72842-2

FILED
May 19, 2015
Court of Appeals
Division I
State of Washington

NO. 72848-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SHELTON,

Appellant.

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

The Honorable Roger Rogoff, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

FEDERAL CASES

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it ordered a mental health evaluation as a condition of community custody.

2. RCW 43.43.7541's mandatory DNA-collection fee violates substantive due process when applied to defendants who do not have the ability or likely future ability to pay.

Issues Pertaining to Assignments of Error

1. Under RCW 9.94B.080, the trial court must make a specific finding that an offender is a mentally ill person as defined in RCW 71.24.025 before ordering a mental health evaluation and recommended treatment as a condition of community custody. It did not do so here. Must this condition be vacated due to the trial court's lack of statutory authority?

2. RCW 43.43.7541 requires trial courts impose a mandatory DNA-collection fee each time a felony offender is sentenced.[1] This ostensibly serves the State's interest in funding the collection, testing, and retention of a convicted defendant's DNA profile to help facilitate criminal investigations. However, the

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[1] RCW 43.43.754 and 43.43.7541 require the courts to impose a mandatory $100 DNA-collection fee on any offender convicted of a felony or of a specifically designated misdemeanor. For clarity and ease of reading, appellant will refer only to felony defendants in this brief, but the arguments apply equally to defendants sentenced of other qualifying crimes.

statute makes it mandatory that trial courts order this fee even when the defendant has no ability to pay the fee. Does the statute violate substantive due process when applied to defendants who do not have the ability – or the likely future ability – to pay the DNA collection fee?

B. STATEMENT OF THE CASE

1. Procedural Facts

On August 6, 2014, the King County prosecutor charged appellant Michael Shelton with one count of second degree assault. CP 1-5. The Information was later amended, and the prosecutor added a deadly weapon enhancement. CP 10-11. A jury convicted Shelton as charged. CP 39-40. The trial court imposed a standard range sentence, ordered him to pay mandatory fees (including a $100 DNA collection fee), and ordered him to participate in a mental health evaluation and recommended treatment as a condition of community custody. CP 41-48. Shelton timely filed a notice of appeal. CP 50-51.

2. Substantive Facts

On August 3, 2014, Shelton and Sana Ceesay were in an alley behind the Walgreen's store at Third Avenue and Pike Street in downtown Seattle, where they were arguing over whether to

share a pipe to smoke some marijuana.[2] 3RP 12, 101-04. The conflict degenerated into a fist fight. 3RP 101-02; 4RP 19. Seattle Police Officer Michal Mehrens responded and separated the two. 4RP 19. Neither complained about any weapons, and Mehrens noted there were no serious injuries. 4RP 17, 20. They were released. 4RP 20.

Shortly afterward, Ceesay was standing in front of the Walgreens near a large metal postal box. 3RP 109. According to Ceesay, Shelton came up and verbally threatened him. 3RP 109. Ceesay moved behind the postal box, but Shelton continued to move forward. 3RP 21 109. Ceesay appeared to be unarmed at this point, although he had a knife in his pocket. 3RP 21, 113.

Shelton and Ceesay began fighting when Shelton struck Ceesay with a broken bottle, cutting Ceesay's cheek and damaging two teeth. 3RP 15-16, 110-11; 4RP 10, 12. Ceesay armed himself with his knife and chased Shelton away. 3RP 16, 18. When it appeared Shelton had gone, witnesses persuaded Ceesay to sit and wait for a medic. 3RP 16. However, Shelton came back around and antagonized Ceesay again. 3RP 16, 26. Ceesay

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[2] The verbatim report of proceedings is referred to as follows: 1RP (10-22-14); 2RP (10-23-14); 3RP (10-27-14); 4RP (10-28-14); 5RP (11-21-14).

grabbed his knife and chased Shelton into a nearby store where the two remained in a standoff until police arrived. 3RP 17, 27.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT ORDERED A MENTAL HEALTH EVALUATION AS A CONDITION OF COMMUNITY CUSTODY WITHOUT FIRST DETERMINING WHETHER SHELTON WAS A MENTALLY ILL PERSON AS DEFINED BY STATUTE.

This Court should strike the mental health evaluation and treatment condition of Shelton's sentence because the trial court failed to make a statutorily required finding to support that condition.

"'[I]llegal or erroneous sentences may be challenged for the first time on appeal.'" State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). A trial court commits reversible error when it exceeds its sentencing authority. State v. C.D.C., 145 Wn. App. 621, 625, 186 P.3d 1166 (2008).

