NO. 72848-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SHELTON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ROGER ROGOFF

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JENNIFER P. JOSEPH
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Federal:

Washington State:

Statutes

Washington State:

Rules and Regulations

Washington State:

A. ISSUES PRESENTED

1. A trial court may impose mental health evaluation and recommended treatment as conditions of community custody only if it finds that the offender suffers from a mental illness which influenced the crime. The State concedes that the trial court failed to make that finding. Should this Court remand for the trial court to consider whether a mental health evaluation is appropriate?

2. A person cannot challenge the constitutionality of a statute unless he or she is harmfully affected by the provisions alleged to be unconstitutional. Shelton contends that RCW 43.43.7541 is unconstitutional as applied to those who lack the present or likely future ability to pay the mandatory $100 DNA fee. The record does not establish that Shelton is constitutionally indigent or is otherwise certain to lack the funds to pay the fee in the future. Does Shelton lack standing to challenge the constitutionality of RCW 43.43.7541?

3. The constitutionality of a mandatory legal financial obligation imposed at sentencing is not ripe for review until the State attempts to collect payment or impose punishment for failure to pay. The State has not attempted to collect the mandatory DNA fee from Shelton. Is his claim unripe, precluding review?

4. Under RAP 2.5, this Court may refuse to review any claim raised for the first time on appeal, including whether imposing mandatory legal financial obligations without consideration of the defendant's ability to pay is unconstitutional. Shelton raised no objection to the DNA fee in the trial court and does not argue that any "manifest constitutional error" exists to justify review under RAP 2.5. Should this Court decline to review the issue?

5. Our supreme court has already held that a statute providing for payment of a mandatory fee does not violate substantive due process when there are sufficient safeguards to prevent imprisonment for a good-faith inability to pay. Such safeguards exist with respect to the DNA fee. Has Shelton failed to prove beyond a reasonable doubt that the DNA fee statute violates substantive due process as applied to indigent defendants?

B. STATEMENT OF THE CASE

The State charged Michael Shelton with one count of Assault in the Second Degree with a deadly weapon. CP 10. The State alleged that Shelton hit another man in the face with a broken bottle, causing lacerations that had to be treated at Harborview Medical Center. CP 4. Following trial, a jury found Shelton guilty

as charged and returned a special verdict finding that he was armed with a deadly weapon. CP 39-40.

The trial court imposed a total sentence of 15 months' confinement and 18 months of community custody. CP 44. Among other things, the court ordered that Shelton obtain a mental health evaluation and comply with treatment recommendations as a condition of community custody. CP 48. The court also imposed the mandatory $100 DNA collection fee. CP 43. Shelton, acting pro se, did not object to these provisions of his sentence.

C. ARGUMENT

For the first time on appeal, Shelton challenges the constitutionality of RCW 43.43.7541, which requires trial courts to impose a $100 DNA fee on any offender convicted of a felony or specified misdemeanor. Because Shelton's claim is both unpreserved and unripe for review, and because he lacks standing to assert it, this Court should decline to review the issue. The Court should reject the claim on the merits, if reached, because Shelton fails to establish that the DNA fee statute is unconstitutional as applied in his case. Shelton also contends that the trial court erred by imposing a mental health evaluation and recommended treatment as a condition of community custody without making the

requisite finding that he is mentally ill. The Court should accept the State's concession of error on that point and remand for correction of the judgment and sentence.

1. SHELTON LACKS STANDING TO CHALLENGE THE DNA FEE STATUTE.

Shelton asks this Court to find that RCW 43.43.7541 violates the constitutional guarantees of substantive due process and equal protection when applied to defendants who lack the present or likely future ability to pay the $100 fee. Because Shelton has not been found to be constitutionally indigent and has suffered no injury in fact, he lacks standing to challenge the statute.

A person cannot challenge the constitutionality of a statute unless he or she has been adversely affected by the provisions claimed to be unconstitutional. State v. Lundquist, 60 Wn.2d 397, 401, 374 P.2d 246 (1962). To establish standing, Shelton must show (1) that he is within the zone of interests to be protected by the constitutional guarantee in question, and (2) that he has suffered an injury in fact, economic or otherwise. Branson v. Port of Seattle, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004). The injury must be "fairly traceable to the challenged conduct and likely to be redressed by the requested relief." State v. Johnson, 179 Wn.2d

534, 552, 315 P.3d 1090 (2014) (quoting High Tide Seafoods v. State, 106 Wn.2d 695, 702, 725 P.2d 411 (1986)). The injury must be "(a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Witt v. Dep't of Air Force, 527 F.3d 805, 811 (9th Cir. 2008) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Where a party lacks standing to assert a claim, courts must refrain from reaching the merits of that claim. Id. at 552 (citing Org. to Preserve Agric. Lands v. Adams County, 128 Wn.2d 869, 896, 913 P.2d 793 (1996)).

