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NO. 59366-8-1

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Thompson's motion for post-conviction DNA testing.

2. The trial court erred in its order denying DNA testing when it entered findings 1, 2, and 4.¹

Issues Pertaining to Assignments of Error

1. Thompson was tried for rape in 1995. His trial defense was that he did not commit the rape and that DNA testing of physical evidence, which the State had not conducted, would reveal the true rapist. He was convicted. In 2006, Thompson moved for DNA testing under RCW 10.73.170. That motion was denied. Where the Supreme Court's opinion in State v. Riofta² reveals that the trial court misapplied the law in denying Thompson's motion, and Thompson meets all statutory requirements for testing, is he entitled to have the evidence tested?

2. The trial court provided three reasons for its denial of Thompson's motion. The evidence does not support, and the State has since conceded that it does not support, the court's first reason.

¹ The court's order is attached to this brief as an appendix. There is no finding number 3.

² State v. Riofta, ___ Wn.2d ___, 209 P.3d 467 (2009).

The court's remaining two reasons are the product of misapplications of the law. Are all three reasons erroneous?

3. Is the denial of a motion under RCW 10.73.170 appealable as of right or only subject to discretionary review?

4. Which subsection of RAP 15.2 controls orders of indigency in these matters?

B. STATEMENT OF THE CASE

On July 25, 1995, a Snohomish County Jury found Bobby Thompson guilty of Rape in the First Degree, and he was sentenced to 280 months in prison. Supp. CP ____ (sub no. 48, Judgment and Sentence). Thompson's conviction was affirmed on appeal. Supp. CP ____ (sub no. 76, Commissioner's Ruling).

On October 20, 2006, Thompson filed a motion under RCW 10.73.170 asking that evidence gathered in his case be subjected to DNA testing. CP 89. Thompson noted that his defense at trial was that he did not commit the rape and alleged that DNA testing would prove his innocence while revealing the rapist's true identity. CP 91-92.

The Snohomish County Prosecutor's Office opposed the test on two grounds. First, the State indicated that, based on representations from the Lynnwood Police Department, the

evidence in question had been destroyed in 2001. Therefore, there was nothing to test. CP 59, 61, 83-84, 87-88. Second, the State argued that even if the evidence were still available, Thompson could not meet the statutory requirements for testing. CP 59-60.

On November 30, 2006, the Honorable Gerald Knight denied Thompson's motion on three grounds: (1) the evidence had been destroyed; (2) there had been no showing that DNA testing was unavailable at the time of trial or that current technology was more accurate or would provide significant new information; and (3) there was no likelihood DNA testing would demonstrate Thompson's innocence. CP 44-45.

Thompson appealed. Based on the assumption all testable evidence had been destroyed, however, this Court dismissed the appeal as moot. The mandate issued July 13, 2007. CP 15-16.

Thompson contacted the Washington State Patrol, asking whether that agency had retained certain blood samples that had been tested for his trial. He learned that the State Patrol had stain samples from several of the items he wished to have subjected to DNA testing, including slides containing spermatozoa. CP 9-11.

In light of this new information, the Snohomish County Prosecutor's Office alerted Judge Knight that the first finding in his

order – indicating there was nothing to test – was incorrect. CP 6. The prosecutor’s office also moved to recall the mandate in Thompson’s appeal. This Court granted that motion and ordered the parties to address, in addition to the substantive issues on appeal, whether the order denying DNA testing was appealable as of right and whether RAP 15.2(b) or 15.2(c) and (d) apply to the determination of indigency in these matters. CP 2-3.

Thompson’s appeal was subsequently stayed pending the Supreme Court’s decision in State v. Riofta. Riofta was decided on June 11, 2009, and this Court lifted the stay.

C. ARGUMENT

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

a. Appealable By Right

RAP 2.2 identifies those decisions of the Superior Court that may be appealed as a matter of right. These include “[a]ny final order made after judgment that affects a substantial right.” RAP 2.2(a)(13). Denial of a motion under RCW 10.73.170 qualifies under this rule.

