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NO. 60823-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO GARCIA-SALGADO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON
THE HONORABLE RICHARD JONES

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

CrR 4.7 authorizes the taking of samples from the defendant's body upon motion by the prosecuting attorney, authorized by a court. The State moved to collect a cheek swab from the defendant to identify his DNA for comparison to genetic material found on the 11-year-old rape victim's clothing, and the court ordered the collection of such a sample. Did the trial court properly order the collection of the sample under CrR 4.7 and properly admit the resulting evidence at trial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Alejandro Garcia-Salgado, was charged in King County Superior Court with Rape of a Child in the First Degree, for his rape of 11-year-old P.H. on November 25, 2006. CP 1. He was also charged with a Violation of the Uniform Controlled Substances Act, possession of cocaine, for the cocaine discovered in his pocket during a search incident to arrest on the same day. CP 1-2. The State filed a sworn Certification for Determination of Probable Cause at the time of filing to support these charges. CP 3-4.

Prior to trial, the State made a motion for discovery, requesting an order requiring Garcia-Salgado to provide a cheek swab for DNA testing.¹ Supp. CP ____ (sub no. 28, Order Continuing Trial); 1RP 2.² The motion to continue the trial date was granted, but the motion requesting a DNA sample was set over. 1RP 2.

Four days later, the same judge heard the State's motion to collect a DNA sample from Garcia-Salgado. Supp. CP ____ (sub no. 29, Original Court Minutes); 1RP 2. At that hearing, the State briefly reviewed the information presented at the prior hearing as to why it was seeking a DNA sample from Garcia-Salgado. 1RP 2-3. In summary, the State had obtained the rape kit collected from the victim on the day of the rape. 1RP 2. Presumptive tests were

¹ The transcript of the March 23, 2007 hearing has not been provided by the appellant, despite the fact that it is clear from the Order Continuing Trial and the transcript of the next hearing (which took place on March 27, 2007) that the matter was at least raised at this earlier hearing. Supp. CP ____ (sub no. 28); 1RP 2.

² The Verbatim Report of Proceedings for this case contains eight volumes of transcripts, which will be referenced as follows:

- 1RP = March 27, 2007 (Judge Robinson)
- 2RP = September 11, 2007 (Judge Jones)
- 3RP = September 12, 2007 (Judge Jones)
- 4RP = September 19, 2007 (Judge Jones)
- 5RP = September 20, 2007 (Judge Jones)
- 6RP = September 25, 2007 (Judge Jones)
- 7RP = September 26, 2007 (Judge Jones)
- 8RP = October 26, 2007 (Judge Jones, Sentencing).

performed by the forensic scientists at the crime lab and determined that genetic material was present. 1RP 4-5. The State sought to compare the genetic material found on the evidence submitted to the crime lab with Garcia-Salgado's DNA to determine whether it matched. 1RP 2, 4-5.

Garcia-Salgado's attorney objected on the basis that it was an "unreasonable intrusion of his privacy and his person" because according to the doctor who examined the victim, there was "no actual physical evidence of penile-vaginal penetration." 1RP 3. After the prosecutor noted that DNA could be present even in the absence of actual penetration, the court overruled the objection and signed the order allowing the sample to be taken. 1RP 4-5; CP 6. The case detective took a cheek swab from Garcia-Salgado in the court's presence immediately following the order. 1RP 5-7.

After a number of unrelated continuances of the trial date, and a substitution of defense counsel, the case was assigned to Judge Richard Jones for trial. 2RP 1. Prior to trial, Garcia-Salgado pled guilty to the VUCSA charge. CP 19-36. A jury found Garcia-Salgado guilty of Rape of a Child in the First Degree as charged. CP 61A.

The trial court sentenced Garcia-Salgado to an indeterminate sentence of 110 months to life on the rape charge. CP 94-106. This appeal followed.³ CP 107-20.

2. SUBSTANTIVE FACTS

In November, 2006, 11-year-old P.H. lived at home in Auburn, Washington with her mother (Joylene Simmons), two brothers, her younger sister Selena, and an older sister (Rachael Jerry). 4RP 28-29. Jerry's boyfriend, Pablo Cruz-Guzman, also lived with them in the home, along with their two young children. 5RP 62-63; 6RP 30. A neighbor boy, 13-year-old Cyrus Ayers, also stayed with them at the house during this time. 6RP 15-17.

