

63807-6

63807-6

NO. 63807-6-1

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

REC'D
OCT 30 2009
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

PAUL BALLARD,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 OCT 30 PM 4:45

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

The Honorable James D. Cayce, Judge

OPENING BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ASSIGNMENTS OF ERROR</u> | 1 |
| <u>Issues Pertaining to Assignments of Error</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 1 |
| C. <u>ARGUMENT</u> | 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 | 2 |
| 1. <u>The Court's Failure to Exercise Discretion Under the Applicable Statute Requires Reversal and Remand</u> | 3 |
| 2. <u>Counsel Rendered Ineffective Assistance By Failing to Object to Sentencing Under the Incorrect Statute</u> | 10 |
| D. <u>CONCLUSION</u> | 12 |

TABLE OF AUTHORITIES (CONT'D)

| | Page |
|--|--------|
| <u>State v. Kylo</u> ___ Wn.2d ___, 215 P.3d 177, 180 (2009) | 10, 11 |
| <u>State v. Maurice</u> 79 Wn. App. 544, 903 P.2d 514 (1995) | 10 |
| <u>State v. McFarland</u> 127 Wn.2d 322, 899 P.2d 1251 (1998) | 10 |
| <u>State v. McGill</u> 112 Wn. App. 95, 47 P.3d 173 (2002) | 9 |
| <u>State v. Pillatos</u> 159 Wn.2d 459, 150 P.3d 1130 (2007) | 7 |
| <u>State v. Ross</u> 152 Wn.2d 220, 95 P.3d 1225 (2004) | 6 |
| <u>State v. Zornes</u> 78 Wn.2d 9, 475 P.2d 109 (1970) | 9 |

FEDERAL CASES

| | |
|---|--------|
| <u>Lindsey v. Washington</u> 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937) | 7 |
| <u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) | 10, 11 |
| <u>United States v. Batchelder</u> 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) | 9 |

OTHER JURISDICTIONS

| | |
|---|---|
| <u>State v. Theriot</u> 782 So.2d 1078 (La. Ct. App. 2001) | 7 |
|---|---|

TABLE OF AUTHORITIES

| | Page |
|--|---------|
| <u>WASHINGTON CASES</u> | |
| <u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999) | 10 |
| <u>State v. Brewster</u> ___ Wn. App. ___, ___ P.3d ___ (filed 10/26/09)..... | 3 |
| <u>State v. Broadaway</u> 133 Wn.2d 118, 942 P.2d 363 (1997) | 11 |
| <u>State v. Buchanan</u> 78 Wn. App. 648, 898 P.2d 862 (1995) | 4 |
| <u>State v. Christensen</u> 153 Wn.2d 186, 102 P.3d 789, 793 (2004) | 8 |
| <u>State v. Curry</u> 118 Wn.2d 911, 829 P.2d 166 (1992) | 3, 4, 9 |
| <u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999) | 3 |
| <u>State v. Grant</u> 89 Wn.2d 678, 575 P.2d 210 (1978) | 9 |
| <u>State v. Grayson</u> 154 Wn.2d 333, 111 P.3d 1183 (2005) | 3, 9 |
| <u>State v. Hall</u> 112 Wn. App. 164, P.3d 350 (2002) | 8 |
| <u>State v. Hodgson</u> 108 Wn.2d 662, 740 P.2d 848 (1987) | 7 |
| <u>State v. Humphrey</u> 139 Wn.2d 53, 983 P.2d 1118 (1999) | 5 |

TABLE OF AUTHORITIES (CONT'D)

| | Page |
|---|------|
| <u>RULES, STATUTES AND OTHER AUTHORITIES</u> | |
| Black's Law Dictionary 661 (7th ed. 1999) | 8 |
| <u>Former</u> RCW 10.01.160(3) (2005)..... | 4 |
| <u>Former</u> RCW 43.43.7541 (2002)..... | 5, 9 |
| Laws of 2002, ch. 289, § 4 | 5 |
| Laws of 2008, ch. 97, § 3 | 5 |
| RCW 7.68.035..... | 4 |
| RCW 9.94A | 5 |
| RCW 9.94A.345 | 5 |
| RCW 10.01.040..... | 6, 8 |
| RCW 43.43.754..... | 2, 5 |
| RCW 43.43.7541..... | 5, 8 |
| Sentencing Reform Act..... | 2 |
| U.S. Const. art. 1, § 10, cl. 1 | 7 |

A. ASSIGNMENTS OF ERROR

1. The sentencing court erred when it failed to exercise its discretion in imposing a non-mandatory DNA collection fee, mistakenly believing the fee was required.

