95504-2

SUPREME COURT NO. _____

Court of Appeals No. 49054-4

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JERRY L. SWAGERTY, Petitioner

PETITION FOR REVIEW

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Cases

Statutes

I. IDENTITY OF PETITIONER

Petitioner Jerry Swagerty, through his attorney, Marie Trombley, requests the relief designated in Part II.

II. COURT OF APPEALS DECISION

Mr. Swagerty seeks review of the January 4, 2018, unpublished decision of Division Two of the Court of Appeals. A copy of the Court's opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. RCW 10.73.170(1) provides the authorization for convicted individuals who are currently serving a term of imprisonment to submit to the court a written motion requesting DNA testing. The purpose is to provide a means for a convicted person to obtain DNA evidence that would support a petition for post-conviction relief. Where the decision by the trial court and affirmed by Court of Appeals is not supported by the facts in the record and rests on conjecture, must the motion be remanded with direction for the trial court to grant the motion?

IV. STATEMENT OF THE CASE

In February 2004, 10-year-old S.B., a special needs child, was at a Safeway store with her father. The store videotape showed a suspect approaching the child as she went to get a grocery cart. (CP 3). She left the store with the man. Approximately ten minutes later she was seen on store videotape in the parking lot headed toward her father and a police officer. (CP 3). S.B. was taken to the hospital where she reported the assailant had touched her genitals with his tongue. (CP 3).

Eight years later, in April 2012, the State made a declaration for determination of probable cause. (CP 3). It averred that the Washington State Patrol Crime Lab (WSPCL) had tested the underpants S.B. wore at the time of the assault. The clothing was tested for amylase and yielded positive results. (CP 3). The DNA profile was consistent with at least two contributors. (CP 4).

The declaration stated: "*Assuming* that part of the DNA profile originated from S.B., a male profile was deduced from the mixture. The male DNA from the *underpants* was determined to be a *match* to the defendant." (CP 4)(emphasis added). The State charged Mr. Swagerty on May 22, 2012, with first degree rape of a child and first-degree child molestation. (CP 1-2). At a hearing held on September 28, 2012, the State told the court that S.B. underwent an exam at the hospital and swabs taken

from her vagina were analyzed and amylase was found. (9/28/12 RP 12). "And there was a cold case DNA hit that matched to the amylase in the defendant's swabs." The State sought a reference sample to compare the DNA. (9/28/12 RP 12-13). The next month the State told the court they were still waiting for DNA results. (10/19/12 RP 15-16). After October 2012, the result of DNA testing is not mentioned in the transcripts and no forensic reports were entered into the record.

Mr. Swagerty pleaded guilty to four amended charges to avoid life in prison without the possibility of parole. (CP 47-61). He entered an Alford plea for Count 2 and an In re Barr plea for the remaining counts. (CP 60-61). The trial court imposed a 30-year exceptional sentence. (CP 93-106; 113-116).

Mr. Swagerty filed a Personal Restraint Petition in January 2014. On October 27, 2016, the Washington State Supreme Court ruled that Mr. Swagerty had the option to withdraw his personal restraint petition and keep to the original bargain he made with the State, or move to vacate the 2013 judgment and sentence, allowing the State to refile the original charges. *In re Matter of Swagerty*, 168 Wn.2d 801, 383 P.3d 454 (2016).

Prior to his personal restraint petition being decided by the Supreme Court, Mr. Swagerty filed a motion in the superior court for a court order authorizing post-conviction DNA testing of swabs taken

directly from S.B. at the hospital in 2004. (CP 119-121). Mr. Swagerty explained that the DNA taken directly from S.B.'s body at the hospital in 2004 had the potential to produce significant evidence that he was not the perpetrator of the accused crimes. (CP 120-21).

On May 12, 2016, Judge Nelson issued the following order:

> THIS MATTER came before the undersigned judge of the above entitled court upon review of the defendant's motions (filed 3/1/16) and defendant's letter/motion dated 4/26/16 (filed 5/5/16). After reviewing the defendant's written pleadings, the court now enters the following order pursuant to RCW 10.73.170:
> 1. Defendant's motions are untimely pursuant to CrR 7.8
> 2. Defendant did not comply with RCW 10.73.170(2)(b). Even if defendant did comply with RCW 10.73.170(2)(b), pursuant to RCW 10.73.170(3), the DNA test which was already performed and *did not match* defendant does not demonstrate defendant's innocence on a more probable than not basis. (emphasis added).
> 3. The court does not order additional DNA testing when adequate DNA testing was already performed.

