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-NO. 63742-8-I

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

STATE OF WASHINGTON,

REC'D
OCT 30 2009
King County Prosecutor
Appellate Unit

Respondent,

v.

YUSSUF ABDULLE,

Appellant.

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

The Honorable Barbara Mack, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress statements he made to police after invoking his constitutional right to counsel. 1RP[1] 81-83; CP 70-73.

2. The court erred when it entered CrR 3.5 conclusions of law "a," "b," "c," and "d" as to the disputed facts.[2] 1RP 81-83; CP 70-73.

3. The court erred when it entered CrR 3.5 conclusions of law "a" and "b" as to the admissibility of the Defendant's statements. 1RP 81-83; CP 70-73.

4. The sentencing court erred when it failed to exercise its discretion in imposing a non-mandatory DNA collection fee, mistakenly believing the fee was required. 4RP 10; CP 62-69.

5. Defense counsel was ineffective for failing to object to the fee.

Issues Pertaining to Assignments of Error

During a pre-trial CrR 3.5 hearing, the State sought to introduce statements appellant made to police. The State called only one of two

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[1] This brief refers to the verbatim report of proceedings as follows: 1RP – May 11, 2009 (3 volumes); 2RP –May 12, 2009 (3 volumes); 3RP –May 13, 2009; 4RP –June 12, 2009.

[2] The Court's written findings and conclusions are attached to this brief as an appendix.

detectives who witnessed the interrogation. The detective admitted appellant unequivocally requested counsel during the interrogation, but claimed appellant later voluntarily waived his right to counsel and to remain silent. Appellant testified the detective continued to show him photographs, comment on his immigration status, and question him about the case after his request for counsel. The detective admitted he engaged in "chit-chat" following appellant's unequivocal request for counsel but testified it did not involve questions about the case. Accepting the arresting officer's testimony as more credible and reliable, the trial court found the statements admissible.

1. Did the State fail to meet its heavy burden of proving appellant's waiver was made freely, when the State failed to support the interrogating detective's testimony with either independent corroborating evidence or the testimony of the other detective who witnessed the interrogation?

2. Did the trial court err in admitting appellant's statements where the detective did not scrupulously honor appellant's right to terminate questioning after his unequivocal request for counsel?

3. During sentencing, the trial court waived all other non-mandatory legal financial obligations, 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?

4. Was trial counsel ineffective for failing to object to the imposition of the mandatory DNA collection fee?

B. STATEMENT OF THE CASE

1. Procedural History

On November 17, 2008, The King County prosecutor charged Yussuf Abdulle with two counts of forgery for an incident that occurred on or about June 9, 2008. CP 1-5.

On May 11, 2009, the Honorable Barbara Mack conducted a pre-trial hearing on the State's motion to admit Abdulle's custodial statements. See 1RP. The court found the statements admissible and entered written findings of fact and conclusions of law on January 15, 2009. 1RP 81-83; CP 70-73. The State then amended the information by adding a first-degree theft charge. 1RP 84-85; CP 6-7. Trial commenced on May 11, 2009. 1RP 199.

A jury found Abdulle guilty on three counts. CP 58-60. The court imposed a first time offender waiver and sentenced Abdulle to 90 days with 60 days converted to electronic home detention, 30 days converted to 240 hours of community service, and 12 months of community custody. 4RP 9-10; CP 62-69. The court waived all non-mandatory fines and fees, but ordered Abdulle to pay a $100 DNA collection fee and a $500 Victim

Penalty Assessment. 4RP 10; CP 62-69. Abdulle timely appeals. CP 74-82.

2. Pretrial CrR 3.5 Hearing

On August 13, 2008, Abdulle's supervisor told him the police wanted to talk him. 1RP 4, 6, 26, 44, 58. Abdulle, working as a security guard at the Expedia Building in Bellevue, returned Bellevue Detective Steven Hoover's call. He agreed to meet with Hoover, but asked that the meeting occur after his shift ended. 1RP 6, 26, 44-45, 55, 58. After the conversation, Hoover contacted Abdulle's supervisor directly and arranged to meet Abdulle earlier. Hoover intended to arrest Abdulle. 1RP 7, 27. Later that afternoon, Abdulle's supervisor told him to come to the parking lot of the Expedia Building. 1RP 7, 27, 45, 58.

Abdulle arrived at the parking lot to see his supervisor, Detective Rich Newell, and a third person. 1RP 27, 45-46. Hoover had not yet arrived. 1RP 27. After waiting three to four minutes, Abdulle saw a car speeding toward him. 1RP 46. After the car came to a brake-slamming stop, Hoover got out, told Abdulle he was under arrest, ripped off Abdulle's identification badge, and handed it to Abdulle's supervisor. 1RP 46-47. Hoover admitted he removed Abdulle's identification badge and arrested him immediately. 1RP 10, 27-28.

