

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 10/02/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

STATE OF ARIZONA, ) 1 CA-CR 12-0082  
)  
Appellee, ) DEPARTMENT A (AUGUST)  
)  
v. ) **MEMORANDUM DECISION**  
)  
PAUL ANDREW PEREZ, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)

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Appeal from the Superior Court in Yavapai County

Cause No. P1300CR201100082

The Honorable Tina R. Ainley, Judge

**AFFIRMED**

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Shelia Sullivan Polk, Yavapai County Attorney Prescott  
By Steven J. Sisneros, Deputy County Attorney  
Attorneys for Appellee

C. Kenneth Ray II, P.C. Prescott  
By C. Kenneth Ray II  
Attorneys for Appellant

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**S W A N N**, Judge

¶1 Paul Andrew Perez pled guilty to sexual assault. He now appeals the superior court's denial of his petition for postconviction DNA testing of spermatozoa found on the victim's

pants. In this case, even if testing showed that the source of the spermatozoa was someone other than Perez, that result would not exclude Perez as the victim's assailant. We therefore affirm the superior court's decision.

#### *FACTS AND PROCEDURAL HISTORY*

¶12 The state charged Perez with two counts of sexual assault, one count of attempted sexual assault, and one count of incest, alleging that Perez engaged or attempted to engage in sexual intercourse with his twenty-year-old first cousin. The state further alleged that Perez committed the offenses while he was on probation for sexual conduct with a minor and had four prior felony convictions.

¶13 During the pretrial phase, investigators identified spermatozoa on the victim's pants. The investigators informed the prosecutor that DNA analysis would require blood samples from both the victim's boyfriend, who was her consensual sex partner, and Perez. The superior court eventually ordered Perez to provide a blood sample for DNA analysis.

¶14 Before the DNA analysis was conducted, defense counsel e-mailed the prosecutor and asked if he knew whose DNA was on the victim's pants. Counsel continued: "If we can settle this before any further analysis, we would be willing to, I think." Counsel then suggested a possible term of imprisonment and stated:

Your case seems to be getting stronger per the analysis thus far but if the DNA match has not been done, maybe you'd be willing to trade a bit of time to unburden the lab a bit. I'll talk to him. I think, right now, he's desperate to save himself a couple of years.

Responding to defense counsel, the prosecutor stated that he did not yet know whose spermatozoa was on the victim's pants and was in the process of obtaining a sample of the boyfriend's blood.

¶15 Perez ultimately agreed to plead guilty to one count of sexual assault. He did so before he provided a blood sample and before the investigators conducted any DNA analysis. The plea agreement provided:

Defendant knowingly, intelligently and voluntarily waives all rights under Arizona Rules of Criminal Procedure, Rule 15.8, as to the disclosure of Scientific Examination results in order to enter this plea agreement. See[] Rivera-Longoria v. Slayton, [225 Ariz. 572, 242 P.3d 171 (App. 2010)]. Therefore, the S[t]ate is not obligated to re-extend these terms upon later completion of any scientific testing relating to this case.<sup>1</sup>

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<sup>1</sup> Ariz. R. Crim. P. 15.8 generally provides for sanctions if the state imposes a plea deadline but does not disclose material information to the defendant at least thirty days prior to the deadline, and the failure to disclose that information materially impacts the defendant's decision to accept or reject the plea offer. Regarding *Rivera-Longoria*, the Arizona Supreme Court later vacated that opinion. See *Rivera-Longoria ex rel. Cnty. of Coconino v. Slayton*, 228 Ariz. 156, 264 P.3d 866 (2011).

¶16 Perez pled guilty to one count of sexual assault and the superior court sentenced him to nine years of imprisonment, the minimum sentence available pursuant to the plea agreement. The court also revoked Perez's probation and sentenced him to 1.5 years of imprisonment for the offense for which he had been placed on probation, to be served before his sentence for sexual assault. The state informed the investigators that the case had been resolved and there was no need to conduct the DNA analysis.

¶17 Almost five months later, Perez filed a petition for postconviction DNA testing pursuant to A.R.S. § 13-4240. Section 13-4240(A) provides that a person convicted of a felony offense may, at any time, request DNA testing of evidence in the control of the state and related to the prosecution that resulted in the conviction. Section 13-4240(B) provides that the court "shall" order DNA testing if: (1) "A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through [DNA] testing"; (2) the evidence still exists and is in a condition that permits testing; and (3) the evidence was not previously subjected to DNA testing or the specific type of testing requested.

¶18 In response to Perez's petition for DNA testing, the state argued that there was no reasonable probability Perez

would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing. The state further argued that Perez was not entitled to postconviction DNA testing because he elected not to complete DNA testing before he pled guilty and because he waived disclosure of any pending DNA tests as part of his plea agreement. The state did not contest that the evidence still existed and had not been tested.

¶9 The superior court denied Perez's petition. The court ruled that Perez failed to establish a reasonable probability that he would not have been prosecuted or convicted if DNA testing had been conducted, because neither the absence of Perez's DNA on the victim's pants nor the presence of some other man's DNA on the victim's pants excluded Perez as the victim's assailant. The court noted that the victim was a twenty-year-old woman involved in a consensual sexual relationship. The court further noted that this was not a case of mistaken identity because the victim not only knew Perez but was related to him.

¶10 Perez appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A), 13-4031 and 13-4033(3).

#### *DISCUSSION*

¶11 DNA testing pursuant to A.R.S. § 13-4240 is a form of postconviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577,

¶ 20, 278 P.3d 1276, 1280 (2012). We review the denial of postconviction relief for abuse of discretion. *Id.* at ¶ 19. Abuse of discretion is “an exercise of discretion which is manifestly unreasonable, exercised on untenable grounds or for untenable reasons.” *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992) (citation omitted). In reviewing an exercise of discretion, “the question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge.” *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985) (citation omitted).

¶12 The trial court did not abuse its discretion when it found there was no reasonable probability that Perez would not have been prosecuted or convicted if additional DNA testing had been conducted. DNA testing that revealed the absence of Perez’s DNA would not have been exculpatory because the absence of his DNA would not exclude him as the assailant. Testing that revealed the presence of the victim’s boyfriend’s DNA would not have been exculpatory because the victim and her boyfriend were involved in a consensual sexual relationship. Testing that revealed the presence of DNA of a third male might have been favorable. But it would not be exculpatory because it would not

exclude Perez as the victim's assailant at the time of the incident, and the victim was a sexually active adult woman. The state informed the trial court that under the circumstances of this case, it was prepared to proceed to trial regardless of the results of any DNA testing.

¶13 Further, the victim and Perez were first cousins who had known each other for years. They had spent much of the day of the incident together at a family gathering. The victim went to sleep, then awoke to find Perez on top of her. The victim asked Perez what he was doing, and Perez spoke to her. At some point during the encounter, he penetrated her vaginally. The victim was not a child who might not recognize her own cousin or might mistake the nature of what he was doing to her. There is no evidence that she could not clearly see her assailant's face or recognize his voice when he spoke to her, or that she was under the influence of alcohol or drugs.

¶14 Under the totality of the circumstances presented in this case, the trial court did not abuse its discretion when it denied the petition for postconviction DNA testing. Because the trial court did not abuse its discretion when it denied the petition, we need not address whether Perez waived his right to seek postconviction DNA testing.

CONCLUSION

¶15 Because we find no error, we affirm the superior court's decision.

/s/

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PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

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PATRICIA A. OROZCO, Judge

/s/

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MARGARET H. DOWNIE, Judge