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COURT OF APPEALS
DIVISION II

NO. 33539-5-II

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STATE OF WASHINGTON

BY  DEPUTY

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

STATE OF WASHINGTON, RESPONDENT

v.

ALEXANDER NAM RIOFTA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 00-1-00511-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion in denying defendant's motion for post-conviction DNA testing pursuant to RCW 10.73.170 where DNA testing was available at the time of trial and the defense chose to forgo testing at that time?

(Appellant's Assignment of Error Number 1).

2. Was the defendant denied due process of law and fundamental fairness by the trial court's denial of his request for post-conviction DNA testing? (Appellant's Assignment of Error Number 2).

B. STATEMENT OF THE CASE.

1. Procedure

Appellant, ALEXANDER N. RIOFTA, hereinafter referred to as defendant, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 00-1-00511-5 for the offense of assault in the first degree.

On September 20, 2002, the Attorney General issued an order denying defendant's appeal from the prosecutor's denial of defendant's request for post-conviction DNA under former RCW 10.73.170(3). CP 55-56. On June 10, 2005, defendant came before the Honorable James Orlando on a motion pursuant to the newly modified RCW 10.73.170(3),

requesting post-conviction DNA analysis. The court denied defendant's motion, ruling:

I think Mr. Riofta was one of the more difficult cases to find that his version was credible, given the facts in the matter, the statement that he made to law enforcement, the evidence that was recovered in his house, the fact that the victim did know Mr. Riofta previously; that Mr. Riofta had been at his house prior to that.

I think it's – in terms of identification, I think there was a lot at risk for the victim in this case. He had been shot at once. His brother was in the process of being involved in the Trang Dai aftermath as well, and he was not someone that was running to court to tell his version of what occurred. And the jury found him to be very credible, believed his version of it.

The fact that there was a hat that may contain some DNA of someone other than Mr. Riofta doesn't put the hat at the scene of the – necessarily at the scene of the shooting in this case.

I don't believe that there is a likelihood that this is the type of evidence that DNA testing would properly demonstrate innocence of Mr. Riofta on a more-probable-than-not basis, so I will deny the motion.

RP 14-15.

A written order was entered denying the motion. CP 63-64.

2. Facts¹

At approximately 6:45 a.m. on the morning of January 27, 2000 victim Ratthana Sok exited his house through his garage, and went to open the gates that secured the driveway to his house. As he opened one of the gates he observed a Honda Civic parked in the street just east of his driveway. The victim observed an Asian male, who he later identified as defendant Alexander Riofta, exit the car and approach. The victim reported that the defendant asked if the victim had a cigarette. The victim told the defendant that he did not smoke and continued opening the gates. The victim reported that he saw the chrome barrel of a gun come out of the defendant's right coat sleeve and he saw the defendant point a gun at him. The victim immediately turned and ran toward his garage. As he was running, he heard four to five shots ring out. Officers later located two bullet holes in the outside wall of the victim's garage and located two bullet holes in one of the cars parked in the garage. The victim was able to get into his house without being harmed. Once inside, the victim called 911.

¹ As provided in State's Response to Defendant's Motion for Post-Conviction DNA Testing (CP 42-56). Defendant cites to the verbatim report of proceedings, something that was not part of the record at the time of the motion and they are not designated as part of the record in this appeal.

The victim was later interviewed by Detective Tom Davidson and other officers about the shooting. The victim was able to provide a detailed description of the shooter and told officers at that time that he recognized the shooter as someone who used to come to his house and play basketball with the victim's older brother, Veasna Sok. The victim also reported that he occasionally saw the shooter in the neighborhood and believed that the shooter had been outside his house the day before the shooting. At the time of the shooting, Veasna Sok was in custody and was scheduled to testify against his co-defendants in the Trang-Dai murder case.

The victim stated that the shooter was a person he knew by the first name of "Alex" and described him as being a Cambodian male, 17-18 years of age, 5'2" or 5'3", 125-130 pounds, with a shaved head and moustache. At the time of the defendant's arrest, one day after the shooting, detectives described him as being 22 years of age, 5'2", 125 pounds, with a moustache and shaved head. The defendant described himself as being Korean and Filipino. A copy of the defendant's booking photograph, taken one day after the shooting, shows the defendant's head is shaved. CP 56.

The victim also stated that the shooter had been wearing baggy blue jeans, a black cotton button up coat, black gloves and a white cap.

The victim indicated that the shooter emerged from the passenger side of the Honda vehicle, and that there was a driver who he could not see.

The white cap, which is the evidentiary item at issue herein, was left at the scene and was recovered by officers.

