

REC'D

JUN 10 2009

King County Prosecutor  
Appellate Unit

NO. 61998-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JUDITH THOMPSON,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Susan Craighead, Judge

REPLY BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON  
ELLEN L. ARBETTER  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ARGUMENTS IN REPLY

1. THE STATE ERRONEOUSLY RELIES ON CRAWFORD'S VIDEO STATEMENT AS A BASIS TO AFFIRM THOMPSON'S WITNESS TAMPERING CONVICTION.

The State claims Thompson's witness tampering conviction should be affirmed based on the video statement by Shirley Crawford. The State is wrong. Crawford's video statement does not constitute "testimony" for purposes of the witness tampering, does not constitute evidence of an inducement to testify falsely, nor is it evidence that Thompson had reason to believe Crawford would be called to testify in an official proceeding.

Witness tampering is intentionally interfering with a witness's testimony. RCW 9A.72.120 (a). RCW 9A.72.120 (a) provides:

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding . . . to:

(a) Testify falsely or, without right or privilege to do so, to withhold any testimony.

RCW 9A.72.120 (a) (emphasis added).

RCW 5.60.020 defines a witness as a person with sound mind and discretion.<sup>1</sup> It specifically exempts people who are (1) of unsound mind

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<sup>1</sup> RCW 5.60.020 sets forth "Who may testify": and provides:

Every person of sound mind and discretion, except as hereinafter provided, may be a witness in any action, or proceeding.

and (2) those incapable of receiving just impressions of the facts respecting about which they are examined, or of relating them truthfully.<sup>2</sup>

Not all evidence is testimony. Testimony is the evidence a competent witness gives at trial, under oath or affirmation, in an affidavit or at a deposition. Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council, 165 Wn.2d 275, 302, 197 P.3d 1153 (2008) ("Kittitas Turbines"). Evidence derived from other sources is not testimony. Nationwide Insurance v. Williams, 71 Wn. App. 336, 342, 858 P.2d 516 (1993) ("Nationwide").

Shirley Crawford was not a witness. She was not named in any official proceeding, and she was not competent to be a witness. As noted by the State, Crawford suffered from dementia and could not accurately remember simple facts. Brief of Respondent (BOR) at 24 citing 6RP 21-24, 191-92<sup>3</sup>. The State does not claim Crawford could have been called as a witness. BOR at 36. As the State acknowledges,

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<sup>2</sup> RCW 5.60.050 sets forth "Who are incompetent" and provides:

- The following persons shall not be competent to testify:
- (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
  - (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

<sup>3</sup> There is an error in numbering the trial transcripts in Thompson's opening brief. The twelve volumes of verbatim report of proceedings should be referenced as follows: 1RP - 4/21/08; 2RP - 4/22/08; 3RP - 4/23/08; 4RP - 4/24/08; 5RP - 5/05/08; 6RP - 5/6/08; 7RP - 5/7/08; 8RP - 5/8/08; 9RP - 5/12/08; 10RP - 5/13/08; 11RP-5/14/2008 and 12RP -

There is, in fact, considerable evidence in the record that the Defendant Judith Thompson did know that Shirley Crawford was not competent.

BOR 30.

Additionally, Crawford's daughter's guardianship hearing was finished. Ex. 14 at 5; Ex.45. Crawford did not testify at that proceeding. Id. Thompson had no reason to believe Crawford would be called as a witness in future proceedings. As pointed out by the State, the Thompsons expected the videotape would "win the day for them" in the guardianship proceedings. BOR at 35.

Crawford's videotaped statement was not testimony. It was not made under oath, it was not given at an official proceeding, and it was not made either in an affidavit or at a deposition. It did not satisfy the requirements of Kittitas Turbines or of Nationwide. It was not testimony. Kittitas Turbines, 165 Wn.2d 275 at 302; Nationwide, 71 Wn. App. at 342.

The State claims Thompson ". . . fully intended to offer the videotape as evidence of Shirley Crawford's informed consent in the guardianship proceedings." BOR 35. That would not change Crawford's unsworn statement into testimony.

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7/17/08. All references to 8RP in Thompson's Opening Brief should have been references to 9RP. All references to exhibit 57 should have been to exhibit 45. Counsel apologizes for any inconvenience this error may have caused the State or the Court.

Witness tampering requires more than obstruction of justice. It is a crime of coercion against an individual victim. State v. Victoria, \_\_ Wn.2d \_\_, 206 P.3d 694, 695-96 (2009). It involves pressuring a person to knowingly violate the law; either by committing perjury or by disobeying a subpoena. Id. Thompson did not commit this crime because Crawford video statement was not "testimony." Therefore, Thompson's conviction for that crime should be reversed and dismissed with prejudice. In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Hickman 135 Wn.2d 97, 103, 954 P.2d 900 (1988).

