

No. 92816-9

NO. 72478-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re Personal Restraint Petition of

SIONE P. LUI,

Petitioner.

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Division
State of Washington

**STATE'S SUPPLEMENTAL RESPONSE TO
PERSONAL RESTRAINT PETITION**

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DEBORAH A. DWYER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. SUPPLEMENTAL ISSUES

1. Whether Lui has failed to show the required nexus between the purported "other suspect" (Alessandro Biagi) and the murder of Elaina Boussiacos.

2. Whether, in light of the fact that evidence of the purported "other suspect" does not meet the requisite standard for admissibility, Lui has failed to show that newly discovered evidence (a drop of blood belonging to Biagi that was found on the stick shift boot in Boussiacos's car) would probably change the outcome of his trial.

B. STATEMENT OF THE CASE¹

Sione Lui and Elaina Boussiacos had "a turbulent relationship, marked by mistrust and infidelity." State v. Lui, 179 Wn.2d 457, 463, 315 P.3d 493, *cert. denied*, 134 S. Ct. 2842 (2014). Boussiacos had told her mother that she planned to call off the engagement. Id. In February of 2001, Boussiacos was scheduled to fly to her mother's home in California for a visit. Id. After spending the night before this planned trip with Lui in their shared home, Boussiacos was never seen alive again. Id. at

¹ A detailed factual statement is contained in Appendix B to the State's Response to Personal Restraint Petition (filed in the Washington Supreme Court on April 20, 2011).

463-64. Her body was discovered a week later in the trunk of her car, which was parked in the parking lot of a nearby health club that she frequented. Id. at 464. The cause of death was strangulation. Id. at 465. Extensive circumstantial evidence pointed to Lui as the murderer. See State's Response to Personal Restraint Petition, Appendix B (filed in the Washington Supreme Court on April 20, 2011).

A jury convicted Lui of second degree murder. Id. at 464, 466. The conviction was affirmed on appeal. 153 Wn. App. 304, 221 P.3d 948 (2009), *aff'd*, 179 Wn.2d 457, 315 P.3d 493, *cert. denied*, 134 S. Ct. 2842 (2014).

C. ARGUMENT

1. LUI CANNOT SHOW THE REQUIRED NEXUS BETWEEN THE PURPORTED "OTHER SUSPECT" AND THE MURDER OF ELAINA BOUSSIACOS.

In arguing that newly discovered evidence of an alleged "other suspect" in the murder of Elaina Boussiacos would likely change the result of his trial, Lui assumes that evidence of this "other suspect" (Alessandro Biagi) would be admissible at a new trial. Supplement to PRP at 7. This assumption is without foundation. Evidence of an "other suspect" will not be admitted

absent a showing of a nexus between the "other suspect" and the crime. There is no such nexus here.

a. Relevant Facts.

Police found a bloodstain on the stick shift "skirt" (boot) of Elaina Boussiacos's car. Ex. B to App. 1 of Supplement to PRP (hereinafter "Ex. B"); Ex. E to App. 1 of Supplement to PRP (hereinafter "Ex. E") at 12-13. Several years after the trial in this case, the Washington State Patrol Crime Laboratory was able to declare a "match" between DNA obtained from this stain and Sandro M. Enciso (name later changed to Alessandro Biagi). Ex. B; Ex. E at 1, 12-13, 18.

Biagi lived in the Seattle/Everett area around the time of Boussiacos's murder. Ex. E at 2-4. His work focused mainly on cars. While working as a salesman at a Chevrolet dealership in Everett, Biagi would sometimes get a "beater" in trade; he would wash and detail the car, and then sell it. Ex. 4-5, 7. When shown a photo of Boussiacos's 1994 Nissan Stanza four-door sedan, Biagi was certain that he had not sold that particular car. Ex. E at 8. Biagi did not think that he had never seen the car. Ex. E at 8.

In February of 2001, Biagi had his own auto detailing business in Seattle ("Ravenna Auto Detail"); he detailed cars for an

auto dealership ("Auto Mart") on Lake City Way. Ex. E at 9, 15-16, 24-28. He also replaced windshields for a brief period as part of a training program at a technical school in Kirkland. Ex. E at 17.

When shown a picture of Elaina Boussiacos, Biagi was certain that he had seen her somewhere, although he did not recognize her name and could not recall how he knew her. Ex. E at 8-9, 11, 31-32. As to Lui, Biagi recognized neither his picture nor his name. Ex. E at 8, 11-12.

b. Lack Of Nexus.

A criminal defendant has a right under both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution to present testimony in his own defense. The right is not absolute, however; a defendant has no right to have irrelevant evidence admitted. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996).

Washington law on the admission of "other suspect" evidence is clear:

While evidence tending to show that another party may have committed the crime may be admissible, before such testimony can be received there must be such proof of connection . . . or circumstances as tend

clearly to point out someone besides the one charged as the guilty party.

