

33831-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

MELISSA KERNS, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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FILED  
May 2, 2016  
Court of Appeals  
Division III  
State of Washington

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court erred when it ordered the defendant to pay a \$100 DNA-collection fee.

## **II. ISSUES PRESENTED**

1. Did the defendant fail to preserve any DNA collection fee issue for appeal?

2. Does the \$100 DNA fee imposition statute, RCW 43.43.7541, violate the due process clause or the equal protection clauses of the state or federal constitution?

## **III. STATEMENT OF THE CASE**

A jury found Ms. Kerns guilty as charged of attempting to elude a police vehicle and felony hit and run (injury accident). RP Trial 276; CP 1-4. Ms. Kern's criminal history included ten prior felony convictions. RP Sentencing 2; CP 7-8. The court imposed concurrent sentences of 53 and 60 months respectively. RP Sentencing 7; CP 10.

On appeal, defendant claims that the trial court found her indigent, at the time of sentencing, citing RP Sentencing 8 and CP 12. *See* Appellant's Br. at 2. However, Respondent has been unable to discover this finding in the record. At sentencing, Ms. Kerns stated that she had been working at Geiger, and had been working there during the day and

then at night. RP Sentencing 6. Taking this averment into account, the trial court delayed her payments until she could get a job in the prison (“... she will be qualified for some kind of programs in there. I can set it for -- set it for June 15th, 2017, that way you'll get settled somewhere and hopefully be able to get a job in the work crew prison place”). RP Sentencing 8. The trial court imposed the mandatory legal financial obligations (LFOs) of a \$500 victim assessment, a \$200 criminal filing fee, and the mandatory \$100 DNA collection fee. RP Sentencing 8-9; CP 12. Ms. Kerns did not object to the imposition of the mandatory DNA collection fee. RP Sentencing 1-11.

#### IV. ARGUMENT

**A. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL; THE DNA COLLECTION FEE IMPOSED IN HIS CASE IS A MANDATORY FINANCIAL OBLIGATION.**

The defendant received \$800 in mandatory LFOs. 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. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). The \$500 victim assessment is mandated by RCW 7.68.035; the \$100 DNA collection fee is mandated by RCW 43.43.7541; and the \$200 criminal filing fee is mandated by

RCW 36.18.020(2)(h). In this case, the sole assignment of error is that the trial court erred by assessing the mandatory DNA fee.

The defendant failed to object to the imposition of the DNA collection fee. The defendant failed to argue that she could not pay the fee. She raised no argument suggesting that the mandatory collection fee violated either the due process clause or equal protection guarantees. Therefore, she failed preserve the matter for appeal. RAP 2.5. Moreover, the appellant fails to cite or discuss this Court's recent decisions on this issue. *See, e.g., State v. Stoddard*, 192 Wn. App. 222, 366 P.3d 474 (2016), *State v. Thornton*, 188 Wn. App. 371, 353 P.3d 642 (2015). As in *Thornton*, here the defendant fails to provide facts from the record establishing that she has paid or has been ordered to pay for the DNA fee in prior cases.<sup>1</sup> As in *Stoddard*, the issue here regarding due process was

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<sup>1</sup> In *Thornton*, this Court determined:

Ms. Thornton provides no facts to support her new argument on appeal suggesting a sample was already collected and submitted to the Washington State Patrol Crime Laboratory under the prior cause number. *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). Ms. Thornton thus makes no showing that RCW 43.43.754(2) even applies to her case, much less to support an argument that it precludes collection of the \$100 DNA fee as a mandatory LFO.

*State v. Thornton*, 188 Wn. App. at 374.

not raised, preserved, or developed in the trial court with supporting facts that would enable this Court to properly review the claim:

We consider whether the record on appeal is sufficient to review Gary Stoddard's constitutional arguments. Stoddard's contentions assume his poverty. Nevertheless, the record contains no information, other than Stoddard's statutory indigence for purposes of hiring an attorney, that he lacks funds to pay a \$100 fee. The cost of a criminal charge's defense exponentially exceeds \$100. Therefore, one may be able to afford payment of \$100, but not afford defense counsel. Stoddard has presented no evidence of his assets, income, or debts. Thus, the record lacks the details important in resolving Stoddard's due process argument.

