

67462-5

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NO. 67462-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID RIGGINS AKA DAWUD MALIK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE TIMOTHY BRADSHAW

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

A criminal defendant has no general right to discovery in post-conviction proceedings. Although an appellate court has inherent authority to order discovery, it will do so only in rare circumstances where the petitioner has demonstrated a substantial likelihood that the requested discovery will lead to evidence that would entitle him to relief. The trial court failed to rule on Riggins' post-conviction motion for discovery. Is remand unnecessary when Riggins failed to establish any basis for his discovery motion?

B. STATEMENT OF THE CASE

Riggins was convicted in 1966 of two counts of murder in the first degree, four counts of robbery, and one count of assault in the first degree, relating to crimes that occurred in 1965 and 1966. CP 74. The facts of the crimes were set forth in the Washington Supreme Court's opinion affirming the convictions and sentence:

The first count concerned the murder of Edwin A. Hutton, which occurred on December 4, 1965. Mr. Hutton was found, bleeding from gunshot wounds in the neck and shoulder and lying in the gutter beside his car, which was parked at the corner of 22nd Avenue and East Terrace in Seattle, a few minutes after he had left the Drum Room, a bar located at Pike Street and 14th Avenue. A witness had observed the defendants getting in his car at that time. A fingerprint

of the defendant Smith was found in the car. Mr. Hutton told the police officer, who came to the scene within a few minutes after the shooting, that he had been shot by two Negroes to whom he had given a ride and who had tried to rob him. There was evidence that Mr. Hutton had cashed a check for \$30 just before leaving the Drum Room. His wallet was found in the street beside his car, and there was no money on his person or in his car.

Count 5 concerned the robbery of Earl Ohlinger, which occurred on May 20, 1966. Mr. Ohlinger testified that the defendants followed him to his apartment at 420 Terry Avenue in Seattle, where they beat him and robbed him. His cigarette lighter and watch were found in the possession of defendant Riggins when he was arrested.

Two days later, on May 22, 1966, shortly after 2 a.m., Dennis Hagen and his 10-year-old son Phillip returned to their home at 729-17th Avenue in Seattle, having been to a late movie. The defendants were in the house. They inflicted beatings upon both the father and the boy, and took what money they could find. They also strangled the boy twice, each time until he lost consciousness. The defendant Smith's fingerprint was found on a broken pane of glass which was lying on the floor beside the back door. This incident formed the bases for count 6, robbery of Dennis Hagen, and count 7, assault in the first degree upon Phillip Hagen.

The evidence produced with reference to count 2, the murder of Reva Krinsky, and count 4, robbery of her husband, Simon Krinsky, tended to show that the defendants entered the Krinsky apartment at 705-24th Avenue, Seattle, on the night of May 25, 1966. They strangled Mrs. Krinsky with her husband's necktie and forced Mr. Krinsky, who was 84 years of age, to lie on the floor beside her while she died. Meanwhile, they ransacked the apartment

and took the small amount of cash which they were able to find. They also took wrist watches belonging to the Krimskys.

The surviving victims identified the defendants in police lineups and in photographs.

State v. Riggins, 74 Wn.2d 744, 747-49, 446 P.2d 571 (1968),
vacated in part, Smith v. Washington, 408 U.S. 934, 92 S. Ct. 2852,
33 L. Ed. 2d 747 (1972).

A jury sentenced Riggins to death for the murder of Reva Krimsky. CP 74. His death sentence was later vacated in Smith v. Washington, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972). Riggins is currently serving a life sentence under the jurisdiction of the Indeterminate Sentencing Review Board. CP 74, 88-90.

Through a public disclosure request in 1998, Riggins received the Seattle Police Department file relating to his crimes, as well as an FBI report regarding the analysis of certain evidence. CP 113. This information formed the basis of a personal restraint petition based on "newly discovered evidence." CP 78-79, 93-94. That petition, in addition to a subsequent petition, was dismissed for failure to establish a basis for relief. CP 93-94.

Over ten years after his public disclosure request, Riggins filed a motion in the superior court pursuant to RCW 10.73.170, for

post-conviction DNA testing of certain evidence. CP 1-4, 33-36. In support of his motion, he cited only to the information he received in 1998.

Specifically, Riggins asked for DNA testing of (1) "hair samples" recovered from the crime scene, (2) soil discovered on his shoes, and (3) the clothing he was wearing at the time he was arrested. CP 1, 33. It appears that the hairs Riggins referred to in his motion were hairs collected from a brush having to do with the Krinsky murder. CP 5-6. The clothing and shoes Riggins referred to were apparently worn by him at the time of his arrest, sometime after the Krinsky murder. CP 26, 78.

Riggins' argument as to how the requested DNA testing would demonstrate his innocence was conclusory and vague. He appeared to argue that he would be exonerated if the hairs discovered on the hairbrush were shown not to be his. CP 1, 33-34, 107. There is no indication from the record where the hairbrush was recovered, and there is nothing to indicate that the killer left the brush at the scene or that he stopped to brush his hair with one of the victim's brushes during the crime. Riggins did not explain how the absence of his hair from the brush would demonstrate that he was innocent.

Additionally, Riggins claimed that his innocence could be shown from the FBI's conclusion that the soil on his shoes did not match the soil outside the Krinsky residence. CP 1, 26, 33-34, 107, 113. Riggins did not explain how soil could be subjected to DNA analysis, and he did not explain how the fact that he had dirt on his shoes at the time of his arrest that did not originate from outside the victim's residence could possibly affect his case.

