IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID RIGGINS aka Dawud Malik, Appellant.	)))))))))	No. 67462-5-I DIVISION ONE UNPUBLISHED OPINION FILED: September 24, 2012

Schindler, J. — In 1966, a jury convicted David Riggins[1] of two counts of murder, four counts of robbery, and one count of first degree assault. In 2010, Riggins filed a motion to conduct DNA[2] testing and produce exculpatory evidence. Riggins contends the court erred in failing to rule on his request for exculpatory evidence. The State concedes that the court did not rule on the motion but argues remand is unnecessary. We accept the State's concession. But because the request is without merit, we conclude remand is unnecessary.

FACTS

In 1966, a jury convicted Riggins and his codefendant Leodis Smith of two counts of first degree murder of Edwin Hutton and Reva Krimsky; four counts of robbery

[1] Riggins is also known as Dawud Malik.

[2] (Deoxyribonucleic acid.)

of Earl Ohlinger, Dennis Hagen, and Simon Krimsky; and one count of assault in the first degree of ten-year-old Phillip Hagen; and he was sentenced to death. The Washington Supreme Court affirmed. State v. Smith, 74 Wn.2d 744, 446 P.2d 571 (1968). In 1972, the United States Supreme Court vacated the death sentence. Smith v. Washington, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972).

In 1998, Riggins obtained Federal Bureau of Investigation (FBI) and Seattle Police Department (SPD) files through a public records request. The FBI documents included a 1966 laboratory report relating to the Krimsky robbery and murder at the Krimsky home. Riggins then filed two successive personal restraint petitions (PRPs).[3]

This court dismissed both PRPs. In the order dismissing the second PRP, we ruled that Riggins did not identify a change in circumstance or law that would justify a different outcome.

In October 2010, Riggins filed a motion in superior court requesting an order for DNA testing under RCW 10.73.170 and an order requiring the state to produce exculpatory evidence. Riggins sought DNA testing on evidence referred to in the FBI and SPD files: hair samples recovered from the crime scene, soil on Riggins' shoes, and the clothing Riggins was wearing when he was arrested. Riggins also asked the court to order the State to produce the prosecutor's file to the court for in camera review "to determine if any prosecution witness has knowledge of any evidence that is possibly exculpatory or favorable to the petitioner," and "the court's determination as to what evidence therein is exculpatory or favorable to the petitioner and that the court order a copy of the aforesaid material not deeded to be exculpatory to be sealed for

[3] The first petition is not in the record.

further review by an appellate court if necessary." Riggins asked the court to identify all exculpatory evidence but specifically requested any evidence showing Riggins did not commit murder, and any evidence indicating another person had committed the murder. Riggins also submitted multiple versions of declarations from Smith in which Smith states that Riggins was not his "crime partner." Riggins argued that if he had he been tried separately, he would have called his codefendant Leodis Smith as a witness to testify that Riggins was innocent.

In November 2010, Riggins submitted a second motion and a writ of mandamus making the same requests. The State responded to Riggins' motion, arguing Riggins was not entitled to DNA testing under the statute or postconviction discovery of the State's file. The State filed a "Supplemental Response to Defendant's Request for Post-Conviction DNA Testing" stating that the evidence Riggins sought to have tested had been destroyed, and provided an affidavit from the employee charged with supervising the King County Superior Court exhibit room. The employee, David Comstock, stated that no evidence from the cases from the 1960s remained in the exhibit room, and that there were no computer records of any exhibits from Riggins' case. The State also provided an affidavit from a SPD homicide detective. The detective stated that the SPD Evidence Unit does not have any evidence related to Riggins because "[p]ursuant to past policy, after the appeals were exhausted the evidence would have been destroyed."

On December 10, 2010, the court entered an order denying Riggins' request for DNA testing. The court found that DNA testing was not developed at the time of trial,

but that the evidence had been destroyed. The court concluded there was "no likelihood that the DNA testing requested would demonstrate innocence on a more probable than not basis" as required by RCW 10.73.170. The order did not address the motion to produce the prosecutor's file and conduct an in camera review. Riggins filed another largely duplicative motion on January 3, 2011, which attached some additional supporting materials. Riggins filed a motion to reconsider on January 4, 2011, requesting a hearing regarding the destroyed evidence. The court denied the motion.

ANALYSIS

On appeal, Riggins argues the court erred in failing to address his request that the court conduct an in camera review of the prosecutor's file to identify potentially exculpatory evidence. The State concedes that the court did not rule on his request, but argues that remand is unnecessary because Riggins' request is without merit.

Due process requires the State to disclose material exculpatory evidence. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999). Evidence is material if " 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " Gentry, 137 Wn.2d at 396 (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). The prosecution cannot intentionally "keep[] itself ignorant of matters known to other state agents," but "has no duty to search for exculpatory evidence." Gentry, 137 Wn.2d at 399. The State's obligation to disclose exculpatory evidence continues after the defendant's conviction. Thomas v. Goldsmith, 979 F.2d

746, 749-50 (9th Cir. 1992).

