

34945-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTIAN SANDSTROM, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The sentencing court failed to consider, under RCW 9.94A.777, whether Defendant has the means to pay legal financial obligations (LFOs) before imposing those obligations.

2. If treated as a mandatory LFO, the \$200 criminal filing fee imposed pursuant to RCW 36.18.020(2)(h) violates equal protection.

3. Irrespective of RCW 9.94A.777, the trial court should have treated the \$200 criminal filing fee as discretionary and assessed Defendant's ability to pay before imposing it.

II. ISSUES PRESENTED

1. Is Defendant's statutory claim barred under RAP 2.5 for failure to raise the issue at the time of sentencing?

2. Whether the \$200 criminal filing fee imposed pursuant to RCW 36.18.020(2)(h) and the \$100 DNA fee imposed pursuant to RCW 43.43.7541 are mandatory or discretionary fees?

3. Does the \$200 criminal filing fee imposed pursuant to RCW 36.18.020(2)(h) fee violate the Equal Protection Clause?

4. If the \$200 criminal filing fee imposed pursuant to RCW 36.18.020(2)(h) and the \$100 DNA fee imposed pursuant to RCW 43.43.7541 are mandatory, whether those fees nevertheless may be

waived pursuant to a finding that a defendant suffers from a mental health condition as set forth in RCW 9.94A.777?

5. Should this case should be remanded to the sentencing court for a determination of whether Defendant has the means to pay LFOs pursuant to RCW 9.94A.777?

III. STATEMENT OF THE CASE

The respondent accepts appellant's statement of the case for purposes of this appeal only.

IV. ARGUMENT

A. DEFENDANT'S STATUTORY CLAIM IS BARRED UNDER RAP 2.5 BECAUSE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL.

A party may not assert a claim on appeal that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). 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. *Id.* at 749. 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.

Although RAP 2.5 permits an appellant to raise for the first time on appeal an issue that involves a manifest error affecting a constitutional right, our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Additionally, this Court should not accept review of the equal protection claim based upon an undeveloped record. As in *State v. Stoddard*, 192 Wn. App. 222, 366 P.3d 474 (2016), the constitutional issue now raised by Defendant was not preserved, or developed in the trial court with

supporting facts that would enable this Court to properly review the claim.

In *Stoddard*, this Court stated:

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.

Id. at 228-29.

Therefore, policy and RAP 2.5 do not favor consideration of the belatedly-raised mandatory legal financial obligations issue.

B. THE \$200 CRIMINAL FILING FEE IMPOSED PURSUANT TO RCW 36.18.020(2)(H) AND THE \$100 DNA FEE IMPOSED PURSUANT TO RCW 43.43.7541 ARE MANDATORY FINANCIAL OBLIGATIONS.

The trial court imposed legal financial obligations (LFOs) consisting of the \$500 crime victim assessment, the \$200 filing fee, a \$100 DNA collection fee. All of these assessments constitute mandatory costs that are not subject to a determination of ability to pay before imposition. *State v. Lundy*, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013).

The \$200 criminal filing fee is mandatory pursuant to RCW 36.18.020(2)(h). *Lundy*, 176 Wn. App. at 10. Trial courts must impose such fees regardless of a defendant's ability to pay. *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016). Similarly, the \$100 DNA (deoxyribonucleic acid) collection fee is a mandatory fee that is required irrespective of the defendant's ability to pay. *State v. Mathers*, 193 Wn. App. 913, 918-20, 376 P.3d 1163, *review denied*, 186 Wn.2d 1015, 380 P.3d 482 (2016); *State v. Kuster*, 175 Wn. App. 420, 424-425, 306 P.3d 1022 (2013).

The mandatory nature of these statutes and whether they violate equal protection or due process was recently raised and rejected in *State v. Mathers*, 193 Wn. App. 913. There, the court held that “[w]here the legislature has had time to correct a court’s interpretation of a statute and has not done so, we presume the legislature approves of our interpretation. . . . Washington courts have consistently held that a trial court need not consider a defendant’s past, present, or future ability to pay” in imposing mandatory fees. *Id.* at 918.

Accordingly, it is well-settled in Washington jurisprudence that the \$200 criminal filing fee and the \$100 DNA collection fee are mandatory legal financial obligations.