Based upon the information provided by the victim, detectives brought the victim to the police department where they used the MUGIS computer. This computer could display the booking photographs of every person booked into the Pierce County Jail. Detective Davidson first typed in a request to display the booking photographs of every Asian male with the name "Alex." That request brought up approximately 12 booking photos. The victim viewed these photos and stated that the shooter was not among them. Detective Davidson then changed the parameters and typed in a request to display the booking photographs of every Asian male with the name "Alexander". This brought of a total of 24 photographs (seven different people), to include two different booking photographs of the defendant. The victim immediately pointed to the defendant's photographs and stated, "That's him right there, I'm positive." During a later contact, the victim stated that he was absolutely positive that the defendant was the person who shot at him.

Detectives contacted and arrested the defendant at his residence on January 28, 2000. The Defendant asked what he was being arrested for

and was told that it was for a shooting the day before. The defendant did not ask any questions about where, when, or how the shooting occurred, but instead screamed, "I didn't shoot no motherfucker yesterday. I was here drinking all night. I worked at the News Tribune yesterday from 1:00 to 5:30. I don't even own no gun, how could I shoot some motherfucker." The detectives had not provided any details about the shooting, and had not indicated that it was only one person who had been shot at, yet the defendant was apparently aware of the fact that a single person ("motherfucker") had been shot at.

Detectives spoke to the defendant's mother who stated that she had come home from work at 4:00 a.m. (January 27th) and saw her son sleeping in his room. She stated that she went to bed and was awakened at approximately 11:20 a.m. by the defendant. She could not account for the defendant's whereabouts between 4:00 a.m. and 11:00 a.m. the morning of the shooting. The defendant told detectives that he was home all night and did not leave his house until approximately 11:00 a.m.

The defendant denied shooting at Rhattana Sok, saying that he did not hang out with him and had no conflicts with him. The defendant stated, "If I was to shoot at someone I would kill him. I wouldn't be stupid enough to get identified." The defendant admitted that he had been at the victim's house in the past to visit Veasna Sok, and also admitted that

he walks up and down the victim's street everyday. When the defendant was discussing Veasna Sok he stated that Veasna was "a sucker for snitching on the homies" and "deserved to get choked up in court for snitching on Cricket." (Referring to the fact that Veasna Sok had agreed to testify against his co-defendants and had been assaulted while in jail. "Cricket" is the nickname for one of the Trang-Dai defendants, Jimmy Chea). The defendant admitted he had a newspaper article from the Trang-Dai shootings with "all the homies' pictures" in his garage. Detectives later recovered that article and showed it to the Defendant's mother. She stated that "Cambodians" used to hang out at her house with her son, but that had been a long time ago. She identified Sarun Ngeth from the photograph in the newspaper article and said that he had been to her house before. Sarun Ngeth was one of the Trang-Dai defendants.

The victim was able to provide a detailed description of the Honda that the shooter had emerged from the morning of the shooting. That vehicle was later recovered on January 29, 2000 at 2107 East 65th. This location is within a few blocks of the defendant's home. The owner of the stolen vehicle stated that his car was stolen between 6:00 p.m. on January 26th and 8:20 a.m. on January 27th. The victim confirmed that the white hat that the shooter was wearing, which was recovered at the scene, had

been in his car at the time it was stolen. The vehicle was processed for latent prints, but none were recovered.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR POST-CONVICTION DNA WHERE DEFENDANT FAILED TO MEET HIS BURDEN OF ESTABLISHING THAT THE TEST WOULD LEAD TO SIGNIFICANT NEW INFORMATION DEMONSTRATING INNOCENCE.

The issue before this court: the scope of Washington's post conviction DNA statute, RCW 10.73.170, is a matter of first impression. The outcome will determine whether this statute was drafted to address the very real problem of defendants who were convicted at a time where DNA science or evidence was unavailable to them at the time of trial; or whether, RCW 10.73.170 opens the floodgates to allow defendants to request an item to be forensically tested regardless of the availability of that item and science at the time of trial. A careful reading of the statute and law allows only the first interpretation to stand.

a. Standard of Review

A decision of whether to grant or deny a motion under RCW 10.73.170 should be reviewed for an abuse of discretion, just as other motions falling under Title 10.73 are reviewed. See, State v. Hardesty,

129 Wn.2d 303, 317, 915 P.2d 1080 (1996)(a trial court's decision under CrR 7.8 and RCW 10.73.090 is reviewable for abuse of discretion). A trial court, unlike an appellate court, is in a better position to analyze whether new evidence or the possibility of obtaining DNA would affect the outcome of a case when it is the tribunal that heard the original evidence and case. In fact, the statute requires the motion to come before the court that entered the judgment and sentence, as occurred in the case at bar. RCW 10.73.170(1).

