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NO. 54035-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN SALOFI ASAELI,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Timothy L. Ashcraft

No. 04-1-05087-3

BRIEF OF RESPONDENT

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I. INTRODUCTION

Thirteen years after Benjamin Asaeli was convicted of murder, assault, and firearm charges, he filed a motion to produce discovery pursuant to CrR 4.7 requesting essentially all discovery in the State's possession. The trial court properly exercised its discretion in denying Asaeli's motion, which went beyond the scope of even CrR 4.7. The plain language of CrR 4.7 indicates that it applies only to procedures prior to trial. Asaeli is not entitled to ongoing, open-ended discovery as part of post-conviction proceedings thirteen years after trial. And he failed to show good cause to believe the discovery would prove he was entitled to relief. The trial court did not abuse its discretion by concluding that the State did not have an obligation to produce the requested discovery. This Court should affirm.

II. RESTATEMENT OF THE ISSUE

- A. Did the trial court abuse its discretion by denying Asaeli's post-conviction motion for discovery pursuant to CrR 4.7 where he filed the motion thirteen years after trial pursuant to a rule that applies only to procedures prior to trial and where he failed to show good cause that the discovery would prove entitlement to relief?**

III. STATEMENT OF THE CASE

In 2004, the State charged Benjamin Asaeli with murder in the first degree, murder in the second degree, assault in the first degree, and

possession of a stolen firearm. CP 16-23. The State added firearm enhancements for the murder and assault charges. CP 20-23. In 2006, a jury convicted Asaeli of murder in the first degree by extreme indifference, second degree felony murder, first degree assault, and possession of a stolen firearm. CP 24-25, 27, 29, 31; *see also* CP 11. The jury found that Asaeli was armed with a firearm while committing the murder and assault. CP 26, 28, 30. The court sentenced Asaeli to a total of 576 months in prison. CP 37-38.

This Court affirmed Asaeli's convictions in the direct appeal. *State v. Asaeli*, 150 Wn. App. 543, 549-50, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001, 220 P.3d 207 (2009). His convictions became final on November 17, 2009—when this Court issued its mandate in the direct appeal. *See* CP 47-48. Asaeli subsequently filed three separate personal restraint petitions (PRPs), all of which were dismissed by the Acting Chief Judge under RAP 16.11(b) as frivolous. *See* CP 101-10; *see also In re Pers. Restraint of Gronquist*, 192 Wn.2d 309, 319, 429 P.3d 804 (2018) (when the acting chief judge dismisses a PRP, courts must infer that the judge determined the PRP was frivolous); RAP 16.11(b).

Thirteen years after trial, and ten years after his convictions became final, Asaeli filed a pro se motion for discovery pursuant to CrR 4.7. *See* CP 1-3. He filed the motion on May 20, 2019 in the trial court and made a broad

request for discovery related to the 2004 case. *See* CP 1-3. His motion was based on CrR 4.7 but included a request for materials that went beyond the scope of CrR 4.7. *See* CP 1.

Specifically, Asaeli requested the following discovery: (1) all correspondence between the State and defendant; (2) documents showing proof of his criminal history; (3) all physical or tangible objects in the possession of the State or its agent that are relevant to his guilt or innocence; (4) all documents “of any kind” that question or raise doubts about the accuracy or reliability “of any scientific and/or expert testing;” (5) the criminal record of all State witnesses, “including arrests, indictments, convictions, acquittals, or charges now pending” against the witnesses; (6) any evidence, “documentary or otherwise, which might undermine or tend to undermine the credibility of any State witness;” (7) all exculpatory evidence the State and its agents have in their files; (8) any mitigating evidence in regards to “guilt or punishment;” and (9) statements of witnesses not called by the State at trial. CP 1. His motion did not allege that the State possessed any new evidence or material since the 2006 trial, nor did it indicate any cause for requesting the materials. *See* CP 1-3.

On August 22, 2019, the trial court denied Asaeli's CrR 4.7 motion to produce discovery. CP 7-8.¹ The trial court explained that Asaeli's case is in the post-conviction phase and that CrR 4.7 "generally does not apply in the post-conviction phase." CP 7. The court based its ruling on *State v. Woodward*, No. 51178-9-II, 2019 WL 2515927 (Wash. Ct. App. June 18, 2019) (unpublished), which held that the trial court did not err by denying the defendant's post-trial motion to produce discovery because CrR 4.7(a)(1) does not apply post-trial. CP 7-8. The court concluded that the State did not have an obligation to produce the requested discovery and denied the motion. CP 7-8. Asaeli appeals the trial court's ruling. CP 9.

IV. ARGUMENT

A. The trial court properly exercised its discretion in denying Asaeli's post-conviction motion for discovery pursuant to CrR 4.7 where he filed the motion thirteen years after trial pursuant to a rule that applies only to procedures prior to trial.

