

73052-5

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Court of Appeals  
Division I  
State of Washington

NO. 73052-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

KENNETH SUTTON, JR.,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BILL BOWMAN

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**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. The constitutionality of a mandatory legal financial obligation imposed at sentencing is not ripe for review until the State attempts to collect payment or impose punishment for failure to pay. The State has not attempted to collect the mandatory DNA fee and Victim Penalty Assessment from Sutton. Is his claim unripe, precluding review?

2. Under RAP 2.5, this Court may refuse to review any claim raised for the first time on appeal, including whether imposing mandatory legal financial obligations without consideration of the defendant's ability to pay is unconstitutional. Sutton raised no objection to the DNA fee or Victim Penalty Assessment in the trial court and does not argue that any "manifest constitutional error" exists to justify review under RAP 2.5. Should this Court decline to review the issue?

3. Substantive due process requires that laws that affect an individual's non-fundamental right be rationally related to a legitimate state interest. Sutton concedes that the State has a legitimate interest in creating and maintaining a DNA database and in funding programs to facilitate victim participation in criminal prosecution. RCW 43.43.7541 establishes a mechanism to fund

the DNA database and RCW 7.68.035 creates a system to fund the programs for victims. Has Sutton failed to prove beyond a reasonable doubt that the DNA fee and Victim Penalty Assessment statutes violate substantive due process as applied to indigent defendants?

4. RCW 10.01.160 permits the trial court to impose "costs" upon a convicted defendant only if he or she has the current or likely future ability to pay them. For purposes of this statute, "costs" are "limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program ... or pretrial supervision." Neither the DNA fee nor the Victim Penalty Assessment is a "cost" by this definition, and courts have held that RCW 10.01.160 does not apply to such mandatory fees and fines. Has Sutton failed to show that the statute precludes imposition of the DNA fee and Victim Penalty Assessment?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Kenneth Sutton, Jr., with one count of Murder in the Second Degree, four counts of Assault in the First Degree, and one count of Unlawful Possession of a Firearm in the

Second Degree. CP 15-17. All but the unlawful possession charge carried firearm enhancement allegations. CP 15-17. The State alleged that Sutton fired a gun multiple times into a group of people outside a bar in Federal Way on June 27, 2012. CP 5-9. Bullets struck and killed Cloise Young, and injured Jontrelle Cole, Amanda Bevocqua, Tera Wilbur, and Anthony Purdmon. CP 5-9.

Sutton waived his right to jury and the case was tried to the bench, the Honorable Bill Bowman presiding. CP 14. Sutton claimed that he acted in self-defense and/or to prevent the commission of a felony. CP 13; 17RP 2815-16.<sup>1</sup> The trial court rejected the defense and found Sutton guilty as charged, including the firearm enhancements. CP 200-09; 18RP 1-12.

The trial court imposed a standard-range sentence of 837 months of confinement, including 300 months of firearm enhancements. CP 100. The court waived all non-mandatory fees and costs, including interest except with respect to restitution. CP 102. The only legal financial obligations imposed were the mandatory \$500 Victim Penalty Assessment, the mandatory \$100 DNA fee, and restitution "to be determined." CP 102. The court

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<sup>1</sup> The State adopts the Appellant's convention for citing the verbatim report of proceedings. See Brief of Appellant at 2 n.1.

later ordered Sutton to pay restitution in the amount of \$23,348.38.

CP 212-13.

## 2. SUBSTANTIVE FACTS<sup>2</sup>

On the evening of June 26, 2012 and early morning hours of the following day, Kenneth Sutton, Cloise Young, Jontrelle Cole, Amanda Bevocqua, Tera Wilbur, Anthony Purdmon and others were at Johnny's Famous Bar and Grill in Federal Way. CP 201. Sutton had armed himself with a .40 caliber firearm and a fully-loaded 22-round extended magazine. CP 201; 16RP 2703. As a convicted felon, Sutton knew he was prohibited from possessing the firearm. CP 201.