Confused and embarrassed, Abdulle asked to be placed in the police car. 1RP 47-48. Hoover put Abdulle in the backseat on the passenger side. 1RP 10, 59. Hoover sat next to Abdulle. 1RP 10, 59. Newell was in front of Hoover, driving. 1RP 10, 48, 59.

The car was a regular, unmarked sedan. 1RP 10-11. Hoover said it was not equipped with a "silent partner" nor any type of screening: Hoover did not say there was any barrier between the front and back seats. 1RP 10-11. Abdulle said Hoover and Newell began talking to one another inside the car, but Abdulle was unable to focus on what was said because he was nervous and afraid he would be arrested and loose his job. 1RP 48, 59. Hoover said Newell drove toward the Bellevue Police Department to book, fingerprint and photograph Abdulle. 1RP 11.

Abdulle and Hoover's description of the drive and booking differed substantially. Hoover said he read Abdulle his Miranda[3] rights and Abdulle did not express any confusion. 1RP 11-12, 15. Before that, Hoover said he asked about Abdulle's background to see if he understood English. 1RP 12. Abdulle said he had been in the United States since 1996 and went to community college and Devry University. 1RP 12.

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[3] Miranda v. Arizona, 384 U.S. 436, 469-73, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Hoover said he told Abdulle they needed to talk about checks Abdulle took from Puget Sound Security and tried to deposit. 1RP 15-17, 28. When Abdulle responded that he had not taken cash or checks, Hoover said he had surveillance photographs from the banks where Abdulle tried to deposit the checks. 1RP 15-16. Abdulle said he wanted to talk to an attorney. 1RP 16.

Hoover said he did not question Abdulle after Abdulle requested an attorney. 1RP 17-19, 29. But Hoover admitted engaging in "chit-chat" about matters he could not specifically recall. 1RP 17-19. Hoover said he could not recall discussing Abdulle's immigration status after Abdulle requested counsel. 1RP 17, 29, 32.

Hoover said Abdulle reinitiated conversation, agreeing to talk in exchange for a cigarette and glass of water. 1RP 18-19, 25. Hoover said they arrived at the Bellevue Police Department and Newell went to get Abdulle water and a cigarette. 1RP 19-20, 33. Hoover said he asked whether Abdulle wanted to talk and Abdulle said yes. 1RP 19-21, 33. Hoover showed Abdulle surveillance photographs and Abdulle answered questions about the checks. 1RP 22-24, 31.[4] Hoover said Abdulle never re-invoked his right to counsel or to remain silent and never expressed

[4] As noted in section 3, infra, Hoover testified at trial about the substance of Abdulle's statements. 3RP 28-30.

doubts about talking. 1RP 26. Hoover did not re-read Miranda rights. 1RP 30, 32. While being booked, Abdulle asked whether he was under arrest. 1RP 24.

Contrary to Hoover's claims, Abdulle said he wasn't read his Miranda rights until Newell started driving. 1RP 49, 60. Abdulle had no prior experience with the criminal justice system and only knew of Miranda rights from television. 1RP 42-44. Abdulle intended to remain silent and not answer questions about the checks after his request for counsel. 1RP 50.

After he requested an attorney, however, Abdulle said Hoover continued to ask him questions about the checks and show him photographs after he requested an attorney. 1RP 49-51,62. Abdulle said Hoover told him he would not be deported to Somalia. 1RP 63. Abdulle did not agree to talk to Hoover in exchange for a cigarette and glass of water. 1RP 51-52. Abdulle said he only asked Hoover to return the cigarettes Hoover had taken from him. 1RP 51-52, 63-64.

Abdulle said Hoover asked him questions at the police station, such as what Abdulle would have done with the money. 1RP 52-53. Abdulle replied that was a trick question and again asked for an attorney. 1RP 53-54. Abdulle said Hoover never put him in touch with an attorney and never asked him whether he was sure he wanted to talk. 1RP 53-54,

60. Abdulle said he never gave a written statement and never agreed to answer any questions. 1RP 50, 62.

In argument, the prosecutor asked the court to believe Hoover's testimony in order to find a voluntary waiver. 1RP 67, 74-75. The State did not produce Newell's testimony at the CrR 3.5 hearing, nor did it explain Newell's absence. Nonetheless, the court found the statements admissible.

3. Trial Testimony

The incident leading to the charges occurred on June 9, 2009. After he was fired as an on-site security officer, Abdulle underwent an exit-interview with Puget Sound Security (PSS). 2RP 16-18. Michael Baker, the night operations manager, conducted the interview. 2RP 10, 16-19. Baker said Abdulle was at PSS from 10:48 a.m. to 11:32 a.m. 2RP 36, 51. Abdulle waited in the front office for approximately 30 minutes while his final paycheck was prepared. 2RP 29-30. Abdulle was alone because the receptionist was ill. 2RP 27-28, 72-73. Non-PSS employees might have visited PSS on June 9, 2009, including an applicant named Abdurrahman Omar. 2RP 38, 56-58, 60, 79; 3RP 30-31.

