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NO. 52747-2-II

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

STATE OF WASHINGTON, Respondent

v.

TONY MICHAEL KING, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00310-4

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENT OF ERROR

I. The trial court properly denied King's post-conviction motion for DNA testing.

STATEMENT OF THE CASE

Tony King was originally charged with Assault in the First Degree – Domestic Violence while armed with a deadly weapon, Rape in the Second Degree – Domestic Violence while armed with a deadly weapon, Felony Harassment Threat to Kill – Domestic Violence while armed with a deadly weapon, and Unlawful Imprisonment – Domestic Violence while armed with a deadly weapon. CP 190. However, instead of proceeding to trial, King chose to enter a guilty plea pursuant to a plea agreement. CP 190. King pled guilty to an offer that included reduced charges and dismissing charges. CP 190. King entered a guilty plea to Assault in the First Degree – Domestic Violence, Rape in the Third Degree – Domestic Violence, and Felony Harassment – Death Threats – Domestic Violence. CP 190. King admitted that he did assault the victim by administering or exposing or transmitting to her a poison or noxious substance, to wit: hydrochloric acid and thereby did inflict great bodily harm. CP 153. King also admitted that he engaged in sexual intercourse with the victim under circumstances where the victim did not consent to such sexual intercourse and that her lack of consent was clearly expressed by words or conduct.

CP 153. King also admitted that he threatened to kill the victim and placed her in reasonable fear that the threat would be carried out. CP 153. Both King and the State agreed to recommend a standard range sentence of 184 months, community custody, no contact with the victim, and other various conditions of community custody. CP 190. The trial court sentenced King as recommended by the parties on June 26, 2013. CP 191. On November 9, 2017, King filed a motion for post-conviction DNA testing pursuant to RCW 10.73.170. CP 191.

DNA testing was not done prior to King's guilty plea. CP 191. The factual allegations underlying the case include that both the victim and King alleged the sexual intercourse occurred, however, the victim claimed it was achieved by force and King alleges it was consensual. CP 191. The victim was married to someone other than King at the time of the rape. CP 191.

The Clark County Superior Court heard and considered King's post-conviction motion for DNA testing pursuant to RCW 10.73.170 and denied the motion. CP 190-192. The Court found that there had been no significant advancement of DNA testing between the time of the motion and 2013, that DNA testing in 2013 was sufficiently developed to test the DNA in King's case, and that King did not claim that DNA testing now would be more accurate than DNA testing would have been in 2013. CP

191. In addition, the Superior Court concluded that because there was no factual dispute as to whether sexual intercourse occurred between the victim and King that DNA evidence would not lead to any more relevant information on the issue of consent. CP 191. This was a case in which the issue was consent; the Court found that DNA testing could not prove whether force was used or whether sexual intercourse was consensual. CP 191-92. In addition, the Superior Court found that the victim's potential sexual acts with others had no bearing on whether she consented to sexual intercourse with King and therefore DNA testing would not provide significant new, relevant, or admissible information. CP 191. The Superior Court concluded that the presence of a third person's DNA in the victim's underwear would not be relevant in King's case, would not have been admissible at trial, and would not have demonstrated King's innocence on a more probable than not basis. CP 192. In addition, the absence of DNA would not demonstrate King's innocence on a more probable than not basis and the presence of only King's DNA would not demonstrate his innocence on a more probable than not basis. CP 192. The Superior Court also concluded that the presence of only King's DNA would not demonstrate King's innocence on a more probable than not basis. CP 192. Accordingly, the Superior Court concluded that King had not shown there

was a likelihood that DNA evidence would demonstrate his innocence on a more probable than not basis and denied King's motion. CP 192.

King then appealed the Superior Court's denial of his post-conviction motion for DNA testing. CP 193.

ARGUMENT

King argues the trial court erred in denying his motion pursuant to RCW 10.73.170. Specifically, King argues that he demonstrated that if the evidence collected by law enforcement during the investigation of this case was tested for DNA, it would show that the sexual intercourse to which he agreed was done without the victim's consent by way of his guilty plea, was actually done with the victim's consent. King argues that the presence of his DNA, the absence of his DNA, and/or the presence of third persons' DNA would tend to show that the sexual intercourse was consensual. King's arguments to the trial court and now on appeal are without merit. The presence or absence of DNA would not prove anything regarding whether the sexual intercourse was accomplished via force or consent, it would only tend to prove what all the parties already agreed occurred: that sexual intercourse did indeed occur. The Superior Court properly denied King's motion for post-conviction DNA testing.

