

62474-1

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NO. 62474-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM J. CLARK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Whether the State must concede that the sentencing court erred in refusing to consider, as a possible basis for an exceptional sentence below the standard range, the victim's participation in the violation of a no contact order?

2. Whether the trial court correctly imposed the \$100 DNA collection fee that became mandatory after the date the crime was committed in this case?

II. OVERVIEW

The defendant, William Clark, was found guilty of domestic violence felony violation of a no contact order. At sentencing, Clark requested an exceptional sentence below the standard range on the grounds that “[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.” RCW 9.94A.535(1)(a). The court denied this request based on the belief that the victim's participation in the no contact order violation could not legally serve as a basis for an exceptional sentence downward.

Subsequently, State v. Bunker¹ has established that a victim's willing participation in the violation of a no contact order may justify (but does not require) an exceptional sentence below the standard range. Without agreeing that an exceptional sentence downward is appropriate in this case, the State concedes that remand for resentencing is required.

Clark also argues that the sentencing court erred in imposing a \$100 DNA collection fee. By recent amendment, the DNA collection fee has been made mandatory for felony no contact order violations. The legislature has made it clear that the application of the DNA collection fee is to be retroactively applied to crimes committed before the adoption of the amended statute. The sentencing court properly imposed the \$100 DNA collection fee.

III. STATEMENT OF THE CASE

A. PROCEDURAL FACTS

William Clark was charged by amended information with one count of a domestic violence felony violation of a no contact order. CP 12. After a bench trial, Clark was found guilty as charged. CP 13-14, 26-28. At sentencing, Clark requested an exceptional

¹ 144 Wn. App. 407, 421, 183 P.3d 1086 (2008), review granted on other grounds, 165 Wn.2d 1003 (2008).

sentence below the standard range. CP 58-72; RP 118-20. The sentencing court denied this request and imposed a standard range sentence. CP 17-20; RP 119-32. With no objection, the court imposed a \$100 DNA fee, which it found was mandatory. CP 19; RP 132.

B. SUBSTANTIVE FACTS

On February 26, 2008, Tukwila District Court issued a no contact order barring the defendant, William Clark (“Clark”), from coming within 500 feet of Kimberly Kurtz (“Kurtz”). This no contact order remained in affect on April 18, 2008. See Trial Exhibit 9.

Erin Enemark (“Enemark”) lived in the Newport Heights Apartment Complex across from Kurtz. RP 67-71. Before April 18, 2008, she had often seen Clark and Kurtz together. RP 73. She had seen Clark “interact physically” with Kurtz. She sometimes saw Clark and Kurtz screaming at each other. RP 73-74. Enemark had also seen Clark “chasing after [Kurtz] and trying to pull her out of her car when she was running a way and screaming at him.” RP 72-73. Enemark had called the police almost a dozen times over the course of the prior year due to the interactions between Clark and Kurtz. RP 62, 71, 73.

On April 18, 2008, Enemark heard Clark and Kurtz screaming at each other and again called 911. RP 73-74. Officers Rossi and DeVries responded to the scene. RP 49-50, 73-75, 82. Officer Rossi found Clark sitting in a car in the parking lot below Kurtz's apartment. RP 55, 83-84. Officer DeVries spoke with Kurtz in her apartment.² RP 51-57. He testified that Kurtz "looked like she had been crying, just very shaken, angry at the same time." RP 58. Kurtz had visible swelling on her lower left lip. RP 58.

The officers arrested Clark. As Clark was taken away, Kurtz screamed and yelled at him. RP 59-60, 85-86. The officers confirmed the existence of a domestic violence no-contact order naming Clark as the defendant and Kurtz as the protected person. RP 61-63, 88. Officer Rossi also verified that there was no other William Joseph Clark in their database. RP 88.

The parties stipulated that prior to April 18, 2008, Clark had twice been convicted for violating a no-contact order. RP 15-16.

The trial court found Clark guilty as charged and entered written findings of fact and conclusions of law to that effect. RP 104-09; CP 26-31.

² Kurtz did not testify. Her identity was confirmed by Officer DeVries, Officer Rossi, and Enemark after viewing a DOL photograph. RP 57, 71, 86.

IV. ARGUMENT

A. **THE STATE CONCEDES REMAND FOR RESENTENCING IS REQUIRED FOR THE CONSIDERATION OF A MITIGATING FACTOR.**

Clark contends that the sentencing court erred in concluding that a victim's participation in the violation of a no contact order may never serve as the basis for an exceptional sentence below the standard range. Since sentencing in this case, this issue has subsequently been resolved by State v. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008), review granted on other grounds, 165 Wn.2d 1003 (2008), which held that a victim's acquiescence in a no contact order violation may, but does not necessarily, justify an exceptional sentence below the standard range. The State concedes that pursuant to Bunker remand for resentencing is required so that the sentencing court may consider this statutory mitigating factor.

Clark sought a sentence below the standard range. RP 118-20. Clark relied on the statutory mitigating factor which provides that the sentencing court may impose an exceptional sentence below the standard range if: "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a).

The trial court denied this request, reasoning that the victim's participation could not serve as a legal basis to reduce the sentence because the no contact order statute provides that the victim may not waive the authority of a no contact order.