On June 10, 2009, Baker was contacted by Dennis Huang, the assistant manager of the International District branch of Bank of America. 2RP 31, 171, 174. After Huang said someone tried to deposit two checks

drawn on the PSS account, Baker contacted the Bellevue Police Department. 2RP 31-32.

On June 11, 2009, Hoover was assigned to the case. 3RP 5. Huang gave Hoover the checks and deposit slips that had been left at the International branch. 3RP 21. One check was issued to PSS employee Michael Wittemann for $1,083.41, and the other check was issued to PSS employee Lauren Burns for $1,0298.98. 2RP 19, 66, 69. Burns and Wittemann said they did not give anyone permission to remove, endorse, deposit, or cash the checks. 2RP 84-85, 92-94. Burns, and Witteman denied writing the name Hiback Omar or their own names on the backs of the checks. 2RP 86-87, 93-94.

Mikhail Lakhter, PSS accounting manager, said he wrote the checks on June 5, 2009, but didn't send them out until June 9, 2009. 2RP 66, 69, 71. Lakhter said he put the checks in the outgoing mailbox at the front office before Abdulle arrived for his interview. 2RP 71, 73. Lakhter didn't notice whether the checks were still in the mailbox when Abdulle left. 2RP 73. Lakhter said the mailbox could be seen from his office, but he did not see Abdulle take the checks. 2RP 72, 79.

Hoover received four surveillance photographs from Andrea Bunch, Bank of America's corporate investigative services manager. 2RP 102, 115; 3RP 6. Bunch said attempts at depositing the checks were made

at Bank of America's First Hill banking branch at 12:12 p.m. and at Bank of America's International banking branch at 12:30 p.m., on June 9, 2009. 2RP 113-14. Bunch identified the tellers as Yisel Anguiano at the First Hill branch and Mohammed Siddique at the International branch. 2RP 114-15.

Anguiano said a man in his mid-20's came to her teller window at the First Hill branch and tried to deposit two PSS checks with different names into Hiback Omar's account. 2RP 130-32, 137-39, 142-43, 153-54. Anguiano could not remember Hiback Omar's name until prompted by Hoover. 2RP 150; 3RP 14, 32-33. Anguiano said the man told her the check holders were his roommates who were out of town, but they wanted him to make the deposit. 2RP 139-40. Anguiano explained Bank of America's policy regarding third party checks was that both the owner and depositor of the check had to be present with identification and to endorse the check. 2RP 134. After Anguiano said she could not deposit the checks because the check holders were not there, the man left with the checks. 2RP 140.

Anguiano identified Abdulle in court as the man who tried to deposit the checks. 2RP 141-42. Anguiano said the incident did not particularly stand out in her mind. 2RP 139. She identified Abdulle in a

surveillance photograph and then in a photomontage. 2RP 146-48; 3RP 7, 15-17.

Siddique said an African man approached his teller window at the International branch and attempted to deposit third party checks. 2RP 157-61. Siddique said he felt uncomfortable and took the checks and deposit slips. The man left. Siddique said he would not recognize the man again. 2RP 161-62. Siddique said he identified the man in surveillance photographs. 2RP 164. Although he picked a person out of a photomontage shown to him by Detective Travis Forbush, Siddique said he could not positively identify the person. 2RP 164, 168, 181, 185.

At trial, Hoover essentially repeated his testimony describing his interrogation of Abdulle. 3RP 22-26. Hoover also testified to the substance of Abdulle's statements. Hoover said Abdulle told him PSS was out to get him and fired him for no reason so he took a check and tried to cash it a bank in Chinatown because he needed money. Abdulle told Hoover he only remembered trying to deposit one check at Chinatown. According to Hoover, Abdulle said he was the man in the surveillance photos. Hoover said Abdulle told him Hiback Omar was his cousin. 3RP 28-29. Hoover said Abdulle asked why he was under arrest when he did not do anything. In response, Hoover asked Abdulle if he took the checks and tried to cash them and Abdulle said "yes." 3RP 30.

Following the State's case-in-chief, defense counsel moved to exclude the photomontage and admonition page relating to Anguiano's testimony. 3RP 36-38. Defense counsel argued the evidence was unduly suggestive given Anguiano's opportunity to view the surveillance photo prior to identifying Abdulle in the photomontage. 3RP 36-38. The court excluded the montage as it pertained to Aguiano's testimony. 3RP 42. The court informed the jury that the montage would not be admitted as evidence. 3RP 60.

