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Court of Appeals
Division III
State of Washington

32622-5-III
(Consolidated with No. 32624-1-III)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS EDWARD KIVETT, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

I. APPELLANT’S ASSIGNMENTS OF ERROR 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 4

 A. The sentencing court did not abuse its discretion by imposing a
 felony firearm offender registration requirement under
 RCW 9.41.330, because the court considered the defendant’s
 extensive criminal history and that history evinced the
 defendant’s propensity for violence..... 4

 B. The trial court correctly imposed a DNA collection
 fee as mandated by RCW 43.43.7541..... 5

V. CONCLUSION 10

TABLE OF AUTHORITIES

WASHINGTON CASES

Geschwind v. Flanagan, 121 Wn.2d 833, 854 P.2d 1061 (1993) 9

King Cy. v. Taxpayers of King Cy., 104 Wn.2d 1,
700 P.2d 1143 (1985)..... 8

State ex rel. Billington v. Sinclair, 28 Wn.2d 575,
183 P.2d 813, 816 (1947)..... 7 FN

State v. Bolar, 129 Wn.2d 361, 917 P.2d 125 (1996)..... 8

State v. DeLeon, __ Wn. App. __ , 341 P.3d 315, 328 (2014)..... 5

State v. J.P., 149 Wn.2d 444, 69 P.3d 318, 322 (2003)..... 8 FN

State v. Jackson, 36 Wn. App. 510, 676 P.2d 517, 521 *aff'd*,
102 Wn.2d 689 (1984) 5 FN

State v. Pike, 118 Wn.2d 585, 826 P.2d 152 (1992)..... 8

State v. Rodriguez, 146 Wn.2d 260, 45 P.3d 541 (2002)..... 5

STATUTES

RCW 43.43.754 5, 6, 7

RCW 43.43.7541 6, 7, 8, 9

RCW 9.41.330 4

RCW 9.41.333 5

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The sentencing judge erred by imposing a felony firearm offender registration requirement.
2. The trial court erred by imposing a DNA collection fee.

II. ISSUES PRESENTED

1. Did the sentencing court abuse its discretion by imposing a felony firearm offender registration requirement under RCW 9.41.330 where the court considered the defendant's extensive criminal history and that history evinced the defendant's propensity for violence?
2. Did the trial court err by imposing a DNA collection fee when that fee is mandated by RCW 43.43.7541?

III. STATEMENT OF THE CASE

Defendant, Mr. Kivett, plead guilty to two felonies; one count of first degree unlawful possession of a firearm, and one count of a felony violation of a no contact order. CP 26-35, CP 12-21. In exchange for his plea, an assault and another unlawful possession of a firearm were dismissed. CP 24-25. Both guilty plea statements included the defendant's criminal history as follows:

Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
MONEY LAUNDER	112410	NV	A	SPOKANE CO, WA	011911
FALSE INS CLAIM	012709	NV	A	SPOKANE CO, WA	072710
PCS	092607	DRUG	A	SPOKANE CO, WA	060408
PCS	082607	DRUG	A	SPOKANE CO, WA	060408
DV VIOL ORDER (F)	112701	NV	A	SPOKANE CO, WA	AFF 040803
DV BURGLARY 2	092800	NV	A	SPOKANE CO, WA	032301
DV ASSAULT (F)	113099	NV	A	SPOKANE CO, WA	041100
DV ASSAULT (F)	052199	NV	A	SPOKANE CO, WA	071599
DV VIOL NCO (F)	090398	NV	A	SPOKANE CO, WA	050799
DV ASSAULT (F)	042798	NV	A	SPOKANE CO, WA	082698
DV VIOL NCO (F)	032698	NV	A	SPOKANE CO, WA	082698
DV ASSAULT (F)	102097	NV	A	SPOKANE CO, WA	020498
RECK DRIVING	062313	MISD.		SPOKANE CO, WA	102113
DV VIOL NCO	092213	MISD.	A	SPOKANE CO, WA	102113
PETIT THEFT	122409	MISD.	A	KOOTENAI CO, ID	052611
DUI	020209	MISD.	A	SPOKANE CO, WA	090909
RECK DRIVING	120407	MISD.	A	SPOKANE CO, WA	060308
DV VIOL NCO	042994	MISD.	A	SPOKANE CO, WA	101294
DV VIOL NCO	022794	MISD.	A	SPOKANE CO, WA	030894
DWI		MISD.	A	SPOKANE CO, WA	071193
DV VIOL PROT ORD	060889	MISD.	A	SPOKANE CO, WA	031891
DWI	092390	MISD.	A	SPOKANE CO, WA	031891
DV VIOL NCO	012490	MISD.	A	SPOKANE CO, WA	080890
DWI		MISD.	A	SPOKANE CO, WA	103189
RECK. DRIVING	101188	MISD.	A	SPOKANE CO, WA	010989

