IN THE SUPREME COURT OF THE STATE OF NEVADA

GENARO RICHARD PERRY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82931

RESPONDENT'S ANSWERING BRIEF

Appeal From The Denial Of A Petition For Genetic Marker Testing
Eighth Judicial District Court, Clark County

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RESPONDENT'S ANSWERING BRIEF

Appeal From The Denial Of A Petition For Genetic Marker Testing
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

Genaro Perry ("Perry") is appealing the denial of a post-conviction Motion Requesting Order Directing the Las Vegas Metropolitan Police Department to Conduct Genetic Marker and Latent Fingerprint Analysis of Evidence impounded at the Crime Scene, which stems from a Category A felony. Therefore, pursuant to N.R.A.P. 17, this appeal is not presumptively routed to the Court of Appeals.

STATEMENT OF THE ISSUES

I. Whether the district court did not err in dismissing the Petition[1] because the Petition did not meet statutory requirements.
II. Whether the district court did not err in dismissing the Petition because the results would not have been favorable to Perry.

[1] Appellant refers to their filing as a "Motion," we are referring to the filing as a "Petition" to comply with NRS 176.0918, the applicable statute.

III. Whether the issue of latent fingerprint testing should be before this Court and whether the district court properly denied it.

STATEMENT OF FACTS

Perry and Carpenter were involved in a six-month relationship from the end of 2013 through mid-April 2014. 1 AA at 50-51. On the night of April 30, 2014, Perry came to Carpenter's house after she was already in bed, demanding the blood pressure medication he had left behind when they broke up. 1 AA at 52. She eventually let him in but told him he would have to leave by the morning. 1 AA at 53.

When the morning came, however, Perry started acting aggressively, scaring Carpenter. 1 AA at 54-55. She tried to call for help, but he grabbed her phone and threw it against the wall, preventing her from calling the police. 1 AA at 56. She tried to escape to the bathroom but he punched her in the face. 1 AA at 57. When she made it to the bathroom, she fell and hit her head on the toilet. Id. When she fell, Perry started repeatedly punching her in the face. Id.

Perry only stopped when Carpenter bit Perry's hand. 1 AA at 57. Carpenter got up and tried to run away from him, but he kicked her in the back and she fell down the stairs. 1 AA at 57-60. After she fell, he began to beat and kick her while she was curled in the fetal position on the kitchen floor. 1 AA at 61-62. Eventually, Perry grabbed a knife that was laying on the stove. 1 AA at 63. Perry attacked

Carpenter with the knife, slicing her hands as she put her hands up to defend herself. 1 AA at 63. Perry threatened to kill Carpenter and her ex-husband. 1 AA at 64-65. Perry took her into the living room at knifepoint and made her sit there for 50 minutes, not moving, while he paced in front of her and made plans to kill her. 1 AA at 64-65.

Perry grabbed Carpenter's car keys from the living room and marched her to the bathroom. 1 AA at 70. He again threatened her, saying that he would kill her if she left the bathroom before she heard the garage door close. 1 AA at 70-71.

As a result of the attack, Carpenter had two black eyes, a fractured nose, and bones sticking out of her face. 1 AA at 78. She was diagnosed with glaucoma due to trauma and had a surgical implant inserted beneath her eyeball to move it back into place because the bone holding it up was fractured. 1 AA at 78-79. She lost two teeth. 1 AA at 80. She went to two months of physical therapy because the damage to her hip was such that she could not walk well. 1 AA at 77-78. The right side of her face was permanently numb and, after two surgeries, was still suffering from nerve damage. 1 AA at 79.

Carpenter's car was found one mile away, at an apartment complex that Perry used. 1 AA at 83-84. He was arrested three weeks later, on May 20, 2014.

SUMMARY OF THE ARGUMENT

The district court did not err in denying Perry's Motion Requesting Order Directing the Las Vegas Metropolitan Police Department to Conduct Genetic Marker and Latent Fingerprint Analysis of Evidence Impounded at Crime Scene ("Petition") because he did not meet the statutory requirements set out in NRS 176.0918. Perry both failed to address the requirements of NRS 176.0918 and failed to meet those requirements to succeed on a petition for genetic marker testing. However, even if Perry had met those requirements, he still would not be able to prove the results of a genetic marker test would have led to him failing to get prosecuted or convicted.