First, since judgment was entered in 1995, the trial court’s order on Thompson’s motion was made “after judgment.”

Second, the order is “final” because there is nothing left for Judge Knight to decide on the motion. In State v. Gossage, 138 Wn. App. 298, 156 P.3d 951 (2007), reversed in part on other grounds, 165 Wn.2d 1, 195 P.3d 525 (2008), the defendant, who had been convicted of multiple sex offenses years earlier and served his sentence, filed a petition in the Superior Court seeking a certificate of discharge, restoration of civil rights, and early termination of his registration obligations. His petition was denied and he appealed. Gossage, 138 Wn. App. at 301-302.

This Court found the matter appealable by right, reasoning that the court’s order denying the petition was final because it left nothing more to be done, the trial court did not have continuing jurisdiction over the offender, and there was no set review of the matter. Id. at 302. This Court contrasted the situation with review of sexually violent predator annual show-cause hearings, dependency review hearings, and other similar matters where, by statute, the court has continuing jurisdiction and is required to conduct scheduled reviews. Id. at 302 (citing In re Detention of Peterson, 138 Wn.2d 70, 980 P.2d 1204 (1999); In re Dependency of Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989); In re Marriage of Greenlaw, 67 Wn. App. 755, 840 P.2d 223 (1992)).

Like Gossage, the trial court in Thompson's case does not have continuing jurisdiction in this matter – there is no statute requiring future consideration of DNA testing. Once the court denied Thompson's motion, there was nothing left to decide. Therefore, denial of the order was final. See also State v. Ransom, 34 Wn. App. 819, 824-825, 664 P.2d 521 (1983) (order forfeiting bond and order denying motion to vacate forfeiture were "final" under RAP 2.2 (a)(13)); State v. Pilon, 23 Wn. App. 609, 611-612, 596 P.2d 664 (1979) (order revoking probation a "final" order).

Finally, Judge Knight's order "affects a substantial right." In recognition that the innocent are sometimes convicted, the Legislature has expressly provided individuals with the means, under RCW 10.73.170, to have DNA tested. If the statute's requirements are met, testing is mandatory. RCW 10.73.170(3) ("The court shall grant a motion . . ."). The wrongful denial of a motion brought under the statute deprives the individual of this statutory right and may result in the continued incarceration of an innocent person.

Both this Court and the Washington Supreme Court have recognized as "substantial" rights falling well short of those targeted by RCW 10.73.170. See Alpine Indus., Inc. v. Gohl, 101 Wn.2d

252, 255, 676 P.2d 488 (1984) (denial of application for leave to file a second motion for new trial in a civil case, after first motion is denied, affects a substantial right); In re Estate of Wood, 88 Wn. App. 973, 975, 947 P.2d 782 (1997) (order removing a personal representative in probate matter affects a substantial right); Herzog v. Foster & Marshall, Inc., 56 Wn. App. 437, 440, 783 P.2d 1124 (1989) (order denying motion to stay proceedings and compel arbitration affects a substantial right); Ransom, 34 Wn. App. at 824-25 (order revoking bond in criminal case); Pilon, 23 Wn. App. at 611-612 (order revoking probation).

Moreover, finding that denial of a motion for mandatory DNA testing affects a substantial right is consistent with RAP 1.2(a), which indicates the "rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits."

Because Thompson satisfies RAP 2.2(a)(13), he has the right to appeal.

b. Subject To RAP 15.2 (a)

Title 15 of the Rules of Appellate Procedure addresses the determination of indigency on appeal. RAP 15.2(b) lists those proceedings in which the trial court is required to grant an order of indigency. These include "criminal prosecutions or juvenile offense

proceedings meeting the requirements of RCW 10.73.150.” RAP 15.2(b)(1)(a). The appeal from denial of a motion under RCW 10.73.170 falls under this rule.

