No. 96488-2
COA No. 76852-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH ANTHONY DIGEROLAMO,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Joseph Digerolamo asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Joseph Anthony Digerolamo*, No. 76852-2-I (October 8, 2018). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

RCW 10.73.170 allows convicted persons to move for postconviction DNA testing where he can show that DNA testing would be more accurate or would provide significant new information, and the likelihood that the DNA evidence would, on a more probable than not basis, demonstrate his innocence. Postconviction, Mr. Digerolamo moved for testing under RCW 10.73.170 of the amylase used to screen for the presence of DNA in order to prove his innocence. Amylase is an essential part of the DNA testing process. Is an issue of substantial public interest that should be determined by this Court

presented where Mr. Digerolamo met all of the requirements for postconviction DNA testing yet was denied the test?

D. STATEMENT OF THE CASE

Joseph Digerolamo lived in the city of SeaTac with his wife of 10 years, Glennis Johnny. RP 125-26. Ms. Johnny had a large extended family which included S.B., her 29-year-old niece, who lived in Victoria, British Columbia. RP 128, 274-77. In late May to early June 2009, S.B. came to SeaTac to celebrate her grandmother's 83rd birthday. RP 293. Although S.B. usually stayed with her other aunt, Crystal, when she visited the Puget Sound area, on this occasion she was staying with Ms. Johnny and Mr. Digerolamo. RP 295.

The birthday party lasted until approximately 6:00 p.m., when people began leaving. RP 295-96. Around 8:00 p.m., Ms. Johnny, S.B., and a few others began conversing and drinking straight shots of Crown Royal Whiskey. RP 299.

S.B. left the group after the first bottle of whiskey had been emptied and the second one opened. RP 301-05. S.B. remembered getting into bed, falling asleep, then rushing to the bathroom to vomit. RP 305. S.B. remembered Mr. Digerolamo coming into the bathroom to check on S.B. and helping her clean up. RP 305. S.B. remembered

lying in bed in the dark, then feeling a person's tongue "around inside [her] vagina." RP 305.

> I remember turning with my hands to try to get him off, but after that it's a complete blank. That's all I remember is just my hand just trying to get the head away, and that's all I remember until I woke up the next morning.

RP 305.

S.B. awoke the next morning and thought about her memory of what had happened during the night. RP 309. S.B. told Ms. Johnny that someone had entered her room that night and had engaged in a sexual act. RP 309. Ms. Johnny contacted the police. RP 310-11.

The State charged Mr. Digerolamo with one count of rape in the second degree. CP 1. At trial, Nathan Bruesehoff of the Washington State Crime Laboratory testified regarding DNA tests he conducted. RP 463. S.B. had oral, perineal vulvar, endocervical, and anal swabs taken as well as her swabs from her underwear. Mr. Bruesehoff did a screening of the perineal swabs and discovered amylase, a digestive enzyme found in saliva and/or vomit. RP 481-82, 503. Mr. Bruesehoff also found amylase on the underwear. RP 485. Once the amylase was found, the samples were sent for further DNA testing. RP 485-86. Following this further testing, a profile was developed. RP 489. The profile developed for the perineal test matched Mr. Digerolamo. RP

493. The same was true for one of the cuttings from the underwear. RP 496.

During his testimony, Mr. Bruesehoff admitted that vomit left on the toilet seat could have transferred the DNA of the contributor to a woman who used the toilet seat later:

> A. Yes, in that scenario, if the vomit that was on the toilet seat was still wet, for example, then it would be able to transfer from one place to the other. Yes, that's possible. Depending upon what type of vomit, if there was food in there, for example, we might have noticed something a bit different. If it were more of a, I don't know, liquids, for example all you'd been consuming was liquids, it might not notice any of food materials to it. So that would kind of depend upon or would depend upon on the scenario as well.
> . . .
> Q. Okay. So is it possible that the male in the bathroom's DNA may be found on the woman's underwear?
>
> A. Yes, if the vomit, again, was wet, transferred to her body, then it could transfer to the underwear from her or again if the underwear itself happened to touch the already wet vomit on the toilet seat that would also get it to the underwear.

RP 525-26.

Following a jury trial Mr. Digerolamo was convicted as charged. CP 5-15.

On February 9, 2017, Mr. Digerolamo sought testing of the amylase under RCW 10.73.170 in order to determine whether the

amylase was saliva amylase or pancreatic amylase. Mr. Digerolamo opined that if the amylase was pancreatic, the positive match could have come from S.B.'s vomit which then attached itself to her underwear when she used the toilet. Mr. Bruesehoff had opined at trial that this was a possibility. RP 525-26.

