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Court of Appeals  
Division I  
State of Washington

NO. 73093-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

GIOVANNI HERRERA-PELAYO,

Appellant.

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

The Honorable Susan K. Cook, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issue Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Procedural Facts</u> .....	2
C. <u>ARUGMENT</u> .....	3
I. THE TRIAL COURT FAILED TO CONSIDER HERRERA-PELAYO'S ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.	3
II. RCW 43.43.7541 IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY THE DNA-COLLECTION FEE.....	9
D. <u>CONCLUSION</u> .....	14

**TABLE OF AUTHORITIES**

	Page
<b><u>WASHINGTON CASES</u></b>	
<u>Amunrud v. Bd. of Appeals</u> 158 Wn.2d 208, 143 P.3d 571 (2006) .....	9
<u>DeYoung v. Providence Med. Ctr.</u> 136 Wn.2d 136, 960 P.2d 919 (1998) .....	10
<u>Johnson v. Washington Dep't of Fish &amp; Wildlife</u> 175 Wn. App. 765, 305 P.3d 1130 (2013) .....	10
<u>Nielsen v. Washington State Dep't of Licensing</u> 177 Wn. App. 45, 309 P.3d 1221 (2013) .....	10, 11
<u>State v. Blazina</u> __ Wn.2d __, 344 P.3d 680 (2015) .....	4, 5, 6, 7, 11, 12
<b><u>FEDERAL CASES</u></b>	
<u>Mathews v. DeCastro</u> 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976) .....	10
<b><u>RULES, STATUTES AND OTHER AUTHORITIES</u></b>	
RAP 2.5 .....	6
RCW 9.94A.753 .....	5
RCW 10.01.160(3) .....	1, 3, 4, 5, 7, 8
RCW 43.43.754 .....	1, 11
RCW 43.43.7541 .....	1, 9, 11, 12, 13, 14
RCW 43.43.752-7541 .....	11

**TABLE OF AUTHORITIES (CONT'D)**

	Page
Russell W. Galloway, Jr. <u>Basic Substantive Due Process Analysis</u> , 26 U.S.F. L.Rev. 625 (1992) .....	10
U.S. Const. amend. V .....	9
U.S. Cosnt. amend. XIV, § 1 .....	9
Wash. Const. art. I, § 3 .....	9

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to consider appellant's ability to pay before imposing discretionary legal financial obligations (LFOs).

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

Issues Pertaining to Assignments of Error

1. The trial court ordered appellant to pay \$300 for discretionary LFOs. There was no on-the-record inquiry into his ability to pay. Hence, the trial court failed to comply with RCW 10.01.160(3). Is remand required for the trial court to comply with that statute?

2. RCW 43.43.7541 requires trial courts to impose a mandatory DNA-collection fee each time a felony offender is sentenced.<sup>1</sup> This ostensibly serves the State's interest in funding the collection, testing, and retention of a convicted defendant's

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

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

B. STATEMENT OF THE CASE

1. Procedural Facts

On October 15, 2013, the Skagit County prosecutor charged appellant Giovanni Herrera-Pelayo with one count of second degree assault. CP 72. On November 24, 2014, the Information was amended, and the prosecutor added one count of felony harassment and one count of unlawful imprisonment. CP 5-6. Each charge had a domestic violence enhancement allegation. CP 5-6.

A jury trial occurred December 1-3, 2014. The harassment charge was dismissed for lack of evidence. 32RP 137. The jury acquitted Herrera-Pelayo of the assault charge. CP 110. However, the jury found him guilty of unlawful imprisonment with the domestic violence enhancement. CP108-09.

The trial court imposed a standard range sentence of 45 days, ordered Herrera-Pelayo to pay \$300 in discretionary fees, and ordered him to pay the mandatory \$100 DNA collection fee. CP 61-71. Herrera-Pelayo timely filed a Notice of Appeal. CP 79-90.

C. ARGUMENT

I. THE TRIAL COURT FAILED TO CONSIDER HERRERA-PELAYO'S ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

RCW 9.94A.760 permits the trial court to impose costs "authorized by law" when sentencing an offender for a felony. RCW 10.01.160(3) permits the sentencing court to order an offender to pay LFOs, but only if the trial court has first considered his individual financial circumstances and concluded he has the ability or likely future ability to pay. The record here does not show the trial court in fact considered Herrera-Pelayo's ability or future ability to pay before it imposed LFOs. Because such consideration is statutorily required, the trial court's imposition of LFOs was erroneous and the validity of the order may be challenged for the first time on appeal.

The trial court ordered Herrera-Pelayo to pay a \$200 "Criminal filing fee" and \$100 "Domestic Violence assessment." CP 365. These are discretionary LFOs. When imposing these fees, however, the trial court failed to make an individualized inquiry into Herrera-Pelayo's current or future ability to pay them. This was a sentencing error. State v. Blazina, \_\_\_ Wn.2d \_\_\_, 344 P.3d 680, 681 (2015).

The trial court may order a defendant to pay costs pursuant to RCW 10.01.160. However, the statute also provides: "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

A trial court thus has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before it imposes legal financial obligations. Blazina, 344 P.3d at 681. The record reflects no such consideration here. RP 528-534.

In the judgment and sentence, the following pre-printed, generic language appears:

**2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court finds

**[X]** That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 63. Despite this, the trial court did not in fact consider Herrera-Pelayo's individual financial resources and the burden of imposing such obligations on him. 3RP 79-80.

