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AUG 14 2009

KING COUNTY PROSECUTOR
APPELLATE UNIT

NO. 62474-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM J. CLARK,

Appellant.

2009 AUG 14 PM 3:41
STATE OF WASHINGTON
CLERK OF COURT

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

The Honorable Laura G. Middaugh, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE IN REPLY</u>	1
B. <u>ARGUMENT IN REPLY</u>	1
THE APPLICABLE DNA COLLECTION FEE STATUTE IS THE STATUTE IN FORCE ON THE DATE OF THE CRIME.	1
1. <i>The Amendatory Language does not Indicate a Legislative Intent to Subvert the Saving Statute</i>	1
2. <i>The State's Interpretation Violates the Ex Post Facto Doctrine</i> . 6	
B. <u>CONCLUSION</u>	7

TABLE OF AUTHORTIES

Page

WASHINGTON CASES

In re Personal Restraint of Powell
117 Wn.2d 175, 814 P.2d 635 (1991)..... 6

State v. Bunker
144 Wn. App. 407, 183 P.3d 1086 (2008)
review granted, 165 Wn.2d 1003 (2008) 1

State v. Grant
89 Wn.2d 678, 575 P.2d 210 (1978)..... 3

State v. Johnson
69 Wn. App. 189, 847 P.2d 960 (1993)..... 5

State v. Kane
101 Wn. App. 607, 5 P.3d 741 (2000)..... 2

State v. Ross
152 Wn.2d 220, 95 P.3d 1225 (2004)..... 2

State v. Schmidt
143 Wn.2d 658, 23 P.3d 462 (2001)..... 6

State v. Toney
103 Wn. App. 862, 14 P.3d 826 (2000)..... 2

State v. Walker
101 Wn. App. 1, 999 P.2d 1296 (2000)..... 5

State v. Zornes
78 Wn.2d 9, 475 P.2d 109 (1970)..... 2

FEDERAL CASES

Blakely v. United States
542 U.S., 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)..... 5

TABLE AUTHORITIES (CONT'D)

Page

United States v. Batchelder
442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979)..... 3

RULES, STATUTES AND OTHER AUTHORITIES

Former RCW 43.43.7541 (2002)..... 4

Former RCW 70.96A.010 (1972)..... 3

Former RCW 70.96A.190 (1972)..... 4

Laws of 2002, ch. 289, § 4..... 4

Laws of 2008, ch. 97, § 3..... 4

RCW 9.94A 4

RCW 9.94A.535 1

RCW 10.01.040 1, 5

RCW 43.43.754 4

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 appellant William J. Clark's offense?¹

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 7-13.

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

¹ In his opening brief, Clark also argued the trial court erred in concluding the "willing participant" mitigating factor, found in RCW 9.94A.535(1)(a), did not apply to the "victim" of a domestic violence no-contact order violation. Brief of Appellant (BOA) at 4-7. The state concedes error. Brief of Respondent (BOR) at 5-7. The state's concession is well taken in light of State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086, review granted on other grounds, 165 Wn.2d 1003 (2008). Clark urges this Court to accept the state's concession and remand for resentencing.

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 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.

B. CONCLUSION

For the reasons cited herein and in the Brief of Appellant, as well as those in the state's concession of error, the trial court's refusal to consider the "willing participant" mitigating factor was a legal error. In addition, the court exceeded its statutory sentencing authority by 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 Clark's sentence and remand for proper consideration of the "willing participant" mitigator and Clark's ability to pay before deciding whether to impose the DNA fee.

DATED this 14 day of August, 2009.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	COA NO. 62474-1-1
)	
WILLIAM CLARK,)	
)	
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 14TH DAY OF AUGUST, 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] WILLIAM CLARK
2900 S. AUSTIN
SEATTLE, WA 98108

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF AUGUST, 2009.

x *Patrick Mayovsky*

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STATE OF WASHINGTON