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

Issues Pertaining to Assignments of Error

1. The court waived all other non-mandatory legal financial obligations, but imposed a non-mandatory DNA collection fee based on the mistaken view the fee was mandatory. Did the court err by failing to exercise its discretion?

2. Was trial counsel ineffective for failing to object to the mandatory DNA collection fee?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Paul Ballard with one count of Identity Theft in the Second Degree and one count of Forgery. Both crimes were alleged to have been committed on March 14, 2008. CP 10-11. Ballard waived his right to a jury trial. CP 12. At a bench trial, the Honorable James Cayce found Ballard guilty and imposed a standard range 10-month sentence. CP 13-17, 21, 23.

The court waived all non-mandatory financial obligations, but ordered Ballard to pay restitution, the mandatory victim penalty assessment, and a \$100.00 DNA collection fee. RP (7/6/09) 8 (“I will waive the non-mandatory costs, fees, and assessments”). The judgment indicates, “\$100 DNA collection fee (RCW 43.43.754)(mandatory for crimes committed after 7/1/02).” CP 22. Ballard timely filed his Notice of Appeal. CP 26.

C. ARGUMENT

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.

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

This Court has just rejected a similar argument made in another case. See State v. Brewster, ___ Wn. App. ___, ___ P.3d ___ (filed 10/26/09). However, counsel for Brewster intends to seek further review of that decision. Therefore, it is raised here.

1. 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, an illegal sentence may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

In State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992), the Court set out the requirements for imposing monetary obligations at sentencing. Although a sentencing court need not enter "formal, specific findings" regarding the ability to pay court costs and recoupment fees, the court listed these prerequisites for constitutionally permissible costs:

1. Repayment must not be mandatory;
- ...
3. Repayment may only be ordered if the defendant is or will be able to pay;

4. The financial resources of the defendant must be taken into account;

5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end.

Curry, 118 Wn.2d at 915-16; see also former RCW 10.01.160(3) (2005) ("The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.").

Notwithstanding this test, Curry upheld the statute establishing that a victim penalty assessment (VPA) must be imposed regardless of the financial resources of the convicted person. Curry, 118 Wn.2d at 917-18. RCW 7.68.035(1) provides, "Whenever any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." The court reasoned that statutory safeguards prevented incarceration based on inability to pay. Curry, 118 Wn.2d at 918.

Statutes authorizing costs in criminal prosecutions are in derogation of the common law and should be strictly construed. State v. Buchanan, 78 Wn. App. 648, 651, 898 P.2d 862 (1995). A

statute that creates a new liability will not be construed to apply retroactively. State v. Humphrey, 139 Wn.2d 53, 62, 983 P.2d 1118 (1999).

Under the statute in effect in March 2008, the date of Ballard's offenses, the DNA fee was not mandatory. Former RCW 43.43.7541 (2002). That version states the court should impose the fee "unless the court finds that imposing the fee would result in undue hardship on the offender." Former RCW 43.43.7541, Laws of 2002, ch. 289, § 4. The version of RCW 43.43.7541 in effect on the date of sentencing provides, "Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." Laws of 2008, ch. 97, § 3 (effective June 12, 2008).

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

Second, in adopting the 2008 version, the Legislature expressed no intent to contravene the general criminal prosecution saving statute, RCW 10.01.040.¹ The saving statute is deemed a part of each statute that amends or repeals an existing penal statute and presumes the version in effect on the date of the offense applies. State v. Ross, 152 Wn.2d 220, 237-38, 95 P.3d 1225 (2004).

¹ RCW 10.01.040 states:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall 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.

The savings statute saves the substantive rights and liabilities of a repealed statute. State v. Hodgson, 108 Wn.2d 662, 740 P.2d 848 (1987) (savings clause did not apply to extension of statute of limitations, a procedural change); see also State v. Pillatos, 159 Wn.2d 459, 470-72, 150 P.3d 1130 (2007) (shifting from court to juries the responsibility for finding sentencing aggravators was a mere procedural change).