1. Standard of Review

Asaeli fails to address the standard of review in his opening brief. The scope of discovery in a criminal case is within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988); *State*

¹ The trial court initially entered an order transferring the motion to the Court of Appeals because it appeared to be time-barred. CP 6. But this Court rejected the transfer because a motion to compel the production of documents is not a CrR 7.8 motion and returned the matter to the trial court for further action. CP 111.

v. Pawlyk, 115 Wn.2d 457, 470-71, 800 P.2d 338 (1990). Courts review a trial court’s denial of a motion to compel discovery for an abuse of discretion. *State v. Norby*, 122 Wn.2d 258, 268, 858 P.2d 210 (1993). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013); *see State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012) (finding an abuse of discretion only when “no reasonable judge would have reached the same conclusion”).

2. The plain language of CrR 4.7 indicates that the rule applies only to procedures prior to trial.

In criminal cases, the discovery provisions of CrR 4.7 guide the trial court in the exercise of its discretion over discovery. *Yates*, 111 Wn.2d at 797. CrR 4.7 is a reciprocal discovery rule that contains the prosecutor’s and defendant’s obligations for discovery. *Pawlyk*, 115 Wn.2d at 471; *see State v. Nelson*, 14 Wn. App. 658, 664-65, 545 P.2d 36 (1975). The plain language of this rule indicates that it applies only to procedures prior to trial.

Courts interpret court rules the same way they interpret statutes—by using the tools of statutory construction and giving effect to the plain language of the rule. *State v. Otton*, 185 Wn.2d 673, 681, 374 P.3d 1108 (2016); *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993) (court rules are interpreted using principles of statutory construction). Plain language does not require construction, and courts assume the Legislature

“means exactly what it says.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). If the plain language is unambiguous, then the court’s inquiry is at an end, and the statute or rule must be enforced in accordance with its plain meaning. *See State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The plain language of the title for all provisions in section 4 of the superior court criminal rules (CrR) indicates that it applies only to procedures “Prior to Trial.” Asaeli’s claim that CrR 4.7 contains “no temporal limitation on its reach” and that “[n]owhere does the rule say it applies only before trial” is incorrect. *See* Br. of App. at 2.

The title to section 4 of the superior court criminal rules, which includes CrR 4.7, explicitly indicates that it applies to “Procedures Prior to Trial.” There are separate sections of the criminal rules that apply to procedures during and after trial—Title 6 applies to “Procedures at Trial” and Title 7 applies to “Procedures Following Conviction.” Further, the prosecutor’s obligations for discovery under CrR 4.7(a)(1) indicate that the materials and information within the prosecutor’s possession or control must be disclosed “no later than the omnibus hearing”. CrR 4.7(a)(1). The omnibus hearing always occurs prior to trial and allows sufficient time for counsel to complete pretrial discovery, conduct further investigation of the

case, and engage in plea negotiations. *See* CrR 4.5. This lends further support that CrR 4.7 is a pretrial discovery procedure.

The plain language of the rule indicates that CrR 4.7 applies only to procedures “Prior to Trial.” This language is unambiguous, and the rule must be enforced in accordance with its plain meaning. *See Armendariz*, 160 Wn.2d at 110. Asaeli is not entitled to discovery under CrR 4.7 because he filed his CrR 4.7 motion for discovery thirteen years after trial. The trial court did not abuse its discretion in denying his post-conviction motion to produce discovery.

3. Asaeli is not entitled to ongoing, open-ended discovery post-conviction, and he failed to show good cause to believe the discovery would prove entitlement to relief.

CrR 4.7 is a pretrial mechanism to facilitate litigation and preserve a defendant’s rights while preparing for trial. *See State v. Copeland*, 89 Wn. App. 492, 496-97, 949 P.2d 458 (1998); *see also* CrR 4.7(a)(1) (requiring prosecutor to disclose specific discovery to the defendant “no later than the omnibus hearing”). The purpose of CrR 4.7 is to aid the trial court in the exercise of its discretion over discovery *prior to trial*:

In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, *discovery prior to trial* should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security.

Yates, 111 Wn.2d at 797 (emphasis added) (quoting Criminal Rules Task Force, *Washington Proposed Rules of Criminal Procedure 77* (West Pub'g Co. ed. 1971)) (quoting in turn *ABA Standards Relating to Discovery and Procedure Before Trial*, Std. 1.2, at 34 (Approved Draft, 1970)).

