72965-9

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Court of Appeals
Division I
State of Washington

NO. 72965-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

THOMAS OLSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Where evidence that is merely "potentially useful" to the defense is lost or destroyed by the State, due process requires dismissal only if the defendant proves that the evidence was destroyed in bad faith. Whether bad faith exists depends on whether the police knew the evidence had exculpatory value at the time it was lost or destroyed. Here, recordings of 911 calls that were not exculpatory were destroyed after 90 days per a standard retention policy when the State mistakenly failed to request their preservation. Absent evidence that destruction of the recordings was improperly motivated, has Olson failed to establish a due process violation?

2. Criminal Rule 8.3(b) gives the trial court discretion to dismiss a prosecution for governmental mismanagement or misconduct that materially affected the defendant's right to a fair trial. Where there is no evidence that destroyed recordings of 911 calls would provide any exculpatory evidence, and where the defense had the names and contact information of all 911 callers in any event, did the trial court properly refuse to dismiss the prosecution?

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 and Victim Penalty Assessment from Olson. 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. Olson raised no objection to the DNA fee or Victim Penalty Assessment 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. Substantive due process requires that laws that affect an individual's non-fundamental right be rationally related to a legitimate state interest. Olson acknowledges the State's legitimate interest in creating and maintaining a DNA database and in funding programs to facilitate victim participation in criminal prosecution. RCW 43.43.7541 establishes a mechanism to fund the DNA database and RCW 7.68.035 creates a system to fund the

programs for victims. Has Olson failed to prove beyond a reasonable doubt that the DNA fee and Victim Penalty Assessment statutes violate substantive due process as applied to indigent defendants?

6. RCW 10.01.160 permits the trial court to impose "costs" upon a convicted defendant only if he or she has the current or likely future ability to pay them. For purposes of this statute, "costs" are "limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program ... or pretrial supervision." Neither the DNA fee nor the Victim Penalty Assessment is a "cost" by this definition, and courts have held that RCW 10.01.160 does not apply to such mandatory fees and fines. Has Olson failed to show that the statute precludes imposition of the DNA fee and Victim Penalty Assessment?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

By amended information, the State charged Thomas Lee Olson with Felony DUI, Driving While License Suspended/Revoked in the First Degree, and Violation of the Uniform Controlled Substances Act (Possession of Heroin). CP 18-19. The State

alleged that Olson was impaired by heroin when driving a blue pickup that crashed into a guardrail and light post and careened into oncoming traffic, that his license was revoked at the time, and that he possessed heroin at the time of the incident and his subsequent arrest. CP 5-6. A jury found Olson guilty as charged. CP 193-96. The trial court imposed a low-end standard range sentence of 41 months of incarceration and 12 months of community custody. CP 261. The trial court imposed only mandatory fees and assessments and waived all non-mandatory legal financial obligations, including interest.[1] CP 260.

2. SUBSTANTIVE FACTS

One afternoon in January 2014, Thomas Olson borrowed his friend Andrew Long's blue pickup truck to move some things. 5RP 84-86.[2] Olson was alone when he met Long to get the keys and did not mention plans to be with anyone else. 5RP 86.

Later that day, Marianne Jones was driving northbound on Lakemont Boulevard in Bellevue behind the large truck. 5RP

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[1] Interest was not waived with respect to restitution. Although Olson had totaled a friend's truck in this incident, it does not appear that the court ever ordered restitution in this case.

[2] The State refers to the verbatim report of proceeding as follows: 1RP (7/31/14); 2RP (10/27/14); 3RP (10/28/14); 4RP (10/29/14); 5RP (10/30/14); 6RP (11/3/14); 7RP (11/4/14); 8RP (1/9/15).

42-43. Jones called 911 after the truck swerved into the opposite lane, and she did not let the truck out of her sight as she followed it down the hill. 5RP 42. The truck "started to swerve into a concrete barrier over a grass embankment, continuing down, swerving across all other oncoming lanes, again up onto a sidewalk, [and] knocked down a lamp post." 5RP 42. The truck continued, again crossing all lanes as parts of the truck fell off onto the road. 5RP 42. It came to a stop at the intersection at the bottom of the hill. 5RP 42. Jones noticed that Olson was the only person in the truck and that he was sitting in the driver's seat. 5RP 44. Jones saw Olson get out, pick up pieces of the truck, and try to get the truck to move. 5RP 42-44, 46-47. No one else got out of the truck or seemed to be associated with it. 5RP 48, 50. Olson "appeared to definitely be out it" and had a "very blank stare on his face." 5RP 51. Jones waited at the scene until the police arrived and arrested Olson. 5RP 50.

