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Court of Appeals
Division III
State of Washington

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NATHAN TRACEY MITCHELL,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred when it ordered appellant, Mr. Mitchell, 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.
3. The record does not support the finding Mr. Mitchell has the current or future ability to pay the imposed legal financial obligations.
4. The trial court erred in imposing certain conditions of community custody as part of the sentence.

II. ISSUES PRESENTED

1. Does the \$100 DNA fee imposition statute, RCW 43.43.7541, violate the due process clause?
2. Does RCW 43.43.7541 violate equal protection because a defendant may have to pay the fee each time he is sentenced?
3. Did the trial court abuse its discretion when it ordered the defendant to submit to a collection of his DNA with the proviso that the order did not apply if the State Patrol already has a sample of the defendant's DNA?
4. Did the defendant fail to preserve any legal financial obligation (LFO) issue for appeal; are the LFOs imposed in his case mandatory financial obligations that are exempt from the inquiry required for discretionary

LFOs under RCW 10.01.160(3); and in any event, did the trial court properly determine that the defendant has the ability to pay his LFOs?

5. Did trial court abuse its discretion when it found that “chemical dependency contributed to this offense,” and, thereafter, ordered the defendant not to use or possess marijuana or THC products, where the order also included the proviso that the defendant “not consume controlled substances except pursuant to lawfully issued prescription?”

III. STATEMENT OF FACTS

Defendant was convicted by a jury of possession of a controlled substance – methamphetamine. CP 104. He committed the offense while on community placement. CP 107. Defendant had an offender score of “19.” CP 107. He received a standard range sentence of 20 months. CP 109. The sentencing court imposed a \$100 DNA fee as part of the sentence, listing RCW 43.43.7541 as the statutory authority for the fee. CP 112. At sentencing, the defendant informed the court that because of this latest felony, he had “lost stocks that [he] had for [his] kids.” RP 237. He lost his guitar, tools, and his car because of the crime, having left the items in his car which he decided not to reclaim. RP 237. At sentencing, the defendant informed the court that he could pay \$5.00 a month, because it was hard to find a job. RP 241. The court discussed with the defendant whether he could pay \$10.00 a month if the court deferred payment for fifteen months, until October 2015. RP 241.

The defendant told the court he could try. *Id.* The court imposed \$10.00 a month and delayed the payments as discussed. The trial court also informed the defendant that if he was not able to make payments, to make sure to let the court know. RP 241.

IV. ARGUMENT

A. RCW 43.43.7541, THE THE COURT DNA FEE IMPOSITION STATUTE, DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

RCW 43.43.7541, the court DNA fee imposition statute, mandates the imposition of a fee of one hundred dollars in every sentence imposed for a felony.¹ The defendant claims this statute violates the *substantive* due process clause. App. Brief, pp. 4-6. Defendant then argues an *equal protection*

¹ RCW 43.43.7541 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.

violation regarding an indigent defendant’s inability to pay. App. Brief, pp. 6-8.

As to the first argument, that RCW 43.43.7541 violates substantive due process, the defendant sets forth the correct standard of review: “Where a fundamental right is not at issue, as is the case here, the rational basis standard applies.” App. Brief, p. 4, citing *Nielsen v. Washington State Dep’t of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013). “To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. *Id.*” App. Brief, p 4.

Applying this deferential standard, this court assumes the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest. *Amunrud v. Bd. Of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 571 (2006).²

² See also *Parrish v. W. Coast Hotel Co.*, 185 Wash. 581, 597, 55 P.2d 1083 (1936) (statute must be unconstitutional “beyond question”), *aff’d*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937); *Nebbia v. New York*, 291 U.S. 502, 537–38, 54 S.Ct. 505, 78 L.Ed. 940 (1934) (every possible presumption is in favor of a statute's validity, and that although a court may hold views inconsistent with the wisdom of a law, it may not be annulled unless “palpably” in excess of legislative power); cited with approval, *Amunrud*, 158 Wn.2d at 215.

The DNA fee imposition statute is rationally related to a legitimate state interest. These fees help support the costs of the legislatively enacted DNA identification system, supporting state, federal and local criminal justice and law enforcement agencies by developing a multiuser databank that assists these agencies in their identification of individuals involved in crimes and excluding individual who are subject to investigation and prosecution. *See*, RCW 43.43.753 (finding “that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are subject of investigations or prosecutions”). The legislation is supported by a legitimate financial justification. As this court recently held in *State v. Thornton*, No. 32478-8-III, ---P.3d---, WL 3751741 (Wash. Ct. App. June 16, 2015):

The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of RCW 43.43.754(1) and (2). The court thus properly imposed the DNA collection fee under RCW 43.43.7541 for Ms. Thornton's felony drug conviction.