The trial court exceeded its statutory authority when it ordered Shelton to participate in a mental health evaluation and follow recommendations. RCW 9.94B.080 provides:

> The court may order an offender whose sentence includes community placement or community

> supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

Emphasis added. For a mental health community custody condition to be valid, the trial court must make an express finding that an offender is a mentally ill person as defined in RCW 71.24.025, and that the defendant's mental health status is likely to have influenced the crime he committed. See State v. Jones, 118 Wn. App. 199, 209, 76 P.3d 258 (2003).

Here, when ordering Shelton to participate in a mental health evaluation and all recommended treatment, the sentencing court did not make a specific finding that Shelton is a mental ill person as defined by statute.[3] CP 48. As such, it lacked authority to impose mental health treatment as a condition of Shelton's sentence.

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[3] By contrast, the trial court expressly found "that mental health issues contributed to this offense. Treatment is reasonably related to the circumstances of this crime and reasonably necessary to benefit the defendant and the community." CP 48. However, this finding – standing alone – does not satisfy RCW 9.94B.080.

Accordingly, this Court should vacate this mental health treatment condition and remand for resentencing.

2. RCW 43.43.7541 IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY THE DNA-COLLECTION FEE.

The mandatory $100 DNA-collection fee authorized under RCW 43.43.7541 violates substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fine. This Court should find trial court erred in imposing that fee without first determining Shelton's ability to pay.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. at 218–19, 143 P.3d 571. It requires that "deprivations of life, liberty, or property be substantively reasonable;" in other words, such deprivations are constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221, 1225 (2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130, 1135 (2013). Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is lighter under this standard, the standard is not meaningless. Indeed, the United States Supreme Court has cautioned the rational basis test "is not a toothless one."

Mathews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, "the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional." DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

Here, the statute mandates all felony defendants pay the DNA-collection fee. RCW 43.43.754. This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile so this might help facilitate future criminal identifications. RCW 43.43.752-7541. This is a legitimate interest. However, the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

There is nothing reasonable about requiring sentencing courts to impose the DNA-collection fee upon all felony defendants regardless of whether they have the ability – or likely future ability – to pay. This does not further the State's interest in funding DNA

collection and preservation. As the Washington Supreme Court recently emphasized, "the state cannot collect money from defendants who cannot pay." State v. Blazina, __ Wn.2d __, 344 P.3d 680 (2015). When applied to such defendants, not only do the mandatory fee orders under RCW 43.43.7541 fail to further the State's interest, they are utterly pointless. It is simply irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue that – standing alone – the $100 DNA-collection fee is of such a small amount that most defendants would likely be able to pay. The problem with this argument, however, is this fee does not stand alone.

The Legislature expressly directs that the fee is "payable by the offender after payment of all other legal financial obligations included in the sentence." RCW 43.43.7541. This means the fee is paid after restitution, the victim's compensation assessment, and all other LFOs have been satisfied. As such, the statute makes this the least likely fee to be paid by indigent defendants.

Additionally, the defendant will be saddled with a 12% rate on his unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial

situation. Indeed, it actually can impede rehabilitation. Hence, the imposition of mounting debt upon people who cannot pay actually works against another important State interest – reducing recidivism. See, Blazina, 344 P.3d at 685 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

In sum, when applied to defendants who do not have the ability, or likely ability to pay, the mandatory imposition of the DNA-collection fee does not rationally relate to the State's interest in funding the collection, testing, and retention of defendants' DNA. Hence, this Court should find RCW 43.43.7541 violates substantive due process as applied and vacate the order.

D. CONCLUSION

For reasons stated above, this Court should vacate the trial court's order that Shelton participate in a mental health evaluation as a condition of community custody.

Additionally, this Court should find RCW 43.43.7541 violates due process as applied to persons who do not have the ability to pay or likely future ability to pay. As such, it should either vacate the $100 DNA-collection fee order or remand with instructions for

the trial court to make a finding regarding Shelton's ability to pay.

Dated this 19th day of May, 2015.

Respectfully submitted

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DIVISION ONE

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	)	
Respondent,	)	
	)	
vs.	)	COA NO. 72848-2-I
	)	
MICHAEL SHELTON,	)	
	)	
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 19TH DAY OF MAY, 2015, 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] MICHAEL SHELTON
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MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF MAY, 2015.

X Patrick Mayovsky