RP 119-20. The court stated in part:

. . . I'm not going to grant [the motion] based on [the fact that the victim was a willing participant]. And the reason for that is that in a domestic violence no contact order – Violation of No Contact Order cases, the No Contact Order specifically says the person protected or the victim cannot waive the order.

RP 119. The court stated that it believed that to allow a victim's participation to serve as a basis for an exceptional sentence downward would be contrary to legislative intent. RP 119-20.

The analysis of the sentencing court in this case has subsequently been rejected by the Court of Appeals in State v. Bunker. In Bunker, the defendant also sought a sentence below the standard range based on the victim's alleged participation in a no contact order violation. The Court of Appeals, in reversing the trial court's refusal to consider this mitigating factor, stated:

The trial court erroneously concluded that it did not have the discretion to consider this mitigating factor. "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually

considered.” State v. Grayson, 154 Wash.2d 333, 342, 111 P.3d 1183 (2005). A trial court's erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is itself an abuse of discretion warranting remand. State v. Garcia-Martinez, 88 Wash.App. 322, 329-30, 944 P.2d 1104 (1997).

While there is, of course, no requirement that the trial court actually impose a mitigated exceptional sentence, we remand Bunker's cause for resentencing to enable the trial court to exercise its discretion in determining whether an exceptional sentence is warranted.

Bunker, 144 Wn. App. at 421.

The State accepts the reasoning of Bunker and agrees that it applies to the facts of this case. Remand for resentencing is appropriate. As the Court in Bunker made clear, at resentencing there is no requirement that the sentencing court actually impose a sentence below the standard range. Whether or not to impose such an alternative, however, must actually be considered by the sentencing court.

B. THE SENTENCING COURT APPROPRIATELY IMPOSED THE \$100 DNA COLLECTION FEE.

Clark contends that the \$100 DNA collection fee is not mandatory, and therefore either the trial court improperly sentenced him believing the fee was mandatory, or his trial counsel was ineffective for failing to argue the fee was not mandatory. This

argument fails because, in adopting recent amendments making the DNA fee mandatory, the legislature made clear that the fee was to be applied retroactively.

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).³ 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 sentenced on October 9, 2008. CP 19.

Clark asserts that because he committed his crime on April 18, 2008, a former version of RCW 43.43.7541 is controlling. Under this former version, the trial court had the discretion to waive the DNA collection fee.⁴ The former version 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

³ Pursuant to RCW 43.43.754, DNA samples must be taken from: "Every adult or juvenile individual convicted of a felony. . ."

⁴ In imposing the fee in this case, the court stated, "There is. . . a \$100 mandatory DNA fee." RP 132.

court finds that imposing the fee would result in undue hardship on the offender.

Former RCW 43.43.7541 (2002 c 289 § 4).

Clark claims that pursuant to a savings clause set forth in RCW 10.01.040, the former version of RCW 43.43.7541 applies to his case. 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 effect on the date a crime is committed controls unless the amended or new statute declares otherwise.

See, e.g., 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.” Kane, 101 Wn. App. at 612-13. Rather, such intent need only be expressed in “words that fairly convey that intention.” Id. 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).

For example, in Zornes, the Supreme Court held that newly enacted drug laws controlled both pending and future criminal cases. The particular amendment to the drug statute stated that “the provisions of this chapter 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.

Likewise, in Grant, a new statute provided that “intoxicated persons may not be subjected to criminal prosecution solely

Wn.2d at 682. The Court held that this new statute applied to pending cases, finding that the language of the statute fairly expressed the legislative intent to avoid the savings statute default rule. Grant, at 684.

In the present case, even assuming the savings statute applies,⁵ 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 former version of RCW 43.43.7541, 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 demonstrates 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

⁵ RCW 10.01.040 applies to criminal penal statutes. State v. Toney, 103 Wn. App. 862, 864-65, 14 P.3d 826 (2000). The statute applies only to substantive changes in the law. State v. McNeal, 142 Wn. App. 777, 793-94, 175 P.3d 1139 (2008) (citing State v. Pillatos, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007)). The amount of the DNA collection fee has remained the same since 2002. The amendment to the statute pertains only to the possibility of waiving the fee. This is not a criminal penal amendment affecting a substantive right.

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 with the statute's text).

In addition, the amended statute specifically states that 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).⁶

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

⁶ 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.”).

43.43.754 expanded the crimes for which a DNA sample was 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 RCW 43.43.754(1) (2002 c 289 § 2).

Thus, the legislature has made it clear that RCW 43.43.7541 and RCW 43.43.754 apply to crimes committed both before and after June 12, 2008. The trial court properly imposed the mandatory DNA collection fee.

V. CONCLUSION

This case should be remanded for a resentencing so that the sentencing court may decide whether or not to impose an exceptional sentence below the standard range pursuant to RCW 9.94A.535(1)(a). To avoid further appellate litigation, the

State requests that the Court remand with direction that the imposition of the \$100 DNA collection fee is mandatory.

DATED this 17th day of July, 2009.

Respectfully submitted,

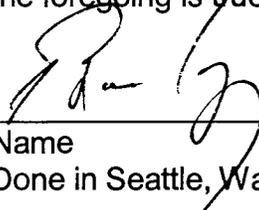
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to ANDREW ZINNER, 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. WILLIAM CLARK, Cause No. 62474-1-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.



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Done in Seattle, Washington

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