Petitioner's claim the district court erred in not testing the knife for latent fingerprints is not properly before the Court. Petitioner provided no legal authority to support his claim. Further, had a latent fingerprint test been conducted, the evidence, regardless of outcome, would not have been exculpatory and would not support Perry's innocence.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DENYING PERRY'S PETITION BECAUSE HE DID NOT MEET STATUTORY REQUIREMENTS

Perry claims the district court abused their discretion in denying his Petition Requesting Genetic Marker and Latent Print Analysis of Evidence. Appellant's

Opening Brief ("AOB") at 7-13. However, Perry did not demonstrate he was entitled to genetic marker testing nor latent fingerprint testing. Perry failed to meet his burden and thus the district court did not err in denying his Petition.

In his Petition, Perry cited NRS 176.0918 as the correct standard in support of his request for genetic marker and latent print analysis. Yet, Perry ignored the requirements of the statute and failed to meet the statutory requirements. NRS 176.0918(3) states, in pertinent part:

> A petition filed pursuant to this section must be accompanied by a declaration under penalty of perjury attesting that the information contained in the petition does not contain any material misrepresentation of fact and that the defendant has a good faith basis relying on particular facts for the request. The petition must include, without limitation:
> (a) Information identifying specific evidence either known or believed to be in the possession or custody of the State that can be subject to genetic marker analysis;
> (b) The rationale for why a reasonable possibility exists that the defendant would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in paragraph (a);
> (c) An identification of the type of genetic marker analysis the defendant is requesting to be conducted on the evidence identified in paragraph (a);
> (d) If applicable, the results of all prior genetic marker analysis performed on evidence in the trial which resulted in the defendant's conviction; and
> (e) A statement that the type of genetic marker analysis the defendant is requesting was not available at the time of trial or, if it was available, that the failure to request genetic marker analysis before the defendant was convicted was not a result of a strategic or tactical decision as part of the representation of the defendant at the trial.

(emphasis added).

Perry did not meet the requirements of NRS 176.0918 and failed to show he was entitled to genetic marker testing because he failed to attach a declaration or statement. 2 AA at 295-304. Thus, the district court did not abuse its discretion when denying the petition. NRS 176.0918(e) requires a petition requesting genetic marker analysis to include a "statement that the type of genetic marker analysis the defendant is requesting was not available at the time of trial or, if it was available, that the failure to request genetic marker analysis before the defendant was convicted was not a result of a strategic or tactical decision as part of the representation of the defendant at the trial."

Perry failed entirely to address this requirement in his Petition. 2 AA at 295-304. Perry's Petition was not accompanied by a declaration under penalty of perjury, as required by NRS 176.0918(3). 2 AA at 295-304. It was Perry's responsibility to file a Petition which complied with all of the requirements in NRS 176.0918. Yet, Perry did not file a statement that the genetic marker analysis was unavailable at trial, nor a rationale for why a reasonable possibility existed that he would not have been prosecuted or convicted if the analysis had been conducted. Perry failed to make a prima facie showing to warrant genetic marker analysis.

NRS 176.09183(5)(a) states:

> "The court shall enter an order dismissing a petition filed pursuant to this section and NRS 176.0918 if:
>
> (a) The requirements for ordering a genetic marker analysis pursuant to his section and NRS 176.0918 and 176.09187 are not satisfied."

"Shall," when used in legislative drafting, describes an action a court is required to take under the conditions specified – it is not discretionary. All Star Bail Bonds, Inc. v. Eighth Jud. Dist. Ct., 130 Nev. 419, 424, 326 P.3d 1107, 1110 (2014). As described above, the "requirements for ordering a genetic marker analysis pursuant to this section and NRS 176.0918 and NRS 176.09187 [were] not satisfied." Therefore, the district court did not abuse its discretion because it was required to dismiss Perry's Petition pursuant to NRS 176.09183(5)(a) when Perry failed to meet the requirements of NRS 176.0918.