Shelton does not attempt to establish standing to challenge the statute in this case. Presumably, he would argue that the imposition of the mandatory fee without regard to his ability to pay unfairly subjects him to the possibility of future punishment if he is unable to pay due to indigence. Indeed, "the due process and equal protection clauses prevent a state from invidiously discriminating against, or arbitrarily punishing, indigent defendants for their failure to pay fines they cannot pay." Johnson, 179 Wn.2d at 552 (citing Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)).

In State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), our supreme court clarified the imposition of fees against an indigent party as a part of sentencing is not constitutionally forbidden; rather, constitutional principles are implicated only if the State seeks to enforce collection of the fee "at a time when the defendant is unable, through no fault of his own, to comply." 131 Wn.2d at 241 (quoting State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (internal quotation marks omitted)). Thus, it is at the point of enforced collection that a defendant may assert a constitutional objection on the ground of indigency.[1] Id. Even at the point of collection, it is only if the defendant is "constitutionally indigent" that a constitutional violation occurs. Johnson, 179 Wn.2d at 553.

While there is no precise definition of constitutional indigence, "Bearden essentially mandates that we examine the totality of the defendant's financial circumstances to determine whether he or she is constitutionally indigent in the face of a particular fine." Johnson, 179 Wn.2d at 553. A finding of statutory indigence does not establish constitutional indigence. Id. at 553, 555. Thus, in Johnson, our supreme court rejected a challenge to

[1] As argued in the following section of this brief, the fact that the State has not yet attempted to enforce collection makes Shelton's claim unripe.

the driving while license suspended statute based on a claim of indigence because Johnson, while statutorily indigent, was not constitutionally indigent and therefore not in the class protected by the Due Process Clause. 179 Wn.2d at 555.

It is up to the party seeking review of an issue to provide an adequate record for review. City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). Here, Shelton does not assert that he is indigent in any sense of the word. He may argue that the trial court's order authorizing appeal in forma pauperis and appointment of counsel and preparation of the record at public expense satisfies this requirement. Brief of Appellant at 4; CP 60. But that is a finding of statutory, not constitutional, indigence. Johnson, 179 Wn.2d at 555. Because the relevant "constitutional considerations protect only the constitutionally indigent," Shelton can demonstrate no injury in fact and therefore lacks standing. Id. This Court should decline to address the merits of his claims.

2. THE COURT SHOULD NOT REACH THE MERITS OF THE CLAIM BECAUSE IT IS NOT RIPE FOR REVIEW.

Even if Shelton has standing to bring this constitutional challenge, the issue is not ripe for review. Generally, "challenges to orders establishing legal financial sentencing conditions that do not

limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them." State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). It is only when the State attempts to collect or impose punishment against an indigent person for failure to pay that constitutional principles are implicated. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992).

Our supreme court adhered to this position in Blank, when it held that an inquiry into defendant's ability to pay is not constitutionally required before imposing a repayment obligation in a judgment and sentence, as long as the court must determine whether the defendant is able to pay before sanctions are sought for nonpayment. Blank, 131 Wn.2d at 239-42. The point of enforced collection or sanctions for nonpayment is the appropriate time to discern the individual's ability to pay because before that point, "it is nearly impossible to predict ability to pay[.]" Id. at 242. "If at that time defendant is unable to pay through no fault of his own, Bearden and like cases indicate constitutional principles are implicated." Id. at 242.

Where nothing in the record reflects that the State has attempted to collect the DNA fee, any challenge to the order

requiring payment on hardship grounds is not yet ripe for review. Lundy, 176 Wn. App. at 109. That is so in this case. Because the issue is unripe, this Court should decline to reach its merits.

3. THE ALLEGED ERRORS ARE NOT MANIFEST CONSTITUTIONAL ERRORS AND SHOULD NOT BE REVIEWED UNDER RAP 2.5.

Shelton did not object to the DNA collection or to imposition of the DNA fee in the trial court. Indeed, Shelton and the State presented an agreed sentencing recommendation that included imposition of the mandatory DNA fee. 2RP 2-3. Accordingly, RAP 2.5(a) bars consideration of his claims.

