

Court of Appeals No. 34450-9-III
Consolidated with No. 34641-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

DERRICK HANEY, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 12-1-00676-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIESii-iii

I. RESPONSE TO ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF FACTS1

III. ARGUMENT3

 A. RCW 43.43.7541 AND RCW 7.68.035 DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS AND IS NOT UNCONSTITUTIONAL AS APPLIED TO THE DEFENDANT.3

 B. APPELLATE COSTS ARE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT.7

IV. CONCLUSION.....13

TABLE OF AUTHORITIES

WASHINGTON CASES

Nielsen v. Dep’t of Licensing, 177 Wn. App. 45, 309 P.3d 1221 (2013)4
State v. Baldwin, 63 Wn. App. 303, 818 P.2d 1116 (1991).....9
State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1976).....8
State v. Blank, 80 Wn. App. 638, 910 P.2d 545 (1996).....8
State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997)..... 7-10
State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 10-11
State v. Brewster, 152 Wn. App. 856, 218 P.3d 249 (2009).....5
State v. Crook, 146 Wn. App. 24, 189 P.3d 811 (2008)9
State v. Edgley, 92 Wn. App. 478, 966 P.2d 381 (1998)9
State v. Keeney, 112 Wn.2d 140, 769 P.2d 295 (1989)8
State v. Lewis, 194 Wn. App. 709, 379 P.3d 129 (2016)..... 5-6
State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013)9
State v. Mahone, 98 Wn. App. 342, 989 P.2d 583 (1999)7
State v. Mullen, 171 Wn.2d 881, 259 P.3d 158 (2011).....4
State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000) 7-9
State v. Seward, ___ P.3d ___, 2016 WL 6441387
(Wash. Nov. 1, 2016)..... 6-7
State v. Shelton, 194 Wn. App. 660, 378 P.3d 230 (2016)6
State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016)7, 11
State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009).....9
State v. Woodward, 116 Wn. App. 697, 67 P.3d 530 (2003)..... 9-10
State v. Wright, 97 Wn. App. 382, 985 P.2d 411 (1999)9

UNITED STATES SUPREME COURT CASES

Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221
(1983).....10
Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974)..10
New York City Transit Auth. v. Beazer, 440 U.S. 568, 99 S. Ct. 1355, 59 L.
Ed. 2d 587 (1979)4
Vacco v. Quill, 521 U.S. 793, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997)..4

WASHINGTON STATUTES

RCW 7.68.0351, 3, 5, 7

| | |
|--------------------------|----------|
| RCW 7.68.035(1)(a) | 5 |
| RCW 9.94A..... | 4 |
| RCW 9.94A.030..... | 4 |
| RCW 10.01.160 | 8, 10-11 |
| RCW 10.01.160(2)..... | 8 |
| RCW 10.01.160(3)..... | 10-11 |
| RCW 10.73.160 | 1, 7-11 |
| RCW 10.73.160(3)..... | 11 |
| RCW 10.73.160(4)..... | 11 |
| RCW 43.43.752 | 5 |
| RCW 43.43.754 | 4 |
| RCW 43.43.7541 | 1, 3-7 |

REGULATIONS AND COURT RULES

| | |
|--------------------|-----|
| GR 34..... | 10 |
| RAP 2.5(a)(3)..... | 6 |
| RAP 14.2..... | 7-8 |

OTHER AUTHORITIES

| | |
|--|---|
| Laws of 1973, 1st Ex. Sess., ch. 122, § 1..... | 5 |
| Laws of 1975, 2d Ex. Sess., ch. 96 | 8 |

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. RCW 43.43.7541 and RCW 7.68.035 do not violate substantive due process and are not unconstitutional as applied to the defendant because the DNA collection fee and victim penalty assessment are imposed on all adult offenders and are rationally related to a legitimate state interest.
- B. Appellate costs are appropriate in this case if the Court affirms the judgment.

II. STATEMENT OF FACTS

The defendant, Derrick Haney, was found guilty of three counts of Rape of a Child in the Second Degree by guilty plea. CP 19-30. On October 18, 2012, the trial court imposed sentence consisting of 194 months to life in prison and community custody. CP 25. The trial court imposed discretionary costs of \$1,160¹ and mandatory costs of \$800². CP 23, 34. Restitution was imposed in the amount of \$999,999.99. CP 23. The court further ordered that “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.” CP 24.

The judgment and sentence contained the following language: “2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has

considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change." CP 22. The box indicating that the court finds that the defendant has the likely future ability to pay the legal financial obligations ("LFOs") was left unchecked. CP 22. On December 13, 2012, the State filed a motion and order amending the restitution from \$999,999.99 to \$612.70. CP 35-36. All other terms of the judgment and sentence remained in effect.