Laurie Rodgers was walking northbound on Lakemont Boulevard's sidewalk. 6RP 66. She heard a loud noise, looked over her shoulder, and saw the truck hitting the guardrail and speeding past her, apparently out of control. 6RP 66, 68. When she got to the bottom of the hill, she saw the truck stopped in the

roadway with several pieces of it scattered on the ground. 6RP 67. One of the fenders was wrapped around one of the tires so it could not be moved. 6RP 70. Rodgers spoke to the man sitting in the driver's seat to make sure he was not hurt and suggested that he stay there until help arrived. 6RP 70. She stayed at the scene until police arrived. 6RP 71.

Joel Lessing witnessed the incident from the bottom of the hill, where he was waiting at a red light. 5RP 8-9. Lessing saw the blue truck strike the guardrail, go across all lanes of traffic, strike the curb, then ricochet and eventually grind to a halt right before reaching the intersection. 5RP 8-9. There were no cars travelling in front of the blue truck. 5RP 10. Lessing called 911 to report the incident and slowly drove into the intersection when the light turned green. 5RP 12-13. Lessing could see into the truck when it came to rest and observed only one person inside. 5RP 15-16. He asked the driver, whom he identified in court as Olson, if he was okay. 5RP 12-13. Olson said he was okay, but Lessing could clearly see that was not so. 5RP 12-13. Olson was still trying to start the disabled vehicle and get it to move. 5RP 12-13. He seemed dazed and "did not see[m] cognizant of what had just happened. It was almost as if he got in his car and it wouldn't start

and he didn't know why it wouldn't start." 5RP 14-15. Lessing advised Olson to hold tight and wait for help, finished his conversation with 911, and left the scene. 5RP 12-13.

Clairissa Schaaf observed Olson's collisions as she drove up the hill, southbound on Lakemont Boulevard. 6RP 92. Schaaf noticed the light post fall, saw that a truck had hit it, and watched the truck back up and then start coming down the hill in her lane. 6RP 92. Schaaf swerved out of the truck's way and called 911. 6RP 92.

Officer Finan and Lieutenant Young responded to the scene within five minutes of the 911 calls. 5RP 48; 6RP 37. Olson was still in the driver's seat. 6RP 69. When he got out of the truck, he saw Finan approaching and started to back away. 6RP 70. To make sure that he did not try to flee, Young grabbed his arm. 6RP 39, 70. Both officers then saw a plastic baggie and needles in Olson's sweatshirt pocket. 6RP 39, 71. The plastic baggie contained a black tar substance that appeared to be, and was later confirmed to be, heroin. 6RP 40, 103. Olson was arrested and advised of his rights, which he stated he understood. 6RP 43.

Olson denied that he had been driving the truck. 6RP 43-44, 53. He claimed that his friend was driving the truck, he was the

passenger, and they were following another friend in a second car. 6RP 43-44. He stated that this other friend was driving erratically and caused the truck to crash. 6RP 43-44. After the crash, he and the driver got out of the blue truck, the driver got into the other friend's car, and those two drove away to get a tow truck. 6RP 43-44. Olson said that he was waiting for them to return. 6RP 82. In fact, there was no indication that there was another vehicle or another person involved in the incident. 6RP 44, 79-80. Lieutenant Young confirmed with a witness that Olson had been driving. 6RP 71. Young remained at the scene for an hour and a half; no one ever returned with a tow truck. 6RP 86.

To the officers, Olson appeared to be impaired: his eyes were droopy, his pupils were constricted, and his speech was slurred. 6RP 45, 72. He seemed "out of it." 6RP 71. He was flushed, slow in response, and his balance was off. 6RP 71. Olson admitted that he had smoked heroin about an hour earlier. 6RP 46. A subsequent test of Olson's blood confirmed the presence of morphine, a metabolite of heroin. 6RP 154-56.

Additional facts are set forth in the discussion section to which they pertain.

C. ARGUMENT

1. NEGLIGENT DESTRUCTION OF RECORDED 911 CALLS DID NOT VIOLATE DUE PROCESS.

Olson contends that the State violated his right to due process by failing to preserve the audio recordings of several 911 calls pertaining to his collision. Because Olson fails to establish that this evidence was material or destroyed in bad faith, his argument fails.