C. ARGUMENT

1. THE TRIAL COURT SHOULD HAVE SUPPRESSED THE STATEMENTS OBTAINED AFTER ABDULLE INVOKED HIS RIGHT TO COUNSEL

a. The State Bears a Heavy Burden to Prove Abdulle Made a Knowing, Voluntary, and Intelligent Waiver of *Miranda* Rights

Custodial statements made by an accused are inadmissible unless preceded by a full advisement of rights, and voluntary, intelligent and knowing waiver of rights, including the right to have counsel present at questioning. Const. Amend. V; Miranda v. Arizona, 384 U.S. 436, 469-73, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). If an accused indicates a desire for an attorney "in any manner and at any stage" of custodial interrogation, officers must immediately stop their questioning. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378

(1981); Davis v. United States, 512 U.S. 452, 461-62, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). The right to terminate questioning must be "scrupulously honored." State v. Grieb, 52 Wn. App. 573, 575, 761 P.2d 970 (1988); State v. Lewis, 32 Wn. App. 13, 20, 645 P.2d 722 (1982), review denied, 98 Wn.2d 1004 (1982). Where officers continue interrogation after a clear invocation of the right to counsel, the resulting statements must be suppressed. Edwards, 451 U.S. at 487-88.

Where an interrogation takes place after the suspect is arrested and without an attorney present, Miranda places a heavy burden of proof on the state to demonstrate that any statements were made freely. State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968); State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571 (1984), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988). "As Miranda clearly indicates, 'interrogation' encompasses much more than mere question-answer sessions; often the more successful techniques include psychological tactics and patient maneuverings designed to undermine the suspect's will to resist." State v. Boggs, 16 Wn. App. 682, 685, 559 P.2d 11 (1977), review denied, 88 Wn.2d 1017 (1997), (citing Miranda, 384 U.S. at 448-456). "Any custodial statement is suspect and the burden is upon the State to demonstrate, if it can, that such a statement was 'volunteered' in the

Miranda sense, i.e., that it was spontaneous and not prompted by questioning or other action calculated to elicit response." Boggs, at 686.

On appeal, the trial court's findings will be upheld only if supported by substantial evidence. State v. Radcliffe, 139 Wn. App 214, 219, 159 P.3d 486 (2007), affirmed by, 164 Wash.2d 900, (citing State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997)). Unchallenged findings are verities on appeal. Radcliffe, 139 Wn. App. at 219. A trial court's conclusions of law are reviewed de novo. Radcliffe, 139 Wn. App. at 219 (citing State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

b. The State Failed to Meet its Heavy Burden to Prove a Knowing, Voluntary, and Intelligent Waiver

Abdulle made an unequivocal and undisputed demand for an attorney. 1RP 16, 50; CP 70-73 (finding of fact "h"). The State failed to meet its heavy burden to prove this unequivocal request was scrupulously honored, or that the statements to Hoover were made after a knowing, voluntary and intelligent waiver. Therefore the trial court erred by admitting Abdulle's statements over defense objection. Because the error is prejudicial, Abdulle's conviction should be reversed.

Miranda sets out factual criteria for courts to consider in determining the validity of a waiver. Unfortunately, the criteria "are of

little value in determining whether the police in a particular case have followed the mandate of Miranda when the only proof given is the testimony of one interrogating officer -- the very person who is accused of violating the defendant's constitutional rights." State v. Erho, 77 Wn.2d 553, 557-558, 463 P.2d 779 (1970). In situations where a waiver is invalid, an accused's own testimony is often the only evidence he has to show invalidity. Erho, 77 Wn.2d at 558. According to Erho, in a survey of Washington cases where the issue of whether a confession is admissible comes down to a "swearing contest," trial courts routinely held the officer more credible than the accused. Erho, 77 Wn.2d at 558; see, e.g., State v. Dodd, 8 Wn. App. 269, 505 P.2d 830 (1973). By contrast, where the issue of admissibility comes down to a "swearing contest" because the state failed to either to call other witnesses who were present to support the officer's testimony, or failed to present existing independent supporting evidence, Washington courts have found the state failed to meet its burden of proof. Erho, 77 Wn.2d at 558; Davis, 73 Wn.2d 271.

In State v. Davis, Belknap was convicted of attempted escape from jail. The court held a pre-trial hearing on Belknap's motion to suppress statements Belknap allegedly made to the police captain after arrest. Davis, at 274. The captain and Belknap were the only witnesses to testify during the hearing and the court decided the captain was more credible. Another officer had been present when Belknap was questioned, but he did not testify at the hearing. Relying on the captain's version of events, the trial court found Belknap had validly waived his Miranda rights and denied the motion to suppress. State v. Davis, 73 Wn.2d at 275.

At trial, Belknap renewed his objection to the captain's testimony, but the statement was admitted. Davis, at 275. The remainder of the trial testimony consisted of other inmates from jail saying Belknap told them he participated in the attempt, that he assisted in camouflaging the hole, acted as a lookout, helped other inmates muffle the noise of sawing the hole, sometimes kept the hacksaw blades, and sawed a portion of a table used as a brace in the escape hole. Davis, at 275.