As a preliminary matter, the 2008 amendment constitutes a substantive change in the law. Complete removal of a court's sentencing discretion does not constitute a mere procedural change. See Lindsey v. Washington, 301 U.S. 397, 400-02, 57 S. Ct. 797, 81 L. Ed. 1182 (1937) (Washington statute removing court's discretion and making mandatory what was previously a maximum sentence "substantive" change); State v. Theriot, 782 So.2d 1078, 1086-87 (La. Ct. App. 2001) (retrospective application of law making mandatory a previously discretionary fine for driving while intoxicated violates prohibition on ex post facto laws under U.S. Const. art. 1, § 10, cl. 1 and state constitution; "a retrospective change in the law is not insulated from ex post facto scrutiny merely by labeling the change 'procedural'"). Because RCW

43.43.7541 constitutes a substantive change, the savings statute applies.

Next, the plain language of the savings statute demonstrates that it applies to the DNA collection fee under 43.43.7541. Unambiguous statutes must be applied based on their plain language. State v. Hall, 112 Wn. App. 164, 167, P.3d 350 (2002). The legislature has not defined “forfeiture” or “penalty” for purposes of RCW 10.01.040. Nonetheless, courts routinely resort to dictionary definitions for guidance when faced with undefined plain statutory terms. State v. Christensen, 153 Wn.2d 186, 195, 102 P.3d 789, 793 (2004). Black’s Law Dictionary defines “forfeiture” as “the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.” Alternatively, it defines “forfeiture as “[s]omething ([especially] money or property) lost or confiscated by this process, a penalty.” Black’s Law Dictionary 661 (7th ed. 1999). Forfeiture may be civil or criminal. Id.

The \$100 fine -- whether or not punishment -- constitutes a loss of property imposed based on commission of a crime and is thus a forfeiture. Because the fine falls under the “penalty or forfeiture” language of the savings statute, that statute “saves” the pre-amendment version of RCW 43.43.7541. Moreover, the

amendment constitutes a substantive change in the law triggering the savings statute.

The Supreme Court has in two cases found non-explicit, yet arguably express, intent to trump the savings statute. State v. Grant, 89 Wn.2d 678, 682, 575 P.2d 210 (1978); State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), overruled on other grounds, United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979). But in each case the statutory amendment contained relatively specific language directing that no prosecutions under an earlier version of a statute should occur. In both cases, moreover, the Court read the language against the State. The amendments in Zornes and Grant are thus distinguishable from the present situation.

While formal findings on the matter are not required, the applicable statute directs the court to consider ability to pay. Former RCW 43.43.7541; Curry, 118 Wn.2d at 916. Failure to do so is an abuse of the trial court's discretion. See Grayson, 154 Wn.2d at 342 (sentencing court's failure to exercise discretion is reversible error); State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (decision to impose a standard range sentence

reviewable for abuse of discretion where court has refused to exercise discretion).

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

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

An accused receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation is prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kylo, ___ Wn.2d ___, 215 P.3d 177, 180 (2009). While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1998).

An accused is prejudiced where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Ballard's case satisfies both prongs of Strickland. There was no legitimate reason for counsel to fail to inform the court that the applicable version of the statute permitted the court to waive the DNA collection fee based on hardship. Counsel has a duty to research the law and is presumed to know applicable law favorable to his or her client.² Moreover, there is a reasonable likelihood counsel's deficient performance affected the outcome because the court waived all non-mandatory financial obligations based on Ballard's indigence. RP (7/6/09) 8.

In summary, this Court should remand this case for resentencing so the court may accurately express in the sentence its stated intent to waive the non-mandatory DNA fee. See State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997) (on remand,

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

the trial court has the authority to correct a sentence where court was initially mistaken about the controlling law).

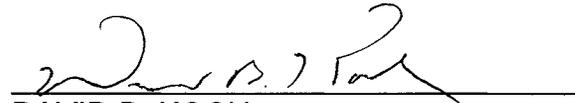
D. CONCLUSION

This Court should remand Ballard's case for resentencing.

DATED this 30th day of October 2009.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051
Attorneys for Appellant

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

| | | |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 63807-6-1 |
| |) | |
| PAUL BALLARD, |) | |
| |) | |
| 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 30TH DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] PAUL BALLARD
DOC NO. 209026682
REGIONAL JUSTICE CENTER
620 W. JAMES STREET
KENT, WA 98032

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

x *Patrick Mayovsky*