CP 57

At sentencing, but before imposing a sentence, the court noted it had reviewed the defendant's extensive criminal history, stating: "You have, looks like, 12 felony convictions. You've had two DOSA sentences in the past, 2001 and 2008. For purposes of your sentencing on these two matters, your offender score is nine plus, so you're maxed out."

RP 19, first paragraph. The criminal history list on the sentencing court's judgment and sentences each contain 23 adult criminal convictions, many of them assaults.

At sentencing, the court informed the defendant that he would be required to register as a felony firearm offender. "Based upon your conviction for unlawful possession of a firearm, you will be required to register as a felony firearm offender,¹ and that attachment will be added to the Judgment and Sentence." RP 20. Also, prior to imposing the firearm registration requirement the court noted that the defendant had a hard time following the law, especially the laws regarding firearm possession. "You're precluded from possessing a firearm, yet you were caught with a firearm. You're precluded from having contact with another individual, yet you had contact, resulting in this charge and then also violation of your release pending sentencing."

¹ The appellant claims that the court did not discuss the possibility of the registration requirement, "at the plea hearing or at sentencing." BOA, page 1, last paragraph. In fact, as above, the court did inform the defendant of the requirement. RP 20.

IV. ARGUMENT

- A. **The sentencing court did not abuse its discretion by imposing a felony firearm offender registration requirement under RCW 9.41.330, because the court considered the defendant's extensive criminal history and that history evinced the defendant's propensity for violence.**

The court is statutorily required to consider whether to impose a firearm registration requirement by considering the defendant's criminal history and any evidence of the defendant's propensity for violence that would likely endanger persons. RCW 9.41.330.² After considering those factors, the court has the discretionary ability to impose the firearm registration requirement at a felony sentencing. *Id.*

The court properly considered the relevant criminal history and violence propensity factors in the instant case. The court commented on the defendant's criminal history, telling him he was "maxed out." The court noted the defendant had 12 prior felonies. The defendant's criminal

² **RCW 9.41.330 Felony firearm offenders – Determination of registration.**(1) On or after July 28, 2013, whenever a defendant in this state is convicted of a felony firearm offense or found not guilty by reason of insanity of any felony firearm offense, the court must consider whether to impose a requirement that the person comply with the registration requirements of RCW 9.41.333 and may, in its discretion, impose such a requirement.

(2) In determining whether to require the person to register, the court shall consider all relevant factors including, but not limited to:

- (a) The person's criminal history;
- (b) Whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and
- (c) Evidence of the person's propensity for violence that would likely endanger persons.

history included felonious DV assaults, violations of no contact orders of protected parties, felonious DV burglaries, and various misdemeanors, many of which were assaults. These assault convictions alone are evidence of the defendant's propensity for violence. The court considered the defendant's criminal history and propensity for violence – and other non-exclusive factors such as defendant's general inability to follow the law – as the court was required to do. The court did not abuse its discretion by ordering the registration requirement as it had the statutory discretion to do so. An abuse of discretion occurs when “no reasonable judge would have reached the same conclusion.” *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002), *State v. DeLeon*, ___ Wn. App. ___, 341 P.3d 315, 328 (2014). The court properly exercised its discretion by ordering the “maxed out” defendant to comply with the registration requirements of RCW 9.41.333.

B. The trial court correctly imposed a DNA collection fee as mandated by RCW 43.43.7541.

Defendant claims that once a defendant has a sample of his or her DNA on file with the Washington State Patrol Crime Laboratory, no additional DNA fee is assessable to the defendant in subsequent cases.³

³ The Court is not required to address this issue. The defendant has not established that he already had a DNA sample on file with the crime laboratory. Appellant assumes facts not in the record. The party seeking

This argument does not comport with the separate statutes covering DNA collection and submission, and the court-ordered legal financial obligations. RCW 43.43.754 sets forth the requirements for the *collection* of a DNA sample from a defendant and the *submission* of the sample (after it is collected) to the DNA database.⁴

RCW 43.43.754 (1) requires a collection, however, subsection (2) does not require the *submission* of the sample to the crime laboratory if the laboratory already has a sample from the individual. These two requirements are totally separate from the fee required to be imposed as a

review has the burden of perfecting the record so that this court has before it all evidence relevant to the issue. *State v. Jackson*, 36 Wn. App. 510, 516, 676 P.2d 517, 521 *aff'd*, 102 Wn.2d 689 (1984).

