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Division II
State of Washington
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No. 53567-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JEROME CEASAR ALVERTO,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 06-1-02214-1
The Honorable K. A. van Doorninck, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The lower court abused its discretion when it denied Appellant's motion to preserve DNA evidence without explanation or qualification.

II. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Where Washington law mandates preservation of all biological and DNA material collected in connection with a criminal investigation, did the trial court abuse its discretion when it denied Appellant's motion to preserve DNA evidence? (Assignment of Error 1)
2. Where Washington law mandates preservation of all biological and DNA material collected in connection with a criminal investigation, should the trial court either grant Appellant's motion to preserve DNA evidence or, alternatively, note in its written order that such evidence shall not be destroyed in accordance with Washington law? (Assignment of Error 1)

III. STATEMENT OF THE CASE

On May 12, 2006, Stephanie Wilson was attacked in her home, hit with a wine bottle, and shot multiple times as she tried to

escape. (CP 36-37)[1] At one point, Wilson ran to a neighbor's house, where she pounded on the neighbor's sliding glass door. (CP 36, 362, 363) The attacker wore dark clothing and a bandanna covering his face. (CP 36)

When medics and police arrived, they found Wilson's boyfriend, Eric Rogers, coming out of her house. (CP 361) But Wilson told officers that her ex-husband, Jerome Alverto, was the person who attacked her. (CP 36, 361) When Alverto was arrested a short time later, he was wearing dark clothing and had blood on his pants. (CP 37, 362)

Through DNA testing, the State matched the blood from Alverto's pants to Wilson. (CP 38, 362) Other items, including a hair found in blood smeared on the neighbor's sliding glass door, were never tested. (CP 362)

The State charged Alverto with attempted murder in the first degree, burglary in the first degree, and robbery in the first degree, all with a firearm enhancement allegation. (CP 6-8) The jury convicted Alverto as charged. (CP 9-14) The trial court imposed a

[1] The factual summary is taken from this Court's 2010 unpublished opinion affirming Alverto's convictions on direct appeal (Case No. 38323–3–II), and from its 2017 unpublished opinion affirming the denial of Alverto's post trial motion to test DNA evidence (Case No. 47960-5-II). (CP 35-47, 360-68)

term of incarceration totaling 460.5 months. (CP 25) Alverto appealed, and his convictions were affirmed in a 2010 unpublished opinion. (CP 34-47)

In 2012, Alverto filed a motion for post-conviction DNA testing of the hair and other evidence, pursuant to RCW 10.73.170. (CP 48-50, 51-61) The trial court denied the request, and a Court of Appeals Commissioner affirmed that order in a 2013 ruling. (CP 86-88)

In 2014, Alverto filed a second motion for post-conviction DNA testing pursuant to RCW 10.73.170, seeking testing of the hair found on the neighbor's sliding glass door. (CP 93-108) This time, Alverto submitted new evidence that had not been presented at trial or in his prior request for post-conviction DNA testing. (CP 109-46) He argued that this new evidence, in conjunction with a DNA test proving the hair belonged to someone else (in particular Rogers), would prove Alverto's innocence on a more probable than not basis. (CP 95, 96, 97)

The trial judge denied this request and Alverto again appealed. (CP 277, 287-98, 299) This Court affirmed the trial court in a 2017 unpublished opinion. (CP 360-38) The Court found that "Alverto's new evidence, even in conjunction with DNA testing

showing that the hair belonged to Rogers, cannot overcome the evidence against Alverto on a more probable than not basis." (CP 367)

On December 26, 2018, Alverto filed a Motion to Preserve Deoxyribonucleic Acid (DNA) Evidence. (CP 371, 372-73) Alverto maintained that "it is in the best interest of justice to preserve all the DNA evidence [as] I continue to pursue testing of the DNA evidence[.]" (CP 373)

In response, the State argued that Alverto's motion should be denied because "the Court of Appeals has repeatedly denied the defendant's request for post-conviction DNA testing[.]" (CP 379) The trial court denied Alverto's motion without explanation. (CP 380) Alverto now appeals. (CP 381)

IV. ARGUMENT & AUTHORITIES

Alverto has twice been denied an order to conduct a DNA test on the hair found in blood on the neighbor's patio door. But now, Alverto seeks only an order preserving any DNA material for potential later testing, should he eventually establish grounds to do so. Preservation of such material is allowed, and indeed required, by Washington statutes, so the trial court should not have

summarily denied his motion without any explanation.[2]

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.[3] A successful motion must overcome several procedural and evidentiary hurdles. RCW 10.73.170(2)(3). The court can only order the requested DNA testing if "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(3). This Court has on two previous occasions found that Alverto has not met these statutory requirements. (CP 80-81, 86-88, 277, 360-68)

The motion currently under review requested an order preserving biological material for potential future DNA testing, should Alverto eventually meet the evidentiary and procedural requirements of RCW 10.73.170(2) and (3). (CP 371-73). Thus, contrary to the State's argument below (CP 379), this is not a third

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[2] A trial court's denial of defendant's motion for post-conviction DNA testing is reviewed for an abuse of discretion. See *State v. Riofta*, 166 Wn.2d 358, 370, 209 P.3d 467 (2009). A trial court's decision on a motion for post-conviction relief is also reviewed for abuse of discretion *See State v. Hardesty,* 129 Wn.2d 303, 317, 915 P.2d 1080 (1996).

