No. 32221-1-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DAVID RANDALL PRIEST,
Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
Honorable Christopher E. Culp, Judge

REPLY BRIEF OF APPELLANT

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A. RESTATEMENT (PARTIAL) OF APPELLANT'S ISSUES

1. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory $100 DNA collection fee.

2. RCW 43.43.7541 violates equal protection because it irrationally requires some defendants to pay a DNA-collection fee multiple times, while others need pay only once.

3. Since the directive to pay LFOs was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs.

B. RESPONDENT'S ANSWERS TO APPELLANT'S ISSUES

1. All references to and arguments based upon documents not contained in the appellate court record must be disregarded by this Court.

2. The defendant lacks standing to challenge DNA fees.

3. The defendant's challenge to the DNA fees is not ripe for review.

C. ARGUMENT IN REPLY TO STATE'S RESPONSE

Mr. Priest relies primarily upon his Brief of Appellant ("BOA") to address all issues raised by the State. He also argues as follows in direct reply to portions of the State's response.

1. References to and arguments based upon documents contained in court records are appropriately part of the appellate record.

The State argues under RAP 9.1(a) that the Appendices A–C attached to Mr. Priest's brief are not contained within the court records and are prohibited from consideration on appeal. Brief of Respondent ("BOR") at 5–7.

The court rules do not prohibit review of SCOMIS records and encourage the consideration of relevant additional facts. RAP 9.1(a) does not specifically prohibit the consideration of SCOMIS (Superior Court Management Information System) records on appeal. RAP 9.1(a) and (c) state:

> *Generally*. The "record on review" *may* consist of (1) a "report of proceedings", (2) "clerk's papers", (3) exhibits, and (4) a certified record of administrative adjudicative proceedings. . . . (c) Clerk's Papers. *The clerk's papers include the pleadings, orders, and other papers filed with the clerk of the trial court.*

RAP 9.1 (emphasis added). SCOMIS records are commonly used in all court proceedings and their authenticity is not in question. RAP 9.1(a) also does not unequivocally prohibit consideration of other items to be included in the "record on review" as the words "generally" and "may" are key words in the rule. RAP 9.1(a).

Further, RAP 9.11 provides in relevant part:

> The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11. See also *In re Adoption of B.T.*, 150 Wn.2d 409, 414, 78 P.3d 634, 636 (2003) (noting the courts may take and consider additional evidence on the merits pursuant to RAP 9.11).

It is also appropriate for an appellate court to consider the content of SCOMIS and ACORDS (Appellate Court Record and Data System) records as a basis for its decision-making. *Scanlon v. Witrak*, 110 Wn. App. 682, 688, 42 P.3d 447 (2002). In *Scanlon*, it was unclear whether a divorce decree discussed by the parties was registered in Washington. *Id.* The appellate court reviewed SCOMIS and ACORDS records on its own to determine the issue: "Because the parties barely addressed this issue in their briefs, we conducted our own research . . . to determine whether the Georgia decree was registered in Washington." *Id.* Finding the decree was not registered in Washington after reviewing SCOMIS and ACORDS,

the court determined it did not have jurisdiction to hear the case and disposed of the appeal. *Id.*

Courts may also take judicial notice of adjudicative facts at any time. *In re Adoption of B.T.*, 150 Wn. 2d at 414; *Fusato v. Washington Interscholastic Activities Ass'n,* 93 Wn. App. 762, 772, 970 P.2d 774 (1999) (citing ER 201(f): "Judicial notice may be taken at any stage of the proceeding."). In general, judicially noticed facts are "not subject to reasonable dispute" in the sense that they are "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* (citing ER 201(b)). "Judicial notice may be taken of those facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty." *Id.* (citations and quotations omitted). Judicial notice may be taken whether or not requested by the parties. *Id.* (citing ER 201(c)).

The State cites *In re Adoption of B.T.* in support of the proposition that an appellate court may not take judicial notice of the record of another independent and separate judicial proceeding. BOR at 6. However, in that case the reason the court refused to take judicial notice under RAP 9.11(a)

was because the additional facts were not helpful for determining the issues in the case. *In re Adoption of B.T.*, 150 Wn. 2d at 415.

