FILED
March 9, 2016
Court of Appeals
Division III
State of Washington

NO. 33831-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

MELISSA KERNS,

Appellant.

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

The Honorable Annette S. Plese, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1319
Winthrop, WA 98862
(509) 996-3959

TABLE OF CONTENTS

Page

A. ASSIGNMENT OF ERROR 1

The trial court erred when it ordered Ms. Kerns to pay a $100 DNA collection fee. 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

1. Whether 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 ability, to pay the fee? 1

2. Whether the mandatory $100 collection fee authorized under RCW 43.43.7541 violates equal protection when applied to defendants who have previously provided a sample and paid the $100 DNA collection fee? 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 2

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 collection fee 2

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 only pay once. 6

E. CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Page

Cases

Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 143 P.3d 571 (2006)........ 2, 3

Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).......... 6

DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 960 P.2d 919 (1998) 3, 7

Mathews v. DeCastro, 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976) 3

Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 309 P.3d 1221 (2013).. 3, 4

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)............................. 5

State v. Bryan, 145 Wn. App. 353, 185 P.3d 1230 (2008) 7

State v. Gaines, 121 Wn. App. 687, 90 P.3d 1095 (2004)...................... 6, 7

Statutes

RCW 9.94A.030 ……………………………………………………….4

RCW 10.82.090(1)... 5

RCW 43.43.752 4

RCW 43.43.7532 4

RCW 43.43.754 .... 4, 7, 8

RCW 43.43.7541……………………………………..1, 2, 4, 5, 6, 7, 8, 9

RCW 43.43.754(2)... 8

RCW 43.43.754(6)(a)……………………………………………………9

Other Authorities

Laws of 1994 c 271 § 1, eff. June 9, 1994 9

Laws of 2002 c 289 § 2, eff. July 1, 2002.. 9

Laws of 2008 c 97 § 2, eff. June 12, 2008 9

Laws of 2008 c 97, Preamble.. 8

Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26
U.S.F. L. Rev. 625, 625-26 (1992) 3

U.S. Const. amend V 2

U.S. Const. amend XIV 2, 6

WAC 446-75-010... 8

WAC 446-75-060... 8

Wash. Const. art. I § 3.. 2

Wash. Const. art I, § 12.. 6

A. ASSIGNMENT OF ERROR

The trial court erred when it ordered Ms. Kerns to pay a $100 DNA collection fee.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether 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 ability, to pay the fee?

2. Whether the mandatory $100 collection fee authorized under RCW 43.43.7541 violates equal protection when applied to defendants who have previously provided a sample and paid the $100 DNA collection fee?

C. STATEMENT OF THE CASE

A jury found Ms. Kerns guilty as charged of Attempting to Elude a Police Vehicle and Hit and Run (injury accident). RP[1] Trial 276; CP 1-2, 3, 4.

Ms. Kerns agreed to her prior criminal history including 10 prior felony convictions. RP Sentencing 2; CP 7-8. She also agreed to an offender score calculation of 11 points. RP Sentencing 2; CP 8. Her felony

[1] The verbatim report of proceedings, RP, is referred to as "RP Trial" (trial dates of September 8 and 9, 2015, consecutively paginated volumes) and "RP Sentencing" for the September 24, sentencing hearing.

criminal history spans a first incident date in October 2003 to the current sentence in September 2015. CP 3, 16.

The court imposed concurrent sentences of 53 and 60 months respectively. RP Sentencing 7; CP 10. Also at sentencing, the court found Ms. Kerns indigent and imposed only mandatory legal financial obligations (LFOs) of a $500 victim assessment and a $200 criminal filing fee. RP Sentencing 8; CP 12. The court also imposed a $100 DNA collection fee. RP Sentencing; CP 12. Ms. Kerns did not object to the imposition of any of the LFOs. RP Sentencing 1-11.

This appeal follows. CP 19-20.

D. ARGUMENT

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 collection fee.

Both the Washington and United States Constitutions mandate that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. Amends V, XIV; 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).

"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;" 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)).

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. *Nielsen*, 177 Wn. App. at 53-54. Although the burden on the State is lighter under this standard, the standard is not meaningless. The United State 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 the 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 offenders pay the DNA collection fee. RCW 43.43.7541.[2] This ostensibly serves the state's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile to help facilitate criminal identification. RCW 43.43.752; RCW 43.43.7541. This is a legitimate interest. But imposing this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

It is unreasonable to require sentencing courts to impose the DNA collection fee upon all felony defendants regardless of whether they have the ability to or likely future ability to pay. The blanket requirement does not further the state's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, "the state cannot

---

[2] Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered LFO as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A.RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. 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.

collect money from defendants who cannot pay." *State v. Blazina*, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the state to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue that the $100 DNA collection fee is such a small amount that the defendant 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 other legal financial obligations included in the sentence." RCW 43.43.7541. Thus the fee is paid only 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 an indigent defendant.