Around closing time, Sutton left the bar while many other patrons, including Young, Purdmon, Bevocqua, Cole, and Wilbur, congregated outside on the sidewalk. CP 201. As he left the bar, Sutton called out his gang affiliation ("Rollin' 90s"). CP 201; 16RP 2648-49. In response, Young said something like "nobody wants to hear that shit." CP 202. Sutton then asked Young something like "What's up with you bitch-ass niggas?". CP 202. Sutton was aggressive and confrontational, and further words were exchanged.

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<sup>2</sup> Facts are largely taken from the trial court's unchallenged findings of fact and conclusions of law pursuant to CrR 6.1(d). CP 200-09.

CP 202. Kenyon Taylor attempted to defuse the situation by walking Sutton away from Young. CP 202.

While Taylor and Sutton were walking away, Young apparently said something unthreatening. CP 202. Sutton then reached for his gun, rolled away from Taylor, called out "90's or nothin'" and fired 11 rounds as fast as he could as he spun towards Young. CP 202. Young died at the scene from gunshot wounds. CP 203. Also injured by Sutton's bullets were Purdmon, Bevocqua, Wilbur, and Cole. CP 203.

Sutton ran from the bar, continuing to fire his gun behind him. CP 203. He was shot twice. 17RP 2753-54. He got into his car and fled the scene, then ditched his car and continued afoot. CP 203. While running through yards to evade the police, he dropped his gun. CP 203. He eventually made it home, changed his clothes, and went to the hospital for treatment of his gunshot wounds. CP 203. Sutton was arrested at the hospital. CP 203.

C. ARGUMENT

When any defendant is convicted of a felony, the trial court is required by law to impose a \$100 DNA fee and a \$500 Victim Penalty Assessment (VPA). RCW 43.43.7541; RCW 7.68.035. The trial court complied with these statutory requirements by

imposing these mandatory legal financial obligations (LFOs) in Sutton's judgment and sentence, and Sutton did not object. For the first time on appeal, Sutton contends the statutes mandating imposition of the VPA and DNA fee are unconstitutional as applied to indigent defendants. Because Sutton's claims are both unpreserved and unripe for review, this Court should decline to consider them. If this Court does reach the merits, it should reject Sutton's claims because he fails to establish that the statutes at issue are unconstitutional beyond a reasonable doubt.

1. THE COURT SHOULD NOT REACH THE MERITS OF THE CLAIM BECAUSE IT IS NOT RIPE FOR REVIEW.

Assuming that Sutton has standing to bring this constitutional challenge,<sup>3</sup> this Court should refuse to reach the

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<sup>3</sup> Generally, a person may challenge the constitutionality of a statute only if he is harmed by the provisions claimed to be unconstitutional. State v. Cates, 183 Wn.2d 531, 540, 354 P.3d 832 (2015). In the context of due process challenges based on legal financial obligations assessed against indigent individuals, a person must demonstrate "constitutional indigence" based on "the totality of the defendant's financial circumstances" to establish standing. State v. Johnson, 179 Wn.2d 534, 553, 555, 315 P.3d 1090 (2014). Here, Sutton supports his claim of indigency by citing his declaration in support of an order authorizing him to seek review at public expense. CP 210-11. This establishes statutory, not constitutional, indigence. Johnson, 179 Wn.2d at 555. See also Curry, 118 Wn.2d at 915 n.2 (noting the difference in scale between costs of obtaining appellate counsel and the court costs at issue there and observing, "It is certainly within the trial court's purview to find that the defendants could not presently afford counsel but would be able to pay the minimal court costs at some future date."). Sutton further relies on his lengthy prison sentence and considerable restitution obligation as evidence of constitutional indigence. Although these factors are relevant to a determination of ability to pay, they do not convey the

merits because the issue is not ripe for review. Generally, “challenges to orders establishing legal financial sentencing conditions that do not limit a defendant’s liberty are not ripe for review until the State attempts to curtail a defendant’s liberty by enforcing them.” State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). It is only when the State attempts to collect or impose punishment against an indigent person for failure to pay that constitutional principles are implicated. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992).

