

NO. 32329-3-III

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November 23, 2015
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY VINCENT BUTTERFIELD II.

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raises two issue on appeal. These can be summarized as follows;

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.
2. RCW 43.43.7541 violates equal protection because it irrationally requires some defendant to pay a DNA collection fee multiple times, while other need only pay once.
3. The trial court abused its discretion when it ordered Mr. Butterfield to submit to another collection of his DNA

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. RCW 43.43.7541 does not violates substantive due process.
2. RCW 43.43.7541 does not violate the equal protection clause.
3. The trial court did not abuse its discretion when it ordered Butterfield to submit to the collection of his DNA.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed.

III. ARGUMENT

Appellant failed raise this issue in the trial court. It is clear from the record at the time of sentencing that the Appellant was aware of the costs that were to be imposed and were in fact imposed because he specifically requested that the trial court be lenient with him regarding the imposition of another cost, jail costs to be paid to Yakima County. Obviously this is defendant's position regarding costs, he agreed with the other costs and specifically requested a reduction of jail costs thereby acknowledging that he was required to pay and had the ability to pay the other costs.

This court should continue to follow the numerous prior rulings from this court and affirmation by the Washington State Supreme court in State v. Blazina, infra, this court still maintains the ability to exercise its discretion to address issues for the first time on appeals under RAP 2.5 and specifically the issue of the imposition of legal financial obligations (LFO's). This court should exercise that discretion and deny this appeal.

Further the allegation that the collection of a specific fee for DNA testing is unconstitutional is not supported by the record and as stated above, was not preserved in the trial court.

Appellate did not object to any of the costs that the time of his sentencing.

RESPONSE TO ALLEGATIONS

This court need not and should not address these issues. As this court ruled previously and as Division II of this court very recently ruled in State v. Lyle, Slip Opinion COA #46101-3-II (July 10, 2015);

Lyle did not challenge the trial court's imposition of LFOs at his sentencing, so he may not do so on appeal. Blazina, 174 Wn. App. at 911. Our decision in Blazina, issued before Lyle's March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal. 174 Wn. App. at 911. As our Supreme Court noted, an appellate court may use its discretion to reach unpreserved claims of error. Blazina, 182 Wn.2d at 830. We decline to exercise such discretion here.

This division of the court has consistently ruled that these issues need not be addressed for the first time on appeal, as did the court in Lyle. This division of the court has consistently denied review since this court's ruling in State v. Duncan, 180 Wn.App. 245, 250, 253, 327 P.3d 699 (2014) (petition for review accepted). In Duncan this court ruled that Duncan's failure to object was not because the ability to pay LFOs was overlooked, rather the defendant reasonably waived the issue, considering "the apparent and unsurprising fact that many defendants do not make an effort at sentencing to suggest to the sentencing court that they are, and will remain, unproductive"

The opinion in Duncan was not changed by the ruling in State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). Blazina addressed RCW

10.01.160(3) which states a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." When determining the amount and method for paying the costs, "the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3). In Blazina the Washington Supreme Court held RCW 10.01.160(3) requires a court "do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry"; rather, the record must show the court "made an individualized inquiry into the defendant's current and future ability to pay."

The Supreme Court ruling in Blazina also reaffirmed that RAP 2.5(a) provides appellate courts with discretion whether to review a defendant's LFO challenge raised for the first time on appeal. Blazina, 344 P.3d at 683. In Blazina the Washington State Supreme Court determined that it would exercise its discretion under this rule and allow the LFO challenge. Id.

Here, Appellant failed to object to the trial court's imposition of any of the LFOs or as is now alleged that he has been required to give multiple samples and pay the DNA fee on multiple occasions. In the course of this trial the court heard trial testimony from his fiancé/girlfriend that the appellant was employed. His fiancé/girlfriend stated that on the

day of the crime Butterfield had been working for a “big doctor” and had “gotten paid” so clearly Mr. Butterfield is an able bodied man. (RP, Vols. III, IV pgs. 151,158-9; Sept.,Nov., March – pages 60-1) The defendant himself stated during discussion of continuation of bail after his conviction that “I have been working.” (RP Vol. III, IV page 274) This court therefore, has discretion to rely on the analysis in Duncan, supra, and not review the claimed error.

