

No. 32920-8-III

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

FILED
Sep 15, 2015
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

CALIXTO RIVERA, JR.,
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Blaine G. Gibson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to sustain appellant's convictions for bail jumping.

2. The record does not support the finding appellant has the current or future ability to pay the imposed legal financial obligations.

3. The trial court erred in ordering the defendant to pay the costs and assessments within six or nine months after his release as a condition of his sentence.

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

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

Issues Pertaining to Assignments of Error

1. Appellant was charged with two counts of bail jumping. Where no evidence shows appellant had knowledge of the requirement of a subsequent personal appearance before the court, an essential element of the crime of bail jumping, was the State's evidence insufficient to support appellant's convictions?

2. Since the directive to pay LFOs was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing court to make individualized inquiry into appellant's current and future

ability to pay before imposing LFOs including costs of incarceration and medical care?

3. Did the trial court abuse its discretion in arbitrarily ordering appellant to pay total costs and assessments within six or nine months after his release as a condition of his sentence without considering his ability to realistically pay that amount within the ordered timeframe?

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

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

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

B. STATEMENT OF THE CASE

About 2:00 am, police initiated a traffic stop of Calixto Rivera, Jr. for pulling a long-bed trailer that did not have a license plate. Rivera did

not know where the plate was or the name of the owner of the trailer. He had picked the trailer up as a favor for an unidentified friend and a second friend named Doby Jack. He was released without arrest after police cited him for driving with license suspended and driving a vehicle without a license plate. The car and trailer were towed to an impound lot. RP 62–65.

Later that morning Pastor Arredondo reported the trailer missing from church grounds on East McDonald Road in Toppenish, Washington, where it had been parked. RP 78–79, 87. David Ruiz recently purchased the trailer at auction for \$750 and made some improvements. He had sold fencing supplies to the congregation and left the trailer with materials there for volunteers to unload as they began putting up a cyclone fence. RP 86–91.

At this time Rivera was living with his girlfriend in a camp trailer on property at 200 South McKinley Road in Yakima County. While investigating an unrelated matter at that location, police discovered some of the fencing materials near the camp trailer. RP 94–97, 125–28, 141.

Based on this evidence, the Yakima County prosecutor charged Rivera with one count of second degree possession of stolen property for the incident, which occurred on May 2, 2013. CP 1.

On February 7, 2014, Rivera did not appear in court for a triage hearing. Based on Rivera's absence, the State also charged him with one count of bail jumping. CP 22, 43, 57. On May 16, 2015, Rivera did not appear in court for another triage hearing and the State charged him with a second count of bail jumping. CP 33, 44, 58.

In support of the bail jumping charges, the State introduced five certified court records. State's Exhibit [SE] 2-6. No trial testimony was presented. RP 67-71. Exhibit 2 was a certified copy of the original information charging Calixto Rivera Jr./aka Calixto Rivera/aka Abel Rivera with second degree possession of stolen property, filed on July 9, 2013. The caption contained a case number and listed a date of birth. SE 2.

Exhibit 3 was a certified copy of an order setting case schedule dated January 24, 2014. The caption contained the name Calixto Rivera, Jr., case number, and listed a date of birth. The court order contained a "defendant" signature above the pre-printed words "Copy received" and ordered the signer to return to court on February 7, 2014 for triage and February 10, 2014 for trial. The court order contained a boldface admonition that failure to appear at court as ordered may result in new

criminal charges, an arrest warrant, forfeiture of bail, and rescheduling of the trial. SE 3.

Exhibit 4 was a certified copy of a court order directing the clerk to issue a bench warrant for the defendant's failure to appear at triage on February 7, 2014. The court order was filed February 7, 2014 and the caption contained the name Calixto Rivera, case number, and listed a date of birth. SE 4.

Exhibit 5 was a certified copy of an agreed order of continuance dated April 18, 2014. The caption contained the name Calixto Rivera, case number, and listed a date of birth. The court order contained a "defendant" signature above the pre-printed words "Copy received" and ordered the signer to return to court on May 16, 2014 for triage and May 19, 2014 for trial. The court order contained a boldface admonition that failure to appear at court as ordered may result in new criminal charges, an arrest warrant, forfeiture of bail, and rescheduling of the trial. SE 5.

Exhibit 6 was a certified copy of a court order directing the clerk to issue a bench warrant for the defendant's failure to appear at triage. The court order was filed May 16, 2014 and the caption contained the name Calixto Rivera, case number, and listed a date of birth. SE 6.

