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NO. 62962-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

CLARENCE BENNETT, JR.,

Appellant.

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

The Honorable Bruce Heller, 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. <u>The State’s Argument is Inconsistent with the Savings Clause and the Sentencing Reform Act (SRA)</u>	1
2. <u>The Savings Statute Applies Because The Amendment is not Merely a Procedural Change</u>	7
3. <u>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.</u>	8
4. <u>The Savings Statute Applies Because the Fine Constitutes a Penalty or Forfeiture for Purposes of the Savings Statute.</u>	9
C. <u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Marriage of Roth</u> 72 Wn. App. 566, 865 P.2d 43 (1994).....	10
<u>In re Metcalf</u> 92 Wn. App. 165, 963 P.2d 911 (1998).....	11
<u>In re Pers. Restraint of Powell</u> 117 Wn.2d 175, 814 P.2d 635 (1991).....	9
<u>Johnston v. Beneficial Management Corp. of Am.</u> 85 Wn.2d 637, 538 P.2d 510 (1975).....	10
<u>State v. Broadaway</u> 133 Wn.2d 118, 942 P.2d 363 (1997).....	12
<u>State v. C.G.</u> 150 Wn.2d 604, 80 P.3d 594 (2003).....	10
<u>State v. Christensen</u> 153 Wn.2d 186, 102 P.3d 789, 793 (2004).....	11
<u>State v. Fenter</u> 89 Wn.2d 57, 569 P.2d 67 (1977).....	7
<u>State v. Grant</u> 89 Wn.2d 678, 575 P.2d 210 (1978).....	3-5
<u>State v. Hall</u> 112 Wn. App. 164, P.3d 350 (2002).....	11
<u>State v. Hanlen</u> 193 Wash. 494, 76 P.2d 316 (1938)	2

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Hodgson</u> 108 Wn.2d 662, 740 P.2d 848 (1987).....	7
<u>State v. Humphrey</u> 91 Wn. App. 677, 959 P.2d 681 (1998) <u>rev'd</u> , 139 Wn.2d 53, 983 P.2d 1118 (1999)	8-10
<u>State v. Kane</u> 101 Wn. App. 607, 5 P.3d 741 (2000).....	2
<u>State v. Keller</u> 98 Wn. App. 381, 990 P.2d 423, 425 (1999) <u>aff'd</u> , 143 Wn.2d 267, 19 P.3d 1030 (2001)	5
<u>State v. Pillatos</u> 159 Wn.2d 459, 150 P.3d 1130 (2007).....	7
<u>State v. Ross</u> 152 Wn.2d 220, 95 P.3d 1225 (2004).....	2, 6
<u>State v. Toney</u> 103 Wn. App. 862, 14 P.3d 826 (2000).....	2
<u>State v. Zornes</u> 78 Wn.2d 9, 475 P.2d 109 (1970).....	2, 3, 5
 <u>FEDERAL CASES</u>	
<u>Lindsey v. Washington</u> 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937).....	7
<u>United States v. Batchelder</u> 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979).....	2

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>OTHER JURISDICTIONS</u>	
<u>State v. Theriot</u> 782 So.2d 1078 (La. Ct. App. 2001).....	7
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
Black's Law Dictionary 661 (7th ed. 1999)	11
Former RCW 70.96A.010 (1972)	4
Former RCW 70.96A.190 (1972)	4
Laws of 2002, ch. 289, § 4.....	5
Laws of 2008, ch. 97, § 3.....	5
RCW 7.68.035	8
RCW 9.94A	5, 6
RCW 9.94A.345	6
RCW 10.01.040	1, 11
RCW 43.43.754	5
RCW 43.43.7541	1, 5, 6, 8, 9, 12
Sentencing Reform Act.....	1, 6
U.S. Const. art. 1, § 10, cl. 1	8

A. ISSUE IN REPLY

Did the sentencing court err when it failed to exercise its discretion under the proper version of the DNA collection fee statute, that is, the one in effect on the date of the alleged offense?

B. ARGUMENT IN REPLY

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

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

The State claims that 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. Brief of Respondent (BOR) at 15-19. 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 savings statute and likewise prohibits application of the amended 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

“‘[This statute] is deemed a part of every repealing statute as if expressly inserted therein, and hence renders unnecessary the incorporation of an individual saving clause in each statute which amends or repeals an existing penal statute.’” State v. Ross, 152 Wn.2d 220, 237-38, 95 P.3d 1225 (2004) (quoting State v. Hanlen, 193 Wash. 494, 497, 76 P.2d 316 (1938)); see State v. Toney, 103 Wn. App. 862, 864, 14 P.3d 826 (2000) (unless the legislature evidences contrary intent, a statute’s pre-amendment version applies to an offense committed before the amendment's effective date).

