

72850-4

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Court of Appeals
Division I
State of Washington

72850-4

No. 72850-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN DUBLIN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT 1

Favorable DNA test results from the items collected in A.B.’s
bedroom would demonstrate Mr. Dublin’s innocence on a more
probable than not basis. No reasonable jurist could conclude
otherwise. 1

B. CONCLUSION 7

TABLE OF AUTHORITIES

Washington Supreme Court Cases

State v. Gentry, 183 Wn.2d 749, 356 P.3d 714 (2015)..... 4, 5

State v. Riofta, 166 Wn.2d 358, 209 P.3d 467 (2009)..... 2, 3, 4

State v. Thompson, 173 Wn.2d 865, 271 P.3d 204 (2012)..... 3, 5

Washington Court of Appeals Cases

In re Pers. Restraint Petition of Bradford, 140 Wn. App. 124, 165 P.3d 31 (2007)..... 3

State v. Gray, 151 Wn. App. 762, 215 P.3d 961 (2009)..... 3, 5

Statutes

RCW 10.73.170(3)..... 1

Other Authorities

Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1 (2009)..... 6

Robert Aronson & Jacqueline McMurtrie, The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues, 76 Fordham L. Rev. 1453 (2007)..... 6

A. ARGUMENT

Favorable DNA test results from the items collected in A.B.'s bedroom would demonstrate Mr. Dublin's innocence on a more probable than not basis. No reasonable jurist could conclude otherwise.

The State appears to largely agree with the relevant standards for evaluating whether the substantive requirements for postconviction DNA testing under RCW 10.73.170 are met. The court considers whether the movant has shown the likelihood that DNA evidence would demonstrate innocence on a more probable than not basis. RCW 10.73.170(3). The court presumes that the results from testing would be favorable to the convicted person. State v. Crumpton, 181 Wn.2d 252, 260, 332 P.3d 448 (2014). The court then considers whether this favorable evidence, when viewed with all the evidence from trial, shows that it is likely that the person is more likely than not innocent. Id.

As argued, this standard is met. A.B.¹ was raped in her bedroom. RP 586-88. DNA recovered from the rape kit, matched Mr. Dublin. RP 699, 856-57. However, items recovered from A.B.'s bedroom which the perpetrator touched or left semen upon were not tested. RP 409-14; CP 64, 66. This included bedsheets, pillow cases, a large stuffed animal,

¹ The State incorrectly represents that A.B. was 16 years old at the time. Br. of Resp't at 3. A.B. was 18 years old. RP 572, 576.

scissors, and underwear. RP 409-14; CP 64, 66. In particular, the bedding may have semen, which would be very probative as to the perpetrator.

The underwear would also be particularly probative because, according to the police, it belonged to the perpetrator and was left there. RP 414, 416; CP 64, 66. If the DNA left on these items does not match Mr. Dublin, this would establish his innocence on a more probable than not basis. It would tend to show that an error had occurred in relation to the rape kit or that Mr. Dublin had consensual sex with A.B. in his truck, as he claimed. RP 2113, 2115-16.

Relying on Riofta, the State disagrees, asserting that “[i]f the item to be tested would not necessarily yield DNA from the perpetrator of the crime, then the standard cannot be met.” Br. of Resp’t at 11. Riofta does not support this proposition. There, our Supreme Court held that testing of a white hat for DNA would not establish the defendant’s innocence on a more probable than not basis. State v. Riofta, 166 Wn.2d 358, 363, 209 P.3d 467 (2009). While the hat had been worn by the perpetrator of a shooting, the hat actually did not belong to the perpetrator and might have only been worn a few minutes. Id. It was also the type of item where one would not necessarily leave DNA. Id. at 370-71.

Riofta is not analogous to this case. Here, the perpetrator likely left semen on A.B.’s bedding. The State acknowledges that DNA

recovered from a sperm fracture, as opposed to DNA left through mere touch, is particularly probative. Br. of Resp't at 12-13.

Contrary to the State's contention, the perpetrator's underwear is not akin to the hat in Riofta. Br. of Resp't at 13. There was no evidence that the underwear was worn by anyone but the perpetrator. It is also the type of item likely to contain DNA because it is worn close to the body. Thus, it is more like the mask in In re Pers. Restraint Petition of Bradford, 140 Wn. App. 124, 165 P.3d 31 (2007). Br. of App. at 17. The State does not respond to this argument. Additionally, the underwear (unlike the hat in Riofta), may also contain semen, making it more like the items in Crumpton, State v. Gray, 151 Wn. App. 762, 215 P.3d 961 (2009) and State v. Thompson, 173 Wn.2d 865, 271 P.3d 204 (2012).