The analysis of motions for DNA testing is the same as that for motions under CrR 7.8. Both are a form of post-conviction relief following conviction in a criminal case. See RAP 7.8(b) (providing post-conviction relief from a final judgment); Riofta, 209 P.3d at 473 (describing motions under RCW 10.73.170 as “a species of post-conviction relief”).

In State v. Priestley Thompson, 93 Wn. App. 364, 967 P.2d 1282 (1998), the defendant moved under CrR 7.8 to vacate his judgment ten months after his convictions. The motion was denied. Thompson appealed and moved for an order of indigency under RAP 15.2(a). The trial court found that Thompson was indigent and ordered the preparation of a necessary transcript at public expense. At the State’s urging, however, the court denied him counsel at public expense. Thompson, 93 Wn. App. at 366.

This Court granted review of the order of indigency and reversed, finding that Thompson had a right to appeal denial of his CrR 7.8 motion under RAP 2.2(a)(10), which expressly grants this right following denial of a motion to vacate judgment. And because

RCW 10.73.150(1) requires appellate counsel at public expense whenever an offender “[f]iles an appeal as a matter of right,” this Court ordered that counsel be included on the order of indigency for Thompson’s appeal. Thompson, 93 Wn. App. at 366-369; accord State v. Larranaga, 126 Wn. App. 505, 108 P.3d 833 (2005) (an indigent offender is entitled to counsel at public expense if the offender files an appeal as a matter of right).

As previously discussed, an appeal from denial of a motion under RCW 10.73.170 is an appeal by right under RAP 2.2(a)(13) because it is a final order after judgment that affects a substantial right. Therefore, as in Priestley Thompson, Bobby Thompson – and others appealing denial of their motions under RCW 10.73.170 – are entitled to an order of indigency covering the costs of appointed counsel.

Moreover, these individuals are entitled to the payment of other costs associated with litigating an appeal. RCW 10.101.005 provides:

The legislature finds that effective representation must be provided for indigent persons and persons who are indigent and able to contribute, consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches.

In In re Grove, 127 Wn.2d 221, 897 P.2d 1252 (1995), the Supreme Court held that once the statutory right to counsel on appeal is established for an indigent offender, RCW 10.101.005 “contemplates the public payment of expenses and fees necessary to provide an adequate record to the appellate court and to present the appeal.” Grove, 127 Wn.2d at 234-235. These include the filing fee, expenses related to preparation of the verbatim report of proceedings and clerk’s papers, and the cost of reproducing briefs.³ Id. at 233-234.

Neither the decision in Priestley Thompson or Larranaga identifies which subsection of RAP 15.2(b)(1) authorizes an order of indigency in appeals from the denial of post-conviction motions. Presumably, however, it is RAP 15.2(b)(1)(a), since that provision requires an order of indigency for appellate review of “criminal prosecutions” meeting the requirements of RCW 10.73.150.

³ The Legislature agrees with this interpretation of RCW 10.101.005, since it has not significantly modified the statute since Grove. See State v. Coe, 109 Wn.2d 832, 846, 750 P.2d 208 (1988) (“The Legislature is deemed to acquiesce in the interpretation of the court if no change is made for a substantial time after the decision.”). Indeed, the Legislature’s only action on the statute suggests strong agreement with Grove. The Legislature modified the statute’s language from “effective representation *should* be provided for indigent persons” to “effective representation *must* be provided for indigent persons.” Laws 2005, ch. 157, § 1.

“Criminal prosecutions” is not defined but – in light of the decisions on CrR 7.8 motions – includes the denial of motions for post-conviction relief. Indeed, that RAP 15.2(b)(1)(a) incorporates RCW 10.73.150 reveals an intent to include within “criminal prosecutions” matters related to a criminal conviction beyond the first appeal from a judgment and sentence, for which there is a constitutional right to review and appointed counsel. See Priestley Thompson, 93 Wn. App. at 368 (RCW 10.73.150 not limited to constitutional “first appeal as a matter of right”; “Legislature clearly indicated its intent to extend the right to counsel for indigent persons beyond constitutional requirements . . .”).

