IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 84739-8
Petitioner,	)	
	)	
v.	)	En Banc
	)	
BOBBY RAY THOMPSON,	)	
	)	
Respondent.	)	
	)	Filed February 23, 2012

ALEXANDER, J.[*]—We granted the State's petition to review a decision of the Court of Appeals in which that court reversed the trial court's denial of Bobby Ray Thompson's motion for postconviction deoxyribonucleic acid (DNA) testing. In reaching its decision, the Court of Appeals held that the trial court erred in considering a post-arrest statement that Thompson made to the police, but which was not admitted in evidence. We affirm the Court of Appeals.

I

On April 13, 1995, a woman identified in the record as J.S. went with friends to a bar in Lynnwood, Washington. During the course of the evening and the early morning hours of the following day J.S. consumed approximately 12 alcoholic drinks. Close to

[*]Justice Gerry L. Alexander is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

the bar's closing time, a man whom J.S. had met earlier in the evening approached J.S. After a brief conversation J.S. agreed to go with him to an "after hours" party at a hotel room across the street from the bar. When they arrived at the room, no one else was present. This caused J.S. to tell the man that she wanted to return to her friends at the bar. J.S. said that the man refused to let her leave and repeatedly beat and raped her. J.S. indicated at trial that she lost consciousness numerous times as the man hit and kicked her in the head and body, raped her several times, and attempted to strangle and drown her in the hotel room bathtub. J.S. testified, additionally, that she did not remember what occurred between the final time she lost consciousness and her awakening at the hospital. She also stated that she had no memory of talking to or seeing anyone at the hotel, except for the man who raped her. Finally, she indicated that she did not remember speaking to police officers at the hospital.

Other testimony at trial revealed that in the early morning hours of April 14, 1995, a hotel desk clerk had reported to the Lynnwood Police Department that a noisy dispute was taking place at the hotel. After arriving at the scene, police officers witnessed Thompson "pushing" J.S. out of the room where the rape of J.S. is alleged to have occurred. Verbatim Report of Proceedings (July 24, 1995) (VRP) at 39, 40. Hotel records showed that the room was registered to Thompson. One of the responding police officers testified that J.S. was crying, shaking, and "yelling hysterically that he'd beat her and he was going to kill her." *Id*. at 40-41. The police officers arrested Thompson at the scene. Shortly thereafter, the officers entered the hotel room and

observed blood on the bed, floor, walls, and in the bathroom.

J.S. was taken to the hospital, where a full rape examination was conducted, including vaginal swabs. The neurosurgeon who treated J.S., Dr. Eric Kohler, testified that J.S. was suffering memory problems, her eyes and ear canals were swollen shut, and there was extensive bruising and swelling of her head and body. Dr. Kohler also indicated that because J.S. reported that the rapist beat her with his fists, he would expect the rapist to have sustained injuries to his hands. There is no evidence that Thompson's fists showed any signs that he administered a beating on the night of his arrest.

A day after the attack, J.S. told a detective she probably could not identify her attacker because she had seen him in the bar "[j]ust for a brief second," and the hotel room was dark. VRP at 81. J.S. also later indicated to an investigator for the defendant that the rapist might have had blond hair, did not have facial hair, and was between 5'7" and 5'8" tall. The record discloses that Thompson has black hair, is 6'3" tall, and had a moustache at the time of his arrest.

The Washington State Patrol Crime Lab received evidence for testing, including bed sheets and a bloody washcloth from the hotel room as well as swabs from the rape kit and blood vials from Thompson and J.S. A forensic scientist testified that although the blood on the sheets may have come from J.S., it could not have come from Thompson. One bloodstain on the sheet contained semen, but the forensic scientist was unable to determine the donor. He also found semen in the vaginal swabs from

the rape kit. He did not, however, perform DNA tests to determine the donor of the semen, indicating that there was insufficient time to do so prior to trial.

On the morning of his arrest, Thompson gave a statement to the police in which he indicated that he and the victim had engaged in consensual sexual intercourse. *See* Br. of Resp't, App. B.