In State v. Wittenbarger, our supreme court formally adopted the United States Supreme Court's test for determining whether the government's failure to preserve evidence significant to the defense violates a defendant's due process rights. 124 Wn.2d 467, 474, 481, 880 P.2d 517 (1994) (citing Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)). Under that test, whether a due process violation has occurred depends on the nature of the evidence and the motivation of law enforcement. If the State has failed to preserve "material exculpatory evidence," criminal charges must be dismissed. Wittenbarger, 124 Wn.2d at 475.

> In order to be considered "material exculpatory evidence", the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant

> would be unable to obtain comparable evidence by other reasonably available means.

Id. (citing California v. Trombetta, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). On the other hand, the State's failure to preserve evidence that is merely "potentially useful" does not violate due process unless the defendant can show bad faith on the part of the police. Youngblood, 488 U.S. at 58; Wittenbarger, 124 Wn.2d at 477. "Potentially useful" evidence is "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Youngblood, 488 U.S. at 57.

Olson concedes that the 911 recordings were merely "potentially useful."[3] Brief of Appellant (BOA) at 8. Thus, the failure to retain the recordings is not a due process violation unless Olson can show that they were destroyed in bad faith. Youngblood, 488 U.S. at 58; Wittenbarger, 124 Wn.2d at 477. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or

[3] Despite this concession and Olson's failure to analyze the issue as one of "material exculpatory evidence" under Youngblood/Wittenbarger, Olson also confusingly refers to the lost 911 recordings as "material" in other portions of his brief. BOA at 10, 12. The State interprets these references to mean "important" or "relevant."

destroyed." 488 U.S. at 56 n.*. In other words, the defendant must show the failure to preserve evidence "was improperly motivated." Wittenbarger, 124 Wn.2d at 478; State v. Groth, 163 Wn. App. 548, 559, 261 P.3d 183 (2011). Olson makes no such showing.

The record indicates that the Bellevue Police Department contracts with NORCOM, a private company, to record and manage 911 recordings. 2RP 23, 26. NORCOM's policy is to record over such recordings after 90 days. 2RP 23, 26.

Shortly after the State filed charges against Olson in superior court, his attorney filed a standard notice of appearance and a demand for discovery of 911 recordings, among other things. CP 277-82. At no point did the prosecuting attorney's office have possession of the 911 recordings, and they were never provided to defense. 3RP 32. Pursuant to its policy, NORCOM recorded over or destroyed the recordings after 90 days. 3RP 32.

In the trial court, Olson identified the State's acquiescence to NORCOM's 90-day retention policy as the bad faith that justified dismissal. 3RP 28-29. Olson did not argue that the police or prosecutor in this case acted with improper motivation in failing to retain the recordings; rather, "it's destruction of evidence for no

reason, which is ... really the substance of our bad faith [argument]." 3RP 29. The trial court rejected the argument:

> I don't find that the 911 calls are materially exculpatory. I think, at the most, that they are potentially useful and I don't think that they were destroyed in bad faith. The 911 calls, at the most, could have – and I didn't – I couldn't figure out how you came up with seven people, but it appeared that the people were identified. I think that the most that these 911 calls would have done is provide impeachment material, maybe, with these people that testified at trial. So – and I don't find they're destroyed in bad faith. ... So I'm going to deny the motion to dismiss.

2RP 34.

Olson has changed his argument on appeal. He now contends that the State's bad faith was not in acquiescing to NORCOM's 90-day retention policy, but the failure to act on the defense request for the 911 recordings. BOA at 10. But without any evidence of improper motivation, the most that can be said is that the State negligently failed to preserve evidence that had no apparent exculpatory value. As a matter of law, negligent destruction of potentially useful evidence does not rise to the level of bad faith that would constitute a due process violation under Youngblood and Wittenbarger. Groth, 163 Wn. App. at 559. Olson's due process argument therefore fails.

Even if Olson could establish bad faith destruction of the 911 calls, the due process violation would be subject to harmless error analysis. See State v. Luvene, 127 Wn.2d 690, 704, 903 P.2d 960 (1995) (State's failure to disclose exculpatory information was harmless when it resulted in no prejudice to defendant). In this case, any error the State made in failing to preserve the 911 calls was harmless.

