SUPREME COURT NO. 93712-5

NO. 46819-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LONZELL GRAHAM,

Petitioner.

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

The Honorable Garold E. Johnson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Lonzell Graham was the appellant below.

B. COURT OF APPEALS DECISION

Graham requests review of the Court of Appeals' (Division Two) decision in State v. Graham entered on June, 28 2016, and its denial of a Motion for Reconsideration entered on August 23, 2016.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Must the State show that the tint meter that an officer relies on for learning to detect window tint violations is a reliable instrument before it can establish the officer had an objectively reasonable suspicion that a violation of RCW 46.37.430 was occurring?

2. Does RCW 43.43.7541 violate substantive due process when applied to defendants who have not been found to have the likely ability to pay their mandatory fees?

3. Given Washington's current legal financial obligation (LFO) enforcement scheme, do this Court's holdings in State v. Curry[2] and State v. Blank[3] require that in order to satisfy constitutional due process trial courts must conduct an ability-to-pay inquiry at the time the

[1] The decision and ruling are attached as Appendix A and Appendix B.

[2] 118 Wn.2d 911, 829 P.2d 166 (1992).

[3] 131 Wn.2d 230, 930 P.2d 1213 (1997).

statutorily mandated LFOs are imposed?

D. REASONS TO ACCEPT REVIEW

Review of the LFO issue raised herein is warranted under RAP 13.4(b)(3). First, Graham's substantive due process challenge raises a significant question of law under U.S. Const. amends. V, XIV, § 1 and Wash. Const. art. I, § 3.

The case also raises the question of whether this Court's due process analysis in Blank and Curry should be applied broadly by the Court of Appeals as a barrier to judicial consideration of other types of due process challenges to LFO statutes. Hence, review is also warranted under RAP 13.4(b)(1) because the case raises the question of whether Blank and Curry – when considered in the context of Washington's current LFO collection scheme – now require trial courts to consider a defendant's likely ability to pay before imposing mandatory LFOs.

Additionally, review of the LFO issue is warranted under RAP 13.4(b)(4) because Graham's substantive due process challenge raises an issue this Court recognizes as one of substantial public interest. See, Blazina, 182 Wn.2d at 835 (noting there are "[n]ational and local cries for reform of broken LFO systems"). An LFO order imposes an immediate debt upon a defendant subjecting him to a myriad of penalties arising from enforced collection efforts. The societal hardships created by the

erroneous imposition of LFOs cannot be understated.

A study by the Washington State Minority and Justice Commission concludes that for many people, erroneously imposed LFOs result in a horrible chain of events:

> ...reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnarling some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008)[4]; see also, State v. Blazina, 182 Wn.2d 827, 344 P.3d 680, 682-84 (2015) (acknowledging these hardships). These realities amply demonstrate judicial review of Washington laws authorizing mandatory imposition of LFO debt is an issue of substantial public interest.

Regarding the illegal stop issue raised herein, this issue raises a significant question of law under both the Fourth Amendment and article I, section 7 of the Washington Constitution. Hence, review should be granted under RAP 13.4(b)(3).

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[4] See: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf

Review should also be granted under RAP 13.4(b)(4), because this case raises an issue of substantial public interest. Tint meter violations are used as the basis for making traffic stops. Unfortunately, there is public concern that this type of infraction is used disproportionally to effectuate stops against minority groups.[5] As such, it is of particular public importance that the government show officers have had reliable training and experience in recognizing an infraction before they initiate such stops.

E. RELEVANT FACTS

On May 18, 2014, Graham and his passenger were driving on Pacific Highway in Milton. RP 55, 65. Officer Donald Hobbs noticed the tint of the windows was dark. RP 57. Hobbs stopped Graham because he suspected the car windows were tinted darker than allowed by law. RP 57-RP 58.

Hobbs took Graham's registration and performed a routine records check. RP 60. He discovered there was a protection order against Graham, and the protected person was his passenger. RP 61-65. Graham was arrested and charged with violating that order. RP 66; CP 1.

Graham moved to suppress, arguing that unless the State proved

[5] See, e.g. "To Reduce Bias, Some Police Departments Are Rethinking Traffic Stops" NPR.org http://www.npr.org/2016/07/25/486945181/some-police-departments-are-rethinking-traffic-stops-to-reduce-bias (accessed 9-15-16); "Window tinting tickets biased?" PostandCourrier.com http://www.postandcourier.com/article/20111016/PC1602/310169932 (accessed 9-15-16)

the tint meter was a reliable device for measuring window tint the State could not show Hobbs had a reasonable suspicion for stopping Graham's car on the basis of a window tint violation. CP 8.

At the hearing, Hobbs testified he suspected the tint was too dark based on his "training and experience." RP 58, 80. However, he also admitted he had no formal training in tint detection and his experience was based solely on his previous personal use of the tint meter to determine whether the degree of tint is legal. RP 80. He testified there is no training provided to officers using these instruments; there is no way to preserve the readings of the instruments for review; there are no protocols or WACs establishing how to properly use tint meters; and the particular instrument Hobbs used had not been tested or calibrated since he first employed it in 2011. RP 73-76.

