

FILED  
March 29, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 74157-8-I

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

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STATE OF WASHINGTON,

Respondent,

v.

STEPHEN HUTSELL,

Appellant.

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

The Honorable David R. Needy, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. RCW 43.43.7541's mandatory DNA-collection fee violates equal protection when applied to defendants who have already paid the fee and had their DNA collected, analyzed, and entered into the DNA database.

2. If the State seeks appellate costs, those should be denied.

Issues Pertaining to Assignments of Error

1. Under RCW 43.43.7541 defendants who have been sentenced only once pay a single \$100 DNA collection fee. However, defendants who are sentenced more than once are statutorily required to pay multiple fees even if their DNA is already in the database system. This is so despite the fact that a defendant's DNA profile need only be collected, analyzed, and entered into the DNA database one time to fulfill the purpose of the statute. As such, is the statute unconstitutional as applied to defendants who are required to pay the DNA-collection fee multiple times?

2. Appellant is indigent. Should this Court deny appellant costs if they are requested?

B. STATEMENT OF THE CASE

On May 22, 2015, the Skagit County prosecutor charged appellant Stephen Hutsell with possession of a controlled substance (heroin). CP 15. He pled guilty as charged. RP 30-39.

At sentencing, Hutsell argued that because his DNA had been collected pursuant to a conviction just seven months before, he should not have to again submit a sample and pay the DNA collection fee. RP 7-8. Finding that Hutsell's DNA was already on file, the trial court ordered no new collection take place. RP 10. However, it imposed the DNA-collection fee because the statute makes the fee mandatory regardless of whether DNA is actually collected. RP 10-11. Hutsell timely appeals. CP 16-28.

C. ARGUMENT

- I. RCW 43.43.7541 VIOLATES EQUAL PROTECTION BECAUSE IT IRRATIONALLY REQUIRES SOME DEFENDANTS TO PAY A DNA-COLLECTION FEE MULTIPLE TIMES, WHILE OTHERS NEED PAY ONLY ONCE.

Imposition of the mandatory DNA-collection fee under RCW 43.43.7541 violates equal protection when applied to defendants who have previously provided a sample and been ordered to pay the \$100 DNA-collection fee.

Under the Equal Protection Clause, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. U.S. Const. amend. XIV; Wash. Const. Art. 1, § 12. 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, 1103-04 (2004) (citations omitted).

Before an equal protection analysis may be applied, a defendant must establish he is similarly situated with other affected persons. Id. In this case, the relevant group is all defendants subject to the mandatory DNA-collection fee under RCW 43.43.7541. Having been convicted of a felony, Hutsell is similarly situated to other affected persons within this affected group. CP 4; RCW 43.43.754 and .7541.

The next step is determining the standard of review. Where neither a 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 v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919, 923 (1998). Where a statute fails to meet these standards, it must be struck down as unconstitutional. Id.

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 even though their DNA is collected, analyzed, and added to the database only once. This classification is unreasonable because multiple payments are not rationally related to the legitimate purpose of the law.

Once a defendant's DNA is collected, analyzed, and entered into the database, subsequent collections are unnecessary. This is because DNA – for identification purposes – does not change. Indeed, the statute itself contemplates this, expressly stating it is unnecessary to collect more than one sample. RCW 43.43.754(2). Hence, there is nothing new to collect with respect to defendants who already had their DNA profiles entered into the database. As to these individuals, the imposition of multiple DNA-collection fees is not rationally related to the purpose of the statute, which is to

fund the collection, analysis, and retention of a convicted defendant's DNA.

In sum, RCW 43.43.7541 discriminates against felony defendants who have previously had their DNA collected by requiring them to pay multiple DNA-collection fees, while other felony defendants need only pay one DNA-collection fee. The mandatory requirement that the fee be collected from these defendants upon each sentencing is not rationally related to the purpose of the statute. As such, RCW 43.43.7541 as applied here violates equal protection, and this Court must vacate the DNA-collection fee order.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Hutsell was represented below by appointed counsel. CP \_\_\_ (sub no. 32). The trial court found him indigent for purposes of this appeal. CP \_\_\_ (sub no. 33). Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

Under RCW 10.73.160(1), appellate courts “*may* require an adult offender convicted of an offense to pay appellate costs.” (Emphasis added). The commissioner or clerk “*will*” award costs to the State if the State is the substantially prevailing party on review, “*unless the appellate court directs otherwise in its decision terminating review.*” RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ 2016 WL 393719.<sup>1</sup> Our Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. Sinclair, WL 393719, \*5. Moreover, ability to pay is an important factor that may be considered. Id.”

Based on Hutsell’s indigence, this Court should exercise its discretion and deny any requests for costs in the event the State is the substantially prevailing party.

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<sup>1</sup> Only the Westlaw version is available at the time of this filing.

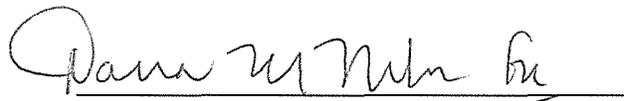
D. CONCLUSION

For reasons stated above, this Court should strike the DNA collection fee order.

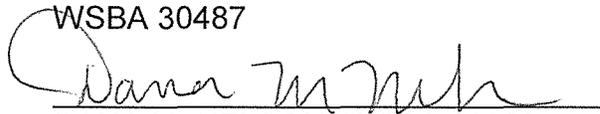
Dated this 29<sup>th</sup> day of March, 2016.

Respectfully submitted

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Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29<sup>TH</sup> DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STEPHEN HUTSELL  
2920 HELEN ROAD, #56  
OAK HARBOR, WA 98277

**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF MARCH 2016.

X *Patrick Mayovsky*