-conviction DNA Testing, sub. nom. 155). On July 6, 2011, Judge Woolard declined to do so. Supp.

Designation of Clerk's Papers (Response from Dept #8/Motion Denied, sub. non 156).

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. Supp. Designation of Clerk's Papers (Mandate, sub. nom. 161).

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. Supp. Designation of Clerk's Papers (Response from Dept #8/Motion Denied, sub. nom. 158). Watson again appealed the denial of his request for post-conviction DNA testing. CP 27-28. This Court accepted Watson's appeal.

## **2. Trial testimony.**

On February 14, 2003, around 7 a.m., Andrew Blaine woke to talking outside his bedroom door. RP (“Report of Proceedings”) March 21, 2005 at 147-49. Blaine opened his bedroom door and was immediately “rushed” by someone wearing a black mask with eye holes and black clothing. RP March 21, 2005 at 149, 152-53. That someone hit Blaine above the right eye with a gun and pushed Blaine causing him to fall onto the floor. RP March 21, 2005 at 150. The person also threw a pillow over Blaine’s head and threw a shirt at him. RP March 21, 2005 at 150-51. Blaine believed the person was African-American because the skin color seemed to match the mask color. RP March 21, 2005 at 155.

One of Blaine’s roommates, Matthew Halligan, had the bedroom across the hall. RP March 21, 2005 at 146, 151. Blaine could see Halligan and another person swinging at each other and wrestling in Halligan’s bedroom. RP March 21, 2005 at 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 skin on his neck. RP March 21, 2005 at 155.

Blaine closed his bedroom door, jumped out of the window, and ran toward the neighbors. RP March 21, 2005 at 152, 156. Before



reaching the neighbors, he had a change of heart and returned to the house. RP March 21, 2005 at 158. Halligan was the only person in the house. Halligan had a “puncture” to his chest and was in “bad shape.” RP March 21, 2005 at 159. Iaine called 911 and stood by for the police to arrive. RP March 21, 2005 at 160; RP March 21, 2005 at 129.

Halligan 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 roll of duct tape, a neoprene mask, and a wool cap. No gun was recovered. 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. Stuckey did not appear and testify. Instead, the parties agreed

certain stipulated facts be read to the jury. RP March 23, 2005 at 449-50. The stipulated facts include the following. 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 around February 14, 2003. 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. Andrew Blaine's two roommates, his brother Joshua Blaine, and Joshua's girlfriend, Ann Westelin, 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. This is when Lockwood met Watson for the first time. RP March 22, 2005 at 315. Lockwood met up with Suggs and Watson a second time at 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 without Lockwood. 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.

At the request of the police, 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. The only possible connection Watson had to Halligan is, as a marijuana user, he

possibly purchased marijuana from Halligan at some time in the past. RP March 25, 2005 at 818.

**D. ARGUMENT**

**THE TRIAL COURT ERRED IN REFUSING DESHAN WATSON ADDITIONAL DNA TESTING.**

RCW 10.73.170 provides a mechanism for Deshan Watson, a convicted felon serving a term of confinement, to request DNA testing. Watson twice made this request to the Clark County Superior Court and twice was denied. In both instances, however, Watson satisfied both the procedural and the substantive requirements of RCW 10.73.170. As such, the trial court erred in denying Watson's DNA requests.

**1. Standard of review**

A trial court's decision on a motion for post-conviction DNA testing is reviewed for abuse of discretion. *State v. Thompson*, 173 Wn.2d 865, 870, 271 P.3d 204 (2012). A trial court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). "A discretionary decision 'is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.' " *Id.* (quoting *State v. Rohrich*, 149 Wn.2d 647,

654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995))).

**2. Watson satisfied the procedural requirements for DNA testing.**

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. *State v. Riofta*, 166 Wn.2d 358, 367, 209 P.3d 467 (2009). Watson satisfied both requirements (a) and (b) in his pleadings.

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. Supp. Designation of Clerk's Papers (Motion Requesting Post-Conviction DNA Testing, sub. nom. 145, pages 2-3.) 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](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.

It is important to note the plain meaning of RCW 10.73.170(2) allows DNA testing based on either advances in technology **or** the potential to produce significant new information. *Thompson*, 173 Wn.2d at 875-76.

In denying a post-trial motion for DNA testing, the trial court is not required to enter findings of fact and conclusions of law. However, there should be some measure by which to determine if the trial court used and abused its discretion. Here the trial court in the first instance denied DNA testing to Watson because he had his own DNA expert at trial. But whether Watson had his own DNA expert shines no light on the question

before the trial court. The question was whether technology changed such that additional DNA testing would benefit Watson and/or would additional testing provide Watson with new information.

The same holds true of the court refusing to take any action given Watson's September 12, 2011 second request for additional DNA testing. The court simply "took no action." A trial court abuses its discretion when it misapplies the law. The trial court failed to take any action on Watson's lawful DNA request. A trial court's refusal to categorically apply existing law is effectively a failure to exercise discretion and is subject to reversal. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

### **3. Watson satisfied the substantive requirements for DNA testing.**

While the procedural requirements of the statute are subject to a lenient test, the substantive requirement that Watson prove the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis is subject to a much stricter standard. RCW 10.71.170(3). "To determine the probability that a petitioner could demonstrate his innocence with the aid of favorable DNA test results, courts must consider the evidence produced at trial along with any newly discovered evidence and the impact that an exculpatory DNA test could have in light of this

evidence.” *Riofta*, 166 Wn.2d at 368. Hence, “[t]he 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 the petitioner was not the perpetrator.” *State v. Gray*, 151 Wn. App. 762, 773-774, 215 P.3d 961 (2009) (quoting *Riofta*, 166 Wn.2d at 366.)

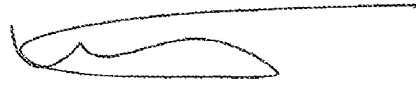
Watson asked the trial court to order additional DNA testing on the mask because he is confident improvements in testing will eliminate him as a donor to the mask’s mixed DNA sample. If Watson’s DNA was eliminated from the mask, it would not preclude him being the second person in the house. Andrew Blaine testified to seeing two masked people in the house. What the results of the DNA retesting would do is eliminate Watson as a 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. After all, any number of people could have committed the crime. Halligan was widely known as a marijuana dealer. Not only would Halligan have marijuana but he also would likely have a large stash of money. Certain persons would find Halligan a tempting target. Watson’s only commonality with the two intruders, as described by

Andrew Blaine, is his African-American ethnicity. Being African American alone does not make it a reasonable probably that Watson was the perpetrator of Halligan's murder or Blaine's assault.

**E. CONCLUSION**

As Watson satisfied the requirements of RCW 13.73.170, the trial court erred in failing to grant his request for post-conviction DNA. Watson's case should be remanded to the trial court with directions to compel Watson's requested testing.

Respectfully submitted this 5<sup>th</sup> day of September 2012.



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

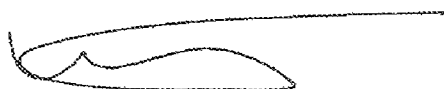
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed Appellant's Brief to: (1) Abigail Bartlett, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (4) I mailed it to 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 September 5, 2012, in Longview, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

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

# COWLITZ COUNTY ASSIGNED COUNSEL

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