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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

GRANT MCADAMS, RESPONDENT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF APPELLANT

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I. APPELLANT'S ASSIGNMENT OF ERROR

The superior court erred in entering an order for post-conviction DNA testing.

II. ISSUES PRESENTED

1. Whether the superior court can order post-conviction DNA testing without making any requisite findings?
2. Whether the court can order DNA testing on latent fingerprint lifts without evidence that such testing is possible, accurate, or reliable?
3. Whether the DNA testing on physical evidence from Mr. McAdams's conviction has the capacity to demonstrate innocence?

III. STATEMENT OF THE CASE

On May 9, 2011, Mohammed Salih left work around 2:00 p.m. 6/6/18 RP 256. He drove to a nearby 7-11 to use the public phone and buy some cigars. *Id.* at 257. Grant McAdams was at the gas station drinking a red bull, and gave Mr. Salih 50 cents to place the call. *Id.* at 258. After the call, Mr. Salih agreed to give Mr. McAdams a ride. *Id.* Mr. McAdams was previously unknown to Mr. Salih at the time. *Id.* After a few blocks, Mr. McAdams asked Mr. Salih to stop the car. *Id.* at 260-61. He then began striking Mr. Salih with a tire iron that Mr. Salih kept in the car. *Id.* Mr. Salih managed to get out of the car, but was pursued by Mr. McAdams who

continued to hit him with the tire iron. *Id.* at 261-64. Mr. McAdams subsequently drove off in the car.

On May 10, the car was found abandoned with its windows rolled down near Gonzaga Prep. 6/6/12 RP 173-179. The tire iron was recovered from the abandoned vehicle along with a jacket, cigarette pack, some receipts, and several drink containers. *Id.* at 210. These items were processed for evidence, although a determination was made not to look for DNA because there was too much blood contamination from the victim. *Id.* at 212. Investigators were able to lift latent prints off some of these items, but the only matches were to the victim, Mr. Salih. *Id.* at 282-85. Investigators were also able to lift a latent palm print from the driver's side door of the car that matched to Mr. McAdams. *Id.* at 288-91.

At trial, the State presented testimony from the victim, 6/6/12 RP 253-65; medical evidence concerning his injuries, 6/5/12 RP 154-161; testimony from three eyewitnesses to the assault, *id.* at 73-104; and evidence from the course of the investigation. Mr. McAdams was identified at trial as the perpetrator by the victim, 6/5/12 RP 264-65; and two of the eyewitnesses, *id.* at 76, 91. Additionally, two independent analyses matched the palmprint from the car to Mr. McAdams. 6/6/12 RP 288-91, 310.

Mr. McAdams did not testify at trial, but maintained at sentencing that he received a concussion at work that day and does not remember anything from that afternoon. 7/19/2012 RP 560. In his defense, Mr. McAdams presented evidence that he was scheduled to work at the Spokane Arena until 2:00 in the afternoon, 6/7/2012 RP 347-56; that the only phone call from the payphone at the 7-11 that afternoon was placed at 2:10, *id.* at 432-36; and that it would take more than 10 minutes to travel the 15 blocks between the Arena and the 7-11, *id.* at 415-22. He also presented testimony from an eyewitness who maintained that Mr. McAdams was not the perpetrator.¹ *Id.* at 398-406. Finally, he presented testimony from an expert in clinical neuropsychology to discuss the effects of head trauma on memory, *id.* at 358-95, and a researcher in eyewitness identification and memory to challenge the eyewitness identifications, *id.* at 438-55.

Based on the evidence, a jury convicted Mr. McAdams on charges of first degree assault and first-degree robbery. 6/12/12 RP 534-5. In July of 2017, Mr. McAdams moved the court to order DNA testing on physical evidence retained from the investigation. CP 34-35. Specifically, he sought

¹ In rebuttal, the State presented evidence that this witness's description of the perpetrator was more similar to the other witnesses' descriptions when he was originally interviewed shortly after the crime. 6/11/12 RP 460-61.

testing of the victim's jeans, the tire iron, the cell phone, and the contents of a tan coat found in the trunk of the car, as well as the latent fingerprint lifts retained from the investigation.² CP 51-56. The State objected. CP 1-5. On September 15, 2017, the superior court considered oral argument on the motion and took the issues under advisement. *See* 9/15/17 RP. After a year without further proceedings or rulings, the court issued an order for DNA testing on October 31, 2018. The State appealed.

