

62962-0

62962-0

NO. 62962-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CLARENCE BENNETT, JR.,

Appellant.

2009 SEP 3 11:3:17
COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE BRUCE HELLER

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. MCCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES PRESENTED

1. Should this Court overturn its own precedent and find that the crime of failure to register as a sex offender is an alternative means crime?

2. Did the sentencing court properly impose the \$100 DNA collection fee?

3. The State concedes that the sentencing court did not have the authority to require the defendant undergo HIV testing?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On July 16, 2008, the defendant was charged with failing to register as a sex offender. CP 1-2. The charging period consisted of the time intervening between January 1, 2008 through April 30, 2008. CP 1-2. On October 3, 2008, a jury found the defendant guilty as charged. CP 27. With an offender score of 11, the defendant received a standard range sentence of 43 months confinement. CP 33, 35.

2. SUBSTANTIVE FACTS

In 1991, the defendant was convicted of a sex offense. 1RP¹ 110, 115. He was informed, and admitted that he knew, he was required to register with the sheriff as a sex offender. 1RP 115, 1RP 82-85. In December of 2006, the defendant registered that he was living at 3325 South 222nd Place in Kent. 1RP 91-92, 116, 129. The defendant moved in with his father at this residence. 1RP 45-46. After receiving this information, Kent police verified that the defendant as indeed living at this address. 1RP 57.

On January 2, 2008, as is customary after one year, Kent police sent a certified letter to the defendant at his registered address to confirm he was still living at that address. 1RP 57. The letter informed the defendant about his registration requirements and included a form for him to fill out and return to the police. 1RP 58. The form was never returned to the police. 1RP 60. Attempts to locate the defendant at the registered address were to no avail. 1RP 63, 70-71.

¹ Consistent with the defendant's briefing, the verbatim report of proceedings is cited as 1RP--encompassing the dates 9/19/08, 9/25/08, 10/1/08, 10/2/08 and 10/3/08; 2RP--consisting of a sealed portion of the proceedings from 10/1/08 (see 1RP 29); and 3RP--1/21/09.

The defendant's father testified and confirmed that the defendant lived with him up until 2008, when because of a disagreement, he asked the defendant to move out. 1RP 46. He said that when officers came looking for his son, the defendant was no longer living with him. 1RP 48. He added that he took the letter he received for the defendant over to his daughter's house where the defendant had been staying. 1RP 47-48. He also told his son that he had taken the letter over there. 1RP 47-48. The defendant's father had signed for the certified letter on January 11, 2008. 1RP 59. The defendant's father testified that after moving out of his house, the defendant initially moved in with his daughter, but then he was living on the streets. 1RP 46, 53.

On February 8, 2008, Detective Douglas Garrett received a message from the defendant on his desk phone--a number that was included in the letter. 1RP 61, 66. In speaking to the defendant on the phone, the defendant told the detective that he was "living here and there, working at the Union Hall, trying to get up enough money so he could get a place of his own. He went on to say he hadn't been at his parents' for a couple of months." 1RP 62. The detective informed the defendant that if he did not have a permanent address that he needed to register as homeless. 1RP

62. The defendant said he would do so the following Monday. 1RP

62. The defendant never registered that he was no longer living with his father. 1RP 107-09.

The defendant testified and said that he had never moved out of his father's house. 1RP 120. He claimed that his father had memory problems. 1RP 117. He added that in February of 2008, he was merely house-sitting at his sister's house, and remained there until March 14th of 2008, when his sister returned home. 1RP 117-18. He testified he then stayed back and forth between his father's house and his sister's house. 1RP 119.

The defendant claimed he had never seen the certified letter sent to his father's house. 1RP 122-23. He also claimed that he had never told the detective that he had moved out of his father's house, or that he was homeless. 1RP 125. The defendant's sister did not testify.

Additional facts are included in the sections they belong.

C. ARGUMENT

1. THE JURY INSTRUCTIONS ACCURATELY INSTRUCTED THE JURY ON THE LAW--FAILURE TO REGISTER AS A SEX OFFENDER IS NOT AN ALTERNATIVE MEANS CRIME.

