

NO. 49469-8-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY E. WHITFIELD,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it denied the defendant's motion under RCW 10.73.170 for post-conviction DNA testing because that testing is material to determining whether or not the court imposed its sentence based upon a mistaken belief that the defendant had transmitted HIV to at least five of the victims in this case.

2. Should the state prevail this court should exercise its discretion and refrain from imposing costs on appeal.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it denies a defendant's motion under RCW 10.73.170 for post-conviction DNA testing when that testing is material to determining whether or not a court imposed its sentence based upon a mistaken belief that the defendant had transmitted HIV to at least five of the victims in this case?

2. If the state prevails on appeal should the court award costs against an appellant with no present or future ability to pay?

STATEMENT OF THE CASE

On November 8, 2004, the Honorable Judge W. Thomas McPhee of the Thurston County Superior Court found the defendant guilty following a bench trial of 17 counts of First Degree Assault with sexual motivation under RCW 9A.36.011(1)(b) for either exposing or transmitting HIV to 17 women during unprotected sexual contact. CP 34-35. The court also found him guilty of two counts of witness tampering and three counts of violating a no contact order. CP 35. At sentencing, the court imposed the top end of the standard range on eight of the first 17 counts and ordered that the first seventeen counts run consecutively under former RCW 9.94A.589. CP 34-47.

Following conviction the defendant appealed. CP 48-74. By part published decision filed May 16, 2006, this division of the Court of Appeals rejected all of the defendant's arguments and upheld both the judgments as well as the sentence. CP 48.74. In that opinion, the court noted the following concerning the defendant's conduct that led to the first 17 convictions as well as its effect upon the victims:

During more than a thousand sexual liaisons involving oral, vaginal, and sometimes anal sex, Whitfield rarely wore a condom, even when asked to. And he never informed any of his partners that he had been diagnosed HIV-positive. When asked about his sexually transmitted disease status, he would deny having any disease or would state that he had tested negative. At least five of the 17 women became HIV-positive or ill with Acquired Immune Deficiency

Syndrome (AIDS) after having sex with Whitfield.

CP 51.

This court then went on to comment as follows on the trial court's decision to place the victims in three separate categories for the purpose of sentencing:

At sentencing, the court distinguished the following three categories of victims from the rest: (1) victims of unprotected sex after Whitfield received the cease and desist order, (2) victims who have become HIV-positive, and (3) victims who have children with Whitfield. Based on these categories, the court imposed a maximum sentence within the standard range for count I (277 months based on Whitfield's offender score of 8); and counts II, III, VI, VIII, IX, XV, and XVI (123 months for each count). The court imposed a sentence of 111 months for each of the remaining counts, which is above the midpoint of the standard range but lower than the maximum for each count. The court ordered all of the assault sentences to be served consecutively under RCW 9.94A.589.

CP 55.

On November 19, 2015, the defendant filed a Motion for Post-Conviction DNA testing under RCW 10.73.170, arguing that this testing would more likely than not prove that he was "not the source of any other person's HIV infections . . ." CP 86, 93. The state responded to the motion by arguing in part that (1) it did not know whether or not any blood samples were taken from the women whom the state claimed the defendant infected with HIV, and (2) that the HIV virus was not subject to DNA testing. CP 127-132. The defendant responded by citing numerous cases in which courts

found that the HIV virus was subject to DNA testing to differentiate different variations of the virus. CP 135-151.

By the time the case came on for argument on the defendant's motion, the state presented only one argument: that the defendant was not entitled to DNA testing under RCW 10.73.170 because under RCW 9A.36.011, even if he did not "transmit" the HIV virus to the five victims who were HIV positive, he was still guilty of the crimes because substantial evidence still showed that he had "exposed" those women to the virus, which is an alternate method of committing the offense. RP 8/31/16 6-8.

The trial court agreed with the state's argument and orally denied the defendant's motion, holding as follows in part:

THE COURT: Thank you. The Court is ready to rule.