Here, the additional facts are records routinely entered into the Superior Court Management Information System that contain relevant information and are helpful for determining Mr. Priest's issue. Review by this Court of the appendices attached to Mr. Priest's opening brief is appropriate. BOA at Appendices A–C.

2. Mr. Priest has standing to challenge the DNA fee.

The State asserts Mr. Priest lacks standing to challenge the DNA fee imposed upon him. It argues that Mr. Priest has not suffered an actual injury and is not constitutionally indigent, and therefore he lacks standing to challenge the DNA fee statute, RCW 43.43.7541. BOR 7–10.

A defendant has standing when he shows "a personal injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief" and when "his claim falls within the zone of interests protected by the statute or constitutional provision at issue." *State v. Johnson*, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014), as amended (Mar. 13, 2014), cert. denied, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014). A state is restricted from imprisoning indigent defendants for failure to pay fines

under the Fourteenth Amendment's equal protection and due process clauses. *Id.* (citations omitted).

A defendant may challenge his legal financial obligations prior to the State's attempted enforcement of the obligations. *State v. Blazina*, 182 Wn. 2d 827, 832 n. 1, 344 P.3d 680 (2015); see also *State v. Lyle*, ___ Wn. App. ___, 355 P.3d 327, 329 (2015) ("[T]he fact that the State may not yet be attempting to collect [the defendant's] LFOs does not preclude our review of this issue.").

Here Mr. Priest is challenging the DNA fee statute because the imposition of the fine upon him is an injury that this Court can redress. *See Johnson*, 179 Wn.2d at 552. Also, his claim is founded upon the principles of the Fourteenth Amendment, which restrict a state's ability to punish him for failure to pay. *Id.* Mr. Priest has standing to challenge the DNA fee.

The State's reliance upon *State v. Johnson* for the proposition Mr. Priest cannot demonstrate he is constitutionally indigent is misplaced. BOR at 42–43.

"No precise definition of "constitutional indigence exists." *Johnson*, 179 Wn.2d at 553. Courts "have recognized that constitutional indigence cannot mean absolute destitution." *Id.* Persons claiming

constitutional indigence in the face of a traffic fine cannot satisfy this standard. *Id.* at 554. In *Johnson,* the defendant challenged his conviction on constitutional grounds, claiming his driver's license suspension was invalid due to his indigence. 179 Wn.2d at 551–555. But the defendant had assets worth at least $300,000, and the court determined he was not constitutionally indigent. *Id.* at 541, 554.

Johnson is distinguishable from this case. 179 Wn.2d at 553. The traffic crime in *Johnson* was based upon a license suspension for failure to pay traffic fines. Id. at 540. Mr. Priest is not challenging a traffic crime or related fines as a basis for his conviction. More importantly, in *Johnson* there was evidence the defendant had assets. *Id.* at 541, 554. The record does not demonstrate Mr. Priest has significant assets like the ones identified in *Johnson* or that he has any assets at all. *Id.*

Mr. Priest has standing to challenge the DNA fee imposed upon him and was indigent as reflected in the court files herein.

3. The defendant's challenge to his legal financial obligations is ripe for review.

The State further asserts Mr. Priest's challenge to the DNA fee is not ripe for review. BOR at 10–12.

However, the Washington State Supreme Court recently rejected this same argument. Although the State is not currently attempting to collect the LFOs imposed upon him, Mr. Priest's challenge is ripe for review. *Blazina*, 182 Wn. 2d at 832 n. 1; *see also Lyle*, ___ Wn. App. ___, 355 P.3d at 329.

D. CONCLUSION

For the reasons stated above and in the Brief of Appellant, this Court should vacate the orders assessing the $100 DNA collection fee and authorizing collection of Mr. Priest's DNA, and remand for the trial court to make an individualized inquiry into Mr. Priest's current and future ability to pay before imposing LFOs.

Respectfully submitted on October 12, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on October 12, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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