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JUL 23 2009

King County Prosecutor
Appellate Unit

NO. 62923-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH N. MCCLAIN,

Appellant.

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

The Honorable Deborah D. Fleck, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state improperly penalized the appellant for invoking his right to have counsel present during custodial interrogation.

2. The prosecutor committed reversible misconduct by arguing without facts in support that the appellant was involved in uncharged criminal activity.

3. The trial court erred when it imposed a non-mandatory DNA collection fee on the mistaken belief the fee was mandatory.

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

5. The appellant was deprived of effective assistance of counsel at sentencing.

6. The trial court violated CrR 3.5(b) by failing to file written findings of fact and conclusions of law following its decision to admit the appellant's out of court statements to police officers.

Issues Pertaining to Assignments of Error

1. The prosecutor elicited testimony from a detective that the appellant terminated a post-arrest interview by requesting the presence of

an attorney. Did the state improperly penalize the appellant for invoking his Miranda¹ rights?

2. Without supporting evidence, the prosecutor accused the appellant of involvement in the uncharged crime of prostitution. Did the comment, which occurred during rebuttal closing argument, constitute reversible misconduct?

3. The trial court waived all other non-mandatory legal financial obligations based on appellant's indigency, 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. Did the sentencing court's retrospective application of the amended DNA collection fee statute violates the constitutional prohibition of ex post facto laws?

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

6. The trial court failed to enter written findings of fact and conclusions of law after a hearing to determine the admissibility of the defendant's statements to police under CrR 3.5. Should this Court remand

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

for entry of written findings and conclusions to satisfy the requirement of CrR 3.5(c)?

B. STATEMENT OF THE CASE

1. *Summary of Trial*

John Howie and Charles David were crack cocaine addicts. 7RP 46, 9RP 98-100.² They smoked cocaine for a couple of hours at Howie's apartment. 7RP 49-52, 9RP 102-03.

Timothy Swenson arrived at Howie's apartment, followed later by "Liz." 7RP 49-51, 9RP 105-06. Howie did not like Liz. 7RP 52. She was "nasty." 7RP 52. He sometimes allowed her to bathe at his apartment. He gave her clothes because she was cold. 7RP 52. Howie testified she may have stayed at motels. 7RP 53-54.

David described Liz as "[a]woman that got high." 9RP 105. She visited Howie to smoke crack cocaine. 9RP 106.

Liz knew the appellant, Joseph McClain. 7RP 54. Liz used Howie's telephone to speak with McClain. 7RP 55-58. McClain continually hung up on Liz. 9RP 106-07. Howie became annoyed and

² The 11-volume verbatim report of proceedings is cited as follows: 1RP – 11/5; 2RP -- 11/6; 3RP -- 11/10; 4RP -- 11/13; 5RP -- 11/17; 6RP -- 11/18; 7RP -- 11/19; 8RP -- 11/20; 9RP – 12/2-12/4; 10RP – 12/3 (p.m.); 11RP – 1/9/2009.

called McClain, who had sold him cocaine in the past. 7RP 40-46, 56-57. McClain told Howie to remove Liz from the apartment. 7RP 57-58. He did. 7RP 58, 9RP 107-08.

David wanted more cocaine. 9RP 109-11. The men could obtain no more crack, so they went in the bedroom to sleep. 7RP 59-60, 9RP 111-12. David later heard a knock on Howie's apartment door. 9RP 112-13. The knocker was McClain. 7RP 62, 9RP 113. McClain told police he went to Howie's apartment because he thought the occupants "had Liz doing bad sexual things." 7RP 127.

David awoke Howie, who left the bedroom and opened the door. 7RP 62, 9RP 114-15. Howie and McClain walked to the kitchen counter. 7RP 63-64. Howie smelled a chemical odor on McClain. 7RP 68, 85-86.

The smell came from "sherm." 7RP 85-86. "Sherm" consists of a tobacco or marijuana cigarette dipped in formaldehyde or dissolved PCP. 7RP 68, 9RP 14-15, 165. PCP is an anesthetic. 9RP 9-10. Chronic PCP use can cause amnesia, serious confusion, disorientation, and psychosis. 9RP 12-20, 24-26.