This Court reviews a trial court's decision on a post-conviction motion for DNA testing for an abuse of discretion. *State v. Riofta*, 166 Wn.2d 358, 370, 209 P.3d 467 (2009). A trial court abuses its discretion if its exercise of discretion is manifestly unreasonable or based upon untenable grounds or made for untenable reasons. *State v. Powell*, 126

Wn.2d 244, 258, 893 P.2d 615 (1995). In addition, a trial court abuses its discretion if its decision rested on facts unsupported in the record or if its decision was reached by applying the wrong legal standard. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). In light of the issues presented in this case, that the defendant's defense was consent, not lack of intercourse, it is clear that DNA testing would not have produced evidence which would, even in conjunction with other evidence, tend to show the defendant's innocence, and therefore the trial court did not abuse its discretion.

A defendant does not have a constitutional right to DNA testing. *State v. Crumpton*, 181 Wn.2d 252, 258, 332 P.3d 448 (2014). However, RCW 10.73.170 permits the defendant to seek DNA testing in order to establish his innocence. *Id.* Under RCW 10.73.170, the defendant must show a likelihood that DNA evidence would demonstrate his innocence on a more probable than not basis. *Id.* at 260. A court looks to whether, "considering all the evidence from trial and assuming an exculpatory DNA test result, it is likely the individual is innocent on a more probable than not basis." *Id.* A defendant is required to show a reasonable probability of his innocence before the State is required to expend resources on DNA testing. *Riofta*, 166 Wn.2d at 370.

King argues that if the victim's underwear contained DNA of a third person it would negate her claim of false imprisonment by the defendant and of forced sexual intercourse. King further argued that if only his DNA is found in the victim's underwear it would show that he allowed the victim to change her clothes, thereby supporting his claim of consensual intercourse. King's arguments make little sense. A woman

having sexual intercourse with another, or multiple other, person(s) has no bearing on whether the sexual intercourse with the defendant was or was not consensual. This would be akin to saying any woman in a sexual relationship with one person would always consent to sexual intercourse with any other person, at any time, in any circumstance. This argument is ridiculous, and any evidence of other partners would be inadmissible at trial under RCW 9A.44.020. King's other argument, that if only his DNA is present it means he let her change her clothes, thus negating any non-consent, is not supported by any evidence and also would do nothing more to support his claim of innocence.

There is no likelihood that DNA testing now would exonerate King. Both he and the victim agree there was sexual intercourse between the two of them. Therefore it is likely that King's DNA would be found in the rape kit, underwear, and other various items collected. DNA from other men would not be admissible under RCW 9A.44.020, especially as King's defense was not that someone else raped the victim; he admitted to the sexual intercourse, his claim was that it was consensual. The presence of his DNA or any other person's DNA in or on the items of evidence would have no bearing on the strength of a consent defense. King's post-conviction motion for DNA testing was properly denied.

RCW 10.73.170 provides that

- (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.

RCW 10.73.170(1)-(3). As an initial matter, King's motion did not comply with subsection (2) of the statute as required. The statute clearly requires that a defendant moving for post-conviction DNA testing indicate that the original trial court ruled that DNA testing did not meet acceptable scientific standards (i.e., did not meet *Frye* and would not have been admissible at trial); that there was no available technology to test the DNA evidence in this case; or that the DNA testing now would be significantly more accurate than prior DNA testing or would provide significant new information. RCW 10.73.170(2). King did not allege any of these circumstances, and none were present in his case.

The original purpose of RCW 10.73.170 was to provide for DNA testing if DNA testing was not available when the person was convicted or not allowed to be admitted into evidence in the court where the conviction occurred. *See* Leg. History, HB 2491, 2000. The statute initially made post-conviction DNA testing available only to inmates who were

incarcerated for life or sentenced to death. *Id.* The statute was amended in 2001 to provide that any inmate who had been imprisoned before December 31, 2004 could move for post-conviction DNA testing if the DNA evidence was not admitted in court because it did not meet acceptable scientific standards or the testing technology was not sufficiently developed to test the DNA evidence in the case. *See* Leg. History, HB 5896, 2001. For inmates imprisoned after January 1, 2005, DNA issues had to be raised at trial or on appeal. *Id.* In 2005 the statute was amended to allow all inmates to petition for post-conviction DNA testing. *See* Leg. History, HB 1014, 2005. It's clear from the prior versions of the statute and the legislative history that the purpose of post-conviction DNA testing was to provide for discovery of evidence that was not previously available to a defendant. The testing King is now asking this Court to order was previously available to him. There have been no significant advances in the DNA testing process since 2013, and King does not argue that there is any reason why DNA testing in 2013 could not have produced the same evidence he now claims the DNA testing would produce.