IV. ARGUMENT

Under RCW 10.73.170(2)(a)(iii), a convicted felon is entitled to have DNA testing done where they can establish that the testing will provide significant new information, and that it would demonstrate innocence on a more probable than not basis. In assessing such a motion, a court must look to whether, in light of all available evidence, favorable DNA test results would raise a likelihood that the person is innocent. *State v. Riofta*, 166 Wn.2d 358, 367, 209 P.3d 467 (2009); *see also State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012). Appellate courts review a decision on motion for post-conviction DNA testing for an abuse of discretion. *State v. Crumpton*, 181 Wn.2d 252, 258, 332 P.3d 448 (2014). Discretion is abused when it is

² Mr. McAdams also sought testing of a red bull can that was not in evidence or otherwise maintained from the investigation. CP 53-54.

exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A. THE TRIAL COURT ERRED BY ENTERING AN ORDER FOR DNA TESTING WITHOUT RULING ON THE DISPUTED ISSUES

Initially, RCW 10.73.170 requires the superior court to make specific findings prerequisite to ordering DNA testing. The court must determine whether the form of the motion complies with the statutory requirements and whether the defendant has “shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3). Here the superior court made no ruling on the motion, but simply issued the order. Whether such an order is correctly entered is reviewed for an abuse of discretion. But discretion cannot be arbitrary. Whether a judge abuses his discretion depends entirely on assessing the *reason* underlying that exercise of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 505-06, 784 P.2d 554 (1990). Where a judge fails to give any reason for his decision, such arbitrary exercise of discretion is manifestly an abuse.

B. DNA TESTING OF LATENT FINGERPRINT LIFTS WAS UNSUPPORTED BY ANY EVIDENCE OF SCIENTIFIC RELIABILITY

Furthermore, the trial court abused its discretion in ordering DNA testing on latent fingerprint lifts. In order to obtain relief under

RCW 10.73.170, a convicted felon must show that the requested DNA testing will provide significant new information that is material to his conviction. At no point in his motion or supporting memorandum and attachments did Mr. McAdams present any evidence that DNA testing on latent fingerprint lifts could yield competent evidence.³ On the contrary, the material submitted indicates the opposite.

Mr. McAdams submitted an affidavit from Phillip Hodge, the scientist responsible for conducting any ordered DNA testing. CP 67-73. Mr. Hodge's declaration highlights the various objects retained from the investigation that he believed could be tested to yield probative DNA evidence. CP 71-73. That declaration makes no mention of testing latent fingerprint lifts for DNA evidence. *Id.* Mr. McAdams also attached two recent studies on DNA testing of latent fingerprint lifts. CP 159-69. Those studies indicate that it is possible to extract genetic material from latent fingerprint lifts. One study examined specific methods of treatment that could improve the quantity and quality of DNA retrieved from latent lifts.

³ At no point in his written motion or memorandum does he explicitly request DNA testing on latent fingerprint lifts. CP 34-63. However, in his reply brief and at oral argument on the motion, Mr. McAdams argued the potential exculpatory value of DNA testing on the latent fingerprint lifts. CP 10-11; 9/15/17 RP 14, 20.

CP 163. However, the second study concluded that DNA testing did not yield accurate and reliable evidence:

DNA recovery from processed prints is insufficient for robust, reliable STR analysis. Not only were the detected profiles partial in nature and lacking discriminatory value, some of the detected alleles were incorrect when compared back to the respective fingerprint donors... [T]his study underscores how DNA analysis of processed latent fingerprints—in pristine condition—gave the real potential of yielding results that wrongly implicate or exonerate the true print donor.

CP at 169.