PCP "controlled" McClain. 5RP 82. He had once been involuntarily committed after exhibiting bizarre behavior while under the influence of the drug. 5RP 55-61, 85-87. McClain was found walking

down the street naked, with a bible in his hand, declaring he was Jesus Christ. 5RP 49-51, 54, 86-87. He broke a neighbor's fish tank because God told him to free the fish. 5RP 86-87.

McClain asked Howie where Liz was. 7RP 64-65. Howie told McClain she was not there. 7RP 64-65. McClain repeated the question several more times. 7RP 64-65. He grew angrier. 7RP 65. Howie said McClain was not acting as he normally did. 7RP 86. McClain grunted and rocked back and forth. He then pulled out a gun. 7RP 65-68.

Howie ran through the bedroom and locked himself in a bathroom. 7RP 69-78, 9RP 115-16. McClain came into the bedroom and killed Swenson with a single shot into Swenson's head. 9RP 8-15, 118-24. He shot David in the face immediately thereafter. 9RP 124-26. He then tried to break into the bathroom. 7RP 76-77, 9RP 126, 134-36. Unsuccessful, McClain shot several times through the bathroom door. 7RP 77-78, 9RP 126, 135-36. He did not hit Howie. 7RP 79-80. McClain looked around for a moment, then left Howie's apartment. 9RP 136-37.

Howie and David called 911. 7RP 79-80, RP9 139-40. Officers arrived quickly. 4RP 23-26. They saw Howie was outside the apartment. He was screaming and hysterical. 4RP 27-28. At about that time someone drove a dark-colored SUV past Howie's apartment. 4RP 28. Howie

exclaimed, "That's him." 4RP 28. McClain, the driver of the SUV, accelerated out of the parking lot. 4RP 30-34. Police gave chase and after several miles, McClain crashed the SUV. 4RP 69-74, 97-104, 134-40. Officers promptly arrested McClain. 4RP 138-41.

A blood analysis revealed McClain had consumed PCP, MDMA, MDA, and THC. 9RP54-55.

The state charged McClain with first degree murder and two counts of first degree attempted murder, all while being armed with a firearm. CP 1-7. McClain presented a diminished capacity defense. An expert psychiatrist concluded McClain suffered from PCP intoxication with possible psychotic symptoms at the time of the shootings. 9RP 93.

The trial court instructed jurors it could consider voluntary intoxication by drugs in determining whether McClain acted with the requisite mental state. CP 163 (voluntary intoxication instruction, WPIC 18.10).³ The court also provided lesser included instructions of second

³ The instruction read:

No act committed by a person while in a state of voluntary intoxication by drugs or alcohol is less criminal by reason of that condition. However, evidence of such intoxication may be considered in determining whether the defendant acted or failed to act with premeditation, intent, recklessness, negligence or knowledge.

degree intentional murder, manslaughter and second degree assault for the charge of first degree murder and attempted second degree murder for the two counts alleging attempted first degree murder. CP 168-84.

During closing argument, McClain argued PCP intoxication prevented him from forming the mental states of premeditation, intent, knowledge, recklessness or negligence 10RP 42-49, 52-62, 65-74. A King County jury disagreed, finding McClain guilty as charged. CP 202-08. The trial court imposed a standard range sentence totaling 860 months. CP 217-25.

2. *Police Post-Arrest Interview*

McClain spoke with Detectives Murray and Vollmer at a police station holding cell a few hours after he was arrested. 7RP 115-19, 8RP 39-41. He told the officers he went to Howie's apartment to look for his friend Liz. 7RP 126-27, 8RP 69. McClain was concerned Liz was "doing bad sexual things" or "[t]he guys inside the apartment had Liz doing bad sexual things." 7RP 127, 8RP 69. Murray testified that after McClain made the statements, he "requested to speak to a family member and an attorney, he didn't want to talk anymore." 7RP 127-28.