An appellate court has inherent authority to compel postconviction discovery. Gentry, 137 Wn.2d at 391. This power is exercised "only in rare circumstances where the petitioner can demonstrate a substantial likelihood the discovery will lead to evidence that would compel relief under RAP 16.4(c)." Gentry, 137 Wn.2d at 392. In Gentry, the court rejected petitioner's request for discovery because "[h]is requests [did] not allege a specific connection to the legal theories he advances, evidencing only a speculative relationship to his theories." Gentry, 137 Wn.2d at 394.[4]

Here, Riggins does not assert a factual predicate which makes it reasonably likely that the prosecutor's file contains material information. Although the court did not rule on the request to conduct an in camera review and identify exculpatory evidence, the record is clear that Riggins provided no factual predicate making it likely that the file contains information material to his defense. Because Riggins merely speculates about the contents of the State's file, he has not demonstrated a substantial likelihood that discovery would lead to evidence that would compel relief.[5]

The cases Riggins cites address the propriety of in camera review of privileged

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[4] Gentry also discussed several cases that have authorized the appointment of an expert to perform DNA testing:

> [N]one of these cases authorize either discovery such as depositions, or the appointment of investigators or experts to identify or develop grounds for challenging convictions or sentences. They merely allow the defendant to interview known witnesses or to obtain or test existing evidence in the government's possession. They also require a showing there is reason to believe a specific discovery request will support a particular, identified claim for relief.

Gentry, 137 Wn.2d at 392.

[5] While the pleadings for Riggins' PRPs are not in the record, the State argues that "[t]he only information Riggins supplied in support of his discovery motions (the FBI report and police documents) had previously formed the basis of two personal restraint petitions, both of which were ultimately dismissed because Riggins had failed to establish a claim for relief."

records to determine whether the records contained any information material to the defense. See Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006).[6]

In his "Statement of Additional Grounds for Review," Riggins argues that because evidence was destroyed, the court erred in not dismissing the conviction.[7] We disagree.

"[W]e review a trial court's decision on a motion for postconviction DNA testing for abuse of discretion." State v. Thompson, 173 Wn.2d 865, 870, 271 P.3d 204 (2012). "A trial court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds." Thompson, 173 Wn.2d at 870. " '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.' " Thompson, 173 Wn.2d at 870 (quoting State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009)[8]).

In order to be "material exculpatory evidence," the destroyed evidence must "possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994).[9] If the evidence is not "materially exculpatory evidence," failure to

[6] Those cases require a " 'plausible showing' that the information will be both material and favorable to the defense," Gregory, 158 Wn.2d at 791 (quoting Ritchie, 480 U.S. at 58 n.15) (internal quotation marks omitted), and indicate that "mere speculation" that the records contain material evidence is insufficient. Gregory, 158 Wn.2d at 792. Riggins does not meet this standard.

[7] Riggins raised these issues to the trial court in his supplement to his motion for reconsideration.

[8] (Internal quotation marks omitted.)

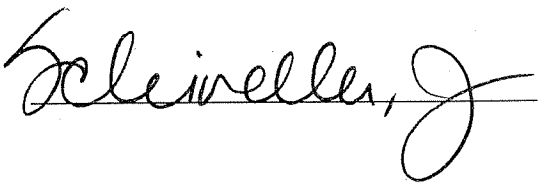
[9] (Emphasis added.)

preserve the evidence does not deny a defendant due process unless the defendant shows that the state acted in bad faith. Wittenbarger, 124 Wn.2d at 477.

Riggins sought DNA testing for: (1) hair samples recovered from the crime scene, (2) soil discovered on Riggins' shoes, and (3) clothing worn by Riggins when he was arrested. Riggins' arguments about why he was entitled to DNA testing are vague and conclusory. Riggins does not show why the absence of his hair from the brush is exculpatory. Riggins does not explain why testing the soil for DNA would exonerate him or implicate someone else as the perpetrator. Riggins merely states that the FBI lab report indicates the shoes "could not have come from the Krimsky crime scene." Riggins also fails to show how DNA testing of the clothes he was wearing would have a reasonable probability of altering the outcome of his trial. Further, there is no evidence of bad faith. The affidavits establish that no evidence was retained from the 1960s, or that the evidence was destroyed pursuant to SPD policy.

Next, Riggins argues that the court should have held an evidentiary hearing to determine the facts surrounding the destruction of the evidence and whether the evidence was actually destroyed. Because the uncontroverted evidence established why the evidence was properly destroyed, the court did not abuse its discretion.

We reject the claim that the conviction should be reversed, and because the request to conduct an in camera review is without merit, remand is unnecessary, and affirm.



WE CONCUR: