NO. 33873-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

TYRONE CHRISTOPHER BELLE,

Appellant.

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

The Honorable John O. Cooney, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state did not prove beyond a reasonable doubt that Tyrone Belle committed the crime of attempting to elude a police vehicle because there was insufficient evidence to support the allegation he drove in a reckless manner after knowingly being signaled to stop.

2. The trial court erred when it ordered Mr. Belle to pay a $100 DNA collection fee.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the evidence is sufficient to prove Tyrone Belle committed the crime of attempting to elude a police vehicle when he did not drive recklessly after knowingly being signaled to stop?

2. Whether 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 ability, to pay the fee?

3. Whether the mandatory $100 collection fee authorized under RCW 43.43.7541 violates equal protection when applied to defendants who have previously provided a sample and paid the $100 DNA collection fee?

C. STATEMENT OF THE CASE

1. Procedural Facts

The Spokane County prosecutor charged Tyrone Belle by amended information with Attempting to Elude a Police Vehicle[1] and Violation of an Ignition Interlock Requirement.[2] CP 2-3. The amended information specifically alleged Mr. Belle's eluding threatened harm or physical injury to one or more persons other than himself or the pursuing police officer.[3] CP 2. The jury found Mr. Belle guilty as charged and answered "yes" to the special allegation. RP[4] 286; CP 5-7.

2. Trial evidence

Spokane Police Officer Seth Killian was monitoring traffic in a residential neighborhood where there had been complaints of speeding and reckless drivers. RP 113, 118. The speed limit in the neighborhood was 25 miles per hour. RP 120. Motorists commonly drove through the neighborhood to avoid a congested intersection. RP 119-20. It was March 11, 2015. RP 120. The sun was shining and families were outside in the nice weather. RP 120-21. People were working in their yards and children were riding their bikes. RP 120-21.

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[1] RCW 46.61.024
[2] RCW 46.20.740
[3] RCW 9.94A.834
[4] There are two consecutively numbered volumes of verbatim report of proceedings ("RP") for this appeal.

Officer Killian was wearing his uniform and driving a marked patrol car equipped with overhead red and blue lights and a siren. RP 121, 133. He had just finished a traffic stop when he heard and saw a dually pickup "flying" around a corner with its exhaust and tires squealing. RP 122. Officer Killian was facing the truck as it headed in his direction. RP RP 122-23. He flashed his overhead lights to signal the truck to slow down and to put the driver on notice that law enforcement was watching. RP 125. The truck did not slow down. RP 124. Officer Killian pulled over to let it pass. RP 123. It passed him at an estimated 50 miles per hour. RP 160. Officer Killian got a "good look" at the driver. RP 129. He described the residential street as tight with vehicles parked on both sides. RP 118.

Office Killian decided to follow the truck which, by then, had slid around another corner to another residential street and was out of his view. RP 125-26. To turn his car in the other direction, Officer Killian had to drive up onto a sidewalk. RP 125. Now headed in the right direction and ready to follow the truck, Officer Killian turned on his overhead lights and blipped his siren several times to alert people in the neighborhood to move out of his way. RP 126-27.

Once around the corner and on the same street as the truck, Officer Killian accelerated to catch up. RP 125. He did not testify that he could see the truck ahead of him or testify to how fast he drove to catch up to the

truck. RP 125-27. At one point, he briefly switched his siren to automatic mode. RP 127.

Officer Killian next saw the truck as it was pulling to the right side of the road as if to stop. RP 127. Officer Killian was able to read the truck's license plate. RP 127. He called off the pursuit. He thought it was too dangerous. He also thought with the license plate and the visual observation of the driver, he could find the truck and the driver. RP 127-28. Rather than coming to a full stop, the truck accelerated, skidded around another corner, and drove away. RP 127.

Officer Killian drove to the address of the truck's registered owner, Irene Nieves. RP 131. After speaking to Ms. Nieves, he used his patrol car's computer to look up "DOL photos and mugshots" for Mr. Belle. RP 131. He identified Mr. Belle in a booking photo. RP 132-33. A review of Mr. Belle's Department of Licensing record showed he had to drive vehicles equipped with an ignition interlock device. RP 135.