II. THE DISTRICT COURT DID NOT ERR IN DISMISSING THE PETITION BECAUSE THE RESULTS WOULD NOT HAVE BEEN MORE FAVORABLE TO PERRY

Perry did not demonstrate there was a reasonable possibility he would not have been prosecuted or convicted. Thus, the district court did not abuse their discretion because Perry failed to even address this requirement of NRS 176.0918(3)(b). See 2 AA at 299-302. This is perhaps unsurprising, because even if the results Perry predicted were obtained through genetic marker testing, such results would not be exculpatory and would not have prevented him from being prosecuted.

Perry requested genetic marker testing of the blood samples impounded from the crime scene: the apparent blood from the steak knife, and two swabs of apparent blood (Package #2, Items #2 and #3). 2 AA at 301-302, 309. Perry asked that these

samples be compared against his own genetic markers as well as those of Carpenter.[2] 2 AA at 302. Perry contended that such testing would show that he was cut with the knife, and that Carpenter had the knife in her hand. 2 AA at 301.

Even if the blood on the knife and the blood samples matched Perry's genetic markers, at most it would show that Perry left his blood at the scene, which would not have been exculpatory. Finding Perry's blood on the knife or elsewhere at the crime scene would not prove that Carpenter cut Perry with the knife. Perry could have cut himself with the knife in the course of committing the crime. Carpenter also testified during trial that she bit Perry while he was attacking her, which also could have resulted in Perry bleeding. 1 AA at 58. The only relevance of the knife to this case was as the deadly weapon enhancement for the Robbery, False Imprisonment, and Assault With Deadly Weapon charges. Information filed June 25, 2014.

There was substantial evidence presented at trial to support a finding of guilt as to this offense. Any testing of the knife or blood found at the scene would not have called this evidence into serious question.

Perry threw Carpenter's phone against the wall so she couldn't call the police and proceeded to punch her in the face over and over. 1 AA at 57-58. Then, when

[2] While Perry may have been required to assert that the State possessed a reference sample from Carpenter if he wanted items tested and compared to her, Perry himself was *required* to submit a reference sample for testing if the Court ordered testing and so would not also need to assert that the State possessed a suitable reference sample of his DNA. NRS 176.09187(2).

Carpenter tried to run away, Perry kicked her in the back causing her to fall down the stairs. 1 AA at 60. When she fell down the stairs and into the kitchen, Perry continued to punch her and kick her in the face. 1 AA at 61-62. Finally, Perry grabbed a knife, swung it at her slicing her hands, and threatened to kill her repeatedly before stealing her car. 1 AA at 62-68. Carpenter sustained a broken nose, an orbital fracture, hip damage, and the loss of two teeth. 1 AA at 24-25, 77, 87, 80.

Evidence of Carpenter's injuries at trial was introduced through her own testimony, photographs taken of Carpenter, testimony from the responding police officer, and testimony from the surgeon who repaired Carpenter's orbital fracture. 1 AA at 25-47, 76-80, 86, 98, 155. Carpenter's surgeon testified that Carpenter required surgery because her eyeball had sunk back into her eye socket. 1 AA at 28.

Thus, the presence of Perry's blood at the scene, if found, would have not called his guilt into serious question, given the documentation of the severe injuries Carpenter received. A genetic marker match between Perry and the blood at the scene would not have exculpated him from any of the charges for which he was convicted.

Even assuming *arguendo* that a match between Perry's genetic markers and blood found at the scene would have supported a self-defense theory, this is not a

sufficient basis for ordering testing under NRS 176.0918.[3] A request for testing under this statute must demonstrate more than a mere possibility that such testing could theoretically support a defense to the charges; it requires a demonstration of a reasonable possibility that the defendant would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis. NRS 176.0918(3)(b).[4]

Perry could not meet this burden because the evidence was overwhelming. Perry caved in Carpenter's face and beat her to a pulp by punching her and kicking her over and over, and then sliced her hands with a kitchen knife and threatened to kill her with it. 1 AA at 57-62. The evidence at trial was so overwhelming that no reasonable jury could have concluded Perry was defending himself against Carpenter. There was no reasonable possibility Perry would not have been

[3] In his Petition, Perry states, "This evidence would have supported *his* self-defense claim." 2 AA at 302. However, Perry's defense at trial was not self-defense. His defense was there was insufficient evidence, and the prosecution did not meet their burden of proving the case beyond a reasonable doubt. 2 AA at 215-221. Thus, the results of genetic marker testing would not have aided his defense at trial.

