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MAY 21 2014

King County Prosecutor
Appellate Unit

NO. 70721-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TOVAR,

Appellant.

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

The Honorable Brian Gains, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it denied appellant's motion for post-conviction DNA testing.

Issue Pertaining to Assignment of Error

Did the trial court err in denying appellant's motion for post-conviction DNA testing where appellant showed that DNA test could reveal the complainant had sex with another man when she claimed appellant raped her, and where the court's reasons for denying the motion were based on a misapplication of the law?

B. STATEMENT OF THE CASE

1. Procedural Facts

In 2010 a King County Jury found Michael Tovar guilty of rape in the second degree while armed with a deadly weapon. He was sentenced to 120 months together with an additional 48 months for the deadly weapon enhancement. Tovar's conviction was affirmed on appeal. CP 137-170 (State v. Michael Tovar, COA No. 65324-5-I, unpublished opinion, filed February 13, 2012).

On July 16, 2013, following the appointment of counsel, Tovar filed a motion under RCW 10.73.170 asking that evidence gathered in his

case be subjected to DNA¹ testing. CP 142-147. A hearing was held on July 25 2015. The Honorable Brian Gains, who presided at Tovar's rape trial, denied the motion. CP 73. Tovar timely appeals from the order denying his motion. CP 74-76.

2. Trial Facts²

A.P. and her husband were engaged in "swinging." The two separated in August 2008 because A.P. wanted more freedom and relationships. 5RP 105.

In early February 2009, A.P. met Tovar on an adult internet website catering to "swingers" and people looking for sexual relationships. 8RP 12-14, 126. Shortly after their internet meeting, A.P. and Tovar arranged to meet in person. At that meeting they had sex in Tovar's car. 8RP 15-16, 126.

¹ Deoxyribonucleic Acid

² Citations to the verbatim report of proceedings of the trial, and filed in appellant's direct appeal (No. 65324-5-I), are as follows: IRP refers to the verbatim report of proceedings (VRP) for December 14, 2009; 2RP the VRP for January 4, 2010; 3RP the VRP for January 5, 2010; 4RP the VRP for January 6, 2010; 5RP the VRP for January 7, 2010; 6RP the VRP for January 11, 2010; 7RP the VRP for January 12, 2010; 8RP the VRP for January 13, 2010; 9RP the VRP for January 14, 2010; 10 RP the VRP for January 15, 2010; 11RP the VRP for January 28, 2010; 12 RP the VRP for February 4, 2010; 13RP the VRP for April 1, 2010; 14 RP the VRP for April 2, 2010.

The two began dating. A.P. soon discovered Tovar was jealous and insecure. Tovar got angry about any reference or contact A.P. had with former sexual partners, and repeatedly expressed concerns about his sexual prowess, which led to arguments. 8RP 19-26.

Nonetheless, A.P. thought Tovar was a good “catch” and she wanted a roommate for financial reasons so by the first week of March she had Tovar move in with her. 5RP 105, 8RP 39, 128-129. After Tovar and A.P. began living together they continued to fight over what A.P. described as Tovar’s jealousy and the size of his penis. 8RP 39. A.P. knew Tovar wanted a monogamous relationship, and testified she was interested in a monogamous relationship as well. 8RP 16. A.P. testified her relationship with Tovar while they were together was monogamous, but a few days after they started living together she discussed bringing other people into their relationship because she wanted to start “swinging” again. 8RP 35, 36, 41, 157.

On March 15th A.P. and Tovar drove around doing errands, and while in the car got into an argument in part because she told him she no longer wanted to be in a monogamous relationship with him. 8RP 41-42, 129. Tovar became angry, punched the dashboard of the car until his fist was cut. When Tovar stopped the car at a stoplight A.P. got out because Tovar was in a frenzy. 8RP 42-43.

A.P. went into a nearby store. Tovar followed her. 8RP 44. Tovar apologized and told A.P. he was hungry so they went to a restaurant for dinner. Id. Tovar, who did not drink, had wine. 8RP 48. Tovar became intoxicated and A.P. had to hold him up and drag him out of the restaurant. 8RP 46. When they got home A.P. could not get Tovar up the stairs so she left him on the ground and went to pick up her children who were at her husband's house. 8RP 50-51.

