

NO. 32781-7-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

RONALD AARON MALONE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR YAKIMA
COUNTY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Did Malone fail to preserve the LFO issue raised on appeal?
2. Is RCW 43.43.7541 constitutional?
3. Did the trial court act within its discretion in ordering a DNA sample?

B. STATEMENT OF THE CASE

On May 29, 2015, Ronald A. Malone pled guilty to the crime of felony possession of a controlled substance. As part of the agreement, the State agreed to dismiss two bail jumping charges and not pursue any additional charges. CP 7. Numerous legal financial obligations (LFOs) were also included in the plea agreement. CP 7. On September 24, 2014, Malone was sentenced. He has 21 prior felony convictions. CP 16. He was sentenced to a bottom of the range sentence of 12 months plus one day. CP 17.

Malone was ordered to pay a total of \$3,950 under section 4.D.3 of his judgment and sentence. This was broken down as follows:

\$500 Crime Penalty Assessment
\$200 Criminal Filing Fee
\$600 Court appointed attorney recoupment
\$100 DNA collection fee
\$200 warrant fee
\$2000 fine to the State of Washington m
\$250 Drug enforcement fund
\$100 Crime lab fee

Costs of incarceration were ordered but not set forth specifically. CP 19. They were capped at \$500 and the defendant was ordered to pay them “at the statutory rate as assessed by the Clerk.” CP 19.

Findings in the judgment and sentence that was completed and entered by the court included a finding that Malone had the present or future ability to pay the financial obligations imposed. CP 17. They also included findings that Malone had the means to pay for the costs of incarceration (not to exceed \$500) and the means to pay any costs of medical care incurred by the county. CP 19.

The parties’ arguments at the sentencing hearing dealt primarily with whether the court should impose a DOSA sentence. Malone made no presentation of evidence or argument directly addressing his ability to pay. Malone also did not object to the costs imposed or to the court’s findings. RP 35-6.

C. ARGUMENT

1. MALONE FAILED TO PRESERVE THE LFO ISSUE RAISED ON APPEAL.

Appellant failed to raise the LFO issue in the trial court.

Therefore, it is not preserved for appeal. In accordance with numerous prior rulings from this court and affirmation by the Washington State Supreme court in State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015),

this Court still maintains the ability to exercise its discretion to address issues raised for the first time on appeal under RAP 2.5. This Court should exercise that discretion and deny this appeal.

This Court need not and should not address this issue. As this Court ruled previously and as Division Two recently ruled in State v. Lyle:

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.

No. 46101-3, 2015 Wash. App. LEXIS 1471 at *3-4 (Wash. Ct. App. July 10, 2015).

This Court has consistently ruled that this issue need not be addressed for the first time on appeal, as did the court in Lyle. This division of the court has done so since this court's ruling in State v. Duncan, 180 Wash. App. 245, 250, 253, 327 P.3d 699 (2014), petition for review accepted, No. 90188-1, 2015 Wash. LEXIS 873 (Aug. 5, 2015). 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.” 180 Wash. App. at 250.

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.” 182 Wn.2d at 838. Rather, the record must show the court “made an individualized inquiry into the defendant’s current and future ability to pay.” Id.

The 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. There, the Blazina court exercised its discretion in favor of allowing the

LFO challenge. Id. Here, Malone failed to object to the trial court's imposition of LFOs. This Court, therefore, has discretion to rely on the analysis in Duncan, supra, and not review the claimed error.

It is an enormous burden and expense to bring innumerable defendants back from prison to conduct new sentencing hearings. This must be balanced against the possibility that the trial court will change the amount of the LFOs. Additionally there is the consideration of the actual amount that will be collected when compared to these new and added costs. Costs to the judicial system will accrue from transporting defendants to and from prison, attorney's fees, and from setting and conducting new hearings. Often the amount of money that would be subject to change or review is nominal because many of the costs found in the boilerplate sections of the judgment and sentence are mandatory versus discretionary costs.

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. In State v. Lundy, 176 Wash. App. 96, 102, 308 P.3d 755 (2013), the court noted that for these costs, "the legislature has directed expressly that a defendant's ability to pay should not be taken into account." The court explained that:

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 Wn.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 Wn.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).