Our supreme court adhered to this position in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), when it held that an inquiry into defendant’s ability to pay is not constitutionally required before imposing a repayment obligation in a judgment and sentence, as long as the court must determine whether the defendant is able to pay before sanctions are sought for nonpayment. Id. at 239-42. The point of enforced collection or sanctions for nonpayment is the appropriate time to discern the individual’s ability to pay because before that point, “it is nearly impossible to predict ability to pay[.]” Id. at 242. “If at that time defendant is unable to pay through no

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“totality of the defendant’s financial circumstances” as required to establish standing under Johnson. Because the relevant “constitutional considerations protect only the constitutionally indigent,” Sutton can demonstrate no injury in fact and therefore lacks standing. Id.

fault of his own, ... constitutional principles are implicated.” Id. at 242.

Where nothing in the record reflects that the State has attempted to collect the VPA or DNA fee, any challenge to the order requiring payment on hardship grounds is not yet ripe for review. Lundy, 176 Wn. App. at 109. That is so in this case. Because the issue is unripe, this Court should decline to reach its merits.

2. THE ALLEGED ERRORS ARE NOT MANIFEST CONSTITUTIONAL ERRORS AND SHOULD NOT BE REVIEWED UNDER RAP 2.5.

Sutton did not object to the imposition of the VPA and DNA fee at sentencing. Accordingly, RAP 2.5(a) bars consideration of his claims.

A claim of error may be raised for the first time on appeal only if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and that it caused actual prejudice to the defendant’s rights. McFarland, 127 Wn.2d at 333. If the facts necessary to adjudicate the issue are not in the record, the error is not manifest. State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Here, Sutton's constitutional claims depend on his present and future inability to pay the mandatory VPA and DNA fee. But although he established statutory indigence at the time of sentencing, Sutton's failure to object to imposition of the DNA fee deprived the trial court of the opportunity to make a record as to his likely future ability to pay. Since there is no evidence that Sutton is constitutionally indigent, any error cannot be manifest within the meaning of RAP 2.5(a).

In State v. Blazina, our supreme court recognized that “[a] defendant who makes no objection to the imposition of discretionary [legal financial obligations (LFOs)] at sentencing is not automatically entitled to review.” 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Thus, where defendants fail to object to the LFOs at sentencing, it is appropriate for appellate courts to decline review. Id. at 834. See also State v. Clark, No. 32928-3-III, 2015 WL 7354717 (November 19, 2015) (recognizing that “the LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity” and exercising discretion not to consider challenge to a fine for the first time on appeal). Because Sutton failed to raise the issue below,

precluding development of an adequate record, this Court should decline review.

3. THE VICTIM PENALTY ASSESSMENT AND DNA FEE STATUTE DO NOT VIOLATE SUTTON'S DUE PROCESS RIGHTS.

Even if this Court exercises its discretion to review the unpreserved claim, it should reject Sutton's constitutional challenges to RCW 43.43.7541 and RCW 7.68.035. A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp., 142 Wn.2d 328, 335, 12 P.3d 134 (2000). If at all possible, statutes should be construed to be constitutional. State v. Farmer, 116 Wn.2d 414, 419-20, 805 P.2d 200 (1991). Sutton cannot meet this heavy burden; his claim should be rejected.

Substantive due process bars arbitrary and capricious government action regardless of the fairness of the procedures used to implement them. State v. Beaver, 184 Wn. App. 235, 243, 336 P.3d 654 (2014), aff'd, 184 Wn.2d 321 (2015). The level of review applied depends on the nature of the interest involved. Id. (citing Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 219, 143 P.3d

571 (2006). Where no fundamental right is at issue, as in this case, the rational basis standard applies. Amunrud, 158 Wn.2d at 222. Under this standard, the challenged statute need only be “rationally related to a legitimate state interest.” Id. In determining whether this relationship exists, the reviewing court may “assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest.” Id.

