

No. 42173-9-II

STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

v.

LINDSEY CRUMPTON

BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

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A. Assignment of Error

Assignment of Error

The trial court erred by denying Lindsey Crumpton's motion for DNA testing pursuant to RCW 10.73.170.

Issue Pertaining to Assignment of Error

When the petitioner has satisfied the procedural component of RCW 10.73.170 and there is a high probability that DNA testing will identify the perpetrator of a rape, should this Court order DNA testing of the evidence?

B. Statement of Facts

Lindsey Crumpton was charged in 1993 by Amended Information with five counts of first degree rape and one count of residential burglary. CP, 4. He proceeded to trial and the jury convicted him as charged. CP, 8. The Court imposed an exceptional sentence. CP, 8.

Mr. Crumpton filed a direct appeal to this Court, which affirmed the conviction, and the Supreme Court denied review. In addition, Mr. Crumpton has filed multiple collateral attacks, all of which have been dismissed.

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Mr. Crumpton was convicted of raping D.F.E. after allegedly breaking into her home, waking her up in her bedroom, and repeatedly having sexual intercourse with her vagina and rectum. CP, 49. The rapist covered her head with blankets, making it impossible for the victim to identify him. During the ordeal, the rapist rammed one or more handkerchiefs into the perinea area of the victim. CP, 50. A handkerchief collected at the scene was soaked with some sort of liquid and also contained a reddish spot believed to be blood. CP, 52. Hairs were collected from the bedroom, one of which exhibited the same microscopic characteristics as the public hair control sample collected from Mr. Crumpton. CP, 52.

In the absence of direct eyewitness identification evidence inculcating Mr. Crumpton, the State relied on circumstantial evidence. Mr. Crumpton was arrested about a half mile away and was found in possession of property identified by the victim as belonging to her. CP, 49-50. He admitted being inside the victim's house, but denied raping her. CP, 51. A jury apparently concluded that this evidence was sufficient to establish Mr. Crumpton's guilt and found him guilty.

In December of 2010, Mr. Crumpton filed a motion for DNA testing. CP, 22. The trial court appointed counsel for the purpose of arguing the motion. CP, 24. In the motion, Mr. Crumpton argued he

should be permitted to have DNA testing pursuant to RCW 10.73.170. CP, 27. Specifically, he requested DNA testing of the rectal and vaginal swabs of the victim, the flannel sheet and white handkerchief collected from the scene of the rape, and the hairs collected from the scene. CP, 28.

The motion was briefed by the parties and denied by the trial court on April 27, 2011. RP, 23. Findings of Fact and Conclusion of Law were entered by the trial court. CP, 60. In its findings of fact, the trial court found, “[Mr. Crumpton] has not presented or alleged any new evidence, nor has he otherwise made any allegations that would call the evidence presented at trial into doubt.” CP, 63. Mr. Crumpton filed a notice of appeal. CP, 66.

C. Argument

RCW 10.73.170 provides a mechanism for people with older convictions to seek DNA testing in order to establish actual innocence. It acts as an exception to the normal rule that a person may file only one collateral attack petition and that petition must be filed within one year of the conviction becoming final. See RCW 10.73.090-.100. RCW 10.73.170 reads:

(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 has both a procedural and substantive component.

Procedurally, the petitioner must allege either that DNA testing was unavailable at the time of conviction, or that the technology has sufficiently developed or significantly improved since the time of conviction, such that a new test would provide significant new information. The State has conceded that Mr. Crumpton has met his burden of showing sufficient development or improvement in DNA technology since the time of his conviction to meet the procedural component. CP, 56.

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The substantive component of the statute requires the petitioner to “explain why DNA evidence is material to the identity of the perpetrator” of the crime. The Washington Supreme Court has explained this provision as follows:

In determining whether a convicted person “has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis,” a court must look to whether, viewed in light of all of the evidence presented at trial or newly discovered, favorable DNA test results would raise the likelihood that the person is innocent on a more probable than not basis. The statute requires a trial court to grant a motion for post conviction testing when exculpatory results would, *in combination with the other evidence*, raise a reasonable probability the petitioner was not the perpetrator.

State v. Riofta, 166 Wn.2d 358, 368, 209 P.3d 467 (2009). In Riofta, the Supreme Court denied DNA testing of a hat which fell off the head of a shooter.

Since the Riofta decision, the Court of Appeals has decided two cases where the defendant invoked his right to DNA testing pursuant to RCW 10.73.170. State v. Gray, 141 Wn.App. 762, 215 P.3d 961 (2009); State v. Thompson, 155 Wn.App. 294, 229 P.3d 901, review granted, 170 Wn.2d 1005 (2010).