Here, Malone was ordered to pay a total of \$3,950 under section 4.D.3 of his judgment and sentence. This was broken down as follows:

- \$500 Crime Penalty Assessment
- \$200 Criminal Filing Fee
- \$600 Court appointed attorney recoupment
- \$100 DNA collection fee
- \$200 warrant fee
- \$2000 fine to the State of Washington
- \$250 Drug enforcement fund
- \$100 Crime lab fee

CP19. Costs of incarceration were ordered but not set forth specifically.

CP 19. They were capped at \$500 and Malone was ordered to pay them “at the statutory rate as assessed by the Clerk.” CP 19.

The only costs that may be discretionary in this case are the \$600 attorney fee, \$250 drug fund fee, and any amount that would be assessed for jail/prison costs that have not been imposed yet. Therefore, any action on the latter costs would be purely speculative.

The State would urge this Court to continue to exercise its right to deny these challenges of costs when they have not been raised in the trial court pursuant to RAP 2.5. The decision rendered in Duncan was appropriate. These costs are a matter that is not simply overlooked by a defendant. These costs are discussed in open court and Malone failed to challenge anything. As stated in Blazina, 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. Our supreme court chose to select that one case and hear the issues presented. That court chose to exercise its discretion under RAP 2.5.

Prior to the supreme court's ruling in Blazina, all three divisions of this Court had held 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. See, eg., State v. Blazina, 174 Wash. App. 906, 911, 301 P.3d 492 (2013), rev'd, 182 Wn.2d 827 (2015); State v. Calvin, 176 Wash. App. 1, 316 P.3d 496, 507-8 (2013), petition for review granted, No. 89518-0, 2015 Wash. LEXIS 858 (Wash. Ct. App. Aug. 5, 2015); State v. Duncan, 180 Wash. App. 245, 253, 327 P.3d 699 (2014), petition for review granted, No. 90188-1 (Aug. 5, 2015). The Supreme Court's decision in Blazina did not change that reasoning. This issue has not been properly preserved, and accordingly, review should be denied.

2. RCW 43.34.7541 IS NOT UNCONSTITUTIONAL.

a. Malone lacks standing.

Malone asks this Court to find that RCW 43.43.7541 violates the constitutional guarantees of substantive due process and equal protection when applied to defendants who lack the present or likely future ability to pay the \$100 fee. (Appellant's Brief at 15-22). Because Malone has not

been found to be constitutionally indigent and has suffered no injury in fact, he lacks standing to challenge the statute.

A person cannot challenge the constitutionality of a statute unless he or she has been adversely affected by the provisions claimed to be unconstitutional. State v. Lundquist, 60 Wn.2d 397, 401, 374 P.2d 246 (1962). To establish standing, Malone must show that he is within the zone of interests to be protected by the constitutional guarantee in question, and that he has suffered an injury in fact, economic or otherwise. Branson v. Port of Seattle, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004). The injury must be “fairly traceable to the challenged conduct and likely to be redressed by the requested relief.” State v. Johnson, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014) (quoting High Tide Seafoods v. State, 106 Wn.2d 695, 702, 725 P.2d 411 (1986)).

For the first time on appeal, Malone challenges the constitutionality of RCW 43.43.7541, which requires trial courts to impose a \$100 DNA fee on any offender convicted of a felony or specified misdemeanor. Because Malone’s claim is both unpreserved and unripe for review, and because he lacks standing to assert it, this Court should decline to review the issue. The Court should reject the claim on the merits, if reached, because Malone fails to establish that the DNA fee statute is unconstitutional as applied in his case.

The injury also must be 1) concrete and particularized, and 2) actual or imminent, not conjectural or hypothetical. Witt v. Dep't of Air Force, 527 F.3d 805, 811 (9th Cir. 2008) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Where a party lacks standing to assert a claim, courts must refrain from reaching the merits of that claim. Id. at 552 (citing Org. to Preserve Agric. Lands v. Adams County, 128 Wn.2d 869, 896, 913 P.2d 793 (1996)).

Malone does not attempt to establish standing to challenge the statute in this case. Presumably, he would argue that the imposition of the mandatory fee without regard to his ability to pay unfairly subjects him to the possibility of future punishment if he is unable to pay due to indigence. Indeed, “the due process and equal protection clauses prevent a state from invidiously discriminating against, or arbitrarily punishing, indigent defendants for their failure to pay fines they cannot pay.” Johnson, 179 Wn.2d at 552 (citing Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)).

