

NO. 74872-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEVEN COOK,

Appellant.

FILED

Sep 23, 2016

Court of Appeals

Division I

State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George N. Bowden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in denying appellant's petition for post-conviction DNA testing.

Issue Pertaining to Assignment of Error

The court must grant a request for post-conviction DNA testing when a favorable result would give rise to a reasonable probability of innocence. Did the court err in denying appellant's request when the forensic nurse testified there would likely be DNA on the swabs if appellant had inserted his finger into the complaining witness' vagina as she claimed?

B. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Steven Cook was acquitted of second-degree rape but convicted of indecent liberties via forcible compulsion. 5RP¹ 2. After his conviction was affirmed on appeal, Cook filed a petition for post-conviction DNA testing. CP 22-27. He also moved to have counsel appointed for his petition. Supp. CP² ____ (sub no. 88, Motion to Appoint Counsel, filed Dec.

¹ On September 22, 2016, a motion was filed requesting transfer of the Verbatim Report of Proceedings from Cook's direct appeal, no. 72619-6-1, to this cause number. Including those reports, there are seven volumes of Verbatim Report of Proceedings referenced as follows: RP – Feb. 19, 2016; 1RP – Aug. 22, 2014; 2RP – Sept. 22, 2014; 3RP – Sept. 23, 2014; 4RP – Sept. 24, 2014; 5RP – Sept. 25, 2014; 6RP – Oct. 23, 2014.

² A supplemental designation of clerk's papers was filed on September 22, 2016.

9, 2015). After a hearing on February 19, 2016, the superior court denied both motions. CP 13, 14. Notice of appeal was timely filed. CP 6.

2. Substantive Facts

Complaining witness N.R. claimed that, during a massage appointment, Cook, a licensed massage therapist with no criminal history, held her down and inserted his finger into her vagina up to the knuckle, several times. 2RP 66-67. When asked about the incident, Cook acknowledged that he had noticed her flinch and wondered if he might have inadvertently touched her vagina during his massage of her legs. 3RP 169-70, 236-37, 244-45.

For two days after the incident, N.R. did not go to the police. 2RP 75, 78-81; 3RP 114. When she finally did make her allegations and evidence was collected, police told her that, with the time that had passed, the chances of finding DNA were slim. 3RP 177-78.

But the forensic nurse who testified at trial had a slightly better analysis of the likelihood of finding DNA. The nurse took four Q-tip style swabs of N.R.'s vagina. 3RP 216. Her goal was to cover a broad area. 3RP 216. She testified she tries to cover as much of the area as possible. 3RP 217. She testified it would also be potentially possible to find oil on the swabs. 3RP 217-18.

She testified that swabs are routinely tested even when the swab occurs up to a week after an alleged rape. 3RP 210. While not highly likely, she testified that, under the circumstances, if N.R.'s accusations were correct, it would be "likely" to find DNA. 3RP 210. She stated, "It's probably not highly likely, but it is likely." 3RP 210. As she pointed out, "Everyone transfers evidence to everyone when you touch them." 3RP 210. She later stated there was a "slim possibility" that the four swabs she took from N.R.'s vagina would show foreign DNA. 3RP 219. With the oil that was on Cook's hands, she explained, the contact described by N.R. would "more than likely leave skin cells and oil" behind. 3RP 214.

The State decided not to have the swabs tested. 3RP 179.

Despite N.R.'s unequivocal testimony about penetration, the jury found Cook not guilty of rape, convicting him only on the charge of indecent liberties by forcible compulsion. 5RP 2.

