No. 84739-8

MADSEN, C.J. (dissenting)—The only issue on which review was granted is whether, in deciding the defendant's postconviction motion for DNA (deoxyribonucleic acid) testing, the trial court properly considered a statement that the defendant made to police after his arrest. Under RCW 10.73.170, the proper focus of a court deciding a postconviction motion for DNA testing is on whether the defendant has made the required showing of actual innocence. This means establishing on a more probable than not basis that the wrong person was convicted.

Unfortunately, in deciding whether the statutory standard for *posttrial* DNA testing is met, the majority applies rules for admissibility *at trial*. But the statutory inquiry is not a criminal trial governed by the same constitutional and evidentiary standards that apply at trial to determine whether the defendant is legally guilty. Instead, to decide whether the defendant has sufficiently shown actual innocence to justify postconviction DNA testing, a trial court should consider reliable evidence that the

defendant committed the acts constituting the criminal offense because this evidence is highly relevant to the inquiry into actual innocence.

Contrary to the majority's belief, our decision in *State v. Riofta*, 166 Wn.2d 358, 209 P.3d 467 (2009), does not limit the inquiry only to evidence that was either admitted at trial or is newly discovered. Indeed, the issue whether available evidence that was not admitted or admissible at trial may be considered was never before the court in *Riofta*. Moreover, we made it absolutely clear in *Riofta* that the focus of a postconviction motion for DNA testing is on whether the defendant is actually innocent, and it cannot seriously be questioned that evidence that was not admitted at trial can be relevant to this question.

Contrary to the majority, it does not "unduly expand" (majority at 9) the statutory inquiry to consider reliable evidence at the very core of RCW 10.73.170. But the majority would have the court disregard important evidence on the issue of actual innocence, not because it is unreliable or irrelevant but because it was not admitted at trial—a requirement found nowhere in the statute—and even though the evidence is a reliable statement that the defendant himself stipulated he voluntarily made and which establishes that he is not innocent of rape.

The majority also paints a picture of uncertain identification, evidently to show the necessity of a DNA test. But the record shows that the victim identified the defendant as the rapist-assailant just as he was physically pushing her out of the room where the rape occurred, *immediately* after the assault, in the presence of numerous police officers, followed by an in-court identification. Whatever may be the limit of eyewitness

identification, it is not relevant here.

I would hold that reliable, relevant evidence bearing on whether the right person was convicted may be considered for the limited purpose of deciding a motion for postconviction DNA testing under RCW 10.73.170, provided that the defendant has the opportunity to challenge the evidence. This standard is satisfied by the defendant's statement at issue in this case. The trial court did not abuse its discretion by considering the statement.

Discussion

Additional Facts

Before turning to the question of what evidence may be considered when ruling on a postconviction motion for DNA testing, additional facts from the record are relevant to the question whether the trial court abused its discretion in denying the defendant's motion. First, the evidence at trial on the issue of the defendant's identity as the person who assaulted J.S. is much stronger than indicated by the majority, showing that the State did not have the weak case the majority describes. Second, the defendant's statement that is at issue was excluded at trial based on a stipulation by the parties. Insofar as its relevance to the statutory inquiry under RCW 10.73.170 is concerned, there has never been any dispute about the reliability of the statement. Third, additional facts relating to forensic testing but not acknowledged by the majority are set out here because whether a defendant seeks DNA testing at trial is a matter that may be considered when deciding whether to grant a postconviction motion for DNA testing. The following additional facts

complete the factual background relevant and necessary for resolving the issue in this case.

a. The evidence of identity

Very early in the morning on April 14, 1995, about 3:00 a.m., Lynwood City Police Officer Ronald Erue was dispatched to a hotel to respond to a 911 call reporting a "physical" domestic dispute. 1 Verbatim Report of Proceedings (VRP) (July 24, 1995) at 35-36. He was the first to arrive. Room 111, where the disturbance had occurred, was just around the corner from the hotel clerk's desk. The door was closed. After additional officers arrived, the officers heard a door open, looked down the hallway, and saw a man and woman leaving room 111. The man was the defendant, Bobby Ray Thompson, and the woman was J.S., the victim. The defendant "was forcing the female out the door and out the emergency exit." *Id*. at 39. "[H]e had a hold of her and physically pushed her out the door." *Id*. "It appeared he was forcing her out the door. . . . He was right behind her physically forcing her out the door." *Id*. at 40. Officer Erue asked them to stop, but Thompson just looked at Erue and continued to push J.S. out the door.[1]

