

NO. 47523-5-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ANDY PATRICK MATHERS,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUE

1. Is a trial court required to consider a defendant's past, present, and future ability to pay prior to its imposition of the mandatory victim assessment fee and the mandatory DNA collection fee?

II. SHORT ANSWER

1. No. A trial court is not required to consider a defendant's past, present, and future ability to pay prior to its imposition of the mandatory victim assessment fee and the mandatory DNA collection fee.

III. FACTS

The State generally agrees with the Respondent's recitation of the facts.

IV. ARGUMENT

1. **A TRIAL COURT IS NOT REQUIRED TO CONSIDER A DEFENDANT'S PAST, PRESENT, AND FUTURE ABILITY TO PAY PRIOR TO ITS IMPOSITION OF THE MANDATORY VICTIM ASSESSMENT FEE AND THE MANDATORY DNA COLLECTION FEE.**

It is important to distinguish between mandatory and discretionary legal financial obligations "because for mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. 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. Lundy, 176 Wash.App. 96, at 102 (2013). "Our courts have held that these mandatory obligations are constitutional so long as 'there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants.'" Id. at 102-103. The victim assessment fee is required by RCW 7.68.035(1)(a) and the DNA collection fee is required by RCW 43.43.7541 "irrespective of the defendant's ability to pay." Id. at 103. "Because the legislature has mandated imposition of these legal financial obligations, the trial court's 'findings' of a defendant's current or likely future ability to pay them is surplusage." Id. at 103.

In Lundy, a jury found the defendant guilty of possession of a stolen motor vehicle, two counts of unlawful issuance of bank checks or drafts, and two counts of bail jumping. Id. at 100. At sentencing, neither party expressly discussed the defendant's future ability to pay legal financial obligations. The trial court imposed \$2,697.82 in legal financial obligations. Id. at 100. The legal financial obligations included fees for restitution, victim assessment, and DNA collection. The court held that the victim assessment fee and the DNA collection fee are mandatory legal financial obligations that do not require the court to consider the

defendant's current or likely future ability to pay for the mandatory fees. Id. at 102-103.

In State v. Kuster, 175 Wash.App. 420 (2013), a jury found the defendant guilty of second degree rape. At sentencing, the trial court imposed \$800 in legal financial obligations consisting of a \$500 victim assessment fee, \$200 in court costs, and a \$100 DNA collection fee. It appears the trial court did not consider the defendant's current or likely future ability to pay for the imposed legal financial obligations. Id. at 422. The defendant appealed the imposition of his legal financial obligations. Id. at 423. On appeal, the court noted that "[two] of the LFOs imposed by the trial court on Mr. Kuster are not discretionary costs governed by RCW 10.01.160. They are, instead, statutorily mandated financial obligations. The \$500 victim assessment is mandated by RCW 7.68.035 and the \$100 DNA collection fee is mandated by RCW 43.43.7541. Neither statute requires the trial court to consider the offender's past, present, or future ability to pay." Id. at 424.

As in the Lundy case and the Kuster case, the trial court was not required to consider the appellant's past, present, or future ability to pay the mandatory victim assessment fee and the mandatory DNA collection fee. Therefore, the State respectfully requests this court not review the appellant's claim.

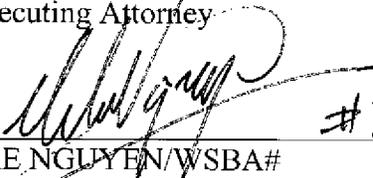
V. CONCLUSION

The appellant's appeal should be denied because the trial court was not required to consider the appellant's past, present, or future ability to pay the mandatory victim assessment fee and the mandatory DNA collection fee.

Respectively submitted this 2 day of October, 2015.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 2nd, 2015.


Michelle Sasser

COWLITZ COUNTY PROSECUTOR

October 02, 2015 - 11:40 AM

Transmittal Letter

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