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Court of Appeals  
Division II  
State of Washington  
3/6/2019 1:33 PM

NO. 52747-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

TONY KING,

Appellant.

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

The Honorable Scott A. Collier, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in concluding appellant failed to show DNA testing would demonstrate innocence on a more probable than not basis.

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

Issue pertaining to assignments of error

Where appellant's motion for post-conviction DNA testing established that testing would provide significant new information which would demonstrate innocence on a more probable than not basis, did the court err in denying the motion?

B. STATEMENT OF THE CASE

In 2013 Appellant Tony King was charged in Clark County Superior Court with first degree assault, second degree rape, felony harassment, and unlawful imprisonment, with deadly weapon enhancements. CP 1-3. Ultimately, he accepted a plea deal and entered guilty pleas to charges of first degree assault, third degree rape, and felony harassment, all domestic violence offenses. CP 4-23. The probable cause declaration indicates S.C. was married to another man and having an affair with King. King acknowledged having sexual intercourse with S.C. but he

reported that it was consensual. Supp. CP (Sub. No. 2, Affidavit/Declaration of Probable Cause, filed 2/19/13). Although samples were gathered from King and S.C., no DNA testing was done prior to King's guilty plea. CP 191.

In 2017 King moved pro-se for post-conviction DNA testing, averring that testing would lead to significant new information relevant to his defense. CP 40-50. King asserted that during her relationship with him S.C. was having affairs with multiple men and made the false accusation of rape to conceal that fact from her husband. King argued that DNA testing was relevant to consent, because test results showing DNA from multiple sources would corroborate this claim and demonstrate his innocence on a more likely than not basis. *Id.* Counsel was appointed to represent King, and counsel filed a motion for post-conviction DNA testing. CP 51-54.

Following a hearing, the court denied the motion for DNA testing. CP 190-92. The court found that no DNA testing was done prior to King's guilty plea, but DNA testing was sufficiently developed at the time to test the evidence in this case, there has been no significant advancement in DNA testing since 2013, and there is no indication that DNA testing now would be significantly more accurate than if it had been done in 2013. CP 191. The court concluded that testing DNA evidence would not lead to

any relevant information on the issue of consent, and it would not show King's innocence, because DNA testing cannot prove whether force was used or consent was given. CP 191. The court determined that evidence of S.C.'s prior sexual acts with others would be irrelevant to consent and inadmissible. Finally, it concluded that King had not shown a likelihood that DNA evidence would demonstrate his innocence on a more probable than not basis. CP 192.

King filed this timely appeal. CP 193.

C. ARGUMENT

KING MET THE STATUTORY REQUIREMENTS FOR POST-CONVICTION DNA TESTING, AND HIS MOTION SHOULD HAVE BEEN GRANTED.

By statute, a person convicted of a felony in Washington may obtain DNA testing of evidence on the ground that it would provide significant new information that would demonstrate innocence on a more probable than not basis:

(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.

RCW 10.73.170.

The person requesting testing must satisfy both the procedural basis set forth in subsection (2) and the substantive basis set forth in subsection (3). *State v. Riofta*, 166 Wn.2d 358, 364, 209 P.3d 467 (2009). The statute “allows DNA testing based on either advances in technology or the potential to produce significant new information.” *Id.* at 365. The “significant new information” statutory basis includes test results that did not exist at the time of conviction, regardless of whether DNA testing could have been done prior to trial. *Id.* at 362, 366.

The State argued below that King failed to meet the procedural requirements of the statute because he did not establish that DNA testing was not available to him pre-conviction, or that such testing has advanced so that it would now provide significant new information. RP 9. The court entered findings that there have been no significant advancements in DNA

testing since King was convicted and no showing that DNA testing would be more accurate than it would have been in 2013. CP 191. The Supreme Court has held, however, that the “significant new information” need not result solely from advances in DNA technology. A request for testing is not precluded by the fact that the very testing being requested could have been done prior to conviction. *Riofta*, 166 Wn.2d at 366. Because no DNA testing was done previously, the statute provides a means for King to obtain DNA evidence if he meets the substantive requirement. *Id.*

The substantive element of the statute requires the petitioner to establish a likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. RCW 10.73.170(3). In deciding whether to grant a motion for DNA testing, the trial court must presume that the testing would yield results favorable to the defense. *State v. Crumpton*, 181 Wn.2d 252, 260, 332 P.3d 448 (2014).

King’s primary contention is that testing which shows the presence of DNA from multiple sources would corroborate his version of events, which is that S.C. was having multiple affairs and made up the rape accusation to conceal that fact from her husband. RP 16-17. The court below concluded that the victim’s prior sexual acts with others would not be relevant or admissible. CP 191. An alleged victim’s sexual activity may be admissible to show consent, however, and may not be excluded if

essential to the defense. *See* RCW 9A.44.020(3); *State v. Jones*, 168 Wn.2d 713, 722, 230 P.3d 576 (2010) (rape shield statute applies only to sexual conduct in the past and does not exclude evidence regarding sexual activity contemporaneous with alleged rape). The court abused its discretion in denying the motion on this basis.

The court further concluded that DNA testing would not show King's innocence because DNA testing cannot prove whether force was used or consent was given. CP 191. Innocence does not have to be established on the basis of test results alone, however. Rather, the statute requires the trial court to grant a motion for post-conviction testing when exculpatory results, together with other evidence, would raise a reasonable probability of innocence. *Riofta*, 166 Wn.2d at 367-68.

Moreover, in deciding a motion for post-conviction DNA testing, the court should not focus on the weight or sufficiency of the evidence used to convict the petitioner. There will always be strong evidence against a person convicted beyond a reasonable doubt. Instead, the court must focus on the likelihood that DNA evidence could demonstrate innocence, despite the multitude of other evidence against them. *Crumpton*, 181 Wn.2d at 262.

There was evidence that S.C. was having an extra-marital affair with King, who claims she had other partners as well. DNA results

confirming this assertion would support King's claim of consent, and S.C.'s motive to lie, and establish King's innocence on a more probable than not basis. The court erred in denying his motion for post-conviction DNA testing.

D. CONCLUSION

King's motion for post-conviction DNA testing met the statutory requirements, and the court erred in denying it. This Court should reverse and remand for entry of an order granting King's motion.

DATED March 6, 2019.

Respectfully submitted,



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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Supplemental Designation of Clerk's Papers in *State v. Tony King*, Cause No. 52747-2-II as follows:

Tony King/DOC#332846  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

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



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Catherine E. Glinski  
Done in Manchester, WA  
March 6, 2019

**GLINSKI LAW FIRM PLLC**

**March 06, 2019 - 1:33 PM**

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