Defense counsel did not object to Murray's statement that McClain requested an attorney. Counsel instead explained outside the jury's

presence that he did not object because he "did not know what to do about it then, and I still don't. . . . I tried to figure out if there's some curative measure that can be taken for that, and I can't think of one that doesn't make matters worse." 7RP 175. Counsel did not request a curative instruction or move for a mistrial.

4. *Closing Argument*

During rebuttal argument, the prosecutor asked jurors to speculate that Liz may have been a prostitute and McClain her pimp:

"[L]et's assume there were some delusions [suffered by McClain] and he really believed, for some stupid reason, completely irrational reason, that Liz was in danger, even though she wasn't.

Do you suppose, perhaps it's possible, that she might support her drugs or drug habit by prostitution? Do you suppose, perhaps, that Mr. McClain might have some involvement in that? Do you suppose that he might have been angry that, here's a woman who lives in a household with three people, drug addicts, who buys drugs from him and owes him, who have been, by now, spending more hours with Liz.

He comes by, he can't find Liz. He thinks they are lying and he demands money. . . . But consider Mr. McClain, his lifestyle, his behavior, his history, and it's not a stretch of any imagination to believe that he had clear motive for killing one and all of the occupants of [Howie's apartment].

10RP 83-84.

Defense counsel did not object to the argument.

3. *Sentencing*

Consistent with McClain's request, the trial court waived recoupment of non-mandatory fees and costs. 11RP 28. The trial court stated it would impose the "\$100 DNA collection fee, which is mandatory." 11RP 28. Defense counsel did not object. The judgment and sentence reflect the court's oral pronouncements. CP 219.

D. ARGUMENT

1. THE STATE VIOLATED MCCLAIN'S CONSTITUTIONAL RIGHTS BY ELICITING TESTIMONY THAT HE EXERCISED HIS RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION.

The state violated the due process protections of the Fourteenth Amendment and the right to remain silent under the Fifth Amendment and article 1, section 9 by eliciting during its case in chief Detective Murray's testimony that McClain requested to have counsel present during post-arrest questioning. Wainwright v. Greenfield 474 U.S. 284, 291, 106 S. Ct. 634, 88 L.Ed.2d 623 (1986); State v. Curtis, 110 Wn. App. 6, 13, 37 P.3d 1274 (2002). The constitutional error is manifest and thus may be raised for the first time on appeal. Curtis, 110 Wn. App. at 11.

"The exercise of constitutionally guaranteed Miranda rights must be without penalty." Curtis, 110 Wn. App. at 8. The state penalizes an accused for invoking his rights when it elicits as substantive evidence of

guilt testimony that the accused exercised his Miranda rights. Curtis, 110 Wn. App. at 8.

It is undisputed the state may not elicit testimony from witnesses relating to a defendant's silence to infer guilt from such silence. State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). The same is true of the defendant's invocation of the right to counsel during questioning. Curtis, 110 Wn. App. at 14 (prosecutor's question and officer's response violated defendant's Fifth and Fourteenth amendment rights because examination served "no discernable purpose other than to inform the jury that the defendant refused to talk to the police without a lawyer.").⁴ See also State v. Borsheim, 140 Wn. App. 357, 372, 165 P.3d 417 (2007) (Miranda's procedural safeguards designed to protect the defendant from self-incrimination "include a warning by police of the right to remain silent and the right to an attorney, and an immediate termination of police questioning if an attorney is requested.").

⁴ The Fifth Amendment and article I, § 9 guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence. State v. Knapp, 148 Wn. App. 414, 420, 199 P.3d 505 (2009). The right of a accused to have counsel present during custodial interrogation "is an indispensable part of the protective privilege of the fifth amendment . . ." State v. Tetzlaff, 75 Wn.2d 649, 651, 453 P.2d 638 (1969).

These cases demonstrate the intertwined nature of the Fifth Amendment rights to silence and to have counsel present upon request during custodial interrogation. Both are rights implicated by Miranda. When each is invoked, the result is the same: the interrogation ends.