C. IMPOSITION OF THE \$200 CRIMINAL FILING FEE DOES NOT VIOLATE EQUAL PROTECTION BECAUSE CRIMINAL DEFENDANTS ARE ONLY CHARGED A FEE AFTER A JUDGMENT HAS BEEN ENTERED AGAINST THEM, WHEREAS CIVIL LITIGANTS ARE CHARGED A FEE UPON ENTRY INTO THE COURT SYSTEM.

First, Defendant takes aim at the wrong target. He claims that RCW 36.18.020(2)(h) violates equal protection. However, his argument is that GR 34, authorizing civil litigants a waiver of fees authorized under the statute, does not do the same for criminal defendants. It is the court rule, not the statute, that authorizes the waiver. The statute makes the fees mandatory to all within its application. Defendant fails to make a claim that GR 34 violates equal protection.

Secondly, Defendant's equal protection argument is perfunctory. He cites no cases dealing with the application of GR 34. Appellate courts should not be placed in a role of crafting issues for the parties; thus, mere "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *Petition of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988) (internal quotation marks omitted) (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)). Therefore, this Court should not consider this new argument.

Furthermore, there is no equal protection violation present in either the challenged statute, RCW 36.18.020(2)(h), or the court rule, GR 34. The

Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution guarantee equal protection under the law. “Equal protection requires that similarly situated individuals receive similar treatment under the law.” *Harris v. Charles*, 171 Wn.2d 455, 462, 256 P.3d 328 (2011). This court reviews constitutional challenges de novo. *State v. Vance*, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010); *State v. Price*, 169 Wn. App. 652, 655-56, 281 P.3d 331 (2012).

The appropriate level of review in equal protection claims depends on the nature of the classification or the rights involved. *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). Appellate courts apply a strict scrutiny standard when state action involves suspect classifications like race, alienage and national origin and/or fundamental rights. *Id.* Intermediate scrutiny is applied for semi-suspect classifications and/or important rights. *Id.* Otherwise, courts apply rational basis review. *Id.* Defendant concedes he is not a member of a suspect or semi-suspect class and agrees that rational basis review applies here. Appellant’s Br. at 11.

Rational basis review is a highly deferential standard, and courts will uphold a statute under this standard unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. *In re Det. of Stout*, 159 Wn.2d 357, 375, 150 P.3d 86 (2007). The rational basis test

requires only that the means employed by the statute be rationally related to a legitimate state goal; the means do not have to be the best way to achieve the goal. *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996). “[T]he Legislature has broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest.” *State v. Ward*, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994).

There is a rational basis for treating civil litigants *entering* the justice system differently than indigent criminal defendants *already in* the system and convicted of a criminal offense. The former group seeks access to justice; the later has received access to justice. Indeed, the State graciously provided this defendant access to justice *free of charge* when it filed the information. There was no *advance* requirement that he pay a filing fee to get into court, as there is in civil cases. It is only upon a criminal defendant’s conviction that he or she is required to pay a filing fee. GR 34 allows the waiver of mandatory filing fees for indigent civil litigants *to provide equal access to justice*. *Jafar v. Webb*, 177 Wn.2d 520, 526-32, 303 P.3d 1042 (2013). Without such a waiver, indigent parties would not be able to seek relief in the courts. *Id.* at 529-31.

Lastly, criminal defendants are authorized to seek remission of these mandatory costs under RCW 10.01.160(4), under the same criteria as that providing waiver of fees to indigent civil litigants under GR 34. “[C]ourts

can and should use GR 34 as a guide for determining whether someone has an ability to pay costs.” *City of Richland v. Wakefield*, 186 Wn.2d 596, 606, 380 P.3d 459 (2016). There is no real difference in the procedure. The defendant in the present case has failed to establish, as is his burden, an equal protection violation.

D. THE STATE AGREES THAT THE \$200 CRIMINAL FILING FEE AND THE \$100 DNA FEE, ALTHOUGH MANDATORY, MAY BE WAIVED PURSUANT TO A FINDING THAT A DEFENDANT SUFFERS FROM A MENTAL HEALTH CONDITION AS SET FORTH IN RCW 9.94A.777; REMAND IS APPROPRIATE TO ENABLE THE SENTENCING COURT TO DETERMINE APPELLANT’S ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS UNDER RCW 9.94A.777.

