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

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| STATE OF WASHINGTON, | ) | No. 62764-3-I |
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| Respondent, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| BRANDY MICHELLE BREWSTER, | ) | PUBLISHED IN PART |
| | ) | |
| Appellant. | ) | FILED: October 26, 2009 |
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Ellington, J. — This case requires us to decide whether the saving statute applies to the deoxyribonucleic acid (DNA) collection fee provision. Because the saving statute, chapter 10.01 RCW, applies only to criminal and punitive enactments and the DNA fee is not punitive, the saving clause does not apply, and the provision in effect at the time of sentencing controls. Brandy Brewster's sentence for possession of cocaine therefore correctly includes the mandatory DNA fee.

## FACTS

Brandy Brewster was arrested on November 15, 2006 for possession of cocaine. She was convicted following a trial. At sentencing, the court waived all nonmandatory legal financial obligations on grounds of indigency, but required Brewster to pay the mandatory victim penalty assessment and the mandatory DNA collection fee.

Brewster argues the court erred in failing to exercise discretion as to the DNA collection fee because the fee was not mandatory at the time she committed her offense. She also contends her attorney was ineffective in failing to make that argument.

At the time of Brewster's offense in 2006, former RCW 43.43.7541 (2002) provided courts with discretion as to whether to impose the DNA collection fee:

> 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*. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed.

Before Brewster was convicted or sentenced,[1] however, the statute was amended to delete the language granting discretion and make imposition of the fee mandatory:

> 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. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed.[2]

Under common law, pending cases must be decided according to the law in effect "at the time of the decision."[3] In derogation of the common law, the saving statute provides that criminal cases must be prosecuted and decided according to the law in effect at the time of the offense unless an intent to affect pending litigation is

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[1] Brewster was convicted October 15, 2008; sentenced December 8, 2008.

[2] RCW 43.43.7541 (effective June 12, 2008).

[3] State v. Zornes, 78 Wn.2d 9, 12, 475 P.2d 109 (1970).

declared in the amendatory or 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.[4]

Brewster contends the saving statute entitles her to be sentenced under the earlier version of the DNA fee provision statute.

The saving clause applies only to criminal and penal statutes,[5] presumptively "saving" all offenses already committed and all penalties or forfeitures already incurred from the effects of amendment or repeal, and requiring that crimes be prosecuted under the law in effect at the time they were committed.[6] In criminal law, the terms "penalty" and "forfeiture" are synonymous with "punishment."[7] Therefore, the question is whether the DNA fee is punitive.

We look first to the legislature's purpose in adopting the law.[8] The DNA collection fee serves to fund the collection of samples and the maintenance and

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[4] RCW 10.01.040.

[5] State v. Kane, 101 Wn. App. 607, 610, 5 P.3d 741 (2000).

[6] State v. Pillatos, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007).

[7] Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 660, 94 S. Ct. 2532, 41 L. Ed. 2d 383 (1974) (the terms "penalty," "liability," and "forfeiture" as used in the federal general saving statute are synonymous with "punishment" and therefore the terms include all forms of punishment for a crime, both ameliorative and harsher; thus a no-parole provision is saved).

[8] State v. Ward, 123 Wn.2d 488, 499, 869 P.2d 1062 (1994).

operation of DNA databases.[9] The legislature has repeatedly found that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigation or prosecution, and in detecting recidivist acts.[10] The databases also facilitate the identification of missing persons and unidentified human remains.[11] These are not punitive purposes.

The inquiry, however, does not end with the legislature's stated purpose. Courts also "examine whether the actual effect of the statute is so punitive as to negate the [l]egislature's regulatory intent."[12] To this end, we consider the following factors:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned."[13]

The DNA fee is a legal financial obligation. Its purpose is monetary, rather than retributive or deterrent. Such obligations have historically not been regarded as punishment.[14] The fee does not define or punish criminal behavior and does not

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[9] RCW 43.43.7541 ("The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.").

[10] See Laws of 2002, ch. 289, §1; Laws of 2008, ch. 97, §1.

[11] Id.

[12] Ward, 123 Wn.2d at 499 (emphasis omitted).

[13] Id. (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69, 83 Sup. Ct. 554, 9 L. Ed. 2d 644 (1963)).

[14] See State v. Humphrey, 139 Wn.2d 53, 62, 938 P.2d 1118 (1999) (increase in victim penalty assessment fee from $100 to $500 not punitive); State v. Blank, 80 Wn.

require a finding of scienter. It does not involve a disability or restraint.[15] The amount of the fee is fixed and does not depend on the gravity of the offense, and is not excessive in relation to its purpose. The DNA collection fee is not punitive.[16]

The saving clause does not apply to the DNA collection fee statute, and the court properly applied the version in effect at the time of Brewster's sentencing.[17] Brewster's counsel therefore was not deficient in failing to urge application of the previous version.[18]

We affirm imposition of the mandatory DNA collection fee.

The balance of this opinion having no precedential value, the panel has

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App. 638, 641, 910 P.2d 545 (1996), affirmed, 131 Wn.2d 230 (1997) (statute imposing costs of appeal, including monies expended on behalf of indigent defendants, on convicted juvenile or adults, not punitive).

[15] See RCW 9.94A.030(28) ("'Legal financial obligation' means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction.").