To avoid application of the savings clause, however, the Legislature need not explicitly state its intent that an amendment apply retroactively, i.e., to a pending prosecutions for a crime committed before the amendment's effective date. Instead, “such 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 prior 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. Id. 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 provide:

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” expressly declared that no person must 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. Id.

In contrast, the current version of RCW 43.43.7541 contains no such expression. The State now 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 18.

Yet the prior, original, version of the statute contains identical language. Former RCW 43.43.7541 (2002); Laws of 2002, ch. 289, § 4. In effect, the State is asking this Court to find express legislative to subvert the saving statute in the same language contained in the first enacted 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 as to 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 savings statute, RCW 9.94A.345¹ 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.” The plain language of the RCW 43.43.7541 “every sentence imposed under chapter 9.94A RCW [the SRA]” makes clear that the fine is part of an SRA sentence and thus subject to RCW 9.94A.345.

¹ Undersigned counsel did not cite RCW 9.94A.345 in the opening brief but Bennett’s opposing party, the King County prosecutor, has already had the opportunity to address the effect of that statute on the DNA fee amendment in State v. Judith Thompson, 61998-5-I (oral argument heard September 17, 2009).

2. The Savings Statute Applies Because The Amendment is not Merely a Procedural Change.²

The savings clause statute 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 rights and liabilities of a repealed statute. State v. Hodgson, 108 Wn.2d 662, 740 P.2d 848 (1987) (savings clause did not apply to extension of statute of limitations, a procedural change); 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) (retrospective application of law making mandatory a previously discretionary fine for driving while

² The State does not specifically argue the amendment is merely procedural in this case but has previously made the argument in response in other cases in which undersigned counsel has raised this issue. E.g., State v. Brandy Brewster, 62764-3-I (oral argument heard September 17, 2009); State v. John Ogden, 62407-5-I.

intoxicated violates prohibition on ex post facto laws under U.S. Const. art. 1, § 10, cl. 1 and state constitution; “a retrospective change in the law is not insulated from ex post facto scrutiny merely by labeling the change ‘procedural’”). Because RCW 43.43.7541 constitutes a substantive change, the savings statute applies.

3. 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.

In addition, the State claims earlier case law relating to an increase in the Victim Penalty Assessment (VPA)³ supports its claim that the 2008 amendment should be applied retroactively. BOR at 20 (citing State v. Humphrey, 91 Wn. App. 677, 959 P.2d 681 (1998), rev’d, 139 Wn.2d 53, 983 P.2d 1118 (1999)). The State is mistaken.

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. 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

³ RCW 7.68.035(1).

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 20. Thus, under the Humphrey rationale, application of the 2008 amendment to RCW 43.43.7541 is likewise an impermissible retroactive application.⁴

4. The Savings Statute Applies Because the Fine Constitutes a Penalty or Forfeiture for Purposes of the Savings Statute.

The Humphrey court also commented 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 this case for at least 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

⁴ The court in Humphrey does not cite the savings statute but the result is consistent with that 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 which creates a new liability or imposes a penalty will not be construed to apply retroactively.” 139 Wn.2d at 62 (quoting Johnston v. Beneficial Management Corp. of Am., 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. 139 Wn.2d at 62 n. 1.

The court’s comments are dicta, however, because the Court expressly stated it was reversing on other grounds and thus would not reach an ex post facto analysis. 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).

Assuming, arguendo, the fine does not constitute punishment for purposes of the ex post facto clause,⁵ however, it does constitute a “penalty or forfeiture” for purposes of the savings statute. RCW 10.01.040.

Unambiguous statutes must be applied based on their plain language. State v. Hall, 112 Wn. App. 164, 167, 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 plain 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 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

⁵ See, e.g., In re Metcalf, 92 Wn. App. 165, 963 P.2d 911 (1998) (a law requiring deductions from prisoner’s wages and other funds held not to violate the prohibition on ex post facto laws).

under the “penalty or forfeiture” language of the savings 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 Bennett’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 stated above and in Bennett’s opening brief, this Court should grant the relief requested.

DATED this 2nd day of October, 2009.

Respectfully submitted,

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DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62962-0-1
)	
CLARENCE BENNETT, JR.,)	
)	
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 2ND 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] CLARENCE BENNETT, JR.
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SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF OCTOBER, 2009.

x *Patrick Mayovsky*

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