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Court of Appeals  
Division III  
State of Washington

33044-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

TERRAL RAY ANTHONY LEWIS, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S 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, namely, a prohibition on the use of marijuana and gang-related restrictions.

## **II. ISSUES PRESENTED**

1. Did the defendant fail to preserve any legal financial obligation (LFO) or community custody condition issues for appeal; are the LFOs imposed in his case mandatory financial obligations exempt from the inquiry required for discretionary LFOs under RCW 10.01.160(3)?
2. Does the \$100 DNA fee imposition statute, RCW 43.43.7541, violate the due process clause?
3. Does RCW 43.43.7541 violate equal protection because a defendant may have to pay the fee each time he is sentenced?
4. Did the trial court abuse its discretion when it ordered the defendant to submit to a collection of his DNA with the proviso that the

order did not apply if the state patrol already has a sample of the defendant's DNA?

5. Did the trial court violate due process and exceed its statutory authority by imposing conditions of community custody including a prohibition on the use of marijuana and association with gang members?

### **III. STATEMENT OF FACTS**

Defendant was charged with two counts of first degree robbery and one count of possession of a controlled substance – methamphetamine, in Spokane superior court. CP 4-5; CP 16-17. Defendant was convicted by a jury as charged in the amended information on December 11, 2014. CP 72-74. On January 7, 2015, he was sentenced to a standard range sentence of 145 months on the two robberies and 24 months on the possession of a controlled substances charge. CP 105-120. The sentences were ordered to run concurrently. CP 111. Defendant was placed on community custody for 18 months for the robberies and 12 months for the possession of a controlled substance. CP 111. The court found that a chemical dependency contributed to the offenses and imposed, among other terms and conditions, a requirement that the defendant complete a substance abuse evaluation and seek treatment as recommended by that evaluation and not use any illegal controlled substances, to include

marijuana as it is “still illegal under federal law.” CP 107; CP 111-113; 1/7/15 RP 9-10 (Sentencing Hearing). The court imposed a \$100 DNA fee as part of the sentence, listing RCW 43.43.7541 as the statutory authority for the fee. Including the DNA fee, the mandatory fines imposed totaled \$800. CP 113-114. The defendant stated that he would not know how much he could pay until his release, but speculated he could pay twenty or thirty dollars per month. 1/7/15 RP 11. The court indicated Mr. Lewis could probably earn some type of income while in prison, and Mr. Lewis acknowledged that his court fees could be automatically deducted from his prison earnings. *Id.*

#### **IV. ARGUMENT**

A. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO); THE LFOS IMPOSED IN HIS CASE ARE MANDATORY FINANCIAL OBLIGATIONS, AND, THEREFORE, EXEMPT FROM INQUIRY UNDER RCW 10.01.160(3).

The defendant failed to object to the imposition of his LFOs. Therefore, he failed to preserve the matter for appeal. RAP 2.5. In its consideration of the issue in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court determined that the LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity. *Blazina*, 182 Wn.2d at 830. No constitutional issue is involved. 182 Wn.2d at 840

(Fairhurst, J. concurring in result). The statutory violation existing in *Blazina* applied to discretionary LFOs, not mandatory LFOs. However, the *Blazina* court exercised its discretion in favor of accepting review due to the nationwide importance of LFO issues and to provide guidance to our trial courts. *Id.* at 830. That guidance has been provided. *Blazina* was decided after the January 2015 sentencing in the instant case. There is no nationwide or statewide import to this present case, and review should not be granted where the defendant failed to object, and thereby give the trial court the ability to make further inquiry as to his ability to pay, if necessary. Statewide appellate procedural rules are of more import in the present case.

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

expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

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

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

*Strine*, 176 Wn.2d at 749-50.

Therefore, policy and RAP 2.5 favor declining review of this statutory,<sup>1</sup> non-constitutional LFO issue.