The trial court denied Graham's motion, concluding the question of the tint meter's reliability went to whether the ticket for a window tint violation was valid, not whether the officer had a reasonable suspicion to stop Graham in the first place. CP 99; RP 99.

Graham was convicted and sentenced. CP 52-62. He is indigent.[6] CP 77-84; RP 348-49. The trial court imposed mandatory fees. CP 18, 74-80. Graham appealed his conviction and the DNA fee. CP 71-72.

[6] At sentencing, he informed the trial court that he receives only $721 a month in social security benefits and has previously been found unable to pay LFOs. RP 349.

Graham argued the trial court erred when it found the State carried its burden of establishing Hobbs had an objectively reasonable suspicion a window tint infraction was committed. This is because Hobbs' basis for his suspicion came solely from his prior use of a tint meter that was never established as a reliable instrument for measuring window tint. Brief of Appellant (BOA) at 9-10; Reply Brief of Appellant (RBOA) at 2-3.

Division Two affirmed the conviction. It explained that because Hobbs testified he had completed "numerous stops on tinted windows and I know what a dark tinted looks like that's darker than allowed by law" (1RP 58) – there was sufficient evidence to find the stop was valid. Appendix A at 6.

Regarding the DNA fee, Graham asserted the Legislative mandate that trial courts impose this fee on all defendants violates substantive due process when applied to those lacking the likely ability to pay. He pointed out that it is irrational to attempt to effectively fund a DNA database or victim's services by imposing fees on someone like Graham who cannot pay. BOA at 11-15 RBOA at 4-20.

In response, the State claimed the issue was not ripe and was previously settled by this Court in Curry and Blank. Brief of Respondent

(BOR) at 15-19. Division Two properly rejected the ripeness argument,[7] however, it concluded that because the statute on its face appears to serve a legitimate state interest in funding a DNA database, then it could not be irrationally applied to those who do not have the ability to pay this fee. Appendix A at 10-11.

F. ARGUMENT IN SUPPORT OF REVIEW

1. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE STATE MUST SHOW THAT TINT METERS USED BY OFFICERS ARE RELIABLE IN MEASURING WINDOW TINT VIOLATIONS WHEN SUCH SUSPECTED VIOLATIONS SERVE AS A BASIS FOR STOPPING A VEHICLE.

Review should be granted so that trial courts and law enforcement may be given clear guidance as to whether tint meters must be shown reliable before an officer's experience with these instruments may serve as valid basis for effectuating a traffic stop.

Both the Fourth Amendment and article I, section 7 of the Washington Constitution prohibit unreasonable seizures. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). Warrantless seizures are per se unreasonable, unless an exception to the warrant requirement

[7] This created a conflict with Division One, which concluded the same issue is not ripe. See, State v. Shelton, 194 Wn. App. 660, __ P.3d __ (2016) and State v. Lewis, 194 Wn. App. 709, __ P.3d __ (2016). The Lewis decision is currently being petitioned, citing a conflict with Graham regarding the ripeness issue. Both raise the same due process challenge and same argument regarding Curry and Blank.

applies. State v. Ladson, 138 Wn.2d 343, 353, 979 P.2d 833 (1999). The State bears the burden of establishing an exception to the warrant requirement. Id. at 350. One exception is an investigative stop that is based on a police officer's objectively reasonable suspicion of a traffic infraction. Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Such a stop "is reasonable only if the officer had an objectively reasonable suspicion that the person was involved in criminal activity." State v. Gantt, 163 Wn. App. 133, 144, 257 P.3d 682, 688 (2011) (emphasis added).

The question here is whether an officer's prior stops for window tint violations – which were merely self-validated through his personal use of his tint meter – constituted sufficient evidence supporting a finding that he had an objectively reasonable suspicion for supporting a stop where the State never established the reliability of the tint meter.

Hobbs testified he suspected the tint was too dark based on his "training and experience." RP 58, 80. However, it turns out, he had no formal training in tint detection and his "experience" was based solely on his personal use of the tint meter to determine whether a degree of tint is illegal. RP 80. Thus, the objective reasonableness of his suspicions – which were based only on his experience with his tint meter – was only as

strong as the reliability of the tint meter. Consequently, it was incumbent upon the State to establish the reliability of the instrument.

Under Division Two's holding, however, an officer might conduct numerous traffic stops using an unreliable tint meter for which he has no training and then justify future stops based on the fact that he knows what a window tint violation looks like because of his "experience." As such, the unreliable readings of a tint meter may be perpetuated to the extent that they are used to effectuate unlawful stops of Washington drivers. Constitutional protections therefore require that before a stop is found to be valid, the government must show that an officer's experience in recognizing tint violation is grounded in the use of a reliable tint meter and reliable training.

In sum, because window tint violations are being used as a basis to initiate traffic stops in Washington, there is a substantial public interest and constitutional necessity in insuring that such stops are based on objectively reasonable suspicion. Proof as to the reliability of tint meters is a key element of this, but Division Two's holding does not require this. Consequently, review should be granted.

2. REVIEW IS WARRANTED BECAUSE WHETHER RCW 43.43.7541 IS UNCONSTITUTIONAL IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT NEEDS TO BE DECIDED BY THIS COURT.