Erue testified that J.S. "got about halfway out the door and turned, saw me, and started yelling hysterically that he'd beat her and he was going to kill her." *Id*. at 40-41. The officer saw that J.S. had "been beat pretty severely." *Id*. at 41.[2] "She kept screaming he had beat her, that he was going to kill her. She was crying, shaking." *Id*. Officer

[1] The defendant did not dispute at trial that he was the man attempting to push J.S. out the door but did contest the State's evidence that he was the person who had beaten and raped her.
[2] Officer Erue described her condition, including the fact that she was bleeding from her eyes, something he had never seen before. She was also bleeding from the nose and mouth.

Erue also testified that she said that "when she would not put out, he beat her and raped her." *Id*. at 54.

Lynnwood City Police Officer David Byrd was also dispatched to the hotel in response to the report of a domestic disturbance in room 111. He similarly described seeing J.S. and Thompson, with Thompson "shoving [J.S.] out the emergency exit door." VRP (July 25, 1995) at 39. Officer Byrd affirmatively identified Thompson in court as being the man he saw outside room 111. He described seeing only Thompson being detained outside room 111 and testified that when he did a protective sweep of the hotel room there was no one else in the room.

Lynnwood City Police Officer Steven Rider also testified that he responded to the hotel and along with Officers Byrd and Erue approached room 111. He testified to Thompson trying to push J.S. out the "back door." *Id*. at 53-54. Officer Rider affirmatively identified Thompson in court as the person who was pushing J.S. out the door. Rider testified that he placed Thompson under arrest.

The hotel clerk on duty at the time identified Thompson in court as the person she had seen the police officers remove from the hotel.

J.S. identified Thompson in court as the man who assaulted her. She testified that he approached her when she was out with friends at a bar and invited her to join him at an "after hours" party at the hotel across the street. 1 VRP at 60-62. She testified that she went with him, but when she discovered there was no one else in the room, told him she had to leave. She said that he responded by hitting her and knocking her unconscious.

She testified that she was raped numerous times and continually beaten and knocked unconscious and that he tried to drown her. J.S. testified that there was no one else in the hotel room.

On cross-examination, J.S. was questioned about a description of her attacker that she had provided during an interview with a defense investigator. (That interview occurred on June 26, 1995, about two and one-half months after the assault. Confidential Investigative Memo to Att'y at 1 (July 3, 1995).) Clerk's Papers (CP) at 53. Defense counsel cross-examined her about having described the attacker as being about five foot seven to five foot eight inches tall with shoulder-length blond hair. J.S. testified that she had said to the investigator that she thought he was that tall but was not sure of his height, adding that she is only four feet, nine inches tall, and "so everybody seems pretty tall to me." 1 VRP at 80-81, 83. She said she "couldn't be sure" and did not "know how tall he was." *Id*. at 83. J.S. testified that she also had told the investigator that she was not sure of the color of his hair. When she was asked about having said the attacker had no facial hair, she denied having said that and instead said that she told the investigator that she was not sure. She did say that she had told a detective the day after the attack that she probably could not identify the attacker.

But regardless of uncertainty she may have expressed when verbally describing her assailant, J.S. positively identified Thompson to police officers *immediately* after the attack and she positively identified him in court as the man who raped and beat her.

In summary, the evidence on identification includes: J.S.'s at-the-scene

identification to police officers of Thompson as the man who had raped, beaten, and tried to kill her;[3] her testimony that he was the only one in the hotel room when she was raped and beaten; her positive in-court identification of Thompson as the rapist;[4] police officers' in-court identifications of Thompson as the man they saw trying to push J.S. out an exit door near the room where she was raped and whom she immediately identified as her attacker; the officers' testimony that there was no one else on the scene; that, upon prompt inspection of the room, no one else was found in it; and the hotel clerk's identification of Thompson as the person she saw the police remove from the hotel. Thompson was positively identified at the time of the assault as J.S.'s assailant and as the only person in the hotel room with her.

b. Exclusion of the defendant's statement

During preliminary proceedings, the defendant's attorney started to say "there [are] some statements that Mr. Thompson made" and the court interrupted, "Are those the ones that are purportedly contained in the affidavit of probable cause?" 1 VRP at 18.

