

No. 32329-3-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED
July 13, 2015
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JEFFREY VINCENT BUTTERFIELD II,
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Ruth E. Reukauf, Superior Court Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it ordered appellant to pay a \$100 DNA collection fee.

2. The trial court erred when it ordered appellant to submit to another DNA collection under RCW 43.43.754.

Issues Pertaining to Assignments of Error

1. Does the mandatory \$100 DNA-collection fee authorized under RCW 43.43.7541 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fine?

2. Does the mandatory \$100 DNA collection fee authorized under RCW 43.43.7541 violate equal protection when applied to defendants who have previously provided a sample and paid the \$100 DNA collection fee?

3. If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, does the trial court abuse its discretion when it orders a defendant to submit to yet another DNA collection?

B. STATEMENT OF THE CASE

Jeffrey Vincent Butterfield II was convicted by a jury of first degree possession of a firearm and possession of a stolen firearm. CP 154–55. He

had six prior felony convictions dated 2002 or later. CP 191. The sentencing court ordered Mr. Butterfield to provide a biological sample for DNA analysis and pay a \$100 DNA collection fee. CP 191–93.

This appeal followed. CP 197.

C. ARGUMENT

1. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory \$100 DNA collection fee.¹

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; 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. It requires that “deprivations of life, liberty, or property be substantively reasonable;” in other words, such deprivations are constitutionally infirm if not “supported

¹ Assignment of Error 1.

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

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. 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 offenders pay the DNA-

collection fee. RCW 43.43.7541². This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752-.7541. This is a legitimate interest. But the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

It is unreasonable to require 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. The blanket requirement does not further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, "the state cannot collect money from defendants who cannot pay." *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 684 (2015). When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the State to mandate trial courts impose this debt upon defendants who cannot

² RCW 43.43.7541 provides: "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754."

pay.

In response, the State may argue 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. Thus the fee is paid only 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 an indigent defendant.

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. 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 683–84 (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).

When applied to defendants who do not have the ability or likely 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 an individual defendant's DNA. Thus RCW 43.43.7541 violates substantive due process as applied. Based on Mr. Butterfield's indigent status, the order to pay the \$100 DNA collection fee should be vacated.

2. 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.³

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const. amend. XIV; Wash. Const., art. I, § 12; *Bush v. Gore*, 531 U.S. 98, 104–05, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000); *State v. Thorne*, 129 Wn.2d 736, 770–71, 921 P.2d 514 (1994). 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 (2004) (citations omitted).

Before an equal protection analysis may be applied, a defendant must establish he is similarly situated with other affected persons. *Gaines*,

³ Assignment of Error 1.

121 Wn. App. at 704. 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, Mr. Butterfield is similarly situated to other affected persons within this affected group. See RCW 43.43.754, .7541.

On review, where neither a suspect/semi-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*, 136 Wn.2d at 144. Where a statute fails to meet these standards, it must be struck down as unconstitutional. *Id.*

The Legislature has declared that collection of DNA samples and their retention in a DNA database are important tools in “assist[ing] federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations

and the identification and location of missing and unidentified persons.”

Laws of 2008 c 97, Preamble. The DNA profile from a convicted offender’s biological sample is entered into the Washington State Patrol’s DNA identification system (database) and retained until expunged or no longer qualified to be retained. WAC 446-75-010; WAC 446-75-060.

Every sentence imposed for a felony crime must include a mandatory fee of \$100. RCW 43.43.754, .7541.

The purpose of RCW 43.43.754 is to fund the collection, analysis, and retention of an individual felony offender’s identifying DNA profile for inclusion in a database of DNA records. Once a defendant’s DNA is collected, tested, and entered into the database, subsequent collections are unnecessary. This is because DNA – for identification purposes – does not change. The statute itself recognizes this, expressly stating it is unnecessary to collect more than one sample. RCW 43.43.754(2). There is no further biological sample to collect with respect to defendants who have already had their DNA profiles entered into the database.

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. This classification is unreasonable because multiple payments are not rationally related to the legitimate purpose of the law,

which is to fund the collection, analysis, and retention of an individual felony offender's identifying DNA profile.

RCW 43.43.7541 discriminates against felony defendants who have previously been sentenced by requiring them to pay multiple DNA collection fees, while other felony defendants need only pay one DNA collection fee. Mr. Butterfield was ordered to pay \$100 DNA fees at the time of his 2005 and 2006 sentencings (CP 49, 61), as well as in the present sentencing. CP 193. The mandatory requirement that the fee be collected from such defendants upon each sentencing is not rationally related to the purpose of the statute. As such, RCW 43.43.7541 violates equal protection. The DNA-collection fee order must be vacated.

3. The trial court abused its discretion when it ordered Mr. Butterfield to submit to another collection of his DNA.⁴

A trial court abuses its discretion if its decision is “manifestly unreasonable,” based on “untenable grounds,” or made for “untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647,

⁴ Assignment of Error 2.

654, 71 P.3d 638 (2003).

RCW 43.43.754(1) requires a biological example “must be collected” when an individual is convicted of a felony offense. RCW 43.43.754(2) provides: “If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted.” Thus, the trial court has discretion as to whether to order the collection of an offender’s DNA under such circumstances.

It is manifestly unreasonable for a sentencing court to order a defendant’s DNA to be collected pursuant to RCW 43.43.754(1) where the record discloses that the defendant’s DNA has already been collected. The Legislature recognizes that collecting more than one DNA sample from an individual is unnecessary. It is also a waste of judicial, state, and local law enforcement resources when sentencing courts issue duplicative DNA collection orders.

Here, Mr. Butterfield’s DNA was previously collected pursuant to the statute. He had six prior felony convictions dated 2002 or later. CP 191. These prior convictions each required collection of a biological sample for purposes of DNA identification analysis pursuant to the current statute. RCW 43.43.754(6) (a); Laws of 2008 c 97 § 2, eff. June 12, 2008;

Laws of 2002 c 289 § 2, eff. July 1, 2002. Since the prior convictions occurred in 2002 or later, Mr. Butterfield was assessed \$100 DNA collection fees at the time of these prior sentencings. There is no evidence suggesting his DNA had not been collected as ordered in the prior judgments and sentences and placed in the DNA database. CP 49, 61. Mr. Butterfield fell within the parameters of RCW 43.43.754(2) and a subsequent DNA sample was not required. Under these circumstances, it was manifestly unreasonable for the sentencing court to order him to submit to another collection of his DNA. CP 192. The collection order must be reversed.

D. CONCLUSION

For the reasons stated, the orders to pay the \$100 DNA collection fee and submit an additional biological sample for DNA identification should be vacated.

Respectfully submitted on July 13, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on July 13, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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