

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY WHITFIELD

Appellant.

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

Cause No. 04-1-00617-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Has Whitfield established that the requested DNA tests are more probable than not to demonstrate his innocence, as required under RCW 10.73.170?
2. Whitfield argues that he should not be subject to appellate costs by reason of his prior finding of indigence. The State does not contest this.

B. STATEMENT OF THE CASE

In 1992, the Appellant, Anthony Whitfield, was diagnosed with HIV. *State v. Whitfield*, 132 Wn.App. 878, 883, 134 P.3d 1203 (2006). Despite his diagnosis, from 1999, to 2004, he embarked on a journey of unprotected sex with seventeen different women, all of whom were unaware of the dangers he posed.¹ *Id.* at 883-84. Of those seventeen women, at least five were later diagnosed with HIV, and according to witness testimony, during this time period, Whitfield told others that if he had HIV, he would spread it to as many people as possible. *Id.* at 884.

Whitfield was eventually tried for these acts, and convicted of 17 counts of first degree assault with sexual motivation. *Id.* at 883. The trial court found that he had exposed all seventeen women to HIV, thus satisfying the third alternative means of first degree assault. *Id.* at 887; *see*

¹ Even after Whitfield had been served with a cease and desist order, mandating that he refrain from activities which could expose others to HIV, Whitfield continued to engage in unprotected sex. *Whitfield*, 132 Wn.App. at 885.

also RCW 9A.36.011. As a result, Whitfield was sentenced to 178 years in prison. *Whitfield*, 132 Wn.App. at 883.

C. ARGUMENT

1. Whitfield's Claim For DNA Testing Must Be Denied.

- a. *The trial court convicted Whitfield of exposing his victims to HIV, and the results of the requested DNA tests will not impact those findings in any way. Therefore, the requested tests will not demonstrate his innocence, and must be denied.*

Whether or not Whitfield actually infected his victims with HIV is wholly immaterial to his convictions or any accompanying sentence enhancements. To obtain court ordered DNA testing under RCW 10.73.170, Whitfield must show there is a likelihood that the requested DNA evidence would demonstrate he was innocent of his crimes or sentence enhancements on a more probable than not basis. Because it is not disputed that Whitfield exposed his victims to HIV, and that was the sole basis of his conviction, the requested DNA tests will not demonstrate his innocence on a more probable than not basis, thus, the trial court rightly denied Whitfield's motion. RP 9; RCW 10.73.170 (3). Absent a showing that the trial court abused its discretion in denying Whitfield's motion, the denial of Whitfield's request for DNA testing must be affirmed. *State v. Gentry*, 183 Wn.2d 749, 768, 356 P.3d 714 (2015)

(holding that a trial court's decision not to order further DNA testing was subject to review under an abuse of discretion standard).

The undisputed facts which led to Whitfield's conviction are as follows 1) Whitfield was diagnosed with HIV in 1992, and warned of the potential for contagion; 2) after he was given his diagnosis, Whitfield engaged in unprotected sex with seventeen different women, exposing them to the virus; 3) Whitfield did not inform any of the seventeen women that he was HIV positive, or that they risked exposure by engaging in unprotected sex; and 4) Whitfield told witnesses that if he had HIV, he'd spread it to as many people as possible. *Whitfield*, 132 Wn.App. at 883-85. These facts led the court to find that Whitfield had exposed his victims to HIV, which is one of the means of committing first degree assault. *See* RCW 9A.36.011(1)(b). The court did not address whether Whitfield actually infected his victims with HIV, nor was it required to do. Likewise, Whitfield's sentencing enhancements for acting with sexual motivation did not require the State to prove he infected his victims with HIV either. *See* RCW 9.94A.835.

Although Whitfield cannot show that the requested DNA test would have any likelihood of proving his innocence, as required under RCW 10.73.170, he attempts to circumvent this by arguing that the DNA results are material to his sentencing enhancements. Appellants Brief at 7-

8 (*citing* RCW 10.73.170(2)(b)). Not only does Whitfield erroneously argue that the trial court’s decision to impose a sentence near the top end of the standard range constitutes a sentence enhancement,² Appellant’s Brief at 7-8, he also failed to argue this position before the superior court, and therefore, may not raise it for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (*citing* RAP 2.5(a) (“As a general rule, appellate courts will not consider issues raised for the first time on appeal.”)). Nevertheless, as noted above, the requested DNA tests have no bearing on Whitfield’s actual sentence enhancements for acting with sexual motivation. *See* RCW 9.94A.835.

Furthermore, here, the trial court found that Whitfield acted with the intent to expose his victims to HIV, and it imposed sentences within the standard range for all of his offenses. As a general rule, standard range sentences are not subject to appellate review. *State v. Friederich-Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994). Because nothing in RCW

² Whitfield claims his sentence enhancements are implicated because the trial court imposed a sentence near the top range for several of his assault charges. However, contrary to Whitfield’s claims, the term “sentence enhancement” is not a broad term encompassing any factor which could negatively impact a sentencing. Rather, it is a term of art specific to particular statutorily enumerated conditions where a defendant is subject to additional penalties, such as firearm enhancements. *See* RCW 9.94A.533. A sentence within the standard range is not a sentence enhancement under Washington law, and thus Whitfield’s claim is not covered by RCW 10.73.170.