Unless this Court issues a decision explicitly declaring RCW 43.43.7541 is unconstitutional as applied, trial courts will continue on a daily basis to mandatorily impose the DNA fee on destitute defendants, which serves only to exacerbate their indigence and the resulting costs to society. The public has a substantial interest in avoiding these costs and ensuring the constitutionality of LFO statutes; therefore review, is warranted under RAP 13.4(b)(3) and (4).

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. 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(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 (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 regulation must be rationally related to a legitimate state interest. Id.

Although the rational basis standard is a deferential one, it 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 this 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.

RCW 43.43.7541 mandates all felony defendants pay the DNA fee. On its face, this mandate appears to rationally serve the State's interest in funding the collection, analysis, and retention of a convicted offender's DNA profile. RCW 43.43.752-7541. However, as applied to defendants who lack the likely ability to pay, the mandatory imposition of this fee does not rationally serve this interest or any legitimate state interest.

First, imposing DNA fees on indigent persons does not rationally serve a legitimate financial interest. As this Court recently emphasized, "the state cannot collect money from defendants who cannot pay." Blazina, 182 Wn.2d at 837. When applied to such defendants, the fees are utterly pointless. There is simply no reasonable way to effectively fund the DNA database by requiring imposition of fees on people who cannot pay them.[8]

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[8] The government acknowledged the fiscal futility of imposing a mandatory DNA fee upon indigent persons when, in 2009, the Legislature made the DNA collection fee mandatory rather than discretionary, despite recognition it would do little to help fund the database:

> This bill will...require all felony offenders to pay the full amount of the $100 fee, no longer allowing the court to reduce the fee for findings of undue hardship. However, the collection rate is expected to be very low for these cases, so it is assumed there will be no significant change to revenue for felony matters.

Washington State Office of Financial Management, Multiple Agency Fiscal Note Summary, 2.S.H.B. 2713 (3/ 28/2008).

Second, as this Court recognizes, the State's interest in deterring crime via enforced LFOs is not rationally served. Id. This interest is instead undermined because imposing LFOs on indigent persons inhibits re-entry into society and "increase[s] the chances of recidivism." Id. at 836-37.

Third, the State's interest in uniform sentencing is not rationally served by imposing mandatory LFOs on persons lacking the ability to pay. This is because defendants who cannot pay are subject to lengthier involvement with the justice system and often pay considerably more LFO debt than defendants who can pay off the fees quickly. Id. at 836-37.

Finally, the State's interest in enhancing offender accountability is not served. In order to foster accountability, a sentencing condition must be something that is achievable. If it is not, the condition actually undermines efforts to hold a defendant accountable.

In sum, there is no rational basis for imposing mandatory DNA fees on defendants who cannot pay. As such, RCW 43.43.7541 violates substantive due process as applied to these individuals. This Court should grant review to decide this significant public issue and to put an end to these fees being ordered on a daily basis without regard to a defendant's ability to pay. RAP 13.4(b)(4).

3. REVIEW IS WARRANTED BECAUSE GRAHAM CONFLICTS WITH THIS COURT'S DECISIONS IN CURRY AND BLANK.

Division Two essentially held that substantive due process challenges like Graham's are foreclosed by this Court's ruling in Curry. Appendix B at 11. However, when Curry and its progeny Blank are considered in light of the realities of Washington's current LFO collection scheme, they actually support Graham's position that an ability-to-pay inquiry must occur at the time DNA fees are imposed. Division Two's holding, however, results in just the opposite – rote imposition of mandatory LFOs without concern for ability to pay. This Court should grant review to clarify that Curry and Blank, when considered in the context of the modern day LFO collection scheme, require sentencing courts to conduct an ability-to-pay inquiry before imposing any LFOs.

Currently, Washington's laws provide for an elaborate and aggressive collections process that includes the immediate assessment of interest, enforced collections methods through a variety of different entities, and the authorization of numerous additional sanctions and penalties. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See, Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J.

Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay). Importantly, this cycle does not conform to the necessary constitutional safeguards established by this Court in Curry and Blank.

In Blank, this Court held that "monetary assessments which are mandatory may be imposed against defendants without a per se constitutional violation." Blank, 131 Wn.2d at 240 (emphasis added). It reasoned that fundamental fairness concerns only arise if the government seeks to enforce collection of the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (referring to Curry, 118 Wn.2d at 917-18).

This Court also noted, however, that the constitutionality of Washington's LFO statutes was dependent on trial courts conducting an ability-to-pay inquiry at certain key times. It emphasized the following triggers for such an inquiry:

* "The relevant time [to conduct an ability-to-pay inquiry] is the point of collection and when sanctions are sought for nonpayment." Id. at 242.

* "[I]f the State seeks to impose some additional penalty for failure to pay...ability to pay must be considered at that point." Id.

* "[B]efore enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." Id.

Blank thus makes clear that in order for Washington's LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry: (1) before "enforced" collection; (2) prior to any additional "penalty" for nonpayment; and (3) before any other "sanction" for nonpayment is imposed.[9] Id. Unfortunately, neither the Legislature nor the trial courts are currently complying with Blank's directives.