The Supreme Court held the State failed to meet its burden to prove the validity of Belknap's alleged waiver. The Court's opinion referred to six factors it has traditionally considered in deciding whether an admission had not followed a valid waiver. Davis, at 282-83. First, the statement was made while Belknap was in police custody. Second, the court assumed the police had both the opportunity and the means readily available to establish substantial corroborating evidence. Third, the only evidence the state presented of waiver consisted of the testimony of one interrogating officer. Fourth, no evidence corroborated the officer's testimony concerning the waiver. Fifth, Belknap completely contradicted the officer's testimony. Finally, the prosecution had not produced the other officer present during the interrogation, another officer, nor did it explain his absence. After finding this last element determinative, the Supreme Court reversed and remanded the case based on the state's failure to meet its burden. Davis, at 285-88.

The Erho facts are similar. Despite the presence of four officers at the scene of the arrest and two officers accompanying Erho in the patrol car, the state produced only one officer's testimony regarding Miranda warnings. Erho, at 556-58. In direct contradiction to the interrogating officer's testimony, Erho testified he did not receive any admonitions at the time of his arrest or before reaching the police station. Erho, at 558.

As in Davis, the state in Erho rested its case for voluntary waiver upon a "swearing contest," even though it had what the court found to be adequate opportunity to obtain and present the testimony of the other officers present at the scene when Erho was arrested and taken into custody. The court thus held the state failed to meet the heavy Miranda burden of proof due to its omission of available corroborating evidence. Erho, at 559.

Davis and Erho control this case. The State attempted to establish a voluntary waiver based on a "swearing contest" between Abdulle and Hoover even though it had access to Newell's testimony. The State failed to explain why it did not call Newell, the only other witness to the interrogation and alleged waiver, nor did it explain his absence. Where evidence, which would properly be part of a case, is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation, he fails to do so, an inference may be drawn that it would be unfavorable to him. Davis, 73 Wn.2d at 276 (quoting Wright v. Safeway Stores, Inc., 7 Wn.2d 341, 346, 109 P.2d 542, 544, 135 A.L.R. 1367 (1941)).

Abdulle made an unequivocal and undisputed demand for an attorney. 1RP 16, 50. From that moment forward, Hoover was required to scrupulously honor Abdulle's request for counsel and cease

questioning. Instead, Hoover continued to "chit-chat" with Abdulle about matters he could not specifically recall. Hoover said he did not ask Abdulle questions about the case after Abdulle's request for counsel. 1RP 17-19, 29. According to Hoover, while driving, Abdulle voluntarily stated he would tell Hoover about the checks in exchange for a cigarette and glass of water. Hoover said Abdulle was given water and a cigarette and asked whether he was sure he wanted to talk because of his previous request for an attorney. 1RP 18-20, 25, 33.

Abdulle testified in direct contradiction. After asking for an attorney, Abdulle's intent was to remain silent and refrain from answering any more questions. Instead, Hoover continued to show him photos, comment on his immigration status, and question him about the case. 1RP 49-50, 62-63. Abdulle did not agree to give a statement in exchange for a cigarette and water, but rather, asked Hoover to return the cigarettes he had taken from Abdulle. 1RP 49-50, 62. Hoover continued to ask Abdulle questions after arriving at Bellevue booking. Abdulle was never put in touch with an attorney. 1RP 52-54.

Given that the trial court relied exclusively on Hoover's alleged credibility when it found Abdulle's alleged statements voluntary, Davis controls. There is no evidence that the State lacked an opportunity to produce Newell. Because the State, without explanation, failed to produce

Newell's testimony, or independent corroborating evidence of the alleged waiver, the State failed to meet its heavy burden under Miranda. The trial court therefore erred in admitting Abdulle's custodial statements.

c. The Admission of Abdulle's Involuntary Statements was Prejudicial

Constitutional error is presumed prejudicial. State v. Spotted Elk, 109 Wn. App. 253, 261, 34 P.3d 906 (2001) (citing State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372. (1997); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); State v. Caldwell, 94 Wn.2d 614, 618, 618 P.2d 508 (1980)). The State bears the burden of proving the error harmless beyond a reasonable doubt. Spotted Elk, 109 Wn. App. at 261. In this context, the State must show the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Spotted Elk, 109 Wn. App. at 261.

The state cannot it meet its burden here. First, as the prosecutor recognized in closing, identity was the main disputed question. 3RP 73-76, 79, 94.[5] To prove identity, the state heavily relied on the unlawfully admitted statements. On several occasions the prosecutor argued Abdulle "admitted he did it," then repeated the substance of the statements. 3RP 74, 76, 79-80, 82, 94-95. The prosecutor also relied on the statements to

[5] "Again a big question, who was it? Was it the defendant? Was is someone else?" 3RP 79.

establish motive and intent: "think back to what he said and why he did it. He said he was angry at Puget Sound Security, they were out to get him and fired him for no reason and that he needed money. He was out to get them, to try to do them some harm. Isn't that an attempt and intent to injure?" 3RP 76. The prosecutor repeated this in relation to the theft charge. 3RP 79-80.