When she arrived at her husband's house, he and their children were making brownies. 8RP 51. That domestic scene made A.P. realize she missed the family experience. She stayed for a while and she and her husband had a conversation about reconciling. 8RP 51-53. A.P. returned home with her children at about 11:30 p.m. and found Tovar on the bathroom floor making phone calls. 8RP 53-54.

At some point A.P. heard Tovar downstairs yelling and talking about his inadequacies. Tovar had stabbed his hand and was bleeding. A.P. threw some band-aids at him, rounded up the kitchen knives and locked them in her car and then told Tovar he had to leave the next day. A.P. then went into the bedroom. 8RP 55-57.

Tovar came into the bedroom carrying a hunting knife with a folding blade and a Samurai sword. 8RP 58. Tovar sat on the couch across from the bed and played with the sword. Tovar turned off the

lights, threw the sword on the floor and walked over to the closet. 8RP 58-59, 136. A.P. heard what she thought were clothes being torn and skin being cut. 8RP 59-60. A.P. said she also heard Tovar talking to himself in two different voices that she described as a pathetic, crying voice and a strong angry voice. 8RP 61. Tovar threatened A.P. and said her children would be fine with their father. 8RP 62, 71.

Tovar then leapt from the closet to the bed. He put his hands on her throat and a pillow over her face. 8RP 62. A.P. testified Tovar then stabbed a pillow that was near her head with the hunting knife. 8RP 63. Tovar told her not to cry or freak out because it angered the "dark guy" and the "dark guy" wanted to hurt her. 8RP 64. A.P. testified that Tovar put his hands over her face and his thumbs in her mouth and squeezed. 8RP 65. Tovar then got off her and apologized. 8RP 65-66.

A.P. went to go check on her children and Tovar accompanied her. 8RP 67. The two then went back into the bedroom. Tovar again started talking about his sexual inadequacies and her sexual experiences with other men. He was crying. 8RP 69-70. A.P. and Tovar had been talking since she returned home at 11:30 that evening. At about 6:00 a.m. the following morning Tovar told A.P. he wanted to give her something nobody else could. 8RP 69-70. 73. Tovar put the hunting knife on the side table, got into the bed, and started crying again about her relationships

with other men and how he was not able to please her sexually while at the same time he pulled her legs apart. 8RP 72.

Tovar then got out of the bed, stood up and took his clothes off. Tovar got back on the bed, put his hand up A.P.'s legs and touched her while talking about "fucking" her "like no other guy has ever fucked me." 8RP 73. Tovar got on top of her, forced himself inside her and a few minutes later he ejaculated. 8RP 75. A.P. said she shook her head "no" but she did not tell Tovar "no" and did not try to push him off her. 8RP 146.

According to A.P., Tovar asked her if he just raped her and said, "I've given you something nobody else has." 8RP 77. They continued to lay on the bed together. Tovar said he wanted to work it out with her and they talked about counseling. 8RP 77, A.P. and Tovar talked for about 15 minutes and Tovar asked A.P. if they could make love again. RP 78, 148. A.P. did not say "no" and they had sex again and Tovar told her he loved her. 8RP 79-81. A.P. told Tovar he could stay and she went into the bedroom where her children were sleeping. 8RP 151-152. She did not call police.

After Tovar left, A.P. emailed her husband and told him Tovar assaulted her but she did not mention anything about being raped. 5RP 115; 8RP 153. A.P. took her oldest children to school and then she and

her youngest child drove to her husband's recently opened restaurant in Tukwila. 8RP 86-87. A.P. stayed at the restaurant until about 11:30 a.m. and then her husband drove her back to his apartment where they stayed until it was time to pick their children up from school. 5RP 124-125. After picking up their children A.P.'s husband then dropped A.P. off at the King County Sheriff's Fairwood substation. 5RP 118; 8RP 90.