This court is well aware that a trial court is not required to inquire about the individual’s ability to pay when imposing mandatory costs. Evidence of ability to pay was unnecessary to support the mandatory financial obligations imposed by the court. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) noting that, for these costs, "the legislature has directed expressly that a defendant's ability to pay should not be taken into account".

As Lundy so accurately states;

As a preliminary matter, we note that Lundy does not distinguish between mandatory and discretionary legal financial obligations. This is an important distinction 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. *See, e.g., State v. Kuster*, No.

30548-1-III, 2013 WL 3498241 (2013). And 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.” State v. Curry, 118 Wash.2d 911, 918, 829 P.2d 166 (1992) (emphasis added).

...
Additionally, a \$500 victim assessment is required by RCW 7.68.035(1)(a), a \$100 DNA collection fee is required by RCW 43.43.7541, and a \$200 criminal filing fee is required by RCW 36.18.020(2)(h), irrespective of the defendant's ability to pay. See State v. Curry, 62 Wash.App. 676, 680-81, 814 P.2d 1252 (1991), *aff'd*, 118 Wash.2d 911, 829 P.2d 166; State v. Thompson, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009). Because the legislature has mandated imposition of these legal financial obligations, the trial court's “finding” of a defendant's current or likely future ability to pay them is surplusage. (Lundy at 102-3, Footnote omitted emphasis in original.)

The following is the statement made by the trial court judge during sentencing addressing the costs imposed:

THE COURT: Mandatory DNA testing under the financial section, 4(d)(3) restitution costs, assessments and fines, I am imposing \$500.00 crime penalty assessment, \$200.00 criminal filing fee, \$600.00 court appointed attorney fee, \$100.00 felony DNA collection fee for a total of \$1,400.00. I will make findings to day because you do have an ability to work, Mr. Butterfield. You can set up time payment arrangements on those amounts, so I am imposing them in full. As to cost of incarceration, do you wish to be heard on that, Mr. Alford?

MR. ALFORD: Judge, I'm asking the Court to limit costs of incarceration. This is a case in which my client, if we ever want him to be a productive member of society, we can probably give him a little consideration.

THE COURT: Alright, and that takes into account your

current ability to date to pay those costs, Mr. Butterfield, which I'm finding to be dramatically limited, so I will cap those costs at \$500.00. I need to tell you that on these prison sentences I don't think the State cares about my language in the order, but I think obviously any local time you've done if there's costs associated with that it may do you some good in that area. Under the notice section you have been provided and will be signing for your right to collateral attack, loss of voting rights. I'm taking out 5.3 because there is no supervision, so I'm striking that part.
(RP Sept., Nov., March, pgs. 67-8)

It the present case Butterflied was ordered to pay only two discretionary costs, court appointed attorney fee, \$600.00 and the cost of incarceration \$500.00. Unlike many cases that have come before this court the amount of jail costs was "capped" at this nominal amount, \$500.00. This cap was requested by Butterfield's trial counsel.

This court has continuously exercised its ability to deny review of challenges of LFO's when the defendant has failed to raise the issue of his or her ability or inability to pay these costs in the future and whether the defendant hast the future ability to pay these costs. This court need not review this allegation pursuant to RAP 2.5.

The Court's decision in Duncan was appropriate, these costs are a matter that is not simply overlooked by a defendant. These costs were discussed in open court and Appellant failed to challenge anything and in fact there was specific discussion regarding the capping of some of the

costs so that Butterfield had a chance in the future to be a productive member of society.