On December 28, 2015, the defendant filed a motion to modify and/or terminate his LFOs, asserting that the sentencing court did not properly inquire into his ability to pay. CP 41-43. The court denied the defendant's motion, ruling that the proper time for the defendant to bring a motion for a hearing to determine his financial resources and ability to pay is once he is released from custody of the Department of Corrections. CP 46. On March 25, 2016, the defendant again moved to correct his judgment and sentence, alleging that the sentencing court did not properly inquire into his ability to pay. CP 53-58. On April 22, 2016, the court determined the record did not reflect the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay

¹ \$500 fine, \$60 sheriff service fee, and \$600 court-appointed attorney fee. CP 23, 34.

before the court imposed the LFOs and ordered a new sentencing hearing for the court to make the proper inquiry. CP 59-60.

A resentencing hearing was held on May 25, 2016, for the court to address the defendant's ability to pay his LFOs. CP 75; RP at 3-12. After conducting the individualized inquiry, the court determined that the defendant did not have the present or likely future ability to pay. CP 76; RP at 9. The court waived the discretionary LFOs, including the accrued interest. CP 76; RP at 9. The mandatory LFOs and restitution remained. RP at 9.

III. ARGUMENT

A. RCW 43.43.7541 AND RCW 7.68.035 DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS AND IS NOT UNCONSTITUTIONAL AS APPLIED TO THE DEFENDANT.

The defendant argues that the imposition of the \$100 DNA collection fee and \$500 victim penalty assessment violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the fee. RCW 43.43.7541 and RCW 7.68.035 do not violate substantive due process and are not unconstitutional because these fees are imposed on all adult offenders and are rationally related to a legitimate state interest.

² \$500 victim penalty assessment, \$100 felony DNA fee, and \$200 criminal filing fee.

The court reviews alleged due process violations de novo. *State v. Mullen*, 171 Wn.2d 881, 893, 259 P.3d 158 (2011). Where interests at stake are not fundamental, the court applies the most lenient and highly deferential review standard—the rational basis standard. *Nielsen v. Dep’t of Licensing*, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013).

RCW 43.43.7541 demands a biological sample, for purposes of DNA identification analysis, from an adult convicted of a felony. The imposition of the mandatory \$100 DNA collection fee does not draw any distinctions between persons. All adults convicted of a felony, regardless of their ability to pay, are required to pay the \$100 DNA collection fee. “Generally speaking, laws that apply evenhandedly to all ‘unquestionably comply’ with the Equal Protection Clause.” *Vacco v. Quill*, 521 U.S. 793, 800, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997) (quoting *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979)).

RCW 43.43.7541 reads, in relevant part:

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 statute serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to facilitate future criminal identifications. RCW 43.43.752-.7541; *see State v. Brewster*, 152 Wn. App. 856, 860, 218 P.3d 249 (2009). To that end, it is a non-punitive legal financial obligation. 152 Wn. App. at 861.

In 1973, the legislature created a crime victims compensation account to aid innocent victims of criminal acts. Laws of 1973, 1st Ex. Sess., ch. 122, § 1. A \$500 crime victim assessment shall be imposed on all adult offenders convicted of a felony. RCW 7.68.035. RCW 7.68.035(1)(a) states:

When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

The defendant concedes that RCW 43.43.7541 and RCW 7.68.035 are legitimate state interests. Br. of Appellant at 6. Therefore, at issue is whether the imposition of the mandatory fee upon defendants who cannot pay the fee rationally serves those interests.

In *State v. Lewis*, 194 Wn. App. 709, 379 P.3d 129 (2016), Lewis argued that, as applied to an indigent defendant, imposition of the

mandatory DNA collection fee under RCW 43.43.7541 violates substantive due process. Lewis also claimed that as applied to a repeat felony offender, the DNA fee statute violates equal protection. *Id.* at 715. In declining to address the substantive due process claim, the court reinforced the holding in *State v. Shelton*, 194 Wn. App. 660, 663, 378 P.3d 230 (2016), which held that until the State attempts to enforce collection of the DNA fee or impose sanctions for failure to pay, the claim is not ripe for judicial review and is not an error of constitutional magnitude subject to review under RAP 2.5(a)(3). *Lewis*, 194 Wn. App. at 715.

In *State v. Seward*, ___ P.3d ___, 2016 WL 6441387, at *3 (Wash. Nov. 1, 2016), Seward challenged the imposition of several mandatory LFOs, including the \$100 DNA fee under RCW 43.43.7541 and the \$500 victim penalty assessment under RCW 7.68.035. Seward asserted that his substantive due process rights were violated when the court imposed these costs without first considering his current or likely future ability to pay. *Seward*, 2016 WL 3441387 at *5. In holding that Seward's substantive due process rights were not violated, the court stated:

First, imposing these fees . . . is rationally related to legitimate state interests because even though some offenders may be unable to pay, some will. So the imposition of these fees and assessments on all offenders creates funding sources for these purposes.