As the Court mentioned, when the Court took the bench this morning, the Court has reviewed the file, including the findings of fact, conclusions of law that were entered by the trial court, and the charges contained within the fifth amended information.

The information alleged that Mr. Whitfield, with intent to – with intent, either administered, exposed or transmitted.

The findings of fact entered by the Court included findings that Mr. Whitfield exposed, opposed to administered or transmitted.

Accordingly, the relief being sought by Mr. Whitfield is moot; he was convicted of exposing.

RP 8/31/16 8-9.

The defendant appeals this decision. CP 172.

BRIEF OF APPELLANT - 4

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION UNDER RCW 10.73.170(3) FOR POST-CONVICTION DNA TESTING.

Under RCW 10.73.170(1) any convicted felon who is currently in prison “may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing.” *See i.e. State v. Riofta*, 166 Wn.2d 358, 209 P.3d 467 (2009). Subsection 2 of the statute sets out the requirements of such a motion and those alternative situations in which DNA testing will be allowed. This subsection states:

(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.

RCW 10.73.170(2).

Subpart (b) of section (2) sets out two alternative situations under which DNA testing will be allowed. In the first alternative, a defendant's motion must allege that available DNA evidence "is material to the identity of the perpetrator or an accomplice" of the offense for which the defendant was convicted. In the second alternative, a defendant's motion must allege that available DNA evidence "is material . . . to sentence enhancement."

In this case the state argued, and the trial court agreed, that the defendant's proposed DNA testing was not "material to the identity of the perpetrator" of those counts of first degree assault where the victims were HIV positive because the defendant was guilty of first degree assault for "exposing" those victims to HIV whether or not he "transmitted" it to them. In this argument and ruling the state and the court were correct. Under RCW 9A.36.011(1)(b), a person is guilty of first degree assault if he or she "exposes, or transmits to . . . the human immunodeficiency virus" to another person." Thus, whether or not the defendant "transmitted" the HIV virus to five of the named victims was irrelevant because substantial evidence supported the conclusion that he had "exposed" those victims to the HIV virus. Thus, the defendant did not qualify under the first alternative requirement of RCW 10.73.170(2)(b) for post-conviction DNA testing. However, as the following explains, the error in the state's argument and the court's ruling was the failure to examine the second alternative under RCW

10.73.170(2)(b).

As was stated above, the second alternative method of meeting the requirement of RCW 10.73.170(2)(b) is to present evidence that available DNA evidence “is material . . . to sentence enhancement.” In this case a review of the trial court’s sentencing decisions, as summarized by this court in its original opinion in this case, reveals that the trial court did use its belief that the defendant had actually transmitted the HIV virus to five of his victims as a basis for imposing a harsher sentence. First, this court noted the following concerning the trial court’s belief that the defendant had actually transmitted HIV to five of the victims:

During more than a thousand sexual liaisons involving oral, vaginal, and sometimes anal sex, Whitfield rarely wore a condom, even when asked to. And he never informed any of his partners that he had been diagnosed HIV-positive. When asked about his sexually transmitted disease status, he would deny having any disease or would state that he had tested negative. **At least five of the 17 women became HIV-positive or ill with Acquired Immune Deficiency Syndrome (AIDS) after having sex with Whitfield.**

CP 51 (emphasis added).

As this court further noted, the trial court used this fact as a basis for imposing the top end of the standard range on more than five of the first degree assault convictions. The court held:

At sentencing, the court distinguished the following three categories of victims from the rest: (1) victims of unprotected sex after Whitfield received the cease and desist order, (2) victims who have become HIV-positive, and (3) victims who have children with

Whitfield. Based on these categories, the court imposed a maximum sentence within the standard range for count I (277 months based on Whitfield's offender score of 8); and counts II, III, VI, VIII, IX, XV, and XVI (123 months for each count). The court imposed a sentence of 111 months for each of the remaining counts, which is above the midpoint of the standard range but lower than the maximum for each count. The court ordered all of the assault sentences to be served consecutively under RCW 9.94A.589.

