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NO. 59366-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

BOBBY RAY THOMPSON,

Appellant.

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

The Honorable Gerald L. Knight, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. DENIAL OF A MOTION UNDER RCW 10.73.170 IS APPEALABLE BY RIGHT AND SUBJECT TO RAP 15.2(b)

The State properly concedes that Thompson has the right to appeal denial of his motion for DNA testing under RAP 2.2(a)(13) because it is a final order made after judgment affecting a substantial right. See Brief of Respondent, at 7.

The State, however, disagrees that there is any right to appointed counsel on appeal. Specifically, the State notes that RCW 10.73.170(4) only addresses the appointment of counsel in the trial court to prepare and present a motion for testing. This, argues the State, demonstrates the Legislature never intended the appointment of counsel on appeal from denial of that motion. See Brief of Respondent, at 19-20.

But the absence of any mention of appellate rights in RCW 10.73.170 is hardly surprising since the entire statute is addressed to the applicable rules and mechanics of litigating a motion in the trial court. See subsection (1) (requiring submission to court entering judgment); subsection (2) (discussing contents of motion); subsection (3) (standard of trial court's review); subsection (4) (authorizing appointment of counsel to litigate motion in trial court);

subsection (5) (requiring crime lab to conduct testing); subsection (6) (allowing for preservation of samples). There simply was no need for the Legislature to address appellate rights, since those rights are already addressed in RCW 10.73.150 and the Rules of Appellate Procedure. See State v. Thompson, 93 Wn. App. 364, 367, 967 P.2d 1282 (1998) (Legislature presumed to have appellate rules in mind when promulgating legislation).

In support of its argument, the State cites In re Detention of Strand, 167 Wn.2d 180, 217 P.3d 1159 (2009), for the proposition that "[w]hen a statute specifically confers the right to counsel at only certain stages of a proceeding, it impliedly excludes the right to counsel at other stages." Brief of Respondent, at 20. But Strand did not involve appellate rights. Rather, Strand – the defendant in an SVP proceeding – argued that the statute providing for the right to counsel upon the filing of an SVP petition should be read to include a prefiling proceeding (a psychological evaluation). Because the Legislature had expressly identified the trial proceedings at which the right to counsel existed, however, and a prefiling evaluation was not included, the Supreme Court rejected the argument. Strand, 167 Wn.2d 190-191.

Were Thompson arguing that RCW 10.73.150 conferred the right to counsel in the trial court beyond preparation and presentation of a motion for DNA testing, Strand would be on point. Similarly, if RCW 10.73.170 purported to cover both trial and appellate proceedings – either by declaring this to be the case or because it expressly addressed matters in the appellate courts – the State would be correct. But the statute only addresses, and was only intended to address, the right to counsel in the trial court. Appellate rights are covered elsewhere (RCW 10.73.150 and RAPs). This also explains the absence of legislative history showing consideration of appellate costs; since most motions likely would not be appealed (either because they were granted or clearly had no merit), the focus was on Superior Court, where the greatest costs would be incurred.

In a related argument, the State maintains that to the extent RCW 10.73.150(1) and 10.73.170(4) conflict on the appointment of counsel for appeal, the latter statute controls because it is more specific and was enacted later in time. Brief of Respondent, at 25-26. Because, however, one statute controls for trial proceedings and the other for appeals, there is no conflict to reconcile.

The State also argues that because subdivisions (2) through (7) of RCW 10.73.150 "deal with appellate challenges to criminal

convictions, subdivision (1) should be limited to such challenges" and the denial of DNA testing falls outside this category. Brief of Respondent, at 22.

But RCW 10.73.150 is broader than the State suggests, conveying the right to counsel in a variety of situations, including defense of motions for discretionary review and the prosecution or defense of post-conviction collateral attacks in the trial and appellate courts. See RCW 10.73.150(2)-(7). Moreover, it is already well established that indigent defendants have the right, under RCW 10.73.150(1), to appointed counsel on appeal from denial of a motion for post-conviction relief under CrR 7.8. Thompson, 93 Wn. App. at 366-369; State v. Larranaga, 126 Wn. App. 505, 108 P.3d 833 (2005). And the Supreme Court has recognized that motions under RCW 10.73.170 are simply another "species of post-conviction relief." State v. Riofta, 166 Wn.2d 358, 370, 209 P.3d 467 (2009).