At least four people called 911 and are listed in the CAD[4] report associated with this incident: Marianne Jones, Clairissa Schaaf, Joel Lessing, and Caroline Williams. Supp. CP __ (Sub. No. 61) (State's Response to Defendant's CrR 8.3 Motion to Dismiss, Appendix: CAD Log). Each of these individuals provided his or her phone number, which was included in the CAD log. The State listed the first three callers as witnesses in the case, and the defense interviewed witnesses before trial. 5RP 61; 6RP 11. The three witnesses gave descriptions of the incident that were consistent with previous statements and corroborated by each other's testimony and that of the officers who responded to the scene. Nothing prevented the defense from calling the fourth

[4] A computer-aided dispatch (CAD) report records all of the communication traffic involving 911 dispatch, the reporting party, and officers.

witness, Caroline Williams, to see whether her observations differed from those of Jones, Schaaf, and Lessing.

Further, Olson's argument that the 911 calls were critical to the defense is itself questionable. He argues that the material was important in order to demonstrate that the witnesses might have been so distracted that they simply failed to notice the other car and drivers that Olson claims were involved. But Olson highlighted the potential distractions during cross examination. For example, Olson's counsel elicited from Jones that she was traveling with her children when she witnessed the collisions and was worried about their safety and that of a nearby pedestrian. 5RP 51-54. Lessing testified on cross examination that he had to decide what to do while the truck was barreling towards him and that he was speaking with 911 at the same time he made contact with Olson. 6RP 5-7. In closing argument, Olson's counsel argued that the distractions faced by the State's witnesses during the collisions provided reasonable doubt. For example, with respect to Jones, defense counsel argued:

> We also know that Ms. Jones had her children in her car, and she was understandably worried about their safety and her own safety. She's on the phone with 911. That alone was distracting and dividing her attention. She had to navigate that intersection, just

> like any other driver, so she's had a lot of things going on. And don't forget, the State's own witness described driving as a divided attention task, so here you have a woman who's on the phone with 911, she has her kids in the car, she's navigating this intersection, and she's trying to observe what happened. Her attention was divided in many parts in this case.

7RP 57. Counsel further argued that all of the State's eyewitnesses "had a lot to do (inaudible) their own safety, the safety of their passengers, safety of other people around the scene, and they had to navigate this intersection and pay attention to all of that in those critical moments" and that these distractions meant that "these witnesses didn't have the ability to observe everything that went on[.]" 7RP 63. Thus, the unavailability of the 911 recordings did not preclude the defense from presenting its theory to the jury.

Further, the evidence against Olson was overwhelming. Several eyewitnesses testified to watching the blue pickup truck ricochet down a hill, enter oncoming traffic, crash into and knock down a light post, and continue driving until the truck was too disabled to move. Not one witness corroborated Olson's claim that someone else was driving the truck and fled in another car. Indeed, Lessing and Jones saw the entire incident and definitively

identified Olson as the truck's driver, and Lieutenant Young testified that Olson was still in the driver's seat when police arrived on the scene. In light of this evidence, it cannot reasonably be said that any error in failing to preserve the 911 recordings affected the jury's verdict.

Because there is no evidence that the State's failure to preserve the 911 recordings was improperly motivated, and because any error in allowing the evidence to be destroyed was plainly harmless given Olson's access to the 911 callers and the overwhelming evidence of his guilt, this Court should reject Olson's claim that a violation of due process entitles him to reversal and dismissal of charges.

2. THE TRIAL COURT PROPERLY REFUSED TO DISMISS THE CASE.

In addition to his due process argument, Olson contends that the trial court erred when it did not dismiss the prosecution for government mismanagement under CrR 8.3(b). Because Olson demonstrates no prejudice from the failure to preserve 911 recordings, this Court should reject the claim.

Under CrR 8.3(b), the trial court may "in the furtherance of justice after notice and hearing, dismiss any criminal prosecution

due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." CrR 8.3(b). Dismissal under CrR 8.3(b) presents "an extraordinary remedy to which the court should resort only in truly egregious cases of mismanagement or misconduct." State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). Dismissal is not warranted if the defendant has not been prejudiced by governmental misconduct. State v. Marks, 114 Wn.2d 724, 730, 790 P.2d 138 (1990). "Dismissal is also inappropriate when there is credible and admissible evidence obtained against the defendant that is untainted by the governmental misconduct." Id. at 731.