The State charged Thompson in Snohomish County Superior Court with first degree rape. Prior to trial, the trial court granted an unopposed defense motion to preclude admission of Thompson's statement to the police that he and the victim had engaged in consensual sexual intercourse. Pursuant to the parties' stipulation, the trial court indicated that the statement could be admitted for impeachment purposes if Thompson testified at trial. Thompson did not testify at trial, and, consequently, his statement was not offered or admitted in evidence. A jury found Thompson guilty of first degree rape, and the trial court sentenced him to 280 months in prison. The judgment and sentence became final in 1997.

Approximately nine years later, Thompson, acting pro se, filed a motion in Snohomish County Superior Court for postconviction DNA testing of all of the evidence collected in the rape case. In his motion, Thompson stated that he "claims actual innocence." Clerk's Papers (CP) at 91. After the State informed the trial court that the evidence had been destroyed in 2001, it denied Thompson's motion.

Thompson appealed that decision to the Court of Appeals, Division One, which dismissed the appeal as moot based on the trial court's determination that all testable

evidence had been destroyed. *State v. Thompson*, 155 Wn. App. 294, 298, 229 P.3d 901 (2010). Thompson later discovered that the testable evidence had not been destroyed and, thus, was available for testing. Based on this information, the State moved to recall the mandate issued by the Court of Appeals. The Court of Appeals granted the motion and stayed Thompson's appeal pending this court's decision in *State v. Riofta*, 166 Wn.2d 358, 209 P.3d 467 (2009). *Thompson*, 155 Wn. App. at 298. After *Riofta* was decided, the Court of Appeals reversed the trial court's order denying Thompson's motion for DNA testing and remanded with instructions to the trial court to enter an order permitting the testing. *Id*. at 304. The State petitioned for this court's review, which we granted. *State v. Thompson*, 170 Wn.2d 1005, 245 P.3d 227 (2010).

II

Like the Court of Appeals, we review a trial court's decision on a motion for postconviction DNA testing for abuse of discretion. *Riofta*, 166 Wn.2d at 370. A trial court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). "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.'" *Id.* (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995))).

Pursuant to the provisions of RCW 10.73.170(2), a motion for postconviction

DNA testing 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.

Subsection (3) of RCW 10.73.170 provides that the motion shall be granted if "the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis."

The trial court set forth three reasons for denying Thompson's motion for postconviction DNA testing: (1) the evidence had been destroyed so there was nothing to test; (2) the defendant failed to satisfy RCW 10.73.170(2)(a) because he did not show that "DNA technology was unavailable at the time of trial"; and (3) the defendant did not show a "likelihood that the DNA evidence would demonstrate the defendant's innocence." CP at 7-8. The Court of Appeals rejected the trial court's reasoning and reversed and remanded for an order permitting DNA testing under RCW 10.73.170.

The only issue before us is whether the trial court erred when it considered evidence available to the State at the time of trial but not admitted at trial. This question implicates the trial court's third reason for denying Thompson's motion, which was based on subsection (3) of RCW 10.73.170. The State argues that DNA testing would

not demonstrate Thompson's innocence because Thompson made a statement to the police shortly after his arrest in which he said that he and the victim had engaged in consensual sexual intercourse. Suppl. Br. of Pet'r at 8. The State points out that "DNA testing might provide evidence on whether one person had sexual intercourse with another, but it cannot show whether that intercourse was consensual." *Id.* It asserts, therefore, that DNA testing would not demonstrate the likelihood that Thompson was innocent on a more probable than not basis.[1]

The Court of Appeals rejected the State's argument, concluding in a footnote that the State could not rely on Thompson's statement because it "was not admitted at trial and . . . the 'more probable than not' innocence determination is made by considering only evidence that was admitted at trial." *Thompson*, 155 Wn. App. at 304 n.26. In reaching this conclusion, the Court of Appeals relied on the standard we set forth in *Riofta*. In that case, a person wearing a hat emerged from a car that had several people inside, fired gunshots at the victim, and dropped the hat on the sidewalk while fleeing the scene. It was later determined that the car had been stolen and that the hat belonged to the car's owner. Thus, more than one person could have worn the hat

