

NO. 62759-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARK RATHBUN,

Appellant.

2009 SEP -3 PM 3:17
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JIM ROGERS

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Did the sentencing court have the authority to impose a \$100 DNA collection fee?

B. STATEMENT OF THE CASE

In 1996, the defendant raped and burglarized three different victims. CP 67-71. On October 13, 2008, a jury found the defendant guilty of three counts of first-degree rape and three counts of first-degree burglary. CP 78-87.

The defendant was sentenced on December 5, 2008. CP 157. The defendant's criminal history includes at least 58 prior felonies, consisting of, among other crimes, 26 counts of rape, 14 counts of residential burglary, 10 counts of forced oral copulation, 5 counts of assault with intent to commit a sex offense, 1 count of forced sodomy and 2 counts of sexual penetration with a foreign object. CP 160-61, 174-75.

Pursuant to the multiple offender policy of RCW 9.94A.535, the sentencing court imposed an exceptional sentence of 640 months on count II (first-degree rape) on a standard range of 210 to 280 months. CP 153, 155, 174-75. The defendant received standard range sentences of 280 months on counts IV and VI (the

other two first-degree rape convictions). CP 155. Being serious violent offenses, as required by RCW 9.94A.400 (recodified at RCW 9.94A.589), counts IV and VI were to be served consecutive to count II. CP 155-56. The defendant received concurrent standard range sentences of 87 months on counts I, III and V (the three counts of first-degree burglary). CP 155. The court also imposed a \$100 DNA collection fee. CP 154.

C. ARGUMENT

1. THE SENTENCING COURT HAD THE AUTHORITY TO IMPOSE A DNA COLLECTION FEE.

The defendant contends that the trial court had no authority to impose a \$100 DNA collection fee. This argument should be rejected. RCW 43.43.7541 requires the court impose the fee for all sentences occurring after enactment of the statute, regardless of the date of offense or conviction. The statute violates neither the savings clause nor *ex post facto* clause.

The statute under which the DNA collection fee was imposed is RCW 43.43.7541. In pertinent part the statute reads:

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 (emphasis added). This version of the statute took effect on June 12, 2008. See RCW 43.43.7541 (2008 c 97 § 3, eff. June 12, 2008). The defendant was convicted on October 13, 2008, and sentenced on December 5, 2008.

The defendant asserts that because he committed his criminal acts in 1996, the court had no authority to impose a DNA collection fee. Two primary arguments have been made in other cases challenging the imposition of the DNA fee. The arguments are not persuasive.

a. The Savings Clause.

In pertinent part, the savings clause reads as follows:

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 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.

RCW 10.01.040.

In short, the savings clause provides that a criminal or penal statute in affect on the date a crime is committed controls unless the amended or new statute declares otherwise. See State v. Kane, 101 Wn. App. 607, 612-13, 5 P.3d 741 (2000). In applying RCW 10.01.040, the Supreme Court does "not insist that a legislative intent to affect pending litigation be declared in express terms in a new statute"; rather, such intent need only be expressed in "words that fairly convey that intention." Kane, 101 Wn. App. at 612 (citing State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), overruled on other grounds, United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979)); see also, State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978).

In Zornes, the Supreme Court held that a newly enacted drug law controlled cases pending at the time of the enactment of the statute even though the law was not in affect at the time of the

commission of the crime. The Zornes, a husband and wife, were convicted under a drug statute pertaining to "narcotic drugs," for their possession of marijuana. The particular amendment to the drug statute enacted while the Zornes' case was pending, stated that "the provisions of this chapter [the narcotic drug statute] shall not ever be applicable to any form of cannabis." Zornes, 78 Wn.2d at 11. The Court found it could be reasonably inferred that the legislature intended the amendment, by use of this language, to apply to pending cases as well as those arising in the future. Zornes, at 13-14, 26.

In Grant, a new statute provided that "intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages." Grant, 89 Wn.2d at 682. The policy behind the statute was that alcoholics and intoxicated persons should receive treatment rather than punishment. Grant was convicted of being intoxicated on a public highway. The Supreme Court held that this new statute applied to Grant's case that was pending at the time of the enactment of the statute. The Court found that the language of the statute (cited above) fairly expressed the legislative intent to avoid the savings statute default rule. Grant, at 684.