10.73.170 suggests that a DNA test may otherwise be ordered to request a lesser sentence within the standard range, without an indication that the trial court abused its discretion, Whitfield may not challenge.³ *Id.*

In conclusion, Whitfield has not shown that the trial court abused its discretion in denying his motion for DNA testing; he hasn't shown that the original trial court abused its discretion in imposing a standard range sentence; he hasn't shown that there is a likelihood that the requested DNA testing will prove his innocence on a more probable than not basis, or that the results would be relevant at all to the question of whether he exposed his victims to HIV; nor has he shown that he has any sentence enhancements which could be impacted by the requested DNA testing. Accordingly, his claim must be denied.

b. Whitfield has requested that DNA analysis be used to determine whether he is responsible for infecting five of his victims. However, tracking the spread of HIV from person to person goes far beyond standard DNA analysis performed in crime labs. Whitfield has not established that such testing was

³ Whitfield acted with the intent to expose 17 women to HIV, and five of them subsequently became infected with HIV. If by sheer luck, another source led to the infection of those women, that doesn't change Whitfield's actions or intent, nor should it change his culpability. The trial court did not state that it was basing his sentence on whether Whitfield was the actual cause, and in fact, never specifically found that Whitfield infected the five women. The simple fact that Whitfield acted with the intent to expose the women, and five of them did become infected merits a lengthier sentence within the standard range regardless. Additionally, it must be noted that there is a very high likelihood that unprotected sex with Whitfield was the vector of infection for the five women.

contemplated by RCW 10.73.170; that the State has the capacity to carry out such requests; that such testing would meet relevant scientific standards even if performed; or that the State may compel Whitfield's victims to submit to DNA testing.

The DNA testing requested by Whitfield is drastically different from a typical DNA test performed by the Washington state patrol crime laboratory,⁴ and as such, it falls outside of what may be requested under RCW 10.73.170.

To begin, what Whitfield is requesting is an epidemiological analysis, rather than a simple DNA sequencing. Even if the RNA/DNA of the HIV virus in Whitfield's system is fully sequenced and compared to the RNA/DNA sequences in his victims, that alone will provide no relevant information. Instead, technicians will need to compare the full DNA sequences of all the samples, and attempt to work backwards to determine whether Whitfield was the source of infection for the five women.⁵ Because HIV has an extremely high mutation rate and significant

⁴ The National Institute of Justice provides a basic look at DNA technology utilized in criminal forensics. DNA Evidence: Basics of Analyzing, NIJ (Aug. 9, 2012), <https://nij.gov/topics/forensics/evidence/dna/basics/pages/analyzing.aspx>. The listing does not include sequencing of HIV under its listed types of DNA analysis.

⁵ For an example of epidemiology researchers using DNA analysis to track the spread of HIV, see Joshua A. Krisch, *How Technology Traced HIV To Its Very Beginnings*, POPULAR MECHANICS (Oct. 2, 2014), <http://www.popularmechanics.com/science/health/a11361/how-tech->

time has passed since infection,⁶ it will now be difficult to accurately map the spread of the virus. Thus, compared to a standard DNA test, wherein a technician only compares a few small sequences of DNA, what Whitfield is asking for is far more complex.⁷ Ultimately, it is unclear whether the analysis requested can be performed in a state crime lab, or if the results would even be sufficiently accurate as to be admissible, both of which are required by RCW 10.73.170. Because 10.73.170 places the burden on the applicant to show there is a likelihood that DNA testing will establish his innocence, Whitfield has the burden of showing that the requested tests can actually be performed, and the results will be admissible. Whitfield has failed to address these questions, much less meet his burden.

Secondly, Whitfield's request will require the State to obtain DNA samples from his victims, yet it is unclear how the State is to accomplish such a task. Whitfield's conviction occurred more than a decade ago, and his victims have certainly attempted to move on with their lives since then.

traced-hiv-to-its-beginnings-17270225/. Notably, this research was observing trends and comparing populations of the HIV virus over considerable lengths of time, rather than attempting to track the virus' spread from person to person.

⁶ See *A Chink In HIV's Evolutionary Armor*, UNDERSTANDING EVOLUTION, http://evolution.berkeley.edu/evolibrary/news/070301_hiv (last visited May 4, 2017) (discussing the high mutation rates of HIV).

⁷ See *DNA Evidence: Basics of Analyzing*, NIJ (Aug. 9, 2012), <https://nij.gov/topics/forensics/evidence/dna/basics/pages/analyzing.aspx> (providing an introduction to standard DNA analysis techniques).

Whether or not they were able to do so is dependent upon how their health has held up, and while Whitfield is still alive after more than a decade with HIV, the State is presently unaware as to whether his victims have been as lucky. In light of these facts, it is doubtful they would voluntarily submit to any DNA testing requested by Whitfield. Nothing in RCW 10.73.170 authorizes the State to compel victims to submit to DNA testing.

2. Whitfield's Request That Appellate Costs Not Be Imposed Is Not Contested By The State.

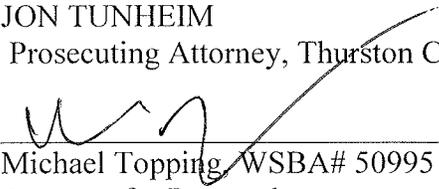
Whitfield has requested that this court not impose appellate fees, by reason of Whitfield's previous findings of indigence. Appellant's Brief at 9. Because Whitfield is in the midst of a 178 year sentence, and unlikely to have the necessary funds any time soon, the State does not oppose his request.

D. CONCLUSION

For these reasons, the State asks that the court deny Whitfield's request for post-conviction DNA testing.

Respectfully submitted this 14th day of May, 2017.

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

Dated this 4th day of May, 2017, at Olympia, Washington.


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