SUPREME COURT NO. 99555-9
COA NO. 80742-1-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HOWARD MARQUICE MCCORD,

Petitioner.

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

The Honorable Karen Donohue, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Howard Marquis McCord asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

McCord requests review of the decision in State v. Howard Marquis McCord, Court of Appeals No. 80742-1-I (slip op. filed Feb. 1, 2021), attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

Whether the court erred in failing to exercise its discretion not to require collection of a DNA sample?

D. STATEMENT OF THE CASE

The State charged Howard Marquis McCord with one count of first degree burglary and one count of first degree robbery. CP 7-8. To avoid a three-strike sentence, McCord pleaded guilty to one count of residential burglary, a non-strike offense. CP 21-47; 1RP[1]403-13.

[1] The verbatim report of proceedings is cited as follows: 1RP – eight consecutively paginated volumes consisting of 4/2/19, 4/3/19, 4/4/19, 4/8/19, 4/15/19, 4/16/19, 10/10/19, 10/25/19; 2RP – two consecutively paginated volumes consisting of 7/12/19, 9/20/19.

Before sentencing, McCord moved to withdraw his plea, contending he entered it based on the mistaken premise that a previous conviction for second degree robbery qualified as a strike offense. CP 61-68. The parties argued their respective positions at a hearing on the matter. 1RP 418-28. The court denied the motion, concluding the recent change in the law removing second degree robbery from the list of strike offenses did not apply to McCord because he committed his current offense before the change in the law took effect. CP 73-75; 1RP 428-29.

At the subsequent sentencing hearing, the court said it would follow the agreed recommendation, but did not enter written findings and conclusions in support of an exceptional sentence. 1RP 441. The judgment and sentence reflects an exceptional sentence of 120 months in confinement. CP 79.

The court also ordered McCord to provide a DNA sample. CP 79, 86. At sentencing, the State said McCord needed "to give a DNA sample for purposes of testing" but did "not need to give a $100 DNA fee as he's paid that in his previous conviction." 1RP 437. The DNA collection fee, — "mandatory unless the state has previously collected DNA as a result of a prior conviction" — was struck by hand from the judgment and sentence. CP 78.

Section 4.6 of the judgment and sentence nonetheless provides: "DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G." CP 79.

Appendix G, the written "order for biological testing," provides:

> (1) DNA IDENTIFICATION (RCW 43.43.754):
>
> The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at (206) 477-5003 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days. CP 86.

On appeal, McCord argued the court erred in (1) failing to enter written findings of fact and conclusions of law in support of the exceptional sentence and (2) in ordering DNA collection.

The Court of Appeals remanded for the trial court to enter written findings and conclusions on the exceptional sentence. Slip op. at 1. The Court of Appeals did not render a holding on the merits of McCord's DNA argument, instead resolving the issue as follows: "Because the record is silent as to the status of McCord's

prior DNA submission, the parties may take the opportunity to address the necessity of a DNA sample on remand." Id. McCord seeks review of the DNA issue.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE COURT ERRED IN UNCONDITIONALLY ORDERING MCCORD TO PROVIDE ANOTHER DNA SAMPLE.

Trial courts have discretion not to require redundant DNA collection. The court did not exercise its discretion on the matter in requiring McCord to provide another DNA sample. McCord seeks review of the DNA issue under RAP 13.4(b)(4).

By statute, "A biological sample must be collected for purposes of DNA identification analysis from . . . Every adult or juvenile individual convicted of a felony[.]" RCW 43.43.754(1)(a). However, "If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted." RCW 43.43.754(4). This provision affords the trial court discretion on whether to require an additional sample.

The trial court in McCord's case, however, did not exercise that discretion. At sentencing, the prosecutor claimed "he has to give a DNA sample for purposes of testing." 1RP 437. Misled by

the prosecutor's representation that DNA collection was mandatory, the court never addressed whether or why an additional DNA sample was appropriate. 1RP 436-44. "Failure to exercise discretion is an abuse of discretion." Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 320, 976 P.2d 643 (1999).

On appeal, the State argued nothing in the record shows McCord previously submitted a DNA sample and so the court did not abuse its discretion in ordering DNA collection in the present case. Brief of Respondent (BR) at 6.

The State's argument flipped the burden of proof on its head. It cited out-of-date case law requiring the defendant to prove previous DNA collection, all of which predates the enactment of RCW 43.43.7541 in 2018. BR at 6-7 (citing State v. Lewis, 194 Wn. App. 709, 721, 379 P.3d 129 (2016), State v. Malone, 193 Wn. App. 762, 767, 376 P.3d 443 (2016), and unpublished cases from 2016 and 2017).