Second, imposing these fees and assessment on offenders who may be indigent at the time of sentencing is also rationally related to funding these purposes because the defendant's indigency may not always exist. We can conceive of situations in which an offender who is indigent at the time of sentencing will be able to pay the fees and assessments in the future.

Id. at *2-3.

Like the court held in *Seward*, the imposition of a DNA collection fee and crime victim penalty is rationally related to a legitimate state interest. As such, RCW 43.43.7541 and RCW 7.68.035 do not violate substantive due process.

B. APPELLATE COSTS ARE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999). As the Court pointed out in *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See also* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the Court can decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In

1976³, the legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. RCW 10.01.160(2). In *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate or even “chill” the right to counsel. *Id.* at 818.

In 1995, the legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank*, the Supreme Court held this statute constitutional, affirming the court’s holding in *State v. Blank*, 80 Wn. App. 638, 641-42, 910 P.2d 545 (1996). 131 Wn.2d at 239.

Nolan noted that in *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that “costs” did not include statutory attorney fees. *Nolan*, 141 Wn.2d at 623.

Nolan examined RCW 10.73.160 in detail. The court pointed out that under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The court also rejected the concept or

³ Actually introduced in Laws of 1975, 2d Ex. Sess., ch. 96.

belief espoused in *State v. Edgley*, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. *Nolan*, 141 Wn.2d at 624-25, 628.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, 63 Wn. App. at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241-42; *see also State v. Wright*, 97 Wn. App. 382, 985 P.2d 411 (1999).

The defendant has the initial burden to show indigence. *See State v. Lundy*, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. *See State v. Woodward*, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). The appellate court may order

even an indigent defendant to contribute to the cost of representation. *See Blank*, 131 Wn.2d at 236-37 (quoting *Fuller v. Oregon*, 417 U.S. 40, 53-54, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974)).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983); *Woodward*, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts of late. In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). The court wrote that “[t]he legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant’s circumstances.” 182 Wn.2d at 834. The court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.* at 835-37. The court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id.* at 838-39.

By enacting RCW 10.01.160 and RCW 10.73.160, the legislature has expressed its intent that criminal defendants, including indigent ones,

should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and RCW 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burdens of persons convicted of crimes, the legislature has yet to show any shift toward eliminating the imposition of financial obligation on indigent defendants.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes “recoupment of fees for court-appointed counsel.” Obviously, all these defendants have been found indigent by the court. Under the defendant’s argument, the court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

As *Blazina* instructed, trial courts should carefully consider a defendant’s financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out, the legislature did not include such a provision in RCW 10.73.160. 192 Wn. App. at 389. Instead, it provided that a defendant could petition for the remission of costs on the grounds of “manifest hardship.” See RCW 10.73.160(4).

Certainly, in fairness, the appellate court should also take into account the defendant's financial circumstances before exercising its discretion. Ideally, pursuant to *Blazina*, the trial courts will develop a record that the appellate courts may use in making their determinations about appellate costs. Until such time as more and more trial courts make such a record, the appellate courts may base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

During resentencing, the defendant indicated that while he had been unemployed at the time of sentencing, he had been attempting to obtain employment through a dislocated worker program with Work Source. RP at 7. Prior to being laid off, the defendant had worked for the Transportation Security Administration. RP at 8. Additionally, the defendant presented no allegation that he suffers from a mental or physical disability which will preclude him from obtaining employment following his release from prison. While the court waived the discretionary fees, there is nothing in the record to support the assertion that the defendant will never be able to pay the appellate costs associated with this case.

In this case, the State submits that it has "substantially prevailed." Any assertion that the defendant cannot and will never be able to pay

appellate costs is belied by the record. This Court should exercise discretion to impose appellate costs.

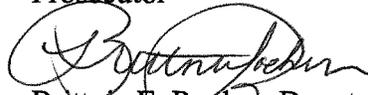
IV. CONCLUSION

Based upon on the aforementioned facts and authorities, the defendant's appeal should be denied. The State respectfully requests that costs be taxed as requested by the State.

RESPECTFULLY SUBMITTED this 28th day of November, 2016.

ANDY MILLER

Prosecutor



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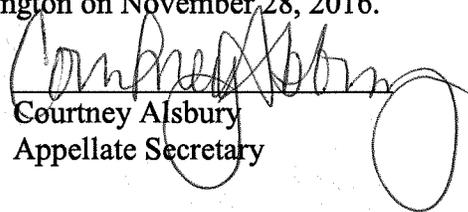
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on November 28, 2016.


Courtney Alsbury
Appellate Secretary