All three divisions of this court had held prior to Supreme Court's ruling in Blazina that a defendant's failure to raise this issue or to object to the imposition of these costs in the trial court was a failure to preserve the issue; State v. Blazina, 174 Wn.App. 906, 911, 301 P.3d 492, *reviewed granted*, 178 Wn.2d 1010 (2013); State v. Calvin, 176 Wn.App. 1, 316 P.3d 496, 507-08 (2013), *petition for review filed*, No. 89518-0 (Wash. Nov. 12, 2013); State v. Duncan, 180 Wn.App. 245, 253, 327 P.3d 699 (2014), *petition for review filed*, No. 90188-1 (Wash, Apr. 30, 2014) The Supreme Court's decision in Blazina did not change that reasoning, this court should decline review of this case. All three courts have continued to deny review after the Blazina decision was handed down.

These issues have not been properly preserved, review should be denied.

RESPONSE TO ALLEGATION ONE – DNA FEE AND DUE PROCESS.

The first issue raised by Appellant is being raised for the first time on appeal. Appellant challenges the mandatory \$100.00 fee DNA under RCW 43.43.7541 as violating due process. The trial court also imposed other mandatory fees such as the \$500.00 criminal victim's compensation fund fee.

Statutes are presumed constitutional, “and the party challenging a statute's constitutionality has the burden of proving otherwise beyond a reasonable doubt.” In re Pers. Restraint of McNeil, 181 Wn.2d 582, 334 P.3d 548 (2014) There have been previous challenges to the imposition of fees previously. A very similar issue was raised and rejected by previously in State v. Blank, 131 Wn.2d 230, 239-42, 930 P.2d 1213 (1997) Appellant has not met the initial test as set out in Blank “Statutes are presumed to be constitutional. A party challenging the constitutionality of a statute has the heavy burden of proving its unconstitutionality beyond a reasonable doubt. Defendants in these cases have the burden of proving any unconstitutionality of RCW 10.73.160(4). (Citations and footnote omitted.)

The issue regarding fees was also raised in Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). The applicability of Fuller in this state is to fees that are assessed was addressed in State v. McCarter, 173 Wn.App. 912, 295 P.3d 1210 (Wn.App. Div. 3 2013). The ruling in McCarter refutes the claim by Appellant. This court ruled when addressing similar costs, “Finally, article I, section 22 of the constitution does not apply because the district court's imposition of \$250 in warrant fees did not compel Mr. McCarter to advance money or fees in order to secure his rights as a defendant under the Washington Constitution.”

McCarter at 923. This same reasoning applies in the present case.

The Appellant lacks standing to challenge the DNA fee, his claim is not supported by anything in the record. What is found in the record would indicate that he has been gainfully employed, nothing supports the claim that he is indigent or would be indigent upon release.

In Spokane Research & Defense Fund v. W. Cent. Cmty., 133 Wn. App. 602, 606, 137 P.3d 120 (2006) the court declined to analyze an allegation for which appellant provided no reasoned argument, reference to the record, or legal authority supporting its argument.

Appellant cites to cases he asserts are relevant legal authority and attempts to set forth argument supported by that case law however, the basic problem with his argument is that there are no facts in the record to support the claim that he is in fact indigent. An individual may qualify for indigent legal assistance and not be indigent with regard to payment of fees and assessments.

Appellant asserts the issue should be reviewed under a rational basis test, he states that the fee serves a valid purpose, but does not “rationally” serve that interest;

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. (Apps brief at 4)

The test is “Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause.” Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 61, 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)). The test is as noted above; is there a rational basis, is the statute rationally related to a legitimate interest of the State. The answer to that question is yes and because the answer is yes this court need take no further action.

If a statute meets the rationally bases standard then it is constitutional. A party may argue to the court that they have no ability to pay, that they are statutorily indigent and the court would have the ability to remove that payment. “Bearden essentially mandates that we examine the totality of the defendant's financial circumstances to determine whether he or she is constitutionally indigent in the face of a particular fine.” State v. Johnson, 179 Wn.2d 534, 553-554, 315 P.3d 1090 (2014). (citing Bearden v. Georgia, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983) It is up to the party seeking review of an issue to provide an adequate record for review. City of Spokane v. Neff, 152 Wn.2d 85, 91,

93 P.3d 158 (2004)

In Johnson, supra, the court examined a constitutional challenge to the driving while license suspended statute based on a claim of indigence. The Washington State Supreme Court rejected the challenge because Johnson, was statutorily indigent, however he *was not* constitutionally indigent, and therefore Johnson was not in the class protected by the due process clause.

