

63049-1

63049-1



2009 AUG 12 PM 3:59

NO. 63049-1-I

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

REC'D

AUG 12 2009

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MILAM,

Appellant.

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

The Honorable Monica J. Benton, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

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

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	4
1. MILAM'S CONVICTIONS FOR IDENTITY THEFT AND SECOND DEGREE THEFT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.	4
a. <u>Introduction to Applicable Law</u>	4
b. <u>The Statutes Do Not Expressly Authorize Multiple Punishments for the Same Act.</u>	6
c. <u>Under the Same Evidence Test, Multiple Punishments Violate Double Jeopardy.</u>	9
2. THE COURT ERRED WHEN IT FAILED TO CONSIDER WHETHER TO IMPOSE THE DNA COLLECTION FEE UNDER THE APPLICABLE STATUTE, AND TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.....	11
a. <u>The Court's Failure to Exercise Discretion Under the Applicable Statue Requires Reversal and Remand</u>	12
b. <u>Assuming, <i>Arguendo</i>, the Legislature Intended to Subvert the Savings Statute, the Amended Statute Alters the Standard of Punishment Without Notice and Therefore Violates the Prohibition on Ex Post Facto Laws.</u>	16
c. <u>Counsel Rendered Ineffective Assistance by Failing to Object to Sentencing Under the Incorrect Statute</u>	17
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Pers. Restraint of Powell</u> 117 Wn.2d 175, 814 P.2d 635 (1991).....	16
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	17
<u>State v. Baldwin</u> 150 Wn.2d 448, 78 P.3d 1005 (2003).....	6
<u>State v. Broadway</u> 133 Wn.2d 118, 942 P.2d 363 (1997).....	19
<u>State v. Buchanan</u> 78 Wn. App. 648, 898 P.2d 862 (1995).....	13
<u>State v. Calle</u> 125 Wn.2d 769, 888 P.2d 155 (1995).....	4
<u>State v. Carter</u> 56 Wn. App. 217, 783 P.2d 589 (1989).....	18
<u>State v. Curry</u> 118 Wn.2d 911, 829 P.2d 166 (1992).....	12
<u>State v. Freeman</u> 153 Wn.2d 765, 108 P.3d 753 (2005).....	4
<u>State v. Gocken</u> 127 Wn.2d 95, 896 P.2d 1267 (1995).....	4
<u>State v. Grant</u> 89 Wn.2d 678, 575 P.2d 210 (1978).....	15
<u>State v. Grayson</u> 154 Wn.2d 333, 111 P.3d 1183 (2005).....	12

TABLE OF AUTHORITIES (CONT'D)

Page

<u>State v. Hickman</u> 135 Wn.2d 97, 954 P.2d 900 (1998).....	11
<u>State v. Hughes</u> __ Wn.2d __, __ P.3d __, 2009 WL 2182808 (July 23, 2009).....	6, 11
<u>State v. Leyda</u> 157 Wn.2d 335, 138 P.3d 610 (2006).....	7
<u>State v. Louis</u> 155 Wn.2d 563, 120 P.3d 936 (2005).....	5
<u>State v. Lynch</u> 93 Wn. App. 716, 970 P.2d 769 (1999).....	4, 7
<u>State v. Maurice</u> 79 Wn. App. 544, 903 P.2d 514 (1995).....	17
<u>State v. McFarland</u> 127 Wn.2d 322, 899 P.2d 1251 (1998).....	18
<u>State v. McGill</u> 112 Wn. App. 95, 47 P.3d 173 (2002).....	16
<u>State v. Ross</u> 152 Wn.2d 220, 95 P.3d 1225 (2004).....	15
<u>State v. Schmidt</u> 143 Wn.2d 658, 23 P.3d 462 (2001).....	16
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	17
<u>State v. Zornes</u> 78 Wn.2d 9, 475 P.2d 109 (1970).....	15

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>FEDERAL CASES</u>	
<u>Blockburger v. United States</u> 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).....	5
<u>Miranda v. Arizona</u> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	2, 3
<u>Missouri v. Seibert</u> 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).....	3
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	17
<u>United States v. Batchelder</u> 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979).....	15
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
Former RCW 9A.56.040 (1)(a) (2007).....	6
Former RCW 9.35.020 (2004).....	6, 10
Former RCW 10.01.160(3) (2005).....	13
Former RCW 43.43.7541 (2002).....	14
Laws of 2008, ch. 97, § 3.....	14
Laws of 2008, ch. 207, § 1.....	8
Laws of 2008, ch. 207, §4.....	7
RCW 9A.56.020	9
RCW 9A.56.040	6, 9
RCW 9.94A	8