[4] The "rational possibility" standard is that which must be met for the district court to order testing. Actually receiving relief after testing is done requires a defendant to file a motion for new trial pursuant to NRS 176.09187 under which a defendant must demonstrate a reasonable *probability* of a different result. NRS 176.09187; State v. Seka, 137 Nev. Adv. Op. 30, 490 P.3d 1272, 1278 (2021) ("The new DNA evidence must be material to a key part of the prosecution or defense, or so significant to the trial overall, such that had it been introduced at trial, a different result would have been reasonably probable.")

prosecuted or convicted of his crimes, therefore the genetic marker testing was irrelevant.

Lastly, Perry's contention that genetic marker testing would have assisted him in demonstrating ineffective assistance of counsel was not a valid basis for ordering testing under NRS 176.0918. The requirements of NRS 176.0918(3) make clear that the purpose of testing is to obtain exculpatory evidence, not to gather evidence to support allegations of ineffective assistance of counsel. Allegations of ineffective assistance of counsel must be, and were, raised in a Post-Conviction Petition for Writ of Habeas Corpus and were not appropriately addressed in Perry's Petition for genetic marker testing. NRS 34.724(2)(b); Harris v. State, 130 Nev. 435, 445, 329 P.3d 619, 626 (2014); Gibbons v. State, 97 Nev. 520, 521, 634 P.2d 1214, 1216 (1981).

III. THE ISSUE OF WHETHER LATENT FINGERPRINT TESTING SHOULD HAVE BEEN PERFORMED IS NOT PROPERLY BEFORE THIS COURT, BUT ASSUMING IT IS, THE DISTRICT COURT PROPERLY DENIED IT

A. NRS 176.0918 does not provide for latent fingerprint testing

The district court did not abuse its discretion in denying Perry's Petition to test the latent fingerprints because it was not provided for under the only statute Perry cited to support his Petition, NRS 176.0918. This statute sets forth the procedure and criteria for a convicted person to request genetic marker analysis of evidence. It authorizes no other form of evidence testing. Perry claims the legal basis

for requesting latent print testing is to support his post-conviction ineffective assistance of counsel claim. AOB at 8, 2 AA at 301. However, Perry is not appealing the district court's denial of his post-conviction Writ of Habeas Corpus where he alleged ineffective assistance of counsel in the instant Appeal, and that petition has not yet been denied.[5] Thus, Perry failed to provide any legal basis for his request for latent fingerprint analysis. Therefore, this request was correctly denied.

B. Even if latent fingerprint testing could have been requested, testing of the knife could not have led to exculpatory evidence

Perry claims that latent fingerprint analysis would have revealed Carpenter's fingerprints on the steak knife that was found at the scene. AOB at 10. However, Perry agrees Carpenter's fingerprints on the knife would not be surprising, because Carpenter testified at trial that she had used the knife the evening before the crime to eat her steak dinner. 1 AA at 63. Thus, Carpenter's fingerprints on the knife would not constitute exculpatory evidence in this case.

Instead, Perry claims the absence of his fingerprints would have been exculpatory because it would support the theory Carpenter attacked him with the knife. AOB at 10. However, the absence of Perry's fingerprints on the knife would be in no way exculpatory, as it would not conclusively prove Perry did not handle the knife. There could be a wide range of explanations for why Perry's fingerprints

[5] Discovery requests, in the context of a post-conviction petition for writ of habeas corpus, are governed by NRS 34.780

would not be on the knife, even though he cut and threatened Carpenter with it. Therefore, the test would not have been exculpatory, even if it had produced the results Perry sought, would not have supported his theory of self-defense, let alone been so exculpatory as to overturn his conviction.

It is also unclear whether the knife was impounded in a manner preserving it for latent fingerprint analysis. There is no mention of visible prints or the preservation of potential fingerprints in either the Crime Scene Investigation Report or the Evidence Impound Report. 2 AA at 305-309. There is simply no basis for granting Defendant's request for fingerprint analysis. Therefore, the district court did not abuse their discretion in denying Perry's request for latent fingerprint analysis testing.

CONCLUSION

For the foregoing reasons, the district court's denial of Perry's Petition should be affirmed.

Dated this 12th day of November, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 3,013 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 12th day of November, 2021.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 12, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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