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April 23, 2015
Court of Appeals
Division I
State of Washington

COA NO. 72652-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FRANCE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bill Bowman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. RCW 43.43.7541's mandatory DNA collection fee violates substantive due process when applied to defendants who do not have the present or likely future ability to pay.

2. The court erred in imposing the DNA fee as part of the sentence. CP 53.

Issue Pertaining to Assignments of Error

RCW 43.43.7541 requires trial courts to impose a DNA collection fee each time a felony offender is sentenced. This serves the State's interest in funding the collection, testing, and retention of a convicted defendant's DNA profile for criminal investigations and the identification of missing and unidentified persons. However, the statute makes it mandatory that trial courts order this fee, regardless of hardship. Does the statute violate substantive due process as applied to defendants who do not have the present or likely future ability to pay the DNA collection fee?

B. STATEMENT OF THE CASE

France was originally convicted of five counts of felony harassment and one count of witness intimidation. CP 14, 20. Based on an offender score of 20, the court found the aggravating "free crime" circumstance and imposed an exceptional sentence of 120 months. CP 15, 17, 69-70. The intimidation conviction was subsequently reversed on

appeal. State v. France, 175 Wn. App. 1024 (2013), aff'd, 180 Wn.2d 809, 329 P.3d 864 (2014). On remand for resentencing, the court imposed the same 120 month exceptional sentence based on the same aggravator. CP 48-50, 534; RP¹ 12-14. The court also imposed a \$100 DNA fee and a \$500 victim compensation fee as part of the sentence, but waived all discretionary costs. CP 53; RP 15. Assigned counsel moved for an order of indigency based on France's declaration, which the court granted. CP 71-75. This appeal follows. CP 60-68.

C. **ARGUMENT**

1. **RCW 43.43.7541 IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE PRESENT OR LIKELY FUTURE ABILITY TO PAY THE DNA COLLECTION FEE.**

The mandatory \$100 DNA collection fee authorized under RCW 43.43.7541 violates substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fee. In that circumstance, the collection fee is not rationally related to a legitimate state interest.

¹ The verbatim report of proceedings is referenced as follows: RP - 10/2/14.

- a. **The DNA fee is mandated by statute, regardless of ability to pay, even where an offender has already had his DNA collected.**

RCW 43.43.754(1) requires a biological example "must be collected" when an individual is convicted of a felony offense. RCW 43.43.754(2) provides an option to forego such collection: "If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required."

RCW 43.43.7541, however, mandates "*Every* sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." (emphasis added). No exception for the collection of the fee is made for offenders who have already had their DNA collected and submitted to the state patrol.

The fee is mandatory. State v. Brewster, 152 Wn. App. 856, 859, 218 P.3d 249 (2009), review denied, 168 Wn.2d 1030, 230 P.3d 1060 (2010). The fee is imposed regardless of ability to pay. State v. Thompson, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009). And there is no ambiguity as to when the fee must be ordered: "We find the phrase 'every sentence' to be an unambiguous indication that sentencing is the precipitating event for imposition of the mandatory fee required by RCW 43.43.7541." Thompson, 153 Wn. App. at 338. Thus, the \$100 DNA fee

must be imposed for every sentence falling under the rubric of RCW 43.43.754 even where an offender's DNA has previously been collected and the requisite DNA fee has been imposed.

DNA collection and the attendant DNA fee have been mandatory for all those convicted of a felony since June 12, 2008. RCW 43.43.7541 (Laws of 2008, ch. 97 § 3; RCW 43.43.754 (Laws of 2008, ch. 97 § 3). France's criminal history includes convictions for felonies in 2009 and 2011. CP 57. From this, we know France's DNA was already collected and he was ordered to pay the DNA collection fee before imposition of the present sentence. France is indigent. But the court, as mandated by statute, ordered him to pay another DNA fee anyway.

b. The statute violates due process as applied to those who lack the ability to pay because the DNA fee order is not rationally related to the State's legitimate interest.

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, § 1; Wash. Const. art. I, § 3.

France bases his due process argument on the deprivation of his property interest. The property interest at issue here is the \$100 DNA fee that the State seeks to extract from France as part of his sentence. As the party challenging RCW 43.43.7541, France must show, by argument and research, that there is no reasonable doubt that the statute violates the

constitution. Island County v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

The touchstone of due process is protection of the individual against arbitrary government actions. Craddock v. Yakima County, 166 Wn. App. 435, 442, 271 P.3d 289 (2012). "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). "Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Amunrud, 158 Wn.2d 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) (quoting Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625-26 (1992)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130, 1135 (2013). 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 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 defendants pay the DNA collection fee. RCW 43.43.7541. This ostensibly serves the State's interest in collecting, analyzing, and retaining a convicted offender's DNA profile to facilitate the identification and detection of individuals in criminal investigations and the identification of missing and unidentified persons. RCW 43.43.753 (setting forth legislative findings). This is a legitimate interest. However, the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

There is nothing reasonable about requiring 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. This does not further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court recently emphasized, "the state cannot collect money from defendants who cannot pay." State v. Blazina, __ Wn.2d __, 344 P.3d 680, 684 (2015). When applied to such defendants, not only do the mandatory fee orders under RCW 43.43.7541 fail to further the State's interest, they are pointless. It is irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue the \$100 DNA collection fee is of such a small amount that most defendants would likely be able to pay. The problem with this argument, however, is that the amount has a way of inexorably growing. 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. This means the fee is paid 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 indigent defendants.

Additionally, "LFOs accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time." Blazina, 344 P.3d at 68 (citing RCW 10.82.090(1)). What starts out as a seemingly small obligation metastasizes into a larger and larger amount. Id. The defendant saddled with a 12 percent rate of interest on his unpaid LFOs, including the DNA collection fee, makes the actual debt incurred even more onerous in ways that reach far beyond his financial situation. Indeed, it actually can impede rehabilitation. The imposition of mounting debt upon people who cannot pay actually works against another important State interest: reducing recidivism. See id. at 683-84 (examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

Substantive due process protects against arbitrary and capricious government action. Amunrud, 158 Wn.2d at 218-19. Statutes that do not rationally relate to a legitimate State interest must be struck down. DeYoung, 136 Wn.2d at 144; Nielsen, 177 Wn. App. at 61. When applied to defendants who do not have the present or likely future 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 the defendant's DNA. RCW 43.43.7541 therefore violates substantive due process as applied and the court erred in ordering the DNA fee based

on an unconstitutional statute. The DNA fee should be vacated based on France's indigent status.

- c. The argument can be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3).**

France did not challenge the DNA fee under RCW 43.43.7541 at sentencing. He may, however, challenge the constitutionality of the statute for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). In re Interest of J.R., 156 Wn. App. 9, 18, 230 P.3d 1087, review denied, 170 Wn.2d 1006, 245 P.3d 226 (2010).

D. CONCLUSION

France requests that this Court vacate the \$100 DNA collection fee order.

DATED this 14th day of April 2015.

Respectfully Submitted,

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DIVISION ONE

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Respondent,)	
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v.)	COA NO. 72652-8-I
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WILLIAM FRANCE,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM FRANCE
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SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF APRIL 2015.

x *Patrick Mayovsky*