In Butterfield's case there is absolutely nothing in the record that would support a claim that he is statutorily indigent, let alone whether he could get a job, or was capable of working, or that there was a totality of circumstances analysis to determine if he was constitutionally indigent. The record would appear to actually appear to disagree with Butterfield's position in his appeal. It would appear that throughout the pendency of his trial and prior to being arrested he was gainfully employed. There is simply an insufficient record to determine that Appellant has standing to raise this issue. It is his burden to provide that record, he has not.

As argued above this too is simply a challenge to an LFO; this alleged error is not manifest or constitutional issue and should not be reviewed under RAP 2.5. RAP 2.5 allows the appellate court to refuse to review any error raised for the first time on appeal. There was no objection to the DNA fee in the trial court. State v. Blazina, 182 Wn.2d

827, 344 P.3d 680 (2015), relied upon by appellant, is based on statutory, not constitutional concerns. The Supreme Court affirmed in Blazina that the Court of Appeals did not abuse its discretion by declining to review the issue under RAP 2.5. Blazina also implicated discretionary LFO's, not mandatory ones such as the DNA fee.

The State Supreme Court has already concluded there is no constitutional infirmity in not considering the defendant's ability to pay when imposing costs, as long as there is a requirement that the court determines there is an ability to pay before imposing punishment. State v. Blank, 131 Wn.2d 230, 239-42, 930 P.2d 1213 (1997). A court must consider a defendant's ability to pay before sanctions are imposed or enforced payment. *Id.* at 247. A defendant who is unable to pay costs may, at any time, petition the court for remission of the costs or to modify the method of payment. RCW 10.01.164. In addition once a defendant has paid his or her costs, the court may waive the interest if it is causing a significant hardship. RCW 10.82.090.

Blank, and the case it relies upon, Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974) identify the rationale for imposing costs at sentencing, but allowing a claim of indigence at time of collection. At the time of sentencing the court's decision as to whether the defendant has the likely future ability to pay is, at best, an educated guess. It is

perfectly rational to wait until the time of collection to make this determination, as better information will be available to all of the parties. There is simply no constitutional infirmity, and the court should decline to hear this issue.

This argument has been raised before, and failed, Blazina states that the statutory language of RCW 10.01.160 requires the court to consider the defendant's likely future ability to pay when assessing *discretionary* LFO's. The constitution mandates the court consider the defendant's ability to pay when the State attempts to enforce collections. This has not yet occurred in this case. Blazina was not a constitutional case and did not overrule prior precedent. This claim must be rejected.

RESPONSE TO ALLEGATION TWO - DNA FEE VIOLATES EQUAL PROTECTION.

Butterfield contends that RCW 43.43.7541 violates equal protection when applied to defendants who have already provided a sample and paid the \$100 DNA collection fee. Brief of Appellant at 6. Because one-time offenders and recidivists are not similarly situated, and there is a rational basis to impose the fee every time an offender is sentenced for a new offense, Butterfield's claim fails. He cites to CP 49, 61 as proof that he has been discriminated against because he is in a group that has been required "to pay" this fee. There is absolutely no proof that

Butterfield “paid” anything. Further, the line for the “total” of the legal financial obligations owed on both CP 49 and 61 are blank. It would be just as easy to assume that this means the court did not impose any of the costs set forth above this last line of this section of these two judgment and sentence documents.

Under the equal protection clause of the Washington State Constitution, article I, section 12, and the Fourteenth Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Harmon v. McNutt, 91 Wn.2d 126, 130, 587 P.2d 537 (1978). The first question in evaluating an equal protection claim is whether the person claiming the violation is similarly situated with other persons. State v. Osman, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). “A defendant must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination.” Id.

