

63962-5

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NO. 63962-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CRAIG HINES,

Appellant.

2010 MAR -8 PM 3:52
FILED
COURT OF APPEALS
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN AND DEBORAH FLECK

BRIEF OF RESPONDENT

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A. ISSUES

1. In 2008, the legislature amended RCW 43.43.7541 to require that sentencing courts assess a \$100 DNA collection fee as part of every sentence imposed under RCW 9.94A for crimes specified in RCW 43.43.754. The DNA fee is a legal financial obligation and is not punitive. At the time Hines committed this felony offense, the imposition of the fee was discretionary under the former version of the statute. Believing the fee to be mandatory, the sentencing court assessed Hines the DNA fee. Did the court properly include the fee as a mandatory legal financial obligation?

2. When a claim of ineffective assistance is based on counsel's failure to object to a term or condition of the court's sentence, the defendant must establish that it was not objectively reasonable for his attorney to remain silent, and that had counsel objected, the court likely would have struck the challenged term or condition. Counsel cannot be ineffective if the challenge would have been unsuccessful. Hines's attorney did not object to the court's imposition of the DNA fee as mandated by RCW 43.43.7541. Has Hines failed to show that his counsel's performance was so deficient that it prejudiced him?

B. STATEMENT OF FACTS

On June 2, 2008, Craig Hines was arrested for assault. CP 1-3. In a search incident to arrest, officers found crack cocaine in Hines's pocket. CP 1-3. On July 25, 2008, he was charged with Violation of the Uniform Controlled Substances Act—Possession of Cocaine. CP 1. A jury found him guilty as charged on May 27, 2009. CP 23.

Hines was sentenced on July 14, 2009. 1RP 18-23.¹ The court imposed a Drug Offender Sentencing Alternative with residential treatment for three to six months, followed by 24 months of community custody. 1RP 18. The court also imposed “the mandatory \$500 victim penalty assessment and the mandatory \$100 DNA fee” as well as a portion of the court costs.² 1RP 21. Hines did not object to any of the legal financial obligations imposed by the court. 1RP 5-28.

¹ The Verbatim Report of Proceedings consists of four volumes. The State has adopted the following reference system: 1RP (05/05/09 (motion hearing-Judge Brian Gain) and 07/14/09 (sentencing-Judge Deborah Fleck)), 2RP (05/21/09), 3RP (05/26/09), and 4RP (05/27/09).

² The judgment and sentence also states that the DNA collection fee is mandatory for all crimes committed after July 1, 2002, per RCW 43.43.754. CP 31.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY IMPOSED THE MANDATORY DNA COLLECTION FEE AS PART OF HINES'S JUDGMENT AND SENTENCE.

Hines argues that the sentencing court erroneously imposed the DNA fee because it was not a mandatory fee under RCW 43.43.7541 at the time he committed the offense. Hines asserts that the court's application of the statutory provision in effect at the time of sentencing that made the DNA fee mandatory, rather than the provision in effect at the time he committed the crime that left the imposition of the fee to the discretion of the sentencing court, violated the saving statute³ and the ex post facto clauses of the United States and Washington constitutions,⁴ and was contrary to the plain language of RCW 9.94A.345.

This Court has previously rejected these arguments in State v. Brewster, 152 Wn. App. 856, 218 P.3d 249 (2009), State v. Thompson, 153 Wn. App. 325, ___ P.3d ___ (2009), and State v. Bennett, No. 62962-0-I, 2010 WL 162028 (Wn. App. January 19, 2010).

³ RCW 10.01.040.

⁴ U.S. Const. art. I, § 10, cl. 1; Wash. Const. art. I, § 23.

