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Court of Appeals
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NO. 53567-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEROME CEASAR ALVERTO,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable K.A. van Doorninck

No. 06-1-02214-1

BRIEF OF RESPONDENT

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I. INTRODUCTION

Alverto brutally attacked his ex-wife, shooting her numerous times in the chest, neck, and head. Law enforcement caught Alverto near the scene of the crime with blood on his pants matching his ex-wife's DNA. Alverto also had a handwritten "to-do list" detailing how he planned to murder his ex-wife. This list included planting a stranger hair at the scene. Alverto's ex-wife miraculously survived the attack. She identified Alverto as her attacker and testified against him at trial. He was convicted of all charges at trial and sentenced to 460.5 months in prison.

Alverto has filed multiple frivolous post-conviction motions and personal restraint petitions that include repeated attempts to get DNA testing of the hair found at the crime scene. Courts have repeatedly denied DNA testing of the hair because such testing would not exculpate him. Alverto then brought a motion before the trial court to preserve all DNA. The trial court did not abuse its discretion in denying this motion. First, Alverto failed to cite any legal basis for his motion and instead accused the trial court of fabricating "false evidence" against him. Second, statutory provisions are already in place regarding under what circumstances "DNA work product" evidence must be preserved by a governmental entity. There is no reason for the trial court to enter a separate order in Alverto's case to

address what is already prescribed by law. Further, Alverto's motion went beyond what these statutory preservation provisions require. Thus, this Court should affirm the trial court's order denying Alverto's motion.

II. RESTATEMENT OF THE ISSUE

- A. Did the trial court abuse its discretion when it denied Alverto's motion to preserve DNA evidence where he failed to cite any legal basis for the motion and where his motion went beyond what the statutory preservation provisions require?

III. STATEMENT OF THE CASE

A. Attempted Murder, Robbery, and Burglary Convictions

The State charged Jerome Ceasar Alverto with attempted first degree murder, first degree robbery, and first degree burglary for events that occurred during the early morning hours of May 13, 2006. CP 1-8; *State v. Alverto*, No. 38323-3-II, 2010 WL 2927452 at *1 (Wash. Ct. App. July 27, 2010) (*Alverto I*).¹

On May 13, 2006, Alverto illegally entered the home of his ex-wife, Stephanie Wilson, hit her over the head with a wine bottle, and repeatedly hit her in the head with a gun. *Alverto I*, 2010 WL 2927452 at *1. He then held the gun to her head and said that he was going to kill her and that her children would find her dead body. *Id.* Wilson recognized Alverto as the attacker by his eyes, body, and voice, even though he tried to conceal his

¹ This decision is unpublished and has no precedential value and is cited only for the factual and procedural history of Alverto's case. *See* GR 14.1(a).

identity by wearing black clothing, black gloves, and a bandana around his face. *Id.* When Wilson tried to escape, Alverto caught her and repeatedly hit her with the butt of his gun. *Id.* She escaped to a neighbor's house, but Alverto followed her and shot her in the chest. *Id.* After she collapsed, Alverto shot her again. *Id.* Wilson played dead until Alverto left. *Id.* He then returned and shot her in the back of the neck. *Id.* After Wilson collapsed a second time, Alverto dragged her down the stairs by her hair and onto a neighbor's lawn where he shot her twice in the head and then fled. *Id.* Wilson managed to reach her neighbor's house and reported that Alverto was her attacker. *Id.* She repeated this information to the police when they arrived. *Id.*

Pierce County Deputy Sheriffs stopped Alverto in his car near the scene of the crime. *See id.* at *2. He was wearing dark clothing and had blood on his pants. *Id.* Alverto denied shooting anyone and claimed he was going deer hunting—it was not deer hunting season. *Id.* Subsequent testing of the blood stains on Alverto's pants matched Wilson's DNA. *Id.* at *2, 5.

Later that morning, a duffle bag was found at a construction site within two miles of Wilson's home. *Id.* at *2. It contained the following items: clothing, multiple gas masks, blue bandana, handcuffs, Wilson's cell phone, trash bags, stocking caps (one with the eyes, nose, and mouth cut out), garage door opener for Wilson's home, photograph of Wilson and her

current boyfriend, bracelet with Wilson's name on it that she had given to Alverto, a grocery list with Alverto's name on it, and a gun covered in blood. *Id.*

The State admitted into evidence a "to-do list" that was found in Alverto's car at the time of his arrest. *Id.* The "to-do list" was written in Alverto's handwriting and detailed how he planned to commit the crime and murder his ex-wife. *Id.* The following excerpts are contained in his murder plan: remove cell (GPS); has to look natural; ransack truck and purse; "(Tools), gun, taser, knife, handcuffs, tape, shoe covers, gloves, flashlight, scarf or face mask, [u]se white face mask, trash bags (2 large, 4 small), "**stranger hair**/condom"; (dress code), dark pants, dark shirt, glove, stocking cap and face mask; (execute), no communication, enter garage and wait, taser individual, handcuff arms to legs, tape arms and legs together; (options), set her on fire, act out carjacking gone bad, taser, stab her in the garage and smear blood in garage. *Id.* at *2 (emphasis added).