2. THE COURT EXERCISED LAWFUL DISCRETION  
WHEN IT WAIVED THE DNA COLLECTION FEE.

Judith Thompson is indigent, incarcerated and ordered to pay over three hundred thousand dollars in restitution. CP 72-79. The State claims it was error for the trial court to waive Thompson's \$100 DNA collection fee. This claim is incorrect. The court used its discretion appropriately and wisely.

RCW 43.43.754 requires every person convicted of a felony to provide a biological sample for DNA identification. RCW 43.43.754(1). RCW 43.43.7541 authorizes the court to impose a \$100 DNA collection

fee. RCW 43.43.7541. Under current RCW 43.43.7541 this fee is mandatory. Id. Under the prior version of RCW 43.43.7541, however, the DNA fee was discretionary. Former RCW 43.43.7541 (2002) provided the court should impose fee “unless the court finds that imposing the fee would result in undue hardship on the offender.” RCW 43.43.7541 (2002). Former RCW 43.43.7541 was in effect at the time of Thompson's offense. Former RCW 43.43.7541 controls here.

Statutes authorizing costs in criminal prosecution are in derogation of the common law and should be strictly construed. State v. Buchanan, 78 Wn. App. 648, 651, 898 P.2d 862 (1995). RCW 10.01.040 requires courts to follow the version of a penalty statute in force when the offense is committed "notwithstanding . . . amendment or repeal "unless a contrary intention is expressly declared by the legislature."<sup>4</sup> State v. Ross, 152 Wn.2d 220, 237-

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<sup>4</sup> RCW 10.01.040 states:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to

38, 95 P.3d 1225 (2004). This section is deemed a part of every statute that amends or repeals an existing penal statute.

RCW 9.94A.345 requires sentencing courts to follow the law in effect when the offense was committed. RCW 9.94A.345 states:

Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.

RCW 9.94A.345. RCW 9.94A.345 controls all sentences imposed under chapter 9.94A RCW.

Because RCW 43.43.7541 applies to "every sentence imposed under chapter 9.94A RCW,"<sup>5</sup> it is governed by RCW 9.94A.345.

Therefore, courts sentencing under RCW 43.43.7541 must use the law from the time of the offense.

Former RCW 43.43.7541 controls here. That version was in effect at the time of the offense and the legislature expressed no intent to

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save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

<sup>5</sup> 43.43.7541 states:

Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

contravene either RCW 9.94A.345 or RCW 10.01.040 in adopting the 2008 version. The State argues the Legislature intended amended RCW 43.43.7541 to be retroactive. BOR at 38. Statutory amendments, however, are presumed to be prospective. In re Detention of Elmore, 162 Wn.2d 27, 35,168 P.3d 1285 (2007). A statute that creates a new obligation, or attaches a new consequence to a past event is retroactive or "retrospective".<sup>6</sup> State v. Humphrey, 139 Wn.2d 53, 61, 983 P.2d 1118 (1999). A statute may not be applied retroactively without clear legislative intent. State v. Humphrey, 139 Wn.2d at 60. An amendment is like any other statute and applies prospectively only. In re F.D. Processing, Inc., 119 Wn..2d 452, 460, 832 P.2d 1303 (1992).<sup>7</sup>

The State argues the Legislature's indicated its intent by (1) stating the section applies to every sentence, (2) removing the language applying the statute to crimes committed on or after July 1, 2002, and (3) using specific language concerning retroactivity in a separate statute, RCW 43.43.754. BOR at 38.

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<sup>6</sup> The Humphrey Court used the words "retrospective" and 'retroactive "interchangeably.

<sup>7</sup> Under certain circumstances, amendments may be applied retroactively if they are remedial. In re F.D. Processing, Inc., 119 Wn..2d at 460. Remedial amendments, however, relate to practice, procedure or remedies. They do not affect substantive rights or create new liabilities. Id. at 462-63; Humphrey, 139 Wn.2d. at 62-63. Amended RCW 43.43.7541 is not remedial because it takes away a procedural right. (In deciding whether a statutory change is remedial or substantive courts look to the effect, not the form of the law.) Humphrey, 139 Wn.2d. at 62-63.

Similar arguments were rejected in Humphrey. There the statute stated:

(1)(a) Whenever any person *is found guilty* in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes *convictions* of only one or more misdemeanors.

Humphrey, 139 Wn.2d. at 58 (emphasis in the original).