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 9.94A.750	14
RCW 10.01.040	14
RCW 43.43.754	14
RCW 43.43.7541	13, 15
RCW 7.68.035	13
U.S. Const. art. 1, § 10, cl. 1	15
U.S. Const. amend. 5	4
U.S. Const. amend. 6	17
Wash. Const. art. I, § 9	4
Wash. Const. art. 1, § 22	17
Wash. Const. art. 1, § 23	15

A. ASSIGNMENTS OF ERROR

1. Appellant's convictions for second degree theft and second degree identity theft violate double jeopardy.

2. The sentencing court erred when it failed to exercise its discretion in imposing a non-mandatory DNA collection fee on the ground it was mandatory.

3. The sentencing court's retroactive application of the amended DNA collection statute violates the constitutional prohibition on ex post facto laws.

4. Appellant was deprived of effective assistance of counsel at sentencing.

Issues Pertaining to Assignments of Error

1. Appellant was convicted of both second degree identity theft and second degree theft based on his use of an ATM card to steal \$360 dollars from a credit union account. To survive a double jeopardy challenge under the "same evidence" test, each offense must require proof of an element not required in the other. While the identity theft statute requires proof of an additional element, the theft statute does not. Do appellant's convictions for second degree theft and second degree identity theft therefore violate double jeopardy?

2. The sentencing court waived all other non-mandatory legal financial obligations based on appellant's indigency, but imposed a non-mandatory DNA collection fee on the mistaken view the fee was "mandatory." Did the court err by failing to exercise its discretion?

3. Did the sentencing court's retrospective application of the amended DNA collection fee statute violate the constitutional prohibition on ex post facto laws?

4. Was trial counsel ineffective for failing to object to the imposition of an inapplicable "mandatory" DNA collection fee?

B. STATEMENT OF THE CASE¹

The State charged appellant Michael Milam with second degree theft and second degree identity theft based on events occurring October 8, 2007. CP 1-8, 28-29. The State alleged Milam used Michelle and Mark Jacobs's ATM card and personal identification number (PIN) to withdraw \$360 from their credit union account. CP 1-6.

The trial court excluded Milam's custodial statement to police, finding the officers purposely delayed Miranda² warnings until mid-

¹ This brief refers to the verbatim reports as follows: 1RP – 7/1/08; 2RP – 11/5/08; 3RP – 11/6/08; 4RP – 11/10/08 morning; 5RP – 11/10/08 afternoon; 6RP – 11/12/08 morning; 7RP – 11/12/08 afternoon; 8RP – 11/13/08; 9RP – 1/21/09; and 10RP – 2/18/09. The pagination of 6RP inexplicably begins with page 401.

questioning, in violation of Missouri v. Seibert.³ CP 106-09. The court denied Milam's motion to dismiss the charges based on governmental misconduct. CP 30-33; 3RP 57-75; 4RP 2-20.

At trial, the State introduced a videotape that purportedly depicted Milam using the ATM card to withdraw money at the ATM at another credit union. 5RP 4, 17-26; 6RP 426-36, 473-81. The credit union's security director testified the transaction pattern was inconsistent with legitimate account activity. 5RP 13-15; 7RP 21-23.

Before the taped transaction, the ATM card and corresponding PIN had last been seen in Michele Jacobs's purse, which was stolen by a different man approximately 30-40 minutes before the withdrawals and about two miles from the ATM. 6RP 407-13, 462-63.

A jury convicted Milam as charged. CP 44-45.

The court calculated Milam's offender score at 18 and sentenced him to a standard-range Drug Offender Sentencing Alternative of 25 months of incarceration followed by 25 months of community custody.⁴ CP 80-90; 9RP 25-45. The court also ordered Milam to pay a \$500

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

³ 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

⁴ The length of the DOSA, 50 months total, reflects the midpoint of the standard range for second degree identity theft. CP 81.

Victim Penalty Assessment (VPA) and \$100 DNA collection fee. 9RP 38. The court explained, “I must order those [penalties]; the legislature requires it.” 9RP 38. The court also explained it was waiving all non-mandatory fines. 9RP 39.

C. ARGUMENT

1. MILAM'S CONVICTIONS FOR IDENTITY THEFT AND SECOND DEGREE THEFT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

a. Introduction to Applicable Law

The double jeopardy clauses of the state and federal constitutions bar multiple punishments for the same offense. U.S. Const. amend. 5; Wash. Const. art. I, § 9; State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995), State v. Lynch, 93 Wn. App. 716, 970 P.2d 769 (1999). But if a defendant's act supports charges under two statutes, this Court must determine whether the Legislature intended to authorize multiple punishments for the crimes in question. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). If the Legislature intended for cumulative punishments to be imposed for the crimes, there is no double jeopardy violation. State v. Freeman, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005).