Secondly, the LFOs ordered are mandatory LFOs. CP 73-74. The \$500 crime victim assessment, \$100 DNA (deoxyribonucleic acid) collection fee, and \$200 criminal filing fee are mandatory legal financial obligations, each required irrespective of the defendant's ability to pay. *State v. Kuster*, 175 Wn. App. 420, 424-425, 306 P.3d 1022 (2013); *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Because the trial

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<sup>1</sup> Assuming the RCW 10.01.160(3) applied to mandatory fees.

court imposed only mandatory LFOs in Mr. Lewis' case, there is no error in the defendant's sentence.

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

The DNA fee imposition statute, RCW 43.43.7541, mandates the imposition of a fee of one hundred dollars in every felony sentence.<sup>2</sup> The defendant claims this statute violates the *substantive* due process clause. Appellant's Br. at 3-7. Defendant then argues an *equal protection violation* regarding an indigent defendant's inability to pay. Appellant's Br. at 7-10.

As to the first argument, that RCW 43.43.7541 violates substantive due process, the defendant sets forth the correct standard of review:

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<sup>2</sup> 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. (Emphasis added).

“Where a fundamental right is not at issue, as is the case here, the rational basis standard applies.” Appellant’s Br. at 4, citing *Nielsen v. Washington State Dep’t of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013). “To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. *Id.*” Appellant’s Br. at 4.

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

The DNA fee imposition statute is rationally related to a legitimate state interest. These fees help support the costs of the legislatively enacted DNA identification system, supporting state, federal and local criminal justice and law enforcement agencies by developing a multiuser databank that assists these agencies in their identification of individuals involved in

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<sup>3</sup> See also, *Parrish v. W. Coast Hotel Co.*, 185 Wash. 581, 597, 55 P.2d 1083 (1936) (statute must be unconstitutional “beyond question”), *aff’d*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937); *Nebbia v. New York*, 291 U.S. 502, 537–38, 54 S.Ct. 505, 78 L.Ed. 940 (1934) (every possible presumption is in favor of a statute's validity, and that although a court may hold views inconsistent with the wisdom of a law, it may not be annulled unless “palpably” in excess of legislative power); cited with approval, *Amunrud*, 158 Wn.2d at 215.

crimes and excluding individual who are subject to investigation and prosecution. *See*, RCW 43.43.753 (finding “that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are subject of investigations or prosecutions...”). The legislation is supported by a legitimate financial justification. As this court recently held in *State v. Thornton*, 188 Wn. App. 371, 374-375, 353 P.3d 642 (2015):

The language in RCW 43.43.7541 that “[e]very sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars” plainly and unambiguously provides that the \$100 DNA database fee is mandatory for all such sentences. *See State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 581, 183 P.2d 813 (1947) (word “must” is generally regarded as making a provision mandatory); *see also State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (DNA collection fee is mandated by RCW 43.43.7541). The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of RCW 43.43.754(1) and (2). The court thus properly imposed the DNA collection fee under RCW 43.43.7541 for Ms. Thornton’s felony drug conviction.

*Thornton*, 188 Wn. App. at 374-375.

Therefore, there is a rational basis for the legislation, and the imposition of the DNA fee does not offend substantive due process guarantees.

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

1. Defendant lacks standing to assert an Equal Protection claim

The defendant lacks standing to assert his equal protection claim - that the imposition of this mandatory fee upon defendants who cannot pay the fee violates equal protection. Defendant has not established that he has paid the fee before, but rather, speculates that because of his lengthy criminal history he must have been assessed and previously paid this fee. Appellant's Br. at 10. The general rule is that "[o]ne who is not adversely affected by a statute may not question its validity." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032 (1987), *as amended* 750 P.2d 254 (1988). This basic rule of standing "prohibits a litigant ... from asserting the legal rights of another." *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281, 937 P.2d 1082 (1997), citing *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994)). It also mandates that a party have a "real interest therein." *State ex rel. Gebhardt v. Superior Court*, 15 Wn.2d 673, 680, 131 P.2d 943 (1942).