The trial court agreed with the State's opposition to the motion and, reading RCW 10.73.170 narrowly, ruled that the statute only authorized DNA testing and the requested testing did fall under the statute. CP 51. Alternatively, the court ruled that, even if the testing was authorized, Mr. Digerolamo failed to demonstrate the results of the testing would demonstrate his innocence. CP 51.

The Court of Appeals also denied Mr. Digerolamo the opportunity to test the amylase, determining that DNA testing under RCW 10.73.170 did not include the testing of amylase. Decision at 4-6. In addition, the Court found that favorable testing, if allowed, would not have demonstrated Mr. Digerolamo's innocence. Decision at 8.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

Mr. Digerolamo met the requirements of RCW 10.73.170 and the trial court erred in failing to order the requested testing.

"RCW 10.73.170 provides a mechanism under Washington law for individuals to seek DNA testing in order to establish their innocence." *Id*. Under RCW 10.73.170, a person currently imprisoned for a felony conviction may file a motion with the trial court requesting DNA testing.

The trial court must grant a motion under RCW 10.73.170 when it meets certain procedural requirements as well as the substantive requirement that 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); *see State v. Gentry*, 183 Wn.2d 749, 764, 356 P.3d 714 (2015).

When determining the likelihood that DNA evidence will demonstrate the convicted person's innocence, the trial court must presume that the result of testing the DNA evidence will be favorable to the convicted person. *Gentry*, 183 Wn.2d at 765. The inquiry is whether "considering all the evidence from trial and assuming an exculpatory DNA test result, it is likely the individual is innocent on a

more probable than not basis." *State v. Crumpton*, 181 Wn.2d 252, 260, 332 P.3d 448 (2014).

The postconviction DNA testing statute, RCW 10.73.170(2) sets forth in relevant part the procedural requirements that must be met:

> 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 ... the crime ...;

Thus, Mr. Digerolamo's motion turns on whether he had established that DNA is now significantly more accurate than at the time of his trial, or that the DNA testing now requested would provide significant new information. The statute's procedural requirements are lenient ones. *State v. Riofta*, 166 Wn.2d 358, 366-67, 209 P.3d 467 (2009).

Mr. Digerolamo's motion was based upon 10.73.170(a)(iii): that the new testing would be significantly more accurate or provide

significant new information than that provided at trial. The trial court denied the motion on the basis that Mr. Digerolamo was not asking for DNA testing. CP 51. But the trial court takes too narrow a view of "DNA testing."

Although not specifically "DNA" testing in terms of generating a genetic profile, the discovery of amylase was part of the process of the DNA testing prior to trial. Without the existence of amylase, the state crime lab would not have continued the testing. Thus, testing of amylase here must be part of the testing for postconviction DNA under the statute. To say otherwise would be anathema to the goal of the statute as stated by *Crumpton*; to allow advances in technology to set innocent people free. *Crumpton*, 181 Wn.2d at 258. Since Mr. Digerolamo met the minimal procedural requirement under the statute, and the requested testing would have been helpful, it should have been ordered. The trial court erred in finding Mr. Digerolamo's request was not covered by the statute.

In addition, the decision ignored the testimony of Nathan Bruesehoff of the Washington State Crime Laboratory, who opined that if Mr. Digerolamo's vomit was present on the toilet seat and still wet, it could be transferred to S.B.'s underwear and then to her body, thus

affirming his theory that the DNA, although found on S.B., was not evidence of sexual assault but of his innocence of that offense. Thus, Mr. Digerolamo has shown on a more probable that not basis that the testing would prove his innocence.

This Court should grant review to determine whether testing of the amylase is authorized under RCW 10.73.170, and if so, whether Mr. Digerolamo has demonstrated a likelihood of his innocence.

F. CONCLUSION

For the reasons stated, Mr. Digerolamo asks this Court to grant review and order the testing of the amylase.

DATED this 3rd day of November 2018.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSEPH ANTHONY DIGEROLAMO, a/k/a JOSEPH DI'GEROLAMO, Appellant.	)	No. 76852-2 DIVISION ONE UNPUBLISHED OPINION FILED: October 8, 2018

CHUN, J. — A jury convicted Digerolamo of second degree rape after his deoxyribonucleic acid (DNA) matched the DNA collected from amylase found in the victim's rape kit. Digerolamo moved for post-conviction DNA testing to determine the type of amylase the rape kit detected. The trial court denied the motion, finding RCW 10.73.170 does not authorize amylase testing and Digerolamo did not meet the statute's substantive requirement. Digerolamo appeals the denial. Because Digerolamo does not meet RCW 10.73.170's procedural or substantive requirements, we affirm.