King's motion did not conform with the requirements of RCW 10.73.170(2) and therefore the trial court was within its proper authority to deny it. The original trial court never ruled that DNA testing did not meet acceptable scientific standards (i.e., did not meet *Frye* and would not have been admissible at trial), thus relief under RCW 10.73.170(2)(a)(i) was not available to King. There was no evidence that there was no available technology to test the DNA evidence in this case at the time of trial, and in fact it is common knowledge that such technology was available.

Therefore relief under RCW 10.73.170(2)(a)(ii) was not available to King. And there was no evidence that the DNA testing now would be significantly more accurate than prior DNA testing and therefore relief under the first half of RCW 10.73.170(2)(a)(iii) was not available to King. Under the second half of RCW 10.73.170(2)(a)(iii), King had to show that DNA testing now will produce significant new information. *Riofta*, 166 Wn.2d at 366. The presence of King's DNA in the rape kit or victim's underwear cannot be considered "significant new information" when the victim claimed sexual intercourse occurred and the defendant claimed sexual intercourse occurred and the presence or absence of King's DNA or the presence or absence of third persons' DNA will not be relevant to whether the sexual intercourse was consensual. What King has to be arguing that would be "significant new information" is the presence of other, third parties' DNA. However, that potential evidence, as will be discussed below, is irrelevant and inadmissible. King was not entitled to relief under any provision in RCW 10.73.170(2) and therefore the trial court properly denied King's motion.

King's situation is not one the statute covers or was ever intended to cover. King chose to forego pretrial investigation which could have included DNA testing, and chose to plead guilty. That guilty plea was made knowingly, intelligently, and voluntarily. He previously waived any right to present a defense and cannot show that even if the evidence is tested for DNA and shows whatever he thinks it may show, that he would be entitled to a new trial.

- a. King failed to show that the requested DNA testing would more probably than not demonstrate his innocence

In addition to meeting the requirements of RCW 10.73.170(2) as discussed above, the trial court properly found that King did not show there was a likelihood that the requested DNA evidence would more probably than not demonstrate his innocence. King did not demonstrate that the DNA evidence would in any way exculpate him, no matter what the results of it would be. His motion was properly denied.

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 favorable DNA test results would raise the likelihood that the person is innocent on a more probable than not basis, when such favorable DNA test results are considered in combination with all the other evidence. *Riofta*, 166 Wn.2d at 367-68. This is exactly what the trial court below did.

King argues that DNA testing would show that the victim was having sex with multiple persons. He argues this result would corroborate his claim of consensual intercourse and would further show the victim’s motive to falsely accuse King in order to cover up her multiple affairs from her husband. There is no logical relation between an individual’s decision to have consensual intercourse with one or more persons, and that same individual’s willingness to consent to intercourse with a different person. King’s initial argument can be broken down to saying if the victim had sexual intercourse with others then she would have had consensual

intercourse with him. This is the exact type of flawed logic and character assassination of the victim that the rape shield statute was created to prevent.

RCW 9A.44.020 provides that evidence of a victim's sexual behavior is inadmissible to prove the victim's credibility and inadmissible to prove consent, except that prior sexual encounters between the defendant and victim that are material to the issue of consent may be admissible. The victim's sexual behaviors with persons other than the defendant would not be admissible to prove her consent to sexual intercourse with the defendant. The victim's marital status would be admissible to show potential motive to fabricate – i.e., that a victim does not want her husband to know she had an affair so she claims rape instead. However, it is clear from the discovery materials provided to King that the victim's husband already knew of her relationship with King. *See* CP 132-36. While this fact would be admissible at trial to support any potential motive the victim may have had to fabricate the rape, any fact of additional sexual partners would be inadmissible pursuant to RCW 9A.44.020.

Thus, King cannot show that the DNA evidence would more probably than not demonstrate his innocence because 1) the victim's potential consensual sexual intercourse with others prior to the rape has no relevance to whether she consented to sexual intercourse with the defendant (this is akin to saying a woman who consensually has sexual intercourse with one person would consent to sexual intercourse with any other person); and 2) any evidence of the victim's sexual behaviors with others is inadmissible under RCW 9A.44.020. The existence of multiple

contributors to DNA found on the victim's underwear would not demonstrate King's innocence. King did not meet the standards required by RCW 10.73.170 and the trial court properly denied his motion.

