IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GREGORY WAYNE CHAPMAN, Appellant.	No. 40708-6-II UNPUBLISHED OPINION

Penoyar, C.J. — Gregory Wayne Chapman appeals the trial court's denial of his motions for new trial and Deoxyribonucleic acid (DNA) testing. He contends that the trial court erred by failing to apply RCW 10.73.170, which addresses DNA test requests, to his motions. We hold that Chapman's motion for a new trial is barred as successive under RCW 10.73.140, and that Chapman fails to meet his burden of showing that DNA evidence would more probably than not establish his innocence as required by RCW 10.73.170. We affirm.

Facts[1]

On September 11, 2001, the State charged Gregory Wayne Chapman with two counts of second degree assault while armed with a deadly weapon and firearm, first degree kidnapping while armed with a firearm, first degree extortion, and second degree unlawful possession of a

[1] The procedural history in this case has been gleaned from prior unpublished decisions addressing Chapman's repeated challenges to his convictions. While our unpublished opinions may not be cited as precedent, GR 14.1(a), we may rely on them for facts established in earlier proceedings in the same case involving the same parties. *State v. Seek*, 109 Wn. App. 876, 878 n.1, 37 P.3d 339 (2002).

firearm. *See State v. Chapman*, noted at 122 Wn. App. 1034, 2004 WL 1616701 at *3; *State v. Chapman*, noted at 135 Wn. App. 1031, 2006 WL 3077738 at *1. The charges stemmed from Chapman's September 5, 2001 assault of Curtis Wilcox, and Chapman's forcing Wilcox to attempt to rob a store. *Chapman*, 2004 WL 1616701 at *1.

At Chapman's subsequent jury trial, Wilcox testified, in part, that on September 5, 2001, Wilcox visited Chapman's apartment and that Chapman pulled a gun from his pocket, pointed it at Wilcox, and threatened to kill Wilcox if he did not pay money that Wilcox allegedly owed to Chapman. *Chapman*, 2004 WL 1616701 at *1. Wilcox testified that Chapman then pulled out two decorative knives, one having a curved blade, and placed the knives point down against each of Wilcox's legs. Wilcox described how Chapman leaned his weight onto the knife pressing into Wilcox's left leg, and that Wilcox felt the knife puncture his leg to the bone. *Chapman*, 2004 WL 1616701 at *2. Other evidence regarding this assault included a photograph of Wilcox's leg wound, and the cut and bloodied jeans that Wilcox was wearing when he was stabbed. *Chapman*, 2004 WL 1616701 at *2. Only the knife with the curved blade had blood on it. *Chapman*, 2004 WL 1616701 at *2. The jury convicted Chapman as charged on November 16, 2001.

Chapman was sentenced on December 3, 2001. At the sentencing hearing, the defense requested a continuance to obtain DNA testing of the blood found on the curved knife. *Chapman*, 2004 WL 1616701 at *4; *Chapman*, 2006 WL 3077738 at *1. DNA results were not available pretrial because of a backlog at the crime lab, and the State informed the trial court that

Chapman, through his prior counsel, had elected to proceed with his speedy trial rather than wait for the DNA results. *Chapman*, 2004 WL 1616701 at *4. The trial court denied the continuance, but told Chapman that, if the DNA results came back indicating that the blood on the knife was not the victim's, Chapman could bring a motion based on newly discovered evidence, which the court could then consider.

Three months after Chapman's sentencing, a forensic scientist in the Washington State Patrol Crime Laboratory DNA tested the blood on the knife used in Chapman's assault of Wilcox. *Chapman*, 2006 WL 3077738 at *1. The scientist concluded that blood on the knife was Chapman's and not Wilcox's. *Chapman*, 2006 WL 3077738 at *1.

On September 16, 2002, Chapman filed a CrR 7.8(b) motion for new trial, based on the new DNA evidence and alleged prosecutorial misconduct. The trial court transferred the motion to this court to be treated as a personal restraint petition (PRP). Chapman, through counsel, also filed a direct appeal of his convictions, and we consolidated his appeal with his PRP. *Chapman*, 2006 WL 3077738 at *1. In his PRP, and in a statement of additional grounds in his direct appeal, Chapman raised the newly discovered DNA evidence issue. *Chapman*, 2004 WL 1616701 at *8. He also argued prosecutorial misconduct and ineffective assistance of counsel.[2] *Chapman*, 2004 WL 1616701 at *9-10.

[2] Chapman argued that he was entitled to a new trial based on newly discovered DNA evidence, which showed that the blood on the curve blade knife was not Wilcox's blood. He also asserted that the prosecutor made improper comments in closing argument by intimating that the blood on the curve blade knife belonged to Wilcox. Chapman also contended that his counsel was ineffective because he failed to DNA test the blood on the curve blade knife prior to trial. *Chapman*, 2004 WL 1616701 at *8-10.

