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I. ISSUE

This court has granted review on only the following issue:

“[W]hether the trial court, in determining whether to grant the defendant's motion for postconviction DNA testing, properly considered evidence available to the State at the time of trial but not presented at trial?”

II. STATEMENT OF THE CASE

The facts are set out in the State's Court of Appeals brief. Brief of Respondent at 2-7. The following summary sets out the essential facts relevant to the issue before this court.

On the evening of April 13, 1995, J.S. met a man in a bar. On the pretext of attending a party, he took her to a hotel across the street. There, he beat her and raped her. 1 RP 59-73.

Police received a report of a domestic disturbance at the hotel. When officers arrived, they saw the respondent, Bobby Thompson, leaving a room with J.S. He took her to a nearby emergency exit and started pushing her out the door. J.S saw the officers and started yelling hysterically that he'd beat her and was going to kill her. Thompson continued pushing her out the door. The officers arrested him. 1 RP 38-4; 2 RP 39, 53-54.

A search of the motel room disclosed clear signs that an assault had occurred there. 2 RP 46-48. The room was registered to Thompson. 2 RP 86-88. When questioned by police, Thompson provided a sworn written statement. He admitted having sexual intercourse with J.S. but claimed that it was consensual. 1 CP 75-76. (This statement is attached to the Brief of Respondent as Appendix B.)

Thompson was charged with first degree rape. In preparation for trial, the defense interviewed J.S. She was unsure about a number of details concerning her assailant's appearance. 1 RP 80-81. Due to a lack of time before trial, no DNA tests were conducted. 2 RP 78-79.

On the day of trial, the defense moved for a continuance, for the purpose of obtaining information about an individual who purportedly fit J.S.'s description of the assailant.¹ 1 RP 6. They were allowed to present this motion in camera, so as to avoid disclosing to the prosecutor the nature of the defense. 1 RP 3-4.

¹ In arguing this motion, Thompson's attorney made some assertions about this individual. Thompson's brief refers to these assertions as an "offer of proof." Brief of Appellant at 16. In fact, Thompson was identified as the source of counsel's information, and counsel said that Thompson would *not* testify. 1 RP 6. The defense did not offer to prove anything.

During the in camera hearing, defense counsel told the court:

The State has not held a 3.5 hearing yet. Quite frankly, I think it might be in Mr. Thompson's – It was going to be an in-limine motion they would not use his statements to the police during their case.

I don't know if [the prosecutor] is even aware that this alleged victim has completely misidentified him. I don't want to tip him off to that.

1 RP 7. The court denied the continuance request. 1 RP 16-17.

The parties then stipulated that Thompson's statement would not be used in the State's case-in-chief. They agreed that the statement was voluntary and could be used if Thompson testified.

1 RP 18-19.

At trial, Thompson did not testify, nor did the defense introduce any evidence. 2 RP 90. The jury found Thompson guilty of first degree rape, as charged. 1 CP 15-16.

Eleven years later, Thompson filed a motion for DNA testing. His motion included an unsworn general denial of guilt. He did not provide any explanation of the circumstances that led to his arrest. 1 CP 89-92. The State's response included a copy of Thompson's statement. 1 CP 75-76. In his reply, Thompson did not object to consideration of this statement. He also did not claim any violation of his Miranda rights or assert that the statement was false. He simply ignored it. 1 CP 46-49.

The trial court denied the motion for testing. The Court of Appeals reversed. The court refused to consider Thompson's statement because it was not admitted at trial. State v. Thompson, 155 Wn. App. 294, 304 n. 27, 299 P.3d 901 (2010). The court did not consider Thompson's other arguments for excluding this statement. Reply Brief at 12.

III. ARGUMENT

A. THE STATUTE GOVERNING POST-CONVICTION DNA TESTING DOES NOT PROVIDE FOR EXCLUSION OF ANY EVIDENCE THAT BEARS ON THE LIKELIHOOD THAT SUCH TESTS WOULD DEMONSTRATE INNOCENCE.

There is no constitutional right to post-conviction DNA testing. District Attorney's Office v. Osborne, ___ U.S. ___, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009). The legislature has, however, provided for testing in certain circumstances:

(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 testing standards; or

(ii) 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.²

(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.

RCW 10.73.170. The ultimate issue in this case involves interpretation of this statute. If Thompson has satisfied the statutory requirements, he is entitled to DNA testing at public expense. Otherwise, he is not.

In enacting this statute, the Legislature attempted to balance two interests. On the one hand, it wanted to provide a process "for cases where DNA tests could provide evidence of a person's innocence." On the other hand, it wanted to keep the number of tests low and restrict them to "cases where there is a credible showing that it likely could benefit an innocent person." House Bill

² No such requirements have been established.

Report on HB 2872 at 3 (2004).³ Post-conviction DNA testing can be costly and place a burden on laboratories that are already overloaded. Osborne, 129 S. Ct. at 2327-29 (Alito, J., concurring). The legislature wished to avoid this burden in cases where it could not accomplish anything.

The statute is thus concerned with fundamental justice, not technicalities. Conspicuously absent is any restriction on the kind of evidence that can be considered in determining whether a person is entitled to testing. If a person who requests tests is in fact guilty, testing could not produce any results that would exonerate an innocent person. In such a case, the test would be a waste of public resources. Why would the Legislature want to have resources wasted, simply because the evidence demonstrating the person's guilt was not introduced at a prior proceeding?

In imposing such a restriction, the Court of Appeals relied on neither the language of the statute nor any considerations of public policy. Rather, it believed that this court created the restriction in State v. Riofta, 166 Wn.2d 358, 209 P.3d 467 (2009). There, this

³ Although HB 2872 was not enacted, a similar bill was enacted the following year. The report on the latter bill explained that HB 2872 was an agreed-upon bill that was not enacted due to lack of time. House Bill Report on SHB 1014 at 3 (2005).

court said that a court ruling on a DNA testing motion must consider “all of the evidence presented at trial or newly discovered.” Id. at 367 ¶ 24. This statement can not, however, be properly interpreted as creating a new non-statutory restriction against consideration of evidence that is not “newly discovered.”

The impact of Riofta is discussed in the Brief of Respondent at 15-17. As pointed out there, the State in Riofta did not offer any evidence beyond that introduced at trial. Consequently, this court had no reason to consider the admissibility of such evidence. “General statements in every opinion are to be confined to the facts before the court, and limited in their application to the points actually involved.” State ex rel Wittler v. Yelle, 65 Wn.2d 660, 670, 399 P.2d 319 (1965).

In any event, Riofta specifically allowed consideration of evidence that was neither used at trial nor newly discovered. In particular, the decision allows consideration of the petitioner's failure to seek DNA testing prior to trial. Riofta, 166 Wn.2d at 366 n. 1. That failure would not normally be introduced into evidence at trial, but it is likewise not “newly discovered.” Riofta also allows a convicted person to seek testing even though DNA evidence could have been obtained before trial. Such evidence would not meet the

definition of “newly discovered evidence.” State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981).

In the present case, Thompson gave police a sworn statement describing the events surrounding his arrest. 1 CP 75-76. This is the *only* account he has given of those events. He has *never* repudiated this statement. To the contrary, it is consistent with the assertion made in his motion for DNA testing – that he is “innocent of this heinous crime.” 1 CP 91.

In light of this statement, Thompson cannot satisfy the statutory requirement of showing “the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3). DNA testing might provide evidence on whether one person had sexual intercourse with another, but it cannot show whether that intercourse was consensual. Thompson has not denied intercourse. He has only claimed consent. The validity of that claim cannot be determined by DNA testing. The Court of Appeals erred in ordering testing that cannot demonstrate innocence.

B. ABSENT ANY CHALLENGE TO A STATEMENT, THE STATE IS NOT REQUIRED TO PROVE THAT IT WAS VOLUNTARY OR OBTAINED IN COMPLIANCE WITH MIRANDA.