On the day after Thanksgiving, November 25, 2006, a number of people were present at the home visiting with Jerry and Cruz-Guzman, including the defendant, Alejandro Garcia-Salgado. 5RP 64-65; 6RP 16-17, 31-33. Although Simmons prohibited drinking in the home, most of the guests were hanging out in the garage area drinking beer after she went to bed. 5RP 65; 6RP 33-34, 55-56.

³ Garcia-Salgado does not challenge any portion of his plea or sentence on the VUCSA charge, he only challenges the validity of his rape conviction.

At one point, Cruz-Guzman and two others left the home to buy more beer, and Garcia-Salgado remained at the house, waiting in the living room. 5RP 69. While they were gone, Jerry heard Garcia-Salgado talking on his cell phone and then thought he left the house, so she went into her bedroom to be with her children. 6RP 33, 48. Meanwhile, Ayers had fallen asleep on the living room couch. 6RP 17. P.H. had earlier gone to bed in her brother's bedroom⁴ on an upper floor near Simmons' room. 6RP 57-58.

A short time after she had fallen asleep, P.H. was awakened by the sound and sight of Garcia-Salgado entering the bedroom. 6RP 58. She recognized him when she saw him flip open his cellphone, illuminating the backlight enough to see in the darkened room. 6RP 58-59. Without speaking, Garcia-Salgado approached P.H. on the bed, removed her pajama pants, took off his own pants, and got on top of her, under the blanket. 6RP 60-62.

P.H. was "too scared" to speak or cry out. Garcia-Salgado started "going up and down" on top of her, putting his "private part" on her "private spot" for approximately 10 minutes. 6RP 61-63.

⁴ Her brother was not present at the house at the time, and P.H. often slept in his room alone. 6RP 41. On the night of the rape, P.H. was in the room alone before Garcia-Salgado entered. 6RP 59.

P.H. felt it hurting her, but was still too afraid to cry out or to talk. 6RP 62-63. Finally, Garcia-Salgado finished, pulled up his pants, and left the room. 6RP 63, 66.

P.H. waited a few minutes, until she thought Garcia-Salgado had left the house. 6RP 67. She immediately found Ayers, woke him up and -- through tears -- told him about the rape. 6RP 69. Ayers and P.H. then told Jerry what happened, and she immediately woke Simmons. Simmons then called the police. 4RP 38-40; 6RP 34-36.

Before police arrived at the house, Cruz-Guzman returned from the store. Jerry immediately told him what happened. As they talked in front of the house, Cruz-Guzman saw Garcia-Salgado try to exit the garage through a window. Cruz-Guzman and another guest grabbed Garcia-Salgado by the neck, pulled him the rest of the way through the window, and subdued him until police arrived. 5RP 72-74; 6RP 36-39. Garcia-Salgado continued to struggle with police when they arrived, but they eventually placed him under arrest. 4RP 82-84. During a search incident to his arrest, police discovered cocaine in Garcia-Salgado's wallet. CP 4, 30.

While detained at the Auburn Jail, Garcia-Salgado waived his Miranda⁵ rights and agreed to speak with Auburn Police Officer Raphael Sermeno. 4RP 147-50. Garcia-Salgado said he arrived at the house at about 8 or 9 p.m. Garcia-Salgado admitted to knowing P.H, who he called the "young Indian girl," or "Indian short thing," for about two years. 4RP 160. He said he had been drinking with Cruz-Guzman and the others and that he fell asleep on the couch when the others went to the store. 4RP 161. The next thing he remembered was waking up in a bedroom on a bed. 4RP 161.

Garcia-Salgado claimed that he woke up suddenly because P.H. was hugging him, as they lay on the bed facing one another. He said he had his clothes on, but did not remember if P.H. was clothed or not. He admitted to kissing her two times on the lips, but said he "did not kiss her passionately" or "stick [his] tongue in her mouth." He denied having sex with her. 4RP 162-64.

Later that night, Simmons took P.H. to Mary Bridge Hospital for a sexual assault examination. 4RP 46. As part of the examination, nurses packaged P.H.'s clothing (pajama top and

⁵ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

bottoms and underpants) and took swabs from her vaginal and anal areas, and turned the entire "rape kit" examination over to the police. 6RP 7-9.