The legislature created the DNA database to store DNA samples of those convicted of felonies and certain misdemeanor offenses. RCW 43.43.753. The legislature identified such databases as “important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts.” Id. To fund the DNA database, the legislature enacted RCW 43.43.7541. This statute originally required courts to impose a \$100 DNA collection fee with every sentence imposed for specified crimes “unless the court finds that imposing the fee would result in undue hardship on the offender.” Former RCW 43.43.7541 (2002). In 2008, the legislature amended the statute to make the fee mandatory regardless of hardship: “Every sentence ... must include a fee of

one hundred dollars.” RCW 43.43.7541. Eighty percent of the fee goes into the “state DNA database account.” Id. Expenditures from that account “may be used only for creation, operation, and maintenance of the DNA database[.]” RCW 43.43.7532.

In 1973, the legislature created a crime victims compensation account to aid innocent victims of criminal acts. State v. Humphrey, 139 Wn.2d 53, 57, 983 P.2d 1118 (1999) (citing LAWS OF 1973, 1<sup>st</sup> Ex. Sess., ch. 122, § 1). To help fund the account, the legislature added a provision in 1977 directing trial courts to impose a penalty assessment upon those found guilty of certain classes of crimes. Id. (citing LAWS OF 1977, 1<sup>st</sup> Ex. Sess., ch. 302, § 10). The Victim Penalty Assessment is thus designed to fund “comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes.” RCW 7.68.035. In addition to encouraging participation at trial, these programs work to assist victims of crime in learning about and applying for benefits, in navigating the restitution and adjudication process, and assist victims of violent crimes in the preparation and presentation of their claims to the department of labor and industries. RCW 7.68.035(4).

Sutton recognizes that requiring those convicted of felonies to pay the DNA fee serves a legitimate state interest in operating the DNA database. Brief of Appellant (BOA) at 9. He also acknowledges that the VPA serves a legitimate state interest in providing services to victims. BOA at 9-10. Based on Blazina, however, he argues that imposing these mandatory LFOs upon those who cannot pay does not rationally serve those interests.

Blazina involved a claimed violation of RCW 10.01.160(3), which requires the trial court to make an individualized determination of a defendant's ability to pay before imposing *discretionary* LFOs as part of a sentence. 182 Wn.2d at 837-38. Because Blazina had not objected to imposition of the LFOs at sentencing, the court concluded that he was not automatically entitled to review. Id. at 832. In deciding to reach the merits anyway, the court noted the "national conversation" about problems associated with imposing LFOs against indigent defendants. Id. at 835-37. Sutton cites this discussion as support for his position that the fee imposed under RCW 43.43.7541 bears no rational relationship to the statute's legitimate purpose, but the passage offers no such support. Rather, Blazina concerned a claimed violation of statute – not due process – and its holding was based

on statutory construction. Accordingly, its application to a constitutional challenge to a mandatory fee is doubtful.

Further, while Sutton and other indigent defendants may have no ability to make even minimal payments at the time of sentencing, that circumstance may not always exist. There is an opportunity for employment in prison. RCW 72.09.100. The legislature recognized that inmates earn money in that program, and provided for a percentage of that income to be paid toward the inmate's LFOs. RCW 72.09.111(1)(a)(iv). Sutton might also receive funds through an inheritance or gift, in which case the legislature has also provided that a portion of those funds would be paid toward LFOs. RCW 72.11.020, .030.

In the context of RCW 10.73.160, pertaining to appellate costs, our supreme court observed that it is not necessary to inquire into a defendant's finances or ability to pay before entering a recoupment order against an indigent defendant "as it is nearly impossible to predict ability to pay over a period of 10 years or longer." Blank, 131 Wn.2d at 242. The same is true with respect to the VPA and DNA fee. Because it is unknown whether the defendant will gain employment in prison or otherwise obtain funds,

indigence at sentencing does not weaken the rational basis for these LFOs.

Sutton emphasizes that Washington's current LFO collection scheme can impose significant hardships upon the indigent. He argues that the current scheme provides for "immediate enforced collection." BOA at 13. He points to RCW 10.82.090, imposing interest on legal financial obligations accruing from the date of judgment, and various statutes relating to collection through payroll deduction and garnishment.

