

No. 47960-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jerome Alverto,

Appellant.

Pierce County Superior Court Cause No. 06-1-02214-1

The Honorable Judge K.A Van Doorninck

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by rescinding its prior order granting Mr. Alverto's request for DNA testing.

ISSUE 1: A court must grant a motion for post-conviction DNA testing when that motion alleges the testing "would provide significant new information" and "would demonstrate innocence on a more probable than not basis." Did the trial judge err by rescinding her prior order granting Mr. Alverto's motion for DNA testing?

2. The Court of Appeals should not impose appellate costs, if the state substantially prevails on review and makes a proper request for such costs.

ISSUE 2: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Alverto is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On May 12, 2006, Stephanie Wilson was attacked in her home, hit with a wine bottle, and shot multiple times. RP (8/6/08) 252-267. The attacker wore dark clothing and a bandanna covering his face. RP (8/6/08) 309, 344. Wilson tried repeatedly to get away, ending up in her neighbor's yard when her attacker left her for dead. RP (8/6/08) 272, 356-359. She pounded on the neighbor's sliding glass door, leaving a puddle of blood on the neighbor's patio. RP (8/6/08) 266-268; RP (8/7/08) 417-419; RP (8/12/08) 717-722.

Medics and police arrived. They came upon Wilson's boyfriend Eric Rogers coming out of her house before they found Wilson. RP (8/7/08) 472-474, 489. Police briefly detained and then released Rogers. RP (8/11/08) 480-481.

Wilson and Rogers had been together as a couple for some time. RP (8/6/08) 243-245. On the night of the attack, Wilson went home instead of staying with Rogers as she usually did, because Rogers was not paying attention to her. RP (8/6/08) 244, 306. Rogers had Wilson's automatic garage door opener, which allowed access to the house. RP (8/6/08) 317, 353-354.

Police found no signs of forced entry. RP (8/12/08) 688.

Wilson told police and medics that her ex-husband Jerome Caesar Alverto was her attacker. RP (8/6/08) 273. Mr. Alverto and Wilson were married, and divorced, the year before. RP (8/6/08) 226-227. After about 40 days of married life, the couple split up. RP (8/6/08) 228. They both dated others at the time of Wilson's attack. RP (8/6/08) 300-302. In May of 2006, they'd been divorced for over a year. RP (8/6/08) 238-241, 300.

Alverto lived a few minutes away from Wilson's home, and police went to his address. RP (8/6/08) 347; RP (8/11/08) 514-541. He was arrested, and eventually charged with attempted murder in the first degree, burglary in the first degree, and robbery in the first degree, all with a firearm enhancement allegation. Amended Information filed 8/18/08, Supp. CP.

At trial, the state presented items the arresting officer alleged were in Mr. Alverto's car when he was arrested. One item that the state offered was a notebook that contained handwriting. The prosecutor offered the testimony of Wilson who said that the writing in the notebook was Mr. Alverto's. The defense countered with Mr. Alverto's ex-wife who said the writing was not Mr. Alverto's.¹ RP (8/14/08) 1099; RP (8/18/08) 1145-1188.

¹ No handwriting expert was offered by either party.

A DNA expert testified that blood on Mr. Alverto's pants was Wilson's. No explanation was offered about how the blood may have been put there. But the state did not send all items for testing, including a hair on the neighbor's sliding glass door. RP (8/12/08) 742; RP (8/13/08) 860; RP (8/14/08) 970.

At trial, Wilson claimed that Mr. Alverto had called her that night and was angry. RP (8/6/08) 247.

Two neighbors saw parts of the attack, and neither were able to identify the attacker. RP (8/7/08) 420-423; RP (8/12/08) 653. One said that he saw a person jogging in the street, and then a car pulled out and the man ran toward the car. RP (8/12/08) 580-581, 655-656. He said that the car and man continued together in the same direction until he lost sight of them. RP (8/12/08) 581. That neighbor got his phone, and looked again and saw a man coming from the back of the house, from the same area the other man and car were leaving. RP (8/12/08) 582-583, 653.

At trial, Mr. Alverto's primary theory was that Eric Rogers had argued with Wilson and then gone to her house. He'd used his garage door opener to gain entrance, covered his face with a bandana, and impersonated Mr. Alverto while assaulting Wilson. RP (8/19/08) 1298-1316; RP (8/20/08) 1199-1244.

The jury convicted Mr. Alverto as charged. Judgment and Sentence filed 9/12/08, Supp. CP. He appealed, and his convictions were affirmed.

Mr. Alverto filed a motion for post-conviction DNA testing pursuant to RCW 10.73.170.² He sought DNA testing of the hair found in blood smeared on the neighbor's sliding glass door. Memorandum of Law filed 6/9/14, Supp. CP; RP (8/12/08) 742. The hair has not previously been tested.

In support of his motion, Mr. Alverto submitted new information that had not been presented at trial (or in his prior request for post-conviction DNA testing). First, he attached an affidavit from Maurice Thrower, to whom Rogers had confessed in 2006. Memorandum of Law (Ex. 1) filed 6/9/14, Supp. CP.

Second, Mr. Alverto attached a letter from a handwriting expert, who concluded that Rogers, rather than Mr. Alverto, authored the notebook that had proved to be a critical piece of inculpatory evidence at trial. Memorandum of Law (Ex. 2) filed 6/9/14, Supp. CP.

² Mr. Alverto had submitted a previous request for post-conviction DNA testing of the hair and other evidence. Motion for Post Conviction DNA Testing filed 6/25/12, Supp. CP. His prior request was denied. Order Denying filed 10/12/12, Supp. CP. Mr. Alverto's current request is supported by new information that was not available at the time he filed his prior motion, as outlined here.