(CP 135)(emphasis added).

Mr. Swagerty made a timely appeal, challenging each of the findings in the trial court's order. (CP 136). In its opinion, the Court of Appeals footnoted that at the hearing in 2012,

> The prosecutor's statement that the DNA was found on swabs taken from the victim is inconsistent with the facts in the probable cause

> declaration, which stated that the DNA was found when the victim's underpants were tested. Other than this statement by the prosecutor and Swagerty's assertions, there is nothing in the record before us suggesting that any swabs were taken from the victim at the hospital.

Slip Op. *1 fn.4.

The Court added:

> In its ruling, the superior court stated, in part, "Even if defendant did comply with RCW 10.73.170(2)(b), pursuant to RCW 10.73.170(3), the DNA test which was already performed and did not match defendant does not demonstrate defendant's innocence on a more probable than not basis." CP at 135 (emphasis added). *It is unclear to what evidence the superior court was referring.* Nothing in the record establishes that there was any DNA comparison that did not match Swagerty's DNA—at best, Swagerty's statement in his motion for DNA testing might suggest that there was some DNA tested that did not match his DNA, but there is nothing in the record supporting that assertion. Because we can affirm on any ground supported by the record, we do not further examine this portion of the trial court's findings. Hoover v. Warner, 189 Wn. App. 509, 526, 358 P.3d 1174 (2015) (we may affirm the superior court on any ground supported by the record), review denied, 185 Wn.2d 1004 (2016).(emphasis added).

Slip Op. *2 fn. 6.

The only information before the trial court and the Court of Appeals was a vague term that recovered DNA "matched the defendant" found in the declaration of probable cause. The record does not contain a forensic report with the necessary statistical comparability of any DNA

evidence that would make the stated "matched the defendant" useful information. There was no substantive documented evidence before the court regarding the DNA testing from the underwear; rather, there was simply a declaration of probable cause. With respect to the swabs from S.B.'s body, the prosecutor did not provide any evidence for the court to consider. The Court of Appeals reasoned that it was "pure conjecture that these DNA tests were not sufficiently detailed to have been admissible." *Slip Op.* *4. However, the trial court specifically found the DNA *did not* match the defendant. CP 135.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt. RCW 10.58.020. "Neither a trial court deciding a post-conviction motion for DNA testing or an appellate court reviewing a trial court's decision on the motion is considering evidence for the purpose of determining whether the defendant is guilty or not guilty. Instead, ... the issue is whether a claim of actual innocence is sufficient to justify the expenditure of costs, resources, and time necessary to provide DNA testing. On this issue, relevant, reliable evidence should be considered in deciding the question of actual innocence." *State v.*

Thompson, 173 Wn.2d 865, 888, 271 P.3d 204 (2012)(*dissent* by J. Madsen).

The purpose of RCW 10.73.170, which allows a convicted person currently serving a prison sentence to file a motion requesting DNA testing, is to allow advances in DNA testing to set innocent people free. *State v. Crumpton,* 181 Wn.2d 252, 258, 332 P.3d 448 (2014). The person requesting testing must satisfy both procedural and substantive requirements. RCW 10.73.170 (2)(3). The motion must state the basis for the request, explain the relevance of the DNA evidence sought, and comply with applicable court rules. RCW 10.73.170 (2)(a)-(c). If the petitioner satisfies the procedural requirements, the court must grant the motion if it concludes the petitioner has shown the "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). The trial court presumes the evidence will be favorable to the convicted party to decide the motion. *Crumpton,* 181 Wn.2d at 260. The presumption is part of the standard. *Id.*

A court's ruling on post-conviction DNA testing is reviewed for abuse of discretion. *State v. Riofta*, 166 Wn.2d 358, 370, 209 P.3d 467 (2009). Where the decision rests on facts which are not supported in the record, it is a decision made for untenable reasons and is an abuse of discretion. *Id.; Thompson,* 173 Wn.2d at 870.

Here, the decision by the trial court and the Court of Appeals is not supported by the facts in this record. The references to DNA introduced to the court were (1) the declaration of probable cause, which provided meaningless information because there was no statistical comparison with respect to the DNA retrieved from S.B.'s underwear, and (2) the prosecutor's assertion to the court that DNA had been retrieved from S.B.'s body.