We issued an unpublished opinion on July 20, 2004, denying Chapman's PRP and affirming all but the extortion conviction, which we reversed and remanded based on instructional error. *Chapman*, 2006 WL 3077738 at *1. We specifically addressed the DNA, ineffective assistance, and prosecutorial misconduct issues that Chapman raised, and denied relief. *Chapman*, 2004 WL 1616701 at *8-10.

On remand, the State chose not to retry Chapman for the extortion charge, and the trial court conducted a resentencing hearing. *Chapman*, 2006 WL 3077738 at *1. Chapman again submitted a CrR 7.8 motion for a new trial and again (purportedly) asserted newly discovered DNA evidence, prosecutorial misconduct, and ineffective assistance of counsel. The trial court denied his request for a new trial in a letter opinion without granting an evidentiary hearing.[3] *Chapman*, 2006 WL 3077738 at *1. Chapman appealed, and we affirmed. *Chapman*, 2006 WL 3077738 at *1.

On May 22, 2009, Chapman filed a CrR 7.8(b) motion for relief from judgment in superior court, asserting that his first CrR 7.8(b) motion, which was filed on September 16, 2002, and transferred to the Court of Appeals, should not have been transferred. Therein he argued that the judge who sentenced him should have ruled on his motion because that judge had "promised a new trial if [Chapman] can prove that the blood isn't the victim's." Clerk's Papers (CP) at 19. The motion, again, was premised on the same newly discovered DNA evidence.

[3] Chapman's subsequent petition for discretionary review was denied, as was his petition for writ of certiorari. *See Chapman*, 2006 WL 3077738, *review denied*, 162 Wn.2d 1003, 175 P.3d 1092 (2007), *cert. denied*, *Chapman v. Washington*, 552 U.S. 1317, 128 S. Ct. 1883, 170 L. Ed. 2d 757 (2008) (case below, 2006 WL 3077738, "Petition for writ of certiorari to the Court of Appeals of Washington, Division 2, denied.").

On February 26, 2010, Chapman filed yet another motion, entitled in part, "Request for DNA Testing." CP at 56. The motion requested that it be consolidated with Chapman's earlier (5-22-09) CrR 7.8(b) motion. Therein, however, he contends that the March 13, 2002, DNA test results, showing that the blood on the knife was Chapman's rather than Wilcox's, should be used to impeach Wilcox's testimony at a new trial. He again relied on the trial court's comment at his sentencing hearing when the court denied Chapman's motion for continuance. The sentencing court, noting that Chapman would not be prejudiced by the denial of his motion to continue, said,

> The motion by [defense counsel] to continue the sentencing is denied. Mr. Chapman loses no rights, in my opinion, by conducting the sentencing hearing at this time. If, in fact, the DNA tests come out indicating that the blood on the pants or the blood on the knife is not Mr. Wilcox's, a motion can be brought at that time, as you are well aware, upon newly discovered evidence, and this court can consider it at that time.

CP at 41-42. Chapman's February 26, 2010, motion asserted that he "has met this burden" and asked for a new trial.[4] CP at 66.

Chapman's motions were argued at a hearing on March 18, 2010, which he attended telephonically. At the hearing, Chapman requested appointment of counsel, the State opposed, and the trial court took the matter under advisement. Chapman then requested that he be permitted to enter his substantive argument on the record, which the court allowed. Relying on the March 13, 2002 DNA test results, he argued that he should receive a new trial as his

[4] Chapman requested that the superior court grant "a new trial or to grant the immediate release of Mr. Chapman based on the attached exhibits proving Mr. Chapman's innocence." CP at 73. The exhibits included the March 13, 2002, DNA test results.

sentencing judge promised. He also contended that his counsel was ineffective for failing to secure DNA testing of the blood before trial, and that the prosecutor's arguments drawing inferences about the blood were improper as shown by the DNA test results.

The trial court subsequently ruled in a memorandum decision, and in a written order, that Chapman's motions were both time barred and successive, and for that reason denied Chapman's request for appointment of counsel. Chapman appeals.

ANALYSIS

Chapman contends that the trial court applied the wrong standard when it dismissed his motions. He contends that the trial court "failed to properly consider the Appellant's motion for a new trial, and motion for DNA testing under RCW 10.73.170," and that such statute requires the trial court to grant the motions if it concludes the appellant has shown the likelihood that the DNA test would demonstrate innocence on a more probable than not basis. Appellant's Br. at 6. We disagree.