State v. Thornton, at p. 2.

Therefore, there is a rational basis for the legislation.

Equal Protection

The defendant lacks standing to assert his second mixed equal protection claim, that the imposition of this mandatory fee upon defendants who cannot pay the fee violates equal protection. The general rule is that

“[o]ne who is not adversely affected by a statute may not question its validity.” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987). This basic rule of standing “prohibits a litigant ... from asserting the legal rights of another.” *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281, 937 P.2d 1082 (1997), citing *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994)). It also mandates that a party have a “real interest therein,” *State ex rel. Gebhardt v. Superior Court*, 15 Wn.2d 673, 680, 131 P.2d 943 (1942). *Dean v. Lehman*, 143 Wn.2d 12, 18-19, 18 P.3d 523, 527-28 (2001).

The defendant has failed to establish he is unable to pay the \$100 fee. He informed the court that he could pay \$5.00 a month and believed he could pay \$10. He is 42 years old, he has acquired stocks and material goods in the past. Defendant inferred he could find a job, but that it was hard; not impossible. He has not established the “constitutional indigence” necessary to raise this equal protection claim. The analysis of what constitutes “constitutional indigence” was recently set forth by our State Supreme Court in *State v. Johnson*, 179 Wn.2d 534, 315 P.3d 1090, *as amended* (Mar. 13, 2014), *cert. denied*, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014):

Considering the totality of the circumstances, we hold that Johnson was not constitutionally indigent. While we do not question that the State may not punish an indigent defendant for the fact of his or her indigence, these constitutional considerations protect only the constitutionally indigent.

Johnson had substantial assets in comparison to the \$260 fine the district court ordered him to pay. Requiring payment of the fine may have imposed a hardship on him, but not such a hardship that the constitution forbids it. *Lewis*, 97 Cal.Rptr. at 422 (the constitution does not require the trial court to allow a defendant the same standard of living that he had become accustomed). Johnson is not constitutionally indigent and lacks standing for his claim. We decline to reach it.

Johnson, 179 Wn.2d at 555.

Defendant had previously acquired a car, stocks, a guitar, and money to purchase methamphetamine. He has not established he is unable to pay the \$100. Furthermore, he has not established that he is part of a class, or that there is a class. Moreover, equal protection of the laws under state and federal constitutions requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978); *Oestreich v. Department of Labor and Industries*, 64 Wn. App. 165, 170, 822 P.2d 1264 (1992). Equal protection requires only similar treatment, not identical impact, on persons similarly situated. *Oestreich*, 64 Wn. App. at 170.

Defendant bases his argument on hypotheticals. In *State v. Baldwin*, the court affirmed a trial court's finding that an offender had the present or likely future ability to pay LFOs where the only evidence to support it was a statement in the presentence report that the offender described himself as employable. *State v. Baldwin*, 63 Wn. App. 303, 311, 818 P.2d 1116, 837 P.2d 646 (1991).

In *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), the Court held that appellate costs, including a repayment obligation for the costs of appointed counsel, could be awarded without an inquiry into the offender's ability to pay. Costs may be imposed upon individuals who are indigent without any per se constitutional violation, so long as ability to pay is considered at the time of *enforcement*. *Id.* at 240-41. A person is “indigent” in the constitutional sense only when he lacks any assets and cannot meet his housing and food needs. *See, Johnson*, 179 Wn.2d at 553-54. Indigency, moreover, is a relative term that must be considered and measured in each case by reference to the need or service to be met. *Id.*, at 555; *State v. Rutherford*, 63 Wn.2d 949, 953-54, 389 P.2d 895 (1964). As the Court in *Johnson* noted:

Requiring payment of the fine may have imposed a hardship on him, but not such a hardship that the constitution forbids it. *Lewis*, 97 Cal.Rptr. at 422 (the constitution does not require the trial court to allow a defendant the same standard of living that he had become accustomed).” *Johnson* is not constitutionally indigent and lacks standing for his claim. We decline to reach it.

State v. Johnson, 179 Wn 2d at 555.

This court should find that Defendant Mitchell lacks standing to raise the equal protection claim, and, that under the rational basis test, the statute does not violate equal protection.

B. RCW 43.43.7541 DOES NOT VIOLATE EQUAL PROTECTION BECAUSE A DEFENDANT MAY HAVE TO PAY THE FEE EACH TIME HE IS SENTENCED.

