IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CECIL LARCEL MORTON, a/k/a CECIL LARCEL MORTIN, III, Appellant.	No. 37511-7-II UNPUBLISHED OPINION

Worswick, J — Cecil Morton appeals the trial court's order denying his motion for post-conviction DNA testing related to his first degree rape convictions. We affirm.

FACTS

On February 18, 1994, Morton and several other individuals were driving around.[1] They eventually came across J.H., a 17-year-old girl who was five months pregnant. Morton and the others decided to rape her. Morton stopped and he and two others forced her into the car. Morton then drove to an area where they took J.H. into the woods. Once there, they ordered her to undress. Five or six of them, including Morton, raped her vaginally, orally, or both. Upon leaving the woods, the men ordered J.H. to get back into the car.

Morton then drove to J.H.'s apartment, where two of the men raped her again. When they left, J.H. called a friend, who called the police. Soon thereafter, Pierce County Sheriff's

[1] We derive the facts mainly from Morton's personal restraint petition that is a part of the record on appeal. The original trial court record is not a part of the record.

deputies stopped Morton for driving with defective equipment. The deputies noticed a machete in the car, so they searched for more weapons and found another weapon, video games, J.H.'s identification card and other items. Because the deputies were not yet aware of the rapes, they released Morton and the others.

Later that day, one of the deputies located and arrested Morton. Morton told a detective that the others raped J.H. and that all he did was steal some of her property.

The State charged Morton with conspiracy to commit first degree murder, first degree kidnapping, three counts of first degree rape, first degree robbery, and first degree burglary. A jury heard the matter.

At trial, two of the individuals in the car with Morton testified for the State, and Morton testified in his own defense. Both of those individuals testified that Morton was the first person to have vaginal intercourse with J.H. One of them also testified that Morton used a condom.

Charles Solomon, a Washington State Patrol Crime Laboratory forensic scientist, testified regarding his examination of saliva and vaginal samples taken from the victim. Solomon stated that because of a natural flushing action during intercourse and fellatio, vaginal and oral samples would only reveal the semen of the last perpetrator and that it would be very unlikely to find semen of the first perpetrator. When asked why the crime laboratory did not conduct enzyme typing or DNA testing, Solomon explained that enzyme typing does not produce good results in the case of multiple "donors" and that the State deemed DNA testing too expensive and not likely to produce good results because of the multiple perpetrators.

The jury convicted Morton of first degree robbery, first degree burglary, and three counts

of first degree rape with a deadly weapon. The trial court imposed a 60-year sentence. In 1998, we affirmed Morton's conviction.

In 1999, the trial court granted Morton's motion to allow access to evidence for DNA testing purposes. Morton, however, never conducted the DNA testing. And in 2000, we denied his personal restraint petition, in which he argued that he received ineffective assistance of counsel because had his counsel pursued DNA testing, the results would have conclusively established that Morton did not have sexual intercourse with J.H.

In late 2004, Morton sent a request for post-conviction DNA testing to the Pierce County prosecutor, as provided under former RCW 10.73.170 (2003). The prosecutor denied the request in June 2005. Morton then filed an appeal with the Attorney General's Office. During this time, RCW 10.73.170 was amended significantly to require that such DNA testing requests be submitted to the trial court. In light of this change, the Attorney General's Office refused to consider Morton's request.

On October 9, 2007, Morton filed the motion for post-conviction DNA testing at issue in this appeal. Along with his motion, he provided declarations from other forensic experts discounting Solomon's testimony that flushing would have limited the value of any DNA testing in this case. The trial court heard the matter on February 22, 2008, and entered an order denying Morton's motion for post-conviction DNA testing on March 24. It stated in relevant part:

> Under RCW 10.73.170, the defendant bears the burden of establishing DNA evidence would provide significant new information. If he meets that burden, the defendant must then prove the DNA evidence would demonstrate his innocence on a more probable than not basis. Assuming the defendant has met his first burden, he cannot meet the second. Most of the arguments made by the defendant in this motion suggest DNA testing could have made the result at trial different than it was. That is not the standard for post-conviction DNA testing.

> The defendant must prove DNA evidence that will establish his actual innocence per case law. Under the particular facts of this case, a gang rape committed by multiple perpetrators acting as both principals and accomplices to each other, the absence of a particular defendant's DNA markers does not exonerate him. (Two of the defendant's three rape convictions are specifically based on his complicity with another person who engaged the victim in forced sexual intercourse.) As such, the defendant has not met his [burden] proving his actual innocence, and he does not qualify for post-conviction DNA testing under RCW 10.73.170.

