

NO. 36505-7-II

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

STATE OF WASHINGTON, Respondent

v.

ERIC ROBERT LEONARD, Petitioner

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-00339

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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RESPONSE TO PERSONAL RESTRAINT PETITION

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 1
II. ISSUE OF MISSING EVIDENCE REPORT..... 3
III. RESPONSE TO ARGUMENT..... 4
IV. CONCLUSION..... 8

TABLE OF AUTHORITIES

Cases

<u>Arizona v. Youngblood</u> , 488 U.S. 51, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988).....	4
<u>In Re Personal Restraint of Cook</u> , 114 Wn.2d 802, 813, 792 P.2d 506 (1990).....	6
<u>In Re Personal Restraint of Gentry</u> , 137 Wn.2d 378, 396, 972 P.2d 1250 (1999).....	6
<u>In Re Personal Restraint of Williams</u> , 111 Wn.2d 353, 365, 759 P.2d 436 (1988).....	6
<u>State v. Ortiz</u> , 119 Wn.2d 294, 302, 831 P.2d 1060 (1992).....	5
<u>State v. Williams</u> , 96 Wn.2d 215, 223, 634 P.2d 686 (1981)	7

Rules

RAP 16.4(c)(3).....	7
RAP 16.7(a)(2)(i).....	6

• I. STATEMENT OF THE CASE

When the State handled the main appeal in this case (Court of Appeals, Division II, No. 33717-7-II), it agreed with the statement of facts as set forth by the defendant in his brief. That statement of facts, in relevant part, reads as follows:

On February 1, 2005, Dawn Mills worked the closing shift at a Vancouver Subway. 2RP 58-59. She closed the shop at 9 p.m. but was still working at 10:00 p.m. when she heard a scraping sound at the alleyway employee-only door. 2RP 59-60, 63-64, 69. When the door handle shook, she called out, "Is anyone there?" 2RP 60. The noise stopped. 2RP 60. Mills called 911. 2RP 60-61.

Vancouver police officer Timothy Huycke arrived at the front of Subway within two minutes. 2RP 69. Defendant Eric Leonard was near the front of the shop. 2RP 71-72. Leonard wore dark clothing and gloves. 2RP 72, 80. Suspicious, Huycke asked Leonard if he had any weapons. 2RP 73. Leonard produced a knife from the small of his back. 2RP 74. Huycke arrested Leonard under a City of Vancouver ordinance prohibiting the possession of a concealed knife. 2RP 75.

Huycke searched Leonard incident to the arrest. 2RP 75. Leonard had a speed loader and bullets in his pocket and a revolver in his waistband. 2RP 76-77. Huycke also found two screwdrivers and a mini mag light on Leonard's pockets. 2RP 81.

Huycke inspected the Subway's employee-only door. 2RP 83-86. He saw pry marks on the green door and some matching green paint chips on the ground near the door. 2RP 86. Nothing covered the paint chips leading Huycke to believe the chips were fresh. 2RP 86. One of the screwdrivers has a small green paint chip on it that appeared to match the paint on the door. 2RP 86. Huycke

testified that he sent the screwdriver and paint chips to the crime lab for comparison purposes but had not received anything back from the lab by trial. 2RP 86-87, 90.

In a second amended information, the Clark County prosecutor charged Leonard with unlawful possession of a firearm in the first degree (count I), attempted burglary in the first degree with a firearm enhancement (count II), possession of a stolen firearm (count III), and possession of burglary tools (count IV). CP 80-81.

At trial, to support the unlawful possession of a firearm charge, the court admitted a signed stipulation by Leonard that he had previously been adjudicated as a juvenile of a serious offense. Exhibit 1; 2RP 97.

The State presented evidence that the revolver found on Leonard was stolen from Dean Edwards in a November 2004 car prowl. 2RP 46-50. Also taken in the car prowl were a tooled leather holster and a speed loader. 2RP 48-49. The speed loader found on Leonard was the speed loader taken in the November car prowl. 2RP 49. Vancouver police found Edwards' leather holster in Leonard's home in December 2004. 2RP 49, 92-93.

No witnesses had test fired the revolver after it was taken from Leonard. 2RP 80, 100. Edwards testified that the revolver was in working order when it was taken in 2004. 2RP 53. A Vancouver police detective, Detective Alie, examined the revolver in court and offered that it appeared to be capable of firing a projectile. 2RP 99.

Alie interviewed Leonard at a later date in February. 2RP 102. During the interview, Leonard told Alie that he acquired the revolver from another person. 2RP 102-04. Leonard knew that the gun was stolen and did not want to give Alie the other person's name for fear that he would get that person in trouble for having a stolen gun. 2RP 103.