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[3] Officer Rider prepared an additional narrative report, in which he said that he heard J.S. say that Thompson was her attacker. His report states that as other officers went to J.S.'s aid, he stayed with Thompson, but could hear J.S. "screaming that Thompson had tried to kill her." Clerk's Papers (CP) at 85.

[4] Inaccuracy of eyewitness identification is often a reason given for why innocent people have been convicted, and thus inferentially one reason why a postconviction process for obtaining DNA testing is important. *See*, *e.g.*, Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 New Crim. L. Rev. 333, 341 (2011) (explaining that inaccurate eyewitness identifications contributed to the convictions in more than 80 percent of documented cases of DNA exonerations). However, in the present case the victim was contemporaneously being physically pushed by the individual she immediately identified as having raped, beaten, and tried to kill her, at the very moment she identified him to police officers as her assailant.

Counsel agreed, advised the court that there had been no CrR 3.5 hearing, and then counsel began to say "so as I understand it." *Id.* At this point, the prosecuting attorney interrupted and advised the court he did not intend to use the statement other than for purposes of cross-examination. The parties then *stipulated* that Thompson's statement was *voluntary* and that it was admissible for purposes of possible impeachment of the defendant if he testified. *Expressly* basing its decision on the parties' *agreed stipulation*, the court granted the motion to limit admissibility to this purpose. There is no evidence suggesting that the statement would have been ruled inadmissible at a CrR 3.5 hearing, such as for lack of *Miranda* warnings.[5] Indeed, the stipulation on the statement's voluntariness and use supports the opposite conclusion.

c. Forensic testing at trial

In *Riofta* we determined that whether a defendant requests DNA testing at trial may be considered in deciding a postconviction motion for DNA testing. Therefore, a further description of the facts regarding forensic testing for trial is relevant and in the context here, highly significant.

Greg Frank, a forensic scientist with the Washington State Patrol laboratory in Marysville, testified at trial to a three-month backlog of cases requiring testing at the Marysville laboratory at the time the bodily fluid evidence in this case was received. He

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In his additional narrative report, Officer Rider stated that after he arrested him he "advised Thompson of his constitutional rights which he said he understood because he had been arrested before." CP at 85 (capitalization omitted). The report continued: "I asked him if, understanding his rights, he would like to waive them and talk to me about what happened. He said he did." *Id.* Thompson then made the statement at issue.

stated that by the time he began testing the blood and other samples, it was too late to send samples on to the state lab in Seattle where DNA testing was done and still have the DNA testing complete by the time of trial in accordance with speedy trial rights.

The defense did not seek a continuance for the purpose of DNA testing. However, the defense *did* move for a continuance for the purpose of trying to obtain other evidence that allegedly would implicate another person as the individual who assaulted J.S. (a motion that the trial court denied as being too "iffy," untimely, and of marginal relevance, 1 VRP at 16).

During closing argument, defense counsel referred to the fact that there was no DNA evidence, saying that being overworked was an unacceptable excuse for DNA testing not having been completed, and described the State's failure to produce DNA evidence as "lack of evidence" that the defendant was guilty. VRP at 100. The prosecuting attorney responded that he wished he did have DNA evidence. He explained to the jury that there were limitations due to the state budget for staff, the time needed to conduct the testing, and the defendant's speedy trial rights.[6]

With these additional facts, I turn to the issue before us.

[6] The majority also relies rather heavily on the defendant's claim that had he been J.S.'s attacker, there would have been evidence at trial that his hands were damaged, but there was none. The absence of such evidence, the defendant asserts, supports his claim of actual innocence. The problem with this argument is that it presumes a conclusion when no evidence on the condition of his hands, one way or the other, was presented at trial. I note that in his additional narrative report, Officer Rider referred to cuts and scrapes on Thompson's body at the time he was arrested. CP at 86.

