

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
13 JUL -1 AM 8:40  
No. 883360  
BY RONALD R. CARPENTER  
CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON

V.

LINDSEY CRUMPTON

---

SUPPLEMENTAL BRIEF OF APPELLANT (*Petitioner*)

---

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

 ORIGINAL

**TABLE OF AUTHORITIES**

**Cases**

Martin v. Wilbert, 162 Wn. App. 90, 253 P.3d 108 (2011),.....2

New Hampshire v. Maine, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d  
968 (2001).....3

State v. Collins, 121 Wn.2d 168, 179, 847 P.2d 919 (1993).....2

State v. Gray, 151 Wn.App. 762, 215 P.3d 961 (2009).....4

State v. Riofta, 166 Wn.2d 358, 209 P.3d 467 (2009).....4

State v. Thompson, 173 Wn.2d 865, 271 P.3d 204 (2012).....4

A. Supplemental Argument

1. Mr. Crumpton's petition is not procedurally barred.

Mr. Crumpton has consistently maintained his innocence of the charge of rape in the first degree. After the jury convicted him, he timely filed a direct appeal and several post-conviction petitions. All of them have been denied.

On December 7, 2010, Mr. Crumpton filed a motion for DNA testing pursuant to RCW 10.73.170. In response to the motion, the State 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. This procedural concession was accepted by the trial court pursuant to RCW 10.73.170(2)(ii) and (iii). The trial court denied the petition, however, because it did not believe Mr. Crumpton had shown a likelihood the DNA evidence would demonstrate innocence on a more probable than not basis, as required by subsection (3). In the Court of Appeals, the State reiterated its position that either DNA testing technology at the time of his trial was not sufficiently developed or that the DNA testing now requested would be significantly more accurate. See Brief of Respondent at 11.

The Court of Appeals affirmed the trial court order in a 2-1 published decision. Mr. Crumpton petitioned for review in this Court.

While the petition for review was pending, the State filed on May 1, 2013 a pleading titled, “State’s Statement of Additional Authorities.” The Statement includes a copy of the Court of Appeal’s “Order Denying Petition” dated April 19, 1994. The State represents the Order is relevant to “the defense’s tactical decision not to seek DNA testing.” On June 6, 2013, this Court granted review.

The State’s infusion of the “State’s Statement of Additional Authorities” into this case is apparently an effort to confuse the issues and raise the specter this case is procedurally barred. Even now, it is unclear how the State intends to argue the relevancy of the April 19, 1994 order. This Court will not review an issue raised for the first time in a supplemental brief. State v. Collins, 121 Wn.2d 168, 179, 847 P.2d 919 (1993). The State has never taken the position that Mr. Crumpton’s motion was procedurally foreclosed. In fact, the State has consistently maintained that Mr. Crumpton’s has met his burden of showing at the time of his trial either that the DNA technology was not sufficiently developed or that DNA testing now would be significantly more accurate. Any contrary position taken now would raise an issue for the first time in a supplemental brief.

While Courts may rely on unpublished decisions in order to establish the law of the case or collateral estoppel, see Martin v. Wilbert,

162 Wn. App. 90, 253 P.3d 108 (2011), a party may not argue a position in the Supreme Court inconsistent with the position it argued in the lower courts. The doctrine of judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. "New Hampshire v. Maine, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (citation omitted).

This Court should treat the failure of the State to argue the procedural prong of RCW 10.73.170(2) in the trial court as a waiver of the right to raise that issue at all. Mr. Crumpton reasonably relied on the State's concession and chose not to present evidence of advances in DNA over the past 20 years. To allow the State to change positions now materially prejudices him because there is not a sufficient factual record.

The State's Statement of Additional Authorities should be stricken and any attempt to argue in its Supplemental Brief this case is procedurally barred should be disregarded.

2. Applying a presumption of favorability, Mr. Crumpton meets his burden to have a DNA test.

In the Court of Appeals, Judge Worswick wrote an eloquent dissent outlining why Mr. Crumpton's motion for DNA testing should have been granted. In her dissent, Judge Worswick relied on this Court's

recent decision in State v. Thompson, 173 Wn.2d 865, 271 P.3d 204 (2012) as well this Court's decision in State v. Riofta, 166 Wn.2d 358, 209 P.3d 467 (2009) and the Court of Appeals decision in State v. Gray, 151 Wn.App. 762, 215 P.3d 961 (2009). Reviewing these three cases, Judge Worswick concludes the trial court should employ a "presumption of favorability." Judge Worswick would interpret Thompson and Riofta to require the "court weighing this motion must presume that the DNA test results would be favorable to the convicted person's claim of actual innocence." Opinion at 15, citing Riofta at 367-68. It would also create "an obligation [] to focus on whether a favorable test raises the likelihood of innocence [and] not to speculate on the results of the test." Opinion at 15.

Judge Worswick's presumption of favorability should be adopted by this Court. This presumption properly weighs competing governmental and personal interests. The problem with the approach taken by the majority in Mr. Crumpton's case is that everyone who files a motion pursuant to RCW 10.73.170 will have been convicted on strong evidence; after all, a jury will have already found the evidence sufficient to convict beyond a reasonable doubt. But having been convicted on evidence beyond a reasonable doubt is not enough to ensure that no one will be convicted who is in fact innocent. In fact, we know that at least 154

convicted rapists have subsequently been declared innocent by DNA testing.

The State envisions a flood gate of petitions unless the courts employ a more restrictive standard. But such a flood gate is extremely unlikely. First, defendants must still meet the procedural hurdles of subsection (1) to show that there has been a change in DNA technology and development. Over time, fewer and fewer people will be able to meet this procedural hurdle. Second, only cases where the actual perpetrator would have left DNA will be implicated. While perpetrators of violent crimes such as rape and homicide frequently leave DNA, perpetrators of non-violent offenses rarely leave DNA. Third, defendants must still show that DNA testing, if presumed favorable, would raise a reasonable probability of innocence. As Judge Worswick pointed out in her dissent, even a presumption of favorability was insufficient to get DNA testing for Mr. Riofta.

Mr. Crumpton agrees with Judge Worswick that trial courts should rely on a “presumption of favorability” and, applying that presumption to his case, the trial court erred by denying his motion. This Court should reverse with instructions to test the evidence from his trial.

DATED this 24<sup>th</sup> day of June, 2013.

A handwritten signature in black ink, appearing to read 'T. E. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488  
Attorney for Defendant