In the Sixth Amendment context, courts have recognized a prosecutor's comments regarding the defendant's exercise of his right to counsel can be just as improper as prosecutorial comments regarding the defendant's exercise of his right to remain silent. United States v. Friedman, 909 F.2d 705, 709 (2d Cir.1990); Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir.1983), cert. denied sub nom., McCarthy v. Bruno, 469 U.S. 920 (1984); United States v. McDonald, 620 F.2d 559, 561-64 (5th Cir. 1980). As under the Sixth Amendment, it is equally improper to comment on the defendant's exercise of his Fifth Amendment right to counsel or his invocation of the right to silence. The state violated McClain's Fifth Amendment right to counsel by eliciting testimony from Murray that McClain exercised his right.

The state's error was not harmless. As opposed to indirect comments on the exercise of Miranda rights, direct comments are presumed prejudicial and are harmless only if a reviewing court finds the comment harmless beyond a reasonable doubt. State v. Romero, 113 Wn.

App. 779, 54 P.3d 1255 (2002); State v. Nemitz, 105 Wn. App. 205, 215, 19 P.3d 480 (2001).⁵ Detective Murray's testimony could not have been more direct. Murray testified that after McClain said Liz was a friend, he "requested to speak to a family member and an attorney, he didn't want to talk anymore." 7RP 127-28.

This testimony prejudiced McClain. McClain admitted he was the shooter. He maintained he was too intoxicated by sherm to be capable of premeditating and forming the requisite mental states. As the following facts demonstrate, there was substantial evidence to support McClain's defense.

First, Howie smelled the chemical odor of sherm emanating from McClain. He saw McClain "grunting" and "rocking" before pulling the gun. 7RP 65.

Second, the officer who handcuffed McClain after the chase said he "seemed like he was high on . . . an illegal drug of some kind"

⁵ For example, an indirect comment on the defendant's right to remain silent occurs when a witness or state agent refers to a comment or act by the defendant that could be inferred as an attempt to exercise the right to remain silent. See State v. Lewis, 130 Wn.2d 700, 705-06, 927 P.2d 235 (1996) (officer did not testify the defendant refused to talk, but rather that the defendant claimed he was innocent); State v. Sweet, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999) (officer's testimony that defendant said he would take a polygraph test after discussing the matter with his attorney was an indirect reference to silence).

4RP 78. McClain was lethargic and had bloodshot eyes. 4RP 79. The officer had to "give him commands more than once to do things." 4RP 79.

Third, an officer who met McClain at the police station holding cell after his arrest and was present during questioning described McClain as initially lethargic, calm, and "maybe out of it a little bit" 8RP 46. After the questioning ended, McClain requested a Bible, which the officer provided. The Bible was well worn, which caused a dramatic change in McClain's demeanor. 8RP 49-50. He became "confrontational" and called the police "racists" and "Satanists" for having a bible in such poor condition. 8RP 50. McClain's change in attitude, according to a defense expert psychiatrist, was consistent with behavior shown by those suffering from PCP intoxication. 9RP 25.

Finally, McClain had PCP in his bloodstream. A psychiatrist familiar with PCP overdoses diagnosed McClain as suffering from PCP intoxication with possible psychotic symptoms at the time of the shooting. 9RP 93.

The state plainly proved McClain shot three individuals from close range with a handgun. But given the substantial evidence supporting the diminished capacity defense, the state's case was not overwhelmingly strong. Under these circumstances, Murray's testimony unfairly prejudiced

the defense. Evidence McClain had the wherewithal to request counsel during questioning that took place only a few hours after the shooting tended to cast doubt on the theory of diminished capacity. Murray's testimony was therefore not harmless beyond a reasonable doubt. This Court should reverse McClain's convictions and remand for a new trial.

2. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT BY IMPLYING MCCLAIN AND LIZ WERE JOINTLY INVOLVED IN PROSTITUTION.

The prosecutor suggested McClain's friend Liz was a prostitute and McClain was her pimp. There are two problems with the argument. First, it was not supported by evidence. Second, it implied McClain was guilty of an uncharged crime. The prosecutor committed misconduct.