Gary Stoddard underscores that other mandatory fees must be paid first and interest will accrue on the \$100 DNA collection fee. This emphasis helps Stoddard little, since we still lack evidence of his income and assets.

*Stoddard*, 192 Wn. App. at 228-29.

This Court should not accept review of the due process or equal protection claim based upon an undeveloped record, especially where the defendant asserted at sentencing that she was employable, and in no way suggested she would not be able to pay the \$100 DNA fee.

Importantly, the defendant neither cites to RAP 2.5 nor offers an argument on appeal suggesting the alleged error is reviewable when no objection was made supporting the claim at the trial court level. 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 (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 DNA fee issue. *See, e.g., State v. Lazcano*, 188 Wn. App. 338, 360, 354 P.3d 233 (2015), *review denied*, 185 Wn.2d 1008 (2016):

The general rule remains that a criminal defendant may not obtain a new trial whenever he or she can identify a constitutional error not litigated below. *State v. Scott*, 110 Wn.2d at 687, 757 P.2d 492 (1988). The manifest error exception is a narrow one. *State v. Scott*, 110 Wn.2d at 687, 757 P.2d 492. We particularly decline to consider a double jeopardy argument to automatically be manifest error in the circumstances when the record lacks specificity for review.

*Lazcano*, 188 Wn. App. at 360.

There is nothing manifest, *i.e.*, so obvious, self-evident, axiomatic, indisputable, plain, clear, perspicuous, distinct, or palpable, appearing from the record provided as to warrant appellate review of the trial court's imposition of the mandatory \$100 DNA fee, a fee that is required by statute.<sup>2</sup>

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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

**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 for every felony sentence. The defendant *admits* - as this Court has held<sup>3</sup> - that this statute serves a legitimate purpose, because it “serves the state’s interest to fund the collection, analysis, and retention of a convicted offender’s DNA profile to help facilitate criminal identification. RCW 43.43.752; RCW 43.43.7541.” Appellant’s Br. at 4. However, the defendant then claims this statute violates the substantive due process clause because “imposing this mandatory fee upon defendants who cannot pay the fee does not rationally serve that [State] interest.” Appellant’s Br. at 4.

As above, the conclusion that the defendant cannot pay the \$100 DNA fee is not supported by the record. Moreover, the defendant’s

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biological sample from the offender as required under RCW 43.43.754.

<sup>3</sup> In *State v. Thornton*, 188 Wn. App. at 375, this Court stated:

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.

argument that due process is violated - after admitting there is a rational basis for the mandatory DNA fee - is not an argument supported by citation to authority. The authority on this issue supports the opposite conclusion. 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).

**C. RCW 43.43.7541 DOES NOT VIOLATE EQUAL PROTECTION.**

Initially, defendant’s equal protection claim is based on her assertion that “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,” and “Ms. Kern’s DNA was undoubtedly collected previously pursuant to statute.” Appellant’s Br. at 8-9. However, Defendant has not established that she paid or has been ordered to pay the the DNA fee more than once. She speculates that a fee was already imposed in prior cases because of her convictions for numerous prior felony offenses. Appellant Br. at 9. 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. 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.

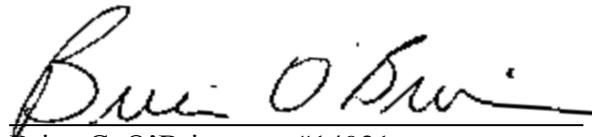
*All* defendants sentenced for felonies receive the DNA assessment as part of their sentencing. Nothing is more equal than that.

## V. CONCLUSION

For the reasons stated above the defendant's \$100 DNA-fee sentence requirement should be affirmed.

Dated this 2 day of May, 2016.

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