FILED
OCTOBER 29, 2014
Court of Appeals
Division III
State of Washington

No. 32182-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

SHANE ALLAN JONES, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The court erred by denying Mr. Jones' motion for DNA testing.

Issue Pertaining to Assignment of Error

Did the court err by denying the motion on the ground Mr. Jones had not shown "a likelihood that DNA evidence would demonstrate innocence on a more probable than not basis"?

II. STATEMENT OF THE CASE

On May 5, 2003, Mr. Jones was charged by amended information with count I: first degree child rape of TJF and count II: first degree child rape of RA. (CP 5). In his Statement of Defendant on Plea of Guilty to Sex Offense, he pleaded guilty to two counts of first degree child rape. (CP 7). Mr. Jones made this statement:

> In Klickitat Co. WA on or about 1995 and 2000 I had sexual intercourse with and was at least 24 months older than the victims, persons who were less than twelve years of age and not married to me. (CP 12-13).

In the plea agreement, the State agreed to recommend confinement of 216 months on count I and 194 months on count II. (CP 17).

In an amended judgment and sentence entered on November 17, 2003, the court sentenced Mr. Jones to 216 months on count I and 194 months on count II, for total confinement of 216 months. (CP 49, 53). It also imposed community custody of 36 months on count I and community placement of 24 months on count II. (CP 54).

On December 6, 2013, Mr. Jones' motion for DNA testing was filed in the trial court. (CP 61). In his supporting affidavit, he asked for testing "upon the grounds that (1) the conviction rested primarily on eyewitness identification evidence, (2) there is a demonstrable doubt concerning [his] identification as the perpetrator, and (3) DNA testing would likely be conclusive on that issue." (CP 63-64).

That same day, the court denied the motion for DNA testing. (CP 74). Its reasons were (1) Mr. Jones had pleaded guilty to the charges in May 2003 and (2) he had not shown a likelihood DNA evidence would demonstrate innocence on a more probable than not basis. (CP 74). This appeal follows. (CP 76).

III. ARGUMENT

A. The court erred by denying the motion for DNA testing on

the ground Mr. Jones had not shown "a likelihood that DNA evidence would demonstrate innocence on a more probable than not basis."

Although the court did cite reasons for its decision, the record shows that Mr. Jones' motion was summarily denied the day it was filed. While this appeal was pending, the Supreme Court decided *State v. Crumpton*, ____ Wn.2d ____, 332 P.3d 448 (2014). Mr. Jones is entitled to the benefits of *Crumpton*. *State v. McCormick*, 152 Wn. App. 536, 539, 216 P.3d 475 (2009), *review denied*, 172 Wn. 2d 1007 (2011) (new principle of law retroactive to cases not yet final).

The trial court's decision on a motion for postconviction DNA testing is reviewed for abuse of discretion. *State v. Riofta*, 166 Wn.2d 358, 370, 209 P.3d 467 (2009). Discretion is abused when the decision is made on facts unsupported in the record or is reached by applying the wrong legal standard. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

Not addressing whether Mr. Jones met the procedural requirements of RCW 10.73.170(2)**,** the trial court looked only to

the substantive portion of the statute requiring the convicted person to show "the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). In *Crumpton*, 332 P.3d at 451-52, the court held that a trial judge should presume evidence would be favorable to the convicted individual when determining if it is likely the evidence would prove his or her innocence:

> Case law supports using a favorable presumption when deciding whether to grant a motion for postconviction DNA testing. We formally hold that this presumption is part of the standard in RCW 10.73.170.

The Supreme Court further observed that "[m]any innocent individuals have been exonerated through postconviction DNA tests, including some who had overwhelming evidence indicating guilt." *Id.* This is such a case where, for whatever reason, Mr. Jones pleaded guilty as noted in the order denying DNA testing. (CP 74). If the DNA does not match, however, he is likely innocent. 332 P.3d at 452.

The trial court should have evaluated the likelihood of innocence based on a favorable test result, not the likelihood of a favorable test result in the first place. *Crumpton*, 332 P.3d at 453.

As in *Crumpton*, there is no indication in the order denying Mr. Jones' motion that the trial court used a standard including use of a favorable presumption. Indeed, the handwritten one-page order that was apparently prepared by the judge himself contains no findings but only conclusions of law. (CP 74). Because the presumption is part of Washington law and should be applied, this Court is constrained to assume the trial judge did not apply the proper standard and thus abused his discretion. *Crumpton*, 332 P.3d at 453. The case should be remanded to the trial court to apply that standard to Mr. Jones' motion.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Jones respectfully urges this Court to reverse and remand to the trial court to apply the proper standard to his motion for DNA testing.

DATED this 29th day of October, 2014.

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CERTIFICATE OF SERVICE

I certify that on October 29, 2014, I served the brief of appellant by first class mail, postage prepaid, on Shane Allan Jones, # 802250, PO Box 2049, Airway Heights, WA 99001, and by email, as agreed by counsel, on Katharine Mathews at kmathews@co.klickitat.wa.us.