[1]Amici Curiae The Innocence Network and the Washington Association of Criminal Defense Lawyers correctly point out that the "objectivity and precision of modern DNA testing has been credited with revealing that, at times, innocent people can and do confess to crimes they did not commit." Br. of Amici at 3; *see also In re Pers. Restraint of Bradford*, 140 Wn. App. 124, 127-32, 165 P.3d 31 (2007) (DNA evidence exonerated Bradford 10 years after he falsely confessed to burglary and rape); Mark Morey, *The Nightmare Continues, Even After Acquittal on Rape Charge*, Yakima Herald-Republic (Nov. 17, 2010), http://www.yakima-herald.com/stories/2010/11/17/the-nightmare-continues-even-after-acquittal-on-rape-charge.

prior to the shooting, including the car owner and the other passengers in the car at the time of the shooting. Because people other than the shooter could have left DNA in the hat, we determined that the defendant was not entitled to test the hat for DNA.

In that case, we articulated the standard for postconviction DNA testing as follows: "[A] court must look to whether, viewed in light of all of the *evidence presented at trial* or newly discovered, favorable DNA test results would raise the likelihood that the person is innocent on a more probable than not basis." *Riofta*, 166 Wn.2d at 367 (emphasis added) (citing RCW 10.73.170(3)). The State contends that to the extent our decision in *Riofta* suggested there are restrictions on the evidence that can be offered in a postconviction motion for DNA testing, "that language was dicta" because in *Riofta* the State did not offer any evidence beyond that submitted at trial. Pet. for Review at 7. Here, however, our concern reaches beyond the fact that the evidence was neither presented at trial nor newly discovered.[2]

In our view, it is significant that even though the State knew about Thompson's statement at the time of trial, it stipulated that the statement would not be admitted in evidence unless Thompson testified. Because of the parties' pretrial stipulation, a CrR

[2]Amici suggest that to "preclude DNA testing solely because the defendant tendered a confession contradicts the intent of Washington's DNA testing statute." Br. of Amici at 4. The reasons for false confessions are numerous and include: "pathological desire for attention or self-punishment; feelings of guilt over prior transgressions; delusions; or a desire to protect the real perpetrator." *Id.* at 5 (citing Saul M. Kassin, *The Psychology of Confessions*, 4 Ann. Rev. Law Soc. Sci. 193, 195 (2008)). Additionally, "false confessions are made by innocent, but vulnerable (*e.g.*, anxious, fatigued or confused) suspects who come to believe that they must have committed the crime." *Id.* at 5-6 (citing Saul M. Kassin, *The Psychology of Confession Evidence*, 52 Am. Psychologist 221 (1997)).

3.5 hearing was never conducted to determine the admissibility of the statement. Nonetheless, the dissent relies on the unadmitted statement for the truth of the matter asserted therein, despite the fact that the veracity of the statement was never tested. Indeed, the dissent seemingly uses the defendant's failure to repudiate the statement against him. *See* Dissent at 17 ("Critically, [Thompson] has never repudiated the truth of the factual statements contained in his sworn statement."). *Riofta* makes clear that the procedure for ordering DNA testing under RCW 10.73.170 is not akin to retrying the case. But if a statement that was not admitted at trial can be considered, then the door opens to a replay of the full range of other "facts" that the parties, for various, often strategic reasons, chose to not offer into evidence. We must be careful to keep the focus on the statutory requirements of RCW 10.73.170 and not unduly expand the inquiry. We, therefore, decline to adopt the State's approach, which would permit a court to deny DNA testing on the basis of evidence that was not admitted at trial that the State affirmatively agreed to keep from the jury unless Thompson testified.

