

70721-3

70721-3

NO. 70721-3-I

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

REC'D
SEP 18 2014
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TOVAR,

Appellant.

2014 SEP 18 11:3:55
COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable Brian Gains, Judge

REPLY BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE TRIAL COURT ABUSED IT DISCRETION BECAUSE IT FAILED TO USE THE PROPER STANDARDS IN ITS DETERMINATION TO DENY THE REQUESTED DNA TESTING.....	1
B. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Bradford

140 Wn. App. 124, 165 P.2d 31 (2007).....2

State v. Crumpton

___ Wn. 2d. ___, 332 P.3d 448 (2014).....1, 3, 4

A. ARGUMENT IN REPLY

THE TRIAL COURT ABUSED IT DISCRETION BECAUSE IT FAILED TO USE THE PROPER STANDARDS IN ITS DETERMINATION TO DENY THE REQUESTED DNA TESTING.

Recently, our Supreme Court affirmed that in determining whether to grant a motion for post-conviction DNA testing “A trial court must look to whether the DNA results, in conjunction with the other evidence from the trial, demonstrate the individual's innocence on a more probable than not basis, assuming the DNA results would be favorable to that convicted individual.” State v. Crumpton, __ Wn. 2d __, 332 P.3d 448 (2014) (Slip. Op. No. 88336-0, ¶ 24).¹ When viewed through that standard, Tovar’s motion for DNA testing should have been granted.

The State concedes the laboratory report confirms the presence of sperm. Brief of Respondent (BOR) at 22. It concedes DNA analysis could determine the identity of the source. Id. The State contends, however, that “any semen obtained from A.P.’s body on the same day that Tovar admittedly had sexual intercourse with her would likely include cells contain Tovar’s DNA...” Id. It concludes that in combination with the trial evidence the presence of the DNA “of another male in addition to

¹ Because the decision was recently filed on August 21, 2014, the reporters have not yet published the case with pagination. Thus, citations to the body of the decision reference paragraph numbers.

Tovar's" does not raise the probability that Tovar is innocent. Id. at 22-23.

The flaw in the State's argument is that it presumes Tovar's DNA will be found in addition to someone else's DNA because "he admittedly had sexual intercourse" with A.P. The State's fails to cite anything in the record to support its presumption. The evidence shows A.P. had sexual intercourse, but there is no forensic evidence that it was with Tovar. The only conceivable basis for that presumption is Tovar's text message exchange with A.P. the following day where he wrote that he remembered they started having sex but they both felt weird and that he asked her they could finish having sex and she nodded "yes." 6RP 77. That is a far cry from an admission he and A.P. in fact engaged in intercourse.

Moreover, the trial court's decision does not mention anything about Tovar admitting to sexual intercourse with A.P. If the court believed there was evidence of such an admission it would have logically been a factor in its analysis. It was not because the record does not support the State's assertion. But, even if he made such an admission that is not a defining factor. See In re Bradford, 140 Wn. App. 124, 165 P.2d 31 (2007) (reversing rape conviction based on exculpatory DNA evidence despite a confession)

The evidence does not show Tovar admitted he and A.P. had intercourse, and that does not appear to have factored into the court's decision. The court nonetheless appeared to base its analysis only on whether a DNA test would show the presence of another's sperm. RP 8. It failed to assume the DNA test would favorably show the semen samples would likewise show the absence of Tovar's DNA. Because it failed to assume the test would show the absence of Tovar's DNA, it did not use the proper standard because its analysis was not based on the assumption of an exculpatory DNA test result. Reversal is warranted. Crumpton, 332 P.3d 448, (Slip. Op. ¶ 24).

The State argues the court correctly denied the motion for DNA testing contending the evidence that Tovar raped A.P. was "overwhelming." BOR at 23. The State, citing the same evidence relied on by the trial court, points to Tovar apologizing to A.P., his apparent suicide attempt when confronted by police, and his failure at trial to present a defense that no sexual intercourse occurred. BOR at 17; RP 7-8. In addition, the State also cites to the evidence of injury on the inside of A.P.'s mouth and puncture marks on the pillow and claims this evidence corroborated A.P.'s testimony. BOR at 18.

