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OCT 20 2009

King County Prosecutor
Appellate Unit

NO. 62968-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

LINKON BROWN,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Deborah Fleck, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY¹

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING PREJUDICIAL NONVERBAL HEARSAY OVER BROWN'S IN LIMINE OBJECTION.

Brown asserts the trial court committed reversible error by denying an in limine motion and permitting an undercover police officer to testify about a suspected prostitute's conduct because it constituted nonverbal hearsay. Brief of Appellant (BOA) at 19-25. The state contends Brown waived the hearsay argument on appeal by failing to renew his objection during the officer's trial testimony. Brief of Respondent (BOR) at 16-17. Because the pretrial objection sufficiently preserved the issue, Brown urges this Court to reject the state's argument.

Brown's co-defendant made the motion in limine to exclude the officer's hearsay testimony and presented most of the argument. 1RP 325-29, 376-83. When the co-defendant's counsel accepted the state's limitation of testimony, Brown's counsel stepped in. Counsel specifically raised the objection made on appeal, that the conduct at issue constituted nonverbal hearsay under ER 801(a). 1RP 382-84. Co-defendant's counsel quickly adopted the argument and withdrew his own. 1RP 384.

¹ Brown stands on the Brief of Appellant with respect to the first argument, regarding alternative means, and adds nothing more here.

The trial court disagreed with Brown's counsel, ruling the conduct "was not some form of nonverbal conduct intended as an assertion." 1RP 385. Brown's counsel replied to the state's argument, which the court had already accepted, and urged the court to reconsider. 1RP 386-87. The court declined. The court held the officer could describe the actions of the purported prostitute, "and that will not be objectionable under motion 12 as a statement." 1RP 387.

Where a party moves in limine to exclude evidence and the trial court makes a final ruling denying the motion, the party is deemed to have a standing objection to the evidence. State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995); State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007), review denied, 163 Wn.2d 1045 (2008). This rule furthers the purpose of a motion in limine, which is to eliminate the need for a contemporaneous objection at trial. Powell, 126 Wn.2d at 256. The rule applies unless the trial court indicates that further objections are required. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984); State v. Asaeli, 150 Wn. App. 543, 587, 208 P.3d 1136 (2009).

The state cites State v. Clark² in support of its contention Brown waived the hearsay objection. BOR at 16. The trial court in Clark held a

² 91 Wn. App. 69, 954 P.2d 956, aff'd., 139 Wn.2d (1999).

pretrial child hearsay hearing in a molestation case. The court then found admissible the child's statements describing Clark's alleged sexual misconduct to school officials and a state's child interviewer. Clark, 91 Wn. App. at 71-74. The parties believed the child would testify at trial about the molestations. Clark, 91 Wn. App. at 74. But this did not happen; instead, the child testified that she lied by accusing Clark of wrongdoing because she was angry with him and wanted to get him in trouble. Clark, 91 Wn. App. at 74. Clark did not object to admission of the child's earlier accusations through the child interviewer's testimony. Clark, 91 Wn. App. at 74.

On appeal, Clark maintained the child's statements to the interviewer should not have been admitted because the child did not "testify" as contemplated by the child hearsay statute. Clark, 91 Wn. App. at 75. The court concluded Clark waived the issue because he did not object to the testimony at trial, did not move to strike the evidence, and did not request a limiting instruction. Clark, 91 Wn. App. at 75-76.

This holding makes perfect sense. Clark's contention on appeal relied on an evidentiary development – the child's recantation – that was unforeseen at the time the trial court made its pretrial rulings. The first opportunity for Clark to object on the new ground presented itself during trial. The holding in Clark is consistent with the well-established rule

against objecting on one ground at trial and another one on appeal. See State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) ("A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial."), cert. denied, 475 U.S. 1020 (1986); State v. Price, 126 Wn. App. 617, 637, 109 P.3d 27 (2005) ("A party who objects to the admission of evidence on one ground at trial may not on appeal assert a different ground for excluding that evidence."), review denied, 155 Wn.2d 1018 (2005); State v. Kendrick, 47 Wn. App. 620, 634, 736 P.2d 1079 ("relevancy objection is insufficient to preserve appellate review based on ER 404(b)"), review denied, 108 Wn.2d 1024 (1987).

Brown's case is not like Clark. The issue he raises on appeal is the specific one he raised in limine in the trial court. The trial court addressed and rejected the specific issue raised. Brown preserved the issue.