Firstly, defendant has not established that he has paid or been ordered to pay the the DNA fee more than once. That is of course, if this court does not consider the appendix that was filed with his brief in contravention of RAP 10.3(8) and RAP 9.11. Under RAP 10.3(a)(8), “An appendix may not include materials not contained in the record on review without permission from the appellate court.” Because Defendant did not obtain the requisite permission, and has yet failed to move to include them, this court should not consider them. *See, Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 594-95, 849 P.2d 669 (1993).³

Secondly, the defendant fails to establish a cognizable violation of people similarly situated. Defendant claims the group is all defendants. This misses the equal protection mark. People on their first sentencing are one group. They may be eligible for a first time offender option and other alternative sentences. People on their second sentencing are another group.

³ We therefore deny the motion to take additional evidence on review. We nonetheless admonish appellants for inappropriately including in the appendix to their opening brief the second affidavit and other materials not of record, without indicating to the court in the brief that those materials were not part of the record and that a motion was pending to allow *595 their consideration. This violates the intention of RAP 10.3 that factual statements in briefs must be referenced to the record. *See* RAP 10.3(4), (7).

People on their nineteenth sentencing are another group, more closely situated with this defendant. *See*, CP 101-02, Defendant's understanding of his criminal history. All defendants sentenced to felonies receive the DNA assessment as part of their sentencing. Nothing is more equal than that.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED THE DEFENDANT TO SUBMIT TO A COLLECTION OF HIS DNA WITH THE PROVISO THAT THE ORDER DID NOT APPLY IF THE STATE PATROL ALREADY HAS A SAMPLE OF THE DEFENDANT'S DNA.

The defendant fails to cite to the record where the trial court ordered Mr. Mitchell to submit to a DNA collection.⁴ That order is contained at CP 113; Felony Judgment and Sentence, page 10, provision 4.4. That "order" contains the proviso that this DNA requirement "*does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense.*" This follows the statutory scheme set forth in RCW 43.43.754, where, under subsection (1) "a biological sample must be collected for purposes of DNA identification analysis from [a qualifying offender]," then, under subsection (2), "If the Washington [S]tate

⁴ Moreover, the defendant has failed to provide a record showing that he had previously provided a DNA test. The improperly attached appendix, a partial selected compilation of incomplete and unexplained summaries, only shows that a *DNA fee* was imposed on prior occasions, not that a *DNA sample* was ordered, or provided. *See Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994) (party seeking review has burden of perfecting record so reviewing court has all relevant evidence before it; insufficient record on appeal precludes review of the alleged errors).

[P]atrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted.”⁵

The order follows the operation of the statute. There is no abuse of discretion in the trial court ordering that which is required by law.

D. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL; THE LFO’S IMPOSED IN HIS CASE ARE MANDATORY FINANCIAL OBLIGATIONS, AND, THEREFORE, EXEMPT FROM INQUIRY UNDER RCW 10.01.160(3), AND, IN ANY EVENT, THE TRIAL COURT PROPERLY DETERMINED THAT THE DEFENDANT HAS AN ABILITY TO PAY HIS LFO’S.

The defendant failed to object to the imposition of his LFOs. Therefore, he failed to preserve the matter for appeal. In its consideration of the issue in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court determined that the LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity. *Blazina*, 182 Wn.2d at 830.

⁵ This issue was laid to rest by this court in its recent decision *State v. Thornton*, No. 32478-8-III, 2015 WL 3751741, at page 2 (Wash. Ct. App. June 16, 2015):

The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of RCW 43.43.754(1) and (2). The court thus properly imposed the DNA collection fee under RCW 43.43.7541 for Ms. Thornton's felony drug conviction.

No constitutional issue is involved. And, as set forth later, the statutory violation existing in *Blazina* applied to discretionary LFOs, not mandatory LFOs. However, the *Blazina* court exercised its discretion in favor of accepting review due to the nationwide importance of LFO issues, and to provide guidance to our trial courts. *Id.* at 830. That guidance has been provided. *Blazina* was decided after the sentencing in the instant case. There is no nationwide or statewide import to this present case, and review should not be granted where the defendant failed to object and thereby allow the trial court the ability to make further inquiry as to his ability to pay, if necessary. Statewide appellate procedural rules are of more import in the present case.

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177, 1180 (2013). This principle is embodied federally in Fed. R. Crim P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed by this court in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

State v. Strine, 176 Wn. 2d at 749-50.

Therefore, policy and the rule favor not allowing review of this statutory, non-constitutional LFO issue.

