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**Nov 17, 2015**  
Court of Appeals  
Division III  
State of Washington

33213-6-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

v.

DEBRA R. MONROE,

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 court miscalculated the offender score to find Ms. Monroe had 18 points, when the judgment and sentence indicates a score of 8.

2. The trial court failed to comply with RCW 9.94A.777 when it imposed the DNA fee without first determining whether Ms. Monroe's mental health conditions prevented her from paying the additional sums.

3. The court imposed legal financial obligations without properly inquiring into ability to pay where evidence was established that Ms. Monroe lacked the present and future ability to pay her financial obligations.

## **II. ISSUES PRESENTED**

1. Did the court miscalculate the offender score to find Ms. Monroe had nine or more points, where defendant stipulated to having more than nine points and signed an acknowledgement of her prior history, including two points for felony drug conspiracies?

2. Did the defendant fail to preserve any legal financial obligation (LFO) issue for appeal?

3. Did the defendant present any actual evidence of mental health conditions that would trigger RCW 9.94A.777, and establish an inability to pay the \$100 DNA fee?

4. Did the court err by ordering mandatory LFOs?

5. Does the DNA fee imposition statute violate the due process clause?

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

Defendant was convicted of three felony counts of second degree possession of stolen property in the Spokane County Superior Court. CP 59-60.

At sentencing the defendant's attorney stipulated that the offender score in the case was over nine points, stating, "[s]o at the very least, roughly, we do agree she's a nine plus." CP 244. Counsel for defendant also informed the trial court that he was waiving any argument regarding washout of the defendant's criminal history because he was arguing "more tha [the defendant] did get clean [from drugs] and stay[ed] clean for a couple – quite a few years."<sup>1</sup> RP 249. Defendant and her attorney both signed the understanding of defendant's criminal history. CP 57-58.

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<sup>1</sup> When asked by the trial court if this was his argument, the defendant's attorney stated "Yes, Your Honor. That's exactly what I was arguing." RP 249.

The defendant received a standard range sentence and \$600 in mandatory legal financial obligations.<sup>2</sup> CP 64, 66. The trial court waived the \$200 filing fee, stating:

I am actually going to waive the filing fee. Usually I don't give you a break, but I'm looking at your other costs and fines, and I honestly don't want you to steal or try to get your fines paid other than the \$500 victim assessment and the \$100 DNA. I'll set you at \$25 a month. I'll start it a year out. You've got quite a bit of credit for time.

RP 254.

#### **IV. ARGUMENT**

**A. THE DEFENDANT STIPULATED AND AGREED THAT THE OFFENDER SCORE WAS OVER NINE POINTS.**

The defendant belatedly claims that her criminal history score is incorrect because some of her prior points may have washed out. However, this claim does not reduce the offender score below the score of nine. The defendant additionally claims that her two prior convictions for conspiracy to possess a controlled substance were not felonies because “conspiracy to possess a class C felony is a gross misdemeanor. RCW 9A.28.040(3)(d).” Appellant’s Br., p. 11.

As to the first argument, regarding the washout of priors used in the offender score calculation, both the defendant and her attorney signed a separate criminal history document affirmatively acknowledging the

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<sup>2</sup> Crime Victim assessment, \$500; DNA fee, \$100. The \$200 filing fee was waived by the court. CP 66, RP 254.

existence of, and use of, the prior convictions. CP 57-58. Moreover, counsel for defendant affirmatively informed that trial court that they were stipulating that the defendant was a nine-plus, stating, “[s]o at the very least, roughly, we do agree she’s a nine plus.” CP 244. Therefore, because the defendant agreed to her criminal history, as did her attorney, the State was relieved of its burden to prove its existence. *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009). In *State v. Mendoza*, the court held that a defendant must affirmatively acknowledge the “*facts and information*” the State introduces at sentencing before the State is relieved of its duty to prove criminal history by a preponderance of the evidence. *Mendoza*, 165 Wn.2d at 928–29. When counsel affirmatively acknowledges a defendant’s criminal history, the State is entitled to rely on such acknowledgement. *State v. Bergstrom*, 162 Wn.2d 87, 96–98, 169 P.3d 816 (2007).