Were it otherwise, i.e., if RAP 15.2(b)(1)(a) did not require an order of indigency in appeals from the denial of DNA testing, an indigent offender would have the right to appeal that denial under RAP 2.2 and the right to appointed counsel for that appeal under RCW 10.73.150, but no way to proceed with the appeal for lack of an order of indigency.⁴ This would make no sense and violate the

⁴ An indigent defendant in this situation could not rely on RAP 15.2(c) or (d) because, under these rules, “the party must also demonstrate in the motion [for order of indigency] or the supporting affidavit that the issues the party wants reviewed have probable merit and that the party has a constitutional right to review

goal of harmonizing the court's procedural rules and the Legislature's statutes. See City of Spokane v. County of Spokane, 158 Wn.2d 661, 679, 146 P.3d 893 (2006) (harmony must be achieved unless there is a direct and unavoidable conflict).

A defendant seeking review of a motion to test DNA is entitled to an order of indigency under RAP 15.2 (b)(1)(a).

c. Discretionary Review

Even if this Court were to apply the standards for discretionary review to denial of Thompson's motion for DNA testing, for the reasons argued below, this Court should review the case because Judge Knight committed obvious error under RAP 2.3(b)(1) or at least probable error under RAP 2.3(b)(2) that renders further proceedings useless and substantially limits Thompson's freedom to act.

2. THOMPSON MEETS THE STATUTORY CRITERIA FOR DNA TESTING.

RCW 10.73.170 provides, in pertinent part:

(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

partially or wholly at public expense." RAP 15.2(a) (emphasis added).

requesting DNA testing, with a copy of the motion provided to the state office of public defense.

(2) The motion shall:

(a) State that:

....

(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.

The Supreme Court's recent decision in Riofta addresses the circumstances in which these motions must be granted. It also makes clear that Judge Knight misapplied the law in denying Thompson's motion.

Judge Knight's first reason for denying Thompson's motion is that the evidence has been destroyed. CP 44. This is obviously

incorrect. The State has conceded the evidence is available for testing, which is why the mandate was recalled. This finding of fact is erroneous. See Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986) (findings of fact not supported by substantial evidence are erroneous), cert. dismissed, 479 U.S. 1050 (1987).

Judge Knight's second reason for denying the motion is a finding that "[t]here has been no showing that DNA technology was unavailable at the time of trial, or that current technology is significantly more accurate or would provide significant new information." CP 44. At the time of this finding, both the State and Judge Knight believed that RCW 10.73.170(2)(a)(iii) was not satisfied if the evidence could have been tested at the time of trial. CP 59-60 (citing Riofta v. State, 134 Wn. App. 669, 142 P.3d 193 (2006)).

The Supreme Court rejected this interpretation, finding that even where the evidence could have been tested but was not, the statute's procedural requirements are satisfied where current testing would produce significant new information. Riofta, 209 P.3d at 471-472. Therefore, the court's second reason for denying Thompson's motion is based on a misinterpretation of the law.

That leaves only Judge Knight's final reason for denying the motion – that under RCW 10.73.170(3), "[t]here is no likelihood that

the DNA evidence would demonstrate the defendant's innocence.” CP 45. Unfortunately, like the finding just discussed, the State's and the court's understanding of this requirement was contrary to the statute's requirements as interpreted by the Supreme Court in Riofta. The Court held:

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 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.

Riofta, 209 P.3d at 472.

In successfully convincing Judge Knight that DNA testing could not raise a reasonable probability Thompson was not the perpetrator, the State relied on inadmissible evidence. Specifically, the State noted that “[i]n a written statement to police, [Thompson] admitted to having sex with the victim . . . (but claimed that this sex was consensual.” CP 60.