Given Washington's current LFO collection scheme, the only way to effectively comply with Blank's due process requirements is for sentencing courts to conduct a meaningful ability-to-pay inquiry at the time LFOs are imposed. Although Blank says that prior case law "suggests" that such an inquiry is not required at sentencing, this Court simply was not confronted with the realities of the State's current collection scheme in that case.

Today, Washington's LFO system consists of a complicated patchwork of enforced collection procedures and a myriad of penalties and sanctions before which there is no inability-to-pay inquiry. The reality is

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[9] "Penalty" means "a sum of money which the law exacts payment of by way of punishment for... not doing some act which is required to be done." Black's Law Dictionary, Sixth Edition, at1133.

"Sanction" means, "Penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations." Id., at 1341.

"Enforce" means: "To put into execution, to cause to take effect, to make effective; as to enforce ... the collection of a debt or a fine." Id. at 528.

that onerous and relentless enforced collection procedures, sanctions, and penalties may begin long before an indigent person is faced with imprisonment for failure to pay.

First, under RCW 10.82.090(1), LFOs accrue interest at a rate of 12 percent – an astounding level given the historically low interests rates of the last several years. Blazina, 182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013). Interest on LFOs accrues from the date of judgment. RCW 10.82.090. This mechanism of enforcement has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. See Blazina, 182 at 836 (citation omitted) (explaining that on average, a person who pays $25 per month toward his or her LFOs will owe the State more 10 years after conviction than they did when the LFOs were initially assessed.). Yet, there is no requirement for the courts to conduct an inquiry into ability to pay before interest is assessed upon unpaid mandatory LFOs.

Washington law also authorizes an annual fee of up to $100 to go to the court clerk for any unpaid account. RCW 36.18.016 (29). There is no ability-to-pay inquiry before this additional sanction is imposed.

Washington law permits courts to use private collection agencies or county collection services to actively enforce collection of LFOs. RCW 19.16.500; 36.18.190. There is nothing in the statutes that prohibits the courts from using collection services immediately after sentencing. Any penalties or additional fees these agencies decide to assess are paid by the defendant. Id. In fact, the statutes authorize that when accounts are assigned to such agencies, the court clerks may impose a transfer fee equal to "the full amount of the debt up to one hundred dollars per account." RCW 19.16.500. This means the DNA fee can be doubled by a clerk's decision to transfer a defendant's account to a collection service. Yet, there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement to collect mandatory LFOs. Id.

Washington law also permits courts to order "payroll deduction." RCW 9.94A.760(3). This can be done immediately upon sentencing. RCW 9.94A.760(3). Beyond the actual deduction to cover the outstanding LFO payments, employers are authorized to deduct other fees from the employee's earnings. RCW 9.94A.7604(4). This constitutes an enforced collection process with additional sanctions. Yet, there is no provision requiring an ability-to-pay inquiry occur before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; see also, Harris, supra, at 1778 (providing examples of wage garnishment as an enforcement mechanism used in Washington). As for garnishment, this enforced collection mechanism may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment is a collection mechanism that may be used within 30 days of a defendant's failure to pay the monthly sum ordered. RCW 9.94A.7701. Employers are permitted to charge an additional "processing fee" when this enforced collection method is used. RCW 9.94A.7705. Again, however, there are no provisions requiring courts to conduct an ability-to-pay inquiry prior to imposition of mandatory LFOs.

These examples show that under Washington's current LFO system, there are many instances where the Legislature provides for "enforced collection" and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms may be used immediately after the judgment is entered. Hence, if the constitutional requirements set forth in Curry and Blank are to be met under the current LFO collection scheme, trial courts must conduct an ability-to-pay inquiry when any LFOs are imposed.

In sum, when Curry and Blank are appropriately considered within the context of Washington's current LFO collection scheme, they actually support the proposition that an ability-to-pay inquiry must occur at the time the trial court imposes the DNA fee. Unfortunately, just the opposite will happen if Division Two's decision stands. As such, this Court should grant review and determine whether Graham conflicts with this Court's holdings in Blank and Curry. RAP 13.4(b)(1).

G. CONCLUSION

For the reasons stated, this Court should grant review.

Dated this 20th day of September, 2016.

Respectfully submitted
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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

June 28, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LONZELL DEVAUGHN GRAHAM, Appellant.	No. 46819-1-II UNPUBLISHED OPINION

MELNICK, J. — Lonzell Devaughn Graham appeals from his conviction and sentence for a felony domestic violence court order violation. We conclude that the trial court did not err by denying Graham's motion to suppress, that the legal financial obligations (LFOs) ordered do not violate his due process or equal protection rights, that the trial court did not err by ordering Graham to provide a biological sample. We further conclude that the trial court did err by not conducting an individualized inquiry before imposing a discretionary LFO. We affirm, but remand to the trial court to conduct an individualized inquiry as to Graham's ability to pay the discretionary LFO.

FACTS

On May 20, 2014, the State charged Graham with a felony domestic violence court order violation, alleging he willfully contacted Tasha Lamb, the protected party, after having received actual notice of the existence of the court order, and that he had at least two previous convictions for violating orders.