If the language of the criminal statutes at issue does not expressly disclose legislative intent as to multiple punishments, this Court must consider whether multiple punishments are nonetheless permitted. Calle,

125 Wn.2d at 777. Under the "same evidence" or Blockburger⁵ test, convictions violate double jeopardy if the offenses are identical in fact and in law. State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005). In other words, where the same act or transaction constitutes a violation of two statutory provisions, the test to determine whether there are two offenses or only one is whether each provision requires proof of a fact the other does not. Lynch, 93 Wn. App. at 723-24 (quoting Blockburger, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). This Court engages in a commonsense, rather than mechanical, comparison of elements: Even if the elements facially differ, the court may nonetheless find they encompass the same violative conduct. State v. Hughes, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 2182808 at 3 (July 23, 2009).

A double jeopardy challenge may be raised for the first time on appeal. State v. Durrett, 150 Wn. App. 402, 406, 208 P.3d 1174 (2009). Even if the separate conviction is to be served concurrently, it has potential adverse collateral consequences that may not be ignored and "carries the societal stigma accompanying any criminal conviction." Calle, 125 Wn.2d at 773.

⁵ Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

b. The Statutes Do Not Expressly Authorize Multiple Punishments for the Same Act.

In the first step of a double jeopardy analysis, this Court examines the language of the pertinent statutes to determine if the legislature authorizes multiple punishments for conduct that violates more than one statute. Hughes, 2009 WL 2182808 at 4; Freeman, 153 Wn.2d 771-73. Here, the applicable versions of the identity theft and the second degree theft statutes are silent on this issue. Former RCW 9.35.020 (2004);⁶ former RCW 9A.56.040 (1)(a) (2007);⁷ State v. Baldwin, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003).

⁶ Former RCW 9.35.020 provides in part:

(1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

....

(3) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value that is less than one thousand five hundred dollars in value, or when no credit, money, goods, services, or anything of value is obtained shall constitute identity theft in the second degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

Laws of 2004, ch. 273, § 2.

⁷ Former RCW 9A.56.040(1)(a) provides:

Wash., (2003). Moreover, the Supreme Court's decision in State v. Leyda addresses the proper unit of prosecution under the identity theft statute but does not squarely address the issue in the present case. 157 Wn.2d 335, 138 P.3d 610 (2006).

In contrast, the amended identity theft statute adds the provision, "Every person who, in the commission of identity theft, shall commit any other crime may be punished therefore as well as for the identity theft, and may be prosecuted for each crime separately." Laws of 2008, ch. 207, §4 (eff. June 12, 2008).

The 2008 amendment, however, does not alter this Court's analysis. First, the statute does not apply because it became effective after the date of the crime in the present case. There is no indication the Legislature intended the change as a clarification of existing law. Compare Lynch, 93 Wn. App. at 725-26 (Legislature expressly stated anti-merger clause of malicious

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) two hundred fifty dollars in value but does not exceed one thousand five hundred dollars in value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle

Laws of 2007, ch. 199, § 4.

harassment statute was “clarification of existing law”) with Laws of 2008, ch. 207, § 1⁸ (identity theft statute amended in response to Leyda).

Second, even assuming the amended statute applied, the anti-merger language does not necessarily vitiate a double jeopardy claim because the amendment authorizes punishment for another crime, not the same crime. Because under the means the State relied on, theft acts as an element of identity theft, it should be considered the same, not another, crime. See Lynch, 93 Wn. App. at 725-26 (likening punishment for both fourth degree assault and malicious harassment under assault/injury prong to punishment for both burglary and criminal trespass, which is impermissible

⁸ Laws of 2008, ch. 207 §1 states:

The legislature enacts sections 3 and 4 of this act to expressly reject the interpretation of [Leyda, 157 Wn.2d 335], which holds that the unit of prosecution in identity theft is any one act of either knowingly obtaining, possessing, using, or transferring a single piece of another's identification or financial information, including all subsequent proscribed conduct with that single piece of identification or financial information, when the acts are taken with the requisite intent. The legislature finds that proportionality of punishment requires the need for charging and punishing for obtaining, using, possessing, or transferring any individual person's identification or financial information, with the requisite intent. The legislature specifically intends that each individual who obtains, possesses, uses, or transfers any individual person's identification or financial information, with the requisite intent, be classified separately and punished separately as provided in chapter 9.94A RCW.

notwithstanding the burglary anti-merger clause because the crimes are the same offense).