A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and that it caused actual prejudice to the defendant's rights. McFarland, 127 Wn.2d at 333. If the facts necessary to adjudicate the issue are not in the record, the error is not manifest. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Here, Shelton's constitutional claims depend on his present and future inability to pay the mandatory DNA fee. But as

discussed above, there is no evidence in the record to show that Shelton is constitutionally indigent, so the error is not manifest within the meaning of RAP 2.5(a).

In State v. Blazina, our supreme court recognized that "[a] defendant who makes no objection to the imposition of discretionary [legal financial obligations (LFOs)] at sentencing is not automatically entitled to review." 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Thus, where defendants fail to object to the LFOs at sentencing, it is appropriate for appellate courts to decline review. Id. at 834. Because Shelton failed to raise the issue below, precluding development of an adequate record, this Court should decline review.

4. SHELTON FAILS TO SHOW THAT THE DNA FEE STATUTE VIOLATES DUE PROCESS.

Shelton presents an as-applied constitutional challenge to RCW 43.43.7541. Even if this Court reaches the merits of the issue, Shelton cannot meet his burden to prove that the DNA fee statute is unconstitutional.

A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt.

State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp., 142 Wn.2d 328, 335, 12 P.3d 134 (2000). Constitutional challenges are questions of law subject to de novo review. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

The federal and Washington State Constitutions guarantee that an individual is not deprived of "life, liberty, or property, without due process of the law." U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. The state and federal due process clauses are coextensive; the state's provision offers no greater protection. State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009). The Due Process Clause confers both procedural and substantive protections. Amunrud, 158 Wn.2d at 216. "Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013) (quoting Amunrud, 158 Wn.2d at 218-19).

The level of scrutiny applied to a due process challenge depends upon the nature of the interest involved. Nielsen, 177 Wn. App. at 53 (citing Amunrud, 158 Wn.2d at 219). Where no fundamental right is at issue, as in this case, the rational basis

standard applies. Amunrud, 158 Wn.2d at 222. Rational basis review merely requires that a challenged law be "rationally related to a legitimate state interest." Nielsen, 177 Wn. App. at 53 (quoting Amunrud, 158 Wn.2d at 222). This deferential standard requires the reviewing court to "assume the existence of any necessary state of facts which [it] can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest." Nielsen, 177 Wn. App. at 53 (quoting Amunrud, 158 Wn.2d at 222).

The legislature created the DNA database to store DNA samples of those convicted of felonies and certain misdemeanor offenses. RCW 43.43.753. The legislature identified such databases as "important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts." Id. To fund the DNA database, the legislature enacted RCW 43.43.7541, which originally required courts to impose a $100 DNA collection fee with every sentence imposed for specified crimes "unless the court finds that imposing the fee would result in undue hardship on the offender." Former RCW 43.43.7541 (2002). In 2008, the legislature amended the statute to make the fee mandatory

regardless of hardship: "Every sentence ... must include a fee of one hundred dollars." RCW 43.43.7541. Eighty percent of the fee goes into the "state DNA database account." Id. Expenditures from that account "may be used only for creation, operation, and maintenance of the DNA database[.]" RCW 43.43.7532.

Shelton recognizes that requiring those convicted of felonies to pay the DNA collection fee serves a legitimate state interest in operating the DNA database. Brief of Appellant at 6. He argues, however, that imposing the fee upon those who cannot pay does not rationally serve that interest. This Court should reject that argument.

In Curry, our supreme court upheld the constitutionality of the mandatory victim penalty assessment (VPA) as applied to indigent defendants. 118 Wn.2d 911, 829 P.2d 166 (1992). Like the DNA fee, the VPA is mandatory and must be imposed regardless of the defendant's ability to pay. Lundy, 176 Wn. App. at 102. The appellants in Curry argued that the statute could operate to imprison them unconstitutionally if they were unable to pay the penalty. 118 Wn.2d at 917. It is fundamentally unfair to imprison indigent defendants solely because of their inability to pay court-ordered fines. Bearden, 461 U.S. at 667-68. The Curry court

agreed with this Court that the sentencing scheme includes sufficient safeguards to prevent unconstitutional imprisonment of indigent defendants:

> Under RCW 9.94A.200[2], a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. Moreover, contempt proceedings for violations of a sentence are defined as those which are *intentional*. RCW 7.21.010(1)(b). Thus, no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.