King also argued that if the DNA test shows no other contributors, then that proves his innocence as well because it showed he allowed the victim to change her clothes. The absence of another's DNA would not prove consensual sexual intercourse or lack of unlawful imprisonment in this case. The victim did not describe a type of imprisonment in which she was tied up and her movements completely restrained to the point where she could not change clothes. Instead, the victim described a type of imprisonment in which she spent the hours convincing King that everything was fine and acting like she loved him because she was afraid of what he would do if she tried to escape. *See* CP 132-36. The victim described eating, going to the bathroom, and eventually driving to a Walgreen's during this period of unlawful imprisonment. *Id.* New evidence that only King's DNA was found in her underwear, which he would then apparently argue meant she changed her underwear, would not bolster his chances of acquittal had he chosen to go to trial. It would not have had any impact on the State's sufficiency of evidence to convict him.

The situation in this case is similar to that in *Riofta, supra*. There, the defendant moved post-conviction to have a white hat, purportedly worn by the perpetrator, tested for DNA. *Riofta*, 166 Wn.2d at 363. The hat had not previously been tested for DNA prior to the defendant's trial. *Id.* The evidence had shown that the white hat belonged to the owner of a stolen vehicle and was worn by the shooter for a short time and the defendant had a shaved head. *Id.* at 370. The Court considered the possible

outcomes of DNA testing in that case. 1) The absence of the defendant's DNA on the hat would not likely demonstrate the defendant's innocence on a more probable than not basis because the absence of his DNA on the hat would not exclude him as the perpetrator; and 2) the presence of a third person's DNA also would not likely demonstrate his innocence on a more probable than not basis because the presence of a person's DNA on the white hat does not make it likely that person was the shooter. *Id.* at 370-71. The Court concluded the strength of the other evidence, along with the limited probative value of the DNA evidence sought made it appropriate for the trial court to deny the defendant's motion for post-conviction DNA testing. *Id.* at 373.

The same is true in this case. The victim's claims were corroborated by physical findings by medical personnel and the police, including the victim's injured eye and evidence of her having been duct taped. *See* CP 132-36. Her claims were also corroborated by the testing of the substance in the bottle from which the defendant used a syringe to withdraw what he injected into the victim's eye. *Id.* Witnesses from the time of the victim's disclosure corroborate her version of events, as does the surveillance video from Walgreen's. *Id.* The defendant's flight and attempt to run from police also support his guilt. *Id.* The defendant also made many statements corroborating the victim's version of events, including that he had a needle containing acid and that that acid got into the victim's eye, but claimed it was an accident, that he had told the victim he was going to kill himself, and that they had sexual intercourse multiple times. *Id.*

Additionally, in the unpublished case of *State v. Dublin*, 200 Wn.App. 1068 (Div. I, 2017)¹, Division I of this Court considered a defendant's appeal of a trial court's denial of his post-conviction motion for DNA testing. *Dublin*, slip op. at 2. In *Dublin*, the defendant had been convicted for three counts of burglary in the first degree, two counts of rape in the first degree and one count of attempted rape in the first degree. *Id.*, slip op. at 1. The rapes and attempted rape involved three separate victims and three separate occasions in which the defendant entered the victims' homes and raped or attempted to rape the victims. *Id.* One victim immediately reported the rape and submitted to a sexual assault examination. *Id.* In addition to the samples taken during the sexual assault examination, police collected sheets, a pillow case, and a stuffed animal from the victim's bed, where the rape occurred. *Id.* The second completed rape victim also had a sexual assault examination done. *Id.*, slip op. at 2. The swabs from the sexual assault kits were tested prior to trial for both completed rape victims and both returned with DNA results with a high degree of certainty that the defendant was the source of the DNA found. *Id.* The evidence collected from the first victim's bed – sheets, pillow case, stuffed animal, pair of underwear – were not tested prior to trial. *Id.* The defendant also had a notebook in his house with a list of names and both completed rape victims' names were on the list and the attempted rape victim's initials were on the list. *Id.* At trial, the defendant claimed that he had consensual sexual intercourse with both completed rape