In his request for post-conviction DNA testing of the swabs, Cook explained that the absence of any of his DNA on the swabs of N.R.'s vaginal area would show that no sexual assault occurred. CP 22-27. The superior court judge who heard Cook's post-conviction motion for DNA testing was not the judge who presided at his trial. RP 1. The new judge denied Cook's request for three reasons: first, if Cook's DNA were to be found on the swabs, it would essentially prove him guilty of the rape he was acquitted of;

second, if someone else's DNA were found on the swabs, it would not disprove the indecent liberties; and third, assuming the complaining witness testified that the sexual contact required for indecent liberties occurred, post-conviction DNA testing is not authorized for purposes of impeaching a witness. RP 10. The court acknowledged it would be very little inconvenience to the State to perform the tests Cook was requesting. RP 9-10.

C. ARGUMENT

1. DNA TESTING IS REQUIRED BECAUSE A FAVORABLE RESULT WOULD REFUTE THE COMPLAINING WITNESS' STORY AND GIVE RISE TO A REASONABLE PROBABILITY OF INNOCENCE.

To guard against the very real possibility that an innocent person has been condemned and imprisoned by our criminal justice system, Washington law provides that a convicted person may request that DNA testing be performed. RCW 10.73.170; State v. Crumpton, 181 Wn.2d 252, 258, 332 P.3d 448 (2014) (citing State v. Riofta, 166 Wn.2d 358, 368, 209 P.3d 467 (2009)). Testing must be permitted when the person meets the procedural and the substantive requirements of the statute. RCW 10.73.170. The procedural burden is met when DNA testing would yield significant new information about the identity of the perpetrator. RCW 10.73.170(2); State v. Thompson, 173 Wn.2d 865, 875-76, 271 P.3d 204 (2012). The

substantive burden is met when there is a “likelihood that the DNA would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3).

In assessing such a request, the court must assume the result of the DNA testing would be favorable to the convicted person. Crumpton, 181 Wn.2d at 255. The court must also assess the impact of the DNA evidence in light of the other evidence at trial, but should not focus on the weight of the other evidence, since any trial leading to a guilty verdict will likely have strong evidence of guilt. Id. at 262. In this light, the court must allow the testing when a favorable DNA test would “raise a reasonable probability the petitioner was not the perpetrator.” Riofta, 166 Wn.2d at 367-68.

A trial court’s decision on a motion for postconviction DNA testing is reviewed under the abuse of discretion standard. State v. Gray, 151 Wn. App. 762, 769, 215 P.3d 961 (2009) (citing Riofta, 166 Wn.2d at 370). A court abuses its discretion if its decision rests on facts unsupported in the record or was reached by applying the wrong legal standard. Thompson, 173 Wn.2d at 870. A court also abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). In Cook’s case, the court abused its discretion in failing to apply the legal principles requiring it to assume a

favorable result and assess the impact of that result in light of the other evidence including the jury's acquittal on one of the counts.

a. Cook's Conviction Rests Entirely on the Already Doubtful Credibility of the Complaining Witness.

Denial of the DNA testing was an abuse of discretion because the court failed to appreciate the central importance of the complaining witness' testimony and her already diminished credibility. Cook was convicted of indecent liberties based solely on testimony by a massage client, N.R., who claimed he penetrated her vagina with his finger during a massage. The jury acquitted Cook of a rape charge that would have required a showing of penetration. 5RP 2; RCW 9A.44.010(1); RCW 9A.44.050. The jury found Cook not guilty despite the client's testimony that he plunged his fingers quite deeply into her vagina. She claimed his finger penetrated her vagina at least three times and up to the knuckle. 2RP 66-67. If the jury had found N.R. to be a credible witness, it would not have acquitted Cook of rape.

The request for post-conviction DNA testing must be evaluated in light of all the evidence at trial. Gray, 151 Wn. App. at 773-74. Thus, the impact of a favorable DNA result must be viewed in light of the following backdrop: the only evidence that any crime was committed at all was the testimony of a woman whose credibility was already compromised. The court did not do this. Instead the court mentioned that N.R. must have

testified that sexual contact occurred, without considering the context and the already considerable doubts about her credibility. RP 10.

b. A Favorable DNA Result Would Give Rise to a Reasonable Probability of Innocence.

