

No. 49054-4-II

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

STATE OF WASHINGTON, Respondent

v.

JERRY SWAGERTY, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. STATEMENT OF FACTS2

III. ARGUMENT5

 The Court Abused Its Discretion When It Denied The Motion
 For DNA Testing.....5

IV. CONCLUSION 14

TABLE OF AUTHORITIES

Washington Cases

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

State v. Gentry, 183 Wn.2d 749, 356 P.3d 714 (2015)..... 5

State v. King County Dist. Court West Div., 175 Wn.App. 630, 307 P.3d 765 (2013)..... 9

State v. Riofta, 166 Wn.2d 358, 209 P.3d 467 (2009) 6

State v. Thompson, 173 Wn.2d 865, 271 P.3d 204 (2012)..... 11

Statutes

RCW 10.73.090 6

RCW 10.73.170 5

RCW 10.73.170(3)..... 7

Rules

CrR 7.8..... 6

I. ASSIGNMENTS OF ERROR

A. The court erred when it denied Mr. Swagerty's motion for DNA testing pursuant to RCW 10.73.170

Issues Pertaining to Assignment of Error

1. Did the trial court err by denying the motion for DNA testing on the ground that it was untimely under CrR 7.8?
2. Did the trial court err by denying the motion for DNA testing on the ground that the motion did not comply with RCW 10.73.170(2)(b)?
3. Did the trial court err by denying the motion for DNA testing on the ground that even if the motion complied with RCW 10.73.170(2)(b), the DNA test which was already performed and did not match defendant does not demonstrate defendant's innocence on a more probable than not basis?
4. Did the trial court err by denying the motion for DNA testing on the ground that "the court does not order additional DNA testing when adequate DNA testing was already performed" ?

II. STATEMENT OF FACTS

In February 2004, 10 year old S.B., a special needs child, was at a Safeway store with her father. The store videotape showed a suspect approaching the child as she went to get a grocery cart. (CP 3). She left the store with the man.

Approximately ten minutes later she was seen on the videotape in the parking lot headed toward her father and a police officer. (CP 3). S.B. was taken to the hospital where she reported the assailant had touched her genitals with his tongue. (CP 3). Tacoma police investigated. The individual they considered to be a person of interest passed a polygraph and was not further investigated as the assailant. (CP 3).

Eight years later, in April 2012, the State made a declaration for determination of probable cause. (CP 3). It averred that the Washington State Patrol Crime Lab (WSPCL) submitted a report that stated the lab had tested the underpants S.B. wore at the time of the assault. The clothing was tested for amylase and yielded positive results. (CP 3). The DNA profile was consistent with at least two contributors. (CP 4).

The declaration for probable cause stated: "Assuming that part of the DNA profile originated from S.B., a male profile was

deduced from the mixture. The male DNA from the underpants was determined to be a match to the defendant.” (CP 4). The State charged Jerry Swagerty on May 22, 2012, with first degree rape of a child and first-degree child molestation based on alleged events that occurred in February 2004. (CP 1-2). The State also filed a “persistent offender notice” in December 2012. (CP 42).

A month later, the charges were amended. The counts were changed to: 1- Rape of a Child in the third degree; 2-Luring; 3-burglary in the second degree; 4- intimidating a witness. (CP 43-45). Each charge alleged aggravated circumstances of knowledge the victim was particularly vulnerable or incapable of resistance and the defendant’s stipulation to the imposition of an exceptional sentence outside the standard range. (CP 43-45).

Mr. Swagerty pleaded guilty to the four amended charges to avoid life in prison without the possibility of parole. (CP 47-61). He entered an *Alford* plea for Count 2 and an *In re Barr* plea for the remaining counts. (CP 60-61). The trial court imposed a 30-year exceptional sentence. (CP 93-106; 113-116).

Mr. Swagerty filed a Personal Restraint Petition in January 2014. On October 27, 2016 the Washington State Supreme Court ruled that Mr. Swagerty had the option to withdraw his personal

restraint petition and keep to the original bargain he made with the State, or move to vacate the 2013 judgment and sentence, allowing the State to refile the original charges. *In re Pers. Restraint of Swagerty*, No. 91268-8. *Slip Op.* at 1.

Prior to his personal restraint petition being decided by the Supreme Court, Mr. Swagerty filed a motion in the superior court for a court order authorizing post-conviction DNA testing of swabs taken directly from S.B. at the hospital in 2004. (CP 119-121). Judge Nelson transferred the motion to the Court of Appeals as a personal restraint petition. (CP 127-128). The Court rejected the transfer, as motions for post-conviction DNA testing under RCW 10.73.170 are not CrR 7.8 motions subject to transfer under CrR 7.8(c)(2). (CP 129;134).