A police report, which was submitted with Mr. Dublin's motion for postconviction DNA testing, states that police seized a pair of grey underwear from A.B.'s room that A.B. said belonged to the assailant. CP 64, 66. At trial, the officer who wrote this report testified to this. RP 414, 416. Now, the State asserts that it has never been established that the underwear belonged to the perpetrator. Br. of Resp't at 14. But the State did not elicit testimony from A.B. concerning the underwear. RP 573-600, 604. If the officer was incorrect, it was surely the State's burden to

correct this error. The State could easily have done so by simply asking A.B. about the underwear.

The State says there was no evidence that the assailant removed his clothing. Br. of Resp't at 14. But given that the assailant penetrated A.B. with his penis, it is reasonable to infer that the assailant took his underwear off. RP 587-88.

The State argues that, as in Riofta, “many other people might have come into contact with items recovered from A.B.’s room.” Br. of Resp't at 16. But unlike Riofta, the items, especially the bedding, may have semen left by perpetrator. Before the attack, A.B. testified that she had been sexually inactive for about two months. RP 639. She did not testify that any men had been in her room before. The State’s claim that “many other people” might have been in A.B.’s room is purely speculative and not supported by the record.

Relying on Gentry, the State asserts that “[w]hen highly probative DNA evidence has already established the perpetrator’s identity, further DNA testing is not warranted under the statute.” Br. of Resp't at 14. This is not the law. In Gentry, postconviction DNA testing revealed that the victim’s blood was on the defendant’s shoelace. State v. Gentry, 183 Wn.2d 749, 356 P.3d 714, 718 (2015). The trial court then denied testing of the remaining items, which included bloodstains on the defendant’s

shoes and hairs found on the victim's body. Gentry, 356 P.3d at 724 (2015). The Supreme Court held it was not an abuse of discretion to deny further testing because, in light of the incriminating blood evidence, reasonable jurists could disagree on whether favorable test results on these other items would prove innocence on a more probable than not basis. Id. at 724-25.

In contrast, here there may be DNA from semen left by the perpetrator on items. Assuming favorable results, as the standard requires, no reasonable jurist could conclude that this does not show Mr. Dublin's innocence on a more probable than not basis. This makes the case more analogous to Gray, Thompson, and Crumpton. Gentry does not support the State's argument.

Further, the DNA evidence in this case has not conclusively established Mr. Dublin as the perpetrator. Mr. Dublin testified that he had consensual sex with A.B. in his truck. RP 2115. The lack of Mr. Dublin's DNA on the items recovered from A.B.'s room, which one would expect the perpetrator to have left DNA upon, would substantiate Mr. Dublin's claim of innocence.

Additionally, laboratories and prosecutors have wrongfully convicted the innocent using DNA evidence before. For example, Josiah

Sutton was wrongfully convicted of rape based on DNA evidence.² In that case, the victim was raped by two men in the backseat of her car.

Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 64 (2009).

Semen was recovered from the vaginal swab and on a stain from the backseat of the car. *Id.* Despite testing that showed the semen stain on the car seat came from only one man who was not Mr. Sutton, this was omitted at trial. *Id.* at 64-65. At trial, the analyst testified that DNA from the semen found in the rape kit uniquely matched Mr. Sutton's DNA.

Robert Aronson & Jacqueline McMurtrie, The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues, 76

Fordham L. Rev. 1453, 1479 (2007). Later analysis, however, revealed that DNA from the rape kit actually matched about only one in every fifteen African-American males. *Id.* If the State's proposed rule had been applied in Mr. Sutton's case, he would still be lingering in prison.

The State does not contest Mr. Dublin's argument that the evidence need only demonstrate his innocence more probably than not as to any conviction. Br. of App. at 18. Here, that standard is satisfied as to

² <http://www.innocenceproject.org/cases-false-imprisonment/josiah-sutton> (last accessed 11/18/2015).

the two convictions related to A.B. Thus, whether the standard is met as to the convictions related to G.G. and E.P.³ is immaterial.

B. CONCLUSION

Mr. Dublin meets the substantive requirements of the statute. Favorable test results from the items would show Mr. Dublin's innocence on a more probable than not basis. No reasonable jurist could conclude otherwise. Thus, the trial court abused its discretion in denying Mr. Dublin's motion. This Court should reverse.

DATED this 18th day of November, 2015.

Respectfully submitted,

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³ The State incorrectly represents that E.P.'s full name was written down in the notebook seized from the home where Mr. Dublin was living. Br. of Resp't at 6. The notebook contained only the first name of E.P. (which is a common first name) and not her last name. RP 2033 ("The name [E] was in there for [E.P.], and just her first name.") (emphasis added). This notebook was seized from a room previously occupied by Mr. Dublin's sister. RP 2166-67.

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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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