

63078-4

63078-4

REC
AUG 25 2009
King County Prosecutor
Appellate Unit

NO. 63078-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL A. PELTS,

Appellant.

2009 AUG 23 11:03:47
REC'D
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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

The Honorable Jeffrey M. Ramsdell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove every element of the charge beyond a reasonable doubt because the law of the case doctrine required the state to prove there was a transfer of a controlled substance.¹

2. The trial court erred when it imposed a non-mandatory DNA collection fee on the mistaken belief the fee was mandatory.

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

4. The appellant was deprived of effective assistance of counsel at sentencing because counsel failed to object to the court's imposition of the DNA collection fee.

Issues Pertaining to Assignments of Error

1. The state charged the appellant with delivery of an uncontrolled substance in lieu of a controlled substance. But according to the law of the case, "deliver" or "delivery" meant "the actual transfer of a controlled substance." CP 41. By proving the appellant transferred an

¹ A defendant may assign error to elements added under the law of the case doctrine. The assignment of error may include a challenge to the sufficiency of evidence of the added element. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

uncontrolled substance, did the state fail to prove "delivery" according to the law of the case?

2. The trial 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?

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

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

B. STATEMENT OF THE CASE

On a spring day in 2008, a team of Seattle police officers deployed to the Belltown neighborhood and set up an undercover narcotics "buy/bust" operation. 2RP 25-28, 53-55, 3RP 4-6.² As they crossed paths walking down a sidewalk, the disguised "buyer" in the operation asked Pelts if he had crack cocaine. 2RP 28-29. Pelts said yes and after continuing to walk a short distance with the "buyer," produced four small

² The five-volume verbatim report of proceedings is cited as follows: 1RP – 9/17/2008; 2RP – 9/22/2008; 3RP – 9/23/2008; 4RP -- 1/27/2009; 5RP – 2/11/2009.

"bundles," each of which contained suspected crack cocaine. 2RP 30. The "buyer" received the suspected cocaine in exchange for \$40 of prerecorded currency. 2RP 30-32.

After the "buyer" signaled to colleagues he had completed a suspected drug transaction, a member of the "arrest team" arrested Pelts. 2RP 30, 43-44, 50, 53-54, 3RP 4-6. The arresting officer searched Pelts and found bills that matched the prerecorded money used by the "buyer." 2RP 55-60.

One of the four rocks was later analyzed and the substance was found to be consistent with aspirin but not with any controlled substances. 2RP 70-77, 81.

Armed with this evidence, the state charged Pelts with delivering an uncontrolled substance in lieu of a controlled substance. CP 1.³ The trial court gave the jury two instructions pertinent to Pelts's appeal. The first defined the terms "deliver" or "delivery:"

³ RCW 69.50.4012(1) provides:

It is unlawful, except as authorized in this chapter and chapter 69.41 RCW, for any person to offer, arrange, or negotiate for the sale, gift, delivery, dispensing, distribution, or administration of a controlled substance to any person and then sell, give, deliver, dispense, distribute, or administer to that person any other liquid, substance, or material in lieu of such controlled substance.

Deliver or delivery means the actual transfer of *a controlled substance* from one person to another.

CP 41 (instruction nine, attached as Appendix A, emphasis added). The second was the "to-convict" instruction, which in pertinent part required the state to prove the following three elements beyond a reasonable doubt:

(1) That . . . the defendant knowingly offered, arranged, or negotiated for the delivery, sale, distribution or dispensing of a controlled substance;

(2) That the defendant delivered *an uncontrolled substance* in lieu of the controlled substance; and

(3) That the acts occurred in the State of Washington.

CP 43 (instruction 11, attached as Appendix B, emphasis added).

During closing argument, Pelts contended the state failed to sustain its burden of proof because

[u]nder the law, as deliver or delivery is defined, you cannot deliver an uncontrolled substance. It's impossible. It's impossible under this law to commit the crime of arranging or offering or negotiating to deliver a controlled substance and then delivering an uncontrolled substance. You can't do it.

3RP 29. A King County jury disagreed and found Pelts guilty. CP 46.

Pelts moved for arrest of judgment. He argued that as a matter of law, the jury could not find he delivered an uncontrolled substance because instruction nine defined "deliver" or delivery" as the transfer of a

controlled substance. CP 47-50; 3RP 36-38, 4RP 2-4. The trial court denied the motion. 4RP 6-8.

The court imposed a standard range sentence. CP 51-57; 5RP 11. The court also imposed as "mandatory" the \$500 victim's penalty assessment, \$100 DNA collection fee, and nine months to 12 months of community custody. CP 53-55; 5RP 11.