⁴ RCW 43.43.754

DNA identification system — Biological samples — Collection, use, testing — Scope and application of section.

(1) A biological sample must be collected for purposes of DNA identification analysis from:

(a) Every adult or juvenile individual convicted of a felony, or any of the following crimes (or equivalent juvenile offenses):[goes on to list other offenses]

(2) 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.

(3) Biological samples shall be collected in the following manner: [goes on to list collection manners]

legal financial obligation at every felony sentencing, set forth in a separate statute, RCW 43.43.7541.

RCW 43.43.7541, the court fee imposition statute, mandates the imposition of a fee of one hundred dollars in *every sentence* imposed for a felony.⁵ Its language is clear. “*Every sentence imposed for a [felony] must include a fee of one hundred dollars.*” (Emphasis added).⁶ This mandatory fee is not contingent upon anything other than the fact that a

⁵ Appellant does not discuss or cite the controlling statute, RCW 43.43.7541, which provides:

DNA identification system — Collection of biological samples — Fee.

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 9.94.A 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.

⁶ “Words or phrases which are generally regarded as making a provision mandatory, include ‘shall,’ and ‘must.’ On the other hand, a provision couched in permissive terms is generally regarded as directory or discretionary. This is true of the word, ‘may,’” *State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 581, 183 P.2d 813, 816 (1947).

sentence is imposed. This statute then designates the priority of payment by the defendant, and the transmittal of the fee when received to the appropriate agencies. There is no conflict between this 2011 statute and the earlier 2008 statute RCW 43.43.754, which requires the *collection* of a DNA sample from every felon, but does not require the *submission* of the sample to the to the Washington state patrol crime lab if the lab already has a sample from that individual.⁷ “*Collection*” of a sample is a term separate from the term “*submission*” to the lab, and neither term supplants the requirement of the “*imposition of a fee*” of \$100 mandated by a different statute, RCW 43.43.7541.

The court is to employ the plain and ordinary meaning of words as found in the dictionary in the absence of a statutory definition of words. *State v. Bolar*, 129 Wn.2d 361, 366, 917 P.2d 125 (1996). All of these terms - collected, submitted, and imposed - are easily understood words and different from each other – both in purpose and effect. In interpreting a statute, the court should assume that the Legislature meant

⁷ If there were a conflict, the later in sequence and time, RCW 43.43.7541 would control. “Under the first canon of construction, the provision coming later in the chapter must prevail so long as it is more specific than the provision occurring earlier in the sequence.” *State v. J.P.*, 149 Wn.2d 444, 453-54, 69 P.3d 318, 322 (2003)

exactly what it said. *King Cy. v. Taxpayers of King Cy.*, 104 Wn.2d 1, 5, 700 P.2d 1143 (1985). Courts are obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh. *State v. Pike*, 118 Wn.2d 585, 591, 826 P.2d 152 (1992).

RCW 43.43.7541 sits alone. Under 43.43.7541, *every sentence* imposed for a felony *must* include a fee of one hundred dollars. The language could not be clearer. Because there is no ambiguity, we derive the statute's meaning from its language alone. *Geschwind v. Flanagan*, 121 Wn.2d 833, 840-41, 854 P.2d 1061 (1993).

RCW 43.43.7541 speaks to *every* sentence, not every first sentence or every sentence where a DNA fee was not collected before. The language is mandatory and not in conflict with the other separate statutes dealing with the collection of DNA samples and the submission of DNA samples. There was no error in the court ordered \$100 DNA fee.

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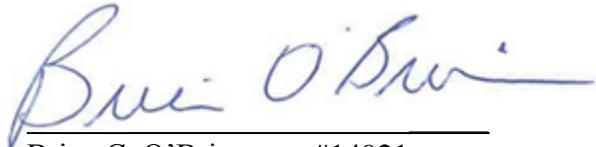
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V. CONCLUSION

For the reasons stated above, the defendant's sentence requirements that include the DNA fee and the firearms registration requirement should be affirmed.

Dated this 23rd day of March, 2015.

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