FACTS

S.B. spent a night at her aunt and Digerolamo's (her aunt's husband) home in 2009. S.B. drank alcohol to the point of intoxication that night but claimed Digerolamo did not drink any alcohol. Digerolamo states S.B. later threw up and the smell caused him to vomit as well. When S.B. went to bed, Digerolamo remained as the only male in the house. After S.B. fell asleep, she

awoke to the feeling of a man with his tongue in her vagina. S.B. tried to push the man off and then blacked out.

The next day the hospital performed a rape kit on S.B. The rape kit found amylase (a digestive enzyme found in saliva and other bodily fluids) on the perineal swab and on S.B.'s underwear. DNA testing determined the amylase came from Digerolamo. A jury convicted Digerolamo of second degree rape. This court affirmed the conviction on appeal.

In 2017, Digerolamo moved for post-conviction DNA testing under RCW 10.73.170(2)(iii).[1] Digerolamo specifically sought a test of his amylase found in the rape kit to determine if it came from his saliva or pancreas. Digerolamo asserted pancreatic amylase would support his innocence by proving the lab found his DNA in the rape kit because the victim sat on the toilet after Digerolamo vomited in it. The trial court denied the motion, finding the statute did

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[1] The pertinent portion of 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.

. . .

(5) DNA testing ordered under this section shall be performed by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

not cover amylase testing and, even if it did, the testing would not meet the statute's substantive requirement. Digerolamo timely appeals.

ANALYSIS

Procedural Requirements of RCW 10.73.170

The State argues Digerolamo does not satisfy the procedural requirements because the statute's "DNA testing" language does not provide for amylase testing.[2] Digerolamo contends the State and trial court define DNA testing too narrowly, and amylase testing should be covered under the statute to meet the statutory goal to allow advances in technology to set innocent people free.[3] We agree with the State.

A. Standard of Review

The meaning of a statute presents a question of law reviewed de novo. State v. Riofta, 166 Wn.2d 358, 365, 209 P.3d 467 (2009) (citing Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d. 4 (2002)).

B. Analysis

To be granted post-conviction DNA testing, the requesting party must satisfy RCW 10.73.170's procedural and substantive requirements. Riofta, 166 Wn.2d at 364. Courts view the procedural requirements of the statute leniently. Riofta, 166 Wn.2d at 367.

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[2] The State also claims Digerolamo did not meet the statute's procedural requirements because he did not demonstrate a crime laboratory can perform the testing he seeks. In support, the State cites RCW 10.73.170(5) ("DNA testing ordered under this section shall be performed by the Washington state patrol crime laboratory.") This section, however, does not mandate a petitioner demonstrate the Washington state patrol crime laboratory's ability to perform the requested testing to meet the procedural requirement.

In interpreting a statute, the court aims to carry out the legislature's intent and give effect to the plain meaning. Riofta, 166 Wn.2d at 365. If the statute does not define a term, courts determine the plain meaning by looking to dictionary definitions. State v. Braa, 2 Wn.App.2d 510, 518, 410 P.3d 1176 (2018) (citing Buchheit v. Geiger, 192. Wn. App. 691, 696, 368 P.3d 509 (2016)).

Courts find statutes ambiguous if they can be reasonably interpreted in more than one way. State v. Slattum, 173 Wn. App. 640, 649, 295 P.3d 788 (2013) (citation omitted). However, "[i]f a statute uses plain language and defines essential terms, the statute is unambiguous." State v. Gray, 151 Wn. App. 762, 768, 215 P.3d 961 (2009) (citation omitted). When a court determines a statute's meaning is plain on its face, it gives effect to the plain meaning. Slattum, 173 Wn. App. at 649.

Digerolamo asserts the term DNA testing should be interpreted broadly to include amylase testing. He contends this would meet the statutory goal of using technology to free innocent people. However, because the term DNA testing is unambiguous, this court declines to hold RCW 10.73.170 authorizes amylase testing.

RCW 10.73.170 is titled "DNA testing requests" and provides "[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," but does not define DNA testing. RCW 1073.170(1). Because the statute does not define the term in