Had the Legislature intended to limit RCW 10.73.150(1) in the manner the State urges, it would have expressly done so. There is no such limitation in the chosen language, however. It only requires "an adult offender convicted of a crime" and indigency. Once these prerequisites are met, counsel must be appointed where that

offender "[f]iles an appeal as a matter of right." RCW 10.73.150(1). The Legislature recognized that motions for DNA testing can be sufficiently complicated to warrant the assistance of appointed counsel at trial and has authorized that assistance. The Legislature would have recognized that appellate litigation following the improper denial of these motions is no less (and perhaps more) complicated, thereby calling for the assistance of counsel on appeal.[1]

The State notes that a successful challenge to the trial court's denial of Thompson's motion to test DNA will not automatically result in a new trial. Brief of Respondent, at 23. But appeals frequently involve remand for additional proceedings that must be conducted before a conviction might be reversed. See, e.g., State v. Cleppe, 96 Wn.2d 373, 382-383, 635 P.2d 435 (1981) (matter remanded for hearing on failure to disclose identity of informant, the results of which would determine whether defendant entitled to new trial); cert.

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[1] In its brief, the State offers two hypothetical lawsuits and argues that a civil litigant in each might be entitled to the appointment of counsel on appeal if this Court finds such a right in Thompson's case. See Brief of Respondent, at 23-24 (personal injury action and civil suit to obtain documents). Each situation must be addressed on an individual basis. One rather glaring distinction is that the Legislature has not provided for appointed counsel in the trial court in either of the circumstances the State suggests are analogous, making it unlikely the Legislature intended the appointment of counsel on appeal.

denied, 456 U.S. 1006 (1982); State v. Young, 62 Wn. App. 895, 908-909, 802 P.2d 829 (1991) (remand for evidentiary hearing on claim of ineffective assistance of counsel, the results of which would determine whether defendant entitled to new trial); State v. Harrel, 80 Wn. App. 802, 804-805, 911 P.2d 1034 (1996) (remand for new hearing where defendant without counsel at initial hearing on motion to withdraw guilty pleas under CrR 7.8). That a favorable decision on appeal will not automatically result in a new trial has never determined the right to counsel in the appellate courts.

The State agrees that if RCW 10.73.150(1) authorizes the appointment of counsel at public expense for appeals from the denial of motions under RCW 10.73.170, RAP 15.2(b)(1)(a) authorizes the trial court to enter an order of indigency. See Brief of Respondent, at 28. This Court should so find.

2. THOMPSON SATISFIES THE CRITERIA FOR DNA TESTING.

In both his motion to test DNA and his reply to the State's opposition, Thompson stated his belief that DNA testing would reveal his innocence and the identity of the true rapist. There can be no doubt he is claiming his innocence:

> The movant believes that if the D.N.A. testing is done on the D.N.A., found in this case, then it will show the

> movant is not the perpetrator in the above cause of action. The movant still claims actual innocence. The D.N.A. was not tested in his case and of the D.N.A. evidence that was found on the bedsheet, was not properly tested. Mr. Franks testified that he could not differentiate between the semen characteristics and the blood characteristics. The movant believes that D.N.A. testing now being done can make that differentiation and show that the movant is not the perpetrator of this crime. The movant also believes that the testing of this D.N.A. evidence will show the true identify of this perpetrator of the crime and eventually lead to his arrest.

CP 91-92; see also CP 47-49 (repeatedly claiming his innocence and indicating testing will identify the real perpetrator).

