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FILED  
Nov 30, 2015  
Court of Appeals  
Division I  
State of Washington

NO. 73403-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTAPHER WHITE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH M. ANDRUS

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

JENNIFER P. JOSEPH  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 477-9497

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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 from White. 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. White raised no objection to the DNA fee 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. White concedes that the State has a legitimate interest in creating and maintaining a DNA database. RCW 43.43.7541 establishes a mechanism to fund this database. Has White failed to prove beyond a reasonable doubt that the DNA

fee statute violates substantive due process as applied to indigent defendants?

B. STATEMENT OF THE CASE

The State charged Christopher White with Assault in the Second Degree, two counts of Rape in the First Degree, two counts of Rape in the Second Degree (in the alternative to first-degree rape), and Unlawful Imprisonment. CP 1-14. The State alleged that White and co-defendant Luis Perez severely beat and took turns anally raping E.C., then kept her from escaping between January 20 and January 22, 2010. CP 6-9. Following trial, a jury found White guilty of Assault in the Second Degree, two counts of Rape in the Second Degree, and Unlawful Imprisonment. CP 30.

The trial court imposed a standard range-sentence of 147 months to life in prison. CP 58. On appeal, the State conceded that the trial court had erroneously calculated White's offender score and imposed an incorrect term of community custody; this Court remanded for resentencing. State v. White, 2014 WL 5823035 (November 10, 2014). This Court otherwise affirmed White's conviction. Id.

At resentencing, the Court imposed the same 147 months-to-life sentence based upon a corrected offender score, to be followed by the correct 18-month term of community custody. CP 54-59; RP 16. The court imposed the mandatory \$500 Victim Penalty Assessment and the mandatory \$100 DNA fee. CP 56. The court waived all other legal financial obligations, including interest. CP 56.

C. ARGUMENT

For the first time on appeal, White challenges the constitutionality of RCW 43.43.7541, which requires trial courts to impose a \$100 DNA fee on any offender convicted of a felony or specified misdemeanor. Because White's claim is both unpreserved and unripe for review, this Court should decline to review the issue. The Court should reject the claim on the merits, if reached, because White fails to establish that the DNA fee statute is unconstitutional as applied in his case.

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

Assuming that White has standing to bring this constitutional challenge,<sup>1</sup> this Court should refuse to reach 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

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<sup>1</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, White supports his claim of indigency by citing his declaration in support of an order authorizing him to seek review at public expense. CP 69-72. This establishes statutory, not constitutional, indigence. Johnson, 179 Wn.2d at 555. Because the relevant “constitutional considerations protect only the constitutionally indigent,” White can demonstrate no injury in fact and therefore lacks standing. Id.

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 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 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.

White did not object to the imposition of the 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, White's constitutional claims depend on his present and future inability to pay the mandatory DNA fee. But although he established statutory indigence at the time of sentencing, White'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 White is constitutionally indigent, the 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, \_\_\_ WL \_\_\_\_\_ (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 LFOs for the first time on appeal). Because White failed to raise the issue below, precluding development of an adequate record, this Court should decline review.

3. THE DNA FEE STATUTE DOES NOT VIOLATE WHITE’S DUE PROCESS RIGHTS.

Even if this Court exercises its discretion to review the unpreserved claim, it should reject White’s constitutional challenge to RCW 43.43.7541. 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). Because White cannot meet his heavy burden, his claim must fail.

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 in a substantive due process challenge 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.

White recognizes that requiring those convicted of felonies to pay the DNA collection fee serves a legitimate state interest in operating the DNA database. Brief of Appellant at 8. He argues, however, that imposing the fee upon those who cannot pay does not rationally serve that interest. He relies on the court’s reasoning in Blazina.

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. White 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.

While White 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). Further, White might 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 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 the fee.

White emphasizes that Washington's current LFO collection scheme can be burdensome and can impose significant hardships upon the indigent. The argument appears to be an attempt to require more than a rational basis for imposing the fee regardless of present ability to pay, and instead to require that the imposition of the fee not be unduly oppressive. He argues that the current scheme provides for "immediate enforced collection." Brief of Appellant at 12. 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 White relies do not result in enforced collection for indigent defendants. While interest may accrue on the DNA fee,<sup>2</sup> 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 the rational basis test has an "unduly oppressive" component in Amunrud, 158 Wn.2d at 226. Instead, the requirement is only 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. Providing a funding mechanism for that database is reasonably related to that interest.

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<sup>2</sup> In this case, the trial court waived interest on all LFOs except for restitution. CP 56.

D. CONCLUSION

White fails to show that the mandatory DNA fee required by RCW 43.43.7541 violates substantive due process as applied to indigent defendants. The State respectfully asks this Court to affirm the imposition of the DNA fee.

DATED this 30<sup>th</sup> day of November, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
JENNIFER P. JOSEPH, WSBA #35042  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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, Christopher White, containing a copy of the Brief of Respondent in State v. Christopher White, Cause No. 73403-2-1, 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

11-30-15  
Date