The defendant contends that the jury instructions were deficient in that the alternative means of committing the crime of failure to register as a sex offender were not contained in the "to convict" instruction. The defendant's argument depends on his assertion that failure to register as a sex offender is an alternative means crime. As this Court has previously found, it is not. See, State v. Peterson, 145 Wn. App. 672, 186 P.3d 1179 (2008) (the different registrations requirements are not elements or alternative means), rev. granted, 165 Wn.2d 1027 (2009); also, State v. Durrett, 150 Wn. App. 402, 406-07, 208 P.3d 1174 (2009) (the subsections of the failure to register statute are definitional statements pertaining to the different ways an offender is required to register).

Here, the "to convict" instruction provided as follows:

To convict the defendant of the crime of failure to register as a sex offender as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the time intervening between January 1, 2008 and April 30, 2008 the defendant was required to register as a sex offender;

(2) That during the time intervening between January 1, 2008 and April 30, 2008 the defendant knowingly failed to comply with the requirements of sex offender registration; and

(3) That these acts occurred in the State of Washington.

CP 24.

A definition instruction described what constitutes a failure to comply.

A person commits the crime of failure to register as a sex offender when that person, having been convicted of a sex offense for which he is required to register as a sex offender with the county sheriff's office, knowingly fails to send signed written notice of a change of address to the county sheriff within seventy-two hours of moving to a new residence within the same county or knowingly fails to comply with the requirement that the defendant who had a fixed residence, send a signed written notice of where the defendant plans to stay to the sheriff of the county where the defendant last registered within forty-eight hours, excluding weekends and holidays, of ceasing to have a fixed residence.

CP 22.

Generally all elements should be included in the "to convict" instruction. See State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005).

The defendant contends that the instructions given here are confusing because the "to convict" instruction does not contain all

the elements of the offense; that the crime of failure to register is an alternative means crime and that the language in the definitional instruction (CP 22) are the elements that must be included in the "to convict" instruction. This is contrary to existing case law. See Peterson, supra. The registration requirements are not alternative means of committing the crime of failing to register.

In Peterson, the prosecutor charged the defendant with the crime of failure to register as a sex offender. The charging document did not specify whether the defendant had moved to another fixed residence or whether he was homeless. In fact, as the prosecutor told the court, the State did not know where the defendant was. Peterson, 145 Wn. App. at 674-75.

Peterson claimed that failure to register as a sex offender is an alternative means crime and thus the alternative means he was charged under needed to be in the charging document. Peterson argued that RCW 9A.44.130 created three distinct alternative means. Specifically, he claimed the State could charge three alternatives:

- 1) failure to register a change of fixed address in the same county, which requires proof that the offender moved to a new residence, within the county, but did not register within 72 hours; 2) failure to register after a move to a fixed residence in a different

county, requiring proof of a move to a fixed residence, in a different county, and failure to notify to the sheriff of the new county 14 days prior to move or the sheriff of the former county within 10 days; or 3) failure to register after becoming homeless, necessitating a showing of homelessness and no registration within 48 hours.

Peterson, at 677.

Whether a statute is an alternative means statute is a question of legislative intent. State v. Arndt, 87 Wn.2d 374, 378-79, 553 P.2d 1328 (1976). What must be ascertained is "whether the Legislature therein intended to define but one crime...and to state the different ways in which the crime might be committed." Arndt, 87 Wn.2d at 378 (citing State v. Pettit, 74 Wash. 510, 518, 133 P. 1014 (1913)). The element of the defined crime here is the failure to register.²

² See e.g., State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007) (an assault by battery, an assault by attempting to inflict bodily injury on another while having the apparent present ability to inflict such injury; and assault by placing the victim in reasonable apprehension of bodily harm are three different methods of committing an assault, but they are not alternative means of committing the crime); State v. Linehan, 147 Wn.2d 638, 654-55, 56 P.3d 542 (2002) (to 'wrongfully obtain' or 'exert unauthorized control' over the property of another are not alternative means of committing the crime of theft), cert. denied, 538 U.S. 945 (2003); State v. Simmons, 113 Wn. App. 29, 32, 51 P.3d 828 (2002) (intent to injure and intent to defraud are not alternative means of committing forgery); State v. Laico, 97 Wn. App. 759, 987 P.2d 638 (1999) (bodily injury which creates a probability of death or which causes significant serious permanent disfigurement, or which causes significant permanent loss or impairment of a function of any bodily part or organ, although stating different methods of committing the crime, they are not alternative means of committing first-degree assault); State v. Al-Hamdani, 109 Wn. App. 599, 601, 36 P.3d 1103 (2001) ("mental incapacity" and "physical helplessness" are not alternative means within

Statutory constructions that lead to unlikely, strange, or absurd results are to be avoided. State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994). Statutes are interpreted to best advance the legislative purpose. Morris v. Blaker, 118 Wn.2d 133, 143, 821 P.2d 482 (1992).