Finally, Riggins did not explain why he wanted the clothing he was wearing at the time of his arrest tested. CP 1, 33, 78, 107. It is unclear when and where Riggins was arrested, and it is unclear how the presence or absence of DNA on his clothes at the time of his arrest would exonerate him of the crimes.

Riggins also requested that the State be ordered to "reveal its entire file to the court," and that it be ordered to "determine if any prosecution witness has knowledge of any evidence that is possibly exculpatory or favorable to [him] and that such information be provided to the Court for review in camera." CP 2, 27, 34.

The State responded to Riggins' motions, arguing that he had failed to meet his burden for post-conviction DNA testing pursuant to RCW 10.73.170. CP 73-95. The State also objected to

Riggins' apparent request for discovery, citing the lack of authority for such a fishing expedition. CP 79-80.

Prior to the court deciding Riggins' motions, the State provided a supplemental response, indicating that the evidence sought to be tested no longer existed. CP 98-106.

The court denied Riggins' motion for DNA testing. CP 96-97. The trial court's order did not address Riggins' apparent request for discovery. Id. Riggins filed a motion for reconsideration, which the court denied without further comment. CP 154. Riggins filed this appeal. CP 155.

C. ARGUMENT

Riggins does not challenge the trial court's denial of his motion for post-conviction DNA testing. Rather, he assigns error only to the trial court's failure to rule on his motion for post-conviction discovery. He asks this Court to remand the case for a ruling on that motion.

However, Riggins failed to cite to any authority in support of his motion for post-conviction discovery. He did not articulate a specific claim for relief, and he failed to demonstrate a substantial likelihood that his request would lead to evidence establishing such

a claim. Because there was absolutely no basis for Riggins' discovery request, remand to the trial court for a ruling on the motion would be an unnecessary use of judicial resources.

I. RIGGINS FAILED TO DEMONSTRATE A SUBSTANTIAL LIKELIHOOD THAT HIS DISCOVERY REQUEST WOULD LEAD TO EVIDENCE THAT WOULD ENTITLE HIM TO RELIEF.

The State is under a continuing obligation to disclose material exculpatory evidence. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). That obligation does not cease after the defendant has been convicted. Thomas v. Goldsmith, 979 F.2d 746, 749-50, (9th Cir. 1992). The State cannot avoid its discovery obligations by keeping ignorant of information known to state agents, but it is under no obligation to affirmatively search out exculpatory evidence. In re Gentry, 137 Wn.2d at 399.

RCW 10.73.170 provides a specific means for a defendant to pursue post-conviction DNA testing. State v. Thompson, No. 84739-8, 2012 WL 581293 at *3 (Wn.2d Feb. 23, 2012). However, there is no mechanism, statutory or otherwise, to compel the general production of discovery post-conviction. Moreover, there is no constitutional right to discovery in post-conviction proceedings

as a matter of ordinary course. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 390-91, 972 P.2d 1250 (1999).

Although an appellate court has inherent constitutional authority to compel discovery, it will do so only in rare circumstances where the petitioner has demonstrated a substantial likelihood that the requested discovery will lead to evidence that would entitle him to relief. Id. at 391-92. "Courts will not condone fishing expeditions to pore over every aspect of a case." Id. at 394. A petitioner must show how, in the context of his own case, "there is reason to believe a specific discovery request will support a particular, identified claim for relief." Id. at 392.

Here, Riggins asked that the State be ordered to turn over its "entire file" for *in camera* review by the court. CP 2, 34, 108. Riggins also asked the court to require the State to seek out and "determine if any prosecution witness has knowledge of any evidence that is possibly exculpatory or favorable." Id.

In support of his requests, Riggins cited to information that he supposedly learned of twelve years earlier, in 1998. CP 3, 35, 113. However, Riggins made no attempt to explain how that information (an FBI report and other investigative documents from the police department) led to the conclusion that material

information would likely be discovered in the prosecutor's file. Furthermore, he did not articulate any particular claim for relief, or demonstrate how information in the State's file would entitle him to such relief.

Indeed, the only information Riggins supplied in support of his discovery motions (the FBI report and police documents) had previously formed the basis of two personal restraint petitions, both of which were ultimately dismissed because Riggins had failed to establish a claim for relief. CP 93-94.

In sum, while the State is required to disclose material exculpatory information to Riggins, it is under no obligation to affirmatively seek out information that might "possibly" be exculpatory or "favorable" to him. In re Gentry, 137 Wn.2d at 399. Riggins' request that the State be ordered to determine whether its witnesses had any helpful information was baseless.

Moreover, Riggins made no specific connection between his request for an *in camera* review of the prosecution's file and any specific legal theory that would entitle him to post-conviction relief. His motion, if granted, would amount to nothing more than a fishing expedition. As such, there was no basis for the trial court to have

granted his motion for discovery. Remand to the trial court to rule on a meritless motion is unnecessary.

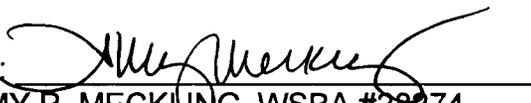
D. CONCLUSION

For the above reasons, Riggins failed to establish any basis to support a motion for post-conviction discovery. As such, remand to the trial court for a ruling on his motion is unnecessary.

DATED this 23 day of March, 2012.

Respectfully submitted,

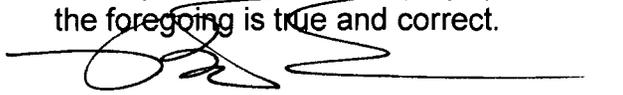
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DAVID RIGGINS AKA DAWUD MALIK, Cause No. 67462-5-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

03/23/12

Date