I. SUPPRESSION HEARING

On August 26, 2014, Graham filed a motion to suppress evidence pursuant to CrR 3.6. On September 3, the trial court heard the following undisputed testimony from Officer Donald Hobbs on the motion to suppress. Hobbs worked as a police officer for approximately ten years. He came into contact with Graham on Pacific Highway in Milton while working patrol. As he monitored traffic, Hobbs observed a gold Lincoln automobile driving southbound with "two windshield wipers stuck on the windshield in an upright position . . . [and] both or one of the side front windows was very dark tinted." 1 Report of Proceedings (RP) at 57. It was a dry day. Hobbs stopped the vehicle because "obviously, the windshield wipers were defective. They were stuck in an upright position, which would make them defective windshield wipers, and probably obscuring his view as well. And dark tinted windows." 1 RP at 58.

Based on Hobbs's training and experience, he knew "what a dark tinted window looks like that's darker than allowed by law," and he "had [completed] numerous, numerous stops on tinted windows." 1 RP at 58. He also has made "many, many" stops for equipment violations, such as windshield wipers stuck in the middle of the windshield. 1 RP at 58. Officer Hobbs took a photo that showed the windshield wipers were stuck in the upright position. He wrote Graham a ticket for the tint of the windows and for the broken windshield wipers.

On September 26, the trial court filed its findings of fact and conclusions of law regarding the motion to suppress. In relevant part, the trial court found:

> UNDISPUTED FACTS
>
> 1. On May 18, 2014, Milton Police Officer Donald Hobbs observed a vehicle traveling south bound at the 7800 block of Pacific Highway in Milton, WA. He observed the vehicle's windshield wipers were stuck in an upright position and it was not raining. Officer Hobbs observed the vehicle's windows were darker than allowed by law. Based on his training and experience as a patrol officer for approximately ten years, Officer Hobbs pulled the vehicle over.

. . . .

CONCLUSIONS OF LAW

. . . .

3. The court found Officer Hobbs' testimony credible.

4. Officer Hobbs had an articulable reasonable suspicion [to] conduct a traffic stop and was legally authorized to contact the defendant.

Clerk's Papers (CP) at 63-65.

II. TRIAL AND SENTENCING

On September 3, the parties stipulated to the admission of Graham's prior convictions for violating protection orders issued under chapter 10.99 RCW or chapter 26.50 RCW.

Officer Hobbs, the sole witness at trial, testified similarly to how he did at the suppression hearing with the following additions. Graham drove the car and a woman sat in the passenger seat. Graham handed Officer Hobbs his registration and license, and Officer Hobbs radioed dispatch to check Graham's name. Dispatch advised Hobbs that Graham had a valid license, and that a no contact order existed prohibiting his contact with Lamb. Dispatch told Officer Hobbs that Lamb was a white female born in 1980. Officer Hobbs went to the passenger side of Graham's vehicle, advised the woman that a protection order existed, and requested her identification. Using the identification the passenger provided, Officer Hobbs confirmed the woman was Lamb. He returned to his car, and after dispatch confirmed the existence of a protection order, Hobbs placed Graham under arrest for violating the no contact order.

The jury found Graham guilty. By special verdict, the jury also found that Graham and Lamb were members of the same family or household.

On September 26, the trial court sentenced Graham to 60 months of confinement. In determining Graham's LFOs the following exchange occurred:

[THE STATE]: Thank you. And I would note it's mandatory legal financial obligations, $500 crime victim assessment, the $100 DNA[1] database fee, the $500 DAC[2] recoupment.

THE COURT: DAC recoupment is not mandatory.

[THE STATE]: I believe she was a conflict through DAC.

[DEFENSE]: Yes.

[THE STATE]: And the $200 filing fee. I just wanted to accurately—

THE COURT: What the court's intent is is that it be the minimum we can impose and still be consistent with the statute. It makes no sense to burden him further with financial obligations. He walks out of here and he has another problem. Enough already.

[THE STATE]: I understand.

[DEFENSE]: Your Honor, Mr. Graham and I were just discussing that some of the costs are mandatory and some are discretionary. And one that he had a question about was the DNA fee, because based on his history, as the court—

THE COURT: Maybe had one or two before?

[DEFENSE]: Yes.

THE COURT: I know. It's mandatory. Whether it makes sense or not, again, that's up to the Legislature. The point is well taken.

[GRAHAM]: I've been—I was sentenced another time where everything was waived because I was on Social Security, and they knew they [weren't] going to get the money anyways.

THE COURT: Well, there's a difference in enforcing and putting it in the rule. And the time of enforcement I think is when you take up the issue of whether or not they're actually going to impose it on you or enforce it at that point. It's not this point. This is the time the amount is set forth. But the actual enforcement is the time to take up the issue of whether or not you can afford is at that time.

[THE STATE]: . . . Would you be putting him on a $10-per-month payment plan upon release from prison?

THE COURT: I don't think I can do that without knowing his financial condition. And I won't know that until he's released, so I won't be doing that.

[THE STATE]: Thank you.

THE COURT: I could put in not more than $10.

[GRAHAM]: I'm on Social Security.