As to the second argument, that conspiracies to commit drug felonies are misdemeanors, the defendant improvidently relies on RCW 9A.28.040(3)(d) to support her claim. Appellant’s Br., p. 11-12.

That statute applies to conspiracies within Title 9A. The specific statute applied to conspiracies outside of Title 9A is RCW 9A.28.010:<sup>3</sup>

RCW 9A.28.010

Prosecutions based on felonies defined outside Title 9A  
RCW.

In any prosecution under this title for attempt, solicitation,  
or conspiracy to commit a felony defined by a statute of  
this state which is not in this title, unless otherwise  
provided:

(1) If the maximum sentence of imprisonment  
authorized by law upon conviction of such felony is  
twenty years or more, such felony shall be treated as  
a class A felony for purposes of this title;

(2) If the maximum sentence of imprisonment  
authorized by law upon conviction of such felony is  
eight years or more but less than twenty years, such  
felony shall be treated as a class B felony for  
purposes of this title;

**(3) If the maximum sentence of imprisonment  
authorized by law upon conviction of such felony  
is less than eight years, such felony shall be  
treated as a class C felony for purposes of this  
title.**

(Emphasis added.)

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<sup>3</sup> When a general and a specific statute proscribe identical conduct under identical circumstances, the specific statute applies. *State v. Austin*, 39 Wn. App. 109, 112, 692 P.2d 206 (1984), *aff'd*, 105 Wn.2d 511, 716 P.2d 875 (1986) (RCW 69.50.403, the specific attempt statute, controls over the general attempt statute, RCW 9A.28.020); *see also State v. Casarez-Gastelum*, 48 Wn. App. 112, 118, 738 P.2d 303 (1987) (RCW 69.50.407 is a specific statute relating to conspiracies involving controlled substances).

The above statute would apply to conspiracy to commit the felony of possession of a controlled substance, a class C felony, if no other provision existed in Title 69 relating to controlled substances. However, Title 69 does contain its own conspiracy statute, RCW 69.50.407:

#### CONSPIRACY

Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Defendant's suggestion that conspiracy to possess a controlled substance should be classified as a gross misdemeanor under RCW 9A.28.040(3)(d), which provides that a conspiracy to commit a class C felony is considered a gross misdemeanor, is not persuasive. RCW 9A.28.040(3)(d) clearly applies to offenses enumerated in Title 9A, but the conspiracy offense here was a violation of the Uniform Controlled Substances Act (UCSA), Title 69, and the specific statute, RCW 69.50.407, which creates the completed offense of a conspiracy violation of the UCSA, controls. *See, e.g. State v. Austin*, 105 Wn.2d 511, 516–17, 716 P.2d 875 (1986) (affirming *State v. Austin*, 39 Wn. App. 109, 692 P.2d 206 (1984)).

Defendant was sentenced to a standard range sentence and the defendant affirmatively waived any argument that she had an offender score less than nine points.

**B. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL.**

The defendant failed to object to the imposition of her LFOs. Therefore, she 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. And, as set forth later, the statutory violation existing in *Blazina* applied to discretionary LFOs, not mandatory LFOs. However, the *Blazina* court exercised its discretion in favor of accepting review due to the nationwide importance of LFO issues, and to provide guidance to our trial courts. *Id.* at 830. That guidance has been provided. *Blazina* was decided in March 2015; after the February 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 her ability to pay, if

necessary. Statewide appellate procedural rules are of more import in the present case.

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177, 1180 (2013). This principle is embodied federally in Fed. R. Crim P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed 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 not allowing review of this statutory,<sup>4</sup> non-constitutional LFO issue.