Here, the statutory language clearly shows the legislature intended RCW 43.43.7541 to apply to "every sentence" imposed after the effective date of the statute, regardless of the date the offense was committed. In the original version of RCW 43.43.7541,¹ the legislature put in specific language that indicated that the statute applied only to crimes "committed on or after July 1, 2002." In amending the statute, the legislature removed any reference to when the crime was committed. This in itself indicates that the legislature did not intend the date a crime is committed to be a limiting factor. See In re Personal Restraint of Sietz, 124 Wn.2d 645, 651, 880 P.2d 34 (1994) (if the legislature uses specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred); Millay v. Cam, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (if the legislature thought such a provision necessary it would have included it within the statute's text).

¹ The original version, enacted in 2002, reads in pertinent part:

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.

Former RCW 43.43.7541 (2002 c 289 § 4).

In addition, the statute specifically says it applies to "[e]very sentence" imposed under the sentencing reform act. The term "every" means "all." See State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991); State v. Harris, 39 Wn. App. 460, 463, 693 P.2d 750, rev. denied, 103 Wn.2d 1027 (1985).²

Finally, the amendment to the statute pertaining to the DNA collection fee is consistent with, was done in conjunction with, and refers directly to, the amendment to RCW 43.43.754, the statutory provision regarding the actual collection of DNA samples. Under RCW 43.43.7541, the DNA collection fee is mandatory for crimes specified in RCW 43.43.754. The 2008 amendment to RCW 43.43.754 expanded the crimes for which a DNA sample is required to be taken. See RCW 43.43.754 (2008 c 97 § 2, eff. June 12, 2008). The legislature stated, in pertinent part, that [t]his section applies to. . .[a]ll adults and juveniles to whom this section applied prior to June 12, 2008." RCW 43.43.754(6)(a). The former version of RCW 43.43.754 referred to by the 2008 amendment applied to "[e]very adult or juvenile individual convicted of a felony." Former

² See also In re Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) ("*Expressio unius est exclusio alterius*, 'specific inclusions exclude implication.' In other words, where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions").

RCW 43.43.754(1) (2002 c 289 § 2). Thus, the legislature made it clear that RCW 43.43.7541 and RCW 43.43.754 applied to crimes committed both before and after June 12, 2008. The trial court here properly imposed the mandatory DNA collection fee.

b. The *Ex Post Facto* Clause.

The *ex post facto* clause of the federal and state constitutions³ forbids the State from enacting a law that imposes a punishment for an act that was not punishable when the crime was committed, or that increases the quantum of punishment for the crime beyond that which could have been imposed when the crime was committed. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). Not every sanction or term of a criminal sentence constitutes a criminal penalty or punishment, and if a sanction or term is not a penalty or punishment, the *ex post facto* clause does not apply. Ward, 123 Wn.2d at 498-99; Johnson v. Morris, 87 Wn.2d 922, 928, 557 P.2d 1299 (1976); In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993).

For example, the legislature's increase of the mandatory victim penalty assessment from \$100 to \$500 was held not to

³ U.S. Const. Art 1, § 10, cl. 1; WA Const. art. I, § 23.

constitute punishment, and thus, imposition of the \$500 amount for crimes committed before the increase in the amount was not a violation of the *ex post facto* clause. State v. Humphrey, 91 Wn. App. 677, 959 P.2d 681 (1998), reversed on other ground, 139 Wn.2d 53, 62, 62 n.1, 983 P.2d 1118 (1999) (the Supreme Court stating that the assessment was not a "penalty" and "would not, therefore, constitute punishment for the purposes of an *ex post facto* determination").⁴

In determining if a term of sentence imposes a "punishment," courts look first for legislative intent. If the legislature intended the sanction as punishment, then the inquiry stops and the *ex post facto* clause applies. Metcalf, 92 Wn. App. at 178. The defendant cannot show a punitive effect here because the legislature clearly did not intend either the collection of the DNA sample, or the imposition of the \$100 collection fee, to be a criminal penalty. As