On May 12, 2016, Judge Nelson issued the following order:

THIS MATTER came before the undersigned judge of the above entitled court upon review of the defendant's motions (filed 3/1/16) and defendant's letter/motion dated 4/26/16 (filed 5/5/16). After reviewing the defendant's written pleadings, the court now enters the following order pursuant to RCW 10.73.170:

1. Defendant's motions are untimely pursuant to CrR 7.8

2. Defendant did not comply with RCW 10.73.170(2)(b). Even if defendant did comply with RCW 10.73.170(2)(b), pursuant to RCW 10.73.170(3), the DNA test which was already performed and did not match defendant does not demonstrate defendant's innocence on a more probable than not basis.
3. The court does not order additional DNA testing when adequate DNA testing was already performed.

(CP 135).

Mr. Swagerty makes this timely appeal. (CP 136).

III. ARGUMENT

The Court Abused Its Discretion When It Denied The Motion For DNA Testing.

1. Standard of Review

A trial court's decision on a motion for post-conviction DNA testing is reviewed for abuse of discretion. *State v. Gentry*, 183 Wn.2d 749, 764, 356 P.3d 714 (2015). A trial court abuses its discretion if its decision rested on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.*

RCW 10.73.170 provides the means for convicted individuals who are currently serving a term of imprisonment to submit to the superior court a written motion requesting DNA testing. The purpose is to provide a means for a convicted person to obtain DNA evidence that would support a petition for post conviction relief. *State v. Riofta*, 166 Wn.2d 358, 358, 209 P.3d

467 (2009). Unlike RCW 10.73.090 and .100, the statute does not restrict the motion to a one-year time limit; and as the Court of Appeals held, motions for post conviction testing are not CrR 7.8 motions subject to transfer. (CP 129). Thus, the trial court reached its conclusion that the motion was untimely by incorrectly applying the law.

2. Procedural and Substantive Component of RCW 10.73.170.

Although there is no time bar, RCW 10.73.170 requires a substantive component and a procedural component to be satisfied to obtain the testing:

- (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 (emphasis added).

Section .170(2)(a-c), the procedural component, “provides a means for a convicted person to produce DNA evidence that the original fact finder did not consider, whether because of an adverse court ruling, inferior technology, or the decision of the prosecutor and defense counsel not to seek DNA testing prior to trial.” *Riofta*, 166 Wn.2d at 366. If the petitioner satisfies the lenient procedural requirements, the court must grant the motion if he can also show “the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3). *Riofta*, 166 Wn.2d at 364;367.

Here, the court found that Mr. Swagerty had not met the procedural component, specifically section .170(2)(b): “Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement”. CP 135).

The record does not support the court's ruling. Rather, the record shows that even though the suspect's image was captured on videotape, the State produced no evidence that anyone identified Mr. Swagerty as the individual in the videotape. In fact, police originally investigated another individual as the suspect and ended the investigation when he passed a polygraph. DNA was crucial in proving identity.

In his motion, Mr. Swagerty explained that the DNA taken directly from S.B.'s body at the hospital in 2004 had the potential to produce significant evidence that he was not the perpetrator of the accused crimes. (CP 120-21).

This is underscored by the court's review of the declaration for determination of probable cause when it accepted the guilty plea. (1/4/13 RP 8). The determination for probable cause stated a DNA sample came from clothing, not S.B.'s person. (CP 4). The determination for probable cause was quite imprecise as to the DNA evidence. The declaration stated there were *at least* two contributors to the DNA profile. It assumed that part of the profile matched S.B. and "a male profile was deduced from the mixture". (CP 4). The declaration contained no statistical comparability, but instead, used the vague term "matched the defendant." However,

“DNA ‘matches’ cannot be interpreted without knowledge of how often a match might be expected to occur in the general population. This is so, because RFLP does not test the whole DNA strand; but rather focuses on specific locations, so absolute identification is impossible. As such, ‘to say that two patterns match, without providing any scientifically valid estimate...of the frequency with which such matches might occur by chance, is meaningless...DNA match testimony without a population probability estimate is neither generally accepted in the relevant scientific community or helpful to the trier of fact. ...Evidence of a DNA ‘match’ may not be introduced without a probability estimate.”

State v. King County Dist. Court West Div., 175 Wn.App. 630, 640, 307 P.3d 765 (2013). (internal citations omitted).

Thus, even though the court had before it a declaration of probable cause stating the DNA “matched” the defendant, it was a meaningless piece of information that should not have been considered. There was no forensic report in evidence. And, there was no evidence before the court regarding the DNA on the swabs from S.B.’s body.

Mr. Swagerty argues that the DNA evidence from the swabs taken at the hospital would provide significant and accurate new information, which the court had not considered when it accepted the negotiated guilty plea. Mr. Swagerty has cleared the procedural hurdles of the statute.

The substantive portion of the statute requires the movant to show “the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3). *State v. Crumpton*, 181 Wn.2d 252, 258, 332 P.3d 448 (2014). In *Crumpton*, the Court formally held that a trial judge should presume evidence would be favorable to the convicted individual when deciding whether to grant a motion for DNA testing. The presumption is part of the standard in RCW 10.73.170. *Id.* at 451-52.

