

FILED
February 9, 2016
Court of Appeals
Division I
State of Washington

No. 73162-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW RAYMOND WASHINGTON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Mr. Washington's conviction should not be sustained on the basis of the fingerprint evidence alone.

a. Mr. Washington was effectively convicted based on fingerprint evidence alone.

The State contends Mr. Washington was not convicted on the basis of fingerprint evidence alone because a witness described a man similar to Mr. Washington in age, build, height, and race leaving the Bloom residence, and because Mr. Washington lived within one mile of the crime scene SRB at 8, 15. But the witness's description of the man he saw was vague and general, and would apply to countless individuals living within one mile of the crime scene. Moreover, the witness's description was inconsistent and did not apply to Mr. Washington in important respects.

The description provided by the witness was vague and general and would apply to countless individuals living within a one-mile radius of the Blooms' house in the Wedgewood neighborhood of Seattle. The witness, Christopher Caldwell, testified that he did not get a good look at the face of the man he saw standing on the front porch of the Bloom residence, and he could not identify Mr. Washington at trial. 1/06/15RP 63, 79. Mr. Caldwell said the man was Caucasian, about

five foot nine inches tall, with a thin, athletic build. 1/06/15RP 63-64. He could not see the man's hair color or recall whether he had facial hair. 1/06/15RP 64.

Mr. Caldwell's description of the man was inconsistent in that it changed from the time of the incident to the time of trial. Seattle Police officer Edward Medlock testified that Mr. Caldwell told him that the man he saw was Caucasian, in his twenties, and around six foot tall and 170 pounds, with a slim build. 1/06/15RP 151. Mr. Caldwell said the man had brown hair, with some kind of facial hair. 1/06/15RP 151-52.

According to his driver's license, Mr. Washington does not match either one of these descriptions in important respects. Although he is Caucasian, has brown hair, and was 26 years old at the time of the burglary, he is six foot three inches tall and weighs 200 pounds. Exhibit 6. He did not have facial hair at the time his driver's license photograph was taken. Id.

Thus, Mr. Washington fits the witness's description only to the extent that he is Caucasian, has brown hair, and is in his twenties. Because these features undoubtedly apply to countless individuals living within the Wedgewood neighborhood of Seattle, and the witness's description was inconsistent over time, the evidentiary value

of the witness's description is negligible. In effect, Mr. Washington was convicted on the basis of the fingerprint evidence alone.

- b. The ability of the defense to obtain an independent expert to evaluate fingerprint evidence is not sufficient to overcome the inherent unreliability of the evidence.*

The State contends that any concerns about the unreliability of fingerprint evidence are alleviated by the ability of the defense to retain an expert to examine the fingerprints and provide an independent opinion. SRB at 17-18. But the ability of the defense to hire an independent expert does not resolve the inherent unreliability of the evidence.

Studies show that substantial numbers of misattributions occur even when a defense expert examines the State's fingerprint evidence. Simon A. Cole, More Than Zero: Accounting for Error in Latent Fingerprint Identification, 95 J. Crim. L. & Criminology 985, 1023-24 (2005). In four cases reported by Cole, erroneous attributions were corroborated by independent experts. *Id.* at 987, 1025. Indeed, in the notorious Mayfield case, the purported fingerprint "match" was confirmed by an independent defense fingerprint examiner. Jacqueline McMurtrie, Swirls and Whorls: Litigating Post-Conviction Claims of Fingerprint Misidentification After the NAS Report, 2010 Utah L. Rev.

267, 281 (2010). “That defense examiners sometimes corroborate disputed attributions would suggest that expectation and suggestion are so powerful they can overcome the defense expert’s presumed pro-defendant bias.” Cole, More Than Zero, *supra*, at 1061.

Thus, given the subjectivity involved in fingerprint identification analysis, and the susceptibility of any examiner to bias and suggestion, the opportunity to have a defense expert independently examine the evidence does not alleviate concerns with the reliability of the evidence. As further argued in the opening brief, a conviction for burglary should not be permitted to rest upon such unreliable evidence alone.

2. Any request that costs be imposed on Mr. Washington for this appeal should be denied because the trial court determined he does not have the ability to pay legal financial obligations.

This Court has discretion not to allow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, __ Wn. App. __, 2016 WL 393719 (No. 72102-0-I, Jan. 27, 2016); RCW 10.73.160(1). The defendant’s inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. Sinclair, 2016 WL 393719 at *6. Here, the

trial court found Mr. Washington is indigent and does not have the ability to pay discretionary legal financial obligations. CP 53; Sub #123. Mr. Washington's indigency is presumed to continue throughout review absent a contrary order by the trial court. Sinclair, 2016 WL 393719 at *7; RAP 15.2(f). Given Mr. Washington's continued indigency, it is appropriate for this Court to exercise its discretion and disallow appellate costs should the State substantially prevail. Sinclair, 2016 WL 393719 at *7.

B. CONCLUSION

For the reasons provided above and in the opening brief, this Court should hold that latent fingerprint evidence is not sufficiently reliable by itself to sustain a guilty verdict for burglary. This Court should reverse and order the charge of residential burglary dismissed.

Respectfully submitted this 9th day of February, 2016.

/s/ Maureen M. Cyr

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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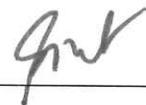
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73162-9-I
v.)	
)	
MATTHEW WASHINGTON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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