[3] The full text of RCW 10.73.170 is attached in Appendix A.

request to test the hair or other DNA evidence.

Furthermore, the State is actually required by statute to preserve the biological material collected in this case. Washington law mandates that, where a defendant has been charged and convicted of a violent offense, all DNA "work product" secured in connection with the case be preserved throughout the length of the sentence. RCW 5.70.010.[4] The description of "DNA work product" is broad, and includes nearly any material collected by law enforcement as part of its investigation that has been stored or prepared for current or future scientific testing, including blood and hair. RCW 5.70.010(3)(b).

The prosecutor and the trial court both seemed unaware of the preservation requirements of RCW 5.70.010. The State notes that the Court of Appeals twice denied Alverto's post-conviction requests for DNA testing, and argues that "in light of these rulings,

---

[4] The statute provides, in relevant part:

> In any felony case initially charged as a violent or sex offense … a governmental entity shall preserve any DNA work product that has been secured in connection with the criminal case according to the following guidelines:
>
> (a) … where a defendant has been charged and convicted in connection with the case, the DNA work product must be maintained throughout the length of the sentence, including any period of community custody extending through final discharge[.]

RCW 5.70.010(1). The full text of the statute is attached in Appendix B.

the defendant's motion lacks merit and should be denied." (CP 379) The State does not reference or address preservation of the evidence. And the trial court's order denying the motion merely states that it has reviewed the record and pleadings, and that Alverto's "Motion to Preserve filed on December 26, 2018 is denied without oral argument." (CP 380)

But by enacting RCW 5.70.010, the Legislature clearly and unambiguously stated its intention to require preservation of biological material collected in a criminal case that might contain DNA evidence.[5] The court's one-sentence denial of Alverto's motion, without any reference to the preservation requirements of RCW 5.70.010, was an abuse of discretion and could easily be interpreted as an invitation to destroy any remaining biological material.

Because preservation of the biological material collected in this case is required by statute, the trial court did not have authority to deny Alverto's motion. Or, at the very least, denial should have

[5] The fundamental objective of the court is to carry out the Legislature's intent and give effect to a statute's plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Here, the statute specifically states that "a governmental entity shall preserve any DNA work product[.]" RCW 5.70.010(1). And the Legislature's stated intent in enacting this statute was to require preservation of potential DNA evidence. See 2015 WASHINGTON HOUSE BILL NO. 1069, COMMITTEE REPORT (January 14, 2015).

been accompanied by an order noting that the material Alverto sought to preserve is protected by the preservation requirements of RCW 5.70.010. This Court should remand this case with directions to either grant Alverto's motion, or amend the order denying the motion so that the record is clear that the biological material, including the hair collected from the neighbor's patio door, must be preserved.[6]

V. CONCLUSION

For the reasons argued above, this Court should remand this case to the trial court so a new order requiring the preservation of biological material can be entered, as Alverto has requested and as required by statute.

DATED: August 9, 2019

STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Jerome Ceasar Alverto

CERTIFICATE OF MAILING

I certify that on 08/09/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jerome Ceasar Alverto, DOC# 322854, MCC – TRU, Post Office Box 888, Monroe, WA 98272-0888.

STEPHANIE C. CUNNINGHAM, WSBA #26436

[6] "The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." RAP 12.2.

APPENDIX A

RCW 10.73.170

West's Revised Code of Washington Annotated
Title 10. Criminal Procedure (Refs & Annos)
Chapter 10.73. Criminal Appeals (Refs & Annos)

West's RCWA 10.73.170

10.73.170. DNA testing requests

Currentness

(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.

(4) Upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW 10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request. Such motion for appointment of counsel shall comply with all procedural requirements established by court rule.

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(5) DNA testing ordered under this section shall be performed by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(6) Notwithstanding any other provision of law, upon motion of defense counsel or the court's own motion, a sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of evidence. The court must specify the samples to be maintained and the length of time the samples must be preserved.

Credits
[2005 c 5 § 1, eff. March 9, 2005; 2003 c 100 § 1, eff. July 27, 2003; 2001 c 301 § 1; 2000 c 92 § 1.]

OFFICIAL NOTES

Effective date--2005 c 5: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 9, 2005]." [2005 c 5 § 2.]

Construction--2001 c 301: "Nothing in this act may be construed to create a new or additional cause of action in any court. Nothing in this act shall be construed to limit any rights offenders might otherwise have to court access under any other statutory or constitutional provision." [2001 c 301 § 2.]