In setting out the appropriate analytical method, the Court instructed the superior court to consider all the evidence, and assume an exculpatory DNA test result. *Id.* at 452. Combining those two factors the court may then determine whether it is likely the individual is innocent on a more probable than not basis. *Id.*

Here, the only DNA evidence introduced to the court was the untested and vague determination for probable cause declaration discussed above. The court’s ruling: “the DNA test which was already performed and did not match defendant does not demonstrate defendant’s innocence on a more probable than not basis” and “the court does not order additional DNA testing when adequate DNA testing was already performed” is not supported by

the record and uses an incorrect legal standard. The only information before the court was the determination for probable cause and it was meaningless without the statistical information.

Even if there were more evidence, the State did not produce it for the court. On 9/28/12 the State told the court S.B. underwent an examination at the hospital and swabs taken from her vagina were analyzed and amylase was found. “And there was a cold case DNA hit that matched to the amylase in the defendant’s swabs.¹” The State sought a reference sample to compare the DNA. 9/28/12 RP 12-13. The next month the State told the court they were still waiting for DNA results. 10/19/12 RP 15-16. After October 2012, the result of DNA testing is not mentioned in the transcripts and no forensic reports in the record.

In *State v. Thompson*, 173 Wn.2d 865, 271 P.3d 204 (2012), the Court addressed the issue of whether the trial court erred when it considered evidence available to the State but not admitted at trial. The question went to the substantive component of RCW 10.73.170(3). *Id.* at 870.

¹ It is unclear what the State was referring to regarding a cold case DNA hit.

There, the defendant was accused of first-degree rape. Police officers witnessed the defendant pushing the victim out of a hotel room where it was alleged she had been sexually assaulted. *Id.* at 868. Officers arrested Thompson. The woman was transported to the hospital where a full rape examination, including vaginal swabs, was conducted. *Id.* The victim could not identify her attacker and her guesses of what he looked like did not match Thompson. *Id.* at 869.

The WSPCL tested evidence from the hotel room, the swabs from the rape kit, and blood samples from Thompson and the victim. *Id.* The lab did *not* test the vaginal swabs for DNA to determine who the produced the semen found on them. *Id.* Thompson was convicted and sentenced to 280 months in prison. *Id.* at 870. Nine years later, Thompson filed a motion for post-conviction DNA testing of all the evidence collected in the case. Like Mr. Swagerty, he claimed actual innocence.

The *Thompson* Court held that even though Thompson had admitted to police that he had been sexually intimate with the victim, the statement was not admitted at trial. Thus, it could not be considered in the motion for post-conviction DNA testing. *Id.* at 873. Despite all of the evidence from the hotel room, the Court

held the trial court's reasoning was in error when it concluded there was no likelihood that the DNA evidence would demonstrate the defendant's innocence. Because the swabs had not been tested for DNA, the results of tests would constitute significant new information because it would either exculpate or inculpate him as the attacker. *Id.* at 876.

Similarly here, the only evidence before the court was that clothing had been tested for a DNA profile. The purported results of the test were inadequate because they were meaningless. And, like *Thompson*, there was no evidence before the court of the results of DNA testing of the swabs from S.B.'s body. Like *Thompson*, if DNA tests could conclusively exclude Mr. Swagerty as the source of the amylase, it is more probable than not that his innocence would be established.

The trial court abused its discretion in denying Mr. Swagerty's motion for post conviction DNA testing. The court incorrectly applied the law when it concluded that Mr. Swagerty's motions were untimely pursuant to CrR 7.8. The trial court abused its discretion because its decision rested on facts unsupported in the record: that a DNA test had already been performed and did not match him. It was an abuse of discretion when the court did not

apply the correct legal standard of a favorable presumption when it concluded he had not demonstrated his innocence on a more probable than not basis. The presumption is part of Washington law and should be applied. *Crompton*, 181 Wn.2d at 268.

The court abused its discretion by applying an incorrect legal standard when it concluded that Mr. Swagerty had not met the procedural requirements of RCW 10.73.170(2)(b). And the trial court abused its discretion when it concluded that adequate DNA testing had already been performed. This case should be remanded to the trial court with instructions to apply the proper legal standard to his motion and order DNA testing.

IV. CONCLUSION

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

Dated this 23rd day of November 2016.

Marie Trombley
Marie Trombley, WSBA 41410
PO Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for JERRY SWAGERTY, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, NOVEMBER 23, 2016 to:

Jerry Swagerty/DOC# 903395
Monroe Correctional Complex
PO Box 777
Monroe, WA 98272

And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Pierce County Prosecuting Attorney at:
PCPatcecf@co.pierce.wa.us

Marie Trombley

WSBA 41410
P.O. Box 829
Graham, WA 98338
marietrombley@comcast.net
253-445-7920

TROMBLEY LAW OFFICE

November 23, 2016 - 3:24 PM

Transmittal Letter

Document Uploaded: 1-490544-Appellant's Brief.pdf

Case Name: State v. Jerry Swagerty

Court of Appeals Case Number: 49054-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Marie J Trombley - Email: marietrombley@comcast.net

A copy of this document has been emailed to the following addresses:

PCPatcecf@co.pierce.wa.us