A prosecutor commits misconduct when he argues facts not in evidence. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432, 442 (2003); State v. Perkins, 97 Wn. App. 453, 459, 983 P.2d 1177 (1999), review denied, 140 Wn.2d 1006 (2000). It is particularly offensive to suggest during closing argument that the defendant committed an uncharged crime. State v. Henderson, 100 Wn. App. 794, 803, 998 P.2d 907 (2000); State v. Torres, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976).

These rules are not new. See State v. Belgarde, 110 Wn.2d 504, 506-10, 755 P.2d 174 (1988) (conviction reversed where the prosecutor

"testified" during closing argument regarding a political organization he claimed was responsible for terrorist incidents when there was no evidence to support that argument); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968) (improper for prosecutor to argue, without supporting evidence, that the defendant was trying to frame the victim's ex-husband for murder), cert. denied, 393 U.S. 1096 (1969); State v. Case, 49 Wn.2d 66, 68-70, 298 P.2d 500 (1956) (prosecutor's unsupported assertions during closing argument constituted reversible misconduct).

Defense counsel did not object to the prosecutor's unsupported accusation that McClain was involved in prostitution. Reversal is nevertheless required if the prosecutor's remarks were so flagrant and ill-intentioned they could not have been cured by a jury instruction. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

The prosecutor's argument meets this test. The enduring nature of the rules the prosecutor broke indicates a conscious, intentional attempt to defeat McClain's diminished capacity defense through any means. Painting a false picture of McClain as a calculating, sophisticated criminal willing and able to sell his friend's body for money furthered the prosecutor's cause by suggesting McClain knew exactly what he was doing when he fired the shots in Howie's apartment. Quite simply, according to

the prosecutor's testimony in the guise of argument, McClain went to the apartment and acted as he did with the intention of protecting his investment in Liz.

The timing of the prosecutor's comments is further evidence of ill intent. The comments came near the end of the prosecutor's rebuttal argument. They were therefore one of the last things jurors heard. State v. Powell is instructive. There the prosecutor suggested a not guilty verdict would deter children from reporting sexual abuse for fear they would not be believed. 62 Wn. App. 914, 918, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992). In reversing a child molestation conviction for prosecutorial misconduct, the court noted the prosecutor made the argument at the end of rebuttal, "immediately prior to the jury beginning their deliberations." Powell, 62 Wn. App. at 919. The court concluded that given the circumstances, a curative instruction would have been futile because "[t]he bell once rung cannot be unring." Powell, 62 Wn. App. at 919 (quoting State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976), review denied, 88 Wash.2d 1004 (1977)).

The same result should obtain here. McClain requests this court reverse his convictions because of the prosecutor's misconduct.

3. 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 trial court imposed the \$100 DNA fee under the mistaken impression it was “mandatory.” This was error; the fee was not mandatory under the statute in force on the date of the offense. Moreover, any retroactive application of the amended DNA collection statute would violate the constitutional prohibition on ex post facto laws. This Court should therefore remand so the trial court may exercise its discretion in deciding whether to impose the DNA fee based on a correct understanding of pertinent law.

- a. 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 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 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 the incarceration based on inability to pay. Curry, 118 Wn.2d at 918.

Statutes authorizing costs in criminal prosecution 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).

The version of RCW 43.43.7541 in effect at the time 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).

But under the version in effect February 21, 2005, the date of McClain’s offenses, the DNA fee was not mandatory. Former RCW 43.43.7541 (2002). That version states the court should impose a fee “unless the court finds that imposing the fee would result in undue hardship on the offender.” Former RCW 43.43.7541.

The former statute controls in McClain's case. When the Legislature amends a criminal or penal statute, its pre-amendment version applies to crimes committed before the amendment's effective date, unless a contrary intention is fairly conveyed in the amendatory action. RCW

10.01.040; 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); State v. Toney, 103 Wn. App. 862, 864, 14 P.3d 826 (2000). The Legislature gave no indication at the time it amended the DNA fee statute that it had retroactive effect. Absent such intent, the former statute applied to McClain.

That statute directed the court to consider an offender's ability to pay. Former RCW 43.43.7541; Curry, 118 Wn.2d at 916. Failing to so consider ability to pay 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. Assuming for Argument 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.

