

FILED
Dec 18, 2015
Court of Appeals
Division III
State of Washington

No. 33441-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JARROD C. JOHNSON,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENT OF ERROR

The trial court erred when it ordered Mr. Johnson to pay a \$100 DNA-collection fee.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

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?

C. STATEMENT OF THE CASE

Mr. Johnson was convicted of possession of a controlled substance—methamphetamine following a trial to stipulated facts. RP 98-103. At sentencing, the Court reduced some of the legal financial obligations due to Johnson's being indigent, but imposed the \$100 DNA collection fee. CP 33, 42-44; RP 102-05.

This appeal followed. CP 45.

D. ARGUMENT

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.

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 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 43.43.754¹. This ostensibly serves the State’s

¹ 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

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 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 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.

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.

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. Therefore, RCW 43.43.7541 violates substantive due process as applied. Based on Mr. Johnson’s indigent status, the order to pay the \$100 DNA collection fee

should be vacated.

E. CONCLUSION

For the reasons stated, the order to pay the \$100 DNA collection fee should be vacated.

Respectfully submitted December 18, 2015,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on December 18, 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 the brief of appellant:

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