¹ GR 14.1 permits citation to unpublished decisions of the Court of Appeals issued on or after March 1, 2013. These opinions are not binding on this Court and may be given as much or little weight as this Court sees fit.

victims. *Id.* He denied any sexual encounter with the attempted rape victim. *Id.* The defendant then sought post-conviction DNA testing of the sheets, pillow case and stuffed animal, arguing that his theory was that he did not have sexual intercourse with the victim in her bedroom, but in his car, so his DNA would not be found on the sheets taken from her bed inside her house. *Id.*

In affirming the trial court's denial of the post-conviction DNA testing, the Court in *Dublin* reasoned that DNA testing of the underwear collected by police would not definitively establish the identity of the rapist as there was no evidence that the rapist wore the underwear collected, and the absence of the defendant's DNA and the presence of another man's DNA would not establish the defendant's innocence. *Id.*, slip op. at 4. The Court also considered that even if the other items were tested and showed the presence of another man's DNA, in light of the evidence presented at trial, it would not establish a probability that the defendant was innocent. *Id.* The same is true in King's case. No matter what the outcome would be in the DNA testing, no outcome, not even the most favorable (which King never argues which outcome he sees as most favorable to him) would establish a probability that he is innocent. The evidence that would be presented at trial would be so overwhelming as to prove his guilt and the DNA evidence, if it showed other men, would be irrelevant, and almost expected given that it is already known the victim is married to a different person other than the defendant. As in *Dublin*, the trial court in King's case did not abuse its discretion in denying his motion for post-conviction DNA testing.

Additionally, in the unpublished case of *State v. Senior*, 3 Wn.App.2d 1056 (Div. I, 2018)², Division I of this Court considered a defendant’s appeal of a trial court’s denial of his post-conviction motion for DNA testing of watch fragments. *Senior*, slip. op. at 2. There, the Court of Appeals found that a favorable DNA test result would not show a reasonable probability of the defendant’s innocence because the results of the DNA test would have little probative value. *Id.*, slip op. at 4. The Court discussed that a favorable result would either show the absence of the defendant’s DNA or the presence of another person’s DNA, neither of which would establish his innocence. *Id.* The same is true in King’s case – no potential favorable result would help establish his innocence. The Court contrasted the evidence in single rapist cases, where DNA results are highly probative – if the DNA test results come back to show the semen present in a victim’s underwear belongs to someone other than the convicted defendant, then that evidence would tend to be high exculpatory and would tend to demonstrate an offender’s innocence. *Id.* However, in a case where the issue isn’t “who did it” and is “whether it was done,” the issue is one of credibility for a fact-finder between the victim who claims forced sexual intercourse and a defendant who claims it was consensual. DNA cannot tell us whether it was left where it was found via consent or non-consent. Additionally, the presence of multiple people’s DNA does not help determine if, and therefore is not relevant to whether, the sexual intercourse was consensual or not.

² GR 14.1 permits citation to unpublished decisions of the Court of Appeals issued on or after March 1, 2013. These opinions are not binding on this Court and may be given as much or little weight as this Court sees fit.

Given the evidence included in the police reports, medical reports, and other evidence collected by police, the DNA results King sought would not likely demonstrate his innocence on a more probable than not basis. To obtain post-conviction DNA testing the defendant must “show a reasonable probability of his innocence before requiring State resources be expended on a test.” *Riofta*, 166 Wn.2d at 370. King did not show a reasonable probability of his innocence. No matter what the DNA results would be, they would not have helped King in his pursuit of post-conviction relief. It would not be sufficient evidence, even along with other evidence, to show that he was wrongly convicted. King’s situation is not one in which RCW 10.73.170 provides for relief.

The Superior Court below properly considered RCW 10.73.170, applicable case law, including *Riofta, supra*, the evidence in the case, the potential outcomes of the DNA evidence, and correctly found that no matter what the results were, they would not be helpful to King in any attempt he may make to prove his innocence. The trial court was correct and did not abuse its discretion. Its decision was legally sound, based on a proper assessment of the evidence and the law. Under the applicable legal standard, the trial court did not err and its decision should be affirmed.

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CONCLUSION

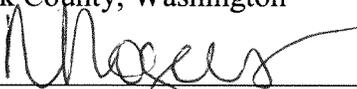
The Superior Court properly concluded that King did not meet the statutory requirements of RCW 10.73.170 for post-conviction DNA testing and its decision to deny King's request should be affirmed.

DATED this 2nd day of May, 2019.

Respectfully submitted:

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