Wilson survived the attack and testified against Alverto at trial. *See Id.* The jury found Alverto guilty of all charges, including firearm enhancements on each count. CP 9-14. On September 12, 2008, the trial court sentenced Alverto to 460.5 months incarceration. CP 20-25. Alverto appealed. CP 33. This Court affirmed all of Alverto's convictions, noting

the “overwhelming evidence” of his guilt. *Alverto I*, 2010 WL 2927452 at *1, 5. The mandate was issued in February 2011. CP 34.

B. Previous Post-Conviction Motions and Personal Restraint Petitions

It appears that Alverto filed his first personal restraint petition (PRP) requesting post-conviction relief in 2011. CP 74 n. 1; *see also* CP 48-50. In 2012, while this PRP was pending, Alverto filed two separate motions in the trial court for post-conviction relief. In January 2012, he filed a motion for post-conviction DNA testing of the hair and other evidence pursuant to RCW 10.73.170. CP 51-60.² Alverto claimed that the police found human hair at the crime scene but never tested it. CP 52. Then, in June 2012, he filed a nearly identical motion for post-conviction DNA testing pursuant to RCW 10.73.170. *See* CP 62-71. The only difference between the two motions was the latter motion did not include a request to test his cell phone bill transaction records. *See* CP 66.

On July 31, 2012, before the trial court ruled on either of these motions, the Court of Appeals dismissed Alverto’s 2011 PRP as frivolous under RAP 16.11(b) and denied his motion for post-conviction DNA

² The other evidence Alverto wanted tested consisted of fingernail scrapings from the victim’s hands, the “handwriting” inside the notebook detailing the murder plan, and his own cell phone billing transaction records. CP 55-58. Alverto’s motion is specifically for “DNA testing” pursuant to RCW 10.73.170. CP 51-60. But his requests to test the handwriting and cell phone records go beyond DNA testing. *See* CP 58.

testing. CP 74-79. Alverto raised numerous issues in this PRP, including the same issues he raised in the 2012 motions filed in the trial court: (1) the human hair was not tested for DNA; (2) the notebook detailing plans to kill the victim were not tested for DNA or against his handwriting; and (3) records from the cell phone do not show he called the victim. CP 74. The Court of Appeals rejected all claims. CP 74-79. Although Alverto claimed he did not commit the crimes, the Court noted that the victim testified at trial and identified Alverto, her ex-husband, as her attacker. *See* CP 75. Regarding Alverto's claim that counsel was ineffective for not testing the hair for DNA, the Court explained that in light of all of the evidence implicating Alverto's guilt, there is "little chance that a single human hair would exculpate him." CP 76-77. It also appears that Alverto brought a separate motion to the Court of Appeals for post-conviction DNA testing, which the Court denied, noting that such motions must be brought in the trial court. CP 78.³

On October 12, 2012, the trial court entered an order denying Alverto's previously filed motions for post-conviction DNA testing. CP 80-81. Pursuant to RCW 10.73.170, the trial court ruled that Alverto failed to show "the likelihood that the DNA evidence would demonstrate innocence

³ Prior to this ruling, Alverto filed a second PRP challenging his legal financial obligations. In December 2012, this Court dismissed his PRP as untimely and also noted it was a successive petition. CP 84-85; *see also* CP 375 n. 1.

on a more probable than not basis.” CP 80; *see* RCW 10.73.170(3). Alverto appealed this order. CP 82-83.

On appeal, Alverto’s appellate counsel moved to withdraw after determining there was no good faith basis for an appeal regarding DNA testing of the evidence. CP 86. On September 18, 2013, a Court of Appeals Commissioner concluded that the appeal was frivolous and affirmed the trial court’s order denying the motions for post-conviction DNA testing under RCW 10.73.170. CP 86-88. The Court concluded that the trial court did not abuse its discretion in denying Alverto’s motion, noting that the judge who denied the motion was the same judge who presided over his trial. CP 87. The Court noted that the “considerable evidence establishing Alverto as the perpetrator of the crimes” is set forth in the opinion from the direct appeal. CP 87. The Commissioner notified Alverto that failure to move to modify the ruling will terminate appellate review. CP 88. The mandate for this ruling was issued in February 2014. CP 91.

