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JUN 26 2009

King County Prosecutor
Appellate Unit

NO. 62764-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDY BREWSTER,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 26 PM 4: 15

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

The Honorable Gregory Canova, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. Did the trial court abuse its discretion when it found, based on an erroneous view of the law, appellant lacked “good cause” to contact the jurors regarding the alleged misconduct?

2. Did the sentencing court err when it failed to exercise its discretion under the proper version of the DNA collection fee statute, that is, the one in effect on the date of the alleged offense?

B. ARGUMENT IN REPLY

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT RELIED ON A MISTAKEN VIEW OF THE LAW IN DENYING BREWSTER’S MOTION TO CONTACT JURORS.

The State complains the defense affidavit is insufficiently explicit to support a claim of jury misconduct. Brief of Respondent (BOR) at 12-14. But the defense did not have the opportunity to contact jurors, and the trial court’s denial of the defense motion was an abuse of discretion. Contrary to the court’s finding, various assertions contained in the defense affidavit do not “inhere in the verdict” because they deal with the fact of rather than the effect of the introduction of extrinsic evidence akin to expert testimony. Because the trial court’s ruling that Brewster did not show “good cause”

resulted from a fundamental misunderstanding of applicable law as to what does and does not inhere in the verdict, it was an abuse of discretion, and reversal is therefore required. Brief of Appellant at 14-20.

2. THE APPLICABLE DNA COLLECTION FEE STAUTE IS THE STATUTE IN FORCE ON THE DATE OF THE CRIME.

The State claims in its brief that the language of the amended DNA collection statute constitutes an express intent to subvert the saving statute and render the amendment retroactive. BOR at 16-22. Because the facts and the law do not support the State's claim, this Court should reject it.

The saving statute, RCW 10.01.040, provides in pertinent part,

Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such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

“[This statute] is deemed a part of every repealing statute as if expressly inserted therein, and hence renders unnecessary the incorporation of an individual saving clause in each statute which amends or repeals an existing penal statute.” State v. Ross, 152 Wn.2d 220, 237-38, 95 P.3d 1225 (2004) (quoting State v. Hanlen, 193 Wash. 494, 497, 76 P.2d 316 (1938)); see State v. Toney, 103 Wn. App. 862, 864, 14 P.3d 826 (2000)

(unless the legislature evidences contrary intent, a statute's pre-amendment version applies to an offense committed before the amendment's effective date).

To avoid application of the savings clause, however, the Legislature need not explicitly state its intent that an amendment apply retroactively, i.e., to a pending prosecutions for a crime committed before the amendment's effective date. Instead, "such intent need only be expressed in 'words that fairly convey that intention.'" State v. Kane, 101 Wn. App. 607, 612, 5 P.3d 741 (2000) (quoting 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)).

Moreover, courts are directed to broadly interpret the following language: "unless a contrary intention is expressly declared." Kane, 101 Wn. App. at 612. That said, in only two cases has the Washington Supreme Court found non-explicit, yet arguably express, intent to trump the saving statute. In both cases, the statutory amendment at issue contained relatively specific language directing that no prosecutions under the prior version of the statute should occur. In both cases, moreover, the Court read the language against the State.

In Zornes, the Court reversed and dismissed defendants' convictions under the Narcotic Drug Act for possession of marijuana. While the appeals were pending, an amendment to the Act became effective stating "the provisions of this chapter shall not ever be applicable to any form of cannabis." Zornes, 78 Wn.2d at 12. From the words "not ever" the Court found it could be reasonably inferred that the legislature intended the amendment to apply to pending cases as well as those arising in the future. Zornes, 78 Wn.2d at 13-14, 26.

In State v. Grant, a new act provided that intoxicated persons must not be prosecuted for various crimes solely because of their consumption of alcohol. 89 Wn.2d 678, 682, 575 P.2d 210 (1978).

The pertinent statutes provide:

It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society.

Former RCW 70.96A.010 (1972).

In addition,

(1) No county, municipality, or other political subdivision may adopt or enforce a local law, ordinance, resolution, or rule having the force of law that includes

drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of the offense giving rise to a criminal or civil penalty or sanction.

(2) No county, municipality, or other political subdivision may interpret or apply any law of general application to circumvent the provision of subsection (1) of this section.

Former RCW 70.96A.190 (1972).

The Court held the statutory language “may not be subjected to criminal prosecution” expressly declared that no person must go to trial on such a charge after the effective date of the act even if the alleged crime occurred before that date. This language was sufficient to overcome the presumptive application of the saving statute. Grant, 89 Wn.2d at 684-85. The Court also noted the statute was remedial and must be construed liberally and, moreover, that ambiguities in criminal statutes must be resolved in favor of the accused. Id.

In contrast, the current version of RCW 43.43.7541 contains no such expression. The State now asks this Court to find the following italicized language akin to the legislative expressions in Zornes and Grant: “*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.” Laws of 2008, ch. 97, § 3 (effective June 12, 2008) (emphasis added);

BOR at 20-21.

Yet the prior, original, version of the statute contains identical language. Former RCW 43.43.7541 (2002); Laws of 2002, ch. 289, § 4. In effect, the State is asking this Court to find express legislative to subvert the saving statute in the same language contained in the first enacted version of the statute, in which the Legislature could have no such intention. This is an unreasonable reading of the statute. State v. Keller, 98 Wn. App. 381, 383-84, 990 P.2d 423, 425 (1999) (when the same words are used in related statutes, this Court presumes the Legislature intended the words to have the same meaning), aff'd, 143 Wn.2d 267, 19 P.3d 1030 (2001).

Moreover, that the original version stated it applied to offenses “committed on or after July 1, 2002” — the effective date of the original act — is of no moment. BOR at 20. The original was a new statute and therefore required some clarification. No such rationale exists regarding the amended statute because the default rule regarding amendment of statutes provides sufficient clarification: Under that rule, the version of the statute in force on the date of the offense is the one presumed to apply. State v. Ross, 152 Wn.2d 220, 237-38, 95 P.3d 1225 (2004).

Finally, citing cases addressing Blakely¹-fix sentencing legislation, the State suggests in a footnote that the amendment eliminating the hardship exception to liability for the DNA collection penalty is merely procedural and therefore RCW 10.01.040 — and presumably the constitutional prohibition on ex post facto laws² — do not apply. BOR at 20 n. 8. This Court should reject the argument not only because it lacks substance but also because it appears in a footnote. Kane, 101 Wn. App. at 613 (statutes establishing penalty for criminal offenses are subject to the saving statute); see also State v. Johnson, 69 Wn. App. 189, 194 n. 4, 847 P.2d 960 (1993) (placing an argument in a footnote is, at best, ambiguous or equivocal and this court may decline to address an argument presented in this fashion).

¹ Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

² U.S. Const. art. 1, § 10, cl. 1; Wash. Const. art. 1, § 23.

C. CONCLUSION

For the reasons stated above and in Brewster's opening brief, this Court should grant the relief requested.

DATED this 26TH 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 26TH 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] BRANDY BREWSTER
 135 N. 82ND STREET
 SEATTLE, WA 98103

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF JUNE, 2009.

x *Patrick Mayovsky*