

original

NO. 34188-3-II

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

STATE OF WASHINGTON, Respondent, v. BOBBY EARL LANNING, JR., Appellant.
FROM THE SUPERIOR COURT FOR CLARK COUNTY THE HONORABLE BARBARA D. JOHNSON CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-02531-0
BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the Statement of Facts submitted in the Brief of Appellant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is that the statutory authority does not authorize the trial court to order a defendant to submit to multiple DNA samples or to pay multiple DNA fees. The defendant, apparently, is saying that because he has been convicted of multiple felonies under different cause numbers at different times, that he does not have to provide a DNA sample for each conviction. The State submits that this is not in line with the statute or case law.

RCW 43.43.754(1) indicates, in the appropriate sections:

(1) Every adult or juvenile individual convicted of a felony, . . . must have a biological sample collected for purposes of DNA identification analysis . . . (RCW 43.43.754(1) (partial).

This further is in line with the legislative's findings under RCW 43.43.753. The Legislative Mandate, in part, is as follows:

“The Legislature further finds that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of the State to assist Federal, State, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons. Therefore, it is in the best interests of the State to establish a DNA database and DNA databank containing DNA samples submitted by persons convicted of felony offenses and DNA samples necessary for the identification of missing persons and unidentified human remains.” (RCW 43.43.753) (partial).

Statutory interpretation is a question of law which the trial court reviews *de novo*. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). When statutory language is unambiguous, the court will look only to that language to determine legislative intent. The court cannot add words or clauses to an unambiguous statute when the Legislature has chosen not to include that language. The court should assume that the Legislature means exactly what it says. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d. 792 (2003). In State v. Olivas, 122 Wn.2d 73, 98,-99, 856 P.2d 1076 (1993), the Supreme Court upheld the validity of a prior version of RCW 43.43.754, the statute requiring DNA testing for convicted felons. One of the matters that it discussed was finding the statute valid

under fourth amendment special needs analysis. In addition, Division I has also upheld the validity of the statute. State v. Surge, 122 Wn.App. 448, 460, 94 P.2d 345 (2004).

The State submits that there is nothing ambiguous about the taking of the DNA sample from a convicted felon. Each time he is convicted, a sample is taken, and a fee is charged for that procedure. Counsel on appeal makes argument that a sample has already been taken from him. Yet, there is no provision for that in the statute, nor is there anything that causes an ambiguity in the statute. Further, there is no showing that the first sample that was taken was properly taken, properly stored or can still be maintained. In short, there is no reason for the court not to continue to order DNA samples taken from each convicted felon pursuant to statute. The State submits that this claim by the defendant has no merit.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant deals with the conditions of community placement. The state made an offer of settlement proposal to the defendant which contained

agreed provisions dealing with providing a biological sample for DNA identification, registering as a sex offender, performing affirmative acts necessary to monitor compliance with the orders of the court, no violations of Federal, State or local criminal laws and to notify the community corrections officer within 48 hours of any arrest or citation. None of the provisions dealing with mental health, alcohol, urinalysis or other provisions were part of the agreement. Further, in the report of proceedings, it does not appear that these are specific areas of concern that were addressed by the court.

In reviewing the Judgment and Sentence (Nonprison) entered in this case, it appears that the sections complained of by counsel on appeal are prechecked sections of this particular form.

The State agrees that provisions of the Judgment and Sentence dealing with possession of controlled substances, possession of paraphernalia, and submission for urine or breath tests were not part of the plea bargain, nor were they specifically mentioned by the trial court at the time of sentencing. Further, in discussions with the deputy prosecutors handling this case, it was not an issue or area of concern with this particular defendant and the nature of the criminal activity he pled guilty to. With that in

mind, the State agrees with the defense concerning striking of those particular provisions. This would warrant resentencing and the State agrees with the defense that that would be appropriate.

IV. CONCLUSION

The State submits that the taking of the DNA sample was appropriate under the circumstances and that some of the portions of the community placement need to be modified and corrected and the State agrees with the defense for purposes of resentencing.

DATED this 12 day of July, 2006.

Respectfully submitted:

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