

FILED
Court of Appeals
Division II
State of Washington
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NO. 52040-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SEAN FORSMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello

No. 12-1-00566-6

Brief of Respondent

MARY E. ROBNETT
Prosecuting Attorney

By
Maureen C. Goodman
Deputy Prosecuting Attorney
WSB # 34012

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court remand for the criminal filing fee to be stricken?
2. Should this court remand for the DNA collection fee to be stricken when there is no proof that a DNA collection was previously ordered or collected?

B. STATEMENT OF THE CASE.

For the purposes of this brief, the State accepts the procedural and factual history as presented in the Appellant's brief.

C. ARGUMENT.

1. THIS COURT SHOULD ORDER THAT THE IMPOSITION OF THE CRIMINAL FILING FEE BE STRIKEN.

In this case, the trial court found the defendant to be indigent. CP 17 - 19. The defendant's direct appeal is still pending. House Bill 1783, effective March 27, 2018, prohibits the imposition of the \$200.00 filing fee on defendants who were indigent at the time of sentencing. As the court held in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), House Bill 1783 is applicable to cases that are on appeal and therefore not

yet final. The State agrees that the criminal filing fee of \$200.00 that was imposed in this case should be stricken. The State further agrees that House Bill 1783 eliminates any interest accrual on nonrestitution legal financial obligations.

The State acknowledges that this defendant was found indigent by the sentencing court, and therefore the \$200.00 criminal filing fee should be stricken.

2. THIS COURT SHOULD NOT ORDER THAT THE IMPOSITION OF THE DNA COLLECTION FEE BE STRIKEN WHERE THE DEFENDANT HAS NOT PROVEN THAT A PREVIOUS COLLECTION HAS BEEN ORDERED OR DNA COLLECTED.

The defendant also challenges the imposition of the \$100 DNA collection fee. Brief of Appellant, page 3. House Bill 1783 establishes that the DNA collection fee is no longer mandatory if the defendant's DNA has been collected as part of a prior conviction. LAWS OF 2018, ch. 269, §18.

In this case, the defendant has not made any showing that a prior DNA collection was ordered or ever occurred. Merely relying on the fact of a prior felony conviction does not comply with the language of House Bill 1783, which states in relevant part, "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offenders DNA as a

result of a prior conviction.” The DNA collection fee may only be stricken when a defendant with prior convictions establishes that the State has already collected his DNA. *State v. Thibodeaux*, COA No. 76818-2-I (Nov. 26, 2018).

Prior to July 1, 2002, RCW 43.43.754 applied only to adults and juveniles convicted or adjudicated guilty of sexual or violent crimes. Former RCW 43.43.754 (1989). As of July 1, 2002, the statute was extended to apply to adults and juveniles convicted or adjudicated guilty of any felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, or communicating with a minor for immoral purposes under RCW 9.68A.090, RCW 43.43.754(1), (4).

In this case, a review of the judgment and sentence reveals that the defendant has three prior felony convictions from the 1990s. CP 1-14. None of the prior convictions are sex or violent offenses. Therefore, the statute in effect at the time of these convictions would not have authorized the collection of the defendant’s DNA.

If the legislature believed that proof of a prior DNA collection order was enough, they would have used such language. Instead, they indicated that waiver of the DNA collection fee is appropriate only when a prior DNA sample itself has been collected. Without proof that a DNA

collection occurred, the defendant is not entitled to relief under House Bill 1783 and his claim that the DNA collection fee should be waived fails.

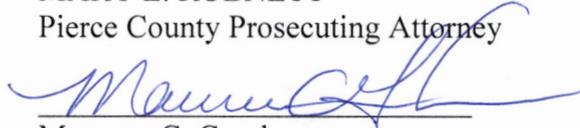
The defendant is also not permitted to rely on evidence outside the record for this direct appeal. *See generally, State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If the defendant has evidence that a prior DNA sample was actually taken, he would need to pursue relief via a personal restraint petition, not by way of a direct appeal.

D. CONCLUSION.

This court should remand for the trial court to strike the imposition of the \$200.00 filing fee but decline to strike the imposition of the \$100 DNA collection fee.

DATED: March 29, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



Maureen C. Goodman
Deputy Prosecuting Attorney
WSB # 34012

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.29.19 Maureen Ka
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

March 29, 2019 - 3:58 PM

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Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

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