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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	No. 49054-4-II UNPUBLISHED OPINION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.

[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.

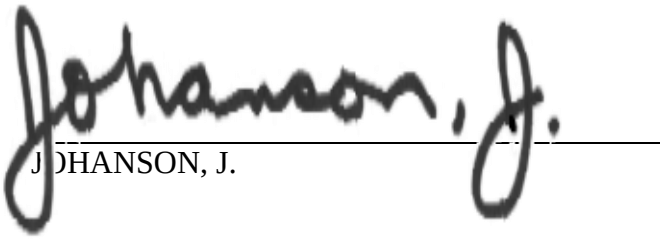
Swagerty also contends that we should not give any weight to the DNA from the victim's clothing. He asserts that that DNA evidence from the underpants was "meaningless" because the only evidence presented to the trial court related to the DNA tests of the underpants was a vague statement about the tests 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.

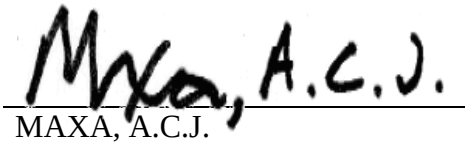
Accordingly, we hold that the trial court did not abuse its discretion when it denied Swagerty's motion and affirm the trial court's denial of Swagerty's motion for postconviction DNA testing.

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.

We concur:



MAXA, A.C.J.

SUTTON, J.