To the extent this case calls for any statutory interpretation, the State agrees that this portion of the analysis is reviewed *de novo*. State v. Heckel, 143 Wn.2d 824, 831-32, 24 P.3d 404 (2001).

A trial court abuses its discretion when it exercises discretion in a manner that is manifestly unreasonable or based upon untenable grounds or reasons. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

b. Law and Argument.

Under RCW 10.73.170² a convicted felon may file a request for post-conviction DNA testing with the court that entered the judgment and sentence. In this particular case the defendant had the burden of showing that “the DNA testing now requested would be significantly more accurate than prior DNA testing *or* would provide significant new information, “ and show “why DNA evidence is material to the identity of the perpetrator.” The court must grant the motion if defendant “has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.”

² RCW 10.73.170 provides:

- (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.

In construing a statute, the court's objective is to determine the legislature's intent. Schrom v. Bd. for Volunteer Fire Fighters, 153 Wn.2d 19, 25, 100 P.3d 814 (2004). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The "plain meaning" of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Wash. Pub. Ports Ass'n v. Dep't of Revenue, 148 Wn.2d 637, 645, 62 P.3d 462 (2003); Campbell & Gwinn, 146 Wn.2d at 10-12. Basic rules of statutory construction permit judicial interpretation of a statute only if it is ambiguous. State v. Grays Harbor County, 98 Wn.2d 606, 607, 656 P.2d 1084 (1983).

The issue before this court turns on the interpretation of subsection (iii) of the statute and on whether the trial court properly concluded that defendant failed to establish the likelihood that the DNA evidence would demonstrate innocence. The defendant's approach asks this court to examine subsection (iii) of RCW 10.73.170 in isolation, rather than reading the clause as a whole and the statute as a whole. This is a fatal mistake. The entire section reads:

The DNA testing now requested would be significantly more accurate *than prior DNA testing* or would provide significant new information;

The phrase “than prior DNA testing” modifies both (a) would be significantly more accurate,” and (b) would provide significant new information. In other words, a more concise way of reading the statute would be to say, “would provide significant new information than prior DNA testing.” If this were not the case then the phrase “or would provide significant new information,” should be in a separate section (iv) and have no link to the other language in that subsection.

Next, looking at the statute as a whole, the statute was drafted to assist defendants in an area where science has changed, e.g. (i) where originally the court felt that DNA did not meet scientific standards but it still may be worth looking at, (ii) where the sample size was too small to test, or (iii) where current science provides more accurate or new information.

Even presuming that this statute is not limited to cases where DNA tests were previously requested, the defendant in this case also fails to establish that the test would provide significant *new information* that is likely to *demonstrate innocence* on a more probable than not basis.

There is nothing “new” about the existence of the white hat and it does nothing to “demonstrate innocence.” The hat and DNA technology were both available at the time of trial. Defendant chose not to pursue this

at trial and now makes a request five years post-conviction. The absence of defendant's DNA material is hardly exculpatory. Defendant had possession of the hat for a short time frame and his head was completely shaved. The hat belonged to the owner of the stolen vehicle. Likewise, the presence of someone else's DNA proves nothing since the vehicle and hat were stolen. Defendant's case is not like a rape or murder case where the presence of semen or blood of the subject or victim may be dispositive of the entire case. Instead, it involves a hat worn by at least two persons that may not even contain any DNA material to test, and has since been admitted at a trial and handled by witnesses, attorneys and possibly jurors.

If this court were to grant defendant his request it sets a very dangerous precedent. As Prosecutor Horne noted in his letter denying defendant's request for DNA testing, "[b]efore trial there was considerable downside risk to seeking testing. Now, having been convicted, your client runs no risk of seeking the testing." CP 18-20. A defendant could intentionally decide not to seek DNA testing at the trial, knowing very well that it could contain incriminating evidence. Then, having nothing to lose after a guilty verdict, a defendant would make a post-conviction request for such testing possibly allowing him a second time in front of the jury.

Defendant's brief is a fine treatise on DNA science but does nothing to shed light on the facts and circumstances of this case. The State would agree that the developments in DNA, including PCR/STR³ (Short Tandem Repeat) as outlined in appellant's brief, would lend support for DNA testing in a pre-STR or pre-DNA case. But this is a 2001 conviction, where DNA and STR-DNA science were available at the time.⁴ When defendant states, "modern DNA analysis of biological material in the white hat will likely provide DNA profiles that can identify who wore the white hat on the day of the shooting," defendant speaks as if this "modern analysis" was not available to defendant. This is entirely untrue and confuses the issue, or lack of issue, in this case.