Because on the date of the offenses, the Legislature expressed no intent to permit multiple punishments for the same act, this Court must engage in the next steps of double jeopardy analysis.

c. Under the Same Evidence Test, Multiple Punishments Violate Double Jeopardy.

This Court next examines whether the same act or transaction constitutes a violation of two statutory provisions. If so, it applies the “same evidence” test to determine legislative intent. Louis, 155 Wn.2d at 569. Milam’s convictions, which were based on a single act, do not survive the same evidence test because only one of the crimes includes an element not included in the other. Lynch, 93 Wn. App. at 724.

Milam was charged with and convicted of second degree theft. CP 28-29. The State was thus required to prove beyond a reasonable doubt that Milam committed (1) theft⁹ (2) of “[p]roperty . . . which exceed[s] [\$250] in value . . . but does not exceed [\$1500] in value.” RCW 9A.56.040; see also CP 61 (instruction 12, court’s “to-convict” instruction).

⁹ The legislature defines theft as “[t]o wrongfully obtain or exert unauthorized control over the property . . . of another . . . with intent to deprive him of such property.” RCW 9A.56.020(1)(a).

Proof of theft of property, money in this case, was also an element of second degree identity theft under the statutory provision the State relied on.

As such, the court instructed the jury:

To convict the defendant of identity theft in the second degree, the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 8th of October, 2007, the defendant knowingly obtained or possessed or used a means of financial information of another person, living or dead;

(2) That the defendant acted with the intent to commit any crime;

(3) *That the defendant used that financial information and obtained an aggregate total of money less than [\$1500.]*

CP 63 (emphasis added); former RCW 9.35.020.

Milam's convictions were based on the same act. A defendant may commit second degree identity theft even "when no credit, money, goods, services, or anything of value is obtained." Leyda, 157 Wn.2d at 341-42 (holding "value" is not an essential element of second degree theft that must be included in charging document). But under the charge here, the State had to prove Milam used financial information to obtain money. CP 63; see id. at 345 (Legislature intended the unit of prosecution under former RCW 9.35.020 to be any one act of either knowingly obtaining, possessing, transferring, or using a single piece of another's identification or financial information); see also Lynch, 93 Wn. App. at 726 (to violate double jeopardy, lesser crime need not be "lesser included" under all means of

committing greater crime); cf. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998) (State assumes the burden of proving the elements contained in the jury instructions). Even where, as here, elements are not facially identical, close consideration may reveal the differences to be illusory. Hughes, 2009 WL 2182808 at 3. Such is the case here.

In summary, a jury found Milam guilty of identity theft based on use of the ATM card and PIN to steal \$360. The jury found Milam guilty of second degree theft based on theft of the same \$360. While the State was required to prove an additional element to prove identity theft, that Milam “knowingly obtained or possessed or used a means of financial information of another person” in the commission of the theft, the second degree theft statute contains no additional element. The pertinent statutory provisions are, therefore, identical in law and in fact. Id. And because the Legislature did not indicate a contrary intent, punishment under both statutes violates double jeopardy. Milam’s second degree theft conviction, the lesser offense, should be vacated. Id. at n. 13.

2. THE COURT ERRED WHEN IT FAILED TO CONSIDER WHETHER TO IMPOSE THE DNA COLLECTION FEE UNDER THE APPLICABLE STATUTE, AND TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

It appears the court imposed the DNA fee under the impression it was “mandatory” while waiving all other non-mandatory fees. 9RP 38-39.

But the fee was not mandatory under the statute in force on the date of the offense. Moreover, any retroactive application of the amended DNA collection statute would violate the constitutional prohibition on ex post facto laws. This Court should, therefore, remand so the court may exercise its discretion in deciding whether to impose the fee based on a correct understanding of the applicable law.

a. The Court's Failure to Exercise Discretion Under the Applicable Statute Requires Reversal and Remand.

An offender may challenge the procedure by which a sentence was imposed. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error). Moreover, 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).

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.”).

Notwithstanding this test, Curry upheld the statute establishing that a VPA must be imposed regardless of the financial resources of the convicted person. Curry, 118 Wn.2d at 917-18. RCW 7.68.035(1) provides, “Whenever any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment.” The court reasoned that statutory safeguards prevented the incarceration based on inability to pay. Curry, 118 Wn.2d at 918.

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).