118 Wn.2d at 918 (citing State v. Curry, 62 Wn. App. 676, 682, 814 P.2d 1252 (1991)) (emphasis in original).

While Curry addressed the mandatory VPA, the same principle has been extended to all mandatory legal financial obligations, including the DNA collection fee required by RCW 43.43.7541. See Lundy, 176 Wn. App. at 102-03; State v. Kuster, 175 Wn. App. 420, 424-26, 306 P.3d 1022 (2013). Although RCW 9.94A.200 has been recodified, the same safeguards against imprisonment of indigent defendants discussed in Curry remain in effect today. See RCW 9.94B.040; RCW 7.21.010(1)(b). Additionally, any defendant who is not in "contumacious default"

[2] Recodified in 2001 as RCW 9.94A.634 and in 2008 as RCW 9.94B.040.

may seek relief "at any time ... for remission of the payment of costs or any unpaid portion thereof" on the basis of hardship. RCW 10.01.160(4). A defendant may also seek reduction or waiver of interest on LFOs upon a showing that the interest "creates a hardship for the offender or his or her immediate family." RCW 10.82.090(2)(a), (c).

As in Curry, these safeguards are sufficient to prevent sanctions and imprisonment for mere inability to pay. Accordingly, like the VPA, the mandatory DNA fee in RCW 43.43.7541 does not violate substantive due process as applied to indigent defendants.

Shelton cites Blazina to support his due process claim. Blazina held that a different statute, RCW 10.01.160(3), requires the trial court to conduct an individualized inquiry into the defendant's ability to pay before imposing discretionary LFOs. 182 Wn.2d 837-38.

Shelton's reliance on Blazina is misplaced. First, Blazina involved a claimed violation of a statute, not due process, and its holding is based on statutory construction. Second, Blazina concerned *discretionary* LFOs, not mandatory fees like the one involved here. 182 Wn.2d 837-38. Nothing in Blazina changes the principle articulated in Curry that mandatory LFOs may be

constitutionally imposed at sentencing without a determination of the defendant's ability to pay so long as there are sufficient safeguards to prevent imprisonment of indigent defendants for a noncontumacious failure to pay.

Shelton fails to show that the mandatory DNA fee required by RCW 43.43.7541 violates substantive due process as applied to indigent defendants. If this Court reaches the merits of this issue, it should affirm.

5. THE TRIAL COURT ERRED BY IMPOSING MENTAL HEALTH EVALUATION AND TREATMENT WITHOUT FINDING THAT SHELTON IS MENTALLY ILL.

Shelton argues that the trial court erred in imposing a mental health evaluation and follow up treatment as a condition of community custody. The State concedes that the trial court did not follow the statutorily-required procedure before ordering mental health treatment. Thus, this Court should remand for correction of the judgment and sentence to delete this requirement.

A trial court may order a mental health evaluation and recommended treatment as a condition of community custody only

when the court has considered a presentence report[3] and has made findings that the defendant is mentally ill and that his mental illness contributed to his crimes. RCW 9.94B.080; State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003). Failure to follow this procedure may be raised for the first time on appeal. Jones, 118 Wn. App. at 204.

The trial court here had cause to be concerned about Shelton's mental health and indicated this concern during sentencing. RP (11/21/2014) at 14, 18. The Court found that "mental health issues contributed to this offense" and that "[t]reatment is reasonably related to the circumstances of this crime and reasonably necessary to benefit the defendant and the community." CP 48. However, the court did not make the finding that Shelton "is a mentally ill person as defined in RCW 71.24.025," as required by RCW 9.94B.080.

Under Jones, the trial court erred when it ordered mental health evaluation and treatment. This Court should remand for the trial court to consider whether a mental health evaluation is appropriate under RCW 9.94B.080. Jones, 118 Wn. App. at 211.

[3] Effective July 24, 2015, the trial court is no longer required to consider a presentence report before ordering mental health evaluation and treatment as a condition of community custody. Laws of 2015, ch. 80, § 1.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm the imposition of the DNA collection and fee and to remand for the trial court to consider whether a mental health evaluation is appropriate.

DATED this 17th day of July, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Jennifer P. Joseph
JENNIFER P. JOSEPH, WSBA #35042
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Dobson (dobsonlaw@comcast.net) and Dana Nelson (nelsond@nwattorney.net), the attorneys for the appellant, Michael Shelton, containing a copy of the Brief of Respondent in State v. Shelton, Cause No. 72848-2 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

C Brame
Name

7/17/15
Date

Done in Seattle, Washington