In Peterson, this Court recognized that Peterson's interpretation of the statute would create a "strange scenario," wherein the legislature created a statute that in many cases a violation of which could never be proven. Peterson, at 677. In many cases, this Court recognized, the State will not have evidence of an offender's whereabouts beyond the fact that the offender is not living at his last registered address. If the statute required evidence of the offender's post-move living situation as an element of the crime--as alternative means, the State generally could not "prove *any* of the options." Peterson, at 677 (emphasis in original). "No doubt," this Court stated, "the legislature did not intend such an absurd result." Id.

Rather than adopt such an unlikely interpretation, this Court recognized that the failure to register statute imposes but one duty, to

the second degree rape statute. Rather, these terms provide an understanding of ways in which the victim is incapable of giving consent to sexual intercourse), rev. denied, 148 Wn.2d 1004 (2003).

register with the sheriff. The punishable offense is contained in but one subsection:

A person who knowingly fails to register with the county sheriff or notify the county sheriff, or who changes his or her name without notifying the county sheriff and the state patrol, as required by this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense.

Peterson, at 677-78 (citing RCW 9A.44.130(11)(a)). The remaining subsections of the statute merely provide the various procedures required for registration depending upon one's living situation and location the person intends to move. Peterson, at 678; Durrett, 150 Wn. App at 404-07. Because the failure to register statute is not an alternative means statute, the defendant's jury instruction argument fails. The "to convict" instruction contained all the elements of the crime, with the definitional instruction providing the meaning of the elements.³

³ The defendant's reliance on two court of appeals cases is of no moment. In State v. Stratton, 130 Wn. App. 760, 124 P.3d 660 (2005), the Court merely found that Stratton was not required to register as homeless or register at another address because he had not left his "fixed residence." In State v. Pickett, 95 Wn. App. 475, 975 P.2d 584 (1999), the Court found Pickett could not be found guilty of failing to register because the statute existing at that time did not provide a way to register if the offender did not have a fixed residence. Neither of these cases, which merely discuss the terms of the statute, supports the claim that the statute is an alternative means statute.

In any event, any error here was harmless. Generally, all elements should be included in the "to convict" instruction. See Mills, supra. At the same time, the requirements of due process usually are met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted. State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). Here, the defendant agreed with the proposed instructions, likely not seeing any potential problem or prejudice in the construct of the instructions. 1RP 74-75. Still, the issue of omission of an element from the "to convict" instruction is of sufficient constitutional magnitude to warrant review when raised for the first time on appeal. Mills, 154 Wn.2d at 6. But this exception is "not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below." Scott, at 687. The exception does not help a defendant when the asserted constitutional error is harmless beyond a reasonable doubt. Id.

Here, the defendant does not argue that the instructions as a whole fail to include all the elements of the crime. Rather, he argues only that all the elements were not included in the "to

convict" instruction. This is important because the instructions did not prevent either party from arguing their theory of the case. See Mills, at 7 ("[j]ury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law").

The defendant's theory of the case, his only defense to the charge, was that he did not need to register because he never left his father's residence. This theory is completely unaffected by the claimed instructional error. If the jury believed the defendant, he would have been found "not guilty," whether or not all the "elements" were in the "to convict" instruction.

In addition, there was substantial evidence supporting both "means" of the crime charged. See Smith, 159 Wn.2d at 783 (a defendant's constitutional right to a unanimous jury verdict is assured when the State presents substantial evidence supporting each alternative means presented).

This case was one of credibility, did the jury believe the defendant still lived at his father's residence as he claimed. The jury rejected his defense. At the same time, the evidence--uncontradicted in this regard--was that the defendant left his

father's residence during the charging period and lived at his sister's residence--thus requiring that he register. 1RP 46-48, 53, 117-18. The evidence also showed that the defendant was living without a fixed residence during this same time period after leaving his sister's residence--again requiring that he register. 1RP 46, 53, 62, 119.

In sum, even were it true that failure to register is an alternative means crime, the failure here having the alternatives in an instruction separate from the "to convict" instruction, any error was harmless.