There are two tests for analyzing an equal protection claim and “whenever legislation does not infringe upon fundamental rights or create a suspect classification,” the rational relationship test is used. State v. Smith, 93 Wn.2d 329, 336, 610 P.2d 869 (1980). Equal protection challenges to the DNA statute do not implicate fundamental rights or

create a suspect classification and are thus subject to a rational basis standard of review. State v. Olivas, 122 Wn.2d 73, 94-95, 856 P.2d 1076 (1993). Under that test, “a law is subjected to minimal scrutiny and will be upheld unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective.” State v. Schaaf, 109 Wn.2d 1, 17, 743 P.2d 240 (1987) (internal quotation omitted).

The party challenging the statute has the burden to show that a legislative classification is purely arbitrary. State v. Coria, 120 Wn.2d 156, 172, 839 P.2d 890 (1992). The rational basis test requires only that the means employed by the statute be rationally related to a legitimate State goal, not that the means be the best way of achieving that goal. Id. at 173. “[T]he Legislature has broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest.” State v. Ward, 123 Wn.2d 448, 516, 869 P.2d 1062 (1994).

Butterfield’s equal protection claim is that the law discriminates against those who have been convicted and sentenced multiple times, this relevant group of “all defendants subject to the mandatory DNA fee,” are being forcing them to pay the DNA fee more than once. Brief of Appellant at 8-9. The argument fails in its basic premise because Butterfield has not established that, as a repeat offender, he is “similarly situated” to those who have been convicted and sentenced only once. See

Osman, 157 Wn.2d at 484. In countless ways, including increased punishment for higher offender scores, the law rationally distinguishes between offenders, from first time offender to those with more elaborate criminal histories.

Even assuming Butterfield is similarly situated to all others subject to the DNA testing statute, his claim fails because there is a rational basis for imposing the fee every time a person is convicted and sentenced.

The original purpose of the DNA testing statute was to investigate and prosecute sex offenses and violent offenses. Laws of 1989, ch. 350, §

1. In 2002, the legislature expanded on its purpose:

DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of this state to assist 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. Therefore, it is in the best interest of the state to establish a DNA data base and DNA data bank containing DNA samples submitted by persons convicted of felony offenses....

RCW 43.43.753 (codified as amended Laws of 2002, ch. 289, § 1).

The statute imposes a \$100 fee for “every sentence” imposed under the act, but does not require an additional DNA sample from an individual if the Washington State Patrol Crime Laboratory already has a sample.

RCW 43.43.7541; RCW 43.43.754(2).

Butterfield argument is that if an offender has already submitted a sample pursuant to an earlier qualifying conviction, the fee is unnecessary and imposing it in subsequent sentences violates equal protection. The argument presumes that the fee's only purpose is related to the *collection* of the sample. However, the legislative findings demonstrate that the purpose of the statute is much broader. RCW 43.43.753. A defendant's previously-submitted DNA sample could and would be used in subsequent cases for the purposes of investigation, prosecution, and detection of recidivist acts. Id. Thus, the fee imposed after "every sentence" does not merely fund the collection of the samples, but also contributes to the expense of maintaining the database so that the original sample may be retained and used in the investigation and prosecution of any future offenses the defendant chooses to commit. Those who commit no subsequent offenses need not pay more than once.

The legislature's 2008 amendments further demonstrate that the purpose of the DNA fee extends beyond collection. The act originally provided that the fee was "for collection of a biological sample as required under RCW 43.43.754." Laws of 2002, ch. 289, § 4. In 2008, the legislature removed the language that the fee was for the collection of a biological sample, stating simply that "[e]very sentence imposed under

[this act] must include a fee of one hundred dollars”. Laws of 2008, ch. 97, § 3. This change suggests that the legislature recognized that the fee was not solely for the purpose of obtaining the sample, but for expenses involved in the sample’s use in later investigations and prosecutions.

The imposition of the \$100 fee after “every sentence” is rationally related to the purpose of not only obtaining the original sample, but also for maintaining the database for use in future criminal investigations, prosecutions and detection of recidivist acts. Butterfield fails to show that RCW 43.43.7541 violates equal protection. This Court should affirm.