On June 9, 2014, less than four months after the Court issued the mandate on the denial of post-conviction DNA testing, Alverto filed another motion in the trial court for post-conviction DNA testing pursuant to RCW 10.73.170. *See* CP 93-146. Alverto’s motion *again* sought DNA testing of the hair found at the crime scene. CP 95-103. His motion also included claims of newly discovered evidence. CP 93-146. The trial court ultimately

denied Alverto's motion for DNA testing on July 30, 2015. CP 277; *see also* CP 261, 264-76, 278-98.⁴ Alverto again appealed. CP 299-301.

In an unpublished opinion issued on March 7, 2017, this Court *again* held that the trial court did not abuse its discretion by denying Alverto's motion for post-conviction DNA testing of the hair found at the crime scene. *See State v. Alverto*, No. 47960-5-II, 2017 WL 943473 (Wash. Ct. App. March 7, 2017) (*Alverto III*).⁵ This Court explained that "regardless of whether DNA testing showed that the hair belonged to someone other than Alverto, it would not demonstrate Alverto's innocence." *Alverto*, 2017 WL 943473 at *1. In October 2017, the Court issued the mandate for this opinion. CP 369.

While this appellate decision was pending, Alverto continued to file post-conviction motions in the trial court. On July 29, 2014, Alverto filed a CrR 7.8 motion for a new trial in the trial court based on newly discovered evidence, fabricated evidence, and ineffective assistance of counsel. CP 147-260, 302. On November 26, 2014, the trial court denied Alverto's motion for a new trial. CP 262. Alverto appealed. CP 263. In an unpublished decision issued on May 17, 2016, this Court held that the trial court does

⁴ Although the trial court initially granted Alverto's motion for DNA testing without a hearing or any input from the State, the Court subsequently reversed that decision and rescinded the order granting DNA testing. CP 261, 264-98.

⁵ This decision is unpublished and has no precedential value and is cited only for the factual and procedural history of Alverto's case. *See* GR 14.1(a).

not have the authority to deny an untimely CrR 7.8 motion for a new trial. *State v. Alverto*, No. 47000-4-II, 2016 WL 2874213 at *1 (Wash. Ct. App. May 17, 2016) (*Alverto II*).⁶ This Court reversed the trial court's order and remanded for the trial court to transfer the motion to the Court of Appeals for consideration as a PRP. *Alverto II*, 2016 WL 2874213 at *1. The trial court subsequently transferred the motion to the Court of Appeals for consideration as a PRP. CP 341. However, Alverto voluntarily moved to strike the motion and withdraw this PRP. CP 339-41. This Court subsequently granted his motion and dismissed his PRP. CP 341.

Instead of pursuing his previously filed July 29, 2014 motion for a new trial, on August 8, 2016, Alverto filed a different motion for a new trial in the trial court pursuant to CrR 7.8 based on newly discovered evidence. CP 338; CP 305-37. This motion presents the same issues previously raised by Alverto in his other motions. *See* CP 305-37; *see also* CP 51-61, 74-79, 93-146, 347-51. On November 2, 2016, the trial court entered an order transferring this most recent motion for a new trial to the Court of Appeals for consideration as a PRP. CP 342-43. On September 7, 2017, this Court dismissed Alverto's third PRP as untimely. CP 375-77. The Court explained that newly discovered evidence must be weighed against the strength of the

⁶ This decision is unpublished and has no precedential value and is cited only for the factual and procedural history of Alverto's case. *See* GR 14.1(a).

State's evidence at trial. CP 376. The Court explained that given that the victim testified and identified Alverto as her attacker and her blood was found on his pants, Alverto fails to show that his newly discovered evidence would probably change the result of the trial. CP 376-77. The Court dismissed the PRP. CP 375-77.

C. Motion to Preserve DNA Evidence

On December 26, 2018, Alverto filed a pro se motion "to preserve the DNA evidence of a hair found in blood on the vertical surface of a glass patio door, and all other DNA evidence" in Cause No. 06-1-02214-1. CP 371. This motion does not include any legal authority but is based on his two-page declaration in which he continues to assert that DNA testing will prove his innocence. CP 371-73.