2. THE SENTENCING COURT WAS REQUIRED TO IMPOSE A \$100 DNA COLLECTION FEE.

The defendant contends that the \$100 DNA collection fee is not mandatory, and therefore either the trial court improperly sentenced the defendant believing the fee was mandatory,⁴ or his trial counsel was ineffective for failing to argue the fee was not mandatory. The defendant's arguments rest on his belief that the DNA collection fee is permissive; it is not. RCW 43.43.7541

⁴ When the court imposed the fee here, the judge stated, "And the Court will also impose \$600, which is the mandatory fees and costs and the court will waive all non-mandatory fees and costs." RP (1/21/09) 21. The only mandatory fees are the \$500 victim penalty assessment and the \$100 DNA collection fee.

requires the court impose the fee for all sentences occurring after enactment of the statute, regardless of the date of offense or conviction. The statute violates neither the savings clause nor *ex post facto* clause.

The statute under which the DNA collection fee was imposed is RCW 43.43.7541. In pertinent part the statute reads:

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.

RCW 43.43.7541 (emphasis added). This version of the statute took effect on June 12, 2008. See RCW 43.43.7541 (2008 c 97 § 3, eff. June 12, 2008). The defendant was convicted on October 3, 2008, and sentenced on January 21, 2009.

The defendant asserts that because he committed his criminal act in January through April of 2008, a former version of RCW 43.43.7541 is applicable, a version of the statute that made the imposition of the DNA fee permissive rather than mandatory.⁵

⁵ The former version reads in pertinent part:

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender.

Former RCW 43.43.7541 (2002 c 289 § 4).

The defendant's two arguments, based on the savings clause and the *ex post facto* clause, are not persuasive.

a. The Savings Clause.

In pertinent part, the savings clause reads as follows:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040.

In short, the savings clause provides that a criminal or penal statute in effect on the date a crime is committed controls unless

the amended or new statute declares otherwise. See State v. Kane, 101 Wn. App. 607, 612-13, 5 P.3d 741 (2000). In applying RCW 10.01.040, the Supreme Court does "not insist that a legislative intent to affect pending litigation be declared in express terms in a new statute"; rather, such intent need only be expressed in "words that fairly convey that intention." Kane, 101 Wn. App. at 612 (citing 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)); see also State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978).

In Zornes, the Supreme Court held that a newly enacted drug law controlled cases pending at the time of the enactment of the statute even though the law was not in effect at the time of the commission of the crime. The Zornes, a husband and wife, were convicted under a drug statute pertaining to "narcotic drugs," for their possession of marijuana. The particular amendment to the drug statute enacted while the Zornes' case was pending, stated that "the provisions of this chapter [the narcotic drug statute] shall not ever be applicable to any form of cannabis." Zornes, 78 Wn.2d at 11. The Court found it could be reasonably inferred that the legislature intended the amendment, by use of this language, to

apply to pending cases as well as those arising in the future.

Zornes, at 13-14, 26.

In Grant, a new statute provided that "intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages." Grant, 89 Wn.2d at 682. The policy behind the statute was that alcoholics and intoxicated persons should receive treatment rather than punishment. Grant was convicted of being intoxicated on a public highway. The Supreme Court held that this new statute applied to Grant's case that was pending at the time of the enactment of the statute. The Court found that the language of the statute (cited above) fairly expressed the legislative intent to avoid the savings statute default rule. Grant, at 684.

Here, the statutory language clearly shows the legislature intended RCW 43.43.7541 to apply to "every sentence" imposed after the effective date of the statute, regardless of the date the offense was committed. In the original version of RCW 43.43.7541, the legislature put in specific language that indicated that the statute applied only to crimes "committed on or after July 1, 2002." In amending the statute, the legislature removed any reference to when the crime was committed. This in itself indicates that the

legislature did not intend the date a crime is committed to be a limiting factor. See In re Personal Restraint of Sietz, 124 Wn.2d 645, 651, 880 P.2d 34 (1994) (if the legislature uses specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred); Millay v. Cam, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (if the legislature thought such a provision necessary it would have included it within the statute's text).

