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SEP 09 2009

King County Prosecutor  
Appellate Unit

NO. 63562-0-1

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT WEBSTER,

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in imposing a count I sentence above the standard range. CP 49.

2. The sentencing court's imposition of the DNA collection fee on remand exceeded the scope of this Court's remand order. CP 50.

3. The sentencing court's imposition of the DNA collection fee violates appellant's due process and equal protection rights..

4. The sentencing court erred when it failed to exercise its discretion in imposing a non-mandatory DNA collection fee on the ground it was mandatory.

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

6. Appellant was deprived of effective assistance of counsel at the resentencing hearing.

Issues Related to Assignments of Error

1. Where the top of the standard range for count I is 312 months, where the jury did not find an aggravating factor, and where the court imposed a 314.25-month sentence, is the sentence unlawful?

2. In its initial sentence, the court waived the non-mandatory \$100 DNA collection fee. On remand, the court stated its intent to again waive all non-mandatory legal financial obligations. But after a statutory amendment and revision of the judgment and sentence form, there was no box to check to waive the fee. By imposing the fee as “mandatory,” did the court: (a) exceed the scope of this Court’s remand order, (b) violate Webster’s due process and equal protection rights, (c) apply the wrong statute, (d) fail to realize it had discretion and therefore abuse its discretion, and (e) violate the prohibition against ex post facto laws?

3. Was trial counsel ineffective for failing to object to the imposition of an inapplicable “mandatory” DNA collection fee?

B. STATEMENT OF THE CASE

The King County prosecutor charged appellant Robert Webster with three counts: first degree assault, domestic violence felony violation of a court order, and felony harassment – domestic violence.

CP 1-2. In an amended information, the state charged four counts: attempted first degree murder, first degree assault, domestic violation of a felony court order, and felony harassment – domestic violence.

CP 13-15. The offenses occurred September 30, 2006. CP 13-15, 48.

The jury returned guilty verdicts on all counts. CP 16. On April 3, 2007, the court sentenced Webster to 337.5 months on count I, 60 months on count III, and 43 months on count IV. The court did not enter judgment or sentence on count II. CP 16, 19. The court did not impose the \$100 DNA collection fee; the court instead checked the box to indicate "DNA fee waived (RCW 43.43.754) (crimes committed after 7/1/02)." CP 18.

Webster appealed. This Court affirmed counts I and III, but agreed the count IV offense was a misdemeanor, not a felony. This Court therefore vacated count IV and remanded with directions to enter a misdemeanor sentence on count IV. Because that lowered Webster's felony offender scores by one point, this Court remanded for resentencing on the felony counts. CP 36, 42.

The resentencing occurred May 5, 2009. The court lowered the offender score by one point, then imposed 314.25<sup>1</sup> months on count I and 29 months on count III, to run concurrently. CP 51. For the misdemeanor, the court imposed 12 months to run concurrently with the felony sentences. CP 45; RP 7-8.

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<sup>1</sup> The court stated it intended to "impose the top end[.]" RP 7.

As relates to the DNA fee, however, the judgment and sentence form had been revised in the interim. It no longer had a box to check to waive the fee. The second judgment and sentence therefore imposes the \$100 DNA collection fee. CP 50.

At the sentencing hearing the court stated it intended to “waive all non-mandatory’s and obviously the victim’s assessment penalty [sic] and all other mandatory assessments are imposed. Waive everything else.” RP 8. Defense counsel did not object to the court’s failure to realize it had discretion to waive the DNA collection fee. RP 8-9.

C. ARGUMENT

1. THE COUNT I SENTENCE IS UNLAWFUL.<sup>2</sup>

When imposing a sentence under Washington's Sentencing Reform Act (SRA), the court's authority is limited to that granted by statutes in effect at the time the offense was committed. RCW 9.94A.345; State v. Smith, 144 Wn.2d 665, 673-75, 30 P.3d 1245, 39 P.3d 294 (2001); State v. Moen, 129 Wn.2d 535, 544-48, 919 P.2d 69 (1996). Under the SRA, the court generally must impose a sentence

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<sup>2</sup> This claim arises due to what appears to be a math error. Although Webster did not challenge the standard range at sentencing, this error may be challenged for the first time on appeal. In re Restraint of Goodwin, 146 Wn.2d 861, 866-76, 50 P.3d 618 (2002).

of confinement within the term set forth in the standard range. The standard range is determined by a sentencing grid based on the seriousness of the current offense and the number of prior offenses counted in the offender score. RCW 9.94A.505(2)(a)(i), 9.94A.510, 9.94A.515.<sup>3</sup>

When a person is convicted of an attempt, rather than the completed offense, the standard range is 75% of the range for the completed offense. RCW 9.94A.510(2).

Webster was convicted of attempted first degree murder, a level XV offense. With an offender score of 6, the range is 312-416 months. CP 49; RCW 9.94A.510. Multiplying that by .75 leaves a range of 234-312 months.