5 RP at 348-50. Graham did not object to the DAC recoupment fee at the hearing, but he did object to the DNA fee. The trial court ordered Graham to pay $1,300 in LFOs, all of which were mandatory, except for the DAC recoupment fee. Graham appeals.

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[1] Deoxyribonucleic acid.

[2] Department of Assigned Counsel.

ANALYSIS

I. MOTION TO SUPPRESS

Graham argues that because Hobbs did not have a reasonable articulable suspicion a traffic infraction was occurring, the trial court erred by denying his motion to suppress evidence. Graham specifically challenges the trial court's finding of fact 1 that the stop was based on the officer's training and experience and conclusion of law 4. We disagree.

A. Standard of Review

We review a trial court's denial of a motion to suppress by determining whether substantial evidence supports the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Evidence is substantial when it is enough "to persuade a fair-minded person of the truth of the stated premise." *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999). Unchallenged findings of fact are verities on appeal. *State v. Bonds*, 174 Wn. App. 553, 562, 299 P.3d 663 (2013). We review conclusions of law de novo. *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014).

B. The Trial Court Did Not Err By Denying the Motion to Suppress

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution, a police officer generally cannot seize a person without a warrant supported by probable cause. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "'As a general rule, warrantless searches and seizures are per se unreasonable.'" *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). However, "[e]xceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view," and investigative stops as set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct.

1868, 20 L. Ed. 2d 889 (1968). *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). "The burden is always on the state to prove one of these narrow exceptions." *Ladson*, 138 Wn.2d at 350.

A *Terry* stop is justified when the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. When considering the reasonableness of a stop, the court must evaluate it based on a totality of the circumstances. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). "The trial court takes into account an officer's training and experience when determining the reasonableness of a *Terry* stop." *Glover*, 116 Wn.2d at 514. *Terry* stops have been applied to traffic violations, including traffic infractions. *State v. Duncan*, 146 Wn.2d 166, 173-74, 43 P.3d 513 (2002); *Ladson*, 138 Wn.2d at 350-51. Those traffic stops are subject to the same reasonableness requirement. *Ladson*, 138 Wn.2d at 350.

Substantial evidence supports the trial court's finding of fact 1. Officer Hobbs, the sole witness at the suppression hearing, testified to each of the facts in the trial court's finding of fact 1. Officer Hobbs stated that based on his training and experience, he had completed "numerous stops on tinted windows and I know what a dark tinted window looks like that's darker than allowed by law." 1 RP at 58. Therefore, substantial evidence supported the trial court's finding.

Because substantial evidence supports the finding, we review the trial court's conclusion of law. Officer Hobbs had a reasonable articulable suspicion that Graham's windows were too darkly tinted, a traffic violation, and the trial court did not err by so concluding.

Therefore, the trial court correctly denied Graham's motion to suppress.

II. LEGAL FINANCIAL OBLIGATIONS

Graham argues the mandatory DNA collection fee under RCW 43.43.7541[3] violates his substantive due process rights because he does not have the ability or the likely future ability to pay. He also argues that RCW 43.43.7541 violates his right to equal protection because it requires some defendants to pay the DNA collection fee multiple times while others only pay it once. Finally, Graham argues that the trial court erred when it ordered him to pay a "court-appointed attorney fee" because it mistakenly believed it was mandatory. Br. of Appellant at 21. We disagree with Graham's arguments, except that the trial court erred in imposing a discretionary LFO, i.e. the attorney fee, without first making an inquiry into his ability to pay.

A. STANDING

The State argues that Graham lacks standing to challenge the constitutionality of the DNA fee as violating substantive due process because he "has not been found to be constitutionally indigent." Br. of Resp't at 12. We disagree.

We review whether a party has standing to assert a constitutional violation de novo. *State v. A.W.*, 181 Wn. App. 400, 409, 326 P.3d 737 (2014).

> No precise definition of "constitutional indigence" exists. In *Williams* [*v. Illinois*, 399 U.S. 235, 242, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970)], the Supreme Court spoke of indigence as meaning "without funds." Nonetheless, courts have recognized that constitutional indigence cannot mean absolute destitution. At the same time, a constitutional distinction exists between poverty and indigence, and constitutional protection attaches only to indigence. *Bearden* [*v. Georgia*, 461 U.S. 660, 661-62, 666 n.8, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983),] essentially mandates that we examine the totality of the defendant's financial circumstances to determine whether he or she is constitutionally indigent in the face of a particular fine.

State v. Johnson, 179 Wn.2d 534, 553-54, 315 P.3d 1090 (2014) (citations omitted).

[3] The 2015 amendment to RCW 43.43.7541 does not affect our analysis in this opinion. *See* LAWS OF 2015, Ch. 265, § 31.

To prove standing, Graham must show (1) "'a personal injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief" and (2) that his claim falls within the zone of interests protected by the statute or constitution provision at issue. *Johnson*, 179 Wn.2d at 552 (quoting *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986)). If a party lacks standing for a claim, we refrain from reaching the merits of the issue. *Johnson*, 179 Wn.2d at 552. A defendant may not challenge the constitutionality of a statute unless he or she is harmed by the alleged unconstitutional feature of the challenged statute. *State v. Jendrey*, 46 Wn. App. 379, 384, 730 P.2d 1374 (1986); *State v. Lundquist*, 60 Wn.2d 397, 401, 374 P.2d 246 (1962).