In addition, the statute specifically says it applies to "[e]very sentence" imposed under the sentencing reform act. The term "every" means "all." See State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991); State v. Harris, 39 Wn. App. 460, 463, 693 P.2d 750, rev. denied, 103 Wn.2d 1027 (1985).⁶

Finally, the amendment to the statute pertaining to the DNA collection fee is consistent with, was done in conjunction with, and refers directly to, the amendment to RCW 43.43.754, the statutory provision regarding the actual collection of DNA samples. Under RCW 43.43.7541, the DNA collection fee is mandatory for crimes specified in RCW 43.43.754. The 2008 amendment to RCW

⁶ See also In re Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) ("*Expressio unius est exclusio alterius*, 'specific inclusions exclude implication.' In other words, where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions").

43.43.754 expanded the crimes for which a DNA sample is required to be taken. See RCW 43.43.754 (2008 c 97 § 2, eff. June 12, 2008). The legislature stated, in pertinent part, that [t]his section applies to. . .[a]ll adults and juveniles to whom this section applied prior to June 12, 2008." RCW 43.43.754(6)(a). The former version of RCW 43.43.754 referred to by the 2008 amendment applied to "[e]very adult or juvenile individual convicted of a felony." Former RCW 43.43.754(1) (2002 c 289 § 2). Thus, the legislature made it clear that RCW 43.43.7541 and RCW 43.43.754 applied to crimes committed both before and after June 12, 2008. The trial court here properly imposed the mandatory DNA collection fee.

b. The *Ex Post Facto* Clause.

The *ex post facto* clause of the federal and state constitutions⁷ forbids the State from enacting a law that imposes a punishment for an act that was not punishable when the crime was committed, or that increases the quantum of punishment for the crime beyond that which could have been imposed when the crime was committed. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d

⁷ U.S. Const. Art 1, § 10, cl. 1; WA Const. art. I, § 23.

1062 (1994). Not every sanction or term of a criminal sentence constitutes a criminal penalty or punishment, and if a sanction or term is not a penalty or punishment, the *ex post facto* clause does not apply. Ward, 123 Wn.2d at 498-99; Johnson v. Morris, 87 Wn.2d 922, 928, 557 P.2d 1299; In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993).

For example, the legislature's increase of the mandatory victim penalty assessment from \$100 to \$500 was held not to constitute punishment, and thus, imposition of the \$500 amount for crimes committed before the increase in the amount was not a violation of the *ex post facto* clause. State v. Humphrey, 91 Wn. App. 677, 959 P.2d 681 (1998), reversed on other ground, 139 Wn.2d 53, 62, 62 n.1, 983 P.2d 1118 (1999) (the Supreme Court stating that the assessment was not a "penalty" and "would not, therefore, constitute punishment for the purposes of an *ex post facto* determination").⁸

⁸ See also State v. Blank, 80 Wn. App. 638, 640-42, 910 P.2d 545 (1996) (law requiring convicted indigent defendants to pay appellate costs not punishment and did not violate *ex post facto* provisions), cited with approval in, State v. Blank, 131 Wn.2d 230, 250 n.8, 930 P.2d 1213 (1997); Ward, 123 Wn.2d at 488 (law requiring sex offenders to register was not punishment and did not violate *ex post facto* provisions); In re Metcalf, 92 Wn. App. 165, 963 P.2d 911 (1998) (law requiring deductions from prisoner's wages and funds to pay for cost of incarcerations not punishment and did not violate *ex post facto* provisions); State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997) (law authorizing civil forfeiture of

In determining if a term of sentence imposes a "punishment," courts look first for legislative intent. If the legislature intended the sanction as punishment, then the inquiry stops and the *ex post facto* clause applies. Metcalf, 92 Wn. App. at 178. The defendant cannot show a punitive effect here because the legislature clearly did not intend either the collection of the DNA sample, or the imposition of the \$100 collection fee, to be a criminal penalty. As the 2SHB 2713 Final Bill Report states, the purpose of the creation of a DNA database is to "help with criminal investigations and to identify human remains or missing persons." The fee is simply intended to fund the creation and maintenance of the database. See 2SHB 2713 Final Bill Report; RCW 43.43.7541.