Furthermore, the defendant has failed to establish he is unable to pay the \$100 fee. His allocution at sentencing demonstrates a desire to change his life through treatment. 1/7/15 RP 7-8. The court indicated that the defendant would likely be able to earn some income while in prison

and the defendant acknowledged that payments for his legal financial obligations would be automatically deducted from those earnings during his incarceration. 1/7/15 RP 11. Defendant has not established the “constitutional indigence” necessary to raise this equal protection claim. The analysis of what constitutes “constitutional indigence” was recently set forth by our State Supreme Court in *State v. Johnson*, 179 Wn.2d 534, 315 P.3d 1090, *as amended* (Mar. 13, 2014), *cert. denied*, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014):

Considering the totality of the circumstances, we hold that Johnson was not constitutionally indigent. While we do not question that the State may not punish an indigent defendant for the fact of his or her indigence, these constitutional considerations protect only the constitutionally indigent. Johnson had substantial assets in comparison to the \$260 fine the district court ordered him to pay. Requiring payment of the fine may have imposed a hardship on him, but not such a hardship that the constitution forbids it. *Lewis*, 97 Cal.Rptr. at 422 (the constitution does not require the trial court to allow a defendant the same standard of living that he had become accustomed). Johnson is not constitutionally indigent and lacks standing for his claim. We decline to reach it.

*Johnson*, 179 Wn.2d at 555.

Moreover, equal protection of the law under state and federal constitutions requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978); *Oestreich v. Department of Labor and Industries*, 64 Wn. App. 165, 170, 822 P.2d 1264 (1992).

Equal protection requires only similar treatment, not identical impact, on persons similarly situated. *Oestreich*, 64 Wn. App. at 170.

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

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

*Id.* at 555; *State v. Rutherford*, 63 Wn.2d 949, 953-54, 389 P.2d 895

(1964). As the Court in *Johnson* noted:

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

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

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

2. RCW 43.43.7541 does not violate equal protection because the fee is imposed at each sentencing for all qualifying offenses.

Defendant has not established that he paid or has been ordered to pay the DNA fee more than once. He speculates that a sample was already collected and submitted to the Washington State Patrol Crime Laboratory because of his convictions for numerous prior felony offenses. Appellant’s Br. at 11-12; CP 101-102. However, this speculation does not establish a fact. *See Bulzomi v. Dep’t of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994) (party seeking review has burden of perfecting record so reviewing court has all relevant evidence before it; insufficient record on appeal precludes review of the alleged errors).

Secondly, the defendant’s argument “misses the mark.” *Thornton*, 188 Wn. App. at 374-375. In *Thornton*, this Court noted that the statute requires the imposition of the DNA fee in every qualifying case:

The language in RCW 43.43.7541 that “[e]very sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars” plainly and unambiguously provides that the \$100 DNA database fee is mandatory for all such sentences. *See State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 581, 183 P.2d 813 (1947) (word “must” is generally regarded as making a provision mandatory); *see also State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (DNA collection fee is mandated by RCW 43.43.7541). The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of RCW 43.43.754(1) and (2). The court thus properly imposed the DNA collection fee under RCW 43.43.7541 for Ms. Thornton's felony drug conviction.

*Thornton*, 188 Wn. App. at 374-375.

All defendants sentenced for felonies receive the DNA assessment as part of their sentencing. Nothing is more equal than that.

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

The court’s order for defendant to submit a sample of his DNA pursuant to his felony conviction is included in the felony judgment and sentence, page 11, provision 4.4. CP 115. That “order” contains the

proviso that this DNA requirement “*does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense.*” This follows the statutory scheme set forth in RCW 43.43.754, where under subsection (1) “[a] biological sample must be collected for purposes of DNA identification analysis from [a qualifying offender],” then, under subsection (2), “[i]f 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.”<sup>4</sup>

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

E. THE COMMUNITY CUSTODY CONDITION THAT DEFENDANT NOT USE OR POSSESS MARIJUANA WAS APPROPRIATE AND REASONABLE.

This court reviews crime-related community custody conditions for an abuse of discretion. *State v. Sanchez Valencia*, 169 Wn.2d 782,

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<sup>4</sup> Again, this issue was laid to rest by this Court in its recent decision *Thornton*:

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

*Thornton*, 188 Wn. App. at 374-375.

