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NO. 67462-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

REC'D  
JAN 24 2012  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DAVID RIGGINS AKA DAWUD MALIK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Timothy A. Bradshaw, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The Superior Court erred when it failed to rule on appellant's motion for production of exculpatory evidence.

Issue Pertaining to Assignment of Error

Appellant filed a motion requesting DNA testing and the production of exculpatory evidence in the State's possession. The Superior Court denied the request for testing, but failed to address or rule on the motion for production of evidence. Should this matter be remanded for consideration of appellant's motion?

B. STATEMENT OF THE CASE

Riggins and co-defendant Leodis Smith were convicted of two counts of murder in the first degree, four counts of robbery, and one count of assault in the first degree for crimes committed in 1965 and 1966. Both men received the death penalty for one of the murder convictions (the murder of Reva Krinsky), and their convictions and sentences were affirmed on appeal. CP 82-86; State v. Smith, 74 Wn.2d 744, 446 P.2d 571 (1969). The death sentences, however, were later converted to life sentences. CP 88-89; Smith v. Washington, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972).

In 1998, Riggins discovered certain documents relevant to the investigation in his case, including an FBI report detailing the analysis of microscopic evidence collected in connection with the Krinsky murder. CP 3, 5-6. He filed two personal restraint petitions based on this discovery. Both were denied. CP 92-94.

In October 2010, Riggins filed a “Request For DNA Testing And Motion For Production Of Exculpatory Evidence.” CP 1-25. Consistent with the motion’s title, Riggins made two requests.

First, citing RCW 10.73.170, Riggins asked for DNA testing of items related to the Krinsky case – hair samples recovered from a comb and a brush, soil collected from his shoes, and the clothes he wore when arrested. Riggins argued the results of DNA tests would establish his innocence on a more probable than not basis. CP 1, 3.

Second, Riggins asked for an order requiring the King County Prosecutor’s Office to turn over exculpatory evidence. Specifically, Riggins moved that the State be ordered to provide its entire case file for an in camera review to identify all exculpatory or favorable evidence for Riggins, including inconsistent witness statements, evidence suggesting Riggins did not murder Krinsky, and evidence suggesting someone else did. CP 12-13.

In November 2010, Riggins filed a second motion. In addition to reiterating his requests for DNA testing and production of all exculpatory evidence from the State's case file, Riggins also sought a writ of mandamus and provided additional materials in support of his requests. CP 26-72.

The King County Prosecutor's Office filed a "Response To Defendant's Request For Post-Conviction DNA Testing." CP 73. The State opposed DNA testing, arguing that Riggins had failed to meet the procedural and substantive requirements of RCW 10.73.170 because he had not demonstrated how the evidence at issue could reveal someone else had committed the murder and had not shown a likelihood that testing would demonstrate his innocence on a more probable than not basis. CP 75-79. At the end of its response, the State also briefly addressed Riggins' motion to produce its case file for in camera review. Citing In re Personal Restraint of Gentry, 137 Wn.2d 378, 972 P.2d 1250 (1999), the State argued that Riggins had no constitutional right to these materials and had not demonstrated their value. CP 79-80.

In a supplemental filing, the State informed the court that the evidence Riggins sought for testing had been destroyed. CP 98-106.

On December 10, 2010, the Honorable Timothy Bradshaw filed an "Order Denying Request For DNA Testing Pursuant to RCW 10.73.170." CP 96. Judge Bradshaw reasoned that because the evidence Riggins sought for testing no longer exists, there is no likelihood testing would demonstrate innocence on a more probable than not basis. CP 96. The order does not address Riggins' motion for production of exculpatory evidence.

On January 3, 2011, Riggins filed another request for DNA testing and production of exculpatory evidence. This motion was largely duplicative of his prior motions, although Riggins attached some new supporting materials. CP 107-149. Shortly thereafter, he submitted a motion for reconsideration of the order denying DNA testing. Riggins argued the State had a duty to preserve the evidence in his case and requested a hearing on the matter. Supp. CP \_\_\_ (sub no. 56, Supplemental Motion for Reconsideration of Order Denying DNA Testing).

The State opposed Riggins' request for a hearing, and Judge Bradshaw subsequently denied Riggins' motion for reconsideration. CP 150-154.

C. ARGUMENT

JUDGE BRADSHAW ERRED WHEN HE FAILED TO ADDRESS OR DECIDE RIGGINS' MOTION FOR PRODUCTION OF EXCULPATORY EVIDENCE.

Riggins clearly made two requests: DNA testing and an in camera review of the State's trial file to identify potentially exculpatory evidence. Unfortunately, Judge Bradshaw never addressed or ruled on the second request.

The failure to exercise discretion is error. See State v. Tharp, 96 Wn.2d 591, 598, 637 P.2d 961 (1981) (failure to exercise discretion in admitting evidence under ER 404(b) where record did not disclose conscious determination); State v. Wright, 76 Wn. App. 811, 827-829, 888 P.2d 1214 (failure to exercise discretion in determining whether offenses involved same criminal conduct for sentencing), review denied, 127 Wn.2d 1010 (1995); Tacoma Recycling v. Capitol Material, 34 Wn. App. 392, 396, 661 P.2d 609 (1983) (failure to exercise discretion in denying motion for new trial). In circumstances where the lower court was required to decide the matter in the first instance, the proper course is to remand for a ruling on the motion. See Wright, 76 Wn. App. at 829; Tacoma Recycling, 34 Wn. App. at 396. That is the proper course here.

While Riggins is not *entitled* to post-conviction discovery, he can obtain requested documents if he demonstrates “good cause to believe the discovery would prove entitlement to relief.” Gentry, 137 Wn.2d at 390-391. Moreover, Riggins did not ask for the entire case file. He merely asked for in camera review of the file. It is not clear what, if any, interest the State has in denying Riggins access to those parts of its trial file the court deems exculpatory. Even assuming a valid interest, however, Riggins is entitled to an in camera review if there is a reasonable probability the prosecutor’s file contains material evidence, meaning evidence sufficient to undermine the outcome at his trial. State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006). Judge Bradshaw should decide whether in camera review is appropriate.

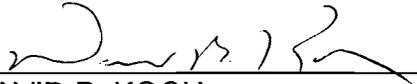
D. CONCLUSION

Riggins' case should be remanded for consideration of his motion for in camera review of the State's trial file and production of potentially exculpatory evidence.

DATED this 24<sup>th</sup> day of January, 2012.

Respectfully submitted,

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Respondent,	)	
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v.	)	COA NO. 67462-5-1
	)	
DAVID RIGGINS,	)	
	)	
Appellant.	)	

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**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 24<sup>TH</sup> DAY OF JANUARY 2012, 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] DAVID RIGGINS  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 24<sup>TH</sup> DAY OF JANUARY 2012.

x Patrick Mayovsky

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