In his declaration, Alverto claims that the trial court "has ruled that the hair found in blood on a vertical surface of a glass door does not match [his] hair profile." CP 372.⁷ He also claims that the trial court judge "fabricated false evidence" when the judge rescinded its order that had granted his motion for DNA testing of the hair. CP 372. Alverto claims, without any supporting evidence, that the police have admitted to "bad faith" destruction of other DNA evidence "believed solely to violate [his]

⁷ The State is unaware of any such ruling, and Alverto does not cite to the record for this assertion.

due process right to a fair trial.” CP 373. Alverto continued to deny attacking his ex-wife or being at the crime scene. CP 373. He stated that he is continuing to pursue testing of the DNA evidence and that it is in “the best interest of justice to preserve all the DNA evidence.” CP 373.

In response to Alverto’s motion, the State argued that Alverto failed to cite any legal basis or authority for his motion. CP 379 (citing CrR 8.2, CR 7(b)). The State noted that the Court has repeatedly denied Alverto’s request for post-conviction DNA testing because the results of any testing would not change the outcome of the trial. *See* CP 379. Based on Alverto’s failure to cite to any rule, statute, or case law in support of his motion, the State requested that the trial court deny his motion. CP 379.

On April 19, 2019, the trial court entered an order denying Alverto’s December 26, 2018 motion to preserve DNA evidence. CP 380. On May 23, 2019, Alverto timely filed a notice of appeal of this order. *See* CP 381-85; *see also* GR 3.1, RAP 5.2(a).⁸ Alverto references RCW 5.70.010 for the first time in his notice of appeal when he argues that the trial court abused its discretion in denying his motion to preserve DNA evidence, “irrespective of RCW 5.70.010.” *See* CP 381.

⁸ Alverto’s notice of appeal complies with GR 3.1, which provides that a document is timely filed if an inmate confined in an institution files a document in the institution’s internal mail system within the time permitted for filing. GR 3.1.

IV. ARGUMENT

A. The trial court did not abuse its discretion in denying Alverto's motion to preserve the DNA evidence where he failed to cite any legal authority for his motion and where his motion went beyond the dictates of the law.

The trial court did not abuse its discretion in denying Alverto's motion to preserve "the DNA evidence of a hair found in blood on the vertical surface of a glass patio door, and all other DNA evidence." First, Alverto failed to cite any legal authority for his motion. Second, statutory provisions are already in place regarding under what circumstances "DNA work product" evidence must be preserved by a governmental entity. There is no reason for the trial court to enter a separate order in Alverto's case to address what is already prescribed by law. Further, Alverto's motion went beyond what these statutory preservation provisions require. In light of Alverto's numerous frivolous post-convictions motions regarding DNA testing, any order by the trial court explicitly ruling that the hair must be preserved could be abused by Alverto in future pleadings. The trial court did not abuse its discretion in denying Alverto's motion that accused the trial court of fabricating "false evidence" against him.

A trial court's decision on a motion for post-conviction DNA testing is reviewed for an abuse of discretion. *State v. Gentry*, 183 Wn.2d 749, 764, 356 P.3d 714 (2015); *see also State v. Riofta*, 166 Wn.2d 358, 370, 209 P.3d 467 (2009) (citing *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080

(1996) (trial court's decision on motion for post-conviction relief is reviewed for abuse of discretion)). A trial court abuses its discretion if its decision rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Gentry*, 183 Wn.2d at 764.

The State agrees that RCW 5.70.010 outlines the procedures for the preservation of "DNA work product." Under RCW 5.70.010(1), 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 guidelines outlined in the statute. RCW 5.70.010(1). Where a defendant has been charged and convicted in a 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)(a). But if a defendant has been convicted and sentenced of certain sex offenses, the DNA work product must be maintained for 99 years or until the death of the defendant, whichever is sooner. RCW 5.70.010(1)(b). And if there is no conviction associated with the case, the DNA work product must be maintained for 99 years or throughout the period of the statute of limitations, whichever is sooner. RCW 5.70.010(1)(c).

Both "governmental entity" and "DNA work product" are defined by statute. "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. RCW 5.70.010(3)(c). "DNA work product" also has a specific statutory definition:

(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:

- (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.

RCW 5.70.010(3)(b).