Like here, the State in Humphrey argued the plain meaning of the statute indicates the date of conviction, not the date of the offense, triggered the operation of the statute, and that the statute applied to any conviction entered after its effective date. Id. The Court disagreed. Id. at 58. The Court noted the statute did not refer to a precise moment in time. Instead, it described a relationship between offense and conviction; a typical event and a necessary consequence. Id. at 58-59. The Court ruled this relationship did not unambiguously establish conviction as the precipitating or "triggering event" of the statute. Id. at 59. The Court found imposing the assessment for offenses committed before the statute's effective date would make the statute retrospective and ruled the statute's

language did not unambiguously express this legislative intent. Id. at 59-60.

Amended RCW 43.43.7541 also fails to describe a precise moment in time. Like the statute considered in Humphrey, it describes a relationship between a typical event and a necessary consequence; offense and sentencing.<sup>8</sup> RCW 43.43.7541 does not describe a precipitating event, it does not express a clear legislative intent to be applied retroactively, and the trial court was correct in finding it did not apply to Thompson.

Humphrey, 139 Wn.2d. at 58-60.

Like the amendment to RCW 43.43.7541, the statute considered in Humphrey left out language included in a former version, limiting the statute to offenses committed on or after its effective date. 139 Wn.2d. at 59; Laws of 1989, ch. 252, § 27. The Humphrey Court did not find that omission significant in ruling the statute was not retroactive. Id. It is not relevant here.

The State claims RCW 43.43.7541 is retroactive because RCW 43.43.754 is retroactive. BOR at 40. A comparison of the two statutes refutes this argument. RCW 43.43.754 requires every person convicted of

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<sup>8</sup> See note 4.

a felony or certain misdemeanors to provide a biological sample for DNA identification. RCW 43.43.753 describes its urgency

The legislature finds that recent developments in molecular biology and genetics have important applications for forensic science. It has been scientifically established that there is a unique pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of the human body. The process for identifying this pattern is called "DNA identification."

The legislature further finds that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of this state to assist federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons. Therefore, it is in the best interest of the state to establish a DNA database and DNA data bank containing DNA samples submitted by persons convicted of felony offenses and other crimes as specified in RCW 43.43.754.

RCW 43.43.753.

RCW 43.43.7541 has no similar urgency. Prior RCW 43.43.7541 authorized courts to collect a \$100 fee for DNA collection<sup>9</sup>. The fee was

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<sup>9</sup> Former RCW 43.43.7541 provided:

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit fees collected to the state treasurer for

mandatory with a limited exception for cases with a finding of undue hardship. Former RCW 43.43.7541. The DNA collection process was in place, the fee collection was in place, there was little reason for urgency. The Legislature had no reason to make amended RCW 43.43.7541 retroactive. Had they intended this result, they would have included language specifically applying it to pre-amendment offenses. They did this in RCW 43.43.754.

RCW 43.43.754(6) specifies, in addition to people convicted of current offenses, the statute applies to:

- (a) All adults and juveniles to whom this section applied prior to the effective date of this section;
- (b) All adults and juveniles to whom this section did not apply prior to the effective date of this section who:
  - (i) Are convicted on or after the effective date of this section of an offense listed in subsection (1)(a) of this section; or
  - (ii) Were convicted prior to the effective date of this section of an offense listed in subsection (1)(a) of this section and are still incarcerated on or after the effective date of this section; and
- (c) All adults and juveniles who are required to register under RCW 9A.44.130 on or after the effective date of this section, whether convicted before, on, or after the effective date of this section.

RCW 43.43.754(6)(b) (emphasis added). Comparing RCW 43.43.7541 with RCW 43.43.754, it is clear the legislature intended to make RCW 43.43.754 retroactive but lacked this intent for RCW 43.43.7541.

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deposit in the state DNA database account created under RCW 43.43.7532.

The State could claim RCW 43.43.754 purely procedural and argue the statute applies retroactively under State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007). This argument would fail for two reasons: (1) the Legislature never intended RCW 43.43.754 to apply retroactively and (2) RCW 43.43.754 is not procedural. Not all procedural statutes are retroactive. Humphrey, 139 Wn.2d at 62. The statute discussed in Pillatos contained an emergency clause, bringing it into immediate effect. Pillatos, 159 Wn.2d at 468. RCW 43.43.754 has no similar clause. RCW 43.43.754 is not procedural. Amending RCW 43.43.754 affected a substantial right. In State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992), the Court set out the requirements for imposing monetary obligations at sentencing. Although a sentencing court need not enter "formal, specific findings" regarding the defendant's ability to pay court costs and recoupment fees, the court listed these prerequisites for constitutionally permissible costs:

1. Repayment must not be mandatory;
- ...
3. Repayment may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end.

Curry, 118 Wn.2d at 915-16; see also former RCW 10.01.160(3) (2005) (“The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.<sup>10</sup>”). This test does not apply to mandatory fees and assessments. Curry, 118 Wn.2d at 917-18.