Pelts's counsel agreed with the trial court that it could not waive the DNA fee because of "the way the statute is worded." 5RP 11, 14. But counsel argued the court could waive the sample requirement because Pelts had given a DNA sample in the past as a result of other recent Washington felony convictions. 5RP 11-14. The trial court declined to waive Pelts's obligation to provide a sample. 5RP 15.

C. ARGUMENT

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE APPELLANT DELIVERED A CONTROLLED SUBSTANCE.

Jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d at 102. This rule applies to all instructions, including those that define elements. See, e.g., State v. Braun, 11 Wn. App. 882, 884, 526 P.2d 1230 (1974), review denied, 85 Wn.2d 1001 (1975) (instruction defining "deadly weapon" became law of the case).

In Pelts's case, the trial court gave the jury an instruction defining "deliver" or "delivery" as the transfer of a controlled substance. CP 41.⁴ No one objected to the instruction. This definition of "deliver" or "delivery," which required the transfer of a controlled substance, thus became the law of the case.

Jurors are presumed to give meaning to and follow every instruction given. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001); State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157 (1999). This court must therefore assume the jury in Pelts's case followed both instruction nine and instruction 11. But the instructions are internally inconsistent as to the material element of "deliver:" instruction nine required transfer of a controlled substance, while instruction 11 required transfer of an uncontrolled substance.

In other contexts, Washington courts have found that inconsistent instructions are prejudicial. For example, it is well established instructions that provide inconsistent decisional standards are erroneous and require reversal. Dever v. Fowler, 63 Wn. App. 35, 42, 816 P.2d 1237, 824 P.2d 1237 (1991), review denied, 118 Wn.2d 1028 (1992); Renner v. Nestor, 33 Wn. App. 546, 550, 656 P.2d 533 (1983). Stated another way, our

⁴ WPIC 50.07 is identical.

Supreme Court has held that instructions that are inconsistent or contradictory on a material point are prejudicial because "it is impossible to know what effect they may have on the verdict." Hall v. Corporation of Catholic Archbishop of Seattle, 80 Wn.2d 797, 804, 498 P.2d 844 (1972); accord, State v. Studd, 87 Wn. App. 385, 389, 942 P.2d 985 (1997), reversed on other grounds, 137 Wn.2d 533, 973 P.2d 1049 (1999).

Under this rule, Pelts's case should be reversed. Instruction 11, the "to-convict" instruction, uses the terms "delivery" and "delivered" in two of the three elements of the offense. The first element required proof that Pelts "knowingly offered, arranged, or negotiated for the *delivery*, sale, distribution or dispensing of a controlled substance[.]" CP 43 (emphasis added). This use of the term in the "to-convict" instruction is not inconsistent with the definition of "delivery" in instruction nine because the "to-convict" element went to the "inducement" element of the offense; i.e., the representation that the bargained for substance is controlled. This is so because if a seller offers, arranges, or negotiates for the delivery of an uncontrolled substance and then delivers same, he has not committed a crime. State v. Lauterbach, 33 Wn. App. 161, 165, 653 P.2d 1320 (1982), review denied, 98 Wn.2d 1013 (1983).

The second element, however, uses "delivered" in the following manner: "That the defendant delivered an uncontrolled substance in lieu of a controlled substance[.]" CP 43. Herein lies the inconsistency: If "deliver" means "the actual transfer of a controlled substance," how can a jury that gives equal weight to every instruction have found that Pelts "delivered," i.e., "transferred" an uncontrolled substance?

The trial court resolved this question by concluding the jury applied instruction nine's definition to the term "delivery" in the "inducement" element and "ignored it" with respect to the term "delivered" in the second element. 4RP 8. Although a convenient and useful way to explain away the problem, this Court cannot condone the trial court's approach. A court may not presume the jury ignored an instruction because this would indicate a belief "the jury is wayward and unintelligent [which] casts our entire system of justice into doubt." Adkins v. Aluminum Co. of America, 110 Wn.2d 128, 157, 750 P.2d 1257, 756 P.2d 142 (1988). As our Supreme Court observed long ago:

[W]e must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and, if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.

State v. Pepoon, 62 Wash. 635, 644, 114 P. 449 (1911).

So as not to make a farce of Pelts's constitutional right to a jury trial, this Court must give meaning to each instruction. Under the instructions, "deliver" means the transfer of a controlled substance. Because this definition became the law of the case, it became necessary for the state to prove there was such a delivery. But the state did not prove Pelts delivered a controlled substance. As a result, the state did not sustain its burden of proof. This Court should therefore reverse Pelts's judgment and remand for dismissal with prejudice. State v. Nam, 136 Wn. App. 698, 707, 150 P.3d 617 (2007).

