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61996-9

NO. 61996-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JORGE A. CRESPO-ORTIZ,

Appellant.

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REC'D  
JUL 15 2009  
King County Prosecutor  
Appellate Unit

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 JUL 15 PM 3:48

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

The Honorable Catherine Shaffer, Judge

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REPLY BRIEF

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A. ISSUE IN REPLY

Did the sentencing court err when it failed to exercise its discretion under the version of the DNA collection fee statute in effect on the date of Jorge Crespo-Ortiz's offense?<sup>1</sup>

B. ARGUMENT IN REPLY

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

The State claims the language of the amended DNA collection fee statute constitutes an express intent to subvert the saving statute and render the amendment retroactive. Brief of Respondent (BOR) at 11-17. Neither the facts nor the law support the State's claim.

*1. The Amendatory Language Does Not Indicate a Legislative Intent to Subvert The Saving Statute.*

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Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such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 provision becomes part of every repealing statute as if expressly inserted therein, thus rendering unnecessary the incorporation of an individual saving clause in each statute that changes an existing

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<sup>1</sup> Crespo-Ortiz raised two other issues in the Brief of Appellant. He rests on that brief in support of those arguments.

criminal law. State v. Ross, 152 Wn.2d 220, 237, 95 P.3d 1225 (2004); see State v. Toney, 103 Wn. App. 862, 864, 14 P.3d 826 (2000) (unless the legislature shows contrary intent, a statute's pre-amendment version applies to an offense committed before the amendment's effective date).

To avoid application of the saving clause, however, the Legislature need not explicitly state its intent that an amendment apply retroactively. Such intent instead may be indicated by words that fairly communicate that message. State v. Kane, 101 Wn. App. 607, 612, 5 P.3d 741 (2000).

Courts should broadly interpret the phrase "unless a contrary intention is expressly declared" in the saving statute. 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 the first case, the Court reversed and dismissed defendants' convictions under the Uniform Narcotic Drug Act for possession of marijuana. State v. Zornes, 78 Wn.2d 9, 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). While the appeals were pending, the Legislature amended the Act to provide that "the provisions of this chapter shall not ever be applicable to any form of cannabis." Zornes, 78 Wn.2d at 11. From the words "not ever," the Court found it could be reasonably

inferred the Legislature intended the amendment to apply to pending cases as well as charges filed after the change. Zornes, 78 Wn.2d at 13-14, 26.

The case involved a new act that prohibited the state from prosecuting intoxicated persons for various crimes solely because they consumed alcohol. State v. Grant, 89 Wn.2d 678, 682, 575 P.2d 210 (1978). In pertinent part, the act 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).

(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” expressed a legislative intent that no person go to trial on such a charge after the effective date of the act even if the alleged crime occurred before that date. This language was sufficient to overcome

the presumptive application of the saving statute. Grant, 89 Wn.2d at 684-85. The Court also noted the statute was remedial and must be construed liberally and, moreover, that ambiguities in criminal statutes must be resolved in favor of the accused. Grant, 89 Wn.2d at 685.

The State 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 15-16.

The state relies on language that appeared in the original version of the statute. Former RCW 43.43.7541 (2002); Laws of 2002, ch. 289, § 4. In effect, the State asks this Court to find the Legislature intended to subvert the saving statute by using the same language it used in the original statute, in which the Legislature could have had no such intention. This is an unreasonable reading of the statute; when closely related provisions use the same word or words, this Court presumes the same meaning. State v. Walker, 101 Wn. App. 1, 7, 999 P.2d 1296 (2000).

Moreover, it is of no moment the original version of the DNA fee statute stated it applied to offenses “committed on or after July 1, 2002.” BOR at 15. The original was a new statute and therefore required clarification of the 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.

Finally, citing cases addressing Blakely-fix sentencing legislation, the State suggests in a footnote that the amendment eliminating the hardship exception to liability for the DNA collection penalty is merely procedural and therefore RCW 10.01.040 — and presumably the constitutional prohibition on ex post facto laws — do not apply. BOR at 14 n. 6. This Court should reject the argument not only because it lacks substance but also because it appears in a footnote. Kane, 101 Wn. App. at 613 (statutes establishing penalty for criminal offenses are subject to the saving statute); State v. Johnson, 69 Wn. App. 189, 194 n. 4, 847 P.2d 960 (1993) (placing an argument in a footnote is, at best, ambiguous or equivocal and this court may decline to address an argument presented in this fashion).

2. *The State's Interpretation Violates The Ex Post Facto Doctrine.*

The ex post facto clause is rooted in the right to fair notice. In re Personal 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 rather than simply procedural; (2) is retrospective in that it applies to events that happened before its enactment); and (3) disadvantages the affected person. Powell, 117 Wn.2d at 185. "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 is a substantive, retrospective change in the law. The 2008 version of the statute also altered 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. CONCLUSION

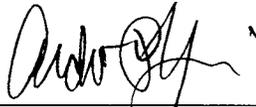
For the reasons cited herein and in the Brief of Appellant, Crespo-Ortiz contends the trial court's prohibition on physical contact between Crespo-Ortiz and his child for life violated Crespo-Ortiz's fundamental right to the care and custody of his child. The court also exceeded its statutory sentencing authority by (1) ordering Crespo-Ortiz to undergo a substance abuse evaluation and to follow resulting treatment recommendations when the evidence established only that alcohol, not

controlled substances, played a role in the offense and (2) imposing a \$100 DNA collection fee without first determining whether the fee would cause financial hardship. Alternatively, trial counsel was ineffective for failing to point out to the court it was not required by statute to impose the DNA fee. This Court should reverse the sentence and remand for vacation of the challenged conditions and reconsideration of the DNA fee under the applicable law.

DATED this 15 day of July, 2007.

Respectfully submitted,

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DIVISION I

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STATE OF WASHINGTON,	)	
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Respondent,	)	
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v.	)	COA NO. 61996-9-I
	)	
JORGE CRESPO-ORTIZ,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15<sup>TH</sup> DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JORGE CRESPO-ORTIZ  
DOC NO. 319397  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST DRIVE  
CLALLAM BAY, WA 98326

**SIGNED** IN SEATTLE WASHINGTON, THIS 15<sup>TH</sup> DAY OF JULY, 2009.

x *Patrick Mayovsky*