A trial court's denial of dismissal under CrR 8.3(b) is reviewed for abuse of discretion. State v. Oppelt, 172 Wn.2d 285, 297, 257 P.3d 653 (2011). Even where a defendant demonstrates some actual prejudice, "the judge may in her discretion refuse to dismiss under CrR 8.3(b) if the actual prejudice is slight and the misconduct is not too egregious." Id. at 297-98.

As explained above, there was no prejudice from the failure to preserve the 911 recordings. While he did not have recordings of the 911 calls, Olson had access to the 911 callers themselves, and to the CAD log, which conveyed the gist of their reports. Olson

was able to interview and cross examine these witnesses, and nothing prevented him from calling the fourth 911 caller if he believed that her testimony would support his version of events or cast doubt on the testimony of other witnesses.

The trial judge determined that Olson could receive a fair trial in the absence of the 911 recordings. Olson has not shown that conclusion to be untenable or unreasonable. This Court should affirm.

3. OLSON'S CHALLENGES TO MANDATORY LEGAL FINANCIAL OBLIGATIONS SHOULD BE REJECTED.

When any defendant is convicted of a felony, the trial court is required by law to impose a $100 DNA fee and a $500 Victim Penalty Assessment (VPA). RCW 43.43.7541; RCW 7.68.035. The trial court complied with these statutory requirements by imposing these mandatory legal financial obligations (LFOs) in Olson's judgment and sentence, and Olson did not object. For the first time on appeal, Olson contends that the statutes mandating imposition of the VPA and the DNA fee are unconstitutional as applied to indigent defendants, and that the trial court failed to comply with RCW 10.01.160(3) by imposing the LFOs without consideration of his ability to pay. Because Olson's claims are both

unpreserved and unripe for review, this Court should decline to consider them. If this Court does reach the merits, it should reject Olson's claims because he fails to establish that the statutes are unconstitutional beyond a reasonable doubt.

a. The Court Should Not Reach The Merits Of The Claim Because It Is Not Ripe For Review.

Assuming that Olson has standing to bring this constitutional challenge,[5] this Court should refuse to reach the merits because 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

[5] Generally, a person may challenge the constitutionality of a statute only if he is harmed by the provisions claimed to be unconstitutional. State v. Cates, 183 Wn.2d 531, 540, 354 P.3d 832 (2015). In the context of due process challenges based on legal financial obligations assessed against indigent individuals, a person must demonstrate "constitutional indigence" based on "the totality of the defendant's financial circumstances" to establish standing. State v. Johnson, 179 Wn.2d 534, 553, 555, 315 P.3d 1090 (2014). Here, Olson supports his claim of indigency by citing sentencing information indicating that he was homeless and indigent at the time of the offense. However, Olson also stated at sentencing that he has been a "very productive member of society," has "been working my whole adult life" and has "been able to support myself." 8RP 20. His financial trouble appears to be related to his serious heroin addiction, treatment of which the trial court facilitated by granting an appeal bond on condition that he remain in a year-long inpatient treatment program of his own choice. 8RP 28; Supp. CP __ (Sub. No. 107). Presumably, after treatment and an extended period of sobriety, Olson will again be able to support himself. In any event, since the trial record does not permit review the totality of Olson's financial circumstances, including whether Olson owns property, he has not established constitutional indigence. See Johnson, 179 Wn.2d at 553-54 ("Ownership of, or equity in, property indicates that a defendant is not constitutionally indigent"). Failure of the record to disclose such information demonstrates the wisdom of refusing to entertain his claim for the first time on appeal.

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 State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), 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. Id. 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, ... constitutional principles are implicated." Id. at 242.

Where nothing in the record reflects that the State has attempted to collect the VPA or 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.

b. The Alleged Errors Are Not Manifest Constitutional Errors And Should Not Be Reviewed Under RAP 2.5.

Olson did not object to the imposition of the VPA or the DNA fee at sentencing. 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, Olson's constitutional claims depend on his present and future inability to pay the mandatory VPA and the DNA fee. But although he established statutory indigence at the time of sentencing, Olson's failure to object to imposition of the DNA fee deprived the trial court of the opportunity to make a record as to his

financial resources and likely future ability to pay. Since there are no facts in the record to adjudicate whether Olson is constitutionally indigent, any error cannot be 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 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. See also State v. Clark, No. 32928-3-III, 2015 WL 7354717 (November 19, 2015) (recognizing that "the LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity," and exercising discretion not to consider challenge to a fine for the first time on appeal). Because Olson failed to raise the issue below, precluding development of an adequate record, this Court should decline review.

c. The Victim Penalty Assessment And The DNA Fee Statute Do Not Violate Due Process.