The version of RCW 43.43.7541 in effect at the time of sentencing 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.” Laws of 2008, ch. 97, § 3 (effective June 12, 2008); see also RCW 9.94A.750 (sentencing court must impose restitution).

But under the version in effect October 8, 2007, the date of Milam’s offenses, the DNA fee was not mandatory. Former RCW 43.43.7541 (2002). That version states the court should impose fee “unless the court finds that imposing the fee would result in undue hardship on the offender. Former RCW 43.43.7541. This is the controlling version because in adopting the 2008 version, the Legislature expressed no intent to contravene the general criminal prosecution saving statute, RCW 10.01.040, which establishes the version in force on the date of the offense is presumed to apply.¹⁰ The saving statute deemed a part of each statute that amends or

¹⁰ 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

repeals an existing penal statute. State v. Ross, 152 Wn.2d 220, 237-38, 95 P.3d 1225 (2004).

The Supreme Court has in two cases found non-explicit, yet arguably express, intent to trump the saving statute. State v. Grant, 89 Wn.2d 678, 682, 575 P.2d 210 (1978); 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). But in each case the statutory amendment at issue contained relatively specific language directing that no prosecutions under an earlier version of a statute should occur. In both cases, moreover, the Court read the language against the State, and thus concerns regarding the constitutional prohibition on ex post facto law were not implicated. U.S. Const. art. 1, § 10, cl. 1; Wash. Const. art. 1, § 23.

While formal findings on the matter are not required, the applicable statute directs the court to consider ability to pay. Former RCW 43.43.7541; Curry, 118 Wn.2d at 916. Failure to do so is an abuse of the trial court's discretion. See Grayson, 154 Wn.2d at 342 (sentencing court's failure to

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.

exercise discretion is reversible error); State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (decision to impose a standard range sentence reviewable for abuse of discretion where court has refused to exercise discretion).

b. Assuming, *Arguendo*, the Legislature Intended to Subvert the Savings Statute, the Amended Statute Alters the Standard of Punishment Without Notice and Therefore Violates the Prohibition on Ex Post Facto Laws.

Milam anticipates the State will argue (as it has previously) the amended statute, enacted after the events in this case transpired, applied at Milam's sentencing. The State's interpretation of the amendment, however, would violate the prohibition on ex post facto laws.

The ex post facto clause is rooted in the right of the individual to fair notice. In re Pers. Restraint of Powell, 117 Wn.2d 175, 184-85, 814 P.2d 635 (1991). In determining whether a statute violates the prohibition, this Court assesses whether the statute "(1) is substantive [or] merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it." Id. at 185. In the criminal context, "disadvantage" means "the statute alters the standard of punishment which existed under the prior law." State v. Schmidt, 143 Wn.2d 658, 673, 23 P.3d 462 (2001). The amendment meets these criteria in that it is a substantive, retrospective change in the law that alters the standard of

punishment: it removes from the sentencing court any discretion to waive the fine based on hardship. Thus, even assuming the Legislature expressed its intent to subvert the saving statute, the resulting retrospective amendment runs afoul of the prohibition on ex post facto laws.

c. Counsel Rendered Ineffective Assistance by Failing to Object to Sentencing Under the Incorrect Statute.

Milam's counsel rendered ineffective assistance in failing to object to the trial court's imposition of the DNA fee, which was not "mandatory" under the controlling statute.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation prejudices the defendant. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is

constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1998).

A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Milam satisfies both prongs of the Strickland test and therefore has demonstrated he received constitutionally ineffective assistance. There was no legitimate reason for counsel to fail to inform the court the applicable version of statute permitted the court to waive the DNA collection fee based on hardship. Counsel is presumed to know applicable statutes favorable to his or her client. See State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel presumed to know court rules). Moreover, there is a reasonable likelihood that counsel's deficient performance affected the outcome because the court waived all other non-mandatory fees based on Milam's indigence.

In summary, this Court should remand this case for resentencing so the court may properly consider Milam's indigence and ability to pay in light of the applicable statutes and, if appropriate, amend the judgment and sentence to eliminate the fee. See State v. Broadaway, 133 Wn.2d 118, 136,

942 P.2d 363 (1997) (on remand, the trial court has the authority to correct a sentence where court was initially mistaken about the controlling law).

D. CONCLUSION

The convictions for second degree identity theft and second degree theft violate double jeopardy and Milam's second degree theft charge should be vacated. Resentencing is also required because the court failed to exercise its discretion when it imposed a non-mandatory DNA collection fee based on the mistaken view the fee was "mandatory.

DATED this 12th day of August, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER

WSBA No. 35220

Office ID. 91051

Attorneys for Appellant