Clerk's Papers (CP) at 249-50. Morton appeals.[2]

ANALYSIS

Morton contends that the trial court committed reversible error when it denied his motion for post-conviction DNA testing under RCW 10.73.170. We disagree and hold that Morton has not met the substantive requirements of the statute.

The post-conviction DNA testing statute imposes three requirements, some substantive and some procedural:

> (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.

[2] We initially stayed Morton's appeal pending the issuance of our Supreme Court's opinion in *State v. Riofta*, 166 Wn.2d 358, 209 P.3d 467 (2009).

RCW 10.73.170; *see State v. Riofta*, 166 Wn.2d 358, 363, 209 P.3d 467 (2009). We review the trial court's application of the statutory standard for an abuse of discretion. *Riofta*, 166 Wn.2d at 368. A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

We first address whether Morton met the procedural requirements of the statute.[3] *Riofta*, 166 Wn.2d at 365; *State v. Gray*, 151 Wn. App. 762, 768-69, 215 P.3d 961 (2009). RCW 10.73.170(2)(a) and (b) are both procedural requirements. *Riofta*, 166 Wn.2d at 364. He argued in his request for relief below that he fulfilled the procedural requirements under RCW 10.73.170(2)(a)-(b). He contends the same in his appeal before us. The State counters that it is unclear from the record whether he can meet the statute's minimal procedural requirements.

The statute's procedural requirements are lenient ones. *Riofta*, 166 Wn.2d at 367. The *Riofta* court held that "the statutory language, 'significant new information,' includes DNA test results that did not exist at the time of trial and that are material to the perpetrator's identity, regardless of whether DNA testing could have been performed at trial." 166 Wn.2d at 361. Because DNA testing was not done prior to trial, such results would certainly constitute "significant new information." And as for materiality, any results would add weight to or discredit Morton's assertion that he did not actually rape J.H. along with the others. Thus, Morton has met the statute's minimal procedural requirements.

[3] The trial court did not explicitly determine whether Morton met the procedural requirements to bring his request for post-conviction DNA testing. Instead, the trial court stated in its order that "assuming [Morton] has met his [procedural requirements], he cannot meet the [substantive requirements]." CP at 249.

The next question is whether Morton met the substantive requirements of the statute. RCW 10.73.170(3) requires the convicted person to demonstrate innocence on a more probable than not basis.[4] *Riofta*, 166 Wn.2d at 367. RCW 10.73.170(3) sets an extremely high bar for the appellant. *Riofta*, 166 Wn.2d at 367. We must make this determination in light of all the evidence presented at trial or newly discovered. *Riofta*, 166 Wn.2d at 367-68.

Morton essentially asserts that DNA evidence, if it were to identify the other perpetrators but not him, would show that he did not rape J.H. Assuming DNA tests are conducted and the results are favorable to Morton in this way, overwhelming evidence of his guilt still remains. This is not a case where one perpetrator raped the victim and DNA testing could identify an unknown perpetrator instead of Morton; this case involved multiple perpetrators. And two of Morton's three rape convictions were based on accomplice liability.

There was testimony at the trial that Morton participated and that he used a condom. He admitted he was at the scene and others testified he was there, including J.H. And even though he presented affidavits from other forensic experts discounting Solomon's testimony that flushing was likely to limit the availability of good DNA evidence, that does not discount the other evidence of Morton's guilt.[5] Thus, his argument fails. He has not demonstrated his innocence on

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[4] Morton asserts that the trial court applied the incorrect standard in its analysis when the trial court stated that he could not show "actual innocence." Appellant's Br. 17. While the correct language is "innocence on a more probable than not basis," the record makes clear that the trial court understood the requisite standard and made its determination accordingly. RCW 10.73.170(3).

[5] Morton also argues pro se in his Statement of Additional Grounds (SAG) that the declarations of these other experts discredit Solomon's testimony. Morton's SAG fails to raise any additional grounds for relief not addressed on direct appeal. Thus, we do not consider his SAG. RAP 10.10(a).

a more probable than not basis.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

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Worswick, J.

We concur:

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Armstrong, J.

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Penoyar, A.C.J.