

No. 33044-3-III

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

FILED
AUG 17, 2015
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

TERRAL RAY ANTHONY LEWIS,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable John O. Cooney, Superior Court Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it ordered appellant 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 trial court erred in imposing improper conditions of community custody.

Issues Pertaining to Assignments of Error

1. 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?

2. 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?

3. 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?

4. Does a court violate due process and exceed its statutory authority by imposing conditions of community custody that are improper, not crime-related or unconstitutionally vague?

B. STATEMENT OF THE CASE

Terral Ray Anthony Lewis was convicted by a jury of two counts of first degree robbery and one count of possession of a controlled substance—methamphetamine. CP 72–74. He had seven prior felony convictions sentenced in 2002 or later. CP 108. The court ordered Mr. Lewis to provide a biological sample for DNA analysis and pay a \$100 DNA collection fee. CP 114–15. Mr. Lewis was indigent for purposes of the proceedings below¹ and remains indigent on appeal. CP 123–24.

Among the conditions of sentence, the court ordered Mr. Lewis not to “wear clothing, insignia, medallions, etc., which are indicative of gang lifestyle” and not to “obtain any new or additional tattoos indicative of gang lifestyle”. CP 113. The court prohibited Mr. Lewis from having “any association or contact with known felons *or gang members or their associates*”. CP 112 (emphasis added).

¹ See Spokane County Superior Court Cause No. 14-1-01441-5, Docket #11, Notice of Appearance filed May 5, 2014, by Kyle Zeller, Spokane County Assistant Public Defender.

The court also imposed a condition of sentence requiring Mr. Lewis not to use or possess “Marijuana and/or products containing Tetrahydrocannabi[nol] (THC).” CP 112. In boilerplate language, the court also ordered Mr. Lewis to “(4) not consume controlled substances except pursuant to lawfully issued prescriptions” and “(5) not unlawfully possess controlled substances while on community custody.” CP 111.

This appeal followed. CP 121–22.

C. ARGUMENT

1. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory \$100 DNA collection fee.²

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. I, § 3. “The due 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

² Assignment of Error 1.

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, 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 43.43.7541³. 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.

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.” *State v. Blazina*, 182

³ 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 fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.”

Wn.2d 827, 344 P.3d 680, 684 (2015). When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue the \$100 DNA collection fee is of 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.

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*, 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. Thus RCW 43.43.7541 violates substantive due process as applied. Based on Mr. Lewis' indigent status, the order to pay the \$100 DNA collection fee should be vacated.

2. 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.⁴

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const. amend. XIV; Wash. 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).

⁴ Assignment of Error 1.

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, Mr. Lewis 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. Mr. Lewis 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 114. 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.

3. The trial court abused its discretion when it ordered Mr. Lewis to submit to another collection of his DNA.⁵

A trial court abuses its discretion if its decision is “manifestly unreasonable,” based on “untenable grounds,” or made for “untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “A decision is based on untenable grounds or made for untenable

⁵ Assignment of Error 2.

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 example “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 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, Mr. Lewis’ DNA was previously collected pursuant to the statute. He had seven prior felony convictions sentenced in 2002 or later. CP 108. 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, Mr. Lewis 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. Mr. Lewis 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 115. The collection order must be reversed.

4. The court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that are improper, not crime-related, or are unconstitutionally vague.⁶

A defendant may challenge an illegal or erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court had statutory authority to impose community custody conditions is reviewed de novo. *State v. Armendariz*, 160 Wn.2d

⁶ Assignment of Error 3.