Based on the above evidence, a jury found Rivera guilty. CP 137–39; RP 190. Rivera was sentenced to concurrent prison sentences of 58 months on the bail jumping convictions and 29 months on the second degree possession of stolen property conviction. CP 145.

The court imposed discretionary costs of \$1,160¹ and mandatory costs of \$800², for a total Legal Financial Obligation (“LFO”) of \$1,960. The court made a finding that “the defendant has the means to pay for the costs of incarceration” and imposed costs of incarceration, which it capped at \$250. The court made an additional finding that “the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant” and ordered the defendant to pay “such medical costs as assessed by the Clerk.” CP 146. The Judgment and Sentence contained the following language:

¶ 2.7 **Financial Ability.** The court has considered the total amount owing, defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753 [*sic*].

CP 72.

¹ \$250 jury fee (RCW 36.18.016 and 10.46.190), \$10 sheriff service fees, \$300 warrant fee, and \$600 court-appointed attorney recoupment. CP 146.

The Court did not inquire into Rivera's financial resources or consider the burden payment of LFOs would impose on him. RP 208–10. The Court ordered Rivera to pay minimum monthly payments in an amount and on a schedule to be determined by the Yakima County Clerk, with any remaining balance to be paid within six or nine months of his release. CP 147 at paragraphs 4.D.4 and 4.D.5.

This appeal followed. CP 153. The court found Rivera indigent for this appeal. CP 151–52.

C. ARGUMENT

1. The convictions for bail jumping must be dismissed because there was insufficient evidence Rivera had knowledge of the requirement of a subsequent personal appearance before the court.³

The State bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction must be reversed where, viewing the evidence in the light most favorable to the State, no rational trier of fact could find all elements of the charged crime

² \$500 crime penalty assessment, \$200 criminal filing fee, and \$100 DNA collection fee. CP 146.

beyond a reasonable doubt. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). When the prosecution fails to present sufficient evidence on any essential element, reversal and dismissal of the conviction is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

This court should hold the State to its burden and determine that the State did not present sufficient evidence to sustain the bail jumping convictions because no evidence showed Rivera had knowledge of the requirement of a subsequent personal appearance before the court. The bail jumping to-convict instructions required each of the following elements to be proved beyond a reasonable doubt:

- (1) That on or about [February 7, 2014*] [May 16, 2014**], the defendant failed to appear before a court;
- (2) That the defendant was charged with Second Degree Possession of Stolen Property;
- (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and
- (4) That the acts occurred in the State of Washington.

CP 132 (*Instruction 10, Count 2), 133 (**Instruction 11, Count 3); accord RCW 9A.76.170(1); *State v. Malvern*, 110 Wn. App. 811, 813, 43 P.3d 533 (2002); *State v. James*, 104 Wn. App. 25, 36, 15 P.3d 1041 (2000); *State v.*

³ Assignment of error 1.

Pope, 100 Wn. App. 624, 627, 999 P.2d 51, rev. denied, 141 Wn.2d 1018 (2000).

In light of these jury instructions, the State was required to prove Rivera had knowledge of the requirement of a subsequent personal appearance before the court. *Hickman*, 135 Wn.2d at 102 (Jury instructions to which neither party objects become the law of the case and delineate the State's proof requirements).

In its failed attempt to meet its burden, the State admitted into evidence certified copies of various court pleadings and scheduling orders. SE 2–6. Even when viewed in the light most favorable to the State, no rational finder of fact could have found this evidence established that Rivera had knowledge of required subsequent personal appearances before the court. *State v. Huber*⁴ and *State v. Santos*⁵ are instructive in this regard.

In Huber's case for bail jumping, the State admitted four certified documents: (1) the information charging the defendant with violation of a protection order and witness tampering, (2) a written court order requiring the defendant to appear on a specific date, (3) the clerk's minutes showing the defendant did not appear on that date, and (4) a bench warrant for the defendant's arrest. *Huber*, 129 Wn. App. at 500–01. The State did not call

⁴ *State v. Huber*, 129 Wn. App. 499, 119 P.3d 388 (2005).

⁵ *State v. Santos*, 163 Wn. App. 780, 260 P.3d 982 (2011).

any witnesses or otherwise show that the exhibits related to the Huber who was present in court. *Huber*, 129 Wn. App. at 501.