This Court has recognized the significant impact an officer's testimony about a confession can have on a jury. State v. Wilson, 144 Wn. App. 166, 185, 181 P.3d 887 (2008). Where the trial prosecutor relied so heavily on the evidence, the state cannot credibly argue on appeal the evidence was insignificant. Appellate courts are not so easily misled. See e.g., State v. Aaron, 57 Wn. App. 277, 282, 787 P.2d 949 (1990) (this Court will closely scrutinize the state's harmless error claim where the error "results from the deliberate effort of the prosecution to get improper evidence before the jury."); State v. Carnahan, 130 Wn. App. 159, 169, 122 P.3d 187 (2005) (error held prejudicial where prosecutor emphasized evidence in closing argument).

A rational juror could reasonably doubt the rest of the state's case. As defense counsel pointed out, the state failed to address other people's access and opportunity to take the checks from the PSS office. The state did not address the fact that a man named Abdurrahman Omar was in the

PSS office same day the checks disappeared and an attempt was made to deposit them in an account owned by a man whose last name was Omar. 3RP 83, 85-86.

Siddique did not positively identify Abdulle from the montage presented by Detective Forbush. 2RP 164, 168, 181. Although Anguiano did identify Abdulle, it was only because Hoover's suggestions led her "by the nose . . . into picking his suspect as the perpetrator." 3RP 83, 87-88.[6] Anguiano also had substantial memory problems. 3RP 89. She could not remember Hiback Omar as the name of the account holder until prompted by Hoover. 2RP 150; 3RP 14, 32-33, 89.

The state admitted it lacked surveillance footage from the PSS office. 3RP 79. Although it relied on photographs from the bank branches,[7] the state did not photograph Abdulle in court. The state thereby failed to protect its record or help this Court reliably determine whether the surveillance photos actually resembled Abdulle.

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[6] The trial court excluded the montage as it pertained to Anguiano's testimony, noting that it was highly suggestible. 3RP 42.

[7] The prosecutor asked the jury "to look at the defendant now, go back in the jury room and look at these photos. Make your own decision whether this surveillance photo . . . shows the defendant or not." 3RP 74; see also 3RP 94 ("You can look at the photos. You can make your own decision as to whether that is the defendant.").

The prejudice took its full toll when defense counsel was forced to address the inadmissible "confession." 3RP 84, 91. One of the most difficult tasks for a trial defense lawyer is explaining why an accused person might confess to a crime the person did not commit. A defendant's confession is "probably the most probative and damaging evidence that can be admitted against him." Arizona v. Fulminante, 499 U.S. 279, 292, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (citing Cruz v. New York, 481 U.S. 186, 195, 107 S. Ct. 1714, 1720, 95 L. Ed. 2d (1987) (WHITE, J. dissenting.)). Nonetheless, false confessions occur. Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 960-62 (2004) (finding that innocent individuals who gave false confessions stood a more than 80% chance of being convicted at trial). Washington courts recognize the dangers from improper compelled interrogation. State v. Hensler, 109 Wn.2d 357, 362, 745 P.2d 34 (1987) (citing State v. Creach, 77 Wn.2d 194, 197, 461 P.2d 329 (1969)) ("Our decisions have long been concerned with the compulsion inherent in custodial questioning."); Heinemann v. Whitman County, 105 Wn.2d 796, 806, 718 P.2d 789 (1986).

As defense counsel pointed out, police officers can fill holes in the state's case by making suggestions to eyewitnesses. They also can

intimidate a suspect into falsely confessing. 3RP 90-91. Abdulle knew the officers would go after his cousin if he did not confess. 3RP 91.

Where the prosecution emphasized the statements on numerous occasions and the remainder of its case allowed rational jurors to have a reasonable doubt, the error is prejudicial. This Court should reverse. Spotted Elk, 109 Wn. App. at 261; Miller, 131 Wn.2d at 90.

2. THE COURT ERRED WHEN IT IMPOSED THE DNA COLLECTION FEE UNDER THE WRONG VERSION OF THE STATUTE AND TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.[8]

The sentencing court imposed the DNA fee under the impression it was "mandatory" while waiving all other non-mandatory financial obligations. 4RP 10. But the fee was not mandatory under the statute in force on the date of the offense. Under the savings statute and the Sentencing Reform Act (SRA), the pre-2008 amendment version of the DNA collection fee statute applied. This Court should, therefore, remand so the court may exercise its discretion in deciding whether to impose the fee based on a correct understanding of the applicable law.