But in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), our supreme court clarified that the imposition of fees against an indigent party as a part of sentencing is not constitutionally forbidden; rather, constitutional principles are implicated only if the State seeks to *enforce* collection of the fee at a time when the defendant is unable, through no

fault of his own, to comply. 131 Wn.2d at 241 (quoting State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992)). Thus, it is at the point of enforced collection that a defendant may assert a constitutional objection on the ground of indigency.¹ Id. Even at the point of collection, it is only if the defendant is “constitutionally indigent” that a constitutional violation occurs. Johnson, 179 Wn.2d at 553.

While there is no precise definition of constitutional indigence, “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.” Johnson, 179 Wn.2d at 553. A finding of statutory indigence does not establish constitutional indigence. Id. at 553, 555. Thus, in Johnson, our supreme court rejected a challenge to the driving while license suspended statute based on a claim of indigence because Johnson, while statutorily indigent, was not constitutionally indigent and, therefore, not in the class protected by the Due Process Clause. Id. at 555.

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). Here, Malone never asserts that he is constitutionally

¹ As argued in the following section of this brief, the fact that the State has not yet attempted to enforce collection makes Malone’s claim unripe.

“indigent,” and the record contains no evidence demonstrating *constitutional* indigence.

On this record, Malone fails to show that he is constitutionally indigent. Because the relevant “constitutional considerations protect only the constitutionally indigent,” Malone cannot demonstrate any injury in fact and, therefore, lacks standing. Johnson, 179 Wn.2d at 555. This Court should decline to address the merits of his constitutional claims.

b. The claim is not ripe for review.

Even if Malone had standing to bring this constitutional challenge, the issue is not ripe for review. Generally, “challenges to orders establishing legal financial sentencing conditions that do not limit a defendant’s liberty are not ripe for review until the State attempts to curtail a defendant’s liberty by enforcing them.” State v. Lundy, 176 Wash. App. 96, 108, 308 P.3d 755 (2013). It is only when the State attempts to collect or impose punishment against an indigent person for failure to pay that constitutional principles are implicated. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992).

Our supreme court adhered to this position in Blank, when it held that an inquiry into defendant’s ability to pay is not constitutionally required before imposing a repayment obligation in a judgment and sentence, as long as the court must determine whether the defendant is

able to pay before sanctions are sought for nonpayment. 131 Wn.2d at 239-42. The point of enforced collection or sanctions for nonpayment is the appropriate time to discern the individual's ability to pay because before that point, "it is nearly impossible to predict ability to pay..." Id. at 242. "If at that time defendant is unable to pay through no fault of his own, Bearden and like cases indicate constitutional principles are implicated." Id. at 242.

Where nothing in the record reflects that the State has attempted to collect the DNA fee, any challenge to the order requiring payment on hardship grounds is not yet ripe for review. Lundy, 176 Wash. App. at 109. That is so in the case at hand. Because the issue is unripe, this Court should decline to reach its merits.

c. The alleged errors are not manifest.

Because Malone did not object to the imposition of the DNA fee in the trial court, RAP 2.5(a) also bars consideration of his claims.

A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and that it caused actual prejudice to the defendant's rights. McFarland, 127 Wn.2d at 333. If the facts necessary

to adjudicate the issue are not in the record, the error is not manifest. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Here, Malone's constitutional claims depend on his present and future inability to pay the mandatory DNA fee. But, as discussed above, there is no evidence in the record to show that Malone is constitutionally indigent, so the error is not manifest within the meaning of RAP 2.5(a). Similarly, Malone's claim that the trial court erred by requiring him to submit a DNA sample because he had given one before (discussed more below) relies on the proposition that he had in fact submitted a sample in the past. See Brief of Appellant at 24. But that is not evident in the record either, so that alleged error is also not manifest.

In State v. Blazina, our supreme court recognized that “[a] defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review.” 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Thus, where a defendant fails to object to the LFOs at sentencing, it is appropriate for appellate courts to decline review. Id. at 834. Because Malone failed to raise the issue below, precluding development of an adequate record, this Court should decline review.

d. Malone fails to show a violation of due process.

Malone presents an as-applied constitutional challenge to RCW 43.43.7541. Even if this Court reaches the merits of the issue, Malone cannot meet his burden to prove that the DNA fee statute is unconstitutional.