If the legislature did not intend a term to be punitive, courts still examine the effects of the legislation to make sure the effects are not so burdensome as to transform the term into a criminal penalty. Metcalf, at 180; Ward, at 499. The courts will consider seven factors: (1) whether the sanction involves an affirmative restraint on the defendant; (2) whether the term has historically been considered a criminal punishment; (3) whether its

property used to facilitate drug offenses not punishment and did not violate *ex post facto* provisions).

enforcement depends on a finding of scienter; (4) whether its imposition promotes the traditional aims of punishment (deterrence and retribution); (5) whether it applies to behavior that is already a crime; (6) whether it is rationally related to a purpose other than punishment; and (7) whether it appears excessive in relation to this other purpose. Metcalf, at 180 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)). In order to override a non-punitive legislative intent, the factors "must on balance demonstrate a punitive effect by the clearest proof." Metcalf, at 180-81.

Application of these factors shows that the legislation here does not have the effect of imposing a criminal punishment. It is no different than the victim penalty assessment, found not to be punishment in violation of the *ex post facto* clause. See Humphrey, supra.

First, a sanction "involves an affirmative restraint" only when it approaches the "infamous punishment of imprisonment." Metcalf, at 181. The imposition of a \$100 fee is certainly not analogous to imprisonment.

Second, monetary fees and assessments have historically not been regarded as criminal penalties within the meaning of the second factor. Metcalf at 181.

Third, the imposition of the DNA fee can be imposed only after a person has been convicted, but the fee itself is not triggered by any particular finding of scienter and, thus, it does not violate the third factor. See Metcalf, at 181-82.

Fourth, the imposition of the fee does not have the primary effect of promoting the traditional aims of punishment (deterrence and retribution). Metcalf, at 182; Ward, at 508. It would be difficult to argue the nominal \$100 fee is retributive or could act as a deterrent. Rather, the purpose of the fee is to reimburse the agency responsible for the collection of DNA samples and to pay to maintain the State database. RCW 43.43.7541.

Fifth, whether the fee applies to behavior that is already a crime depends upon whether it applies specifically to the felony for which the defendant is convicted instead of to the status of having been convicted of a felony. In Metcalf, the Court reviewed a retroactively applied statutory change that required the deduction of funds received by inmates to pay for costs of incarceration. The Court found that this sanction was not "applied to behavior that is

already a crime" within the meaning of this factor, because it was triggered by the status of having been convicted of a felony rather than by commission of the felony itself. Metcalf, at 182. Similarly, here the DNA fee is triggered by the status of having been convicted of a felony rather than by anything specific to the behavior that constituted the crime.

The sixth and seventh factors examine whether the sanction has a rational non-punitive purpose and whether the sanction is excessive in relation to that purpose. In the context of fines, courts draw a line between fees or assessments that are primarily intended to reimburse the State and those primarily intended to impose criminal punishment for the purposes of public justice. Metcalf, at 177-78. Here, the fee is the former. It has the rational non-punitive purpose of reimbursing the State for the costs of collecting the DNA sample and maintaining the database. A nominal fee of \$100 appears proportionate to that purpose.

Based on the above, the \$100 DNA collection fee does not constitute a criminal penalty or punishment. Therefore, imposition

of the fee does not violate the *ex post facto* clause.⁹

3. THE STATE CONCEDES THE TRIAL COURT DID NOT HAVE THE AUTHORITY TO ORDER HIV TESTING.

The defendant argues that the trial court incorrectly imposed a requirement for HIV testing as part of his sentence. The State agrees.

Generally, no person may undergo HIV testing without their consent unless authorized by law. RCW 70.24.330. However, HIV testing may be imposed for certain specified offenses, specifically those defendants convicted of a sexual offense. RCW 70.24.340(1)(a). Failure to register as a sex offender is not sexual offense. State v. Nelson, 131 Wn. App. 175, 178, 123 P.3d 526 (2005); RCW 9.94A.030(42). Thus, the State concedes it was error to impose a requirement the defendant undergo HIV testing.

⁹ The State will not address the defendant's ineffective assistance of counsel claim. In the event this Court finds the DNA fee is not mandatory, the case should be remanded for the sentencing court to exercise its discretion. It is clear here, the sentencing court believed as the State does, that the fee is mandatory.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction, and except for the requirement that the defendant undergo HIV testing, this Court should affirm the defendant's sentence.

DATED this 2 day of September, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

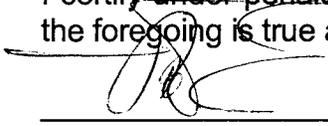
By: 

DENNIS J. MCCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. BENNETT, JR., Cause No. 62962-0-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

09-08-2020

Date