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[8] Abdulle recognizes this Court recently rejected a similar argument made in another case. See State v. Brewster, ____ Wn. App. ____, _____ P.3d ____. No. 62764-3-I (filed 10/26/09). Brewster intends to seek further review of that decision. Abdulle also cites RCW 9.94A.345, an argument not addressed in Brewster.

a. The Court's Failure to Exercise Discretion Under the Applicable Statue 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). An illegal sentence may be challenged 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 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 account of 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 victim penalty assessment (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, 898 P.2d 862 (1995). A statute that creates a new liability will not be construed to apply retroactively. State v. Humphrey, 139 Wn.2d 53, 62, 983 P.2d 1118 (1999).

Under the statute in effect in February 2008, the date of Abdulle's offenses, 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, Laws of 2002, ch. 289, § 4. The version of RCW 43.43.7541 in effect on the date of 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).

The statute in effect in February 2008 controls for several reasons. The first reason is the Legislature's stated intent in RCW 9.94A.345. That statute provides "[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." It would be difficult to find a clearer statement of legislative intent to require the imposition of sentence conditions in accord with statutes in effect when the offense was committed.

Second, in adopting the 2008 version, the Legislature expressed no intent to contravene the general criminal prosecution saving statute, RCW 10.01.040.[9] The saving statute is deemed a part of each statute that

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[9] 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

amends or repeals an existing penal statute and presumes the version in effect on the date of the offense applies. State v. Ross, 152 Wn.2d 220, 237-38, 95 P.3d 1225 (2004).

The savings statute 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).

As a preliminary matter, the 2008 amendment constitutes a substantive change in the law. Complete removal of a court's sentencing discretion 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); State v.

> 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.

Theriot, 782 So.2d 1078, 1086-87 (La. Ct. App. 2001) (retrospective application of law making mandatory a previously discretionary fine for driving while 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.

Next, the plain language of the savings statute demonstrates that it applies to the DNA collection fee under 43.43.7541. 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 -- constitutes a loss of property imposed based on commission of a crime and is thus a forfeiture. Because the fine falls under the "penalty or forfeiture" language of the savings statute, that statute "saves" the pre-amendment version of the RCW 43.43.7541. Moreover, the amendment constitutes a substantive change in the law triggering the savings statute.

The Supreme Court has in two cases found non-explicit, yet arguably express, intent to trump the savings 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 contained relatively specific language directing that no prosecutions under an earlier version of a statute should occur. In both cases, moreover, the Court read the language against the State. The amendments in Zornes and Grant are thus distinguishable from the present situation.

While formal findings on the matter are not required, the applicable statute directs the court to consider 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).

b. Counsel Rendered Ineffective Assistance By Failing to Object to Sentencing Under the Incorrect Statute.

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

An accused receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation is prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); 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). "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, __ Wn.2d __, 215 P.3d 177, 180 (2009). While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1998).

An accused is prejudiced 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.

Abdulle's case satisfies both prongs of Strickland. There was no legitimate reason for counsel to fail to inform the court that the applicable version of the statute permitted the court to waive the DNA collection fee based on hardship. Counsel has a duty to research the law and is presumed to know applicable law favorable to his or her client.[10] Moreover, there is a reasonable likelihood counsel's deficient performance affected the outcome because the court waived all non-mandatory financial obligations based on Abdulle's indigence. 4RP 10; CP 62-69.

In summary, this Court should remand this case for resentencing so the court may accurately express in the sentence its stated intent to waive the non-mandatory DNA fee. See Broadaway, 133 Wn.2d at 136 (on remand, the trial court has the authority to correct a sentence where court was initially mistaken about the controlling law).

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[10] Kyllo, 215 P.3d at 180, 183-84; State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules).

D. CONCLUSION

For the reasons stated in argument 1, this Court should reverse Abdulle's conviction and remand for a new trial. As stated in argument 2, resentencing is required because the court failed to exercise its discretion when it imposed a non-mandatory DNA collection fee based on the mistaken view the fee was "mandatory."

DATED this 30th day of October, 2009.

Respectfully submitted,

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Attorneys for Appellant

APPENDIX

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. YUSSUF ABDULLE, Defendant.	No. 08-1-12124-7 SEA WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO SUPPRESS THE DEFENDANT'S STATEMENT(S)

A hearing on the admissibility of the defendant's statement(s) was held on May 11, 2009, before the Honorable Judge Barbara Mack.

The court informed the defendant that:

(1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant testified at the hearing.

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After considering the evidence submitted by the parties and hearing argument, to wit: the testimony of Bellevue Police Department Detective Steven Hoover and the defendant, the court enters the following findings of fact and conclusions of law as required by CrR 3.5.