RCW 9.94A.777(1) requires a sentencing court to determine whether a defendant suffering from a “mental health condition” has the means to pay “any legal financial obligations . . . other than restitution or the victim penalty assessment under RCW 7.68.035.” 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 record of involuntary hospitalization, or by competent expert evaluation.

According to established principles of statutory interpretation, courts must “derive legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.” *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). “Plain language that is not ambiguous does not require construction.” *Id.* However, “[i]f a penal statute is ambiguous and thus subject to statutory construction, it will be ‘strictly construed’ in favor of the defendant.” *Id.* (quoting *State v. Hornaday*, 105 Wn.2d 120, 127, 713 P.2d 71 (1986)).

RCW 9.94A.777 exempts two legal financial obligations – restitution and the victim penalty assessment – from its mandate that courts ascertain whether a defendant with a mental health condition has the means to pay any legal financial obligation. RCW 9.94A.777(1). The statute does not address the \$200 criminal filing fee or the \$100 DNA collection fee. In so doing, the statute appears clear on its face to require the court to ascertain whether a defendant with a mental health condition has the means to pay the \$200 criminal filing fee or the \$100 DNA collection fee before imposing

those fees. It follows that if courts are required to consider a defendant's means to pay those fees, that courts may waive those fees in the face of evidence that a defendant with a mental health condition lacks the means to pay them.

The record supports a finding that Defendant suffered from a "mental health condition" under RCW 9.94A.777(1). Specifically, the record reflects that Defendant had qualified for social security disability payments. RP 216, 218. Social security disability constitutes a "public assistance program" that evidences a defendant's inability to participate in gainful employment under RCW 9.94A.777(2). Having established that Defendant suffers from a qualifying "mental health condition," the sentencing court was required to determine whether Defendant had the "means to pay" "any legal financial obligations ... other than restitution or the victim penalty assessment under RCW 7.68.035," to include the \$200 criminal filing fee and the \$100 DNA fee. RCW 9.94A.777(1). The sentencing court failed to make this determination.

Importantly, the defendant *invited* the court to accept a minimal payment plan of \$5 per month instead of requesting the trial court address the defendant's means and ability to pay the DNA and criminal filing fee, as required, under RCW 9.94A.777. However, it seems apparent from the

record that the trial court was unaware of this obligation¹ – therefore remand for the trial court to make that determination is appropriate. If the trial court was unaware of its duty to determine whether the defendant has the means to pay the DNA and filing fee when it made its decision to impose these fees, the decision to impose these fees may have been an abuse of discretion. “A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

Accordingly, the State suggests that remand is appropriate to enable the sentencing court to make the required determination regarding the defendant’s ability to pay these fees under RCW 9.94A.777. Alternatively, this Court could strike these fees without necessitating the defendant reappear for another hearing because the trial court has already indicated that it would not have assessed these fees if it was not required to do so, and the record already establishes the defendant’s indigency. RP 222.

¹ See RP 222:

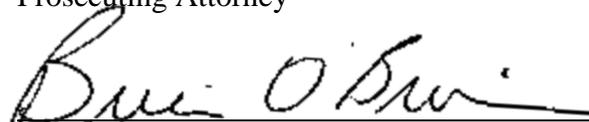
Judge Price: Christian, these fines, I don’t want to order them, but I don’t have a choice, okay? So I just wanted to make sure you knew that. I have to order \$500 victim impact, \$200 court costs, \$100 DNA, and we’ll get a payment going at \$5 a month starting March 15th of 2017.

V. CONCLUSION

For the reasons stated above, the Court should find that Defendant's claim is barred under RAP 2.5. In the alternative, this court could either remand to the sentencing court for a determination regarding Defendant's ability to pay the \$200 criminal filing fee and the \$100 DNA fee or strike the DNA and filing fee.

Dated this 25 day of October, 2017.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

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v.

CHRISTIAN SANDSTROM,

Appellant.

NO. 34945-4-III

CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on October 25, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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10/25/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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