The State argues these claims are insufficient to warrant testing because they are not verified, i.e., Thompson has not sworn he believes the testing will show he is innocent. Brief of Respondent, at 11. The trial court did not seem concerned about the lack of verification. It was not one of the three listed reasons for denial of Thompson's motion. See CP 44-45. Had the court indicated its decision might turn on this point, Thompson could have provided a verification. Similarly, if this Court is now inclined to reject Thompson's appeal on this new ground, he should at least be given the opportunity to provide a verification.

As to the merits of Thompson's motion, the State argues that based on the evidence against him, he was not entitled to testing.

But the statute simply requires testing "when exculpatory results would, in combination with the other evidence, raise a reasonable probability the petitioner was not the perpetrator." Riofta, 166 Wn.2d at 367-368. This probability is based on several weaknesses in the State's own evidence, making the State's contention that "there is no possibility of eyewitness misidentification" a gross overstatement. See Brief of Respondent, at 14.

First, Smiley had consumed 12 drinks in the hours immediately preceding the rape. 1RP 59, 78-79.

Second, shortly after the rape, Smiley told a detective she probably could not identify her attacker, and her trial testimony supported this. Explaining her uncertainty, she testified that she had seen the rapist in the bar "[j]ust for a second" and it had been dark in the hotel room. 1RP 80-81.

Third, she described the rapist as 5' 7" or 5' 8" tall, possibly with blond hair, and she was unaware whether he had facial hair. Thompson, however, is 6' 3" tall, with black hair and a moustache.[2]

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[2] The State points out that the defense never presented evidence, consistent with a pretrial offer of proof on Thompson's trial defense, establishing that one of Thompson's co-workers matched Smiley's description of the rapist. See Brief of Respondent, at 12. The more important (and uncontested) point, however, is that her description of the rapist does not match

1RP 79-84; 2RP 54-55.

Fourth, the rapist beat Smiley with his fists and the doctor who treated her testified he would expect the rapist to have injuries to his hands. 2RP 13, 20, 33. Yet, there is no evidence Thompson's fists showed any signs that he administered such a brutal beating.[3]

Fifth, Thompson was just one of many employees from the Loram Corporation staying at the hotel. The company had reserved at least a dozen rooms at the hotel. 2RP 88. This raises the specter that someone other than Thompson may have known when he was away from the room and gained access to it. The hotel clerk testified she had no idea who had been in room 111 the morning of the rape. 2RP 88-89.

Sixth, other than Smiley's questionable identification of Thompson as the rapist, not a single individual testified to seeing

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Thompson.

[3] The State minimizes the significance of this point because Thompson has provided "no evidence of the *absence* of injuries to his hands." Brief of Respondent, at 13 (emphasis in original). Common sense dictates, however, that had there been any evidence of injury to Thompson's hands, the State would have presented that evidence at trial. Under Riofta, this Court is required to look at "all the evidence presented at trial" when considering the impact of a favorable DNA test. Riofta, 166 Wn.2d at 367. This would include the absence of prosecution evidence on such a critical point.

Thompson at the Riviera, seeing Thompson with Smiley after she left the Riviera, or seeing Thompson with her as she arrived at the Landmark Hotel. Thompson was only seen with Smiley after the rape occurred removing her from the hotel through an emergency exit. 1RP 39-40; 2RP 39, 53-54.

In light of these circumstances, a DNA test result showing that the only semen found on Smiley or anywhere else at the scene belonged to someone other than Thompson most certainly would "raise a reasonable probability the petitioner was not the perpetrator." Riofta, 166 Wn.2d at 367-368.

The State makes much of the fact Thompson did not demand DNA testing before his trial. See Brief of Respondent, at 14. In Riofta, the Supreme Court rejected this as a litmus test for post-conviction testing. Instead, it is merely one consideration in determining the likelihood testing could demonstrate the defendant's innocence. Riofta, 166 Wn.2d at 366 n.1.

Moreover, the State reads too much into the available record. The record shows that Thompson wanted to exercise his right to a speedy trial. 1RP 3 (counsel notes Thompson opposed a trial continuance). There was a backlog at the crime lab, and DNA testing was going to further delay trial. 2RP 78-80. Given Smiley's

description of her attacker, a description that did not match Thompson, he may have felt confident he could obtain both a speedy trial and an acquittal without waiting an unknown – but quite possibly very lengthy – time for DNA testing to be completed.