We review a trial court's decision on a CrR 7.8(b) motion for relief from judgment for abuse of discretion. *State v. Smith*, 159 Wn. App. 694, 699, 247 P.3d 775 (2011). We likewise review a trial court's decision regarding a motion for DNA testing under RCW 10.73.170 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 it exercises its discretion in a manifestly unreasonable manner, or when the exercise of discretion is based on untenable grounds or reasons. *Smith*, 159 Wn. App. at 699-700. The meaning of a statute is a question of law, which we review de novo. *Riofta*, 166 Wn.2d at 365.

As a threshold matter, the State responds that Chapman's motions are barred as successive under RCW 10.73.140. Chapman replies that his motions are not PRPs and, thus, they are not subject to RCW 10.73.140. Chapman's May 22, 2009, motion is a CrR 7.8(b) motion for relief from judgment. The court rule expressly provides that such motion is "subject to" RCW 10.73.140. *See* CrR 7.8(b); *see also State v. Brand*, 120 Wn.2d 365, 370, 842 P.2d 470 (1992) (holding that RCW 10.73.140 applies to CrR 7.8 motions by analogy). Thus, Chapman's collateral attack seeking relief from judgment is subject to RCW 10.73.140's successive petitions prohibition.[5]

RCW 10.73.140 provides:

> If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review, the court of appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition. Upon receipt of a first or subsequent petition, the court of appeals shall, whenever possible, review the petition and determine if the petition is based on frivolous grounds. If frivolous, the court of appeals shall dismiss the petition on its own motion without first requiring the state to respond to the petition.

[5] As our Supreme Court reiterated in *In re Personal Restraint of Becker*, "the drafters of CrR 7.8(b) intended RCW 10.73.140 to apply by analogy because '[t]o hold otherwise would thwart the legislative purpose by allowing repetitious collateral attacks in the trial courts in contravention of the policy limiting collateral review.'" 143 Wn.2d 491, 498, 20 P.3d 409 (2001) (quoting *Brand*, 120 Wn.2d at 370). "[A] court may not consider a CrR 7.8(b) motion if the movant has previously brought a collateral attack on similar grounds." *Becker*, 143 Wn.2d at 498 (citing *Brand*, 120 Wn.2d at 370 (citing RCW 10.73.140)).

At the March 18, 2010 hearing on his motions, Chapman's oral presentation never asked the court to order a new DNA test. Instead, he argued for a new trial based on the March 13, 2002 DNA test evidence that he had already received. He summarized his arguments, which are all based on the new DNA evidence that the blood on the curve blade knife was his and not Wilcox's. He explained that because of such evidence he was entitled to a new trial as his sentencing judge promised. He also contended that the prosecutor's incorrect comments in closing argument about the blood were misconduct and that his trial counsel was ineffective for failing to DNA test the blood before trial.[6] These contentions are echoed in his written motions. Chapman has raised these same arguments in previous challenges, and we have rejected them. *See Chapman*, 2004 WL 1616701 at *8-10. Thus, the trial court did not abuse its discretion in denying Chapman's motions as successive, to the extent that the motions sought a new trial.[7]

[6] Chapman also admitted that he had raised the new DNA test results issue in a prior proceeding. RP (3-18-10) at 14.

[7] As *Brand* directs, "a court may not consider a CrR 7.8(b) motion if the movant has previously brought a collateral attack on similar grounds." *Brand*, 120 Wn.2d at 370 (citing RCW 10.73.140). *Brand* also held that "in the context of 'newly discovered evidence,' a collateral attack is based on 'similar grounds' unless the current evidence is significantly different in either quantum or quality from the evidence presented in a previous collateral attack." *Brand*, 120 Wn.2d at 370. See also *Becker*, 143 Wn.2d at 500 (defendant is guaranteed one bite at the apple, not a feast).

Nevertheless, Chapman contends that the trial court abused its discretion by not applying RCW 10.73.170[8] to his combined CrR 7.8(b) motion for a new trial and his request for DNA testing. He cites *Riofta*, 166 Wn.2d 358, as support, but under the circumstances presented, we

[8] RCW 10.73.170 addresses DNA testing requests, and provides:

> (1) A person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.
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> (2) The motion shall:
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> (a) State that:
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> (i) The court ruled that DNA testing did not meet acceptable scientific standards; or
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> (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;
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> (b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and
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> (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.
>
> (4) Upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW 10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request. Such motion for appointment of counsel shall comply with all procedural requirements established by court rule.
>
> (5) DNA testing ordered under this section shall be performed by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.
>
> (6) Notwithstanding any other provision of law, upon motion of defense counsel or the court's own motion, a sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of evidence. The court must specify the samples to be maintained and the length of time the samples must be preserved.

reject Chapman's contentions.