In ruling on a request for post-conviction DNA testing, the court must presume a favorable result. Crumpton, 181 Wn.2d at 255. It would be a favorable result for Cook if none of his DNA were to be found on any of the four swabs. The superior court erred in failing to presume that would be the result. RP 10. Instead, the court here focused on the potential negative result if Cook's DNA were to be found on the swabs, reasoning that would only prove him guilty of the rape that he was acquitted of. RP 10.

The absence of Cook's DNA would be significant, despite the small size of the swabs in relation to the vaginal wall, because four swabs were taken, and the nurse attempted to cover as much surface area as possible. 3RP 216-17. She also testified it was likely that touch DNA could be found under these circumstances. 3RP 210. Therefore, an absence of touch DNA in the vagina would be entirely consistent with Cook's statements insisting that there was, at most, a possibility of brief, inadvertent contact. 3RP 169-70, 236-37, 244-45. It would, however, refute N.R.'s testimony that Cook's finger penetrated inside her vagina up to the knuckle several times. 2RP 66-67. An absence of Cook's DNA in N.R.'s vaginal area is far more consistent

with Cook's innocent explanation of the incident than with N.R.'s story. Testing the swabs would provide the significant new information required under RCW 10.73.170(2)(a)(iii) and would give rise to a likelihood of probable innocence as required under RCW 10.73.170(3).

The court here appears to have viewed additional DNA testing as nothing more than impeachment. RP 10. But the law does not say that impeachment is outside the scope of the statute. The statutory standard requires that the DNA test be "material to the identity of the perpetrator." RCW 10.73.170(2)(b). Impeachment can be on either a material or collateral issue. State v. Gakin, 24 Wn. App. 681, 686, 603 P.2d 380 (1979). When, as here, a conviction rests entirely on one witness' testimony with no physical evidence whatsoever, to impeach that witness' allegations is material and creates a reasonable probability the defendant is innocent.

Cook's equivocal statement to police does not negate the import of favorable DNA test results. He did not confess, but even in cases where the defendant confesses, DNA may demonstrate a high probability of innocence. In In re Bradford, 140 Wn. App. 124, 127-132, 165 P.3d 31 (2007), testing excluding the defendant as the source of DNA found on a mask used to cover the rape victim's face required a new trial despite the defendant's confession to the crime. See also Riofta, 166 Wn.2d at 377-378 (Chambers,

J., concurring in dissent) (discussing fallibility of confessions and eyewitness testimony as revealed by DNA testing).

This case is a classic he-said-she-said. The forcible compulsion element necessary to convict Cook of indecent liberties rested solely on N.R.'s testimony. RCW 9A.44.100. With evidence showing no DNA was found, there is a reasonable probability the jury would have found even more reason to doubt her credibility on the indecent liberties charge. The oral ruling shows that the superior court below failed to view the DNA evidence in light of this posture. RP 10. DNA testing would raise the probability that Cook is innocent, and his request for post-conviction DNA testing should be granted.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Cook indigent and entitled to appointment of appellate counsel at public expense. CP 1-2. If Cook does not prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160 (1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Cook’s ability to pay must be determined before discretionary costs are imposed. Cook was 64 years old at the time of his sentencing in 2014. 6RP 8. His family home was in foreclosure. 6RP 12. He received an indeterminate sentence with a minimum term of 68 months and a maximum term of life. 6RP 2, 22-23. The superior court found him indigent for purposes of this appeal. CP 1. The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f).

Without a basis to determine that Cook has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

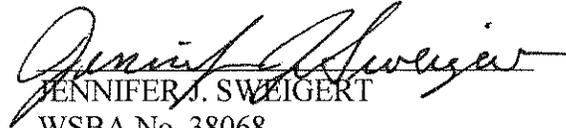
D. CONCLUSION

For the foregoing reasons, Cook requests this Court reverse the order denying his petition for post-conviction DNA testing.

DATED this 23rd day of September, 2016.

Respectfully submitted,

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