Here, the trial court correctly applied the Curry test in waiving the \$100 DNA collection assessment. As an indigent defendant, Thompson had the right to have the court consider Curry in exercising its discretion. Id. at 915-16. She had the right to have the fee waived if appropriate. Id. In making the collection fee mandatory the legislature took away this procedural right for future defendants. Id. at 917-18. The amendment was enacted after Thompson's offense. Taking away Thompson's Curry rights for a pre-amendment offense would be impermissibly retroactive. Humphrey, 139 Wn.2d. at 59-60 (see also State v. Adams, 119 Wn. App. 373, 376-77, 82 P.3d 1195 (2003) (the court's discretion in applying SSOSA is governed by the law in effect when the current offense was committed)).

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<sup>10</sup> The wording of current RCW 10.01.160(3) is the same.

Contrary to the State's claims, the Legislature intended RCW 43.43.7541 to be prospective. RCW 9.94A.345 makes all chapter 9.94A RCW sentencing laws prospective. The Legislature passed RCW 9.94A.345 to " . . . clarify the applicability of statutes creating new sentencing alternatives or modifying the availability of existing alternatives". Laws of 2000 c 26 § 1.<sup>11</sup> Amended RCW 43.43.7541 modified the availability of existing sentencing alternatives. It took away the court's authority to waive the \$100 DNA collection fee. RCW 43.43.7541. RCW 9.94A.345 was passed to govern sentencings under this type of statute. The Legislature intended RCW 43.43.7541 to be prospective. The trial court was correct in applying former RCW 43.43.7541 and exercising its discretion.

The presumption against retroactive application of statutes is an essential thread in the mantle of protection that the law affords the individual citizen. In re LaChapelle, 153 Wn.2d 1, 8, 100 P.3d 805(2004)

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<sup>11</sup> Laws of 2000 c 26 § 1 states:

RCW 9.94A.345 is intended to cure any ambiguity that might have led to the Washington supreme court's decision in State v. Cruz, Cause No. 67147-8 (October 7, 1999). A decision as to whether a prior conviction shall be included in an individual's offender score should be determined by the law in effect on the day the current offense was committed. RCW 9.94A.345 is also intended to clarify the applicability of statutes creating new sentencing alternatives or modifying the availability of existing alternatives.

(citations omitted). That presumption is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Id. The constitutional prohibition against ex post facto legislation is but a further manifestation of the repugnance with which such retroactive legislation is viewed. Id.

In amending RCW 43.43.7541, the Legislature was silent on the subject of retroactivity. RCW 9.94A.345 fills that silence. The Legislature intended RCW 43.43.7541 to be prospective. The trial court was correct in applying former RCW 43.43.7541

B. CONCLUSION

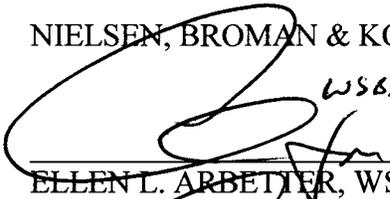
Thompson is not guilty of tampering with a witness. Her conviction on this charge must be reversed and dismissed. The trial court was correct in applying former RCW 43.43.7541 and exercising its discretion. This ruling must be affirmed.

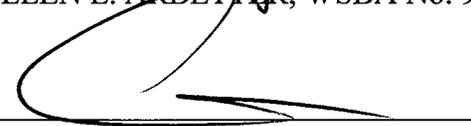
DATED this 10th day of June, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

*WSBA 25097*

  
\_\_\_\_\_  
ELLEN L. ARBETTER, WSBA No. 9198

  
\_\_\_\_\_  
CHRISTOPHER H. GIBSON, WSBA No. 25097  
Office ID No. 91051

Attorney for Thompson

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 61998-5-I
	)	
JUDITH THOMPSON,	)	
	)	
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 10<sup>TH</sup> DAY OF JUNE 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] OLIVER DAVIS  
WASHINGTON APPELLANTE PROJECT  
1511 3<sup>RD</sup> AVENUE  
SUITE 701  
SEATTLE, WA 98101
  
- [X] JUDITH THOMPSON  
DOC NO. 320746  
MISSION CREEK CORRECTIONAL CENTER  
3420 NE SANDHILL ROAD  
BELFAIR. WA 98528

**SIGNED** IN SEATTLE WASHINGTON, THIS 10<sup>TH</sup> DAY OF JUNE 2009.

x *Patrick Mayovsky*