Report on DNA testing--2000 c 92: "By December 1, 2001, the office of public defense shall prepare a report detailing the following: (1) The number of postconviction DNA test requests approved by the respective prosecutor; (2) the number of postconviction DNA test requests denied by the respective prosecutor and a summary of the basis for the denials; (3) the number of appeals for postconviction DNA testing approved by the attorney general's office; (4) the number of appeals for postconviction DNA testing denied by the attorney general's office and a summary of the basis for the denials; and (5) a summary of the results of the postconviction DNA tests conducted pursuant to RCW 10.73.170 (2) and (3). The report shall also provide an estimate of the number of persons convicted of crimes where DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or where DNA testing technology was not sufficiently developed to test the DNA evidence in the case." [2000 c 92 § 2.]

Intent--2000 c 92: "Nothing in chapter 92, Laws of 2000 is intended to create a legal right or cause of action. Nothing in chapter 92, Laws of 2000 is intended to deny or alter any existing legal right or cause of action. Nothing in chapter 92, Laws of 2000 should be interpreted to deny postconviction DNA testing requests under existing law by convicted and incarcerated persons who were sentenced to confinement for a term less than life or the death penalty." [2000 c 92 § 4.]

Notes of Decisions (40)

West's RCWA 10.73.170, WA ST 10.73.170
Current with all currently effective legislation from the 2019 Regular Session of the Washington Legislature.

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APPENDIX B

RCW 5.70.010

West's Revised Code of Washington Annotated
Title 5. Evidence (Refs & Annos)
Chapter 5.70. DNA Evidence

West's RCWA 5.70.010

5.70.010. Preservation of DNA work product--Definitions--Failure to preserve DNA work product

Effective: July 24, 2015
Currentness

(1) In any felony case initially charged as a violent or sex offense, as defined in RCW 9.94A.030, a governmental entity shall preserve any DNA work product that has been secured in connection with the criminal case according to the following guidelines:

(a) Except as provided in (b) of this subsection, where a defendant has been charged and convicted in connection with the case, the DNA work product must be maintained throughout the length of the sentence, including any period of community custody extending through final discharge;

(b) Where a defendant has been convicted and sentenced under RCW 9.94A.507 in connection with the case, the DNA work product must be maintained for ninety-nine years or until the death of the defendant, whichever is sooner; and

(c) Where no conviction has been made in connection with the case, the DNA work product must be maintained for ninety-nine years or throughout the period of the statute of limitations pursuant to RCW 9A.04.080, whichever is sooner.

(2) Notwithstanding subsection (1) of this section, in any felony case regardless of whether the identity of the offender is known and law enforcement has probable cause sufficient to believe the elements of a violent or sex offense as defined in RCW 9.94A.030 have been committed, a governmental entity shall preserve any DNA work product, including a sexual assault examination kit, secured in connection with the criminal case for ninety-nine years or throughout the period of the statute of limitations pursuant to RCW 9A.04.080, whichever is sooner.

(3) For purposes of this section:

(a) “Amplified DNA” means DNA generated during scientific analysis using a polymerase chain reaction.

(b) “DNA work product” means (i) product generated during the process of scientific analysis of such material, except amplified DNA, material that had been subjected to DNA extraction, and DNA extracts from reference samples; or (ii) any material contained on a microscope slide, swab, in a sample tube, cutting, DNA extract, or some other similar retention method used to isolate potential biological evidence that has been collected by law enforcement as part of its investigation and prepared for scientific analysis, whether or not it is submitted for scientific analysis and derived from:

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(A) The contents of a sexual assault examination kit;

(B) Blood;

(C) Semen;

(D) Hair;

(E) Saliva;

(F) Skin tissue;

(G) Fingerprints;

(H) Bones;

(I) Teeth; or

(J) Any other identifiable human biological material or physical evidence.

Notwithstanding the foregoing, "DNA work product" does not include a reference sample collected unless it has been shown through DNA comparison to associate the source of the sample with the criminal case for which it was collected.

(c) "Governmental entity" means any general law enforcement agency or any person or organization officially acting on behalf of the state or any political subdivision of the state involved in the collection, examination, tracking, packaging, storing, or disposition of biological material collected in connection with a criminal investigation relating to a felony offense.

(d) "Reference sample" means a known sample collected from an individual by a governmental entity for the purpose of comparison to DNA profiles developed in a criminal case.

(4) The failure of a law enforcement agency to preserve DNA work product does not constitute grounds in any criminal proceeding for challenging the admissibility of other DNA work product that was preserved in a case, and any evidence offered may not be excluded by a court on those grounds. The court may not set aside the conviction or sentence or order the reversal of a conviction under this section on the grounds that the DNA work product is no longer available. Unless the court finds that DNA work product was destroyed with malicious intent to violate this section, a person accused of committing a crime against a person has no cause of action against a law enforcement agency for failure to comply with the requirements of this section. If the court finds that DNA work product was destroyed with malicious intent to violate this section, the court may impose appropriate sanctions. Nothing in this section may be construed to create a private right of action on the part of any individual or entity against any law enforcement agency or any contractor of a law enforcement agency.

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