⁴ See also State v. Blank, 80 Wn. App. 638, 640-42, 910 P.2d 545 (1996) (law requiring convicted indigent defendants to pay appellate costs not punishment and did not violate *ex post facto* provisions), cited with approval in, State v. Blank, 131 Wn.2d 230, 250 n.8, 930 P.2d 1213 (1997); Ward, 123 Wn.2d at 488 (law requiring sex offenders to register was not punishment and did not violate *ex post facto* provisions); In re Metcalf, 92 Wn. App. 165, 963 P.2d 911 (1998) (law requiring deductions from prisoner's wages and funds to pay for cost of incarcerations not punishment and did not violate *ex post facto* provisions); State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997) (law authorizing civil forfeiture of property used to facilitate drug offenses not punishment and did not violate *ex post facto* provisions).

the 2SHB 2713 Final Bill Report states, the purpose of the creation of a DNA database is to "help with criminal investigations and to identify human remains or missing persons." The fee is simply intended to fund the creation and maintenance of the database.

See 2SHB 2713 Final Bill Report; RCW 43.43.7541.

If the legislature did not intend a term to be punitive, courts still examine the effects of the legislation to make sure the effects are not so burdensome as to transform the term into a criminal penalty. Metcalf, at 180; Ward, at 499. The courts will consider seven factors: (1) whether the sanction involves an affirmative restraint on the defendant; (2) whether the term has historically been considered a criminal punishment; (3) whether its enforcement depends on a finding of scienter; (4) whether its imposition promotes the traditional aims of punishment (deterrence and retribution); (5) whether it applies to behavior that is already a crime; (6) whether it is rationally related to a purpose other than punishment; and (7) whether it appears excessive in relation to this other purpose. Metcalf, at 180 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)). In order to override a non-punitive legislative intent, the factors

"must on balance demonstrate a punitive effect by the clearest proof." Metcalf, at 180-81.

Application of these factors shows that the legislation here does not have the effect of imposing a criminal punishment. It is no different than the victim penalty assessment, found not to be punishment in violation of the *ex post facto* clause. See Humphrey, supra.

First, a sanction "involves an affirmative restraint" only when it approaches the "infamous punishment of imprisonment." Metcalf, at 181. The imposition of a \$100 fee is certainly not analogous to imprisonment.

Second, monetary fees and assessments have historically not been regarded as criminal penalties within the meaning of the second factor. Metcalf, at 181.

Third, the imposition of the DNA fee can be imposed only after a person has been convicted, but the fee itself is not triggered by any particular finding of scienter and, thus, it does not violate the third factor. See Metcalf, at 181-82.

Fourth, the imposition of the fee does not have the primary effect of promoting the traditional aims of punishment (deterrence and retribution). Metcalf, at 182; Ward, at 508. It would be difficult

to argue the nominal \$100 fee is retributive or could act as a deterrent. Rather, the purpose of the fee is to reimburse the agency responsible for the collection of DNA samples and to pay to maintain the State database. RCW 43.43.7541.

Fifth, whether the fee applies to behavior that is already a crime depends upon whether it applies specifically to the felony for which the defendant is convicted instead of to the status of having been convicted of a felony. In Metcalfe, the Court reviewed a retroactively applied statutory change that required the deduction of funds received by inmates to pay for costs of incarceration. The Court found that this sanction was not "applied to behavior that is already a crime" within the meaning of this factor, because it was triggered by the status of having been convicted of a felony rather than by commission of the felony itself. Metcalfe, at 182. Similarly, here the DNA fee is triggered by the status of having been convicted of a felony rather than by anything specific to the behavior that constituted the crime.

The sixth and seventh factors examine whether the sanction has a rational non-punitive purpose and whether the sanction is excessive in relation to that purpose. In the context of fines, courts draw a line between fees or assessments that are primarily

intended to reimburse the State and those primarily intended to impose criminal punishment for the purposes of public justice. Metcalf, at 177-78. Here, the fee is the former. It has the rational non-punitive purpose of reimbursing the State for the costs of collecting the DNA sample and maintaining the database. A nominal fee of \$100 appears proportionate to that purpose.

Based on the above, the \$100 DNA collection fee does not constitute a criminal penalty or punishment. Therefore, imposition of the fee does not violate the *ex post facto* clause.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's sentence.

DATED this 2 day of August, 2009.

Respectfully submitted,

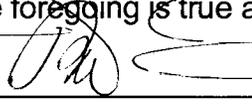
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RATHBUN, Cause No. 62759-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

09-03-2009

Date