Even if this Court exercises its discretion to review the unpreserved claim, it should reject Olson's constitutional challenges to RCW 43.43.7541 and RCW 7.68.035. 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). If at all possible, courts should construe statutes to be constitutional. State v. Farmer, 116 Wn.2d 414, 419-20, 805 P.2d 200 (1991). Olson cannot meet this heavy burden; his claim should be rejected.

Substantive due process bars arbitrary and capricious government action regardless of the fairness of the procedures used. State v. Beaver, 184 Wn. App. 235, 243, 336 P.3d 654 (2014), aff'd, 184 Wn.2d 321 (2015). The level of review applied depends on the nature of the interest involved. Id. (citing Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 219, 143 P.3d 571 (2006)). Where no fundamental right is at issue, as in this case, the rational basis standard applies. Amunrud, 158 Wn.2d at 222. Under this standard, the challenged statute need only be "rationally related to

a legitimate state interest." Id. In determining whether this relationship exists, the reviewing court may "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." Id.

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. This statute 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.

In 1973, the legislature created a crime victims' compensation account to aid innocent victims of criminal acts. State v. Humphrey, 139 Wn.2d 53, 57, 983 P.2d 1118 (1999) (citing LAWS OF 1973, 1st Ex. Sess., ch. 122, § 1). To help fund the account, the legislature added a provision in 1977 directing trial courts to impose a penalty assessment upon those found guilty of certain classes of crimes. Id. (citing LAWS OF 1977, 1st Ex. Sess., ch. 302, § 10). The Victim Penalty Assessment is thus designed to fund "comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035. In addition to encouraging participation at trial, these programs work to assist victims of crime in learning about and applying for benefits, assist such victims in navigating the restitution and adjudication process, and assist victims of violent crimes in the preparation and presentation of their claims to the Department of Labor and Industries. RCW 7.68.035(4).

Olson recognizes that requiring those convicted of felonies to pay the DNA fee serves a legitimate state interest in operating the DNA database. BOA at 15. He also acknowledges that the

VPA serves a legitimate state interest in providing services to victims. BOA at 15-16. Relying on Blazina, however, he argues that imposing these mandatory LFOs upon those who cannot pay does not rationally serve those interests.

Blazina involved a claimed violation of RCW 10.01.160(3), which requires the trial court to make an individualized determination of a defendant's ability to pay before imposing *discretionary* LFOs as part of a sentence. 182 Wn.2d at 837-38. Because Blazina had not objected to imposition of the LFOs at sentencing, the court concluded that he was not automatically entitled to review. Id. at 832. In deciding to reach the merits anyway, the court noted the "national conversation" about problems associated with imposing LFOs on indigent defendants. Id. at 835-37. Olson cites this discussion as support for his position that the fee imposed under RCW 43.43.7541 bears no rational relationship to the statute's legitimate purpose, but the passage offers no such support. Rather, Blazina concerned a claimed violation of a statute – not a due process violation – and its holding was based on statutory construction. Accordingly, Blazina's application to a constitutional challenge to a mandatory fee is doubtful.

Further, while Olson may have no ability to make even minimal payments at the time of sentencing, that circumstance may not continue indefinitely. Olson is a young man with a 41-month sentence who has worked his entire adult life and has been able to support himself. 8RP 20. Presumably, he will still be employable upon his release. Further, there is an opportunity for employment in prison. RCW 72.09.100. The legislature recognized that inmates earn money in that program, and provided for a percentage of that income to be paid toward the inmate's LFOs. RCW 72.09.111(1)(a)(iv). Olson might also receive funds through an inheritance or gift, in which case the legislature has also provided that a portion of those funds would be paid toward LFOs. RCW 72.11.020, .030.

In the context of RCW 10.73.160, pertaining to appellate costs, our supreme court observed that it is not necessary to inquire into a defendant's finances or ability to pay before entering a recoupment order against an indigent defendant "as it is nearly impossible to predict ability to pay over a period of 10 years or longer." Blank, 131 Wn.2d at 242. The same is true with respect to the VPA and the DNA fee. Because it is unknown whether the defendant will gain employment in prison or otherwise obtain funds,

indigence at sentencing does not weaken the rational basis for these LFOs.