The trial court appointed Graham a lawyer, and at sentencing, the trial court learned that Graham was on social security. The trial court found him indigent. The trial court also made clear that because of Graham's financial situation, it was attempting to impose the least amount of LFOs it could. Graham is constitutionally indigent for purposes of this appeal and was so in the trial court. He is challenging the law for imposing mandatory LFOs on indigent defendants. Relying on the above-stated two part test, Graham has standing.

B. RIPENESS

The State argues that Graham's claim is not ripe for review because the State has not yet attempted to enforce payment. We disagree.

In *State v. Blazina*, 182 Wn.2d 827, 832 n.1, 344 P.3d 680 (2015), the court clarified that a challenge to the trial court's entry of an LFO order under RCW 10.01.160(3) is ripe for judicial determination. The same rationale applies to LFOs imposed pursuant to other statutes.

C. SUBSTANTIVE DUE PROCESS

Graham argues that RCW 43.43.7541 is unconstitutional because it violates the due process rights of defendants who do not have the ability or likely future ability to pay the obligation. We disagree. We recently rejected similar arguments in *State v. Mathers*, No. 47523-5-II, 2016 WL 2865576 (Wash. Ct. App. May 10, 2016).

We must determine whether RCW 43.43.7541[4] violates the guarantees of the due process clauses of the Washington and federal constitutions. RCW 43.43.7541 requires every sentence imposed for a violation of specified crimes include a $100 DNA fee. Felony violation of a no contact order is one of the specified crimes. RCW 43.43.7541.

Both the state and federal 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.'" *Nielsen v. Dep't of Licensing*, 177 Wn. App. 45, 52, 309 P.3d 1221 (2013) (quoting *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006)). "'Substantive due process seems to have been gradually adopted as the shorthand for individual rights which are not clearly textual.'" *Mathers*, 2016 WL 2865576, at *7 (quoting Stephen Kanter, *The Griswold Diagrams: Toward A Unified Theory of Constitutional Rights*, 28 Cardozo L. Rev. 623, 669 n.170 (2006)). "Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Amunrud*, 158 Wn.2d at 218-19. "It requires that 'deprivations of life, liberty, or property be substantively reasonable' . . . [or] 'supported by some legitimate justification.'"

[4] This statute is entitled: DNA identification system—Collection of biological samples—Fee.

Nielsen, 177 Wn. App. at 53 (quoting Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. Rev. 625, 625-26 (1992)).

The level of review applied in a substantive due process challenge depends on the nature of the interest involved. *Amunrud*, 158 Wn.2d at 219. If no fundamental right is involved, the proper standard of review is rational basis. *In re Det. of Morgan*, 180 Wn.2d 312, 324, 330 P.3d 774 (2014).

For a statute to survive a rational basis review, it must be "rationally related to a legitimate state interest." *Amunrud*, 158 Wn.2d at 222. When applying this test, we may "assume the existence of any necessary state of facts which [we] can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest." *Amunrud*, 158 Wn.2d at 222. The rational basis test "'is not a toothless one,'" but statutes are presumed constitutional, and the burden is on the challenger to prove the law is unconstitutional. *Mathews v. De Castro*, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976)). Both parties correctly argue we should employ this standard of review.

Graham argues that an indigent's inability to pay the DNA fee is not rationally related to any legitimate state interest. However, Graham concedes that the DNA fee serves a legitimate interest because it "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." Br. of Appellant at 13.

For the foregoing reasons, and for those stated in *Mathers*, 2016 WL 2865576, RCW 43.43.7541 does not violate due process because there is a legitimate state interest, as Graham concedes, and that interest is rationally related to the law and the infringement on the offenders' rights.

But Graham argues that the imposition of a mandatory fee on indigent defendants who will be unable to pay the fee does not rationally serve that interest. He is conflating arguments. The rational relationship still exists. However, to the extent that Graham argues that he could be incarcerated for failure to pay, there are protections in place and his claim fails. "[O]ur courts have held that these mandatory obligations are constitutional so long as 'there are sufficient safeguards in the current sentencing scheme to prevent *imprisonment* of indigent defendants.'" *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013) (quoting *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992)).

> "Due process precludes the jailing of an offender for failure to pay a fine if the offender's failure to pay was due to his or her indigence. However, if an offender is capable of paying but willfully refuses to pay, or if an offender does not make sufficient bona fide efforts to seek employment or borrow money in order to pay, the State may imprison the offender for failing to pay his or her LFO. The burden is on the offender to show that his nonpayment is not willful. Although the offender carries the burden, due process still imposes a duty on the court to inquire into the offender's ability to pay. Inquiry into the offender's ability to pay comes at the point of collection and when sanctions are sought for nonpayment."

State v. Stone, 165 Wn. App. 796, 817, 268 P.3d 226 (2012) (internal quotations omitted) (quoting *State v. Nason*, 168 Wn.2d 936, 945, 233 P.3d 848 (2010)).

