

**No. 49054-4-II**

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

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STATE OF WASHINGTON, Respondent

v.

JERRY SWAGERTY, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY

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REPLY BRIEF OF APPELLANT

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I. STATE'S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State takes issue with this Court's ruling that Mr. Swagerty's post-conviction motion for DNA is appealable as a matter of right. (Br. of Resp. at 1).

2. The State has raised the issue of whether post-conviction DNA testing in this case is moot because the Court can no longer provide relief, and the issue is not one of continuing and substantial public interest, and thus Mr. Swagerty's appeal should be denied. (Br. of Resp. at 1).

II. STATEMENT OF FACTS

Mr. Swagerty relies on the facts presented in his opening brief and adds the following.

On February 27, 2017, in response to briefing by both parties, this Court issued a written ruling on that Mr. Swagerty's motion for post-conviction relief was appealable as a matter of right under RAP 2.2(a)(13).

Mr. Swagerty and the prosecutor's office negotiated a plea agreement in the matter of the underlying charges approximately one week before the State filed its response brief . Supp. CP 3/20/17: Statement of prosecuting Attorney; 3/20/17: Statement of defendant on plea of guilty. On 4/14/17 the trial court entered a judgment and sentence, imposing 87 months of confinement with credit for time already served. Supp. CP: 4/14/17: Judgment and Sentence for cause number 12-1-01877-6. The court imposed 36 months of community custody. Id.pp. 7-8.

### III. ARGUMENT

#### A. Mr. Swagerty's Post Conviction Motion Is Appealable As A Matter of Right

This Court has already held that Mr. Swagerty's post conviction motion is appealable as a matter of right under RAP 2.2(a)(13), which authorizes review of a final order made after judgment and affects a substantial right. See Commissioner's ruling of 2/27/2017.

The State takes issue with the Court's ruling, pointing to the fact that in January 2015, this Court held that Mr. Swagerty's convictions must be vacated and directed remand for entry of an order of dismissal. (Br. of Resp. at 1-2). The State's contends

there was no final judgment from which to appeal. The State is incorrect for two reasons.

First, RAP 2.2(a)(13) provides that a final order entered after a judgment is appealable *only* if it affects a right *other than those adjudicated by the earlier final judgment*. *State v. Campbell*, 112 Wn.2d 186, 190, 770 P.2d 620 (1989)(emphasis added). The final order must affect a new substantial right. *Id.*

Here, the trial court's order denying the post-conviction DNA testing was a final order affecting a substantial right, separate and distinct from those adjudicated by the earlier judgment, which remained under review.

Second, the trial court had not vacated the underlying sentence and judgment at the time it ruled on the post-conviction motion. Mr. Swagerty was still under the judgment of conviction and serving his term of imprisonment. The Commissioner's ruling should be affirmed.

Alternatively, RAP 7.2 authorizes a trial court to perform certain functions without appellate court permission after acceptance of review. RAP 7.2(e)(4) authorizes the trial court to consider postjudgment motions authorized by criminal rules and statutes without obtaining the permission of the appellate court to

act. It is only if the trial court's decision on such a motion will change a decision then being reviewed by the appellate court that the parties must obtain permission from the appellate court before it may formally enter a decision. *State v. J-R Distributors*, 111 Wn.2d 764, 769, 765 P.2d 281 (1988).

The Rule contemplates that the trial court will make decisions on postjudgment matters while a matter is on appeal. It allows for initiation of a separate review while the appellate court is reviewing another decision in the matter. The trial court here was well within its authority to consider and rule on the post-judgment motion brought under RCW 10.73.170. Mr. Swagerty has the right to appeal that ruling.

B. The Appeal Is Not Moot And This Court Should Decide The Issue On The Merits.

Mr. Swagerty rests on the arguments raised in his opening brief and adds the following.

The issue in this case is not moot and this Court can provide effective relief for Mr. Swagerty. Mr. Swagerty is not going to have a trial but, he remains under the control of the Department of Corrections. If Mr. Swagerty were to be released prior to this Court

rendering an opinion in his case, he still remains subject to community custody for the next 36 months.

Custody is statutorily defined as restraint pursuant to a lawful arrest, or an order of a court, or any period of service on a work crew. RCW 9A.76.010(2). Community custody means the portion of an offender's sentence of confinement imposed either in lieu of early release time or imposed as part of a sentence, which is served in the community subject to the controls placed on the individual's movement and activities by the Department of Corrections. RCW 9.94A.030(5).

Upon release, Mr. Swagerty will be subject to strict regulations that include reporting to a community corrections officer regularly, having to work at a DOC approved education, employment or community service; notifying DOC of any change in his address or employment; pay supervision fees to DOC; his living arrangements must be approved by DOC. Supp. CP Judgment and Sentence entered 4/14/17. Violation of community custody imposed for a sex offense may result in additional confinement. *Id.*

Division One of the Court of Appeals held that for purposes of RCW 10.73.170, the statute which provides for state-funded post-conviction DNA testing of individuals convicted of a felony and

currently serving a term of imprisonment, includes an individual on community custody. *State v. Slattum*, 173 Wn.App. 640, 295 P.3d 788 (2013). In *Slattum*, the sole issue before the Court was whether the language of RCW 10.73.170, which plainly applied to those “currently serving a term of imprisonment” applied to an offender serving the community custody portion of his sentence. *Id.* at 649.

The Court relied on the SRA definition of community custody and noted the SRA defines “confinement” as either total or partial, and the calculation of a maximum sentence includes time in prison and time on community custody. *Id.* at 652-653. The “term of imprisonment” found in RCW 10.73.170 is not qualified by a specific location, such as a prison institution. *Id.* at 655.

In finding that RCW 10.73.170 did not contain language limiting imprisonment to confinement in a prison or a jail, it applied the rule of lenity. *Id.* at 656. The Court reasoned the statute was ambiguous and the legislative intent was to provide a remedy for those who were wrongly convicted and focused on the petitioner’s innocence. *Id.* at 661. The rule of lenity compelled a statutory construction most favorable to the defendant. *Id.* at 657.

IV. CONCLUSION

Mr. Swagerty remains incarcerated for the foreseeable next three years. He has met the strict standards of the procedural and substantive requirements of RCW 10.73.170(2) and respectfully asks this Court to find his appeal is ripe, and reverse and remand to the trial court to apply the proper standard and order DNA testing.

Dated this 5<sup>th</sup> day of May 2017.

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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 Reply Brief was sent by first class mail, postage prepaid, May 4, 2017 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 Reply Brief to the Pierce County Prosecuting Attorney at: [PCPatcecf@co.pierce.wa.us](mailto:PCPatcecf@co.pierce.wa.us)

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**TROMBLEY LAW OFFICE**  
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