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October 19, 2015
Court of Appeals

NO. 72850-4-I

Division I

State of Washington

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRIAN DUBLIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. FACTS OF THE CRIMES	2
C. <u>ARGUMENT</u>	8
THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN CONCLUDING THAT DUBLIN FAILED TO MEET THE REQUIREMENTS OF RCW 10.73.170	8
D. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Crumpton, 181 Wn.2d 252,
332 P.3d 448 (2014)..... 10, 12, 13, 16

State v. Gentry, ___ Wn.2d ___,
356 P.3d 714 (2015)..... 11, 14, 16

State v. Riofta, 166 Wn.2d 358,
209 P.3d 467 (2009)..... 9, 10, 11, 13, 16

State v. Thompson, 173 Wn.2d 865,
271 P.3d 204 (2011)..... 12, 13, 16

Statutes

Washington State:

RCW 10.73.100..... 12

RCW 10.73.170..... 1, 8, 9

A. ISSUE PRESENTED.

Whether the trial court properly exercised its discretion in denying the defendant's motion for post-conviction DNA testing where the court reasonably concluded that it is not more probable than not that favorable DNA results would demonstrate innocence?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Brian Dublin was convicted by jury trial of two counts of rape in the first degree, one count of attempted rape in the first degree, and three counts of burglary in the first degree in 2010. CP 27, 34. He was sentenced to an indeterminate sentence of 539 months to life. CP 31. His convictions were affirmed on appeal. CP 40-48.

In 2014, Dublin filed a motion for post-conviction DNA testing pursuant to RCW 10.73.170. CP 50-84. The State opposed the motion. CP 91-106. The Honorable Laura Middaugh, who had presided over the trial, denied the motion, concluding that Dublin had failed to show a likelihood that the DNA evidence would demonstrate his innocence on a more probable than not basis. CP 88-90.

2. FACTS OF THE CRIMES.

At approximately 3:30 a.m. on January 10, 2010, 16-year-old E.P. was suddenly awakened in her darkened bedroom at her parents' home on Vashon Island by a man who was on top of her. RP 1617, 1638. E.P. reached up to touch the man's face, suspecting that the man might have been her boyfriend. RP 1639, 1656. When she felt a beard, she knew he was not her boyfriend, who was clean-shaven. RP 1639.

In a distinctive voice, the man told E.P. not to make a sound or he would kill her. RP 1640. Terrified, E.P. "froze" as the man removed her underwear and digitally penetrated her vagina. RP 1639-40. He then penetrated E.P. with his penis. RP 1640-41. When he finished raping E.P., the attacker demanded to know if he "needed to come back" and warned E.P. not to tell anyone he had been there, or he would be forced to return. RP 1641.

The attacker then left E.P.'s bedroom; E.P. waited until she heard the home's front door, which the family usually left unlocked, close and then got up to run to her parents' room. RP 1592, 1642-43. E.P. was so traumatized that she urinated on herself before she could make it to her parents' room. RP 1642-44. She awakened her parents, who called 911. RP 1644-45.

E.P. told the officers who responded to her house, which was in a wooded, isolated location far from other residences, that she suspected her attacker was Dublin, who was then in his late-twenties, and who had been sending her numerous text messages inviting her to parties. RP 1629-30, 1644-45. E.P. explained that at one party she had attended at Dublin's house the previous summer, she had awakened alongside Dublin in his bedroom; she was wearing only her underwear, and had no recollection of anything that had occurred after having a few sips of her first beer upon her arrival there. RP 1624-28.

E.P. had also briefly seen Dublin earlier that night when he arrived at a party that E.P. was attending. RP 1634-35. Dublin had a beard and was wearing a dark pullover at the party. RP 1644-45. Surveillance film obtained from a bar on the island showed a bearded Dublin, wearing a dark sweatshirt, ordering drinks. RP 739-43. Dublin closed his tab at the bar at 1:51 a.m. on the morning of January 10. RP 746.

DNA obtained from E.P.'s rape examination matched male DNA obtained from an unsolved rape case on the island in 2003. RP 1985. At approximately 3:00 a.m. on October 8, 2003, 16-year-old A.B. was asleep in her bedroom in her parents' home -- located

in a wooded, isolated area, and a home in which the external doors were generally left unlocked – when she awakened to a man standing next to her bed. RP 551, 579. In a low, raspy whisper, and brandishing a knife, the man told A.B. to shut up and take off her shirt. RP 584-86. The man said that he had already tied up A.B.'s family; he added that if A.B. later talked to the police or the local newspaper, he would return and kill A.B. RP 586.

