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Original filed at the Supreme Court
Copy to counsel listed above.

IN THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of) No. 88336-0
LINDSEY LADELL CRUMPTON,) STATE'S STATEMENT OF ADDITIONAL
Petitioner.) AUTHORITIES

RESPONDENT, the State of Washington, respectfully requests that the Court consider the following additional authority, pursuant to RAP 10.8, a copy of which is attached:

In re Lindsey Crumpton, No. 17588-6-II (Order Dismissing Petition) (Noting the defense's tactical decision not to seek DNA testing).

DATED this 1st day of May, 2013.

RUSSELL D. HAUGE,
PROSECUTING ATTORNEY

RANDALL A. SUTTON, WSBA NO. 27858
Deputy Prosecuting Attorney



ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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In re the)
Personal Restraint Petition of)
LINDSEY L. CRUMPTON,) No. 17588-6-II
) ORDER DISMISSING PETITION
Petitioner.)
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Lindsey L. Crumpton has filed a petition seeking relief from confinement pursuant to his convictions of five counts of rape in the first degree and one count of burglary in the first degree for acts against a 75-year-old woman. He is serving an exceptional sentence of 748.5 months. His appeal from that jury trial and sentencing is pending before this court. See No. 17502-9-II. In his petition, Crumpton asserts that he was denied a fair trial because of ineffective assistance of trial counsel. He presents three arguments in support of his position. None have merit and, therefore, we dismiss this petition.

Crumpton first claims that his trial counsel's assistance was ineffective because of its failure to test the DNA structure of semen samples found at the scene of the rape.

The test for ineffective assistance of counsel has two parts. One, it must be shown that the defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness. Two, it must be shown that such conduct prejudiced the defendant, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopted test from *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

In reviewing this type of challenge, this court must presume that the assistance was effective. *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986). Generally, a court will not consider those matters it regards as tactical decisions or matters of trial strategy. *State v. Carter*, 56 Wn. App. 217, 224, 783 P.2d 589 (1989). "If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel." *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986); *State v. Adams*, 91 Wn.2d 86, 90-91, 586 P.2d 1168 (1978); *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

The affidavit of Crumpton's trial counsel reveals that the decision not to have the DNA characteristics of the samples tested was a tactical decision. That affidavit provides:

We discussed the pros and cons of such testing with Mr. Crumpton indicating that the tests could inculcate or exculpate him. We also discussed the fact that DNA testing could not be completed within the 60-day speedy trial period, and that Mr. Crumpton would have to waive his right to a speedy trial if he wished us to proceed with DNA testing. Mr. Crumpton adamantly advised us that he was unwilling to waive speedy trial because he wished to get the trial over with. We were bound by this decision.

As noted, tactical decisions cannot form the basis for a claim of ineffective assistance of counsel unless the petitioner can show that the decision was not a legitimate trial strategy. Crumpton fails to make such a showing. He also fails to make a showing that he was prejudiced by the failure to do DNA testing. He concedes as much in his petition saying, "I realize that I cannot meet the burden of showing that I have been prejudiced by my trial counsel's failure to request DNA testing of the samples unless the samples are tested and they show that I was not the person who raped the victim." In a personal restraint petition, the petitioner has the burden of showing actual prejudice and cannot rely on speculative assertions. *In re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); *In re Hews*, 99 Wn.2d 80, 93, 660 P.2d 263 (1983). *Hews*, at 93. A failure to make such a showing is grounds for a dismissal. *Hews*, at 93.

Crumpton's second claim is that his trial counsel failed to call his sister as an alibi witness. Again, Crumpton's claim involves a tactical decision made by his trial counsel. *State v. Early*, 70 Wn. App. 452, 461, 853 P.2d 964 (1993). His sister avers that she would have testified that she was with her brother at the time of the rapes, that he had lent his car to a person

known as "K" who is shorter than she, and that "K" came back late with the car and handed her brother a white cloth sack.

The affidavit of Crumpton's trial counsel shows that his attorneys interviewed Crumpton's sister several times as a potential witness, but decided not to put her on the stand because of the potential damage her testimony could have on Crumpton's defense. Evidently, the victim described the person who committed the rapes as a large man about six-feet tall, Crumpton is six feet one inch in height, Crumpton's sister is less than five feet six inches tall, and, thus, her testimony would have made it more likely that Crumpton committed the rapes than "K". This decision clearly was a legitimate trial strategy and, as such, cannot serve as a basis for a claim of ineffective assistance.

Crumpton's third claim of ineffective assistance of counsel is that his trial counsel failed to cross-examine the victim about a radio found at the scene. The witness identified the radio as belonging to her deceased husband. In fact, the radio belonged to Crumpton, which he knew because it had his Department of Corrections number etched into the back of it; his number from when he was serving time for his prior convictions of rape in the second degree and burglary in the second degree.

His trial counsel's affidavit admits their awareness that the victim mistakenly identified the radio, but explains that they chose not to ask the witness about the DOC number because it would invite the State to introduce Crumpton's prior convictions

into evidence. Again, this was a legitimate trial strategy and cannot serve as a basis for a claim of ineffective assistance.

Crumpton fails to make a prima facie showing in support of his petition for relief. Accordingly, it is hereby

ORDERED that this petition is dismissed. Each party will bear its own costs and fees. RAP 14.2

DATED this 18th day of April, 1994.



Chief Judge

cc: Lindsey L. Crumpton
Pamela Loginsky
Kitsap County Clerk

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Case name: In re the Personal Restraint of Lindsey Ladell Crumpton
Case number: 88336-0
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