[16] The saving clause applies only to substantive changes to such statutes, not procedural ones. Because the DNA fee is not punitive, however, we need not decide whether the change effected by the 2008 amendment is substantive or procedural. See Pillatos, 159 Wn.2d at 472.

[17] Brewster was both convicted and sentenced after the effective date of the 2008 amendment. We therefore need not decide whether the triggering event for determining what statute applies is conviction or sentencing. See Humphrey, 139 Wn.2d at 58–59 (holding that language "whenever any person is found guilty" in RCW 7.68.035(1)(a) does not elucidate whether triggering event for statute is date of conviction or date of sentencing and further analysis is required).

[18] To show ineffective assistance of counsel, an appellant must show that counsel's performance was deficient and the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

determined it should not be published in accordance with RCW 2.06.040.

FACTS

On the afternoon of November 15, 2006, Seattle police officers Nicholas Guzley and Shane Yama saw two women in an alley known for narcotics use. They recognized one of the women, Georgeanne Goldberg, from prior contacts. The other woman, whom the officers did not know, had a lighter in one hand and several rocks of what appeared to be crack cocaine in the other. She gave her name as Brandy Brewster and said she lived at Hammond House in Seattle. Guzley seized the suspected cocaine and arrested the woman, but did not take her into custody.

Brewster was charged with possession of cocaine. Her defense at trial was stolen identity. She testified she had lost her identification in downtown Seattle in July 2006 and was issued new identification in September 2006. She lived in Kent in November 2006, and never lived at or heard of Hammond House. Brewster did not know a woman named Georgeanne.

Guzley explained the procedure he followed to establish the woman's identity. She identified herself by name and date of birth, and either she presented identification or one of the officers ran her name and date of birth through the patrol car's computer or by radioing the dispatcher. Guzley could not recall which. The woman's physical characteristics matched the information thusly obtained. Guzley did not know whether Hammond House was a homeless shelter.

The jury found Brewster guilty. She moved for a new trial based on juror misconduct, claiming two jurors shared highly specialized personal knowledge

regarding recognition of homelessness, the habits and practices of the habitually homeless, and certain police practices and procedures. In the alternative, Brewster sought permission to contact jurors to obtain additional affidavits to support her motion for a new trial. The court denied both motions. Brewster appeals.

DISCUSSION

Brewster argues the court abused its discretion in denying her motions for a new trial and to contact jurors. Whether juror misconduct occurred and whether it affected the verdict are matters for the discretion of the trial court.[19] A court's decision on juror access, which may be granted only upon a showing of good cause, is also reviewed for abuse of discretion.[20]

It is misconduct for a juror to introduce extrinsic evidence into deliberations.[21] "[E]xtrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document."[22] This is especially true of highly specialized information, "outside the realm of a typical juror's general life experience."[23] But where the juror's background is known to the parties, who then allow the juror to serve on the jury, and the juror imparts specialized information in evaluating the evidence introduced at trial, there is no misconduct.[24]

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[19] Breckenridge v. Valley General Hosp., 150 Wn.2d 197, 203, 75 P.3d 944 (2003).

[20] GR 31(j); see State v. Sponburgh, 84 Wn.2d 203, 210, 525 P.2d 238 (1974).

[21] Richards v. Overlake Hosp. Medical Center, 59 Wn. App. 266, 270, 796 P.2d 737 (1990).

[22] Id.

[23] Id. at 274.

[24] Id. at 273–74.

In support of her motions, Brewster's counsel alleged that two jurors (a social worker and a sheriff's deputy) introduced specialized knowledge, outside the record and the scope of everyday experience, relating to recognition of homelessness, the habits and practices of the habitually homeless, and certain police practices and procedures.[25] But Brewster accepted the venire with knowledge of the jurors' backgrounds. If the jurors discussed the evidence in light of their experience, it was therefore not misconduct.

The court did not abuse its discretion in denying the motion to contact jurors or in denying a new trial based on juror misconduct.

Lastly, Brewster argues the court erred in ordering her to submit to alcohol evaluation and treatment when there is no indication in the record that alcohol contributed to her criminal conduct.

A sentencing court may order a defendant to participate in treatment if it is directly related to the circumstances of the crime committed.[26] A court may not require alcohol evaluation and treatment unless the evidence indicates alcohol contributed to the criminal conduct.[27] Because there is no such indication in the record here, the court erred in ordering Brewster to submit to alcohol evaluation and treatment.[28]

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[25] Counsel also represented that credibility was a central issue to the jury and that the information introduced by the jurors prejudiced Brewster by undermining her credibility while bolstering that of the two officers. Brewster concedes these statements are not an appropriate basis for establishing jury misconduct. See Richards, 59 Wn. App. at 272 (statements on the effect misconduct may have had on deliberations not an appropriate basis for establishing jury misconduct because such considerations inhere in the verdict).

[26] See, e.g., RCW 9.94A.607, .700(5)(c), .715(2)(a).

[27] State v. Jones, 118 Wn. App. 199, 207–08, 76 P.3d 258 (2003).

We affirm and remand with instructions to strike the condition of submitting to alcohol evaluation and treatment from Brewster's judgment and sentence.

Ellington, J.

WE CONCUR:

Cox, J.

Becker, J.

[28] The State contends the issue is one of chemical dependency and that courts should not parse out which substance contributed to the defendant's criminal conduct. But the court here did not make a finding of chemical dependency, nor that such dependency contributed to Brewster's offense. See RCW 9.94A.607.