These items were submitted for DNA testing and comparison. A mixed sample of DNA was found on P.H.'s underpants. The female component of the sample matched P.H.'s DNA profile, and the male component matched Garcia-Salgado's DNA profile. 5RP 146-49. P.H.'s shirt also contained semen with a DNA profile that matched Garcia-Salgado's DNA profile. 5RP 150-53. The estimated probability of selecting an unrelated individual at random from the United States population with a matching profile was 1 in 13 trillion. 5RP 149, 53.

Garcia-Salgado did not testify at trial.

C. ARGUMENT

THE TRIAL COURT PROPERLY GRANTED THE STATE'S PRE-TRIAL REQUEST TO COMPEL THE DEFENDANT TO SUBMIT A DNA SAMPLE AND PROPERLY ADMITTED EVIDENCE OBTAINED AS A RESULT OF THAT ORDER.

Garcia-Salgado challenges the collection of his saliva from a court-ordered cheek swab on the basis that it was a "warrantless search" and argues that the evidence obtained as a result of that

"search" should have been suppressed at trial. Br. App. at 4. This argument should be rejected. CrR 4.7(b)(2)(vi) authorizes a trial court to order the defendant to submit a sample of material from his body as part of the pre-trial discovery process. Based on the facts known to the court, there was probable cause to believe that evidence would be obtained from the sample, and the test was reasonable and non-intrusive.

CrR 4.7(b)(2)(vi) allows the trial court in a criminal case, on motion of the prosecuting attorney or the defendant, to "require or allow" a defendant to:

permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under defendant's fingernails which involve no unreasonable intrusion thereof.

CrR 4.7(b)(2)(vi). Although the rule is subject to constitutional limitations, "a trial court's decisions regarding discovery under CrR 4.7 will not be disturbed absent manifest abuse of discretion." State v. Gregory, 158 Wn.2d 759, 822, 147 P.3d 1201 (2006).

Thus, the determination of historical facts relevant to the establishment of probable cause is subject to the abuse of discretion standard. Gregory, 158 Wn.2d at 822. In contrast, the legal determination of whether that information as a whole amounts

to probable cause is subject to de novo review. Gregory, 158 Wn.2d at 822.

In order to comply with constitutional limitations, an order for a "blood draw" under CrR 4.7 must be supported by probable cause. Gregory, 158 Wn.2d at 822 (citing United States v. Wright, 215 F.3d 1020, 1025 (9th Cir. 2000)). Three requirements must be met for the draw to meet constitutional reasonableness requirements: (1) there must be a "clear indication" that in fact the desired evidence will be found; (2) the chosen test must be reasonable; and (3) it must be performed in a reasonable manner. Gregory, 158 Wn.2d at 822-23 (citing State v. Judge, 100 Wn.2d 706, 711-12, 675 P.2d 219 (1984)).

Garcia-Salgado does not challenge the reasonableness of the cheek swab as a method for collecting a DNA sample, nor does he challenge the reasonableness with which the test was performed. Rather, he argues that the trial court ordered the test based on the State's "hope" that the desired evidence might be obtained and not on any "clear indication" that the search would result in admissible evidence. Br. App. at 8.

This argument is without merit. At the time the court ordered the sample, it had ample information before it supporting the

collection of the biological sample. Garcia-Salgado had been identified as the rapist by the victim and several members of her family, and had been apprehended as he tried to flee the scene. CP 3-4. P.H. claimed to have been vaginally raped during the attack. CP 3. A "rape-kit" examination had been performed on P.H. within hours of the rape. 1RP 2. P.H.'s clothing was tested by forensic scientists at the crime lab and genetic material was found on that clothing. 1RP 4-5. The State was seeking a biological sample of Garcia-Salgado to compare his DNA profile to that evidence. The fact that Garcia-Salgado had been identified as the rapist by the victim certainly provides the "clear indication" that his DNA would match the genetic profile found on the victim's clothing.