Detective Marylisa Priebe-Olson spoke with A.P. then accompanied A.P. back to A.P.'s house where Priebe-Olson photographed and seized evidence. 4RP 18-32. After Priebe-Olson retrieved and photographed the evidence A.P. took herself to the Valley Medical Center. 4RP 33. A.P. told the doctor that her boyfriend had nonconsensual sex with her, and in addition to putting his hands in her mouth he put his hands around her neck. 7RP 22-23. There was no physical evidence to conclude A.P. was raped. 7RP 47.

Later that day Tovar sent an email to both A.P. and her husband. In the message Tovar apologized for how things turned out and asked if they could coordinate a time when he could go over to the house and get the rest of his belongings. 4RP 37. At about midnight Tovar sent A.P. another message thanking her for talking through things with him the night before and asking her if he could send her some pictures he had. He also told A.P. he was respectful of her desire to move on. 4RP 35. A.P.

responded she was going to court to deal with a ticket she received, that she would leave the door open so he could go get his belongings and she thanked him for the pictures. 4RP 39. The next day A.P. sent Tovar an email telling him her ticket was dismissed. 4RP 40.

In text messages the two exchanged the day after the incident, A.P. accused Tovar of raping her. 6RP 75. Tovar denied the accusation. 6RP 76. Tovar told A.P. he remembered they started having sex but they both felt weird about it and they then talked about A.P.'s desire to get back with her husband. He said he also remembered asking her at one point if they could finish having sex and she nodded "yes." 6RP 77. A.P. asked Tovar if he remembered afterwards asking her if he had just raped her. 6RP 77. Tovar replied he did not remember any such conversation. 6RP 79.

On March 18th, A.P. and Tovar arranged to talk on the telephone. Priebe-Olson met A.P. in a parking lot. They sat in Priebe-Olson's car and while A.P. spoke with Tovar on the telephone Priebe-Olson had her ear next to the phone and took notes of the conversation. 4RP 42-44. The telephone conversation lasted about an hour and Priebe-Olson described it as emotional. 4RP 88. According to Priebe-Olson, when A.P. asked Tovar where he was he responded by telling her that he believed A.P. would tell police. 4RP 70. Tovar asked A.P. what was the worst thing she

remembered and A.P. said it was Tovar putting his hands in her mouth. 4RP 70-71. Tovar apologized and started to cry. 4RP 71.

A.P. again told Tovar that after “you raped me” you asked if you just raped me. Tovar responded he remembered being scared. When A.P. asked Tovar if he remembered dragging her from her children’s bedroom Tovar said he remembered talking to the kids and holding her. 4RP 72. A.P. told Tovar he also said he was to going to kill her and himself, and that he cut himself. In response, Tovar said it sounded like he owed her an apology and that he could not believe she was doing this to him, he cared about her, and he could not go to prison. 4RP 73. A.P. asked Tovar to turn himself into police to which Tovar replied, “Good news. Good. You can punish me now.” 4RP 74. Tovar then asked A.P. if she remembered him asking to make love to her one last time and she nodded “yes.” Id. As the conversation continued Tovar asked A.P. if she was going to call police. 4RP 76-77.

Tovar then started talking about suicide. He said that he was going to end his life and asked her to wait a couple of hours before she called police. 4RP 79-80. Tovar said he would tell her where to find his body and that he could not go to prison because if he went to prison he would lose the option of taking his life. 4RP 81-82. Tovar told A.P. another couple had asked him to spend the night with them but he got an email

that indicated there was a warrant for his arrest and he again asked her not to call police for a couple of hours. 4RP 87.

In the meantime police had Tovar's car under surveillance in a parking lot. 5RP 8. When Tovar got into his car and left the parking lot they followed him. 5RP 76; 6RP 27. Police finally stopped Tovar and with weapons drawn ordered him out of his car. 5RP 81. Tovar sat in his car and vacillated between being calm and screaming and crying. He insisted the police were going to kill him. 5RP 83-86. After about 20 minutes, Tovar let out a scream and took off. 5RP 87. Tovar's car went through an embankment and hit a tree. 5RP 88. He was seriously injured and an officer who was also an emergency room doctor rendered life saving aid. 5RP 9, 94-98. A.P. also received a telephone call from a crying Tovar who said he had just crashed his car into a tree and wanted to see his son one last time. 8RP 123.