The statute applies in Alverto's case because he was initially charged with a violent offense. *See* CP 1-3 (Information charging Alverto with attempted murder in the first degree and robbery in the first degree);

see also RCW 9.94A.030(56)(a). Because Alverto was charged and convicted in this case, law enforcement must maintain the DNA work product throughout the length of Alverto's 460.5 month sentence, including his period of community custody. *See* CP 1-8, 20-26; *see also* RCW 5.70.010(1)(a). Nothing in the statutory provision requires a separate order from the trial court for the preservation of DNA work product to apply.

CrR 8.2 provides that CR 7(b) shall govern motions in criminal cases. CR 7(b)(1) provides that motions "shall state with particularity the grounds therefor," and shall set forth the relief sought. CR 7(b)(1). Alverto did cite RCW 5.70.010 in his motion before the trial court. *See* CP 371-73. In fact, he did not cite to any legal authority supporting his motion. *Id.* Rather, he accused the trial court of fabricating "false evidence" against him and argued that it is in "the best interest of justice to preserve all of the DNA evidence" because he planned to continue to pursue testing of the evidence. *See* CP 372-73. Alverto was required to "state with particularity the grounds" for relief. This requires more than simply stating the reasons why he wants the court to order relief. Rather, he must articulate the reasons specified by the law that will serve as a basis for relief. Alverto did not do this, and the trial court did not abuse its discretion in denying his motion.

Moreover, Alverto's motion "to preserve the DNA evidence of a hair found in blood on the vertical surface of a glass patio door, and all other

DNA evidence” went beyond the mandatory preservation requirements outlined in RCW 5.70.010. Alverto’s motion was open-ended with no end date to his preservation request. *See* CP 371-73. Thus, it went beyond the statutory requirements for preservation under the facts of his case. Because of the nature of Alverto’s convictions, DNA work product must only be maintained through the length of his sentence and community custody. *See* RCW 5.70.010(1)(a).

There is no basis to preserve all DNA evidence in Alverto’s case “indefinitely” as his motion suggests. Courts have repeatedly found that Alverto’s requests for DNA testing of the hair is frivolous and would not exculpate him or demonstrate his innocence. *See* CP 76-77 (in light of all of the evidence implicating his guilt, there is “little chance that a single human hair would exculpate him”); CP 80 (failing to show “the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis”); CP 87 (noting the “considerable evidence establishing Alverto as the perpetrator of the crimes”); *Alverto*, 2017 WL 943473 at *1 (“regardless of whether DNA testing showed that the hair belonged to someone other than Alverto, it would not demonstrate Alverto’s innocence”); CP 376-77 (failing to show that his newly discovered evidence would probably change the result of the trial).

The hair could have been from the victim after Alverto grabbed her by the hair at her neighbor's home and dragged her onto the lawn. *See Alverto I*, 2010 WL 2927452 at *1. Or, since the hair was located on the neighbor's property, it could be from the neighbor or from anyone visiting that residence. Even if testing of the hair failed to match any of these individuals, it still would not exculpate Alverto as his detailed plan of attack against his ex-wife involved using a "stranger hair." *See Alverto I*, 2010 WL 2927452 at *2.

Trial courts are not required to enter specific orders preserving DNA work product evidence. Law enforcement must always preserve such qualifying evidence under the requirements of RCW 5.70.010. Further, the basis for Alverto's motion is still unclear as his notice of appeal indicates that the trial court abused its discretion in denying his motion to preserve DNA evidence, "irrespective of RCW 5.70.010." CP 381. Alverto's opening brief is based solely on RCW 5.70.010. *See Br. of Appellant* at 6-8. And yet his notice of appeal indicates he is seeking review without regard to the provisions of RCW 5.70.010. Thus, it appears that Alverto was not relying on RCW 5.70.010 as the basis for his motion after all.

The trial court's order related only to the specific motion filed by Alverto, which cited no legal authority in support of the motion and did not comport with the requirements in RCW 5.70.010. The trial court's order

does not refer to RCW 5.70.010 or suggest that law enforcement is not required to comply with the mandates in RCW 5.70.010 regarding the preservation of DNA work product. However, if this Court concludes that the trial court's order could be interpreted as an invitation to law enforcement to destroy any biological material as Alverto asserts, then this Court should remand for the court to clarify its order, as opposed to remand in order to grant the motion. Any clarification should reiterate that Alverto's motion remains denied but could include a provision that the trial court's ruling does not alter the provisions of RCW 5.70.010 regarding the preservation of DNA work product by a governmental entity.

V. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's order denying Alverto's motion to preserve "the DNA evidence of a hair found in blood on the vertical surface of a glass patio door, and all other DNA evidence."

RESPECTFULLY SUBMITTED this 1st day of October, 2019.

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Certificate of Service:

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