In light of the revamped law on DNA collection and associated fees, a defendant's "prior felonies give rise to a presumption that the State has previously collected a DNA sample." State v. Van Wolvelaere, 8 Wn. App. 2d 705, 710, 440 P.3d 1005 (2019), rev'd on other grounds, 461 P.3d 1173 (2020). The Court

of Appeals has accordingly held it is the State's burden to show that the defendant's DNA has not previously been collected when a defendant has a prior Washington felony conviction. State v. Houck, 9 Wn. App. 2d 636, 651 n.4, 446 P.3d 646 (2019), review denied, 194 Wn.2d 1024, 456 P.3d 397 (2020).

McCord has no burden to prove a DNA sample was previously collected. Because he has a felony history, CP 82, it is the State's burden to prove a prior sample wasn't collected. The State made no attempt on appeal to meet its burden. The presumption that McCord's DNA has already been collected remains unrebutted.

RCW 43.43.7541, meanwhile, provides: "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction."

In the judgment and sentence, the DNA collection fee, described as "mandatory unless the state has previously collected DNA as a result of a prior conviction," was struck by hand from the judgment and sentence. CP 78. By the plain language of RCW 43.43.7541, the court could not have struck the DNA fee unless the State had previously collected McCord's DNA. McCord's felony

history assures that his DNA sample is already in the database. See State v. Maling, 6 Wn. App. 2d 838, 844, 431 P.3d 499 (2018), review denied, 193 Wn.2d 1006, 438 P.3d 118 (2019) (in striking DNA fee, reasoning "Mr. Maling's lengthy felony record indicates a DNA fee has previously been collected.").

The order requiring McCord to provide a redundant DNA sample should be stricken because it serves no purpose. Alternatively, at minimum, the order should be modified to reflect the statutory language under RCW 43.43.754(4): "If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted."

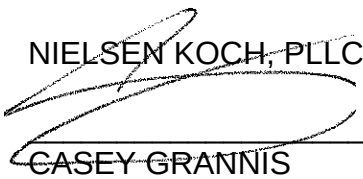
F. CONCLUSION

For the reasons stated, McCord requests that this Court grant review.

DATED this 3rd day of March 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HOWARD MARQUICE MCCORD, Appellant.	No. 80742-1-I DIVISION ONE UNPUBLISHED OPINION

PER CURIAM — The State charged Howard McCord with one count of first degree burglary and one count of first degree robbery. Based on the law at the time, the convictions would have constituted McCord's third strike. Accordingly, McCord negotiated a plea agreement in which he pleaded guilty to one count of residential burglary and agreed to an exceptional sentence of 120 months. The court orally noted that the exceptional sentence was "based upon the negotiations and the penalty that Mr. McCord was previously facing," but did not enter written findings of fact and conclusions of law supporting the exceptional sentence. The court also required McCord to provide a DNA (deoxyribonucleic acid) sample. It did not require him to pay the $100 DNA collection fee based on the State's representation that McCord had "paid that in his previous conviction."

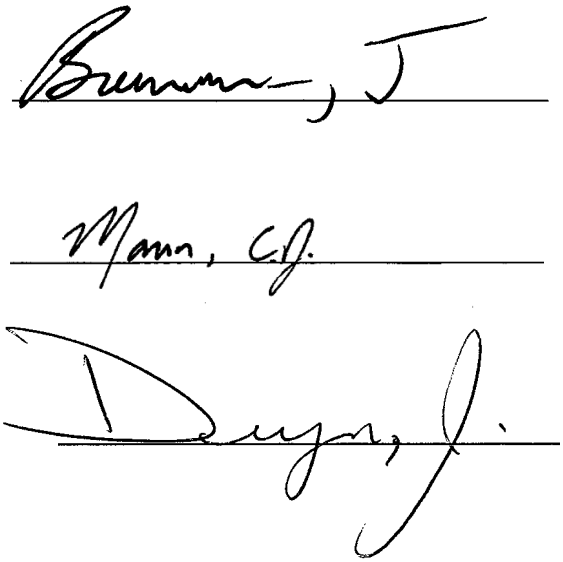
McCord challenges the trial court's failure to enter written findings of fact and conclusions of law supporting the exceptional sentence, as required by RCW 9.94A.535. The State concedes the error. We accept the State's concession and remand for the trial court to enter written findings and conclusions in compliance with the statute.

McCord also contends the trial court erred in imposing the DNA collection requirement. RCW 43.43.754(4) provides that, if an individual's DNA is already on file with the Washington State Patrol crime laboratory, "a subsequent submission is not required to be submitted." McCord contends that he has already submitted a DNA sample as part of a prior felony conviction. He acknowledges that a trial court nonetheless has the discretion to order collection of a DNA sample as part of any felony conviction, but contends that the trial court misunderstood its discretion and believed it was required by statute to order collection of his DNA. Because the record is silent as to the status of McCord's prior DNA submission, the parties may take the opportunity to address the necessity of a DNA sample on remand.

We remand for the trial court to enter findings of fact and conclusions of law supporting the exceptional sentence, and to address the DNA collection

requirement. In all other respects, we affirm.

FOR THE COURT:



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