On appeal, the court reversed Huber's conviction, concluding the documentary evidence was insufficient to show Huber was the person named in the documents. *Huber*, 129 Wn. App. at 504. Although one of the warrants contained a general physical description, the Court of Appeals found this insufficient, not because the description was vague but because the record did not reflect any comparison between that description and the person before the court. *Huber*, 129 Wn. App. at 503, n. 18. The Court noted that to sustain its burden of proof, the State must do more than provide documentary evidence; it must also prove the person named in the documents is the person on trial. *Huber*, 129 Wn. App. at 502.

In *Santos*, a felony driving under the influence case, the State was required to prove four or more prior offenses. To meet its burden the State presented judgments that identified the defendant named in those judgments as Santos. *Santos*, 163 Wn. App. at 782- 83. The court found the State did not produce sufficient evidence showing Santos was the same person named in the judgments. The *Santos* court ruled, "None of the information in the State's exhibits can be compared to Mr. Santos, the defendant in this case, by simple observation to determine whether he is the person named in the judgments." *Santos*, 163 Wn. App. at 785. "The State produced no evidence

of Mr. Santos's address, birth date, or criminal history" nor did it produce "photographs of 'Santos, Heraquio' or 'Heraquio Santos' to compare to Mr. Santos, who appeared in person at trial." *Id.*

Similarly, here no witness identified Rivera as the same "defendant" who signed any of the documents. No expert testified that the "defendant" signature on the exhibits matched Rivera's signature. Thus, none of these documents showed Rivera was the same person who signed the order setting case schedule on January 24, 2014, or agreed order of continuance on April 18, 2014, which provided notice of the requirement of a subsequent personal appearance before the court.

During closing argument the State was unable to point to any evidence that Rivera had knowledge of the required subsequent personal appearances before the court. Instead, the State argued the documents proved Rivera knew he had to appear in court because a signature "acknowledges receipt" on SE 3 and 5. RP 169–72. But, none of the "defendant" signatures in the State's exhibits could be compared to Rivera by simple observation to determine whether he was in fact the same person who signed the documents.

In returning a guilty verdict on the bail jumping counts, the jury was left with no choice but to presume, as the State had asked, that Rivera had actually signed the court documents. But this presumption was not

supported by the evidence. Outside of pure conjecture, there was not sufficient evidence to rationally conclude that Rivera had actually signed the documents which provided knowledge of required subsequent personal appearances before the court.

Because the State failed to meet its burden of proof, this court must reverse the bail jumping convictions and remand for dismissal of the charges with prejudice. *Hickman*, 135 Wn.2d at 99.

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into Mr. Rivera's current and future ability to pay before imposing LFOs including costs of incarceration and medical care.⁶

a. *This court should exercise its discretion and accept review.*

Rivera did not make this argument below. However, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 683 (2015). In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because “[n]ational and local cries for reform of broken LFO systems demand ...

⁶ Assignment of error 2.

reach[ing] the merits” *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts’ failures to consider each defendant’s ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this court. Indigent defendants who are saddled with wrongly imposed LFOs have many “reentry difficulties” that ultimately work against the State’s interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is “the state cannot collect money from defendants who cannot pay.” *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court’s remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this court has the immediate opportunity to expedite reform of the broken LFO system. This court should embrace its obligation to uphold and enforce the Washington Supreme Court’s decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant’s current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—“to stand by the thing decided”—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Rivera’s case regardless of his failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) (“Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.”) (Citations omitted).

The sentencing court’s signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is

wholly inadequate to meet the requirement. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685. Rivera's sentencing occurred before the *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect future trial courts to make the appropriate inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Rivera respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this court should reach the unpreserved error and accept review. *Blazina*, 182 Wn.2d 827, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. *Substantive argument.*

There is insufficient evidence to support the trial court's finding that Rivera has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47–48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915–16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington

Constitution, Article 1, § 12 and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 9.94A.760(2)⁷ and RCW 70.48.130⁸ provide, respectively, that if the

⁷ In pertinent part, RCW 9.94A.760, Legal Financial Obligations, provides:

(2) If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration, the court may require the offender to pay for the cost of incarceration at a rate of fifty dollars per day of incarceration, if incarcerated in a prison, or the court may require the offender to pay the actual cost of incarceration per day of incarceration, if incarcerated in a county jail. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision shall take precedence over the payment of the cost of incarceration ordered by the court. All funds recovered from offenders for the cost of incarceration in the county jail shall be remitted to the county and the costs of incarceration in a prison shall be remitted to the department.