106, 110, 156 P.3d 201 (2007). “As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). A “[c]rime-related prohibition” is defined, in relevant part, as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10); see also *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). If the condition was statutorily authorized, crime-related prohibitions are reviewed for abuse of discretion. *Armendariz*, 160 Wn.2d at 110 (citing *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001)). But conditions that do not reasonably relate to the circumstances of the crime, the risk of reoffense, or public safety are unlawful, unless explicitly permitted by statute. See *Jones*, 118 Wn. App. at 207–08.

a. Marijuana. Unless waived by the court, a court shall order an offender to “refrain from possessing or consuming controlled substances *except pursuant to lawfully issued prescriptions*.” RCW 9.94A.703(2)(c) (emphasis added). Marijuana and its tetrahydrocannabinols (THC) are Schedule I controlled substances. RCW 69.50.204(c)(22); *Seeley v. State*, 132 Wn. 2d 776, 784, 940 P.2d 604 (1997).

Here, the offending condition prohibits Mr. Lewis from “us[ing] or possess[ing] [] Marijuana and/or products containing Tetrahydrocannabi[nol] (THC).” CP 112. The exception required by the legislature, “except pursuant to lawfully issued prescriptions”, is missing. The blanket prohibition exceeds the sentencing court’s authority. The absolute prohibition also conflicts with boilerplate language purporting to recognize the legislative exception:

- [T]he defendant shall: ... (4) not consume controlled substances except pursuant to lawfully issued prescriptions;
- (5) not unlawfully possess controlled substances while on community custody.

CP 742. The offending condition must be modified to comply with the authorizing statute.

b. Gang-related conditions. The prohibitions against Mr. Lewis’ association or contact with “gang members or their associates” and wearing apparel or obtaining tattoos “indicative of gang lifestyle” are not related to the crimes of conviction. There is no evidence in the record that the robberies or drug possession involved gang-related circumstances. The court exceeded its statutory authority in imposing the conditions and they must be stricken. See O’Cain, 144 Wn. App. at 775 (stating the remedy for an erroneous community custody condition was to strike it on remand).

Alternatively, the challenged conditions are unconstitutionally vague and impinge on protected Mr. Lewis' First Amendment rights. The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. U.S. Const. amend. 14, Const. art. I, § 3; *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 753.

Vagueness challenges are sufficiently ripe for review even if the conditions of community custody do not yet apply because the defendant is still in prison, since upon his release the conditions will immediately restrict him. *Bahl*, 164 Wn.2d at 751–52. The challenge is also ripe because it is purely legal, i.e., whether the condition violates due process vagueness standards. *Id.* at 752. See also *State v. Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (pre-enforcement challenges to community custody conditions are ripe for review when the issue raised is primarily legal, further factual development is not required, and the challenged action is final). In *Valencia*, the petitioner's vagueness

challenge to their community custody condition prohibiting possession or use of “any paraphernalia that can be used for the ingestion or processing of controlled substances” was held to be ripe for review. *Valencia*, 169 Wn.2d at 786–91. Here, Mr. Lewis similarly challenges the gang-related conditions as unconstitutionally vague. The issue is ripe for review and should be considered on its merits.

“[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct.” *Bahl*, 164 Wn.2d at 752. This assures that ordinary people can understand what is and is not allowed, and are protected against arbitrary enforcement of the laws. *Id.* at 752–53 (quoting *Douglass*, 115 Wn.2d at 178 (citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983))).

Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. *Bahl*, 164 Wn.2d at 753, 193 P.3d 678. If the condition is unconstitutionally vague, it is manifestly unreasonable. *Valencia*, 169 Wn.2d at 793 (citing *Bahl*, 164 Wn.2d at 753).

Here, the offending prohibitions are:

- not to have “any association or contact with . . . gang members or their associates
- not to “wear clothing, insignia, medallions, etc. which are indicative of gang lifestyle”
- not to “obtain any new or additional tattoos indicative of gang lifestyle”

The terms “gang members or their associates” and apparel or body art that may be “indicative of gang lifestyle” are not defined. The conditions are no more acceptable from a vagueness standpoint than the conditions found vague in *Bahl*, which prohibited the possession of or access to pornography. As in *Bahl*, the vague scope of proscribed conduct fails to provide Mr. Lewis with fair notice of what he can and cannot do.