Here, Tovar's apology was in response to A.P. telling him he threatened to kill her and himself. His apparent suicide attempt when

stopped by police was after A.P. had accused him of rape, despite Tovar telling her he could not face going back to prison. And, the injury to A.P.'s mouth may show an assault but does not show Tovar raped her. The evidence Tovar raped A.P. was not overwhelming.

Courts have found DNA testing warranted in cases where the evidence of guilt was far more compelling. See, Brief of Appellant at 16-17. Crumpton is also instructive. Crumpton matched the description of the rapist, was found by police running a half a mile from the victim's house, had in his possession items belonging to the victim as well as pillowcase matching the victim's bedding and smeared with blood, and one of the hairs collected from the victim's mattress matched Crumpton's pubic hair sample. In addition, Crumpton admitted he was in the victim's house for approximately 40 minutes and he took her items but denied hitting or raping her. Crumpton, 332 P.3d 448. (Slip. Op. ¶ 2-5). Despite the evidence, the Court found "any DNA evidence left on the items Crumpton petitioned to test would almost certainly have been left by the perpetrator of the rape" and exculpatory results of DNA testing in this case would "directly affect the likelihood Crumpton was innocent." Id. (Slip. Op. ¶ 17).

But, even if the evidence against Tovar was "overwhelming" that is not the proper analysis. As the Crumpton Court observed, "Many

innocent individuals have been exonerated through postconviction DNA tests, including some who had *overwhelming* evidence indicating guilt.” Crumpton, 332 P.3d 448, (Slip. Op. ¶ 18) (emphasis added). In determining whether to grant the motion for DNA testing, the trial court “must focus on the likelihood that DNA evidence could demonstrate the individual's innocence *in spite of the multitude of other evidence against them*.” Crumpton, 332 P.3d 448, (Slip. Op. ¶ 19) (emphasis added). The Court explained, a trial court must not focus on the weight or sufficiency of the evidence, but instead “evaluate the likelihood of innocence based on a favorable test result, not the likelihood of a favorable test result in the first place.” Id.

Here, the court focused on the weight of the evidence and did not evaluate the likelihood of innocence based on a favorable test result. The defense theory was that A.P. would do anything to get what she wanted and she made up the rape story to get Tovar out of her house so she could get back with her husband. 9RP 107-114. The State does not dispute the case hinged on A.P.'s credibility. If DNA evidence shows that Tovar was not the source of the semen, which the court did not consider, then it would completely undermine A.P.'s testimony that Tovar raped her. If the evidence shows Tovar was the possible source of the semen and also the presence of spermatozoa from a source other than Tovar, it would

conclusively show A.P. had intercourse with someone other than Tovar and she lied about only having intercourse with him. That, in combination with the other evidence showing her lack credibility, would lead to a reasonable inference she lied about Tovar raping her and show Tovar's innocence on a more probable than not basis. In sum, where the State's case relies on the credibility of the complaining witness, exculpatory results of a DNA test directly affects the likelihood of innocence.

The trial court failed to apply proper the test because it failed to assume the test would show the absence of Tovar's DNA. It also erroneously viewed only the evidence from the trial that showed Tovar's guilt and not whether a favorable DNA test result in conjunction with *all* the evidence would affect the likelihood Tovar was innocent.

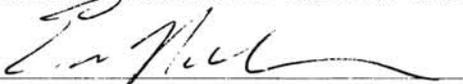
B. CONCLUSION

For the above reasons and those articulated in the Brief of Appellant this Court should remand for DNA testing.

DATED this 18 day of September 2014.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC


ERIC NIELSEN
WSBA No. 12273
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70721-3-1
)	
MICHAEL TOVAR,)	
)	
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 18TH DAY OF SEPTEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL TOVAR
 DOC NO. 874007
 MONORE CORRECTIONAL COMPLEX
 P.O. BOX 888
 MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF SEPTEMBER, 2014.

x *Patrick Mayovsky*