In addition, Thompson was not unconditionally opposed to a trial continuance. The day of trial, with Thompson's consent, defense counsel asked for a continuance to obtain more information on one of Thompson's co-workers, who had stayed at the hotel the night of the rape and matched Smiley's description of the rapist. When that motion was denied, trial began that day. 1RP 6-16. Had the defense motion been granted, however, the State may have had DNA test results by the time of trial. Thus, it is not true (as the State implies) that Thompson was determined there would be no DNA evidence at his trial. He was willing to give the State additional time to obtain its results in exchange for more time to gather evidence on his co-worker.

As it did below, the State also attempts to rely on Thompson's statement to police following his arrest to persuade this Court DNA testing would not be useful. The State argues that Riofta does not limit consideration to evidence admitted at trial or newly discovered. See Brief of Respondent, at 15-18. Even if true, surely the evidence

must be *admissible* at a trial.

The prosecution, as proponent of a defendant's statements, bears the burden to prove voluntariness and compliance with Miranda.[4] Lego v. Twomey, 404 U.S. 477, 487-89, 92 S. Ct. 619, 30 L.Ed.2d 618 (1972); State v. Schatmeier, 72 Wn. App. 711, 716, 866 P.2d 51, review denied, 124 Wn.2d 1019 (1994); State v. Teran, 71 Wn. App. 668, 671-672, 862 P.2d 137 (1993), review denied, 123 Wn.2d 1021 (1994), abrogated on other grounds by State v. Hill, 123 Wn.2d 641, 644-645, 870 P.2d 313 (1994). There was no CrR 3.5 hearing in Thompson's case. In fact, a defense motion to preclude use of the statement resulted in the prosecutor stipulating the statement would not be used as substantive evidence. 1RP 7-8, 18-19.

It appears the defense did agree the statement could be used if Thompson took the stand and testified, but even then only for possible impeachment. 1RP 19. Thompson did not take the stand, however, so the statement was and remains inadmissible under the trial court's ruling.

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[4] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The State argues that the proper inquiry is not whether the statement would be admissible at a trial, but whether it is admissible in a proceeding to determine whether DNA testing should be ordered. See Brief of Respondent, at 17. It is difficult to imagine this is what the Legislature or the Riofta Court had in mind. Under the State's approach, testing could be denied based on "proof" no jury could ever consider in assessing the defendant's guilt.

In any event, even if this Court were to grant the State's request and now use Thompson's statement to police to impeach his claims of innocence, in light of the State's evidence at trial – which casts doubt on Smiley's identification of Thompson as the rapist – a DNA test result identifying someone else as the rapist still would create a reasonable probability Thompson was not the perpetrator. See State v. Gray, 151 Wn. App. 762, 766-767, 772-775, 215 P.3d 961 (2009) (DNA testing required even though defendant matched description of rapist, defendant was nearby at time, canine tracked defendant's scent from rape scene to location of his arrest, and two eyewitnesses identified defendant from a photo montage); In re Bradford, 140 Wn. App. 124, 127-132, 165 P.2d 31 (2007) (testing excluding defendant as DNA source required new trial even where defendant had confessed to crime).

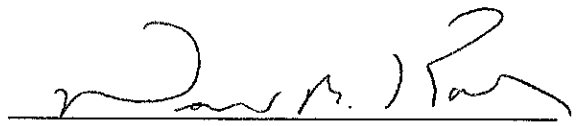
B. CONCLUSION

For the reasons discussed in the opening brief and above, Thompson is entitled to DNA testing.

DATED this 11th day of January, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 59366-8-I
	)	
BOBBY R. THOMPSON,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF JANUARY 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SETH FINE
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[X] BOBBY RAY THOMPSON
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SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF JANUARY 2010.

x Patrick Mayovsky