791–92, 239 P.3d 1059 (2010). A court abuses its discretion when it adopts a view that no reasonable judge would take. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Stated differently, a trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The defendant argues the trial court exceeded its authority when imposing a community custody condition that the defendant not possess or consume controlled substances, including marijuana and or products containing Tetrahydrocannabinol (THC), while supervised on community custody.

During trial, law enforcement officers testified that Mr. Lewis exhibited the effects of having consumed a stimulant. Methamphetamine was found on his person at the time of his arrest for the robberies and defendant admitted to robbing the coffee shop so he could get some cash to get high. RP 64-65, 72-73, 82.

At sentencing, defendant's family members, as well as the defendant himself, presented letters to the court each indicating defendant had a substance abuse problem. CP 89-99. While none of these letters, nor the testimony during trial specifically mentioned marijuana as a problem for Mr. Lewis, the court found a chemical dependency contributed to the

offense, CP 107, and ordered the defendant into treatment<sup>5</sup> after his release from prison, CP 112.

Additionally, the order precluding marijuana possession is simply a clarification that marijuana is a controlled substance for the purposes of the sentencing, even though it is a controlled substance that is conditionally lawful in our state. There is no error here. Possession is prohibited because it is still a controlled substance federally,<sup>6</sup> and it cannot be used without a prescription.<sup>7</sup> There was no abuse of discretion here.

F. THE PROHIBITIONS ON GANG RELATED ACTIVITIES AND ASSOCIATIONS SHOULD BE STRICKEN BECAUSE THERE IS NO EVIDENCE IN THE RECORD THAT MR. LEWIS HAD ANY KNOWN GANG TIES.

After a diligent review of the record and the clerk's papers, the State agrees with Defendant that the record lacks any mention of the defendant having gang ties that would warrant gang restrictions as a part of defendant's supervision. Therefore, the State agrees, as to this issue

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<sup>5</sup> Generally, an individual engaged in a substance abuse treatment program is required to abstain from the use of *any* non-prescribed substance, including THC and alcohol, in order to be compliant with a treatment contract.

<sup>6</sup> The sentencing judge noted that the defendant's prohibition against using controlled substances included marijuana as "that's still illegal under federal law." 1/7/15 RP 10.

<sup>7</sup> The judgment and sentence contains language allowing for the possession of controlled substances pursuant to lawfully issued prescriptions. CP 111.

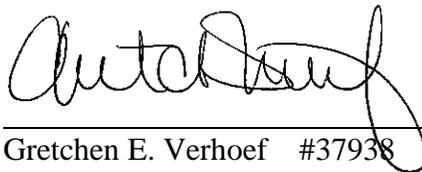
only, the matter should be remanded for the sentencing court to strike these gang-related prohibitions. Thus, this court need not reach the constitutional claims raised by the defendant as to this issue.

## V. CONCLUSION

For the reasons stated above, the defendant's LFO sentence requirements should be affirmed, as well as the prohibition on the possession or use of marijuana. However, the state agrees that this matter should be remanded to the sentencing court to strike only the gang-related restrictions from the judgment and sentence.

Dated this 14 day of October, 2015.

LAWRENCE H. HASKELL  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

TERRAL RAY ANTHONY LEWIS,

Appellant,

NO. 33044-3-III

CERTIFICATE OF MAILING

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I certify under penalty of perjury under the laws of the State of Washington, that on October 14, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Susan Marie Gasch  
gaschlaw@msn.com

10/14/2015

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)