Additionally, the defendant will be saddled with a 12% interest rate on his unpaid DNA collection fee, making the actual debt incurred even more onerous in ways that reach far beyond her financial situation. RCW 10.82.090(1). Imposing mounting debt upon people who cannot pay works against another important state interest – reducing recidivism. See *Blazina*, 182 Wn.2d at 837 (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).

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 an individual defendant's DNA. Thus RCW 43.43.7541 violates substantive due process as applied. Based on Ms. Kerns indigent status, the order to pay the $100 DNA collection fee should be vacated.

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 only pay once.

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const. Amend XIV; Wash. Const., Art I, § 12; *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). A valid law administered in a manner that unjustly discriminates between similarly situated persons, violates equal protection. *State v. Gaines*, 121 Wn. App. 687, 704, 90 P.3d 1095 (2004) (citations omitted).

Before an equal protection analysis may be applied, a defendant must establish if she is similarly situated with other affected persons.

Gaines, 121 Wn. App. at 704. Here, the relevant group is all defendants subject to the mandatory DNA collection fee under RCW 43.43.7541. Having been convicted of two felonies, Ms. Kerns is similarly situated to other affected persons within the afflicted group. See RCW 43.43.754; RCW 43.43.7541.

On review, where neither a suspect/semi-suspect class nor a fundamental right is at issue, a rational basis analysis is used to evaluate the validity of the differential treatment. *State v. Bryan*, 145 Wn. App. 353, 358, 185 P.3d 1230 (2008). That standard applies here.

Under rational basis scrutiny, a legislative enactment that, in effect, creates different classes will survive an equal protection challenge only if: (1) there are reasonable grounds to distinguish between different classes of affected individuals; and (2) the classification has a rational relationship to the proper purpose of the legislation. *DeYoung*, 136 Wn.2d. at 144. Where a statute fails to meet these standards, it must be struck down as unconstitutional. *Id*.

The Legislature has declared that collection of DNA samples and their retention in a DNA database are important tools in "assist[ing] federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and

unidentified persons." Laws of 2008 c 97, Preamble. The DNA profile from a convicted offender's biological sample is entered into the Washington State Patrol's DNA identification system (database) and retained until expunged or no longer qualified to be retained. WAC 446-75-010; WAC 446-75-060. Every sentence imposed for a felony crime must include a mandatory fee of $100. RCW 43.43.754; RCW 43.43.7541.

The purpose of RCW 43.43.754 is to fund the collection, analysis and retention of an individual felony offender's identifying DNA profile for inclusion in a database of DNA records. Once a defendant's DNA is collected, tested, and entered in the database, subsequent collections are unnecessary. This is because DNA – for identification purposes – does not change. The statute itself recognizes this, expressly stating it is unnecessary to collect more than one sample. RCW 43.43.754(2). There is no further need for a biological sample to collect regarding defendants who have already had their DNA profiles entered into the database.

Here, RCW 43.43.7541 does not apply equally to all felony defendants because those who are sentenced more than once have to pay the fee multiple times. This classification is unreasonable because multiple payments are not rationally related to the legitimate purpose of the law, which is to fund the collection, analysis, and retention of an individual offender's identifying DNA profile.

Ms. Kern's DNA was undoubtedly collected previously pursuant to statute. She has 10 prior adult felony convictions dating back to 2004. CP 7-8. These prior convictions each required collection of a biological sample for DNA identification. RCW 43.43.754(6)(a); Laws of 2008 c 97 § 2, eff. June 12, 2008; Laws of 2002 c 289 § 2, eff. July 1, 2002; Laws of 1994 c 271 § 1, eff. June 9, 1994. The $100 DNA collection fee has been in place since at least 2002. Laws of 2002 c 289 § 2, eff. July 1, 2002. All 10 of Ms. Kern's prior felony convictions are 2004 or later. CP 7-8. There is no evidence suggesting DNA had not been collected as would have been ordered in the prior judgments and sentences and placed in the DNA database.

RCW 43.43.7541 discriminates against defendants who have previously been sentenced by requiring them to pay multiple DNA collection fees, while other defendants need only pay one DNA collection fee. The requirement that the fee be collected from such defendants upon each sentencing is not rationally related to the purpose of the statute. As such, RCW 43.43.7541 violates equal protection. The DNA collection fee ordered must be vacated.

E. CONCLUSION

On remand, the $100 DNA collection fee should be vacated and stricken from Ms. Kern's Judgment and Sentence.

Respectfully submitted March 8, 2016.

LISA E. TABBUT/WSBA 21344
Attorney for Melissa Kerns