Jolyn Hendrix who worked and lived with A.P. testified A.P. had a reputation for being untruthful. 9RP 59. A few days after the incident with Tovar, A.P.'s husband had left his girlfriend, and sometime around the 1st week of April A.P. had moved back with him. 8RP 12.

A.P. admitted that on March 23rd, a few days after Tovar was arrested, she sent Tovar an email. She told Tovar she missed him loved him and wished she could go back and prevent the past. 4RP 41.

Following his conviction Tovar moved for a new trial alleging, in part, trial counsel prevented him from testifying at trial CP 47-51. Tovar consistently informed his attorneys he wanted to testify at his trial and always assumed he would testify. 13RP 18. 26. The court denied Tovar's new trial motion and that denial was affirmed on appeal. CP 170.

3. Motion For DNA Test

Tovar submitted his declaration in support of his RCW 10.73.170 motion.³ Prior to trial Tovar asked trial counsel to ask the prosecuting attorney if there was a "rape kit" in connection with the case. CP 52. Tovar, however, states he was not shown any discovery that indicated any swabs were taken from A.P. and analyzed. Id.

While reviewing his case during his direct appeal, Tovar came across a document indicating the police submitted something to the crime laboratory. CP 152. Tovar made a public records request to the Washington State Patrol Crime Laboratory asking for documents related to his case. Id. In response, he received a report showing a sexual assault kit was submitted for testing. Id. The kit contained oral, perineal, endocervical, vaginal pool, anal and anal fold swabs taken from A.P. CP 155 (Exhibit C attached to Motion for DNA Testing).

³ Tovar's declaration is attached as Exhibit B to his motion. CP 150-153.

Some testing was done on the swabs. Based on those tests, the report concluded, “semen was identified on the oral swabs.” CP 155. It also concluded that tests indicated “the presence of semen on the perineal, endocervical, vaginal pool, anal and anal fold swabs.” Id. The report stated a male “DNA testing profile is unlikely to be obtained using autosomal STR DNA typing” on the swabs but that the swabs “may be suitable for Y-STR typing analysis” which “is not currently available at the Washington State Patrol Crime Laboratory.” Id.⁴

Tovar stated that in 2000 he had a vasectomy performed by Dr. Hunter McKay. CP 151. Dr. McKay explained the procedure and told Tovar that the vasectomy would make it impossible for Tovar to ejaculate sperm. Id. Laboratory tests following the vasectomy verified a zero sperm count in Tovar’s ejaculate. CP 151-152.

Tovar argued because of his 2000 vasectomy it would have impossible that it was his sperm found on the swabs taken from A.P, and a DNA test on would confirm that. RP 3 (7/25/2013). Tovar argued that if the DNA test showed the sperm was not his but someone else’s, it would cast significant doubt on A.P.’s credibility and show his innocence on a more probable than not basis. RP 4-5 (7/25/2013).

⁴ The decision not to do the testing was based on the cost of the testing at that time. 5RP 43-44.

The State argued it could have done a Y-STR test by sending the swabs to a different laboratory. RP 6 (7/25/2013). It argued that because the case against Tovar rested on A.P.'s credibility, which the defense attacked at trial, and not on whether the two had sex, Tovar did not meet the requirements of the statute. Id.

Judge Gain ruled even if it was shown the sperm found on the swabs was not Tovar's it would not show "innocence under the statute by a more probable than not basis." RP 7 (7/25/2013). Judge Gain reasoned the phone conversations where Tovar apologized, his running from police, attempt to take his own life, and his defense at trial, which was to attack A.P.'s credibility and not whether sex occurred, supported the conclusion Tovar failed to meet the statutory requirement that the DNA evidence would demonstrate innocence on a more probable than not basis. RP 8-9 (7/25/2013). Tovar's motion was denied. RP 9 (7/25/2013); CP 73.

C. ARGUMENT

TOVAR MEETS THE STATUTORY CRITERIA FOR DNA TESTING.

RCW 10.73.170 provides in part:

(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.