Postconviction Motion for DNA Testing; Evidence

Relying on a single sentence in *Riofta*, the majority says that under RCW 10.73.170 the only evidence that can be considered is evidence that was admitted at trial and newly discovered evidence. This both misreads and misapplies *Riofta*. Quite simply, there was never any issue in *Riofta* about whether evidence that was not presented to the jury but available at the time of trial may be considered when deciding a postconviction motion for DNA testing. We never held that the evidence that can be considered is so unduly restricted. To the contrary, the primary emphasis in *Riofta* is on the requirement that a defendant show actual innocence.

We emphasized that the legislature used the word “innocence” “to restrict the availability of postconviction DNA testing to a limited class of extraordinary cases where the results could exonerate a person who was wrongly convicted of a crime.” *Riofta*, 166 Wn.2d at 369 n.4. “RCW 10.73.170 is not aimed at ensuring a defendant had a fair trial. Its purpose is to provide a remedy for those who were wrongly convicted *despite* receiving a fair trial.” *Id*. RCW 10.73.170 “asks a defendant to show a reasonable probability of his innocence before requiring State resources to be expended on a test.” *Id*. at 370. Accordingly, the focus is on the defendant’s *innocence*. *Id*. “Innocent” means that the State convicted the wrong person. *Id*. at 369 n.4 (citing *Sawyer v. Whitley*, 505 U.S. 333, 340, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992)).

When reliable evidence available at the time of the motion shows that the State did

not convict the wrong person, the purpose of the statute is not furthered by granting the motion.[7] On the contrary, the statutory goal is served by permitting a trial court to consider relevant, reliable evidence such as the defendant's statement here. In fact, if there is relevant, reliable evidence bearing on the issue of the defendant's actual innocence, the failure to consider it may result in a significantly distorted view of the defendant's innocence (or lack thereof). This is not what the legislature intended.

The majority says, though, that we must "focus on the statutory requirements" and "not unduly expand the inquiry." Majority at 9. I completely agree, but am at a loss as to how considering reliable evidence directly bearing on the issue of actual innocence is an undue expansion of the inquiry into actual innocence. I also agree that the postconviction inquiry is not a retrial, *see id.*; indeed, this is why the standards and rules of admissibility applicable at a criminal trial should not strictly control. The statute's focus on actual innocence should guide us in deciding what evidence may properly be considered when deciding whether the defendant has made a sufficient showing of innocence.

Simply stated, a motion under RCW 10.73.170 does not occur in a criminal trial. Rather, RCW 10.73.170 provides a species of postconviction relief. *Riofta*, 166 Wn.2d at 370. A defendant seeking postconviction relief is in a "significantly different situation than a person facing trial." *Id.* at 369. Available rights are limited. In *District Attorney's*

[7] DNA test results can be exculpatory, inconclusive, or inculpatory, and in some cases may provide exclusionary results sufficient "enough to undermine the validity of the conviction." Melissa Duncan, Comment, *Finding a Constitutional Right to Access DNA Evidence: Postconviction*, 51 S. Texas L. Rev. 519, 523 (2009). (Contrary to the title of this comment, the United States Supreme Court held that there is no constitutional right to DNA testing in *Osborne*.)

Office for Third Judicial District v. Osborne, 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009), the United States Supreme Court explained why different rights exist during postconviction proceedings than exist in a criminal trial:

> A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. At trial, the defendant is presumed innocent and may demand that the government prove its case beyond reasonable doubt. But "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera v. Collins*, 506 U.S. 390, 399, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). "Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." [*Conn. Bd. of Pardons v.*] *Dumschat*, [452 U.S. 458,] 464, 101 S.Ct. 2460[, 69 L. Ed. 2d 158 (1981)] (internal quotation marks and alterations omitted).
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> The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. "[W]hen a State chooses to offer help to those seeking relief from convictions," due process does not "dictat[e] the exact form such assistance must assume." *Pennsylvania v. Finley*, 481 U.S. 551, 559, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). [The] right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that [the individual] has already been found guilty at a fair trial, and has only a limited interest in postconviction relief.

Id. at 2320 (some alterations in original).

Thus, in *Osborne*, the Court held there is no free-standing substantive due process right to postconviction DNA testing. *Id*. at 2322-23. The Court said that a state may create a limited liberty interest in demonstrating innocence with new evidence, but this right has to be analyzed in light of the fact that the defendant has already been convicted. *Id*. at 2319-20.