A.B. disrobed, and the attacker began to orally penetrate A.B.'s vagina. RP 586. He then vaginally raped A.B., asking her how "it" felt; A.B. told him that it was "bad and degrading." RP 588. After what she believed to be about 20 minutes, the attacker left A.B.'s room. RP 590. Once she saw him in the backyard, walking away from the home, A.B. ran for her stepfather and called 911. RP 592-94. She was taken by police to Harborview Medical Center in Seattle for a rape examination. RP 595.

The male DNA obtained from both A.B. and E.P. matched Brian Dublin. RP 696, 699, 710-11. DNA found in the anal, vaginal, neck and breast swabs from A.B. matched Dublin's DNA profile, with the probability of matching a randomly selected individual being 1 in 130 quadrillion. RP 856-57. A.B. knew

Dublin's sister, but did not know Dublin well; she testified that she may have seen him at local events on the island. RP 597-98, 602.

Investigators saw numerous similarities between Dublin's attacks on A.B. and E.P. and another then-unsolved incident on Vashon Island in 2006. On the night of July 2, 2006, at approximately 3:00 a.m., the same time as the other two attacks, 12-year-old G.G. was asleep at her parents' home in an isolated, wooded area. RP 1260, 1311. Like E.P.'s and A.B.'s parents, G.G.'s parents usually left the doors to the home unlocked. RP 1245. G.G. was sleeping in bed with her younger sister, S.G., and they were in the bedroom that had until recently belonged to their older sister, F.G. RP 1311, 1378.

G.G. awakened to a man telling her to "get the fuck up." RP 1311-12, 1314. In a low, rough whisper, the man told G.G. that he would kill her and that he had already stabbed her older sister. RP 1317, 1325. G.G. complied and left the bedroom with the attacker. RP 1315.

The man led G.G. into the darkened family room, at which time he grabbed her crotch and asked her, "Who are you sleeping with?" RP 1319-21. G.G. told him that she wasn't sleeping with anyone, explaining that she was only 12 years old. RP 1319-20.

The man told G.G. to take off her clothes and to bend over.

RP 1323. When he released his grip from her, G.G. bolted from the room and raced to her parents' room. RP 1324-28. The attacker fled before police arrived. RP 1266-67.

Though G.G. did not know Dublin, her older sister, F.G., knew him and had socialized with him years earlier when they were in high school together. RP 1368-69. Dublin had been to the family's home on several occasions to pick F.G. up; she would typically leave through the door in her bedroom (the one occupied by G.G. in 2006) and meet Dublin outside. RP 1371-72. F.G. explained to the jury that she was living in California in July 2006. RP 1365.

King County Sheriff's Office detectives obtained a search warrant for Dublin's home in May 2010. RP 1123-24. In the course of the search, detectives recovered, among other items, a notebook in a loft near Dublin's bed. RP 1137-38, 1144-45. In the notebook, the full names of A.B. and E.P. had been written down, along with G.G.'s initials. RP 1146-47.

Detectives presented Dublin at a lineup in December 2010 that G.G. attended. RP 1509. Each of the participants in the lineup

was told to say aloud, "Shut up or I'm going to fucking kill you," "Your sister is all stabbed up," and "Who are you sleeping with?" RP 1513-14. When informed of the statements, Dublin blinked and swallowed hard. RP 1514-15. Although G.G. was unable to definitively identify Dublin, she told the investigators that he and another individual most closely resembled the person she had seen in her darkened home four years earlier. RP 1523. She also testified that hearing Dublin's voice "brought back a lot" and made her afraid again, much more so than when other lineup participants said the same words. RP 1336, 1338.

Dublin testified in his own case-in-chief. He admitted knowing E.P., A.B., and G.G.'s sister, F.G. RP 2113. He claimed to have had consensual sex with A.B. in his truck sometime in 2003, and claimed that he had also had sex in his truck with E.P. in 2010. RP 2115, 2127-28. He admitted knowing where A.B. and E.P. lived, and that he had often spent time with F.G. in high school. RP 2114, 2120. Dublin denied authorship of the contents of the notebook found in his home. RP 2140-41.

C. ARGUMENT.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN CONCLUDING THAT DUBLIN FAILED TO MEET THE REQUIREMENTS OF RCW 10.73.170.