C. DEFENDANT’S CLAIM THAT THE COURT MUST FIRST DETERMINE THAT SHE HAS THE MEANS TO PAY THE MANDATORY DNA FEE BY OPERATION OF RCW 9.94A.777 IS INCORRECT BECAUSE THE DEFENDANT NEVER ESTABLISHED SHE SUFFERS FROM A MENTAL HEALTH CONDITION THAT WOULD TRIGGER THE OPERATION OF THAT STATUTE.

RCW 9.94A.777 states:

Legal financial obligations — Defendants with mental health conditions.

(1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.

(2) For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a

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<sup>4</sup> Assuming the RCW 10.01.160(3) applied to mandatory fees.

record of involuntary hospitalization, or by competent expert evaluation.

At sentencing, defendant never established that she suffers from a mental health condition that *prevents her from gainful employment*. She presented no evidence of a determination or diagnosis of a mental disability that prevents her from being gainfully employed, or mental disability as the basis for public assistance, or involuntary hospitalization, or that any competent expert evaluation was performed.<sup>5</sup>

D. THE TRIAL COURT DID NOT ERR BY IMPOSING MANDATORY LFOS.

The \$500 crime victim assessment, and the \$100 DNA (deoxyribonucleic acid) collection fee, are mandatory legal financial obligations, each required irrespective of the defendant's ability to pay. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). The \$500 victim assessment is mandated by RCW 7.68.035, and the \$100 DNA collection fee is mandated by RCW 43.43.7541. The trial court considered Ms. Monroe's situation and waived the filing fee. These statutes do not require the trial court to consider the offender's past, present, or future ability to pay. To the extent that the trial court imposed mandatory LFOs, there is no error in the defendant's sentence.

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<sup>5</sup> Even assuming defendant could show a mental health diagnosis that prevents her from gainful employment, the \$500 crime victim penalty is not waivable by RCW 9.94A.777.

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

The court DNA fee imposition statute, RCW 43.43.7541, mandates the imposition of a fee of one hundred dollars in every sentence imposed for a felony.<sup>6</sup> To the extent the defendant claims this statute violates the due process clause, this argument has been put to rest by this Court's recent decision in *State v. Thornton*, 188 Wn. App. 371, 353 P.3d 642 (2015). In *Thornton*, this Court noted that the DNA fee imposition 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.*

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<sup>6</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 9.94.A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

*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.

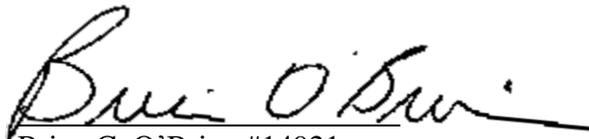
Additionally, it should be noted that monetary assessments that are mandatory may be imposed on indigent offenders at the time of sentencing without raising constitutional concern because “[c]onstitutional principles will be implicated ... only if the government seeks to enforce collection of the assessments at a time when [the defendant is] unable, through no fault of his own, to comply,” and “[i]t is at the point of enforced collection..., where an indigent may be faced with the alternatives of payment or imprisonment, that he may assert a constitutional objection on the ground of his indigency.” *State v. Blank*, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (most alterations in original) (internal quotation marks omitted) (quoting *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992)); *and see State v. Thompson*, 153 Wn. App. 325, 336–38, 223 P.3d 1165 (2009) (DNA fee); *State v. Williams*, 65 Wn. App. 456, 460–61, 828 P.2d 1158, 840 P.2d 902 (1992) (victim penalty assessment).

**V. CONCLUSION**

For the reasons stated above the defendant's standard range sentence and her LFO sentence requirements should be affirmed.

Dated this 17<sup>th</sup> day of November, 2015.

LAWRENCE H. HASKELL  
Prosecuting Attorney

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

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CERTIFICATE OF SERVICE

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I certify under penalty of perjury under the laws of the State of Washington that on November 17, 2015, I e-mailed a copy of the Brief of Respondent to Travis Stearns, attorney for the defendant, at [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org).

Dated this 17 day of November 2015

Spokane, WA

(Place)

Kim Cornelius

(Signature)