In his Court of Appeals briefing, Thompson asserted an additional reason why the statement was inadmissible: because the State was purportedly required to prove that the statement was obtained in compliance with Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The Court of Appeals did not reach this issue. It is not within the scope of the issue on which this court granted review. Nonetheless, this court has discretion to consider it under RAP 13.7(b):

If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues.

Thus, if this court decides that the statement is admissible under Riofta, it also has discretion to decide whether Miranda requirements prevent its consideration.

In the trial court, Thompson did not raise any objection to consideration of his statement. 1 CP 46-49. Consequently, he can raise the issue on appeal only if it involves “manifest error affecting a constitutional right.” RAP 2.5(a)(3). If the record is inadequate to allow consideration of an alleged error, that error is not “manifest”

and cannot be raised for the first time on appeal. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Here, the record contains no information on the circumstances that led to Thompson's statement. If Thompson is arguing that Miranda requirements were not complied with, his argument cannot be resolved from the record. As a result, it cannot be considered on appeal.

Thompson claims that the prosecution has the burden of proving voluntariness and compliance with Miranda, citing Lego v. Twomey, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 818 (1972); State v. Schatmeier, 72 Wn. App. 711, 866 P.2d 51, review denied, 124 Wn.2d 1019 (1994), and State v. Teran, 71 Wn. App. 668, 862 P.2d 137 (1993). Lego specifically says that the burden applies "when a confession *challenged as involuntary* is used against a criminal defendant at his trial." Lego, 404 U.S. at 489 (emphasis added). The other two cases similarly involve defendants who affirmatively challenged admissibility of their statements. Schatmeier, 72 Wn. App. at 714; Teran, 71 Wn. App. at 670-71.

When there is *no* challenge to the admissibility of a statement, there is no requirement for a hearing to determine its

admissibility. State v. Fanger, 34 Wn. App. 635, 638, 663 P.2d 161 (1983). “[T]he constitution does not require a voluntariness hearing absent some contemporaneous challenge to the use of the confession.” Wainwright v. Sykes, 433 U.S. 72, 86, 97 S. Ct. 2487, 53 L. Ed. 2d 594 (1977). Here, Thompson did not challenge the admissibility of his statement in the DNA testing proceedings, on either Miranda grounds, voluntariness grounds, or any other basis. Consequently, the State had no obligation to prove that the statement was voluntary or obtained in compliance with Miranda.

In any event, Thompson had already stipulated to the voluntariness of the statement. 1 RP 18-19. Miranda is inapplicable, since it only affects the admissibility of statements in criminal cases. Baxter v. Palmigiano, 425 U.S. 308, 315, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976); see Brewer v. Dept. of Motor Vehicles, 23 Wn. App. 412, 415, 495 P.2d 949 (1979) (statements obtained in violation of Miranda admissible in driver’s license revocation proceedings). This case is not a criminal proceeding: it is a proceeding initiated by a convicted person to obtain expenditure of public funds. The burden of proof is on Thompson, not the State. RCW 10.73.170(3). Even if police failed to comply with Miranda in obtaining his statement, he would still have no right

to have public money wasted on pointless tests that could not prove his innocence. Even in criminal proceedings, statements obtained in violation of Miranda can be used to impeach the defendant's testimony. Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971). Similarly, Thompson's statements can be considered in this proceeding to refute his claims of innocence.

Thompson had a full opportunity in the trial court to offer any evidence that might have reduced the probative value of his statement. He chose not to do so. His statement stands undenied and unrefuted. Since Thompson has admitted sexual intercourse with the victim, there is no likelihood that DNA testing would prove the absence of such intercourse. The trial court properly denied his motion for such testing.

IV. CONCLUSION

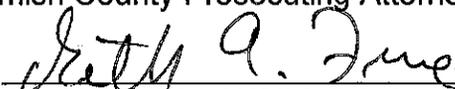
The decision of the Court of Appeals should be reversed.

The trial court's order denying DNA testing should be affirmed.

Respectfully submitted on November 30, 2010.

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