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.

The trial court imposed the \$100 DNA fee under the mistaken belief the fee assessment was mandatory. 5RP 11. Pelts's counsel unfortunately agreed the trial court could not waive the DNA fee because of "the way the statute is worded." 5RP 11, 14. But both the court and counsel were considering the wrong version of the statute. 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 trial court may exercise its discretion in deciding whether to impose the DNA fee based on a correct understanding of pertinent 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 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).

But under the version in effect May 14, 2008, the date of Pelts's offenses, the DNA fee was not mandatory. Former RCW 43.43.7541 (2002). That version states the court should impose a fee "unless the court finds that imposing the fee would result in undue hardship on the offender." Former RCW 43.43.7541.

The former statute controls in Pelts's case. When the Legislature amends a criminal or penal statute, its pre-amendment version applies to crimes committed before the amendment's effective date, unless a contrary intention is fairly conveyed in the amendatory action. RCW 10.01.040; 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); State v. Toney, 103 Wn. App. 862, 864, 14 P.3d 826 (2000). The Legislature gave no indication at the time it amended the DNA fee statute that it had retroactive effect. Absent such intent, the former statute applied to Pelts.

That statute directed the court to consider an offender's ability to pay. Former RCW 43.43.7541; Curry, 118 Wn.2d at 916. Failing to so consider ability to pay is an abuse of the trial court's discretion. See Grayson, 154 Wn.2d at 342 (sentencing court's failure to 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 for Argument 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.

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

In determining whether a statute violates the prohibition, this Court assesses whether the statute (1) is substantive rather than simply procedural; (2) is retrospective in that it applies to events that happened before its enactment); and (3) disadvantages the affected person. In re Personal Restraint of Powell, 117 Wn.2d 175, 184-85, 814 P.2d 635 (1991). In the criminal context, "disadvantage" means "the statute

changes the standard of punishment that existed under the former law. State v. Schmidt, 143 Wn.2d 658, 673, 23 P.3d 462 (2001).

The DNA collection fee amendment meets these criteria. The amendment is a substantive, retrospective change in the law that alters the standard of punishment by removing 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 was Ineffective for Failing to Object to Sentencing Under the Incorrect Statute.

Pelts's counsel was ineffective for failing to object to the trial court's imposition of the DNA fee because it was not "mandatory" under the controlling statute.

The Sixth Amendment and article 1, section 22 guarantee the right to effective representation. 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 is deficient when his performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). 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 (1995). Prejudice exists where, but for the deficient performance, there is a reasonable probability the result would have been different. State v. B.J.S., 140 Wn. App. 91, 100, 169 P.3d 34 (2007).

Pelts' satisfies both prongs of the Strickland test. First, 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). Second, there was no legitimate tactical reason for counsel to stand mute while the trial judge imposed a \$100 fee without first considering Pelts's ability to pay. Moreover, there is a reasonable likelihood counsel's deficient performance affected the outcome because the court waived all other non-mandatory fees.

This Court should remand for resentencing so the court may properly consider Pelts's indigence and ability to pay in light of the applicable statute and, if appropriate, amend the judgment and sentence to

eliminate the fee. See State v. Broadway, 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).

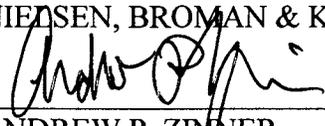
D. CONCLUSION

The state failed to prove each element of the charge beyond a reasonable doubt because it did not prove Pelts delivered a controlled substance. This Court should reverse Pelts's conviction and remand for dismissal with prejudice. Alternatively, the trial court also failed to exercise its discretion when it imposed a non-mandatory DNA collection fee based on the mistaken view the fee was "mandatory." Trial counsel rendered ineffective assistance for failing to object to the fee. This Court should thus remand for resentencing to allow the court to properly exercise its discretion in determining whether to impose the \$100 DNA fee.

DATED this 25 day of August, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

APPENDIX A

No. 9

Deliver or delivery means the actual transfer of a controlled substance from one person to another.

APPENDIX B

No. 11

To convict the defendant of the crime of delivery of a material in lieu of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 14th day of May, 2008, the defendant knowingly offered, arranged or negotiated for the delivery, sale, distribution or dispensing of a controlled substance;

(2) That the defendant delivered an uncontrolled substance in lieu of the controlled substance; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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

| | | |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 63078-4-I |
| |) | |
| PAUL A. PELTS, |) | |
| |) | |
| Appellant. |) | |

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 25TH DAY OF AUGUST, 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] PAUL A. PELTS
DOC NO. 832830
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

2009 AUG 25 11:3:47
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF AUGUST, 2009.

x Patrick Mayovsky