Secondly, the LFOs ordered are mandatory LFOs. CP 104 (top of page); CP 111-12. The \$500 victim assessment, \$100 DNA (deoxyribonucleic acid) collection fee, and \$200 criminal filing fee are each required irrespective of the defendant's ability to pay. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Crime victim assessments, DNA fees, drug crime fees, and criminal filing fees are mandatory LFOs and the court lacks discretion to consider a defendant's ability to pay when imposing them. *Lundy*, 176 Wn.App. at 102. To the extent that the trial court imposed mandatory LFOs, there is no error in the defendant's sentence.

If the court accepts review of this issue, waived by the defendant's failure to object, not applicable because the fees are mandatory, then the trial court did make sufficient inquiry to the defendant's financial circumstances.

RCW 10.01.160(3) requires that the court make an individualized determination of the defendant's ability to pay *discretionary* LFOs at the time of sentencing.

At sentencing, the defendant informed the court that because of this latest felony, he had "lost stocks that [he] had for [his] kids." RP 237. He lost his guitar, tools, and his car, having left these items in his car that he failed to reclaim. RP 237. He affirmatively informed the court that he could pay \$5.00 a month. RP 241. The court inquired whether the defendant could pay \$10.00 a month if the court deferred payment for for fifteen months, until October 2015. RP 241. The defendant affirmatively told the court he could try. *Id.* The court imposed \$10.00 a month and delayed the payments as it had suggested in its discussion with the defendant. This personalized discussion with the defendant who would be temporarily unemployed, but provided with housing and food during his period of confinement, satisfies the rational setting of \$10.00 per month payments to start only after he was out of custody.

In *State v. Baldwin*, the court affirmed a trial court's finding that an offender had the present or likely future ability to pay LFOs where the only evidence to support it was a statement in the presentence report that the

offender described himself as employable. *State v. Baldwin*, 63 Wn.App. at 311. There was no error here.

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED THE DEFENDANT NOT TO USE OR POSSESS MARIJUANA OR THC PRODUCTS, WHEN THE COURT FOUND THAT “CHEMICAL DEPENDENCY CONTRIBUTED TO THIS OFFENSE,” AND WHEN THE JUDGMENT AND SENTENCE ALSO INCLUDED THE PROVISIO THAT THE DEFENDANT “NOT CONSUME CONTROLLED SUBSTANCES EXCEPT PURSUANT TO LAWFULLY ISSUED PRESCRIPTION.”

The defendant objects to the community custody condition ordering him not to use or possess marijuana or products containing THC.

This court reviews crime-related community custody conditions for an abuse of discretion. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791–92, 239 P.3d 1059 (2010); *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A court abuses its discretion when it adopts a view that no reasonable judge would take. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Stated differently, a trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here the court informed the defendant that “[y]ou’re required not to use any illegal controlled substances. That includes marijuana. It might not be illegal under state law, but it’s still illegal under federal law.” RP 240. This occurred directly after the court found that *chemical dependency contributed to*

the instant offense. RP 239-40.⁶ That finding makes the drug prohibition crime related. As Defendant agrees, the court may impose crime-related prohibitions. App. Brief, page 22.

Additionally, the subsequent order precluding possession regarding marijuana was simply a clarification that marijuana is a controlled substance for the purposes of the sentencing, even though it is conditionally lawful in our state. This sentencing provision is modified by the trial court's other provision directly preceding it that required the defendant to "not consume controlled substances *except pursuant to lawfully issued prescription.*" CP 110; Judgment and Sentence p. 7, section 4.2(B)(4). These provisions should be read in harmony. There is no error here. When read together, the provisions provide that even though marijuana possession is authorized under state law, possession is prohibited because it is a controlled substance federally, and it cannot be used without a prescription. There was no abuse of discretion here.

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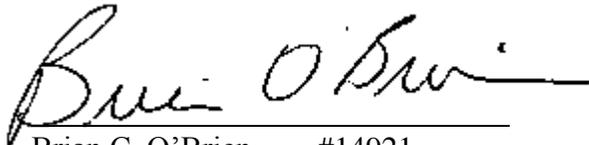
⁶ This factual finding is not challenged on appeal. Unchallenged findings of fact are verities on appeal, *State v. Harris*, 106 Wn.2d 784, 790, 725 P.2d 975 (1986).

V. CONCLUSION

For the reasons stated above, the defendant's LFO sentence requirements should be affirmed, as well as the order prohibiting marijuana use without a prescription.

Dated this 8 day of July, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

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

STATE OF WASHINGTON,

Respondent,

v.

NATHAN TRACEY MITCHELL,

Appellant,

NO. 32707-8-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 8, 2015, I e-mailed a copy of the Response Brief in this matter, pursuant to the parties' agreement, to:

Susan Gasch
gaschlaw@msn.com

7/8/2015

(Date)

Spokane, WA

(Place)

Crystal McNees

(Signature)