Moreover, the breadth of potential violations under these conditions offends the second prong of the vagueness test, rendering the conditions unconstitutionally vague. Because the conditions might potentially encompass a wide range of everyday conduct, they “‘do[] not provide ascertainable standards of guilt to protect against arbitrary enforcement.’” *Bahl*, 164 Wn.2d at 753 (quoting *Kolender*, 461 U.S. at 357, 103 S.Ct. 1855). Conditions that leave so much to the discretion of individual community corrections officers are unconstitutionally vague.

Other jurisdictions considering vagueness challenges to similar restrictions involving gang clothing have required specificity. See e.g. *United States v. Soltero*, 510 F.3d 858, 865–86 (9th Cir.2007) (condition forbidding the defendant from wearing, using, displaying or possessing apparel connoting affiliation upheld because it specifically referenced the Delhi gang and district court was entitled to presume the defendant—who had admitted to being a member of the gang—was familiar with the gang's paraphernalia); *United States v. Johnson*, 626 F.3d 1085, 1091 (9th Cir. 2010) (upholding release condition proscribing wearing clothing that “ ‘evidences affiliation’ with the Rollin' 30's gang”).

Specificity has also been required regarding association with gang members. See e.g. *United States v. Vega*, 545 F.3d 743, 749–50 (9th Cir.2008) (upholding a release condition prohibiting the defendant from associating “with any member of any criminal street gang as directed by the Probation Officer, specifically, any member of the Harpys street gang”); *Soltero*, 510 F.3d at 866–67 (upholding a condition forbidding the defendant from associating “with any known member of any criminal street gang ..., specifically, any known member of the Delhi street gang”). Unlike in the above cases, the restrictions in Mr. Lewis’ case lack specificity and are therefore impermissibly vague.

In *United States v. Johnson*, the court concluded the restriction against association with “persons who associate with” gang members was impermissibly vague.

There is a considerable difference, however, between forbidding a defendant from associating with gang members and precluding him from associating with *persons who associate with* gang members. The latter proscription is impermissibly vague and entails a deprivation of liberty that is greater than necessary to achieve the goal of preventing Johnson from reverting to his previous criminal lifestyle. As Johnson points out, this condition sweeps too broadly because it encompasses not only those who are involved in the gang's criminal activities, but also those who may have only a social connection to an individual gang member. The provision could forbid Johnson from associating with, for example, the mother or father, sister or brother, aunt or uncle, employer, minister or friend of a Rollin' 30's gang member. It could even preclude Johnson from meeting with his probation officer.

Johnson, 626 F.3d at 1091. As in *Johnson*, the condition prohibiting Mr. Lewis' contact with the “associates” of gang members is impermissibly vague.

Where First Amendment rights are involved, a greater degree of specificity may be demanded. *Bahl*, 164 Wn.2d at 757 (freedom of speech); see also *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (gang affiliation is protected by the First Amendment right of association). Conditions that place limitations upon fundamental rights are permissible only if imposed sensitively. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993); *United States v. Consuelo-Gonzalez*, 521 F.2d

259, 265 (9th Cir.1975). A defendant's freedom of association may be restricted only if reasonably necessary to accomplish the essential needs of the state and public order. *Malone v. United States*, 502 F.2d 554, 556 (9th Cir.1974), *cert. denied*, 419 U.S. 1124, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975).

Choice of wearing apparel, tattoos and friends or acquaintances involve fundamental freedoms that should not lightly be abrogated. The boilerplate constraints imposed upon Mr. Lewis are unconstitutionally vague. Because the conditions are not crime-related and because they are manifestly unreasonable, the offending conditions should be reversed.

Bahl, 164 Wn.2d at 753

D. CONCLUSION

For the reasons stated, the matter should be remanded for resentencing to vacate the orders to pay the \$100 DNA collection fee and submit an additional biological sample for DNA identification, to modify the marijuana prohibition, and to remove the gang-related conditions.

Respectfully submitted on August 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 August 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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