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NO. 62836-4-I

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

REC'D STATE OF WASHINGTON,

Respondent,

JUL 28 2009

King County Prosecutor
Appellate Unit

v.

BRIAN WALSH,

Appellant.

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

The Honorable Michael J. Fox, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred when it failed to exercise its discretion in imposing a non-mandatory DNA collection fee on the ground it was mandatory.

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

3. Appellant was deprived of effective assistance of counsel at sentencing.

Issues Pertaining to Assignments of Error

1. The sentencing court waived all other non-mandatory legal financial obligations based on appellant's indigence, 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?

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

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

B. STATEMENT OF THE CASE

On April 18, 2007, the King County Prosecutor charged appellant Brian Walsh with one count of first degree murder, allegedly committed on April 15, 2007, and one count of second degree assault, allegedly committed the same day. CP 1-6. Pursuant to a plea agreement, Walsh pled guilty to an amended charge of second degree murder, and the state agreed to dismiss the assault charge. CP 7-27.

At sentencing on December 5, 2008, the court imposed the top of the standard range, 220 months, based on an offender score of zero. CP 29-37. With respect to costs and financial penalties, the court imposed the victim penalty assessment (VPA) and the DNA collection fee, believing both were mandatory:

But with regard to costs and financial penalties, I will impose the victim penalty assessment and the DNA collection fees, which are both mandatory. But I'll waive all other nonmandatory financial penalties such as court costs or recoupment since there doesn't appear to be any evidence that Mr. Walsh will have any in the near future or even in the future after release from prison the capacity to pay such assessments, especially with the accumulation of any interest that might be applicable.

RP (12/5/08) 22. This appeal follows. CP 38-39.

C. ARGUMENT

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 court imposed the DNA collection fee under the mistaken impression it was “mandatory.” Under the statute in force on the date of the offense, the fee was not in fact mandatory. Moreover, any retroactive application of the amended DNA collection statute would violate the constitutional prohibition on ex post facto laws. This Court should remand so the trial court may exercise its discretion in deciding whether to impose the DNA fee based on a correct understanding of applicable law.

1. 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 into account 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 that 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 incarceration based on inability to pay. Curry, 118 Wn.2d at 918.

Statutes authorizing costs in criminal prosecutions are in derogation of the common law and should be strictly construed. State v. Buchanan, 78 Wn. App. 648, 651 P.2d 862 (1995).

The version of RCW 43.43.7541 in effect at the time of Walsh’s 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); see also RCW 9.94A.750 (sentencing court must impose restitution).

But under the version in effect in April 2007, the date of Walsh’s offense, the DNA fee was not mandatory. Former RCW 43.43.7541 (2002). That version states the court should impose the fee “unless the court finds that imposing the fee would result in undue hardship on the offender.” Former RCW 43.43.7541. This is the controlling version, because in adopting the 2008 version, the Legislature expressed no intent to contravene the general criminal prosecution saving statute, RCW 10.10.040, which establishes the

version in force on the date of the offense is presumed to apply.¹ The savings statute is deemed a part of each statute that amends or repeals an existing penal statute. State v. Ross, 152 Wn.2d 220, 237-38, 95 P.3d 1225 (2004).

The Supreme Court has in two cases found non-explicit, yet arguably express, intent to trump the saving statute. 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). But in each case, the statutory amendment at issue contained relatively specific language directing that no

¹ RCW 10.01.040 states:

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.

prosecutions under an earlier version of the statute should occur. In both cases, moreover, the court read the language against the state, and thus concerns regarding the prohibition on ex post facto law were not implicated. U.S. Const. art. 1, § 10, cl. 1; Wash. Const. art. 1, § 23.

While formal findings are not required, the applicable statute directs the court to consider the ability to pay. Former RCW 43.43.7541; Curry, 118 Wn.2d at 916. Failure to do so 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). The court's failure to consider Walsh's ability to pay, as well as the court's failure to exercise discretion regarding imposition of the DNA collection fee, requires reversal here.

2. Assuming *Arguendo*, 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.

The state may argue the amended statute, enacted after the events in this case transpired, applied at Walsh's sentencing. Such

an interpretation of the amendment, however, would violate the prohibition on ex post facto laws.

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)).

The amendment meets these criteria in that it is a substantive, retrospective change in the law that alters the standard of punishment: it removes from the sentencing court any discretion to waive the fine based on hardship. Thus, even assuming the Legislature expressed its intent to subvert the savings statute, the resulting retrospective amendment runs afoul of the prohibition on ex post facto laws.

3. Counsel Rendered Ineffective Assistance by Failing to Object to Sentencing under the Incorrect Statute.

Walsh's counsel rendered ineffective assistance in failing to object to the trial court's imposition of the DNA fee, which was not "mandatory" under the controlling statute.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); 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's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). While an attorney's decisions are afforded deference, conduct for which there is no legitimate or strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1998).

A defendant suffers prejudice where there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

Walsh satisfies both prongs of the Strickland test and therefore has demonstrated he received constitutionally ineffective assistance. There was no legitimate reason for counsel to fail to inform the court the applicable version of the statute permitted the court to waive the DNA collection fee based on hardship. 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). Moreover, there is a reasonable likelihood that counsel’s deficient performance affected the outcome because the court waived all other non-mandatory fees based on Walsh’s indigence.

D. CONCLUSION

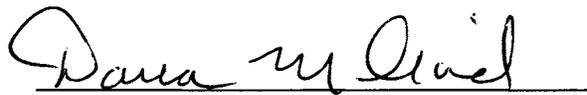
In summary, this Court should remand this case for resentencing so the court may properly consider Walsh’s indigence and ability to pay in light of the applicable statutes and, if

appropriate, amend the judgment and sentence to eliminate the DNA 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 it was initially mistaken about controlling law).

Dated this 28th day of July, 2009.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "Dana M. Lind", written over a horizontal line.

DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62836-4-I
)	
BRIAN WALSH,)	
)	
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 28TH DAY OF JULY, 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] BRIAN WALSH
DOC NO. 325703
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF JULY, 2009.

x *Patrick Mayovsky*