⁸ In pertinent part, RCW 70.48.130, Emergency or necessary medical and health care for confined persons--Reimbursement procedures--Conditions—Limitations, provides:

...

(4) As part of the screening process upon booking or preparation of an inmate into jail, general information concerning the inmate's ability to pay for medical care shall be identified, including insurance or other medical benefits or resources to which an inmate is entitled. The inmate may also be evaluated for medicaid eligibility and, if deemed potentially eligible, enrolled in medicaid. This information shall be made available to the authority, the governing unit, and any provider of health care services. To the extent that federal law allows, a jail or the jail's designee is authorized to act on behalf of a confined person for purposes of applying for medicaid.

(5) The governing unit or provider may obtain reimbursement from the confined person for the cost of health care services not provided under chapter

court determines an offender has the means to do so, it may require the offender to pay for the cost of incarceration and/or medical care. RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685. “This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a

74.09 RCW, including reimbursement from any insurance program or from other medical benefit programs available to the confined person. Nothing in this chapter precludes civil or criminal remedies to recover the costs of medical care provided jail inmates or paid for on behalf of inmates by the governing unit. As part of a judgment and sentence, the courts are authorized to order defendants to repay all or part of the medical costs incurred by the governing unit or provider during confinement.

(6) To the extent that a confined person is unable to be financially responsible for medical care and is ineligible for the authority's medical care programs under chapter 74.09 RCW, or for coverage from private sources, and in the absence of an interlocal agreement or other contracts to the contrary, the governing unit may obtain reimbursement for the cost of such medical services from the unit of government whose law enforcement officers initiated the charges on which the person is being held in the jail: PROVIDED, That reimbursement for the cost of such services shall be by the state for state prisoners being held in a jail who are accused of either escaping from a state facility or of committing an offense in a state facility.

defendant's ability to pay.” *Id.* The remedy for a trial court’s failure to make this inquiry is remand for a new sentencing hearing. *Id.*

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id.* This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id.* (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW

10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id.* at 915–16. The individualized inquiry must be made on the record. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685.

Here, the judgment and sentence contains a boilerplate statement that the trial court has “considered” Rivera’s present or future ability to pay legal financial obligations. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ”

Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in the judgment and sentence, the record does not show the trial court took into account Rivera's financial resources and the potential burden of imposing LFOs on him. RP 208–10. The court was generally aware Rivera “went to college for being a custodian”, “manage[s his] own business” and has his G.E.D. The court was further aware Rivera did not have a job, had a fiancée and three young children to help support, and may have had residual LFOs from his extensive criminal history of mostly property and drug crimes. RP 203, 208–09. Knowing these facts and despite finding him indigent for this appeal, the Court failed to “conduct on the record an individualized inquiry into [Rivera’s] current and future ability to pay in light of such nonexclusive factors as the circumstances of his incarceration and his other debts, including nondiscretionary legal financial obligations, and the factors for determining indigency status under CR 34” as is required by *Blazina*. Washington Supreme Court orders dated August 5, 2015, pp. 1–2, in *State v. Mickle* (90650-5/31629-7-III) and *State v. Bolton* (90550-9/31572-6-III) (granting Petitions for Review and remanding cases

to the superior court “to reconsider the imposition of the discretionary legal financial obligations consistent with the requirements” of *Blazina*.).

The boilerplate finding that Rivera has the present or future ability to pay LFOs is not supported by the record. The matter should be remanded for the sentencing court to make an individualized inquiry into Rivera’s current and future ability to pay before imposing LFOs including costs of incarceration and medical care. *Blazina*, 344 P.3d at 685.

3. The trial court abused its discretion in arbitrarily ordering Rivera to pay total costs and assessments within six (6) or nine (9) months after his release as a condition of his sentence without considering his ability to realistically pay that amount within the ordered timeframe.⁹

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Ryan v. State*, 112 Wn .App. 896, 899, 51 P.3d 175 (2002) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the

⁹ Assignment of error 3.

requirements of the correct standard. *Ryan*, 112 Wn. App. at 899–900, citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

The order requiring Rivera to pay costs and assessments within six months and “all other fees” within nine months after his release is preprinted in paragraph 4.D.7 of the judgment and sentence under the general heading, “Financial Obligations.” CP 146. Implicit in the court’s order is an implied finding that Rivera has the ability to pay within the six or nine month timeframe. No evidence was presented that Rivera had or will have the means to pay the balance of the LFOs within six or nine months following his release. There is also no statutory provision or necessity for requiring payment within this timeframe. Under RCW 9.94A.760(4), the court retains jurisdiction over an offender, for purposes of the offender’s compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime.