Riofta requires consideration of “evidence presented at trial or newly discovered.” Riofta, 209 P.3d at 472. Thompson's

statement is neither. The defense moved to preclude the State from using this evidence at trial. 1RP⁵ 7, 19. The State stipulated the statement would not be used as substantive evidence, although the State reserved the right to use it for impeachment if Thompson took the stand. 1RP 18-19. There was never even a CrR 3.5 hearing to determine whether Miranda⁶ requirements had been met. 1RP 18. Therefore, this evidence is not properly considered.

The evidence that was admitted at trial, however, in combination with new test results demonstrating that Thompson's DNA was not found in the evidence samples, most certainly would raise a reasonable probability Thompson is not the rapist.

Thompson's trial defense was that he did not commit the rape, and the victim's description of the rapist matched the physical characteristics of a co-worker, Mr. Maguire. 1RP 4, 6, 8. In a pretrial offer of proof, defense counsel indicated that both Thompson and Maguire worked for Loram Maintenance, a Minneapolis company that contracts to repair railroad beds around the country, and both were staying at the hotel where the rape

⁵ This brief refers to the verbatim report of proceedings as follows: 1RP – July 24, 1995; 2RP – July 25, 1995.

⁶ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

occurred. 1RP 6, 11. Defense counsel indicated that during a defense interview with the victim, she had identified the rapist as possibly 5' 8" to 5' 9" tall, southern accent, shoulder length blond hair, and no facial hair. 1RP 6, 11. Counsel indicated that Thompson was about 6' 2" tall and had facial hair. 1RP 11-12.

At trial, the victim – Jill Smiley – testified that on the night of the rape, she went out with friends. She had recently given birth and this was her first night out in some time. At her fiancée's suggestion, she went out drinking and dancing with her fiancée's cousin and his friend. 1RP 55-59. The three stopped at a bar and Smiley had one drink. 1RP 78. They then drove to another bar, the Riviera in Lynnwood, where Smiley had 11 more drinks. 1RP 59, 79. In the months leading up to this night, Smiley had only consumed an occasional glass of wine. 1RP 79.

At one point, a man approached Smiley and said hello. Smiley ignored him. 1RP 60. Later, however, the same man approached her just before 2:00 a.m., when the Riviera was about to close. 1RP 61. He told her there was an after hours party across the street. 1RP 62. Smiley told the two men she had arrived with that she was going to check out the party, but would be back since they were her ride home. 1RP 62.

Smiley and the man walked across the street to the Landmark Hotel. 1RP 64. She testified that she and the man entered a room that was not on the same floor as the front desk. 1RP 65. Nobody was in the room, so Smiley told the man she was leaving. 1RP 66. The man then struck her in the head with his fist, knocking her unconscious. 1RP 66.

When Smiley regained consciousness, she was partially nude and being raped. 1RP 67-68. When she tried to fight back, the man beat her. 1RP 69. She tried to get away, but the man pulled her to the floor and raped her again. 1RP 69. He hit her some more and tried to strangle her. 1RP 70. Smiley was screaming for help. At one point, the man tried unsuccessfully to rape her anally. 1RP 72. Smiley ran into the bathroom, but the man followed her, hitting her head against the wall and knocking her out again. When she awoke, she was in the tub, which was full of water, and the man was trying to drown her. She did not remember anything else at the hotel thereafter, including how she got out of the room or how she was discovered. 1RP 71-73.

At trial, on direct examination by the prosecutor, Smiley identified Thompson as the man who introduced himself in the bar, walked with her to the Landmark, and repeatedly raped her. 1RP

60-62. On cross-examination, however, she conceded that the day after the attack, she told a detective she probably could not identify the attacker. 1RP 80. She also conceded telling a defense investigator that she thought the attacker was 5' 7" or 5' 8" tall, although she could not be sure of his height. 1RP 79-80, 83. She testified she was not sure what color hair the attacker had, although it might have been blond, and she was not sure if he had facial hair. 1RP 80, 83-84.