The state also relies on Sturgeon v. Celotex Corp.³ BOR at 16. Sturgeon is readily distinguishable. In response to Celotex's broad, nonspecific motion in limine, the trial court merely commented, "Well, just stating it rather briefly, defendant's motion in limine would be denied." Sturgeon, 52 Wn. App. at 619-20. This Court held Celotex's failure to contemporaneously object to the admission of the evidence at trial waived the issue because

³ 52 Wn. App. 609, 762 P.2d 1156 (1988).

the circumstances surrounding the trial court's ruling on Celotex's motion in limine properly placed the court's ruling in the category of a tentative or advisory ruling. The court made no statement that would suggest that the court was making a final, definitive ruling upon which the parties could rely. The motion was so broad in scope and discussed the evidence to be excluded in such a general way as to implicitly suggest to the trial judge the likelihood of error if he tried to make a definitive, final ruling before hearing any of the testimony in the case. Thus, the circumstances make it likely that the trial judge was saying no more than that the motion in limine was being denied at that time.

Sturgeon, 52 Wn. App. at 623.

In contrast, Brown's in limine objection was narrowly focused and mirrors the argument raised on appeal. In addition, the trial court specifically discussed and rejected Brown's claim, finding the conduct at issue did not constitute a nonverbal assertion. Unlike in Sturgeon, the court's ruling cannot be reasonably characterized as tentative or advisory. Sturgeon thus does not further the state's cause.

To summarize, Brown did not waive his challenge to the trial court's admission of nonverbal hearsay. The cases upon which the state relies are distinguishable. This Court should address the merits of Brown's argument, find the trial court erred, reverse Brown's conviction, and remand for retrial with an order prohibiting admission of the nonverbal hearsay.

2. THE APPLICABLE DNA COLLECTION FEE STATUTE IS THE STATUTE IN EFFECT ON THE DATE OF THE OFFENSE.

The state maintains the language of the amended DNA collection statute, RCW 43.43.7541, constitutes express intent to subvert the saving statute and render the amendment retroactive. BOR at 23-27. Because the facts and the law do not support the state's claim, this Court should reject it. Moreover, the SRA is consistent with the saving statute and likewise prohibits application of the amended statute.

a. The State's Argument is Inconsistent with the Saving Clause and the Sentencing Reform Act (SRA).

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

The statute is read into every repealing statute as if expressly inserted therein, thereby obviating the need to include an individual saving clause in each amending or repealing statute. State v. Ross, 152 Wn.2d 220, 237-38, 95 P.3d 1225 (2004).

To avoid application of the clause, however, the Legislature need not explicitly state its intent that an amendment apply retroactively. Ross,

152 Wn.2d at 238. Instead, the 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 earlier 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 that stated "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 provided:

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” 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. Grant, 89 Wn.2d at 684-85.

In contrast, the current version of RCW 43.43.7541 contains no similar expression of intent. The state nevertheless 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 22, 25-27.

The state's reliance on this language overlooks the identical language found original version of the statute. Former RCW 43.43.7541 (2002); Laws of 2002, ch. 289, § 4. In effect, the state is asking this Court to find express legislative intent to subvert the saving statute in the same language contained in the first 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 25. The original was a new statute and therefore required clarification of its effective date. 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. Ross, 152 Wn.2d at 237-38.

In addition, consistent with the saving statute, RCW 9.94A.345 states, “Any sentence imposed under this chapter [the SRA] shall be determined in accordance with the law in effect when the current offense was committed.” That RCW 43.43.7541 refers to the same chapter in the phrase “every sentence imposed under chapter 9.94A RCW” makes clear that the fine is part of an SRA sentence and thus subject to RCW 9.94A.345.

b. The Savings Statute Applies Because The Amendment is not Merely a Procedural Change.

The saving clause applies to all repealed criminal and penal statutes. State v. Fenter, 89 Wn.2d 57, 61, 569 P.2d 67 (1977). It saves the substantive, but not procedural, rights and liabilities of a repealed statute. State v. Hodgson, 108 Wn.2d 662, 740 P.2d 848 (1987) (saving clause did not apply to extension of statute of limitations, which is a procedural change), cert. denied sub nom Fied v. Washington, 485 U.S. 938 (1988); see also State v. Pillatos, 159 Wn.2d 459, 470-72, 150 P.3d

1130 (2007) (shifting from court to juries the responsibility for finding sentencing aggravators was a mere procedural change).

Complete removal of a court's sentencing discretion, however, does not constitute a mere procedural change. See Lindsey v. Washington, 301 U.S. 397, 400-02, 57 S. Ct. 797, 81 L. Ed. 1182 (1937) (Washington statute removing court's discretion and making mandatory what was previously a maximum sentence "substantive" change and therefore violated prohibition on ex post facto laws); State v. Theriot, 782 So.2d 1078, 1086-87 (La. Ct. App. 2001) (retroactive application of law making mandatory a previously discretionary fine for driving while intoxicated violates prohibition on ex post facto laws under U.S. Const. art. 1, § 10, cl. 1 and state constitution; such change in law does not evade ex post facto scrutiny simply by being labeled procedural). Because RCW 43.43.7541 constitutes a substantive change, the savings statute applies.

c. The Case Law Cited by the State Related to the Victim Penalty Assessment Undercuts the State's Argument as to the Fine in this Case.