Officer Killian found the truck parked at Ms. Nieves's mother's home. RP 134. He looked in the truck's windows and saw no ignition interlock device. RP 135. He requested a warrant for Mr. Belle's arrest. RP 134.

Officer Killian was the state's only witness. RP 113-209. Mr. Belle did not testify. RP 232.

3. Sentencing

Mr. Belle agreed to his criminal history. CP 8-9. On the attempting to elude conviction, the court imposed one day on the substantive charge plus the 12-month special enhancement for a 12 month-plus-1-day sentence. RP 296; CP 14. The court imposed all 364 days on the misdemeanor ignition interlock conviction but suspended the sentence for two years. RP 297; CP 26.

The court found Mr. Belle indigent and imposed only mandatory legal financial obligations (LFOs): a $500 victim assessment and a $200 criminal filing fee. RP 297; CP 16, 17. The court also imposed a $100 DNA collection fee. RP 297; CP 17. Mr. Belle did not object. RP 291-301.

Mr. Belle appeals all portions of both judgments and sentences. CP 30-54.

D. ARGUMENT

1. The state did not prove beyond a reasonable doubt that Mr. Belle committed attempting to elude a police vehicle.

The state failed to meet its burden of proof. The evidence did not establish Mr. Belle drove recklessly after he was knowingly signaled to stop. His attempting to elude conviction must be reversed and dismissed.

The Fourteenth Amendment Due Process Clause requires the state prove each essential element of the crime charged beyond a reasonable

doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S Ct. 1068, 25 L.Ed. 2d 368 (1970). Evidence is sufficient only if, reviewed in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L Ed.2d 560 (1979).

A claim of insufficient evidence admits the truth of the state's evidence and all inferences that can reasonably be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The "to convict" instruction for the attempting to elude required the state to prove Mr. Belle, on March 11, 2015:

> (1) drove a motor vehicle;
>
> (2) was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;
>
> (3) the signaling police officer's vehicle was equipped with lights and sirens;
>
> (4) willfully fled or refused to immediately bring the vehicle to a stop after being signaled to stop;
>
> (5) and, while attempting to elude, drove his vehicle in a manner indicating a reckless manner.

Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury (sub. nom. 31), Instruction 6.

Three essential elements of the crime "must occur in sequence." *State v. Stayton*, 39 Wn. App. 46, 49, 691 P.2d 596 (1984); *accord* Seth A. Fine & Douglas J. Ende, *13 Wash. Prac.*, *Criminal Law With Sentencing Forms* § 2204 (2013-14 ed.). First, a uniformed police officer with a vehicle equipped with lights and sirens must give a signal to a driver to bring the vehicle to a stop. Second, the driver must willfully fail to immediately stop. Finally, the driver must drive his vehicle in a reckless manner while attempting to elude the pursuing police vehicle. RCW 46.61.024(1); S*ee Stayton*, 39 Wn. App. at 49-50 (interpreting prior version of RCW 46.61.924(1)). The state failed to present sufficient evidence both that the three elements occurred and that they occurred in the required sequence. On this record there was insufficient evidence Mr. Belle willfully failed to stop and only thereafter drove recklessly to elude Officer Killian.

Officer Killian testified his initial flashing of lights at the truck was only to alert the driver of police presence and to slow down. RP 122. It was not a signal for the truck's driver, after skidding around the corner of the residential street, to stop. The truck flashed past Officer Killian at 50 miles per hour. RP 160. Officer Killian's focus at that moment was to see

the driver, not signal the truck to stop. RP 124. The truck passed Officer Killian, who was facing the opposite direction, and immediately turned onto another residential street. RP 125. Officer Killian was not, at that moment, signaling the truck's driver to stop.

There can be no attempt to elude unless there is the prerequisite knowledge there is a pursuing police vehicle. *Stayton*, 39 Wn. App. 49. In other words, the driver must know he is being signaled to stop. *State v. Flora*, 160 Wn. App. 549, 555, 249 P.3d 188 (2011). When the truck made the turn, Officer Killian's only signal to the truck was to slow down.