In denying the motion, the trial court found "the DNA test which was already performed and did *not match* the defendant does not demonstrate defendant's innocence on a more probable than basis" and "the court does not order additional DNA testing when adequate DNA testing was already performed." If, the DNA test did not "match" Mr. Swagerty, then additional DNA testing was certainly in order. The affirmation by the Court of Appeals was based on speculation that DNA tests had been performed, were admissible, and would not demonstrate Mr. Swagerty's innocence.

The decision by the Court of Appeals is in conflict with this Court's decision in *Thompson.* In *Thompson,* the defendant admitted he had been sexually intimate with the victim, but his statement was not admitted at trial. This Court held that statement could not be considered in the motion for post-conviction DNA testing. *Thompson,* at 873. Despite

physical evidence from the scene of the attack, this Court held the trial court's reasoning was in error when it concluded there was no likelihood that the DNA evidence would demonstrate the defendant's innocence. *Because the swabs had not been tested for DNA, the results of tests would constitute significant new information because it would either exculpate or inculpate him as the attacker. Id.* at 876.

Like Thompson, if DNA tests could conclusively exclude Mr. Swagerty as the source of the amylase, it is more probable than not that his innocence would be established. The court abused its discretion by applying an incorrect legal standard when it concluded that Mr. Swagerty had not met the procedural requirements of RCW 10.73.170(2)(b). And the trial court abused its discretion when it concluded that adequate DNA testing had already been performed.

VI. CONCLUSION

Based on the foregoing facts and authority, Mr. Swagerty respectfully asks this Court to accept review of his petition.

Submitted this 5th day of February 2018.

Marie J. Trombley, WSBA 41410
Attorney for Petitioner

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

January 4, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JERRY LEE SWAGERTY, Appellant.	No. 49054-4-II UNPUBLISHED OPINION

JOHANSON, J. — Jerry Lee Swagerty appeals the superior court's denial of his motion for postconviction deoxyribonucleic acid (DNA) testing under RCW 10.73.170. Because Swagerty failed to establish a likelihood that additional DNA testing would demonstrate innocence on a more probable than not basis, even presuming a favorable outcome of the requested DNA testing as required under RCW 10.73.170(3), we affirm.[1]

FACTS

I. BACKGROUND AND INITIAL PLEAS

In February 2004, a 10-year-old, developmentally disabled girl reported that a man had lured her from a grocery store and sexually assaulted her by touching her vagina with his tongue. A store video recorded a man approaching the child in the store and the child following the man

[1] Because we affirm on this ground, we do not address Swagerty's other arguments.

outside the store. About 10 minutes later, the recording showed the child returning to her father in the store parking lot. The police initially investigated another person of interest, but that person "passed a polygraph indicating that he was not the assailant." Clerk's Papers (CP) at 3. In May 2012, more than eight years after the incident, the State charged Swagerty with first degree rape of a child and first degree child molestation.

According to the probable cause declaration that supported these charges, in April 2012, the Washington State Patrol crime lab tested two samples from the crotch region of a pair of white underpants that the victim had been wearing during the assault.[2] The DNA tests were positive for amylase, a substance found in high amounts in saliva and in lower amounts in various other bodily fluids. The lab extracted DNA from the samples that was "consistent with at least two contributors." CP at 4. "Assuming that part of the DNA profile originated from [the victim], a male profile was deduced from the mixture. The male DNA from the underpants was determined to be a match to the defendant [(Swagerty)]." CP at 4. The declaration of probable cause also mentioned that the victim was taken to the hospital and examined. But it did not mention any vaginal swabs having been taken from the victim on the date of the incident or whether any vaginal swabs were tested.

Following this DNA testing, the State charged Swagerty with first degree rape of a child and first degree child molestation. During pretrial proceedings, the parties briefly discussed the

[2] The record contains no explanation of why it took eight years for this evidence to be tested.