In Gray, the defendant was convicted in 1991 of first degree rape and attempted first degree rape. The Court first concluded that the petitioner had satisfied the procedural component because DNA testing

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was not sufficiently advanced in 1991. Turning to the substantive component, the Court reviewed the relevant facts. In 1991, an assailant had attacked four teenagers who were camping. He threatened all four teenagers with a knife and forced one of the female teenagers to first perform fellatio on him, then he anally raped her. He tried to rape a second female, but she refused. Rectal and vagina swabs were collected from the primary victim. No semen was located. No DNA testing was conducted. Hair analysis did not produce incriminating evidence.

The State in Gray objected to DNA testing because “the evidence on which he was convicted was strong.” Gray at 773. The Court did not find this persuasive, commenting, “Because this statute applies to post conviction testing, the evidence will always have been sufficient to convict beyond a reasonable doubt. But whether the evidence in the original trial was strong or weak is only part of the question.” Gray at 773. The Court noted that, unlike the hat in the Riofta case which could have been worn by any number of people; there was only one person who perpetrated the rapes in this case. The testing had the possibility of identifying the petitioner as the rapist, being inconclusive, or of excluding the petitioner, in which case the testing would have shown the petitioner’s innocence on a more probable than not basis.

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In Thompson, the Court again reviewed a rape case and concluded that DNA testing was warranted. The facts against the petitioner were again more than adequate to convince a jury beyond a reasonable doubt. The victim met petitioner at a bar and went voluntarily with him to a hotel under the pretext that there was a party in the hotel room. Once at the hotel, according to the victim's testimony, petitioner knocked her unconscious and raped her at least twice. Police responded to what they thought was a domestic violence call at the hotel and discovered the petitioner exiting the hotel room with the hysterical victim. A vaginal swab of the victim revealed the presence of semen, but no DNA analysis was conducted in 1995. Despite this very strong evidence, the Court ordered DNA testing pursuant to RCW 10.73.170. They analyzed the case, saying,

But an absence of Thompson's DNA in the semen sample is highly probative of his innocence because the only source of the semen was the rapist. Because there was no evidence that J.S. had intercourse that night with anyone other than the rapist, DNA results ruling out Thompson as the sperm source would rebut even the strong eyewitness testimony indicating he was the rapist. Indeed, favorable DNA results ere would be even stronger evidence of innocence than in Gray where there was no semen to be tested, but only swabs from areas where intimate contact may have occurred.

Thompson at 304.

Implicit in both the Gray and Thompson decisions is the idea that sex offenses, when it comes to the probability that DNA testing will exonerate the suspect, are different than other offenses. This is because there is a high likelihood the rapist will have left his DNA behind. Rape necessarily requires the assailant to come in close physical proximity to the victim, frequently leaving behind skin, hair, and blood. Even more probative is the frequent presence after rape of semen and sperm. If, as was the case in Gray, the victim has semen in her vagina or other body orifices, and there is no evidence of intercourse with anyone other than the rapist, the absence of a DNA match to the petitioner will be highly probative of innocence. In fact, of the 273 DNA exonerations tracked by Project Innocence, 154 have involved the crime of rape. See www.projectinnocence.org.

The trial court in its findings of fact erroneously conflated the standards for obtaining a new trial based upon new evidence and obtaining DNA testing pursuant to RCW 10.73.170. The statute is not designed as a mechanism for requesting a new trial; rather the statute is designed to obtain scientifically reliable testing of the available samples. As Justice Johnson stated in Riofta, “Obviously, testing will sometimes help a person if it later establishes his or her innocence. But sometimes it will not help.

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The intent of the statute is to provide for testing; the result of the testing is not important.” Riofta at 374 (Justice Johnson, dissenting). Obviously, should the DNA testing exclude Mr. Crumpton as a sperm match with the rapist, a motion for new trial will follow. But should the DNA testing inculcate Mr. Crumpton, then no motion for a new trial will be filed and society will breathe easier knowing that the right man is behind bars.

It is difficult to identify the prejudice to the State in denying DNA testing in a case like this. There are at least three arguments for how the State might be prejudiced. None of them has any merit upon closer examination, however.

The first reason that State might possibly be prejudiced is the expenditure of State financial resources, a reason cited by the majority in Riofta. At the trial level, Mr. Crumpton was represented by attorney Clark Tibbits, who also happens to be the head of the Kitsap County Prosecutor’s Office. As the head of that office, he is the one who authorizes public expenditure for expert services pursuant to CrR 3.1. Mr. Tibbits stated, “DNA testing used to be prohibitively expensive and onerous. Now, I think we are doing DNA testing for maybe a couple thousand dollars. I forget what I am authorizing on any per case basis. It may even be less than that. And it doesn’t take very long, and the accuracy of it is so much greater than it has been, particularly from 1993. . .