Third, Mr. Alverto attached phone records, arguing that they showed he did not make the threatening telephone call Wilson received just prior to the attack. Memorandum of Law (Ex. 4) filed 6/9/14, Supp. CP.

The trial judge initially granted Mr. Alverto's motion. CP 1. The state filed a motion to reconsider. CP 53. The trial judge found the state's motion untimely, but nevertheless rescinded her prior order. CP 66; RP (7/30/15) 3-13.

Mr. Alverto appealed.³ CP 90-92.

ARGUMENT

I. MR. ALVERTO IS ENTITLED TO POST-CONVICTION DNA TESTING BECAUSE HE HAS SATISFIED THE REQUIREMENTS OF RCW 10.73.170.

In Washington, a felon serving a term of imprisonment is entitled to post-conviction DNA testing when the results “would provide significant new information” and the offender shows a “likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170.⁴ Mr. Alverto has met the requirements of the

³ He also sought reconsideration. CP 67. His motion for reconsideration was summarily denied without argument. CP 78.

⁴ Ambiguous portions of the statute must be construed in favor of the offender. *State v. Statum*, 173 Wn. App. 640, 657, 295 P.3d 788 (2013). Furthermore, the Supreme Court has described the statute's procedural requirements as “lenient.” *State v. Riofita*, 166 Wn.2d 358, 367, 209 P.3d 467 (2009).

statute; accordingly, he is entitled to an order for DNA testing under RCW 10.73.170(3).

The statute allows for relief even if defense counsel elected not to seek DNA testing at trial. *State v. Thompson*, 173 Wn.2d 865, 876, 271 P.3d 204 (2012) (citing *Riofta*, 166 Wn.2d at 366). Furthermore, a court considering a motion under RCW 10.73.170 must consider new evidence in addition to evidence submitted at trial. *Riofta*, 166 Wn.2d, at 367-68. The court must “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.” *Id.* (emphasis in original).

Here, Mr. Alverto met the statute’s “lenient” procedural requirements as well as the more “onerous” substantive standard. *Riofta*, 166 Wn.2d at 367. The court’s initial order granting his motion was proper, and should not have been rescinded. CP 1, 66. Exculpatory results would “raise a reasonable probability [Mr. Alverto] was not the perpetrator,” when considered with the other evidence that was not previously presented to the jury. *Riofta*, 166 Wn.2d at 368.

At trial, the defense theory was that Eric /Rogers covered his face with a bandanna, dressed in a black turtleneck and other dark clothing, and

impersonated Mr. Alverto during an assault on Wilson.¹ RP (8/19/08) 1298-1316; RP (8/20/08) 1199-1244. Police found Rogers at the house. RP (8/7/08) 472-474, 489.

Since trial, a handwriting expert² has concluded that Rogers, rather than Mr. Alverto, authored a critical piece of inculpatory evidence (the notebook). Memorandum of Law (Ex. 2) filed 6/9/14, Supp. CP. Mr. Alverto has also obtained a declaration asserting that Mr. Rogers confessed to the crime. Memorandum of Law (Ex. 1) filed 6/9/14, Supp. CP. In addition, Mr. Alverto argues that his phone records show he did not make the threatening telephone call Wilson received just prior to the attack. Memorandum of Law, (Ex. 3) filed 6/9/14, Supp. CP

DNA results implicating Rogers “would, *in combination with the other evidence*, raise a reasonable probability [Mr. Alverto] was not the perpetrator.” *Riofta*, 166 Wn.2d at 367-68 (emphasis in original). Although Rogers had conflicting explanations regarding his presence at Wilson’s house, he did not claim that he’d been anywhere near the neighbor’s sliding glass door (where the blood and hair were found). RP (8/12/08) 590-645.

¹ Although she’d been struck in the head with a bottle and could not see her assailant’s face, she had identified Mr. Alverto as her attacker based (in part) on the perpetrator’s height and his question “‘why’d you marry me.’” RP (8/6/08) 254, 342,-343, 349, 364.

² David G. Cupp, Certified Fraud Specialist and Handwriting Examiner. Memorandum of Law (Ex. 2) filed 6/9/14, Supp. CP.

The trial court's original order granting DNA testing was proper. CP 1. The trial judge should not have rescinded the order. CP 66. Exculpatory DNA results would, when considered along with other evidence not presented at trial, raise a reasonable probability that Mr. Rogers was the perpetrator and that Mr. Alverto was not. *Id.*; CP 66. The court's order rescinding the prior order must be reversed, and the case remanded for reinstatement of the prior order (or entry of a new order) directing DNA testing. *Id.*

II. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 72102-0-I, 2016 WL 393719 (Wash. Ct. App. Jan. 27, 2016).⁷

Appellate costs are "indisputably" discretionary in nature. *State v. Sinclair*, 72102-0-I, 2016 WL 393719 at * 4. The concerns identified by

⁷ Division II's commissioner has indicated that Division II will follow *Sinclair*.

the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Alverto indigent. That status is unlikely to change, given his felony record and lengthy prison term. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

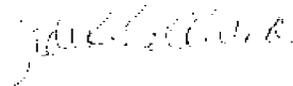
If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

The court should reverse the trial court's order denying DNA testing.

Respectfully submitted on March 23, 2016,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jerome Alverto, DOC #322854
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

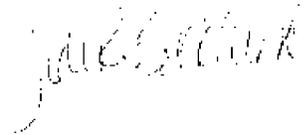
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 23, 2016.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

March 23, 2016 - 10:00 AM

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