dispute, the court looks to dictionary definitions. Merriam-Webster's defines DNA test as a "test that examines DNA and that is used to identify someone or show that people are relatives." MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/DNA%20test [https://perma.cc/7PY4-YNJA]. Webster's Third New International Dictionary defines DNA as "any various nucleic acids that yield deoxyribose as one product of hydrolysis, are found in the cell nuclei and especially genes, and are associated with the transmission of genetic information." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 604 (2002). Similarly, Black's Law Dictionary defines DNA as "[d]eoxyribonucleic acid; the double-helix structure in cell nuclei that carries the genetic information of most living organisms." BLACK'S LAW DICTIONARY 584 (10th ed. 2014). As the definitions of DNA are uniform, the terms DNA and DNA testing are unambiguous because they cannot be reasonably interpreted in more than one way. Because the term DNA testing is unambiguous, this court must give effect to the term's plain meaning. The plain meaning of DNA testing is testing to identify the source of a DNA sample. Here, the amylase samples on the victim's perineal area and underwear have already undergone DNA testing and have identified Digerolamo as the source. The testing Digerolamo seeks would only determine whether the amylase came from Digerolamo's saliva or pancreas, as opposed to discovering the identity of the sample. As a result, this testing falls outside the scope of RCW 10.73.170 and

thus we affirm the trial court's denial of Digerolamo's motion for post-conviction DNA testing.

Substantive Requirement of RCW 10.73.170

The State claims, even if RCW 10.73.170 authorizes amylase testing, Digerolamo fails to meet the statute's substantive requirement. Digerolamo contends proof the amylase came from his pancreas demonstrates his innocence on a more probable than not basis. Again, we agree with the State.

A. Standard of Review

Appellate courts review a trial court's application of a statutory standard for an abuse of discretion. Riofta, 166 Wn.2d at 370 (citing State v. Hardesty, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996)). "A trial court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds." State v. Thompson, 173 Wn.2d 865, 870, 271 P.3d 204 (2012) (citing State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009)). A trial court bases its decision on untenable grounds "if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." Thompson, 173 Wn.2d at 870 (internal quotations and citations omitted).

B. Analysis

If a defendant meets RCW 10.73.170's procedural requirements, a trial court must grant the post-conviction DNA testing if he or she has also shown the "'likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.'" Riofta, 166 Wn.2d at 364 (citing RCW 10.73.170(3)).

A court must "grant a motion for postconviction testing when exculpatory results would, *in combination with the other evidence*, raise a reasonable probability the petitioner was not the perpetrator." Riofta, 166 Wn.2d at 367–68; see also State v. Crumpton, 181 Wn.2d 252, 262 332 P.3d 448 (2014) (stating "[the trial court] must focus on the likelihood that DNA evidence could demonstrate the individual's innocence in spite of the multitude of other evidence against them") (citation omitted). Our Supreme Court has noted DNA testing should be granted if a reported assault has only one perpetrator, because, even if other strong evidence exists, a DNA result that does not match the convicted person most likely demonstrates innocence. Crumpton, 181 Wn.2d at 260.

A trial court "presume[s] that the DNA evidence would be favorable" to the requesting party. Crumpton, 181 Wn.2d at 258. However, "neither our Supreme Court nor this court has held that a petitioner is entitled to additional inferences in his favor beyond the assumption of a favorable DNA test result." Braa, 2 Wn.App.2d at 521. As such, even with courts presuming favorable results, the "substantive standard is onerous" and those requesting post-conviction testing "face a heavy burden." Riofta, 166 Wn.2d at 367, 369–70 (citations omitted). The substantive standard is more stringent because defendants requesting post-conviction testing do "not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process . . ." Herrera v. Collins, 506 U.S. 390, 399–400 (1993). Moreover, our courts want "to avoid

overburdening labs or wasting state resources without good reason." Crumpton, 181 Wn.2d at 261.

Digerolamo maintains he meets the substantive requirement's heavy burden. He asserts the pancreatic amylase would demonstrate a likelihood he is innocent of second degree rape because it would show the amylase samples from the victim's rape kit came from Digerolamo's wet vomit.

Proof the amylase came from Digerolamo's pancreas would benefit him because it would make his "vomit-transfer" theory more likely. However, other theories could also explain the presence of pancreatic amylase on the victim. As the State points out in its briefing, "even if Digerolamo had vomited on the night in question, both salivary and pancreatic amylase would likely be present in his mouth when he sexually assaulted the victim." Though the court presumes the testing will be favorable to Digerolamo in that it will be pancreatic amylase, he is not entitled to a further inference as to how the pancreatic amylase got onto the victim. See Braa, 2 Wn.App.2d at 521.

As such, the trial court properly exercised its discretion to find a favorable amylase test would not demonstrate Digerolamo's innocence on a more probable than not basis. Here, there was only one alleged perpetrator and the DNA evidence matched Digerolamo. While Digerolamo points out his DNA is the only forensic evidence linking him to the crime and the victim has limited memory of the night, it is not likely favorable test results would demonstrate his innocence in spite of the other evidence against him. In particular, the victim stated she was

sexually assaulted and the rape kit found Digerolamo's DNA on the victim and her underwear.

Affirmed.

Chun, J.

WE CONCUR:

Schindler, J.

Leach, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76852-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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