Citing State v. Humphrey,⁴ the state also argues that earlier case law relating to an increase in the Victim Penalty Assessment (VPA)

⁴ 91 Wn. App. 677, 959 P.2d 681 (1998), rev'd., 139 Wn.2d 53, 983 P.2d 1118 (1999).

supports its claim the 2008 amendment to the DNA fee statute should be applied retroactively. BOR at 28-29. Brown disagrees.

In Humphrey, a divided panel of this Court held a statutory amendment increasing the VPA from \$100 to \$500 applied to offenses committed before effective date of the amendment. Humphrey, 91 Wn. App. 677.

The Supreme Court reversed, holding (1) statutory amendments are presumed to apply prospectively and (2) applying the amended statute to an offense committed before enactment of the amendment changed the legal consequences of the offense and was therefore an impermissible retrospective application. Humphrey, 139 Wn.2d at 57, 60-63.

As the State implicitly acknowledges, this amendment is analogous to the VPA increase discussed in Humphrey. BOR at 28-29. Thus, under the Humphrey rationale, application of the 2008 amendment to RCW 43.43.7541 is likewise an impermissible retroactive application.

d. The Saving Statute Applies Because the DNA Fine Constitutes a Penalty or Forfeiture.

The Humphrey Court also observed the VPA constituted a “liability,” but not “punishment,” for purposes of ex post facto analysis. The Court’s statement should not affect this Court’s analysis in Brown's case for two reasons.

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).

In Humphrey, the Supreme Court stated the increased obligation did not apply retroactively because a statute that creates a new liability or imposes a penalty will not be interpreted to apply retroactively. 139 Wn.2d at 62 (citing Johnston v. Beneficial Management Corp., 85 Wn.2d 637, 642, 538 P.2d 510 (1975)). In a footnote, the court then noted that “liability” under the VPA did not constitute punishment for purposes of ex post facto analysis. Humphrey, 139 Wn.2d at 62 n. 1.

The court’s comments are dicta, however, because it expressly stated it was reversing on other grounds and thus would not reach an ex post facto analysis. Humphrey, 139 Wn.2d 63. See State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003) (where court of appeals reversed on separate issue, its discussion of another issue likely to arise on remand was

dicta); In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) ("Dicta is language not necessary to the decision in a particular case."). Dicta have no precedential value. Bauer v. State Employment Sec. Dept., 126 Wn. App. 468, 475 n.3, 108 P.3d 1240 (2005).

Even if the fine does not constitute punishment for purposes of the ex post facto clause, however, it does constitute a "penalty or forfeiture" under the saving statute. RCW 10.01.040.

Unambiguous statutes must be applied based on their plain language. State v. Hall, 112 Wn. App. 164, 167, 48 P.3d 350 (2002). The legislature has not defined "forfeiture" or "penalty" for purposes of RCW 10.01.040. Nonetheless, courts routinely resort to dictionary definitions for guidance when faced with undefined statutory terms. State v. Christensen, 153 Wn.2d 186, 195, 102 P.3d 789, 793 (2004). Black's Law Dictionary defines "forfeiture" as "the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." Alternatively, it defines "forfeiture as "[s]omething ([especially] money or property) lost or confiscated by this process, a penalty." Black's Law Dictionary 661 (7th ed. 1999). Forfeiture may be civil or criminal. Id.

The \$100 fine, whether or not considered "punishment" for purposes of ex post facto analysis, constitutes a loss of property imposed based on commission of a crime and is thus a forfeiture. Because the fine

falls under the “penalty or forfeiture” language of the saving statute, that statute “saves” the pre-amendment version of the RCW 43.43.7541.

Again, this Court should remand this case for resentencing so the court may properly consider Brown’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).

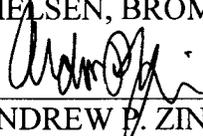
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, Webb requests this Court to reverse the trial court’s denial of Webb’s motion to suppress evidence and remand for dismissal of counts one through four with prejudice.

DATED this 20 day of October, 2009.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62968-9-1
)	
LINKON C. BROWN,)	
)	
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 20TH DAY OF OCTOBER, 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] LINKON C. BROWN
3596 TACOMA AVENUE S.
TACOMA, WA 98418

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF OCTOBER, 2009.

x *Patrick Mayovsky*