The Court also held that there is no procedural due process right requiring the State, in postconviction proceedings where a defendant seeks DNA evidence, to disclose

material exculpatory evidence; the obligation recognized in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), requiring a prosecutor to disclose material exculpatory evidence to the defendant before trial does not apply in postconviction proceedings. *Osborne*, 129 S. Ct. at 2319-20; *Twillie v. Foulk*, 360 F. App'x 301, 304 (3d Cir. 2010) (unpublished opinion).

This court, too, recognizes that different rights exist, and different analyses apply, depending upon whether the proceeding is the criminal trial itself or some other proceeding. In particular, admissibility of evidence at trial is not necessarily a prerequisite to its consideration in proceedings other than a criminal trial. For example, sentencing judges have traditionally had discretion in the sources and types of evidence that may be considered when determining a defendant's sentence. *State v. Strauss*, 119 Wn.2d 401, 418, 832 P.2d 78 (1992); *State v. Herzog*, 112 Wn.2d 419, 424, 771 P.2d 739 (1989). At sentencing, the rules of evidence do not strictly apply. *Strauss*, 119 Wn.2d at 418. Rather, evidence admitted at a sentencing hearing must meet due process requirements that the evidence be reliable and the defendant be given the opportunity to refute it. *Id*. at 418-19.

Reliability is also key to considering certain otherwise inadmissible evidence in postconviction proceedings where, although an individual is guaranteed some rights, they are not the same rights guaranteed in a criminal prosecution. *State v. Abd-Rahmaan*, 154 Wn.2d 280, 288-89, 111 P.3d 1157 (2005) (postconviction sentence modification hearings are not criminal prosecutions and therefore "flexible" due process requirements

govern confrontation). *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999), is instructive. There, the issue was whether hearsay evidence was properly admitted in a defendant's hearing on revocation of a special sentencing alternative sentence. Because the hearing was not a criminal proceeding and because the "minimal" due process rights that are required in order to confront and cross-examine witnesses are not absolute, we applied a balancing analysis, weighing reliability of the hearsay evidence against the difficulty that would be involved in procuring a live witness. *Id*. at 686.

Neither a trial court deciding a postconviction motion for DNA testing or an appellate court reviewing a trial court's decision on the motion is considering evidence for the purpose of determining whether the defendant is guilty or not guilty. Instead, as stated, the issue is whether a claim of actual innocence is sufficient to justify the expenditure of costs, resources, and time necessary to provide DNA testing.[8] On this issue, relevant, reliable evidence should be considered in deciding the question of actual innocence.

Another court has faced the issue whether statements that were inadmissible or not admitted at trial can be considered in deciding whether to grant a postconviction request

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[8] In 2006, a North Carolina Department of Justice cost study determined that the average cost of analyzing a rape kit in a state crime laboratory was $568.96, and in a private laboratory, after processing costs are added, $681.03. Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations*, 59 Drake L. Rev. 799, 828 (2011). Federal law provides for federal funds to help defray costs in states where the DNA testing statutes conform to federal requirements. Justice for All Act of 2004, Pub. L. No. 108-405, § 413, 118 Stat. 2260, 2285 (2004). Generally, the standard required for federal funds is that there is a reasonable probability the defendant would not have been convicted if DNA testing had been available and conducted at the time of trial.

for DNA testing. The Texas Criminal Court of Appeals held that the defendant's statement and accomplices' statements were properly considered by the trial court ruling on a postconviction request for DNA testing. In *Ex Parte Gutierrez*, 337 S.W.3d 883, 892 (Tex. Crim. App. 2011), the defendant, who was denied postconviction DNA testing, argued that the trial court improperly considered both his own "statement to police—because it was purportedly taken in violation of his right to remain silent—[and] his accomplices' statements—because they were neither admissible nor admitted at trial." (Footnote omitted.) The defendant claimed that the trial court therefore improperly denied his request for appointed counsel to assist in a motion for forensic DNA testing, as authorized by state law if a trial court determined that the defendant established reasonable grounds to file a motion for DNA testing.