Defendant also claims that testing is called for because the State's case is weak. First, there is nothing in RCW 10.73.170 that invites the court to engage in such an analysis. Second, the trial court in this case found that the opposite was true and that the State's case against defendant

³ Polymerase Chain Reaction – PCR involves copying a short segment of DNA millions of times, a process known as amplification. See, State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994)(for general background and law in Washington on DNA testing and admissibility). There are three subtypes of PCR testing, DQ-Alpha, which tests a single genetic marker, Polymarker, which tests five genetic marks, and STR, which tests three or more genetic markers. See, People v. Hill, 89 Cal.App 4th 58, 57, 107 Cal.Rptr.2d 110 (2001).

⁴ STR/PCR has been scientifically and accepted by the courts for over a decade. See, People v. Allen, 72 Cal.App. 4th 1093, 85 Cal.Rptr, 2d 655 (1999).

was very strong. RP 14-15. Finally, the State presented a solid case at trial.

First the State presented evidence of a motive. It was the State's position that the assault in this case was an act of intimidation against the victim and victim's brother, Veasna Sok. The intimidation and threat of witnesses was a real issue in the Trang Dai case. The assault against Rathana Sok, Veasna Sok's younger brother, occurred while the Trang Dai case was still pending trial. The defendant not only knew the Trang Dai defendants, including Sarun Ngeth, he believed that Veasna was a "sucker for snitching on the Homeys, and that he deserved to get choked up in court for snitching on [Jimmie Chea]." The defendant followed the case and the defendants, keeping a newspaper clipping on the defendants. RP Defendant also knew Rathana Sok and Veasna Sok.

Contrary to defendant's argument, the eyewitness identification in this case was strong given that the suspect and victim knew each other and the victim was able to get a good view of defendant's face. Defendant spoke to Sok, asking for cigarettes, allowing Sok to hear a voice that was familiar to him.

Sok's description of the defendant prior to viewing a photo of him was very accurate. Sok described the shooter as a 17-18-year old Cambodian male named Alex, 5'2" to 5'3", 125-130 lbs., with a

moustache and shaved head. Sok's description of the defendant could not have been any more accurate given the circumstances. A booking photo at the time of arrest shows the accurateness of the victim's description. CP 56.

Sok's level of certainty when presented with a photo of the defendant was 100%. Sok looked at the photo and told Detective Davidson, "That's him right there. I'm positive."

The State also presented physical evidence in the form of the get-away car. The stolen vehicle involved in the shooting was found several blocks from the defendant's residence. The defendant lived only six blocks away from the Sok residence.

Defendant was also seen walking by the victim's home just days before the shooting. When arrested, defendant asked if he was the only suspect even though officers had not told him that there were other people in the car at the time of the shooting.

The defendant attempts to strengthen the materiality of his DNA request by proffering an unsworn letter from counsel for Jimmee Chea, Kristi Minchau, asserting that her client told her that Mr. Riofta was innocent and knew the identification of the real shooter. This unsworn statement offers little to the defendant's case. The source of the information, Jimmee Chea, is suspect and untrustworthy given his

motivation for trying to exonerate someone who attempted to assist in the intimidation of one of the witnesses against him. A court should consider the untrustworthy character of such affidavits when considering whether such new evidence *will probably* change the outcome of a trial. See, State v. Wicker, 10 Wn. App. 905, 909, 520 P.2d 1404 (1974). Even more suspect is the fact that Chea fails to state who the actual perpetrator is.

Defendant has failed to meet his burden of showing, (1) that the DNA testing requested would provide significant new information than previous available testing, and (2) that such evidence would demonstrate innocence. The trial court, after considering the facts as presented at trial, properly concluded that defendant's petition does not fall within the requirements of RCW 10.73.170.

2. DUE PROCESS AND FUNDAMENTAL
FAIRNESS DOES NOT DICTATE POST-
CONVICTION DNA TESTING.

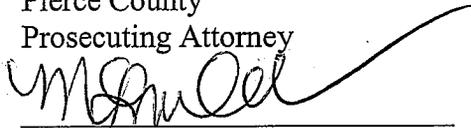
The State hereby incorporates by reference its due process and fundamental fairness arguments as contained in the personal restraint petition which is consolidated with this appeal. (See, State's Response to Personal Restraint Petition at 8-11, and 18-19).

D. CONCLUSION.

This court should affirm the trial court's discretionary ruling of whether to allow post-conviction DNA analysis in a case where DNA testing was available at the time of trial. Since there is no new science or evidence available to defendant the likelihood of establishing innocence is unlikely.

DATED: February 7, 2006.

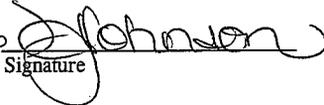
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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