To turn himself around to follow the truck, Officer Killian had to drive up on a sidewalk, back down off of the sidewalk, get back on the road, and safely turn to follow the truck. RP 125. In the meantime, the truck is moving away from Officer Killian down another residential street. Officer Killian is not behind the truck.

As Officer Killian safely approached the turn, he blipped his siren a couple of times, not to signal the truck to stop, but to be cautious and to alert the neighborhood to his presence. RP 126-27. Although Officer Killian accelerated to an unspecified speed to catch up to the truck, and momentarily turned his siren on to full audible mode, he did not testify to seeing the truck – and the nature of its driving – again until reaching the end of the block. RP 127.

When Officer Killian saw the truck - and the truck's driver could see Officer Killian's lighted patrol car - the truck was slowly rolling to a stop on the right side of the road and Officer Killian could see the truck's license plate. RP 127. Arguably, at this moment, the truck's driver was signaled to stop by the patrol car's overhead lights. But Officer Killian had the truck's license plate and had decided to no longer pursuing the truck. RP 128. There was nothing for the truck's driver to elude.

On this record, the state failed to prove the required three-step sequence of proof necessary for the attempting to elude conviction. Because the state failed to meet its burden, reversal and dismissal of the prosecution is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The prohibition against double jeopardy forbids retrial after a conviction is reversed for insufficient evidence. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory $100 DNA collection fee.

Both the Washington and United States Constitutions mandate that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. Amends V, XIV; Wash. Const. Art. I § 3. "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) (citing Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. Rev. 625, 625-26 (1992)).

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. *Nielsen*, 177 Wn. App. at 53-54. Although the burden on the state is lighter under this standard, the standard is not meaningless. The United States Supreme Court has cautioned 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 9 (1976). As the Washington Supreme Court has explained, "the court's role is to assure that even under the 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 offenders pay the DNA collection fee. RCW 43.43.7541.[5] This ostensibly serves the state's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile to help facilitate criminal identification. RCW 43.43.752; RCW 43.43.7541. This is a legitimate interest. But imposing this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

It is unreasonable to require sentencing courts to impose the DNA collection fee upon all felony defendants regardless of whether they have the ability to or likely future ability to pay. The blanket requirement does

[5] Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A.RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

not further the state's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, "the state cannot collect money from defendants who cannot pay." *State v. Blazina*, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). When applied to indigent defendants, the mandatory fee orders 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 that the $100 DNA collection fee is such a small amount that the defendant would likely be able to pay. The problem with this argument, however, is this fee does not stand alone.

The Legislature expressly directs that the fee is "payable by the offender after payment of other legal financial obligations included in the sentence." RCW 43.43.7541. Thus, the fee is paid only 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 an indigent defendant.

Additionally, the defendant will be saddled with a 12% interest rate on his unpaid DNA collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. Imposing mounting debt upon people who cannot pay works against another important state interest – reducing recidivism. See *Blazina*, 182

Wn.2d at 837 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA collection fee does not rationally relate to the state's interest in finding the collection, testing, and retention of an individual defendant's DNA. Thus, RCW 43.43.7541 violates substantive due process as applied. Based on Belle's indigent status, the order to pay the $100 DNA-collection fee should be vacated.

3. RCW 43.43.7541 violates equal protection because it irrationally requires some defendants to pay a DNA collection fee multiple times, while others need only pay once.

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const. Amend XIV; Wash. Const., Art I § 12; *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000). A valid law administered in a manner that unjustly discriminates between similarly situated persons, violates equal protection. *State v. Gaines*, 121 Wn. App. 687, 704, 90 P.3d 1095 (2004) (citations omitted).

Before an equal protection analysis may be applied, a defendant must establish he is similarly situated with other affected persons. *Gaines*, 121 Wn. App. at 704. Here, the relevant group is all defendants subject to the mandatory DNA collection fee under RCW 43.43.7541. Having been convicted of a felony, Mr. Belle is similarly situated to other affected persons within the afflicted group. See RCW 43.43.754; RCW 43.43.7541.