RESPONSE TO ALLEGATION THREE – SUCCESSIVE
COLLECTION OF DNA SAMPLE.

One of the major flaws in Butterfield’s argument comes near the end of his brief where he states, “[t]here is no evidence suggesting his DNA had not been collected as ordered in the prior judgments and sentences and placed in the DNA database.” The lack of a record does not mean that something has occurred. This argument assumes evidence that is not before this court. There is nothing in the record before this court that would indicated that Butterfield has ever paid this fee before, assessed perhaps but not paid. The record before this court would indicate that he was “ordered to pay this mandatory fee, it does not reflect that he has ever paid this fee as ordered. State v. Garcia, 45 Wn. App. 132, 140, 724 P.2d

412 (1986), “[a] party seeking review has the burden of perfecting the record so that the appellate court has before it all the evidence relevant to the issue. State v. Jackson, 6 Wn. App. 510, 516, 676 P.2d 517, aff’d, 102 Wn.2d 689, 689 P.2d 76 (1984).”

Further, the \$100 DNA collection fee is not a discretionary fee. Under RCW 43.43.7541, payment of a \$100 DNA collection fee is mandatory for every adult or juvenile convicted of a felony or certain other offenses. Although a sentencing court may waive collection of DNA for a felon who already has a sample at the Washington state patrol crime lab, it may not waive the DNA collection fee. See RCW 43.43.754(2); RCW 43.43.7541.

Butterfield argues that the trial “court erred in failing to exercise its discretion to not require him to give another DNA sample and, therefore, he should not pay the DNA assessment. However, even if this court were to agree with the proposition that a court can abuse discretion it was never asked to exercise, there was no error here. Even though a court can waive the DNA collection, the court had no ability to waive the DNA collection fee. Separate statutes govern the two situations. Butterfield correctly points out that 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, 654, 71 P.3d 638 (2003). Clearly innumerable reasonable trial courts have exercised their discretion based on very tenable grounds and imposed this condition.

It is impossible based on the record before this court to ascertain that the Petitioner’s DNA has in fact been collected and is in the State database. That information is completely lacking from this record. As indicated above, State v. Garcia, 45 Wn. App. 132, 140, 724 P.2d 412 (1986), states “[a] party seeking review has the burden of perfecting the record so that the appellate court has before it all the evidence relevant to the issue. State v. Jackson, 6 Wn. App. 510, 516, 676 P.2d 517, aff’d, 102 Wn.2d 689, 689 P.2d 76 (1984).” It was and is Butterfield’s obligation to supply this court with the record needed to properly review his claims.

Once again there are two related statutes in play here. The first, RCW 43.43.754(1), requires collection of a DNA sample from every person convicted of failing to register, as a sex offender, although it recognizes an exception if the "crime laboratory already has a DNA sample ... for a qualifying offense." RCW 43.43.754(2). The second statute is the adjoining RCW 43.43.7541. It provides, in part:

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.

By amendment of RCW 43.43.7541, the legislature mandated payment of the DNA collection fee. See State v. Brewster, 152 Wn.App. 856, 218 P.3d 249 (2009). The purpose of the fee is to help pay for the testing of DNA samples and the maintenance and operation of DNA databases. *Id.* at 860, To that end, it is a non-punitive legal financial obligation. Accordingly, it applies to each sentencing after its enactment. *Id.* There is no causal connection between sample collection and the fee assessment.

The trial court was not asked by Butterfield to wave the collection of his DNA sample on this occasion. Butterfield has not presented this court with a single piece of information that would confirm his allegation that he has in the past submitted a sample and has “paid” his fees.

IV. CONCLUSION

For the reasons set forth above this court should deny allegations set forth in this appeal.

Respectfully submitted this 23rd day of November 2015,

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DECLARATION OF SERVICE

I, David B. Trefry state that on November 23, 2015 emailed a copy, by agreement of the parties, of the Respondent's Brief, to Mrs. Susan Gasch at gaschlaw@msn.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 23rd day of November, 2015 at Spokane, Washington.

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