[B]ecause the burden is small, and the potential consequences are very large for Mr. Crumpton, I would ask the court to authorize that order.” RP, 8. Given that the person charged with guarding the public coffers believed the cost to be minimal and justified, the State is not prejudiced by this small expenditure.

The second possible prejudice to the State is that it further victimizes the victim. While the State may wish to advise the victim that DNA testing is being conducted and the reason for the testing, it is unnecessary for the victim to testify or take any affirmative action. And if the testing confirms the identity of the rapist, the victim will sleep better knowing that everything scientifically possible has been done to ensure that the right man has been convicted and will (in Mr. Crumpton’s case, at least) never be released from prison. On the other hand, in the event DNA testing excludes Mr. Crumpton, one would think the victim would be more victimized knowing that the wrong man is in prison and the real rapist remains at large than by the fact that some chemistry nerd in a lab somewhere conducted a scientific test.

The third possible prejudice to the State is that it potentially reopens a case that the courts have considered final. To a certain extent, this concern has been addressed by the legislature. By passing RCW 10.73.170, the legislature has expressed an interest in doing everything

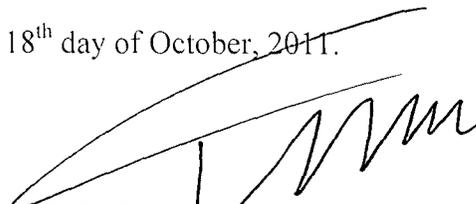
humanly possible to ensure truth in convictions, i.e. that the guilty are found guilty and the innocent are found innocent. As Justice Chambers so eloquently put it, “Judicial finality is a virtue but a vastly inferior one to actual substantive justice.” Riofta at 378 (Justice Chambers, dissenting).

In sum, there is no rational reason not to allow the DNA testing to proceed. If, as the State obviously believes, the testing merely confirms the findings of the jury, then there will be no change to the conviction and the State will not have been prejudiced. On the other hand, if the testing excludes Mr. Crumpton as the rapist, then the courts will have to deal with the fact that an innocent man has spent eighteen years and counting in prison after being convicted of a crime he did not commit.

D. Conclusion

This Court should remand to the trial court with instructions to order DNA testing of the vaginal and rectal swabs, the flannel sheet and white handkerchief collected from the scene of the rape, and the hairs collected from the scene.

DATED this 18th day of October, 2011.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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STATE OF WASHINGTON
BY _____
DEPUTY

8 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
9 DIVISION II

10 STATE OF WASHINGTON,) Case No.: 93-1-00265-1
11) Court of Appeals No.: 42173-9-II
12 Respondent,) AFFIDAVIT OF SERVICE
13 vs.)
14 LINDSEY CRUMPTON,)
15 Defendant.)

16 STATE OF WASHINGTON)
17 COUNTY OF KITSAP)

18 THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

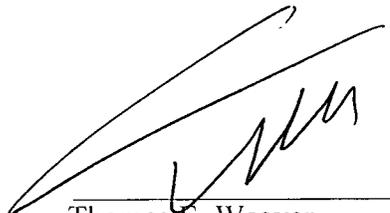
19 I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action,
20 and competent to be a witness.

21 On October 19, 2011, I sent the original, via postage prepaid, of the BRIEF OF
22 APPELLANT to The Washington State Court of Appeals, Division Two, 950 Broadway, Suite
23 300, Tacoma, WA 98402 and a copy, via interoffice mail, to the Kitsap County Prosecutor, 614
24 Division St, MS-35, Port Orchard, WA 98366.

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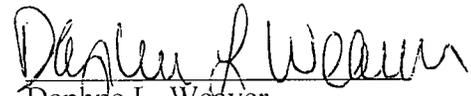
1 On October 19, 2011, I sent a copy, via postage prepaid, of the BRIEF OF
2 APPELLANT, to Ms. Lindsey Crumpton, Stafford Creek Corrections Center, 191
3 Constantine Way, Aberdeen, WA 98520.

4
5 Dated this 19th day of October 2011.



6
7 Thomas E. Weaver
8 WSBA #22488
9 Attorney for Defendant

10 SUBSCRIBED AND SWORN to before me this 19th day of October 2011.



11 Daphne L. Weaver
12 NOTARY PUBLIC in and for
13 the State of Washington.
14 My commission expires: 03/21/2013

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Daphne L Weaver
Notary Public
State of Washington
My Commission Expires on 03-21-2013