CP 55.

As these portions of this court's opinion reveal, the trial court used its belief that the defendant had actually transmitted the HIV virus to five of his victims as a basis for imposing a harsher sentence that it would otherwise have imposed. Given this conclusion, testing on available biological samples from the five victims who were HIV positive would be "material . . . to sentence enhancement" under RCW 10.73.170(2)(b). Thus, in this case, the trial court erred when it failed to grant the defendant's motion for DNA testing on biological samples of those five victims who tested positive for the HIV virus after having unprotected sex with the defendant.

In this case the state may well argue in response that it is unsure whether or not it has possession of or access to any biological samples from the five victims who tested positive for the HIV virus. While this issue is relevant, it not determinative. Rather what it means is that on remand this court should instruct the trial court to order the state to determine whether or not it has possession or access to any biological samples from the five victims

who tested positive for the HIV virus. If it does, then the court should order the DNA testing of those samples. If the state does not have any such samples, the defendant should be informed whether any such samples were in state custody and if so, the reason why they are no longer in state custody, thus giving the defendant the opportunity for further argument if in fact the state improperly destroyed this evidence.

II. SHOULD THE STATE PREVAIL THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFRAIN FROM IMPOSING COSTS ON APPEAL.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra*. In the case at bar the trial court found the defendant indigent and entitled to the appointment of counsel on appeal. CP 105-106. In the same matter this Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a "commissioner or clerk of the appellate court will award costs to

the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2. In *State v. Nolan, supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate court itself. The Supreme Court noted:

Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word “will” in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: “[t]he court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (emphasis added). In *State v. Sinclair, supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing “cannot displace the court’s obligation to exercise discretion when properly

requested to do so.” *Supra*.

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant’s ability to pay, as remand to the trial court not only “delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties.” *State v. Sinclair*, 192 Wn. App. at 388. Thus, “it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief.” *State v. Sinclair*, 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra*. The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina, supra*). As the court notes in *Sinclair*, “[i]t is entirely appropriate for an appellate court to be mindful of these concerns.” *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis*, to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was “unable by reason of poverty to pay for any of the expenses of appellate review” and that the defendant “cannot contribute anything toward the costs of appellate review.” *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant’s indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

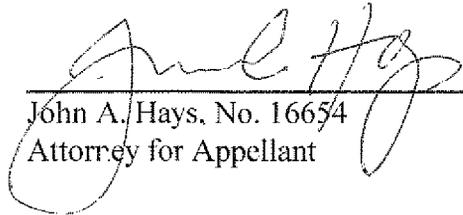
Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. In fact, the defendant is a 44-year-old man serving an effective sentence of life without release. Given the trial court’s finding of indigency at the appellate level, it is unrealistic to think that the defendant will ever be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state substantially prevail.

CONCLUSION

The trial court erred when it denied the defendant's motion under RCW 10.73.170 for post-conviction DNA testing. As a result, this court should vacate the trial court's order and remand this case with instructions to (1) grant the defendant's motion if any biological samples from the five victims who tested positive for the HIV virus are available for testing, or (2) force the state to disclose what happened to those samples if they were at one time in state custody. In the alternative, should the state substantially prevail on appeal this court should exercise its discretion and refrain from imposing costs on appeal.

DATED this 10th day of March, 2017.

Respectfully submitted,



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Attorney for Appellant

APPENDIX

RCW 9A.36.011 Assault in the First Degree

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony.

RCW 10.73.170 DNA Testing Requests

(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.

(4) Upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW 10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request. Such motion for appointment of counsel shall comply with all procedural requirements established by court rule.

(5) DNA testing ordered under this section shall be performed by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(6) Notwithstanding any other provision of law, upon motion of defense counsel or the court's own motion, a sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of evidence. The court must specify the samples to be maintained and the length of time the samples must be preserved.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
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Appellant.

NO. 49469-8-II

**AFFIRMATION
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this March 10, 2017, at Longview, WA.



Diane C. Hays

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