CrR 4.7(a) lists the prosecutor's obligations in engaging in criminal discovery prior to trial. CrR 4.7(h)(2) provides an ongoing duty to disclose any new material of a substantive nature discovered by either party. *State v. Folkerts*, 43 Wn. App. 67, 70, 715 P.2d 157 (1986). The parties have a duty to promptly disclose any additional material subject to CrR 4.7 that they discover. CrR 4.7(h)(2); *State v. Greiff*, 141 Wn.2d 910, 919, 10 P.3d 390 (2000). But this duty does not extend to post-conviction proceedings. *See In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390-94, 972 P.2d 1250 (1999) (no right to discovery in post-conviction proceedings as a matter of ordinary course or to conduct a fishing expedition in order to obtain evidence to support new claims).

If a defendant requests the disclosure of information beyond what the prosecutor is specifically obligated to disclose under the discovery rules, the defendant's request must meet the requirements of CrR 4.7(e)(1). *Norby*, 122 Wn.2d at 266. CrR 4.7(e)(1) provides: "Upon a showing of *materiality* to the preparation of the defense, and if the request is *reasonable*, the court in its discretion may require disclosure to the

defendant of the relevant material and information not covered by sections (a), (c) and (d).” CrR 4.7(e)(1) (emphasis added). Thus, the defendant’s discovery request under CrR 4.7(e)(1) must meet two threshold requirements before the court may exercise its discretion in granting the request—the information sought must be material and the request must be reasonable.

First, none of these provisions apply to Asaeli’s case because under the plain language of the rule they are applicable only to discovery sought “prior to” trial. Second, even assuming that CrR 4.7 applies—which it does not—Asaeli has not shown the materiality or reasonableness of his discovery request. Rather, he makes a broad request for essentially all discovery in the possession of the State and its agents that goes beyond the scope of CrR 4.7. And he makes no showing of materiality for this broad request. *See* CP 1-3; *see State v. Zektzer*, 13 Wn. App. 24, 27, 533 P.2d 399 (1975) (trial court did not abuse its discretion in denying motion to compel answers to interrogatories that were oppressively broad in scope). Asaeli has not shown that the information he seeks is discoverable during post-conviction proceedings.

After a conviction, the presumption of innocence is gone, and a defendant is no longer entitled to the same pretrial liberty interests. *District Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68-69,

129 S. Ct. 2308, 174 L.Ed.2d 38 (2009). When a defendant is convicted after a fair trial, he is “constitutionally deprived of his liberty” and has “only a limited interest in postconviction relief.” *Id.* at 69. The State has more flexibility in deciding what procedures are needed in the context of post-conviction relief. *Id.* And our State Supreme Court has determined that there is no generalized constitutional or rule-based right to discovery in post-conviction proceedings. *Gentry*, 137 Wn.2d at 390-94; *see also State v. Mullen*, 171 Wn.2d 881, 902, 259 P.3d 158 (2011) (observing that pretrial discovery principles do not apply to post-conviction processes).

This Court’s unpublished opinion in *State v. Woodward*, No. 51178-9-II, 2019 WL 2515927 (Wash. Ct. App. June 18, 2019) is instructive.² In *Woodward*, this Court held that the trial court did not err in denying the defendant’s post-trial motion to compel discovery under CrR 4.7(a) because this rule does not apply post-trial. *Woodward*, 2019 WL 2515927 at *2-3. Woodward filed his discovery request in 2017, which was “well after his conviction” and entry of the 2014 judgment and sentence. *Id.* at *3. The Court concluded that the State has no duty to provide ongoing, open-ended discovery post-conviction because CrR 4.7 does not apply to post-

² Unpublished opinions have no precedential value and are not binding on any court. An unpublished opinion filed on or after March 1, 2013, may be cited as nonbinding authority and may be accorded such persuasive value as the court deems appropriate. GR 14.1(a).

conviction proceedings. *Id.* at *2-3. In explaining its ruling, the Court noted that CrR 4.7 applies only to pretrial discovery:

CrR 4.7 applies to pretrial discovery procedures. Our Supreme Court observed that pretrial discovery principles do not apply to post-conviction processes. *See State v. Mullen*, 171 Wn.2d 881, 902, 259 P.3d 158 (2011). Although the State has an ongoing duty to disclose evidence, this duty does not extend eternally to post-conviction proceedings. *See In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390-91, 972 P.2d 1250 (1999).

Woodward, 2019 WL 2515927 at *3.

Asaeli mischaracterizes *Woodward* by claiming that the opinion “recognized CrR 4.7 does apply post trial.” *See* Br. of App. at 3. In fact, *Woodward* explicitly states that “CrR 4.7 applies to pretrial discovery procedures” and “does *not* apply to post-conviction proceedings[.]” *Woodward*, 2019 WL 2515927 at *3 (emphasis added). The Court’s brief reference to the redaction requirements in CrR 4.7(h)(3) does not diminish the holding in *Woodward* and merely clarifies that the defendant is not entitled to unredacted discovery as part of the defense attorney’s obligation to provide the client’s file pursuant to RPC 1.16—a rule that does not apply to the State. *See Woodward*, 2019 WL 2515927 at *2.