On review, where neither a suspect/semi-suspect class nor a fundamental right is at issue, a rational basis analysis is used to evaluate the validity of the differential treatment. *State v. Bryan*, 145 Wn. App. 353, 358, 185 P.3d 1230 (2008). That standard applies here.

Under rational basis scrutiny, a legislative enactment that creates different classes will survive an equal protection challenge only if: (1) reasonable grounds distinguish between different classes of affected individuals; and (2) the classification has a rational relationship to the proper purpose of the legislation. *DeYoung*, 136 Wn.2d. at 144. Where a statute fails to meet these standards, it must be struck down as unconstitutional. *Id*.

The Legislature has declared that collection of DNA samples and their retention in a DNA database are important tools in "assist[ing] federal, state, and local criminal justice and law enforcement agencies in

both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons." Laws of 2008 c 97, Preamble. The DNA profile from a convicted offender's biological sample is entered into the Washington State Patrol's DNA identification system (database) and retained until expunged or no longer qualified to be retained. WAC 446-75-010; WAC 446-75-060. Every sentence imposed for a felony crime must include a mandatory fee of $100. RCW 43.43.754; RCW 43.43.7541.

The purpose of RCW 43.43.754 is to fund the collection, analysis and retention of an individual felony offender's identifying DNA profile to include in a database of DNA records. Once a defendant's DNA is collected, tested, and entered in the database, subsequent collections are unnecessary. This is because DNA – for identification purposes – does not change. The statute itself recognizes this, expressly stating it is unnecessary to collect more than one sample. RCW 43.43.754(2). There is no further need for a biological sample to be collected regarding defendants who have already had their DNA profiles entered into the database.

Here, RCW 43.43.7541 does not apply equally to all felony defendants because those who are sentenced more than once have to pay the fee multiple times. This classification is unreasonable because multiple

payments are not rationally related to the legitimate purpose of the law, which is to fund the collection, analysis, and retention of an individual offender's identifying DNA profile.

Mr. Belle's DNA was undoubtedly collected previously pursuant to statute. In Washington, he has two prior adult felony convictions, one in 2013 and the other in 1997. CP 12. These prior convictions each required collection of a biological sample for DNA identification. RCW 43.43.754(6)(a); Laws of 2008 c 97 § 2, eff. June 12, 2008; Laws of 2002 c 289 § 2, eff. July 1, 2002; Laws of 1994 c 271 § 1, eff. June 9, 1994. The $100 DNA collection fee has been in place since at least 2002. Laws of 2002 c 289 § 2, eff. July 1, 2002. One of Mr. Belle's prior felony convictions was 2002 or later. There is no evidence suggesting DNA had not been collected as would have been ordered in the prior judgments and sentences and placed in the DNA database. CP 12.

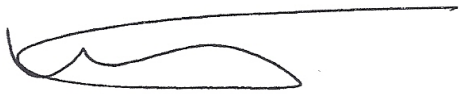
RCW 43.43.7541 discriminates against defendants previously sentenced by requiring them to pay multiple DNA collection fees, while other defendants need only pay one DNA collection fee. The requirement that the fee be collected from such defendants upon each sentencing is not rationally related to the purpose of the statute. As such, RCW 43.43.7541 violates equal protection. The DNA collection fee ordered must be vacated.

E. CONCLUSION

Mr. Belle's eluding conviction – and enhancement – should be reversed and remanded for dismissal with prejudice.

Also on remand, the $100 DNA collection fee should be vacated and stricken from Mr. Belle's judgment and sentence.

Respectfully submitted April 4, 2016.



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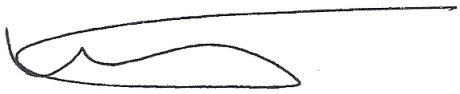
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Spokane County Prosecutor's Office, at SCPAappeals@spokanecounty.org; (2) the Court of Appeals, Division III; and I mailed it to (3) Tyrone Christopher Belle/DOC# 748836, Brownstone Work Release, 223 S Browne, Spokane, WA 99201.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed April 4, 2016, in Winthrop, Washington.



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