A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp., 142 Wn.2d 328, 335, 12 P.3d 134 (2000). Constitutional challenges are questions of law subject to de novo review. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

The federal and Washington State Constitutions guarantee that an individual is not deprived of “life, liberty, or property, without due process of the law.” U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. Washington’s due process clause is coextensive with that of the Fourteenth Amendment, providing no greater protection. State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009). It confers both procedural and substantive protections. Amunrud, 158 Wn.2d at 216. “Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” Nielsen v. Washington State Dep’t

of Licensing, 177 Wash. App. 45, 53, 309 P.3d 1221 (2013) (quoting Amunrud, 158 Wn.2d at 218-19).

The level of scrutiny applied to a due process challenge depends upon the nature of the interest involved. Nielsen, 177 Wash. App. at 53 (citing Amunrud, 158 Wn.2d at 219). Where no fundamental right is at issue, as in this case, the rational basis standard applies. Amunrud, 158 Wn.2d at 222. Rational basis review merely requires that a challenged law be “rationally related to a legitimate state interest.” Nielsen, 177 Wn. App. at 53 (quoting Amunrud, 158 Wn.2d at 222). This deferential standard requires the reviewing court to “assume 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.” Nielsen, 177 Wash. App. at 53 (quoting Amunrud, 158 Wn.2d at 222).

In 2002, the legislature created a DNA database to store DNA samples of those convicted of felonies and certain misdemeanor offenses. RCW 43.43.753. The legislature identified such databases as “important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts.” Id. To fund the DNA database, the legislature enacted RCW 43.43.7541, which originally required courts to impose a \$100 DNA collection fee

with every sentence imposed for specified crimes “unless the court finds that imposing the fee would result in undue hardship on the offender.” Former RCW 43.43.7541 (2002). In 2008, the legislature amended the statute to make the fee mandatory regardless of hardship: “Every sentence ... must include a fee of one hundred dollars.” RCW 43.43.7541. Eighty percent of the fee goes into the “state DNA database account.” Id. Expenditures from that account “may be used only for creation, operation, and maintenance of the DNA database...” RCW 43.43.7532.

Malone recognizes that requiring those convicted of felonies to pay the DNA collection fee serves a legitimate purpose of law. Appellant’s Brief at 22. He argues, however, that imposing the fee upon those who cannot pay does not rationally serve that interest. Id. This Court should reject that argument.

In State v Curry, our supreme court upheld the constitutionality of the mandatory victim penalty assessment (VPA) as applied to indigent defendants. 118 Wn.2d 911, 829 P.2d 166 (1992). Like the DNA fee, the VPA is mandatory and must be imposed regardless of the defendant’s ability to pay. Lundy, 176 Wash. App. at 102. The appellants in Curry argued that the statute could operate to imprison them unconstitutionally if they were unable to pay the penalty. 118 Wn.2d at 917. However, the Curry court agreed with this Court that the sentencing scheme includes

sufficient safeguards to prevent unconstitutional imprisonment of indigent defendants:

Under RCW 9.94A.200^[2], a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. Moreover, contempt proceedings for violations of a sentence are defined as those which are *intentional*. RCW 7.21.010(1)(b). Thus, no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.

118 Wn.2d at 918 (citing State v. Curry, 62 Wash. App. 676, 682, 814 P.2d 1252 (1991)) (emphasis in original).

While Curry addressed the mandatory VPA, the same principle has been extended to all mandatory legal financial obligations, including the DNA collection fee required by RCW 43.43.7541. See Lundy, 176 Wash. App. at 102-03; State v. Kuster, 175 Wash. App. 420, 424-26, 306 P.3d 1022 (2013). Although RCW 9.94A.200 has been recodified, the same safeguards against imprisonment of indigent defendants discussed in Curry apply. See RCW 9.94B.040; RCW 7.21.010(1)(b). Additionally, any defendant who is not in “contumacious default” may seek relief “at

² Recodified in 2001 as RCW 9.94A.634 and in 2008 as RCW 9.94B.040.

any time ... for remission of the payment of costs or any unpaid portion thereof” on the basis of hardship. RCW 10.01.160(4). A defendant may also seek reduction or waiver of interest on LFOs upon a showing that the interest “creates a hardship for the offender or his or her immediate family.” RCW 10.82.090(2)(a),(c).

As in Curry, these safeguards are sufficient to prevent sanctions and imprisonment where a defendant is merely unable to pay. Accordingly, like the VPA, the mandatory DNA fee in RCW 43.43.7541 does not violate substantive due process as applied to indigent defendants.