Dublin argues that the trial court erred in denying the motion for DNA testing. However, Dublin cannot show the trial court abused its discretion. The DNA evidence presented at trial conclusively demonstrated Dublin's identity as A.B.'s rapist. In light of this fact, the absence of Dublin's DNA on items found in A.B.'s room or the presence of someone else's DNA, would not be probative of Dublin's innocence. Presumably there are traces of other people's DNA in A.B.'s bedroom. The trial court did not abuse its discretion in concluding that Dublin has not demonstrated a likelihood that favorable DNA evidence from these items would establish his innocence on a more probable than not basis.

RCW 10.73.170 allows a defendant who has been convicted and is currently serving sentence to file a motion with the court that entered judgment on the conviction to request DNA testing. The statute reads, in relevant part:

(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.

(2) The motion 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, or to sentence enhancement; and

(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.

RCW 10.73.170.

The statute contains both procedural and substantive requirements that must be met before the defendant is entitled to testing. Procedurally, the defendant must fall within the statute and state the basis for the request, explain the relevance of the DNA evidence and comply with the applicable court rules. State v. Riofta, 166 Wn.2d 358, 364, 209 P.3d 467 (2009). Substantively,

the defendant must show a “likelihood that [favorable] DNA evidence would demonstrate innocence on a more probable than not basis.” Id.; State v. Crumpton, 181 Wn.2d 252, 332 P.3d 448, 450 (2014). In making this substantive determination, the court “must consider the evidence at trial along with any newly discovered evidence and the impact that an exculpatory DNA test could have in light of this evidence.” Riofta, 166 Wn.2d at 369. The court should presume that the DNA results would be favorable to the defendant, in other words that his DNA would be absent or that another’s DNA would be present, when making the determination of whether the DNA test would demonstrate innocence on a more probable than not basis. Crumpton, 181 Wn.2d at 260.

The statute places a heavy burden on a defendant to show a reasonable probability of his actual innocence. Riofta, 166 Wn.2d at 369. The court must look to whether, considering all the evidence and assuming favorable DNA results, it is likely the defendant is innocent on a more probable than not basis. Crumpton, 181 Wn.2d at 260. The court has the discretion to consider all relevant evidence in deciding a motion for post-conviction DNA testing, including newly discovered inculpatory

evidence. State v. Gentry, ___ Wn.2d ___, 356 P.3d 714, 724 (2015).

The trial court's grant or denial of a motion for post-conviction DNA testing is reviewed for abuse of discretion. Id.

If the item to be tested would not necessarily yield DNA from the perpetrator of the crime, then the standard cannot be met. In Riofta, the defendant requested DNA testing on a white hat found at the scene of the shooting. Id. at 363. The victim testified that the shooter, whom he recognized as "Alex" and later identified as the defendant, was wearing a white hat. Id. at 362. The Washington Supreme Court affirmed the trial court's denial of the defendant's motion to conduct DNA testing on the white hat. The court explained that neither the absence of his DNA nor the presence of another's DNA on the white cap would establish Riofta was innocent on a more probable than not basis. Id. at 373. Since Riofta's head was shaved and he might only have worn the hat for a few minutes, the court explained that the absence of his DNA on the white cap would not exclude him as being the shooter. Id. at 370. Conversely, the presence of someone else's DNA on the hat, which could have been worn by any number of people before the shooting, would not mean that that person was the shooter. Id. at

371. Thus, the court held that Riofta had failed to meet the substantive requirement of RCW 10.73.100(1).

In contrast, samples from rape kit examinations have been recognized as being especially probative of guilt or innocence. State v. Thompson, 173 Wn.2d 865, 271 P.3d 204 (2011), like the present case, involved a rape conviction. In that case, the victim was raped in a hotel room in 1995 by a man she met at a bar. Id. at 867. Swabs from a rape kit, as well as a bed sheet and a bloody washcloth from the hotel room, were submitted for testing. Prior to trial, the laboratory determined that a bloodstain on the sheet contained semen, but was unable to determine a donor. Id. at 869. No DNA analysis of semen found in the vaginal swab was performed. Id. The state supreme court held that the motion for post-conviction DNA testing should have been granted. Because the victim only had intercourse with one person, the rapist, on the night of the attack, DNA results that excluded Thompson as the source of the semen on the vaginal swab would make it more probable than not that he was innocent. Id.