But the statutes on which Sutton relies do not result in enforced collection for indigent defendants. While interest may accrue on the VPA and DNA fee in some cases, it will not accrue here because the trial court waived interest on all LFOs except restitution. CP 102. Even when interest is not waived at sentencing, it is not necessarily collected. The interest may be reduced or waived in certain circumstances; it must be waived if it accrued during the time the defendant was in total confinement or if the interest "creates a hardship for the offender or his or her immediate family." RCW 10.82.090(2). The payroll deduction and wage garnishment statutes necessarily apply only if the offender

has gainful employment, a condition that makes it likely that he has the ability to pay something toward the DNA fee.

Moreover, our supreme court rejected the claim that rational basis review requires the court to consider whether the challenged laws are unduly oppressive on individuals in Amunrud, 158 Wn.2d at 226. Instead, the only requirement is that the law bears a reasonable relationship to a legitimate state interest. The State has a legitimate interest in creating and maintaining a DNA database and in providing services to crime victims. Providing a funding mechanism for these programs is reasonably related to that interest.

4. RCW 10.01.160 DOES NOT APPLY TO MANDATORY LFOS.

In addition to his constitutional challenges to the VPA and DNA fee, Sutton contends for the first time on appeal that his LFOS should be stricken because the trial court failed to comply with RCW 10.01.160(3) by imposing the LFOS without considering Sutton's ability to pay. Sutton failed to preserve this non-constitutional issue for review by failing to object to the VPA and DNA fee at sentencing; this Court should therefore decline to review this argument. RAP 2.5(a)(3); Blazina, 182 Wn.2d at 834

(court of appeals properly exercises its discretion to decline review of unpreserved LFO claims). His argument fails in any event, because RCW 10.01.160 does not apply to mandatory LFOs.

RCW 10.01.160 gives the court discretion to order a defendant to pay "costs," which it defines as "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program ... or pretrial supervision" if the defendant has the ability to pay them. RCW 10.01.160(2), (3). Costs are a subset of the definition of "legal financial obligations," the definition of which distinguishes among different types of costs and obligations. RCW 9.94A.030(3) (listing "court costs" separately from "statutorily imposed crime victims' compensation fees assessed pursuant to RCW 7.68.035" and "any other financial obligation that is assessed to the offender as a result of a felony conviction"). RCW 10.01.160 lists a series of costs that may be imposed under its authority, such as warrant service costs, jury fees, costs of administering deferred prosecution or pretrial supervision, and incarceration costs. RCW 10.01.160(2). The definition omits any reference to mandatory fines or fees.

In Curry, our supreme court observed that mandatory LFOs like the VPA are not governed by RCW 10.01.160's ability-to-pay

requirement: “In contrast to RCW 10.01.160, no provision is made in the [VPA] statute for indigent defendants.” Id. Although Sutton argues that remark was dicta, Divisions Two and Three of this Court have repeatedly held that RCW 10.01.160 does not apply to mandatory LFOs. See, e.g., Clark, 2015 WL 7354717 at \*2 (RCW 10.01.160’s ability-to-pay inquiry required only for discretionary LFOs, not for VPA or DNA fees); Lundy, 176 Wn. App. at 102-03 (“For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant’s ability to pay should not be taken into account.”); State v. Kuster, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (VPA and DNA fee “are not discretionary costs governed by RCW 10.01.160”). Although none of this Division’s published cases have so clearly held that RCW 10.01.160 does not apply to mandatory LFOs, this Court should adhere to that well-established conclusion.

D. CONCLUSION

Sutton fails to show that the mandatory DNA fee required by RCW 43.43.7541 and the mandatory Victim Penalty Assessment required by RCW 7.68.035 violate substantive due process as applied to indigent defendants or that the trial court violated RCW 10.01.160 by imposing the mandatory LFOs without inquiring into

his ability to pay. The State respectfully asks this Court to affirm the imposition of the VPA and DNA fee.

DATED this 16<sup>th</sup> day of December, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Winkler ([winklerj@nwattorney.net](mailto:winklerj@nwattorney.net)), the attorney for the appellant, Kenneth Sutton, Jr., containing a copy of the Brief of Respondent in State v. Sutton, Cause No. 73052-5 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

12-16-15  
Date