1. THE UNDISPUTED FACTS:

a. Bellevue Police Department Detective Hoover met the defendant, Hussein Abdulle, at the Expedia building where Abdulle was working as a security guard.

b. Detective Hoover arrived with Bellevue Police Department Detective Newell in an unmarked police car.

c. Detective Hoover met Abdulle with the intent to arrest him.

d. Shortly after arresting Abdulle, Detective Hoover removed Abdulle's security officer badge and gave it to Abdulle's supervisor.

e. Shortly after arresting Abdulle, Detective Hoover placed Abdulle in the back of the unmarked car. Detective Hoover got into the backseat with Abdulle. Detective Newell was driving.

f. Before any questioning of Abdulle took place, Detective Hoover read Abdulle his Miranda rights from a Bellevue Police Department card that he was carrying.

g. Detective Newell drove the car to the Bellevue Police Department for booking. The drive took approximately 15 minutes.

h. At some point during the 15 minute drive, Abdulle invoked his right to counsel.

i. Upon arrival at Bellevue booking, Detective Hoover gave Abdulle at least one cigarette and a glass of water.

j. After this occurred, Detective Hoover and Abdulle had a further conversation about the incident. Abdulle said that "they were out to get him at Puget Sound Security" and "fired him for no reason." Abdulle said that made him mad and he needed money, so he took one check and tried to cash it at a bank in "Chinatown." When Detective Hoover pointed out that there were two checks involved and that he went to two banks, Abdulle said he only remembered the bank in "Chinatown." Detective Hoover then showed Abdulle the surveillance photos from both banks. When Detective Hoover asked Abdulle if that was him in each picture, Abdullesaid "yes." When Detective Hoover asked why Abdulle tried to deposit the checks in Omar's account, Abdulle said that Omar was his cousin. Abdulle also said he tried to cash the checks.

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k. While Abdulle was being booked, he asked if he was under arrest. When Detective Hoover said yes, Abdulle asked why if he did not get anything from the incident. Detective Hoover asked Abdulle if he stole the checks; he said "yes." Detective Hoover asked Abdulle if he tried to cash the checks, he said "yes." Detective Hoover asked Abdulle if he would have kept the money if he had been able to cash the checks; Abdulle did not answer.

2. THE DISPUTED FACTS;

a. Whether the conversation at Bellevue booking occurred after Abdulle re-initiated conversation regarding the incident with Detective Hoover or whether Detective Hoover simply continued to interrogate Abdulle after he invoked his rights.

i. Detective Hoover testified that, after informing Abdulle of his rights, Abdulle initially agreed to talk with him. Detective Hoover told Abdulle that he needed to talk with him about when he took two payroll checks from PSS. Abdulle responded that he did not take the checks. When Detective Hoover told Abdulle that he had video from the banks and showed him the surveillance photos, Abdulle said he wanted to talk to an attorney. Detective Hoover said that was fine and if Abdulle wanted to restart the conversation, he would have to contact the detective. While still driving to the booking, Abdulle spontaneously stated, "Ok, I'll tell you what happened, but I want a cigarette and a drink of water." When they arrived at the booking facility, Detective Hoover gave Abdulle a cigarette and a drink of water. Detective Hoover asked Abdulle if he was sure he wanted to talk, because he had previously said he wanted an attorney. Abdulle indicated that he did want to talk.

ii. Abdulle essentially denied that the above conversation took place. Abdulle testified that Detective Hoover continued to ask him questions and try to show him pictures even after he had asked for an attorney. Abdulle testified that he had not said he would testify if given a cigarette and a glass of water, but merely asked that Detective Hoover return the cigarettes that he had taken from Abdulle. Abdulle stated that he felt coerced into given the statements.

3. CONCLUSIONS AS TO THE DISPUTED FACTS:

a. Detective Hoover's testimony was more credible and reliable than Abdulle's.

b. The conversation at Bellevue booking occurred after Abdulle voluntarily reinitiated conversation with Detective Hoover.

c. The circumstances of the arrest were not unduly coercive.

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d. Abdulle understood what was happening and understood the rights read to him.

e. Abdulle's statement at Bellevue booking was knowing, intelligent, and voluntary.

4. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S STATEMENT(S):

a. The statements noted in the above Findings of Fact made to Bellevue Detective Hoover are admissible in the State's case-in-chief.

b. These statements are admissible because Miranda was applicable and the defendant's statements were made after a knowing, intelligent and voluntary waiver of his Miranda rights.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 12 day of ~~May~~ June, 2009.

JUDGE

Presented by:

34049

Deputy Prosecuting Attorney

Copy received:

Attorney for Defendant
Dillon Johnson, WSBA #38289

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 63742-8-I
	)	
YUSSUF BALLARD,	)	
	)	
Appellant.	)	

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STATE OF WASHINGTON
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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 30TH DAY OF OCTOBER, 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] YUSSUF BALLARD
8840 DELRIDGE WAY SW
#201
SEATTLE, WA 98106

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF OCTOBER, 2009.

x Patrick Mayovsky