Because we conclude that the Court of Appeals properly determined that the trial court erred in considering Thompson's statement, we agree with the Court of Appeals' rejection of the trial court's third reason for denying Thompson's motion. The trial court stated that the third reason it denied Thompson's motion was that there "'is no likelihood that the DNA evidence would demonstrate the defendant's innocence.'" *Thompson*, 155 Wn. App. at 301. The Court of Appeals relied on our reasoning in *Riofta* to explain the standard for determining innocence on a more probable than not

basis, which was that the "'statute requires a trial court to grant a motion for postconviction testing when exculpatory results would, in combination with the other evidence, raise a reasonable probability the petitioner was not the perpetrator.'" *Id.* at 302 (quoting *Riofta*, 166 Wn.2d at 367-68). The Court of Appeals distinguished the facts here from *Riofta* and instead analogized them to a case it had recently decided, *State v. Gray*, 151 Wn. App. 762, 215 P.3d 961 (2009). *Thompson*, 155 Wn. App. at 303. In *Gray*, that court held that the defendant, who had been convicted of rape and attempted rape of two teenage girls, was entitled to DNA testing because if the test results identified the donor of the semen it would establish Gray's innocence on a more probable than not basis. This is so because there was only one perpetrator of the attacks and, therefore, there would only be one source of DNA. This scenario is distinguishable from *Riofta*, where the hat may have been worn by other people prior to the shooting, making it possible that DNA could be left at the crime scene by someone other than the shooter. The Court of Appeals, therefore, properly deemed *Gray*, where DNA testing was permitted, to be factually closer to this case than *Riofta*, where testing was not permitted.

The record here shows that the victim only had intercourse with one person on the night of the attack, the rapist. If DNA test results should conclusively exclude Thompson as the source of the collected semen, it is more probable than not that his innocence would be established, particularly in light of the weakness of the victim's identification of Thompson as her attacker. As noted above, J.S. was unsure of her

ability to identify her attacker and her tentative description of her attacker does not match Thompson's appearance. In sum, we agree with the Court of Appeals that the motion should have been granted because Thompson "has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3).[3]

Although the issue is not before us, we note that the Court of Appeals also properly determined that the second reason set forth by the trial court for denying the motion, that the defendant failed to show that DNA technology was unavailable prior to Thompson's trial, is not sustainable. We say that because proof that DNA technology was unavailable at the time of trial is not procedurally required by RCW 10.73.170(2)(a). In *Riofta*, we stated that the plain meaning of RCW 10.73.170 is that evidence is to be tested when it has the potential to produce "new information." *Riofta*, 166 Wn.2d at 365. We explained that the "plain meaning of the statute allows DNA testing based on either advances in technology *or* the potential to produce significant new information." *Id.* We stated that,

> [r]ead as a whole, the statute provides a means for a convicted person to produce DNA evidence that the original fact finder did not consider, whether because of an adverse court ruling, inferior technology, or the decision of the prosecutor and defense counsel not to seek DNA testing prior to trial.

[3]We recognize this case presents troubling facts, namely that Thompson was seen pushing J.S. out of his hotel room on the morning the rape allegedly occurred. There may be an explanation—other than that Thompson was the rapist—for this fact, but that inquiry is not ours to make. Our role is to determine whether the trial court erred in concluding that Thompson failed to meet the statutory requirements set forth in RCW 10.73.170. As we explain, it did.

Id. at 366.

Here, the vaginal swabs were not tested for DNA, even though the forensic scientist explained in his testimony that semen was present on the swabs. If the semen can be tested, the results of the tests will constitute "significant new information" under RCW 10.73.170(2)(a)(iii) because the test results will reveal whether Thompson was the donor of the semen, which will either exculpate or inculpate him as the rapist. This case presents the scenario we contemplated in *Riofta*, in that the DNA evidence from the vaginal swabs was unknown to the fact finder at trial but will now provide significant new information.

In conclusion, we hold that the Court of Appeals correctly determined that the trial court improperly relied on Thompson's unadmitted statement in denying the motion for postconviction DNA testing. We therefore affirm the Court of Appeals.

AUTHOR:
Gerry L. Alexander, Justice Pro Tem.

WE CONCUR:

Justice Charles W. Johnson

Justice Debra L. Stephens

Justice Tom Chambers

Justice Susan Owens