Similarly, in State v. Crumpton, the victim, a 75-year-old widow, had been repeatedly raped by an intruder in her home in 1993. 181 Wn.2d at 255. Crumpton moved for post-conviction

DNA testing of rectal and vaginal swabs from the victim, the flannel sheet from the victim's bed, hairs, and white handkerchiefs used by the rapist in the victim's perineal area after the rape. The State argued that the motion should not be granted because of overwhelming evidence of Crumpton's guilt (he was stopped 8 minutes after the victim called the police running a half a mile from the victim's house, carrying one of the victim's pillowcases smeared with blood and other items belonging to the victim, and admitted to being in the victim's house). Id. at 259. The supreme court held that the court must presume that DNA testing would be favorable to the defense in considering the motion. Id. at 260. Applying this presumption, the court concluded that "because there was only one rapist and no other sexual activity, any DNA on the tested evidence would *necessarily* have to be the rapist's DNA." Id. at 261 (emphasis added).

In this case, however, unlike Thompson or Crumpton, the rape kit samples were tested for trial and found to conclusively match Dublin. The bedding and underwear found in A.B.'s room are more like the hat in Riofta than the items at issue in Thompson and Crumpton. In his briefing, Dublin asserts that the underwear was "worn by the perpetrator." Brief of Appellant, at 2. This fact

has never been established. A.B. testified that she had a very messy room. RP 578. Det. Maley testified that he never interviewed A.B. but was sent to collect items from her room. RP 409-14. He collected bedding and a pair of gray underwear that he thought might have belonged to the rapist. RP 409-13. He thought he might have been told by another officer that the underwear belonged to the rapist. RP 414. However, no officer testified that A.B. said the underwear in her room was the rapist's. There was no evidence that the rapist removed his clothing during the attack. And significantly, A.B. was never asked on cross-examination about the underwear. RP 600-04. Thus, a fair reading of the record is that the underwear was never conclusively linked to the rapist.

When highly probative DNA evidence has already established the perpetrator's identity, further DNA testing is not warranted under the statute. In Gentry, supra, 356 P.3d at 716, the defendant was convicted of murdering a 12-year-old girl in 1991. Twenty years later, he requested further DNA testing of numerous items. Id. These items included hairs found on the victim's body and blood found on Gentry's shoes and shoelaces. Id. at 718. The State did not initially object to testing but reserved the right to object

to relevance and admissibility, and the court granted the motion. Id. Gentry's shoelaces were tested first, and blood on them was found to match the victim's DNA profile. Id. at 718-19. The State then filed a motion to deny further DNA testing in light of that result. Id. at 719. The trial court granted the State's motion denying further testing. Id.

The supreme court affirmed, reasoning that assuming a favorable DNA result, the presence of another person's hair on the victim's body would not establish Gentry's innocence. Id. at 724. Likewise, the trial court reasonably concluded that the presence of a person's blood other than the victim's on the shoe, in conjunction with the fact that the victim's blood was found on the shoelace, would not demonstrate Gentry's innocence on a more probable than not basis. Id.

In the present case, neither the absence of the defendant's DNA nor the presence of another DNA profile on the items that Dublin requested be tested would make it more probable than not that Dublin is innocent of burglarizing A.B.'s home and raping her. The most probative piece of evidence is the DNA profile found in the sexual assault examination test samples, which matched Dublin's profile. The absence of his DNA on other items in A.B.'s

room would not be particularly probative of anything, and would not demonstrate Dublin's innocence on a more probable than not basis given the fact that Dublin's DNA was found in the swabs from the rape examination.

Just as in Riofta, many other people might have come into contact with the various items located in A.B.'s room. Unlike Thompson and Crumpton, one cannot say with any confidence that DNA from these items would necessarily be from the person that raped A.B. And as in Gentry, the presence of some other DNA profile on these items would not diminish the extremely probative value of the defendant's DNA profile found in the anal, vaginal, neck and breast samples from A.B. The trial court reasonably concluded that further DNA testing of these items, even if producing favorable results, would not lead to the conclusion that it is likely that Dublin is innocent on a more probable than not basis.

Dublin's request did not meet the substantive statutory standard. Considering all the evidence, Dublin failed to establish a likelihood that the presence of another person's DNA on these items would demonstrate that he is innocent of the burglary and rape of A.B. on a more probable than not basis. The trial court properly exercised its discretion in denying the motion.

D. CONCLUSION.

The trial court's order denying the motion for post-conviction DNA testing should be affirmed.

DATED this 19th day of October, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Richard W Lechich, the attorney for the appellant, at richard@washapp.org, containing a copy of the Brief of Respondent in State v. Brian Chadwick Dublin, Cause No. 73282-0, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 19 day of October, 2015.


Name:
Done in Seattle, Washington