State v. Russell, 125 Wn.2d 24, 75, 882 P.2d 747 (1994) (quoting State v. Kwan, 174 Wash. 528, 532-33, 25 P.2d 104 (1933)). In other words, the evidence must establish a *nexus* between the other suspect and the crime. State v. Mezquia, 129 Wn. App. 118, 124, 118 P.3d 378 (2005), *review denied*, 163 Wn.2d 1046 (2008).

Remote acts, disconnected and outside the crime itself, are not admissible for the purpose of showing that someone else committed the charged crime. State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932). "Other suspect" evidence that establishes only a *suspicion* that someone else committed the crime is not admissible. State v. Franklin, 180 Wn.2d 371, 380, 325 P.3d 159 (2014). "The *Downs* test in essence has not changed: some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." Franklin, 180 Wn.2d at 381.

The defendant has the burden of showing that the "other suspect" evidence is admissible. Mezquia, 129 Wn. App. at 124.

Lui cannot meet the standard for admissibility here. He proffers neither a motive on Biagi's part to murder Elaina

Boussiacos, nor any evidence that Biagi had the ability or the opportunity to do so at the relevant time. Cf. Franklin, 180 Wn.2d at 383 (noting that defendant had shown that the "other suspect" had the motive, ability and opportunity to commit the charged crime).

The decision in State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022 (1993), offers a useful comparison. In that case, the defendant, charged with murdering her husband, sought to introduce evidence that her stepson could have been the killer. Id. at 159, 160. She proffered evidence that father and son had quarreled, that the son might benefit financially if his stepmother were convicted, that the son knew where the murder weapon was kept, and that the son had been absent without explanation from work on the morning of the murder. Id. at 160-61. The trial court nevertheless refused to allow the "other suspect" evidence because the defense could produce nothing to show that the son was anywhere near the murder scene on the day of the crime. Id. at 161.

The Court of Appeals affirmed. Id. at 166. The court noted that, while the son *could* have traveled to the murder scene, there was no evidence that he *did*. Id. at 163. "Not only must there be a

showing that the third party had the ability to place him- or herself at the scene of the crime, *there also must be some step taken by the third party that indicates an intention to act on that ability.*" Id. (italics added). Concluding that the theory that the son could have been the murderer was "unsupported" and "nothing more than speculation," the appellate court held that the trial court "properly excluded the evidence as irrelevant and lacking in foundation." Id.

Similarly, here, there was no showing that Biagi was anywhere near Boussiacos's home, or the parking lot where her body was found, around the time of the murder. There was no evidence of *any action* taken by Biagi that connected him with Boussiacos's murder. As in Rehak, there is nothing but speculation to support Lui's "other suspect" theory. Speculation is not enough. If offered at a new trial, this "other suspect" evidence would certainly be excluded.

2. LUI HAS FAILED TO SHOW THAT THE NEWLY DISCOVERED EVIDENCE WOULD PROBABLY CHANGE THE RESULT OF HIS TRIAL.

Because the "other suspect" evidence would not be admitted at any new trial, Lui cannot show that it would probably change the outcome. Even assuming that the evidence *would* be admitted at a new trial, Lui cannot make the requisite showing.

A new trial will not be granted on the basis of newly discovered evidence unless the defendant demonstrates that the evidence: 1) will probably change the result of the trial; 2) was discovered since the trial; 3) could not have been discovered before trial by the exercise of due diligence; 4) is material; and 5) is not merely cumulative or impeaching. State v. Williams, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981). The absence of any one of these factors is grounds for denial of a new trial. Id. at 223.

Lui cannot show that his proffered "other suspect" evidence would probably change the result of his trial. Since the evidence does not meet the relevant standard for admissibility, it could not possibly play any part in a jury's decision, and there is no reason to think that a new trial based on the same evidence introduced at the first trial would somehow turn out differently.

Even if the "other suspect" evidence were admitted at a new trial, Lui cannot show a probability that the result would be any different. Alessandro Biagi held a number of jobs in the auto industry in the Seattle area, including auto detailing and windshield replacement. A jury would not find it particularly noteworthy or unusual that a small spot of his blood, deposited at some unknown time, might be found in a car driven in the Seattle area.

Moreover, Boussiacos died by strangulation. There is nothing to suggest that there was any blood involved. This makes it even less likely that the spot of blood on the gear shift boot would have caused a jury to come to a different conclusion at any new trial.

D. CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the State's Response to Personal Restraint Petition filed in the Washington Supreme Court on April 20, 2011, the State respectfully asks this Court to dismiss this personal restraint petition.

DATED this 7th day of January, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Deborah A. Dwyer
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the petitioner,
David Zuckerman, containing a copy of the **State's Supplemental
Response to Personal Restraint Petition**, in **IN RE PERSONAL
RESTRAINT OF SIONE P. LUI**, Cause No. **72478-9-1**, 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

01-07-15