When asked if she understood that Thompson was 6' 3" tall, Smiley responded that she was only 4' 9", so everyone looked tall to her. 1RP 81, 83. She agreed that Thompson has black hair and a moustache. 1RP 81; 2RP 54-55. In an attempt to explain her uncertainty about the rapist's appearance, she then added that she had been raped in the dark and that she saw the rapist at the bar "[j]ust for a brief second." 1RP 81.

One or more individuals apparently heard Smiley's screams for help. Just before 3:00 a.m., Lynnwood Police were dispatched to the Landmark Hotel to investigate a reported "domestic dispute" in room 111. RP 35-36. That room was registered to Thompson. 2RP 86-87. Officer Ronald Erue was the first to arrive. 1RP 34, 36. A hotel security officer showed Erue the location of the room,

which was on the same floor as the front desk and just around the corner. 1RP 37. Through the closed door, Erue could hear the shower running but no voices. 1RP 37-38.

Erue returned to the front desk and two other officers arrived. They heard a door opening down the hall and looked to see what was happening. 1RP 38. They saw Thompson physically pushing Smiley out of an emergency exit to room 111. 1RP 39-40; 2RP 39, 53-54. When Smiley saw the officers, she became hysterical and claimed that Thompson had beaten and raped her. 1RP 40-41, 53-54. Thompson was placed under arrest. 2RP 54.

Smiley was treated at a nearby hospital. She had been badly beaten and was suffering memory problems. 2RP 7, 23. Her face was severely swollen, including her eyes and ear canals, all of which were swollen shut. And she had multiple bruises on her body, including her neck and vaginal area. 2RP 10-13, 20, 24-25.

The hospital conducted a full rape examination, including vaginal swabs for later testing. 2RP 13. Smiley reported that the rapist beat her with his fists. 2RP 12, 33. The doctor who treated Smiley indicated that if the rapist used his fists, he would expect the rapist to have injuries to his hands. 2RP 20.

The Lynnwood Police sent a crime scene technician to gather evidence from room 111. 2RP 44. There were numerous bloodstains in the room and on the bed sheets. 2RP 46-47. The sheets were collected for testing. 2RP 48.

Washington State Patrol Crime Lab Forensic Scientist Greg Frank tested the items collected in the case, including the bed sheets, a bloody washcloth, and swabs from the rape kit. 2RP 67, 75. Using blood enzyme tests, Frank concluded that blood on the sheets may have come from Smiley. It did not come from Thompson. 2RP 71-74, 78. One bloodstain also contained semen, but Frank was unable to determine the donor. 2RP 74, 77-78.

All of the swabs from the rape kit showed the presence of acid phosphatase, high concentrations of which are found in semen. 2RP 75-76. Frank found sperm on three swabs, but because it was mixed with Smiley's body fluids, he could not determine the source of the semen. 2RP 77. Frank testified that no DNA testing was done on any of this evidence because, based on a backlog at the lab, there was insufficient time to obtain DNA results by the start of trial. 2RP 78-80.

A clerk at the Landmark Hotel testified that Thompson had registered under the Loram Corporation and a Minnesota address.

He was one of many employees staying at the hotel. In all, the company had reserved twelve or thirteen rooms. 2RP 88. The clerk saw police taking Thompson away the morning he was arrested, but testified she had no idea who had been in room 111 that morning. 2RP 88-89.