This Court has repeatedly determined in unpublished decisions that the superior court criminal rules in Title 4, which include CrR 4.7, apply only to procedures prior to trial. *See, e.g., State v. Weller*, 197 Wn. App.

731, 391 P.3d 527 (2017) (holding in the unpublished portion of the opinion that the trial court did not manifestly abuse its discretion by denying the defendant’s request for discovery at resentencing because CrR 4.7 applies only to procedures before trial); *State v. Peterson*, No. 35686-8-III, 2018 WL 6716155 at *1 (Wash. Ct. App. Dec. 18, 2018) (denying defendant’s request for a subpoena duces tecum following the appeal of his conviction because CrR 4.8 applies only to pretrial motions).³

Asaeli argues that the trial court erred in denying his motion because it relied on a single unpublished case. *See* Br. of App. at 2-4. But the trial court recognized that *Woodward* was an unpublished case filed after March 1, 2013 and correctly observed that it may consider this opinion for its persuasive value. CP 7; *see also* GR 14.1(a). The trial court also considered the Washington Supreme Court decisions in both *Gentry* and *Mullen* as a basis for its decision. CP 7-8. The trial court considered all of the above in the context of the specific motion filed by Asaeli—which was filed thirteen years after trial and included a broad request for discovery that went beyond the scope of even CrR 4.7—and correctly concluded that the State did not have an obligation to produce the requested materials. *See* CP 7-8. And the plain language of the rule—referencing applicability to “Procedures Prior

³ Unpublished opinions have no precedential value and are not binding on any court. But unpublished opinions filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

to Trial"—further supports the trial court’s ruling. An appellate court may affirm a trial court’s ruling on any grounds established by the pleadings and supported by the record, even if the trial court did not consider it. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

Asaeli argues that *Gentry* is inapplicable because it does not address CrR 4.7. Br. of App. at 3. The State agrees that *Gentry* does not explicitly address CrR 4.7. But Asaeli misconstrues *Gentry* and reads this opinion far too narrowly. The Supreme Court’s analysis in *Gentry* supports the trial court’s determination that Asaeli was not entitled to the requested discovery during post-conviction proceedings.

Gentry explained that there is no generalized constitutional or rule-based right to discovery in post-conviction proceedings. *Gentry*, 137 Wn.2d at 390-94. The Court denied Gentry’s post-conviction motions for discovery and appointment of investigators and experts, noting it “will not condone a fishing expedition to pore over every aspect of the case[.]” *Id.* at 394. “From a due process standpoint, prisoners seeking postconviction relief are not entitled to discovery as a matter of ordinary course, but are limited to discovery only to the extent the prisoner can show good cause to believe the discovery would prove entitlement to relief.” *Id.* at 390-91. The Court further explained that there is “no rule for discovery at the appellate court

level” allowing a party “to further support the allegations in a PRP as filed or to obtain evidence to support new claims.” *Id.* at 391.

Further, the State has no duty to search for exculpatory evidence. *Id.* at 399. Although RAP 16.15(h) authorizes the appointment of counsel in PRPs and allows the payment of expenses “as may be necessary to consider the petition”, discovery may be allowed under this rule “only in rare circumstances where the petitioner can demonstrate a substantial likelihood the discovery will lead to evidence that would compel relief under RAP 16.4(c).” *Gentry*, 137 Wn.2d at 391-92.

Here, Asaeli is not entitled to ongoing, open-ended post-conviction discovery pursuant to CrR 4.7 because this rule applies only to discovery sought prior to trial. The trial court did not abuse its discretion in denying his broad request for discovery that went beyond the scope of even CrR 4.7. Asaeli has not shown the materiality of the discovery or the reasonableness of his request. He has not shown good cause to believe the discovery would prove he was entitled to relief. *See Gentry*, 137 Wn.2d at 390-91. And he has not shown a substantial likelihood that the discovery would lead to evidence that would compel relief in a PRP. *See id.* at 391-92.

Further, Asaeli filed his motion to produce discovery thirteen years after trial and approximately ten years after his conviction became final. *See* CP 1-3, 47-48; *see also* RCW 10.73.090(3) (judgment becomes final when

appellate court issues its mandate disposing of the direct appeal). The State has no ongoing, open-ended discovery obligations thirteen years after trial and under circumstances where Asaeli fails to show any basis whatsoever for such a broad discovery request. Neither the court rules nor case law allow for such a fishing expedition. The trial court properly exercised its discretion when it concluded that the State did not have an obligation to produce the requested discovery.

V. CONCLUSION

For the foregoing reasons, the trial court did not abuse its discretion in denying Asaeli's post-conviction motion to produce discovery pursuant to CrR 4.7. This Court should affirm.

RESPECTFULLY SUBMITTED this 1st day of July, 2020.

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7/1/20 *s/Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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