State's request for cheek swabs from Swagerty to allow for additional DNA testing by the State and independent testing by Swagerty.[3]

In arguing this motion, the State asserted that after the victim was taken to the hospital, "[s]he underwent a medical examination and *swabs were taken from her vagina*. Those swabs were analyzed, amylase was found, which is what saliva is contained in."[4] Report of Proceedings (RP) (Sept. 28, 2012) at 12 (emphasis added). The State further asserted that "then there was a cold case DNA hit that matched to the amylase in the defendant's swabs." RP (Sept. 28, 2012) at 12. The State stated that it was seeking additional cheek swabs from Swagerty for "chain of custody purposes" and that it wanted to "compare that DNA [the cheek swab DNA] to the DNA that was found for comparison purposes." RP (Sept. 28, 2012) at 12. The State did not mention the DNA testing of the victim's underpants as described in the declaration of probable cause. The trial court granted the order for the additional cheek swabs. There is nothing further in the record about this additional testing.

In December 2012, the State advised the superior court that it (the State) had received DNA results from the Washington State Patrol crime lab. There is no mention in the record of what these additional results were or whether Swagerty conducted any independent testing.

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[3] Based on our record, the State did not explain why it requested additional testing.

[4] The prosecutor's statement that the DNA was found on swabs taken from the victim is inconsistent with the facts in the probable cause declaration, which stated that the DNA was found when the victim's underpants were tested. Other than this statement by the prosecutor and Swagerty's assertions, there is nothing in the record before us suggesting that any swabs were taken from the victim at the hospital.

In February 2013, Swagerty pleaded guilty to amended charges of third degree rape of a child, luring, second degree burglary, and intimidating a witness. At the change of plea hearing and the sentencing hearing, no one mentioned any issues involving DNA testing.

II. MOTION FOR POSTCONVICTION DNA TESTING

Three years later, in February 2016, Swagerty filed a pro se motion for postconviction DNA testing, asking that the trial court order DNA testing "of [e]vidence taken directly from [the victim] at the [h]ospital in 2004 at the time of [the] incident."[5] CP at 118. In support of this motion, he asserted,

> 2. Declaration for Determination of Probable Cause . . . "clearly underlines [that the victim] was taken to the Hospital on 02/14/2004 immediately after the alleged incident."
> 3. [Hospital] Report clearly provides that a thorough examination of [the victim] was conducted with results that "no physical crime was evident", and that [the victim] was then forwarded for [DNA] testing whereof Jerry Swagerty's DNA has been on file since 2002 and "was not" discovered on swabs taken directly from the vagina of [the victim] in 2004 at the time of the alleged incident[].

CP at 120 (emphasis omitted).

[5] While the motion for DNA testing was pending before the superior court, Swagerty also filed a personal restraint petition (PRP). *In re Pers. Restraint of Swagerty*, noted at 185 Wn. App. 1032 (2015), *rev'd in part*, 186 Wn.2d 801, 383 P.3d 454 (2016). While this appeal was pending, Swagerty's PRP was granted, he withdrew his original plea, and he repleaded to one count of second degree child molestation. Although the withdrawal of the original plea and entry of a new plea raise the issue of whether this appeal is moot, we choose to address the merits of the appeal because this matter is easily resolved.

On May 12, apparently without holding a hearing, the superior court denied Swagerty's motion for postconviction DNA testing.[6] Swagerty appeals the denial of his motion for postconviction DNA testing.

ANALYSIS

We review the trial court's denial of Swagerty's motion for postconviction DNA testing for an abuse of discretion. *State v. Riofta*, 166 Wn.2d 358, 370, 209 P.3d 467 (2009). "A trial court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds. 'A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" *State v. Thompson*, 173 Wn.2d 865, 870, 271 P.3d 204 (2012) (internal quotation marks omitted) (citation omitted) (quoting *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009)). We may affirm the trial court on any ground supported by the record. *Hoover v. Warner*, 189 Wn. App. 509, 526, 358 P.3d 1174 (2015), *review denied*, 185 Wn.2d 1004 (2016). We hold that the trial court did not abuse its discretion.

[6] In its ruling, the superior court stated, in part, "Even if defendant did comply with RCW 10.73.170(2)(b), pursuant to RCW 10.73.170(3), the DNA test which was already performed and *did not match defendant* does not demonstrate defendant's innocence on a more probable than not basis." CP at 135 (emphasis added). It is unclear to what evidence the superior court was referring. Nothing in the record establishes that there was any DNA comparison that did *not* match Swagerty's DNA—at best, Swagerty's statement in his motion for DNA testing might suggest that there was some DNA tested that did not match his DNA, but there is nothing in the record supporting that assertion. Because we can affirm on any ground supported by the record, we do not further examine this portion of the trial court's findings. *Hoover v. Warner*, 189 Wn. App. 509, 526, 358 P.3d 1174 (2015) (we may affirm the superior court on any ground supported by the record), *review denied*, 185 Wn.2d 1004 (2016).