Hence, this six or nine month timeframe is merely a local Yakima County provision destined to produce probation violations, resulting in further sanctions when offenders are unable to pay their legal financial obligations in full after so short a time period. In order to comply with this

order¹⁰ Rivera would have to pay \$326.66 per month (for 6 months) or \$217.77 per month (for 9 months) after his release. This is not a realistic monthly payment that a person who is indigent going into prison could afford immediately upon his release. The six or nine month timeframe is completely arbitrary and does not take into account all debts owed by Rivera or his present or future financial resources.

The trial court's order is unsupported by evidence Rivera has the ability to pay the amount owed within the six or nine month timeframe or any finding to that effect. Since there was no oral or written finding and because there was no evidence to support the order, the order is based on untenable grounds. The trial court abused its discretion and this sentencing condition should be stricken.

4. 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.¹¹

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV; Wash. Const. art. 1, § 3. "The due

¹⁰ This calculation is based on the bare LFO balance of \$1,960 set forth in the Judgment and Sentence. CP 146. It does not include any deduction for minimal possible payments during incarceration or the addition of costs of incarceration and/or medical care plus accrued statutory interest from the date of sentencing.

process clause of the Fourteenth Amendment confers both procedural and substantive protections.” *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Id.* at 218–19. It requires that “deprivations of life, liberty, or property be substantively reasonable;” in other words, such deprivations are constitutionally infirm if not “supported by some legitimate justification.” *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52–53, 309 P.3d 1221 (2013) (citing Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. *Nielsen*, 177 Wn. App. at 53–54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. *Id.* Although the burden on the State is lighter under this standard, the standard is not meaningless. The United States Supreme Court has cautioned the rational basis test “is not a toothless one.” *Mathews v. DeCastro*, 429 U.S. 181,

¹¹ Assignment of error 4.

185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, “the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional.” *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); *Nielsen*, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. *Id.*

Here, the statute mandates all felony offenders pay the DNA-collection fee. RCW 43.43.7541¹². 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.

¹² RCW 43.43.7541 provides:

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

It is unreasonable to require sentencing courts to impose the DNA-collection fee upon all felony defendants regardless of whether they have the ability or likely future ability to pay. The blanket requirement does not further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d 827, 344 P.3d at 684. When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the State to mandate that trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue the \$100 DNA collection-fee is such a small amount that most defendants would likely be able to pay. The problem with this argument, however, is this fee does not stand alone.

The Legislature expressly directs that the fee is "payable by the offender after payment of all other legal financial obligations included in the sentence." RCW 43.43.7541. Thus, the fee is paid only after restitution, the victim's compensation assessment, and all other LFOs have been satisfied. As such, the statute makes this the least likely fee to be paid by an indigent defendant.

fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

Additionally, the defendant will be saddled with a 12% rate on his unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. The imposition of mounting debt upon people who cannot pay actually works against another important State interest – reducing recidivism. See, *Blazina*, 182 Wn.2d 827, 344 P.3d at 683–84 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA-collection fee does not rationally relate to the State’s interest in funding the collection, testing, and retention of an individual defendant’s DNA. RCW 43.43.7541 violates substantive due process as applied. Based on Rivera’s indigent status, the order to pay the \$100 DNA collection fee should be vacated.

5. RCW 43.43.7541 violates equal protection because it irrationally requires some defendants to pay a DNA-collection fee multiple times, while others need pay only once.¹³

The equal protection clauses of the state and federal constitutions

¹³ Assignment of Error 4.

require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const. amend. XIV; Const., art. I, § 12; *Bush v. Gore*, 531 U.S. 98, 104–05, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000); *State v. Thorne*, 129 Wn.2d 736, 770–71, 921 P.2d 514 (1994). A valid law administered in a manner that unjustly discriminates between similarly situated persons, violates equal protection. *State v. Gaines*, 121 Wn. App. 687, 704, 90 P.3d 1095 (2004) (citations omitted).

Before an equal protection analysis may be applied, a defendant must establish he is similarly situated with other affected persons. *Gaines*, 121 Wn. App. at 704. In this case, the relevant group is all defendants subject to the mandatory DNA-collection fee under RCW 43.43.7541. Having been convicted of a felony, Rivera is similarly situated to other affected persons within this affected group. See RCW 43.43.754, .7541.