The uncontroverted evidence before the trial court indicated that DNA testing of latent fingerprint lifts could not at this time provide material evidence, and that the laboratory was not able to conduct such testing. Despite this, the superior court ordered latent fingerprint lifts tested for DNA. CP 23-24. That decision lacked any tenable grounds in the facts presented, and should be reversed.

C. THE DNA TESTING ORDERED LACKS A CAPACITY TO DEMONSTRATE INNOCENCE

More broadly, though, the sum of the DNA testing ordered lacks any potential to prove Mr. McAdams innocent. In order for a convicted individual to be entitled to DNA testing, they must meet the onerous standard of establishing that favorable results would prove them innocent. *Crumpton*, 181 Wn.2d at 261. Testing is limited to those situations where it could benefit a possibly innocent individual. *Id.* In analyzing such requests,

the court presumes that the requested DNA testing would produce results favorable to the convicted defendant. *Id.* Then the court weighs the hypothetical, favorable evidence with the evidence from trial to determine whether the DNA testing could prove the defendant innocent. *Id.* So, the question here becomes whether presumptively favorable new evidence from DNA testing, when considered with the evidence presented at trial, would demonstrate Mr. McAdams's innocence more probably than not.

Before the trial court, Mr. McAdams identified favorable evidence as being the absence of his DNA and the presence of some other person's DNA on some or all of the tested items. CP 56-58. However, none of the items to be tested are closely linked with the perpetrator of the crime. All of the items to be tested were present in the victim's car prior to the incident, and retrieved from the abandoned car a day after the incident. A redundant DNA profile on some combination of this evidence will simply prove that the individual was present in the car. Such a DNA profile could be left by any previous passenger or any individual who came in contact with the abandoned car. Mr. McAdams's palm print established his presence at that same scene. The presence of some other individual along with Mr. McAdams cannot prove his innocence when considered with the identifications by the victim and two eyewitnesses.

A similar issue arose in *Riofta*. There, the convicted defendant sought to have a white hat that was known to have been worn by the perpetrator of the crime tested for DNA. 166 Wn.2d 358. The Supreme Court found that he was not entitled to have the hat tested because the test results would not prove him innocent. *Id.* That court examined two possible, “favorable” test results, (1) that the defendant’s DNA was not found, and (2) that someone else’s DNA was found. *Id.* at 370. But, because any number of other people may have worn the hat in addition to the perpetrator, neither of these results would prove the defendant innocent. *Id.* at 371-73. The same is true here. Testing may establish that someone else was in the car at some point in time, but it could not establish that Mr. McAdams was absent.

DNA evidence can be powerful, identifying evidence where there is some material definitively linked with the perpetrator of the crime. For example, vaginal swabs taken from a rape victim who did not have recent sexual intercourse with anyone other than the perpetrator, could definitively prove the identity of that perpetrator. *See Thompson*, 173 Wn.2d 865. However, in situations like Mr. McAdams’s DNA evidence can only present suspects. The court must presume that DNA testing would generate such suspects, but it must also accept the evidence that’s been presented.

The court cannot ignore the evidence from trial. In light of all the evidence available, DNA testing of items recovered from the crime scene

cannot prove Mr. McAdams innocent, and consequently, the superior court lacked a factual basis to grant the motion for DNA testing. Since the order lacked a tenable basis in fact, the superior court abused its discretion, and this court should reverse that decision.

V. CONCLUSION

The trial court erred in entering an order for post-conviction DNA testing that was unsupported by the evidence presented. Furthermore, the requested DNA testing lacks the capacity to prove innocence. Consequently, Mr. McAdams was not statutorily entitled to relief, and the State respectfully requests this Court reverse and vacate the order for post-conviction DNA testing.

Dated this 26 day of February, 2019.

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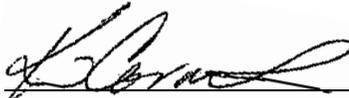
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SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on February 26, 2019, I e-mailed a copy of the Brief of Appellant in this matter, pursuant to the parties' agreement, to:

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2/26/2019
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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