RCW 10.73.170(1) allows a person convicted of a felony who is currently serving a prison sentence to file a motion requesting DNA testing with the court that entered the judgment on the conviction. The motion for DNA testing must state that (1) "[t]he court ruled that DNA testing did not meet acceptable scientific standards," (2) the DNA testing technology was not sufficiently developed to test the relevant DNA, or (3) new DNA testing could be significantly more accurate or would provide new information. RCW 10.73.170(2)(a) (i)-(iii). The motion must also "[e]xplain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement." RCW 10.73.170(2)(b). The motion must further "[c]omply with all other procedural requirements established by court rule." RCW 10.73.170(2)(c). Once these requirements are met, the superior court must grant the motion if "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(3).

Here, in light of the DNA evidence discovered on the victim's underpants, Swagerty does not show a likelihood that any potential new DNA evidence from vaginal swabs would demonstrate his innocence on a more probable than not basis. Even presuming, as we must,[7] that further testing revealed that any existing vaginal swabs contained no male DNA or DNA solely from another male contributor, the DNA results showing that Swagerty's saliva and DNA were on the victim's underpants would still be enough to demonstrate Swagerty's guilt because there is no possible innocent explanation for his DNA's presence inside the victim's clothing. Such new evidence would not exclude Swagerty as the perpetrator—at best, it would raise the specter of a

[7] When evaluating the potential evidence from the proposed DNA testing, we must presume the evidence would be favorable to Swagerty. *State v. Crumpton*, 181 Wn.2d 252, 260, 332 P.3d 448 (2014).

second assailant. As our Supreme Court put it when addressing Swagerty's ineffective assistance of counsel claim in his PRP, "It is difficult to imagine what evidence or strategy could have overcome the documented presence of Swagerty's DNA in the victim's underwear." *In re Pers. Restraint of Swagerty*, 186 Wn.2d 801, 814, 383 P.3d 454 (2016). The evidence as a whole, which includes the DNA testing from the victim's underpants implicating Swagerty, would not raise the likelihood that Swagerty is innocent on a more probable than not basis.

Swagerty's reliance on *Thompson* is unpersuasive. In *Thompson*, unlike here, none of the DNA had yet been tested, and there was no existing DNA evidence linking Thompson to the crime. 173 Wn.2d at 869, 876. Here, in contrast, there was DNA evidence consistent with Swagerty's involvement in the crime.

Swagerty also contends that we should not give any weight to the DNA from the victim's clothing. He asserts that that DNA evidence from the underpants was "meaningless" because the only evidence presented to the trial court related to the DNA tests of the underpants was a vague statement about the tests in the probable cause declaration, which lacked any information on the "statistical comparability" of the DNA match. Br. of Appellant at 8-9.

Swagerty is correct that information related to the DNA evidence from the underpants in the probable cause declaration was minimal. But it is pure conjecture that these DNA tests were not sufficiently detailed to have been admissible, relevant evidence of Swagerty's involvement in this offense if the case had gone to trial. The record does not show that Swagerty demonstrated to the trial court that the existing DNA evidence from the underpants was inadequate, and he does not request retesting of that evidence. And Swagerty cannot fault the State for not presenting evidence that was not relevant once Swagerty agreed to plead guilty. Notably, there is nothing in

the record suggesting that Swagerty attempted to support his motion for postconviction DNA testing with any additional evidence or documentation from the original DNA tests.

Accordingly, we hold that the trial court did not abuse its discretion when it denied Swagerty's motion and affirm the trial court's denial of Swagerty's motion for postconviction DNA testing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.
JOHANSON, J.

We concur:

Maxa, A.C.J.
MAXA, A.C.J.

Sutton, J.
SUTTON, J.

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Jerry Swagerty, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Petition for Review was sent by first class mail, postage prepaid on February 5, 2018 to:

Jerry Swagerty
2607 Marine View West Apt. 2
Everett, WA 98201

And by electronic service by prior agreement between the parties to:

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