Olson emphasizes that Washington's current LFO collection scheme can impose significant hardships upon the indigent. He argues that the current scheme provides for "immediate enforced collection." BOA at 19. He points to RCW 10.82.090, imposing interest on legal financial obligations accruing from the date of judgment, and various statutes relating to collection through payroll deduction and garnishment.

But the statutes on which Olson relies do not result in enforced collection from indigent defendants. While interest may accrue on the VPA and the DNA fee in some cases, it will not accrue here because the trial court waived interest on LFOs. CP 260. Even when interest is not waived at sentencing, it is not necessarily collected. The interest may be reduced or waived in certain circumstances; it must be waived if it accrued during the time the defendant was in total confinement or if the interest "creates a hardship for the offender or his or her immediate family." RCW 10.82.090(2). The payroll deduction and wage garnishment statutes necessarily apply only if the offender has gainful

employment, a condition that makes it likely that he has the ability to pay something toward the DNA fee.

Moreover, in Amunrud, our supreme court rejected the claim that rational basis review requires the court to consider whether the challenged laws are unduly oppressive on individuals. 158 Wn.2d at 226. Instead, the only requirement is that the law bears a reasonable relationship to a legitimate state interest. The State has a legitimate interest in creating and maintaining a DNA database and in providing services to crime victims. Providing a funding mechanism for these programs is reasonably related to that interest.

d. RCW 10.01.160 Does Not Apply To Mandatory LFOs.

In addition to his constitutional challenges to the VPA and the DNA fee, Olson contends for the first time on appeal that his LFOs should be stricken because the trial court failed to comply with RCW 10.01.160(3) by imposing the LFOs without considering his ability to pay. Olson failed to preserve this non-constitutional issue for review by failing to object to the VPA or the DNA fee at sentencing; this Court should therefore decline to review this argument. RAP 2.5(a)(3); Blazina, 182 Wn.2d at 834 (court of

appeals properly exercises its discretion to decline review of unpreserved LFO claims). His argument fails in any event, because RCW 10.01.160 does not apply to mandatory LFOs.

RCW 10.01.160 gives the trial court discretion to order a defendant to pay "costs," which it defines as "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program ... or pretrial supervision" if the defendant has the ability to pay them. RCW 10.01.160(2), (3). Costs are a subset of the definition of "legal financial obligations," which distinguishes among different types of costs and obligations. RCW 9.94A.030(3) (listing "court costs" separately from "statutorily imposed crime victims' compensation fees assessed pursuant to RCW 7.68.035" and "any other financial obligation that is assessed to the offender as a result of a felony conviction"). RCW 10.01.160 lists a series of costs that may be imposed under its authority, such as warrant service costs, jury fees, costs of administering deferred prosecution or pretrial supervision, and incarceration costs. RCW 10.01.160(2). The definition omits any reference to mandatory fines or fees.

In Curry, our supreme court observed that mandatory LFOs like the VPA are not governed by RCW 10.01.160's ability-to-pay

requirement: "In contrast to RCW 10.01.160, no provision is made in the [VPA] statute for indigent defendants." 118 Wn.2d at 917. Although Olson argues that remark was dicta, Divisions Two and Three of this Court have repeatedly held that RCW 10.01.160 does not apply to mandatory LFOs. See, e.g., Clark, 2015 WL 7354717 at *2 (RCW 10.01.160's ability-to-pay inquiry required only for discretionary LFOs, not for VPA or DNA fees); Lundy, 176 Wn. App. at 102-03 ("For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account."); State v. Kuster, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (VPA and DNA fee "are not discretionary costs governed by RCW 10.01.160"). Although none of this Division's published cases have so clearly held that RCW 10.01.160 does not apply to mandatory LFOs, this Court should adhere to that well-established conclusion.

D. CONCLUSION

Olson fails to show that the State acted in bad faith in failing to preserve recorded 911 calls or that he suffered actual prejudice as a result. He further fails to show that the mandatory DNA fee and Victim Penalty Assessment violate substantive due process as applied to indigent defendants or that the trial court violated RCW

10.01.160 by imposing the mandatory LFOs without inquiring into Olson's ability to pay. The State respectfully asks this Court to affirm.

DATED this 6th day of January, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Dobson (dobsonlaw@comcast.net) and Dana Nelson (nelson@nwattorney.net), the attorney for the appellant, Thomas Lee Olson, containing a copy of the Supplemental Designation of Clerk's Papers in State v. Olson, Cause No. 72965-9 -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.

Name

01-06-16
Date

Done in Seattle, Washington