The Texas appellate court rejected the argument. The court explained that "[a]lthough evidence offered against a defendant at a criminal trial and challenged on constitutional grounds must be admissible to give adequate protection to the values that exclusionary rules are designed to serve," a postconviction proceeding addressing a person's request for DNA testing "is not a 'criminal trial'" but is instead "an independent, collateral inquiry" where the exclusionary rule has no place. *Id*. at 892-93. The court observed that the state "legislature ha[d] placed no barriers to the type of relevant and reliable information that the trial judge may consider" and, while the information the court considers must be reliable, "it need not be admissible or previously admitted at trial." *Id*. at 893.

The Texas court's analysis and its conclusion that reliability is the linchpin for consideration of the statements in *Gutierrez* are similar to our own postconviction decisions holding that constitutional protections and evidentiary standards are not the same as in the criminal trial and in certain circumstances reliable evidence may be considered even though not admissible at trial.

Moreover, just as was true of the Texas law at issue, our state legislature has placed no restrictions on the type of evidence that may be considered in deciding whether a defendant has established that DNA testing, along with other evidence, will show innocence on a more probable than not basis. Nothing in RCW 10.73.170 precludes consideration of relevant, reliable evidence that was available but not admitted at trial. This is entirely in keeping with the purpose of the statute to enable consideration of actual innocence when deciding whether to grant the motion for DNA testing.[9]

A trial court ruling on a postconviction motion for DNA testing is not determining whether the defendant was guilty of the crime. The individual has already been convicted. *See* RCW 10.73.170(1) (authorizing a person in prison after being "convicted of a felony" to move for DNA testing). Because the issue is whether the defendant has made a sufficient showing of actually innocence, here the defendant's statement to police is highly relevant. It affirmatively shows that he is not actually innocent. As the majority

[9] The fact that a defendant continues to maintain innocence while requesting DNA testing does not mean that the defendant is actually innocent, of course. For unknown reasons that seem to defy logic, an individual may maintain innocence for years and then, when DNA testing is finally obtained, the test results match this individual who had maintained innocence. Krieger, *supra*, at 387-88 (noting this problem, and referring to one innocence "project admitted that eight of the twenty-five DNA tests the project conducted matched the individual professing innocence").

says, majority at 10, only one person had sexual intercourse with the victim the night she was raped and beaten. In his statement, the defendant voluntarily stated that he had sexual intercourse with J.S., although he claimed it was consensual.

The statement is also reliable. As mentioned, at trial the defendant stipulated to voluntariness and he does not now make any claims to the contrary. Critically, he also has never repudiated the truth of the factual statements contained in his sworn statement, including the fact that he had sexual intercourse with J.S. He had no need or obligation to do so at trial, of course, but on this postconviction motion for DNA testing, where he must make an affirmative showing of innocence, his failure to counter the veracity of his admittedly voluntary statement is pertinent on the matter of reliability. Finally, he has presented no evidence that contradicts his admission that he had sexual intercourse with J.S.

The trial court properly considered the defendant's statement made to police after his arrest.

Based on all of the evidence before it, and contrary to the majority's conclusion, the trial court did not abuse its discretion when it denied the defendant's postconviction motion for DNA testing.[1]

In addition to the evidence of the defendant's statement, the trial court[11] was also

[1] The majority addresses the issue whether the defendant was required to show that DNA technology was unavailable at the time of trial. Majority at 11-12. Our grant of review was limited, however, to the issue whether the trial court properly considered the defendant's statement to the police. Order, *State v. Thompson*, No. 84739-8 (Nov. 3, 2010); *see* RAP 13.6; RAP 13.7(b). It is unfair, as well as in violation of our rules, to grant review on a limited issue, receive supplemental briefing only on that issue, and then address and decide an additional issue.

presented with the evidence pertaining to the defendant's failure to request DNA testing at trial. Although not a per se bar to postconviction DNA testing, a court may take into account a defendant's failure to seek DNA testing at trial. *Riofta*, 166 Wn.2d at 366 n.1. RCW 10.73.170 "does not allow defendants to adopt a 'wait and see' approach. A defendant's failure to request DNA testing at trial of evidence he now claims to be exculpatory must be weighed against his claim of probable innocence unless circumstances exist to justify the failure." *Riofta*, 166 Wn.2d at 368 n.3.