Garcia-Salgado cites primarily to the prosecutor's comment that "something" was found on P.H.'s clothing, but that she "couldn't say exactly what at this point in time." 1RP 4-5. He argues that this ambiguity in the prosecutor's remarks somehow amounts to nothing more than a mere "hope" that evidence would be obtained. However, the context of this remark strongly suggests that the only uncertainty at the time of the remark was what *type* of genetic material was found on each piece of clothing (i.e., spermatozoa, ejaculate, pre-ejaculate, saliva or some other genetic material). It

seems clear from the discussion that some kind of genetic material was found, and that further testing was needed to determine whether the DNA profile contained in that material matched Garcia-Salgado's profile.

Moreover, Garcia-Salgado's attempt to frame this pre-trial discovery order as a "warrantless search" applies the incorrect legal framework to this situation. The warrant requirement applies to criminal investigations occurring *prior* to charges being filed in a criminal case. The Washington Supreme Court has previously observed that:

criminal trials and determinations of probable cause play fundamentally different roles in the process of criminal justice. To ensure the protection of individual rights, the judicial determination of probable cause provides a check on *an investigating officer* engaged in the often competitive enterprise of ferreting out crime.

Seattle Times Co. v. Eberharter, 105 Wn.2d 144, 152, 713 P.2d 710 (1986) (emphasis added). Indeed, a search warrant can be issued even though no criminal charge is filed or is ever filed. State v. Goss, 78 Wn. App. 58, 61, 895 P.2d 861 (1995). Thus, the "neutral magistrate" requirement provides a check on police investigation and an added protection to citizens to be free from unreasonable intrusions into their privacy.

Once a criminal charge is filed, however, a trial court has already made a determination of probable cause that a charge is warranted. A criminal defendant has a right to an attorney and the discovery process is regulated by court rule and by impartial trial judges. There is simply no reason to require a "warrant" once a criminal charge is filed: a neutral court has already determined that there is probable cause to believe that the defendant committed this crime, and can regulate discovery to determine whether further requests for discovery are reasonable.

This procedure was followed in this case. No "affidavit" was necessary: to comply with constitutional requirements only a "clear indication" that the requested sample would lead to the desired evidence was required. Gregory, 158 Wn.2d at 822. The Certification for Determination of Probable Cause, supplemented by the representations made by the prosecuting attorney at the motion hearing, was certainly sufficient to provide such a clear indication that desired evidence (i.e., a genetic link of the defendant to the crime scene) would be found.

Moreover, the prosecutor's statements at the March 27, 2007 hearing appear to be an abbreviated summary of information that was presented at a prior hearing. 1RP 2. It is at least

possible, if not likely, that the basis for the motion was provided in greater detail at the earlier hearing. Garcia-Salgado's failure to provide the record of that earlier hearing should be construed against him. RAP 9.2(b) (party seeking review bears the burden to "arrange for transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review"); State v. Thompson, 143 Wn. App. 861, 181 P.3d 858 (2008) (appellant's failure to provide an adequate record for review precludes appellate review of that claim); State v. Rienks, 46 Wn. App. 537, 545, 731 P.2d 1116 (1987) (same).

Because the trial court properly weighed constitutional considerations before ordering the collection of the biological sample as a matter of pretrial discovery, Garcia-Salgado's related claim that he received ineffective assistance of trial counsel should also be rejected. In order to demonstrate ineffective assistance of counsel, a defendant must show (1) that trial counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance

prejudiced the defendant, in that there is a reasonable probability that but for counsel's errors, the outcome of the trial would have been different. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) (citing Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). If the defendant fails to carry his burden on either part of the test, the inquiry need not go further. Hendrickson, 129 Wn.2d at 78.

Here, Garcia-Salgado cannot demonstrate deficient performance or prejudice. The attorney representing him at the time of the motion hearing objected to the collection of the sample and was overruled. 1RP 3, 5. Garcia-Salgado's subsequent attorney had no basis for moving to suppress the evidence obtained pursuant to court order. Even if his trial attorney had made a motion to suppress the evidence, it would have been denied because there was probable cause to believe the desired evidence would be discovered at the time the order was signed. Garcia-Salgado's ineffective assistance of counsel claim must be rejected.

D. CONCLUSION

For the foregoing reasons, this Court should reject Garcia-Salgado's challenge and affirm his conviction for Rape of a Child in the First Degree.

DATED this 20th day of October, 2008.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory C. Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ALEJANDRO GARCIA-SALGADO, Cause No. 60823-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

Date
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