As with Brewster, Thompson, and Bennett, at the time Hines committed the crime, the DNA collection statute required a trial court to impose a \$100 DNA collection fee with every sentence imposed under RCW 9.94A for certain crimes specified in RCW 43.43.754 “unless the court finds that imposing the fee would result in undue hardship on the offender.” RCW 43.43.7541 (2002). Ten days after Hines’s crime, an amendment to RCW 43.43.7541 took effect. Laws of 2008, ch. 97, § 3 (effective June 12, 2008). RCW 43.43.7541 now states, that “[e]very sentence under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030...”

In Brewster and Thompson, this Court held that the saving statute, which applies only to criminal and penal statutes, did not require that the defendants be sentenced according to the former version of RCW 43.43.7541 because the DNA fee was not punitive. Brewster, 152 Wn. App. at 861; Thompson, 153 Wn. App. at 337.

Hines, like Thompson, also argues that the sentencing court’s application of the current version of the DNA collection fee statute violated the ex post facto clauses. The Thompson court was unpersuaded by this argument as well. Like the saving clause,

the ex post facto clauses of the federal and state constitutions apply only to punitive laws. Thompson, 153 Wn. App. at 337 (citing State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994)).

Hence, because the imposition of the DNA fee was not punitive, the ex post facto clauses were not violated.

Hines further argues that RCW 9.94A.345⁵ required the court to apply the version of the DNA collection fee statute in effect at the time that his crime was committed. The Thompson court also rejected this argument, holding that RCW 9.94A.345 did not provide defendants with a vested right in the version of the DNA collection fee statute in effect at the time that they committed their crime. Id. at 337-38. On the contrary, the Court held that the amendment to RCW 43.43.7451 only removed “the trial court’s discretion to make a finding of undue hardship,” which permitted the waiver of the fee. Id. at 338. Finally, this Court concluded that the phrase “every sentence” in RCW 43.43.7541 was an unambiguous indication from the legislature that sentencing is the precipitating event for imposition of the mandatory fee rather than the commission of the crime itself.

⁵ Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed. RCW 9.94A.345.

Because the statutory provision in effect at the time of defendant's sentencing hearing controls, the trial court properly included the DNA collection fee as a mandatory legal financial obligation.

2. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR NOT OBJECTING TO THE IMPOSITION OF THE DNA FEE.

Hines argues that his counsel was ineffective for failing to object to the imposition of the DNA fee since it was not mandatory at the time of Hines's sentencing hearing. This argument is without merit because Hines's counsel cannot be found ineffective for failing to object to a fee that the sentencing court did not have the authority to waive.

To prevail on his claim of ineffective assistance of counsel, Hines must show that defense counsel's objectively deficient performance prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish both elements defeats the claim. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990). Counsel's performance is deficient only when it falls below an

objective standard of reasonableness. State v. Riofta, 134 Wn. App. 669, 693, 142 P.3d 193 (2006). To demonstrate prejudice, the defendant must show that trial counsel's inadequate performance probably resulted in a different outcome. McFarland, 27 Wn.2d at 335. A reviewing court engages in a strong presumption that counsel's performance was effective and within the wide range of reasonable professional assistance. Id.

To prevail on his claim, Hines must show that it was not objectively reasonable for his counsel to have remained silent regarding the court's imposition of the DNA fee, and that had an objection been raised, the court likely would not have imposed the DNA fee as a term of the judgment and sentence. For the reasons discussed above, any objection raised at sentencing to the DNA fee would have been overruled and the fee would have been imposed. Counsel cannot be found ineffective if a challenge to the imposition of the fee would have failed. See State v. Nichols, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007). Because Hines cannot establish that his counsel's performance was deficient, he also cannot affirmatively prove prejudice. See Nichols, 161 Wn.2d at 8; Strickland, 466 U.S. at 693.

D. CONCLUSION

For the foregoing reasons, the State respectfully requests that Hines's conviction and sentence be affirmed.

DATED this 8th day of March, 2010.

Respectfully submitted,

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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 Christopher Gibson, 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. CRAIG HINES, Cause No. 63962-5-1, 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.

W Brame
Name Wynne Brame
Done in Seattle, Washington

3/8/10
Date