Malone cites Blazina to support his due process claim. Appellant’s Brief at 18. Blazina held that a different statute, RCW 10.01.160(3), requires the trial court to conduct an individualized inquiry into the defendant’s ability to pay before imposing discretionary LFOs. 182 Wn.2d 837-38.

Malone’s reliance on Blazina is misplaced. First, Blazina involved a claimed violation of a statute, not due process, and its holding is based on statutory construction. Second, Blazina concerned *discretionary* LFOs, not mandatory fees like the one involved here. 182 Wn.2d 837-38. Nothing in Blazina changes the principle articulated in Curry that mandatory LFOs may be constitutionally imposed at sentencing without a determination of the defendant’s ability to pay so long as there are

sufficient safeguards to prevent imprisonment of indigent defendants for an unintentional failure to pay.

Malone fails to show that he is constitutionally indigent and that the mandatory DNA fee required by RCW 43.43.7541 violates substantive due process as applied to indigent defendants. Should this Court reach the merits of this issue, it should affirm.

e. The statute does not violate the equal protection clause.

Malone next 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. Appellant's Brief at 19. 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, Malone's claim fails.

Under the equal protection clause of the Washington State Constitution, 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).

Malone’s equal protection claim is that of the relevant group of “all defendants subject to the mandatory DNA fee,” the law discriminates against those who have been convicted and sentenced multiple times by forcing them to pay the DNA fee more than once. Appellant’s Brief at 22. The argument fails in its basic premise because Malone 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 first-time offenders and those with more elaborate criminal histories. Because Malone fails to show that he is “similarly situated” to first-time offenders, this Court should reject his equal protection claim.

Even assuming Malone 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 database 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).

Malone argues that “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 DNA profile.”

Appellant’s Brief at 22. 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. As such, Malone fails to

show that RCW 43.43.7541 violates equal protection. This Court should affirm.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING A DNA SAMPLE.

In addition to his constitutional challenges, Malone contends that the trial court abused its discretion by ordering him to provide a DNA sample when one had already been ordered as part of a previous felony sentence. This Court should reject this unpreserved claim because the record does not establish that Malone had in fact submitted a sample.

When an individual is convicted of a felony or certain other crimes, a biological sample must be collected for DNA identification analysis unless “the Washington state patrol crime laboratory already has a DNA sample” from the individual for a qualifying offense. RCW 43.43.754(1), (2). If the crime lab already has a sample, “a subsequent submission is not required to be submitted.” RCW 43.43.754(2). Thus, as Malone concedes, the statute gives the trial court discretion whether or not to require a submission of a biological sample even if a prior sample was submitted. See Appellant’s Brief at 23. The trial court’s decision should be affirmed absent an abuse of discretion.

Here, Malone argues that it is manifestly unreasonable for a sentencing court to order the collection of DNA “where the record

adequately supports the fact that the defendant's DNA has already been collected." Appellant's Brief at 23. But the only evidence he cites to is the judgment and sentence, which refers to prior felony convictions. While this shows prior convictions, there is no evidence that DNA collection was ordered in those cases, nor that a sample was actually submitted.³ As the party seeking review, it is Malone's burden to perfect the record and an insufficient record on appeal precludes review. State v. Thornton, No. 32478-8, 2015 Wash. App. LEXIS 1281 at *4 (Wash. Ct. App. June 16, 2015) (citing Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (1994)). Because Malone makes no showing that RCW 43.43.754(2) even applies to his case, much less that the trial court abused its discretion by ordering collection in this case, his argument fails. See Thornton, No. 32478-8 at *4.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Malone's conviction and sentence.

³ Had Malone objected to DNA collection below, the parties could have introduced evidence on whether he had already submitted a sample. Because he did not object, the claim is reviewable only if it presents a manifest constitutional error. RAP 2.5(a). An error is not manifest where the record is inadequate for review. O'Hara, 167 Wn.2d at 99. This Court should decline to review the issue.

Respectfully submitted this 10th day of August, 2015,

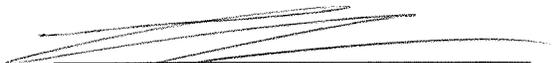
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Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on August 10, 2015, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Mr. David N. 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 10th day of August, 2015 at Yakima, Washington.



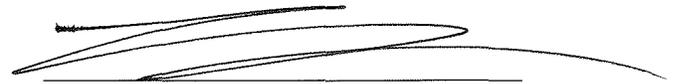
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