The boilerplate language used by the trial court is inadequate to meet the requirements under RCW 10.01.160(3). "[T]he court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Blazina, 344 P.3d at 685. The trial court failed to do anything more than enter the boilerplate language. Thus, if failed to follow the statutory mandate in imposing the legal financial obligations and the remedy is a new sentencing hearing. Id.

In response, the State may argue that this issue has been waived and should not be considered for the first time on appeal.

Even though defense counsel did not object to the imposition of these LFOs below, this Court has the discretion to reach this error consistent with RAP 2.5. Id. at 681. As shown below, given the trial court's failure to conduct any semblance of an inquiry into Herrera-Pelayo's ability to pay and given his indigent status,<sup>2</sup> this Court should exercise its discretion under RAP 2.5(a) and consider the issue.

First, Blazina provides compelling policy reasons why trial courts must undertake a meaningful inquiry into an indigent defendant's ability to pay at the time of sentencing and why, if that is not done, the problem should be addressed on direct appeal. There, the Supreme Court discussed in detail how erroneously imposed LFOs haunt those who cannot pay, not only impacting their ability to successfully exit the criminal justice system but also limiting their employment, housing and financial prospects for many years beyond their original sentence. Blazina, 344 P.3d at 683-85. Considering these circumstances, the Supreme Court concluded that indigent defendants who are saddled with wrongly imposed

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<sup>2</sup> Appellant was appointed publically funded counsel both at trial and on appeal, based on his indigent status. CP \_\_\_ and \_\_\_ (sub nos. 92-93).

LFOs have many “reentry difficulties” that ultimately work against the State’s interest in reducing recidivism. Id.

As a matter of public policy, courts must do more to make sure improperly imposed LFOs are quickly corrected. As Blazina shows, the remission process is not an effective vehicle to alleviate the harsh realities recognized in that decision. Instead, correction upon remand is a far more reasonable approach from a public policy standpoint.

Second, there is a practical reason why appellate courts should exercise discretion and consider, on direct appeal, whether the trial court complied with RCW 10.01.160 (3). As the Supreme Court recognized in Blazina, the fact is “the state cannot collect money from defendants who cannot pay.” Id. at 684. There is nothing reasonable about requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal. Remanding back to the same sentencing judge who is already familiar with the case so he may actually make the ability-to-pay inquiry is more efficient, saving the defendant and the State from a wasted layer of administrative and judicial process.

Finally, the erroneous ability-to-pay finding entered here is representative of a systemic problem that requires a systemic response. Unquestionably, the trial court erred in imposing discretionary LFOs without making any inquiry into Herrera-Pelayo's ability to pay. The Supreme Court has held that "RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay" before a court may impose legal financial obligations. Id. at 685. This did not happen.

As explained above, the pre-formatted language used here, and in the majority of courts around the state, is simply inadequate to meet the requirements of RCW 10.01.160(3). The systemic misuse of this boilerplate finding requires a systemic response. Part of this response must come from appellate courts through the immediate rejection of such boilerplate and remand for the trial court to follow the law.

For these reasons, this Court should exercise its discretion, consider the issue, and remand with instructions that the sentencing court conduct a meaningful, on-the-record inquiry into Herrera-Pelayo's ability to pay LFOs.

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

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

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

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. at 218–19, 143 P.3d 571. It requires that "deprivations of life, liberty, or property be substantively reasonable;" in other words, such deprivations are constitutionally infirm if not "supported by some

legitimate justification.” Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221, 1225 (2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

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

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is lighter under this standard, the standard is not meaningless. Indeed, the United States Supreme Court has cautioned the rational basis test “is not a toothless one.” Mathews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, “the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional.” DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis

scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

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

There is nothing reasonable about requiring sentencing courts to impose the DNA-collection fee upon all felony defendants regardless of whether they have the ability – or likely future ability – to pay. This does not further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court recently emphasized, “the state cannot collect money from defendants who cannot pay.” Blazina, 344 P.3d at 684. When applied to such defendants, not only do the mandatory fee orders under RCW 43.43.7541 fail to further the State's interest, they are utterly pointless. It is simply irrational for the State to mandate trial

courts impose this debt upon defendants who cannot pay.

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

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

Additionally, the defendant will be saddled with a 12% rate on his unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. Indeed, it actually can impede rehabilitation. Hence, the imposition of mounting debt upon people who cannot pay actually works against another important State interest – reducing recidivism. See, Blazina, 344 P.3d at 383-85 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

In sum, when applied to defendants who do not have the ability, or likely future 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 the defendant's DNA. Hence, this Court should find RCW 43.43.7541 violates substantive due process as applied and vacate the order.

D. CONCLUSION

For reasons stated above, this Court should vacate the trial court's order that Herrera-Pelayo pay discretionary LFOs and remand for a hearing on his ability to pay.

Additionally, this Court should find RCW 43.43.7541 violates due process as applied to persons who do not have the ability or likely future ability to pay. As such, it should vacate the \$100 DNA-collection fee order and remand with instructions for the trial court to make a finding regarding Herrera-Pelayo's ability to pay.

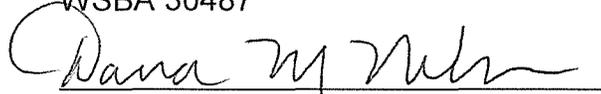
Dated this 17<sup>th</sup> day of June, 2015.

Respectfully submitted

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