During closing argument, defense counsel focused on the main trial issue – “whether Mr. Thompson was the one who did this.” 2RP 99. Counsel discussed the fact there were several employees from the corporation staying at the Landmark, implying that another employee could have accessed the room earlier, and that police merely saw Thompson pushing Smiley out of room 111. 2RP 99. Counsel noted Smiley’s level of intoxication, having had 12 drinks. 2RP 101-102. Counsel pointed out that Smiley indicated the rapist might have had blond hair, was between 5’ 7” and 5’ 8”, and may not have had facial hair. In contrast, Thompson has black hair, is 6’ 3” tall, and has a moustache. 2RP 99-100, 102. Moreover, there was no evidence of any injuries to Thompson’s hands. 2RP 100.

Counsel also focused on the absence of DNA evidence, pointing out that such testing would have conclusively revealed who raped Smiley. 2RP 100-101. Counsel concluded by arguing:

Where is the reasonable doubt here? The reasonable doubt here is whether it was Mr. Thompson that was even involved in this incident, or was Mr. Thompson in the wrong place at the wrong time pushing this woman out the door. He gets arrested, but Ms. Smiley says it was somebody else that did it. That is a reason to doubt this case and is a reason to return a verdict of not guilty. Thank you.

2RP 103.

Returning to the test under RCW 10.73.170, the question for this Court on appeal is whether DNA evidence collected in Thompson's case would demonstrate his innocence on a more probable than not basis. RCW 10.73.170(3). "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." Riofta, 209 P.3d at 472.

Smiley testified that only one person committed the rape. 1RP 71. If DNA testing reveals that semen from the sheets and vaginal swabs did not come from Thompson, this would be powerful new evidence. Combined with Smiley's level of intoxication; her description of the rapist as possibly blond, short, and without facial hair; that other witnesses merely saw Thompson removing Smiley from room 111; and the absence of any evidence

Thompson had injuries to his hands, such DNA evidence would indeed raise a reasonable probability Thompson was not the perpetrator. See In re Bradford, 140 Wn. App. 124, 165 P.2d 31 (2007) (testing excluding defendant as source of male DNA found on mask touched by rapist required new trial even where defendant had confessed).

Thompson is entitled to DNA testing.

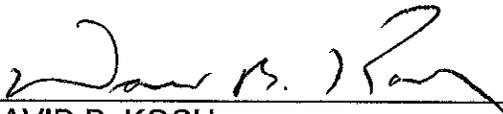
D. CONCLUSION

This Court should remand for DNA testing.

DATED this 28th day of July, 2009.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051
Attorneys for Appellant

APPENDIX



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PAM L. DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

BOBBY R. THOMPSON,

Defendant.

No. 95-1-00539-4

ORDER DENYING MOTION
FOR DNA TESTING

This matter came before the court for consideration of the defendant's motion for DNA testing pursuant to RCW 10.73.170. The court has considered the motion, the State's response, and the evidence introduced at trial.

Being fully advised, the court hereby DENIES the motion for the following reasons:

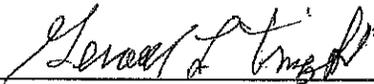
1. As the evidence has been destroyed, there is nothing that can be tested.
2. The defendant has failed to satisfy RCW 10.73.170(2)(a). There has been no showing that DNA technology was unavailable at the time of trial, or that current technology is significantly more accurate or would provide significant new information.

ORIGINAL

AS
89

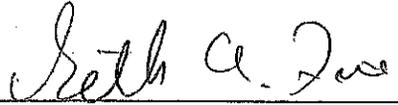
4. The defendant has failed to satisfy RCW 10.73.170(3). There is no likelihood that the DNA evidence would demonstrate the defendant's innocence.

Entered this 27 day of November, 2006.



HON. GERALD L. KNIGHT, Judge

Presented by:



SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 59366-8-1
)	
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 28TH DAY OF JULY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] BOBBY RAY THOMPSON
DOC NO. 739120
WASHINGTON STATE REFORMATORY
P.O. BOX 777
MONROE, WA 98272

2009 JUL 28 PM 9:58
**COURT OF APPEALS
STATE OF WASHINGTON**
FILED

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF JULY 2009.

x *Patrick Mayovsky*