No. 31578-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ANTHONY L. ALLEN, SR.,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENT OF ERROR

The trial court erred in denying the defendant's motion for post-conviction DNA testing.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court abuse its discretion in denying the defendant's motion for post-conviction DNA testing?

C. STATEMENT OF THE CASE

Anthony Allen was convicted of first degree kidnapping and second degree assault with a deadly weapon against Karla Jones and second degree assault with a deadly weapon against Dewey Hudson on December 20, 2007. CP 5-6, 71. Allen appealed his convictions. CP 20-21. This Court affirmed his convictions in an unpublished opinion on September 22, 2009. CP 44-55.

At the trial there were two co-defendants, Uriah Allen, who testified, and Wanda Phillips, who invoked her 5th Amendment privilege and did not testify. The State's case was that Allen assaulted both victims with a knife found at the scene. Allen's defense was that he was merely a bystander who intervened to break up the fight and that he was not the person who wielded the knife. CP 71-72.

The incident came about when Karla Jones and Dewey Hudson Jr. went to Mr. Hudson's home at his suggestion to retrieve her dog. Ms. Jones testified that when she reached the porch on Mr. Hudson's home, Mr. Allen opened the door, grabbed Ms. Jones, and pulled her into the entryway. Mr. Allen and another man then started punching her in the face. When Mr. Hudson tried to intervene, Allen knocked him down, slapped him in the face with a butcher knife, and hit him in the jaw with the butt of the butcher knife. Allen next used the butcher knife to cut off Ms. Jones's hair while a woman was kicking Ms. Jones in the side. Then Allen hit Ms. Jones in the back of the head with a pistol, and the three assailants left Mr. Hudson's house. CP 45-46, 107-15.

The butcher knife found at the scene had a red substance on it that was presumed to be blood from the victim. Two swabs were taken but DNA testing was not done on either the knife or the swabs. CP 72, 85-89, 159-60. Detective Ferguson testified that the red substance may have been blood. She also testified that nobody saw the defendants the night of the incident so she could not exclude them as possible contributors of blood on the knife. CP 74, 85-89.

Allen filed a motion for post-conviction DNA testing pursuant to RCW 23 10.73.170 on November 29, 2012. In the motion he asked the

court to order DNA testing of a butcher knife and the swabs taken from the blade of the knife. CP 158. The Court denied Allen's motion for post-conviction DNA testing. CP 161. This appeal followed. CP 162-69.

D. ARGUMENT

RCW 10.73.170(1) allows a convicted person currently serving a prison sentence to file a motion requesting DNA testing with the court that entered the judgment on conviction. *State v. Riofta*, 166 Wn.2d 358, 364, 209 P.3d 467 (2009). The person requesting testing must satisfy both the procedural and substantive requirements of the statute. *Id*.; RCW 10.73.170(2), (3). DNA testing may be requested on the ground it "would be significantly more accurate than prior DNA testing or would provide significant new information." RCW 10.73.170(2)(a)(iii). 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).

The first consideration is whether Allen's motion met the procedural requirements for testing under the statute. The meaning of a

statute is a question of law reviewed de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The fundamental objective of the court is to carry out the legislature's intent and give effect to the statute's plain meaning. *Id.* " '[T]he plain meaning rule requires courts to consider legislative purposes or policies appearing on the face of the statute [as well as] background facts of which judicial notice can be taken.' " *Id.* at 11, 43 P.3d 4 (citations omitted).

The plain meaning of the statute allows DNA testing based on either advances in technology *or* the potential to produce significant new information. *Riofta,* 166 Wn.2d at 366, 209 P.3d 467. The trial court, herein, found Allen "met the procedural burden of RCW 10.73. 170(2)(a)(iii) because the requested DNA testing will produce significant new information as DNA testing was not done prior to trial." CP 160.

The second consideration, and what is at issue here, is whether Allen 's request for testing met the substantive requirement of the statute. RCW 10.73.170(3) provides:

> 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.

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. *Riofta*, 166 Wn.2d at 367, 209 P.3d 467. 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 the petitioner was not the perpetrator. *Riofta*, 166 Wn.2d at 367-68, 209 P.3d 467. With this interpretation of the statute in mind, appellate courts review the trial court's application of the statutory standard for an abuse of discretion. *Riofta*, 166 Wn.2d at 370, 209 P.3d 467 (citing *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996)).

Here, there are several possible scenarios if the knife and swabs are submitted for DNA testing. The red substance could be proved to be blood or not blood, and it could be determined if it contained Allen's blood or not. If the substance proves to be Allen's blood, it is unlikely that he was wielding the knife during the assaults. More importantly, if DNA testing on the handle and other parts of the knife excludes Allen as a

contributor to the DNA, it would exculpate Allen in the assaults on the two victims. It would confirm his defense that he was merely a bystander who intervened to break up the fight and that he was not the person who wielded the knife, thus discrediting Jones' testimony.

Since Jones' testimony was that the defendant was the only one holding the knife during this incident, a positive DNA test on the handle of the knife would establish who was actually wielding the knife. Based on Jones' testimony, that person would be the person who actually committed the assaults. If the DNA test reveals the person was someone other than Allen, it would exculpate Allen as the perpetrator of the offenses.

In summation, exculpatory DNA results would, in combination with the other evidence, raise a reasonable probability that Allen was not the perpetrator of these crimes. See *Riofta*, 166 Wn.2d at 367-68. Accordingly, favorable DNA test results would raise the likelihood that Allen is innocent on a more probable than not basis. See *Riofta*, 166 Wn.2d at 367. Therefore, the trial court abused its discretion in denying the motion for post-conviction DNA testing.

E. CONCLUSION

For the reasons stated, the matter should be remanded with instructions for the trial court to have the evidence submitted to the appropriate agency for DNA testing.

Respectfully submitted September 20, 2013,

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s/David N. Gasch
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on September 20, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

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