The judgment and sentence, however, inexplicably lists the top of the range as "314.25" months. CP 49. That is the sentence the court imposed. RP 7; CP 51. Because the jury did not find an aggravating factor to support an exceptional sentence, the sentence is unlawful. RCW 9.94A.505(2)(a)(xi); Blakely v. Washington, 542

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<sup>3</sup> This brief refers to the cited statutes in effect on September 30, 2006, when these offenses were committed. RCW 9.94A.345.

U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Doney, 165 Wn.2d 400, 198 P.3d 483 (2008).

This Court should vacate the count I sentence and remand for a sentence within the 234-312 month range. In re Restraint of Goodwin, 146 Wn.2d 861, 877-78, 50 P.3d 618 (2002).

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.

When it initially sentenced Webster in April 2007, the court waived the \$100 DNA collection fee. CP 18. After Webster's successful appeal, the court stated at the May 2009 resentencing it still intended to waive all non-mandatory fees and to impose only "mandatory" legal financial obligations. RP 8. The legislature had amended the DNA collection fee statute in 2008, however, and the revised judgment and sentence form at the resentencing hearing no longer included a box for the court to check to waive the DNA collection fee. CP 50 (citing RCW 43.43.754), see also, Laws of 2008, ch. 97, § 3 (effective June 12, 2008).

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). As discussed in argument 1, an appellant may challenge an unlawful sentence for the first time on appeal. Goodwin, 146 Wn.2d at 866-76.

The imposition of the increased fee is erroneous for several reasons. (1) It exceeds the scope of this Court's remand, (2) it violates due process and equal protection as applied to Webster, (3) it applies the wrong statute, (4) the court's failure to realize it had discretion to waive the fee is an abuse of discretion, (5) any retroactive application of the amended DNA collection statute would violate the constitutional prohibition against ex post facto laws, and (6) defense counsel's failure to object denied Webster of his right to effective assistance of counsel.

This Court should remand so the trial court can give effect to its stated intent to waive all non-mandatory fees based on a correct understanding of applicable law.

a. The Increased Fee Exceeded the Scope of This Court's Remand Order.

Webster's appeal challenged the count IV felony no contact order conviction. The state conceded error and this Court remanded for entry of a misdemeanor conviction. CP 41. Because this removed a felony from Webster's criminal history, his offender score was

reduced and resentencing was required on counts I and III. CP 37, 42; RCW 9.94A.525. This Court's decision stated "Webster's offender score must be recalculated on remand based on our decision vacating the felony violation of a court order." CP 42.

"The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation." State v. Schwab, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008) (citations omitted); accord, State v. Strauss, 119 Wn.2d 401, 413-14, 832 P.2d 78 (1992). This Court's decision in Webster's appeal did not authorize the trial court to impose fees it had previously waived. The increased fee exceeded the law of the case as stated in this Court's decision.

Application of the doctrine serves the interests of justice. The trial court initially waived the fee. Webster filed his brief successfully challenging his count IV conviction on appeal. That brief was filed in cause number 59944-5-I on November 13, 2007,<sup>4</sup> well before the 2008 amendment to RCW 43.43.7541. Laws of 2008, ch. 97, § 3 (effective June 12, 2008). The only thing that changed in the interim

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<sup>4</sup> This Court may take judicial notice of its own files. ER 201(b); State v. Perkins, 32 Wn.2d 810, 872, 204 P.2d 207, cert. denied, 338 U. S. 862 (1949).

was the state's concession and this Court's decision agreeing with Webster that the count IV conviction was erroneous.

This Court's remand order did not grant the trial court authority to depart from its prior determination on fees. The \$100 DNA collection fee therefore should be vacated.

b. Application of the Amendment Would Violate Webster's Due Process and Equal Protection Rights.

Assuming the amended statute might apply to some persons who committed offenses before its effective date, the statute still cannot constitutionally apply to Webster. This is because he was initially sentenced under the former statute and the fee was waived. He was only resentenced because he filed a successful appeal that required resentencing with a lower offender score.

The increased fee is actually vindictive and violates Webster's due process rights. U.S. Const. amend. 14; Blackledge v. Perry, 417 U.S. 21, 27-29, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006), also at 656, 661 (J.M. Johnson, J., concurring) (the presumption of vindictiveness applies where the state increases punishment after a successful appeal); cf. State v. Bryan, 145 Wn. App. 353, 363-64, 185 P.3d 1230

(2008) (due process not violated where there was no increase in the sentence following remand).

The increased fee also violates Webster's equal protection rights. U.S. Const. amend. 14; Wash. Const. art. 1, § 12. He is similarly situated with the class of offenders who committed offenses and were sentenced before the effective date of the 2008 amendment. The only difference is that he also is a member of a class who successfully challenged an erroneous conviction and needed to be resentenced as a result of court or prosecutorial error. There is no legitimate or rational basis for the state's disparate treatment and increase of the fee for those in Webster's class. The increased fee is "purely arbitrary" and therefore violates equal protection. Cf. State v. Bryan, 145 Wn. App. at 359-63 (equal protection not offended where there was no actual increase in the sentence following remand, and where additional criminal history points resulted from Bryan's own criminal misconduct).

c. The Court's Failure to Exercise Discretion Under the Applicable Statute Requires Reversal and Remand.