On review, where neither a suspect/semi-suspect class nor a fundamental right is at issue, a rational basis analysis is used to evaluate the validity of the differential treatment. *State v. Bryan*, 145 Wn. App. 353, 358, 185 P.3d 1230 (2008). That standard applies here.

Under rational basis scrutiny, a legislative enactment that, in effect, creates different classes will survive an equal protection challenge only if:

(1) there are reasonable grounds to distinguish between different classes of affected individuals; and (2) the classification has a rational relationship to the proper purpose of the legislation. *DeYoung*, 136 Wn.2d at 144. Where a statute fails to meet these standards, it must be struck down as unconstitutional. *Id.*

The Legislature has declared that collection of DNA samples and their retention in a DNA database are important tools in “assist[ing] federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons.” Laws of 2008 c 97, Preamble. The DNA profile from a convicted offender’s biological sample is entered into the Washington State Patrol’s DNA identification system (database) and retained until expunged or no longer qualified to be retained. WAC 446-75-010; WAC 446-75-060. Every sentence imposed for a felony crime after June 12, 2008, must include a mandatory fee of \$100. RCW 43.43.754, .7541 (Laws of 2008, c 97 § 3 (eff. June 12, 2008)).

The purpose of RCW 43.43.754 is to fund the collection, analysis, and retention of an individual felony offender’s identifying DNA profile for inclusion in a database of DNA records. Once a defendant’s DNA is

collected, tested, and entered into the database, subsequent collections are unnecessary. This is because DNA – for identification purposes – does not change. The statute itself recognizes this, expressly stating it is unnecessary to collect more than one sample. RCW 43.43.754(2). There is no further biological sample to collect with respect to defendants who have already had their DNA profiles entered into the database.

Here, RCW 43.43.7541 does not apply equally to all felony defendants because those who are sentenced more than once have to pay the fee multiple times. This classification is unreasonable because multiple payments are not rationally related to the legitimate purpose of the law, which is to fund the collection, analysis, and retention of an individual felony offender's identifying DNA profile.

RCW 43.43.7541 discriminates against felony defendants who have previously been sentenced by requiring them to pay multiple DNA collection fees, while other felony defendants need only pay one DNA collection fee. Rivera was presumably ordered to pay \$100 DNA fees at the time of his prior felony sentencings occurring after June 12, 2008, as well as in the present sentencing. CP 144. The mandatory requirement that the fee be collected from such defendants upon each sentencing is not rationally related to the purpose of the statute. As such, RCW 43.43.7541

violates equal protection. The DNA-collection fee order must be vacated.

6. The trial court abused its discretion when it ordered Rivera to submit to another collection of his DNA.¹⁴

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 at 26. “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).

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

It is manifestly unreasonable for a sentencing court to order a defendant’s DNA to be collected pursuant to RCW 43.43.754(1) where the

¹⁴ Assignment of Error 5.

record discloses that the defendant's DNA has already been collected. The Legislature recognizes that collecting more than one DNA sample from an individual is unnecessary. It is also a waste of judicial, state, and local law enforcement resources when sentencing courts issue duplicative DNA collection orders.

Here, Rivera's DNA was previously collected pursuant to the statute. He had four prior felony convictions sentenced in 2002 or later. CP 144. These prior convictions each required collection of a biological sample for purposes of DNA identification analysis pursuant to the current statute. RCW 43.43.754(6)(a); Laws of 2008 c 97 § 2, eff. June 12, 2008; Laws of 2002 c 289 § 2, eff. July 1, 2002. Since the prior convictions occurred in 2002 or later, Rivera was assessed \$100 DNA collection fees at the time of these prior sentencings. There is no evidence suggesting his DNA had not been collected as ordered in the prior judgments and sentences and placed in the DNA database. Rivera fell within the parameters of RCW 43.43.754(2) and a subsequent DNA sample was not required. Under these circumstances, it was manifestly unreasonable for the sentencing court to order him to submit to another collection of his DNA. CP 146. The collection order must be reversed.

D. CONCLUSION

For the reasons stated, the convictions for bail jumping should be reversed and remanded for dismissal of those charges with prejudice. Alternatively the case should be remanded to make an individualized inquiry into Rivera's current and future ability to pay before imposing LFOs including costs of incarceration and medical care. In addition, the orders to pay the \$100 DNA collection fee and to submit an additional biological sample for DNA identification should be vacated.

Respectfully submitted on September 15, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 15, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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