

REC'D

JUN 29 2009

King County Prosecutor
Appellate Unit

NO. 62759-7-I

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

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
2009 JUN 29 PM 3:52

STATE OF WASHINGTON,

Respondent,

v.

MARK RATHBUN,

Appellant.

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

The Honorable Jim Rogers, Judge

BRIEF OF APPELLANT

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Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The court erred when it imposed a DNA collection fee.

Issue Pertaining to Assignment of Error

The sentencing court waived all non-mandatory legal financial obligations based on appellant's indigency, but imposed a DNA collection fee. Did the court err when it imposed a DNA collection fee where the law in effect at the time appellant was sentenced did not authorize imposition of a DNA collection fee?

B. STATEMENT OF THE CASE

The King County prosecutor charged appellant, Mark Rathbun, by Second Amended Information, with three counts of first degree burglary and three counts of first degree rape. CP 67-71. The information also alleged as aggravating factors that Rathbun's offender score would result in some current offenses going unpunished and the presumptive sentence would be too lenient because of unscored prior misdemeanor and foreign convictions. RCW 9.94A.535(2)(c); RCW 9.94A.535(2)(b); RCW 9.94A.010. CP 71. The jury convicted Rathbun as charged following a lengthy trial. CP 78-83.

Rathbun's criminal history includes 58 felonies and he currently serving a California State sentence of 1,040 years plus 10 life sentences. CP 174. The court concluded that given Rathbun's offender score, some

of the current offenses, specifically counts II, IV and VI, the rape convictions, would go unpunished. CP 175; RCW 9.94.535(2)(c). The court imposed an exceptional sentence of 100 months by ordering the sentences in counts II, IV and VI be served consecutive to the concurrent sentences ordered in counts I, III and V. CP 155-156.

In addition, the court waived all nonmandatory fees and assessments. RP 17 (12/5/2008). The court, however, checked the box in the judgment and sentence imposing a \$100.00 DNA collection fee. CP 154.

C. ARGUMENT

THE COURT ERRED WHEN IT IMPOSED THE DNA COLLECTION FEE AS PART OF RATHBUN'S SENTENCE.

It is well settled that establishing the penalties for crimes is a legislative function. State v. Thorne, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). It is that law in effect at the time a criminal offense is committed that controls disposition of the case. State v. Schmidt, 143 Wn.2d 658, 673-74, 23 P.3d 462 (2001). Moreover, statutes authorizing costs in criminal prosecutions 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).

A defendant may challenge an illegal sentence for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). The rule

also applies to a challenge to the sentencing court's authority to impose a sentence. State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993).

The statute authorizing the DNA collection fee, RCW 43.43.7541, was originally enacted in 2002. Laws of 2002, ch. 289, § 4 (effective July 1, 2002). It authorized the trial court to impose the collection fee as part of a sentence for certain crimes committed after July 1, 2002 and it allowed the court to waive the fee if imposing the fee would result in a hardship. Former RCW 43.43.7541.

In 2008 the statute was amended. Laws of 2008, ch. 97, § 3 (effective June 12, 2008). The 2008 version provides, “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.” RCW 43.43.7541. The 2008 version eliminated the language authorizing the imposition of the fee to crimes committed after July 1, 2002 as well as the language authorizing the judge to waive the fee. Id.

Here, it was alleged and proven the crimes for which Rathbun was sentenced were committed between May and December, 1996. CP 67-71; CP 107-112 (instructions 21-26). When Rathbun’s crimes were committed there was no statute or other law that either authorized or required the sentencing court to impose a DNA collection fee. Because RCW 43.43.7541 was not enacted until 2002 and not amended until 2008 and there

was no other statute or law in 1996 that allowed a sentencing court to impose a DNA collections fee, imposing the fee here was illegal. Although Rathbun did not object to the DNA collection fee, because the court was not authorized to impose the fee, imposition of the is illegal. This Court should remand with instructions to strike the fee from Rathbun's judgment and sentence. State v. Brockob, 159 Wn.2d 311, 349, 150 P.3d 59 (2006).

D. CONCLUSION

For the above reasons, this Court should remand with instructions to strike the DNA collection fee from Rathbun's judgment and sentence.

DATED this 21 day of June, 2009.

Respectfully submitted,

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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 29TH DAY OF JUNE, 2009, 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] MARK RATHBUN
NO. V53583
CALIPATRIA STATE PRISON
P.O. BOX 5001
CALIPATRIA, CA 92233

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JUNE, 2009.

x Patrick Mayovsky