D. EQUAL PROTECTION

Graham argues that RCW 43.43.7541 violates his equal protection rights because "it irrationally requires some defendants to pay a DNA-collection fee multiple times, while others need pay only once." Br. of Appellant at 16. We disagree. The two groups Graham asks us to

compare are offenders who are required to provide DNA samples one time and offenders who are ordered to give biological samples multiple times.

Under the Washington and federal constitutions, persons similarly situated with respect to the legitimate purposes of the law are guaranteed equal treatment. U.S. CONST. amend. 14; WASH. CONST. art. I, § 12; *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996). "Equal protection is denied if a valid law is administered in a way that unjustly discriminates between similarly situated persons. Before [we] will scrutinize an equal protection claim, the defendant must establish that he is situated similarly to others in a class." *Harris v. Charles*, 151 Wn. App. 929, 936, 214 P.3d 962 (2009) (citing *State v. Handley*, 115 Wn.2d 275, 289-90, 796 P.2d 1266 (1990)).

Equal protection challenges are analyzed under one of three standards of review: strict scrutiny, intermediate scrutiny, or rational basis. *Manussier*, 129 Wn.2d at 672-73. When the classification does not involve a suspect class or threaten a fundamental right we utilize a rational basis test. *Manussier*, 129 Wn.2d at 673. We review Graham's challenge under the rational basis test.[5]

> When evaluating an equal protection claim, we must first determine whether the individual claiming the violation is similarly situated with other persons. A defendant must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination. Although equal protection does not require that the State treat all persons identically, any classification must be relevant to the purpose for the disparate treatment.

State v. Osman, 157 Wn.2d 474, 484, 139 P.3d 334 (2006) (citations omitted). "Disparate treatment of those within and without a designated class rationally relates to achievement of the State's objective if there is *some basis in reality* for the distinction between the two classes and

[5] Both Graham and the State correctly agree this standard is the one we should utilize.

the distinction serves the purpose intended by the legislature." *Osman*, 157 Wn.2d at 486. Like treatment must be afforded to people who are similarly situated with respect to the legitimate purpose of the challenged statute. *Manussier*, 129 Wn.2d at 672.

One purpose of this statute is to fund the state DNA database and defray costs for agencies that collect the biological samples. Another purpose of the statute is to satisfy the "public's incontestable interest in deterring recidivism and identifying persons who commit crimes and the likelihood that a DNA databank will advance this interest." *State v. Brewster*, 152 Wn. App. 856, 860, 218 P.3d 249 (2009). The statute's purpose is rationally related to the legislature's interest in funding the state's DNA database.

Regardless, Graham's equal protection claim fails because, "[w]ithout proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. 'The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class*. A *fortiori* it does not do so when . . . the classes complaining of disparate impact are not even protected.'" *State v. Johnson*, No. 32834-1-III, 2016 WL 3124893, at *2 (Wash. Ct. App. June 2, 2016) (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 207, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008)). Graham does not assert or demonstrate that the legislature had a discriminatory intent when it enacted RCW 43.43.7541.

Therefore, we conclude that RCW 43.43.7541 does not violate Graham's right to equal protection.

E. COLLECTION OF DNA SAMPLE

Graham asks us to reverse the trial court's DNA collection order because it abused its discretion in imposing it. We disagree.

A party may object to a sentencing condition for the first time on appeal. *State v. Armstrong*, 91 Wn. App. 635, 638, 959 P.2d 1128 (1998). We review sentencing conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A trial court abuses its discretion if the imposition of the condition was "on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court ordered the biological sample under RCW 43.43.754(1). However, this statute provides that "[i]f the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted." RCW 43.43.754(2).

It was clear that the trial court understood that Graham had likely provided a DNA sample in the past. However, Graham never presented proof of this fact and never affirmatively stated he had. And even if he had, the statute does not preclude the submission of additional samples from a defendant. RCW 43.43.754(2). The trial court did not abuse its discretion by ordering Graham to submit a DNA sample.

F. DISCRETIONARY LFO

Graham argues that the trial court erred by ordering him to pay the discretionary $500 DAC recoupment fee because it mistakenly believed the fee was a mandatory LFO. Because it is not a mandatory LFO, we remand to trial court to make an individual inquiry on Graham's current and future ability to pay the discretionary DAC recoupment fee. *Blazina*, 182 Wn.2d at 830.

We affirm, but remand the case to the trial court to conduct an individualized inquiry on Graham's ability to pay the discretionary LFO imposed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Maxa, A.C.J.

Sutton, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LONZELL DEVAUGHN GRAHAM,

Appellant.

No. 46819-1-II

ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Lonzell Devaughn Graham filed a motion for reconsideration of this court's June 28, 2016 unpublished opinion. Graham asks this court to exercise its discretion to not impose appellate costs.

After review of the record, we deny the motion for reconsideration. The cost bill and objection to appellate costs will be considered by a commissioner in due course.

IT IS SO ORDERED.

Panel: Jj. Maxa, Melnick, Sutton

Dated this 23rd day of August, 2016.

Maxa, A.C.J.

Acting Chief Judge

NIELSEN, BROMAN & KOCH, PLLC

September 22, 2016 - 10:04 AM

Transmittal Letter

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