The jury returned guilty verdicts on all 4 counts as charged plus a firearm enhancement special verdict on the attempted burglary in the first degree. CP 107-111.

(Brief of Appellant in No. 33717-7-II, at 2-6)

II. ISSUE OF MISSING EVIDENCE REPORT

The defendant has put forth in his personal restraint petition that a crime lab report dealing with the screwdriver was kept from him by both the prosecution and the defense. Attached are the request for laboratory examinations and the test results on both the screwdriver and the firearm. It appears that part of the difficulty was because the firearm that was recovered from the defendant generated a lot of additional Vancouver Police Department report numbers. It was a stolen gun. He was a felon in possession of a firearm. The firearm was also implicated in a possible drive-by shooting. Finally, it was the basis for a burglary in the first degree. In reviewing the files, it generated multiple reports in various numbers. However, the particular reports are only generated under the one Vancouver number which is V05-2117. However, as the documentation clearly indicates, the defendant is correct that the report had been generated approximately five months before trial. Whether or not anyone knew of it is unknown.

III. RESPONSE TO ARGUMENT

To determine if a failure to preserve exculpatory evidence amounts to a denial of due process, the Appellate Courts apply the standard set forth in Arizona v. Youngblood, 488 U.S. 51, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988). In that case, the defendant was convicted of child molestation, sexual assault and kidnapping. Youngblood, at 52. The State negligently failed to preserve semen samples that were collected from the victim and his clothing, and tests which could have exonerated the defendant were not performed. Youngblood, at 53-54. In reinstating the conviction, the court held that “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” Youngblood, at 58.

In our case, there is nothing to indicate that the law enforcement agencies did not handle the samples (the screwdriver with a fleck of green paint on it) in the usual manner. Their actions appear to be reasonable and in good faith. There is substantial evidence in the record to support this. Nothing indicates that State or law enforcement had intentionally destroyed evidence nor that any attempt was made to conceal it from the defendant. The State submits that in absence of bad faith, the failure to preserve potentially exculpatory evidence is not a violation of due process.

The difficulty the defendant has in this case is even more pointed in the fact there is nothing exculpatory about the nature of the lab findings. The lab report does not indicate that the green paint on a screwdriver does not match up with green paint found on the door or on the ground near the door of the restaurant that was being burglarized. Quite the contrary, the report indicates that the examiner found no paint chips on the screwdriver. Thus in our case, there has been no destruction of evidence. What we have is a basically neutral report that, the State submits, would have no relevance to the ultimate outcome of the case. The fact that the screwdriver did or did not have flecks of paint on it would not be the determining factor. The fact that he had screwdrivers with him, together with all the other circumstances that evening, is the critical information.

Following usual procedures is probative of police good faith. State v. Ortiz, 119 Wn.2d 294, 302, 831 P.2d 1060 (1992). Here there is no showing that they did not follow usual procedures in sending the evidence up to the crime lab. In fact, the crime lab not only received it in a timely fashion, but generated its report in a timely fashion. The problem appears to be that the report did not make it back into a specific file.

Evidence is material and therefore must be disclosed if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different.

In applying this “reasonable probability” standard, the “question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. (cites omitted)

In Re Personal Restraint of Gentry, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999).

It is interesting to note that the defense was able to pursue a valid theory because of the lack of lab reports. In reviewing the notes from opening statement, it appears that the defense attorney had argued to the jury that there is a lack of scientific evidence in the case.

Finally, a personal restraint petitioner has the burden of proving constitutional error that results in actual prejudice or nonconstitutional error that results in a miscarriage of justice. In Re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Regardless of whether the petitioner based his challenge on constitutional or nonconstitutional error, he must state facts on which the claim of unlawful restraint is based and state the evidence available to support the factual allegations; he cannot rely solely on conclusory allegations. RAP 16.7(a)(2)(i); In Re Personal Restraint of Williams, 111 Wn.2d 353, 365, 759 P.2d 436 (1988).

The issue also raises a question as to whether or not this is to be considered new evidence. Newly discovered evidence is grounds for

relief in a personal restraint petition if those facts “in the interest of justice require” vacation of the conviction or sentence. RAP 16.4(c)(3). The standard applied under this rule is the same as that applied to motions for new trials made on the same ground. State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 686 (1981). Under that test, the defendant must show: that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. State v. Williams, 96 Wn.2d at 223. The State submits that the defendant has not met this burden as it relates to newly discovered evidence. There is nothing to indicate that there is a probability that this would change the result of the trial, nor that this information is material nor that this is anything other than impeachment.