McClain anticipates the State will argue the amended statute, enacted after the events in this case transpired, applied at McClain's

sentencing. The State's interpretation of the amendment, however, would violate the prohibition on ex post facto laws.

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. In re Personal Restraint of Powell, 117 Wn.2d 175, 184-85, 814 P.2d 635 (1991). In the criminal context, "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 meets these criteria. The amendment is a substantive, retrospective change in the law that alters 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.

c. Counsel Was Ineffective Assistance for Failing to Object to Sentencing Under the Incorrect Statute.

McClain's counsel was ineffective for failing to object to the trial court's imposition of the DNA fee because it was not "mandatory" under the controlling statute.

The Sixth Amendment and article 1, section 22 guarantee the right to effective representation. 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 is deficient when his performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). 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 (1995). Prejudice exists where, but for the deficient performance, there is a reasonable probability the result would have been different. State v. B.J.S., 140 Wn. App. 91, 100, 169 P.3d 34 (2007).

McClain satisfies both prongs of the Strickland test. First, 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). Second, there was no legitimate tactical reason for counsel to stand mute while the trial judge imposed a \$100 fee without first considering McClain's ability to pay. Moreover, there is a reasonable likelihood counsel's deficient performance affected the outcome because the court waived all other non-mandatory fees.

This Court should remand for resentencing so the court may properly consider McClain's indigence and ability to pay in light of the applicable statute 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).

4. THE TRIAL COURT'S FAILURE TO FOLLOW CrR 3.5(c) WARRANTS A REMAND FOR ENTRY OF PROPER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

After a hearing to determine the admissibility of a defendant's statements, the trial court must enter written findings of undisputed and disputed facts, conclusions as to the disputed facts, and the conclusion as to whether the statement is admissible along with reasons therefore. CrR

3.5(c). These findings and conclusions are mandatory. State v. Cunningham, 116 Wn. App. 219, 227, 65 P.3d 325 (2003).

The trial court held a hearing to determine whether to admit McClain's statements to police. 2RP 15-112. After hearing from five witnesses, including McClain, the trial court concluded McClain knowingly and voluntarily waived his right to remain silent. 2RP 108-112. His statements were therefore admissible. 2RP 112. The court did not enter written findings of fact and conclusions of law.

The purpose of written findings and conclusions is to promote efficient and precise appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); see State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (“A prosecuting attorney required to prepare findings and conclusions will necessarily need to focus attention on the evidence supporting each element of the charged crime, as will the trial court. That focus will simplify and expedite appellate review.”).

The absence of written findings and conclusions in McClain's case prohibits effective appellate review. And although the trial court entered oral findings, those findings are not a suitable substitute. “A court's oral opinion is not a finding of fact.” State v. Hescoek, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). Rather, a court's oral opinion is merely an

expression of the court's informal opinion when rendered. Head, 136 Wn.2d at 622. An oral opinion is not binding unless it is formally incorporated in the written findings, conclusions and judgment. Head, 136 Wn.2d at 622 (citing State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)).

A trial court's failure to enter written findings and conclusions requires remand for entry of the required findings. Head, 136 Wn.2d at 624. Remand is thus the appropriate remedy here.

D. CONCLUSION

The state improperly used McClain's invocation of his right to have counsel present during custodial interrogation as substantive evidence of guilt. In addition, the prosecutor committed reversible misconduct by arguing with no supporting evidence that McClain was involved with his friend Liz in prostitution. These errors warrant reversal of McClain's convictions. In any event, the trial court failed to exercise its discretion when it imposed a non-mandatory DNA collection fee based on the mistaken view the fee was "mandatory." Further, the state and trial court failed to enter written findings and conclusion as required by CrR 3.5(c), thereby frustrating effective appellate review. These errors warrant a

remand for resentencing and for entry of written findings of fact and conclusions of law.

DATED this 23 day of July, 2009.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62923-9-1
)	
JOSEPH MCCLAIN,)	
)	
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 23RD 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] JOSEPH MCCLAIN
 DOC NO. 831827
 WASHINGTON STATE PENITENTIARY
 1313 N. 13TH AVENUE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF JULY, 2009.

x *Patrick Mayovsky*