Here, when making his postconviction motion for DNA testing, the defendant claimed that he had sought a continuance at trial to permit DNA testing. The State submitted transcripts from the trial record showing that this claim is false. Rather, as explained, the defendant sought a continuance in order to try to obtain evidence that another person allegedly committed the crime, specifically, a copy of a driver's license that purportedly would show that its holder fit the description that the defense claimed J.S. had provided to the defense investigator.[12]

Given that at trial the defendant was willing to seek a continuance to obtain evidence that purportedly would have incriminated another individual, it is highly significant that the defendant did not seek a continuance for the purpose of DNA testing. If he believed that DNA testing would show that he was innocent, presumably he would

[11] As provided in RCW 10.73.170(1), the movant is to submit the motion for DNA testing to the court that entered the judgment of conviction. In this case, the same judge ruled on the motion as had presided at Thompson's criminal trial.
[12] Even at the time of the postconviction motion, however, the defendant presented no such additional evidence suggesting that another person actually committed the crime.

have sought DNA tests that could have exonerated him or at least been exculpatory.[13] Yet, the defendant did not attempt to obtain DNA testing for trial. His failure to do so undercuts his claim that the evidence and DNA testing would establish a likelihood of innocence on a more probable than not basis. It strongly suggests that at trial he knew that DNA test results were unlikely, in fact, to have been favorable to his defense.

In light of the evidence, the trial court properly denied the postconviction motion for DNA testing. Not only is the failure to seek such testing at trial highly significant, Thompson's statement that he had sexual intercourse with J.S. is also extremely damaging to his motion because DNA testing could not differentiate between rape and consensual intercourse.[14] Thompson has not carried his burden under RCW 10.73.170(3) of showing that a DNA test would demonstrate innocence on a more probable than not basis.

Conclusion

The majority imposes an unjustified barrier to considering reliable evidence that is relevant to whether a defendant's postconviction motion for DNA testing under RCW 10.73.170 should be granted. Neither the statute nor our decision in *Riofta* supports the majority's conclusion that only evidence admitted at trial or newly discovered may be considered when assessing a defendant's claim of innocence under the statute.

[13] By the time the rape in this case had occurred, DNA testing had been held admissible in criminal trials in this state. *See*, *e.g.*, *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995) (filed on Jan. 6, 1995); *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994); *State v. Kalakosky*, 121 Wn.2d 525, 852 P.2d 1064 (1993).

[14] It is possible that this is the reason why the defendant did not move for a continuance to obtain DNA testing at trial.

The statute's purpose is to authorize DNA testing where there is a likelihood, on a more probable than not basis, that the defendant is actually innocent. If reliable evidence is relevant to this issue, it should be considered. Otherwise, an inaccurate assessment of innocence may occur. I cannot agree with the majority's assertion that consideration of such evidence "unduly expands" the statutory inquiry; indeed, an admittedly voluntary statement that the defendant committed the acts constituting the crime, as in this case, goes to the very heart of the statutory inquiry.

Riofta never addressed the issue whether evidence that was available but not admitted at trial may be considered in deciding a motion under RCW 10.73.170. Rather, *Riofta* underscores the purpose of the statute to assess a defendant's showing of actual innocence, not to assess guilt under the standards that govern criminal trials.

The majority's narrow view of what may be considered also does not comport with principles governing postconviction proceedings, where the defendant's rights are not the same as at a criminal trial.

The statement that the defendant made to the police following his arrest the morning after the assault on J.S. is reliable and relevant evidence bearing on whether the defendant has made a sufficient showing of innocence. It was properly considered by the court when the court ruled on Thompson's motion for DNA testing. The court also properly considered the fact that the defendant did not seek such testing at trial although, at the same time, he did seek a continuance in order to try to obtain other evidence he asserted would be exculpatory. The parties presented argument on this point, and the

State submitted part of the trial transcript to authenticate what had occurred at trial.

After considering the information urged by the defendant, his statement, and the circumstances surrounding forensic testing at trial, the trial court acted well within its discretion when it denied Thompson's postconviction motion for DNA testing.

For these reasons, I dissent. I would reverse the Court of Appeals and reinstate the trial court's ruling in this case.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice James M. Johnson

Justice Charles K. Wiggins

Justice Mary E. Fairhurst