In *Riofta*, our Supreme Court explained how, and under what circumstances, RCW 10.73.170 is to be applied. The statute allows a convicted person to request DNA testing "if he can show the test results would provide new material information *relevant to the perpetrator's identity*." *Riofta*, 166 Wn.2d at 373 (emphasis added). A trial court must grant a motion for DNA testing "only when the petitioner 'has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.'" *Riofta*, 166 Wn.2d at 373 (quoting RCW 10.73.170(3)). The statute's purpose is to provide a means for a convicted person to obtain DNA evidence that would support a petition for postconviction relief. *Riofta*, 166 Wn.2d at 368. But the statute "asks a defendant to show a reasonable probability of his innocence before requiring State resources to be expended on a [DNA] test." *Riofta*, 166 Wn.2d at 370.

Here, Chapman already has DNA test results showing that the blood on the knife is his and not Wilcox's.[9] And even though Chapman's February 26, 2010, motion is entitled "Request for DNA Testing," CP at 56, the focus of his request is that the court grant him "a new trial or . . . grant the immediate release of Mr. Chapman based on the attached exhibits proving Mr. Chapman's innocence." CP at 73.[10] Thus, Chapman's pro se request for DNA testing appears to actually be a motion for a new trial rather than a proper request for DNA testing under RCW 10.73.170.

Moreover, even if we ignore the fact that Chapman already has the DNA test results that

[9] Chapman's motion for DNA testing repeatedly cites and relies on the already acquired DNA test results as the basis for challenging his conviction and establishing his right to a new trial.

[10] The exhibits attached to the motion include the March 13, 2002, DNA test results.

his motion purportedly seeks to acquire, his request for DNA testing fails the RCW 10.73.170 requirements, as set forth in *Riofta*. As noted, *Riofta* directs that the requested DNA test must relate to the perpetrator's *identity*, and that the petitioner must show that the requested DNA evidence would demonstrate innocence on a more probable than not basis. *Riofta*, 166 Wn.2d at 373. Neither requirement is met here. Chapman's motion explains that he intends to use the DNA evidence at a new trial to challenge Wilcox's testimony about what transpired in Chapman's apartment regarding how Wilcox sustained his leg injury. Accordingly, Chapman seeks to use the already acquired DNA evidence to impeach Wilcox's testimony about Chapman's actions (i.e. the particulars of the assault), rather than to challenge the victim's identification of the perpetrator.[11]

As for the requirement that Chapman must show that the requested DNA evidence would demonstrate innocence on a more probable than not basis, this court has previously held that the new March 13, 2002 DNA test results do not provide a basis for a new trial. *Chapman*, 2004 WL 1616701 at *8-9. Noting that the new DNA evidence would only serve to impeach Wilcox's credibility, we explained:

[11] This case does not involve an unfamiliar assailant. Wilcox knew Chapman, admitted that he had purchased drugs from Chapman on previous occasions, and testified that he went to Chapman's apartment on the night of the assaults. *Chapman*, 2004 WL 1616701 at *1. There is no evidence that anyone other than Chapman assaulted Wilcox. *Chapman*, 2004 WL 1616701 at *1. *Cf. State v. Thompson*, 155 Wn. App. 294, 304, 229 P.3d 901, *review granted in part on other grounds*, 170 Wn.2d 1005, 245 P.3d 227 (2010) (absence of defendant's DNA in semen samples is highly probative of his innocence because the only donor of the semen was the rapist).

> Here, defense counsel argued during closing arguments that the State had failed to meet its burden of proof because it did not DNA test the knives. Additionally, Wilcox admitted that he had changed his mind as to which knife he had been stabbed with. Despite this evidence and defense counsel's arguments, the jury convicted Chapman. Thus, it is unlikely that further evidence impeaching Wilcox's credibility would have led the jury to a different outcome.

Chapman, 2004 WL 1616701 at *9. Accordingly, we held that Chapman had failed to show how the new DNA evidence would have changed the trial's outcome. *Chapman*, 2004 WL 1616701 at *8.

Given this court's previous ruling, Chapman cannot meet his burden of showing that the new DNA evidence would demonstrate innocence on a more probable than not basis. Under these circumstances, we cannot say that the trial court abused its discretion in denying Chapman's motions for new trial and DNA testing.

Finally, the State requests that Chapman pay all taxable costs of this appeal under RAP Title 14. Because we hold that the State substantially prevailed on appeal we grant the State recoupment of appropriate costs. *See* RAP 14.2; RAP 14.3; RCW 10.73.160.

In sum, we hold that Chapman's motion for a new trial is barred as successive under RCW 10.73.140, and that Chapman fails to meet his burden of showing that DNA evidence would more probably than not establish his innocence as RCW 10.73.170 required, and we award the State taxable costs on appeal. We affirm.

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.

Penoyar, C.J.

We concur:

Van Deren, J.

Worswick, J.