The State submits that the defendant was adequately represented at the trial court level and was able to present his case to the jury. The lab report was not exculpatory. It does not form the basis of a reasonable probability that a different outcome would have occurred or that in some way the rights of the defendant have been so violated as to require a new trial.

IV. CONCLUSION

The personal restraint petition should be denied. The trial court should be affirmed in all respects.

DATED this 4 day of September, 2007.

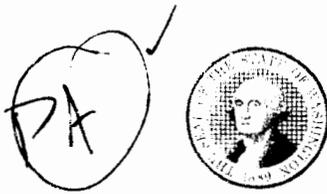
Respectfully submitted:

ARTHUR D. CURTIS
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By:


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Senior Deputy Prosecuting Attorney

APPENDIX



05-1-554-1 / KAH
INITIALS DIS 3/30
KJ PS

STATE OF WASHINGTON
WASHINGTON STATE PATROL

2502 112th Street East, Room 273 • Tacoma, Washington 98445-5104 • (253) 536-4280 • FAX (253) 536-4290

CRIME LABORATORY REPORT

AGENCY: Vancouver Police Department
OFFICER: Officer Timothy Huycke
VICTIM: Mills, Dawn Marie
SUSPECT: Leonard, Eric R.

LABORATORY NO.: 305-0277
REQUEST NO.: 0001
AGENCY NO.: V052117

EVIDENCE

- Item 6 One sealed zip-lock bag containing one "Vermont American" brand screwdriver.
- Item 8 One sealed zip-lock bag containing tiny gray-green paint flakes.

PROCEDURES

Stereomicroscopy was used to examine Item 6 for the presence of paint flakes on the tip, particularly green colored paint flakes.

RESULTS

No paint chips, particularly green colored paint chips, were found on Item 6.

MAR 25 7 43 PM '05
KJ PS

Ronald Wojciechowski
Ronald Wojciechowski, Forensic Scientist

3/18/5

Date



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**Washington State Patrol
Crime Laboratory -
Tacoma**

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Tacoma, WA 98445
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STATE OF WASHINGTON
WASHINGTON STATE PATROL

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CRIME LABORATORY REPORT

AGENCY: Vancouver Police Department
OFFICER: Officer Timothy Huycke
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LABORATORY NO.: 305-0277
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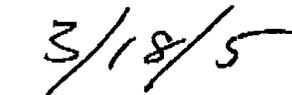
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Ronald Wojciechowski, Forensic Scientist


Date



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WASHINGTON STATE PATROL

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STATE OF WASHINGTON
WASHINGTON STATE PATROL

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CRIME LABORATORY REPORT

AGENCY: Vancouver Police Department
OFFICER: Detective Jay Alie
VICTIM: Not listed
SUSPECT: Leonard, Eric R.
Sourjohn, Louis

LABORATORY NO.: 305-000396
AGENCY NO.: V0423672
V052117
REQUEST NO.: 0001

Evidence:

- Item 1228-2 (063629): One Ruger GP100 .357 Magnum caliber revolver, serial number 174-39916.
- Item 1228-4 (063631): One HKS Speedloader containing six unfired "PMC" .357 Magnum cartridges.
Four unfired "PMC" .357 Magnum cartridges.
Two unfired "S&W" .357 Magnum cartridges.
- Item 1340-01(061335): One fired jacketed bullet.
- Item 1340-01(061632): One fired lead bullet core.

Examination Results:

The Ruger GP100 .357 Magnum caliber revolver, serial number 174-39916, was test fired and found to be operable. The trigger pull was determined to be approximately 3 3/4 to 4 pounds single action, and 8 3/4 to 9 pounds double action. Test fires from this revolver will not be entered into the WSP computerized database. Revolvers are not routinely entered into the database.

The fired jacketed bullet submitted in Item 1340-01(061335) was visually and microscopically examined and determined to be consistent with a .38/.357 caliber bullet. The fired jacketed bullet was microscopically compared to test fires from the submitted Ruger .357 Magnum caliber revolver, serial number 174-39916, and determined to have been fired from that revolver.

The fired lead bullet core submitted in Item 1340-01(061632) was visually and microscopically examined and determined to be consistent with a .38/.357 caliber bullet core. The lead bullet core exhibited similar class characteristics to the submitted Ruger .357 Magnum caliber revolver, serial number 174-39916, however the core did not exhibit individual characteristics. The lead bullet core could not be identified or eliminated to the submitted Ruger .357 Magnum caliber revolver, serial number 174-39916.

Brenda Robinson
Brenda D. Robinson, Forensic Scientist

3/25/05
Date