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 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).

Under the statute in effect on September 30, 2006, the date of Webster'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. Following this statute, the sentencing court initially waived the fee in Webster's first sentence. CP 18.

The statute was amended between Webster's initial sentence and his resentencing. The version of RCW 43.43.7541 in effect at Webster's resentencing 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 2006 controls for several reasons. The first 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. The saving statute presumes the version in effect on the date of the offense is presumed to apply. The saving statute is deemed a part of each statute that amends or repeals an existing penal statute. State v. Ross, 152 Wn.2d 220, 237-38, 95 P.3d 1225 (2004).

The Supreme Court has in two cases found non-explicit, yet arguably express, intent to trump the saving 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. For that reason, the decisions

raised no concerns regarding the constitutional prohibition against ex post facto laws. U.S. Const. art. 1, § 10, cl. 1; Wash. Const. art. 1, § 23.

While formal findings are not required, the applicable statute directed the court to consider ability to pay. Former RCW 43.43.7541; Curry, 118 Wn.2d at 916. At the initial sentencing and on resentencing the court stated its intent to waive all non-mandatory fees. CP 18; RP 8. Unfortunately, it failed to recognize it retained discretion to waive the DNA collection fee. Its failure 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).

- d. Assuming the Legislature Intended to Subvert the Savings Statute, the Amended Statute Alters the Standard of Punishment Without Notice and Therefore Violates the Prohibition Against Ex Post Facto Laws.

Webster anticipates the State will argue (as it has previously) the amended statute, enacted after the events in this case transpired, applied at Webster's resentencing. The State's interpretation of the

amendment, however, would violate the prohibition against ex post facto laws.

The ex post facto clause is rooted in the right of the individual to fair notice. In re Pers. Restraint of Powell, 117 Wn.2d 175, 184-85, 814 P.2d 635 (1991). In determining whether a statute violates the prohibition, this Court assesses whether the statute “(1) is substantive [or] merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.” *Id.* at 185. In the criminal context, “disadvantage” means “the statute alters the standard of punishment which existed under the prior law.” State v. Schmidt, 143 Wn.2d 658, 673, 23 P.3d 462 (2001). The amendment meets these criteria in that it is a substantive, retrospective change in the law that alters the standard of punishment: it removes 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.

“A retrospective change in the law is not insulated from ex post facto scrutiny merely by labeling the change ‘procedural.’” *State v. Theriot*, 782 So.2d 1078, 1086 (La. Ct. App. 2001) (quoting Collins v.

Youngblood, 497 U.S. 37, 45-46, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).

The amendment to RCW 43.43.7541 meets these criteria in that it is a substantive, retrospective change in the law that alters the standard of punishment: it removes from the sentencing court any discretion to waive the fine based on hardship. The Theriot court held retrospective application of a statute making mandatory a previously discretionary fine for driving while intoxicated violated the prohibition on ex post facto laws under U.S. Const. art. 1, § 10, cl. 1 and the state constitution. Theriot, 782 So.2d at 1085-87. The amendment was not merely procedural; as here, removal of the court's discretion made the punishment for the crime more burdensome and "deprive[d] defendant of substantial protection." Id. at 1087. This case is persuasive authority that this Court should follow in finding a violation of the prohibition against ex post facto laws. Cf. 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 violated prohibition against ex post facto laws).

e. Counsel Rendered Ineffective Assistance By Failing to Object to Sentencing Under The Incorrect Statute.

Webster'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.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); 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). An accused receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation is prejudicial. Strickland, 466 U.S. at 687; 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. Kylo, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (No. 81164-4, 9/2/09), slip op. at 5, 13-14 (citing Strickland). 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.

Webster's case satisfies both prongs of Strickland. There was no legitimate reason for counsel to fail to inform the court the applicable version of 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.<sup>5</sup> Moreover, there is a reasonable likelihood counsel's deficient performance affected the outcome because the court stated its intent to waive all non-mandatory fees based on Webster's indigence. RP 8. The same judge previously waived the \$100 DNA fee in Webster's initial sentence. CP 18.

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<sup>5</sup> See Kyllo (No. 81164-4, 9/2/09), slip op. at 5, 13-14; State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules).

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 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).

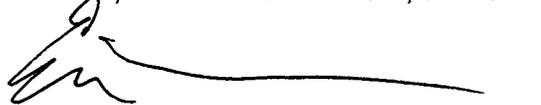
D. CONCLUSION

For the reasons stated in argument 1, this Court should vacate the court I sentence and remand for resentencing within the standard range. For the reasons stated in argument 2, this Court should remand to permit the court to properly express on the sentence its intent to waive all non-mandatory legal financial obligations.

DATED this 9<sup>th</sup> day of September, 2009.

Respectfully Submitted,

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