A trial court's decision on a motion for postconviction DNA testing is reviewed under the abuse of discretion standard. State v. Riofta, 166 Wn.2d 358, 370, 209 P.3d 467 (2009). A court abuses its discretion if its discretionary decision rests on facts unsupported in the record or was reached by applying the wrong legal standard. State v. Thompson, 173 Wn.2d 865, 870, 271 P.3d 204 (2012) (citations omitted).

Judge Gain denied Tovar's motion concluding there is no likelihood that the DNA evidence would demonstrate innocence on a more

probable than not basis. Judge Gains' conclusion was based on a misapplication of the law.

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 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. 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.

The issue at trial was A.P.'s credibility, and her credibility was suspect. A.P. testified she and Tovar were in a monogamous relationship and at the time she had not had sex with anyone else. She testified Tovar said he was going to fuck her like no other guy and that she shook her head "no." But, she did not tell Tovar "no" and she did not physically resist. After Tovar left, A.P. emailed her husband, not police, and told him Tovar assaulted her but she did not mention anything about being raped. During the conversation listened to by Detective Priebe-Olson, A.P. tried to get Tovar to admit he raped her. Tovar talked about what

happened but he did not make any admission. There was also testimony that A.P. had a reputation for untruthfulness. Tovar's theory was that A.P. would do anything to get what she wanted and she made up the rape story to get Tovar out of her house. 9RP 107-114.

Swabs taken from A.P. show the presence of semen. Although there was semen found on the oral swab, A.P. did not mention having any oral sex with Tovar. Semen was also discovered on the vaginal and anal swabs with indications of the presence of spermatozoa, but because of his vasectomy Tovar could not ejaculate sperm. If DNA evidence shows the semen was not from Tovar, or the presence of spermatozoa, it would be powerful new evidence A.P. had sex with someone other than Tovar and she lied about only having sex with him, which in combination with the other evidence showing her lack credibility would indeed raise a reasonable probability she lied about Tovar raping her showing Tovar's innocence.

Judge Gain's reasoned, however, that because Tovar apologized, "ran" from police, apparently tried to kill himself, and attacked A.P.'s credibility at trial, favorable DNA evidence would not show innocence on a more probable than not basis. Although, the jury could have viewed those facts as strong circumstantial evidence of guilt, this Court has observed evidence of guilt is always strong because the convicted person

making the motion has already been found guilty beyond a reasonable doubt. State v. Gray, 151 Wn.App. 762, 773, 215 P.3d 961 (2009). The analysis is not whether the evidence, however strong, supports the conviction. The court in deciding the motion must presume that the DNA test results would be favorable to the convicted person's claim of actual innocence, and in combination with the other evidence, raise a reasonable probability of innocence. Riofta, 166 Wn.2d at 367–68. Indeed, DNA testing has exonerated persons who were found guilty on the basis of their own inculpatory statements or where there was eyewitness evidence. See In re Bradford, 140 Wn. App. 124, 165 P.2d 31 (2007) (testing excluding defendant as source of male DNA found on mask touched by rapist required new trial even where defendant had confessed); see also State v. Gray, supra, (DNA testing required even though defendant matched description of rapist, defendant was nearby at time, canine tracked defendant's scent from rape scene to location of his arrest, and two eyewitnesses identified defendant from a photo montage). In viewing the request through the lens of only the evidence supporting the conviction, Judge Gain misapplied the law.

Moreover, the facts cited by Judge Gain do not undermine the more probable than not standard. Tovar's apology was in response to A.P. telling him he threatened to kill her and himself. His apparent suicide

attempt when stopped by police was after A.P. had accused him of rape, despite Tovar telling her he could not face going back to prison. The facts cited by Judge Gain do not lead to the legal conclusion that a favorable DNA test in combination with the evidence showing A.P.'s lack of credibility would not raise a reasonable probability of innocence.

D. CONCLUSION

This Court should remand for DNA testing.

DATED this 2 day of May 2014.

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70721-3-1
)	
MICHAEL TOVAR,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF MAY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL TOVAR
DOC NO. 874007
MONROE CORRECTIONAL COMPLEX
P.O. BOX 888
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF MAY, 2014.

X *Patrick Mayovsky*

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