SUPREME COURT NO. 94205-0

NO. 74157-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN HUTSELL,

Petitioner.

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

The Honorable David R. Needy, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Stephen Hutsell was the appellant below.

B. COURT OF APPEALS DECISION

Hutsell requests review of the decision issued by Division One of the Court of Appeal in State v. Hutsell, entered on January 17, 2017.[1]

C. ISSUE PRESENTED FOR REVIEW

Does RCW 43.43.7541's mandatory DNA-collection fee violate Equal Protection because it irrationally requires some defendants to pay the fee multiple times, while other offenders need only pay once – despite the fact DNA is unchanging and need only be collected, analyzed, and entered into the database once to serve the purpose of the statute?

D. REASONS TO ACCEPT REVIEW

Review is warranted under RAP 13.4(b)(3) because Hutsell's equal protection challenge raises a significant question of law under U.S. Const. amends. V, XIV, and Wash. Const. art. I, § 12. As explained below, the statutes takes people who are similarly situated (convicted persons whose DNA is required to be collected, analyzed, and entered into a database) and irrationally

[1] This decision is attached as Appendix A.

discriminates by making some pay the $100 DNA-collection fee multiple times even though DNA need only be collected, analyzed, and entered into the data base once. As such, the statute runs afoul of the equal protection clause.

Review is also warranted under RAP 13.4(b)(4) because Hutsell's challenge raises an issue this Court recognizes as one of substantial public interest. See, State v. Blazina, 182 Wn.2d 827, 835 344 P.3d 680 (2015) (noting there are "[n]ational and local cries for reform of broken LFO systems"). An LFO order imposes an immediate debt upon a defendant subjecting him to a myriad of penalties arising from enforced collection efforts. The societal hardships created by the erroneous imposition of LFOs cannot be understated.

A study by the Washington State Minority and Justice Commission concludes that for many people, erroneously imposed LFOs result in an unfortunate chain of events:

> ...reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnarling some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from

> restoring their civil rights and applying to seal one's criminal record.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008);[2] see also, Blazina, 182 Wn.2d at 682-84 (acknowledging these hardships). These realities amply demonstrate that the judicial review of Washington laws authorizing the mandatory imposition of LFO debt is an issue of substantial public interest. Thus, this Court should grant review to provide the courts guidance on this very important constitutional issue which is of significant public interest.

E. RELEVANT FACTS

Hutsell is indigent and the trial court waived all discretionary fees and costs, but it imposed a DNA fee as mandated by statute. CP 8.

At sentencing, Hutsell argued that because his DNA had been collected pursuant to a conviction just seven months before, he should not have to again submit a sample and pay the DNA collection fee. RP 7-8. Finding that Hutsell's DNA was already on file, the trial court ordered no new collection take place. RP 10.

[2] See: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf

However, it imposed the DNA-collection fee because the statute makes the fee mandatory regardless of whether DNA is actually collected. RP 10-11.

Hutsell appealed arguing the imposition of this fee pursuant to RCW 43.43.7641 violated equal protection. Brief of Appellant (BOA) at 2-7. The Court of Appeals disagreed, concluding a rational basis exists to impose a fee for every felony sentence because the fee funds the cost of collection and maintenance of the State DNA database. Appendix A at 2.

F. ARGUMENT IN SUPPORT OF REVIEW

REVIEW IS WARRANTED TO SETTLE WHETHER RCW 43.43.7541 VIOLATES EQUAL PROTECTION WHEN IT OPERATES TO MAKE SOME FELONY OFFENDERS PAY MULTIPLE FEES, WHILE OTHERS ONLY PAY ONCE.

Imposition of the mandatory DNA-collection fee under RCW 43.43.7541 violates equal protection when applied to defendants who have previously provided a sample and been ordered to pay the $100 DNA-collection fee.

Under the Equal Protection Clause, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. U.S. Const. amend. XIV; Wash. Const. Art. 1, § 12. 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, 1103-04 (2004) (citations omitted).

Before an equal protection analysis may be applied, a defendant must establish he is similarly situated with other affected persons. Id. In this case, the relevant group is all defendants subject to the mandatory DNA-collection fee under RCW 43.43.7541. Having been convicted of a felony, Hutsell is similarly situated to other affected persons subject to the fee. CP 4; RCW 43.43.754 and .7541. However, the statute as applied discriminates against him because he has been convicted multiple times and is required to pay multiple fees.

The next step is determining the standard of review. Where neither a 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, in effect, creates different classes will survive an equal protection challenge only if: (1) there are reasonable grounds to distinguish between different classes of affected individuals; and (2) the

classification has a rational relationship to the proper purpose of the legislation. DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919, 923 (1998). Where a statute fails to meet these standards, it must be struck down as unconstitutional. Id.

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 even though their DNA is collected, analyzed, and added to the database only once. This classification is unreasonable because multiple payments are not rationally related to the legitimate purpose of the law.

Once a defendant's DNA is collected, analyzed, and entered into the database, subsequent collections are unnecessary. This is because DNA – for identification purposes – does not change. Indeed, the statute itself contemplates this, expressly stating it is unnecessary to collect more than one sample. RCW 43.43.754(2). Hence, there is nothing new to collect with respect to defendants who already had their DNA profiles entered into the database. As to these individuals, the imposition of multiple DNA-collection fees is not rationally related to the purpose of the statute, which is to fund the collection, analysis, and retention of a convicted defendant's DNA.

In sum, RCW 43.43.7541 discriminates against felony defendants who have previously had their DNA collected by requiring them to pay multiple DNA-collection fees, while other felony defendants need only pay one DNA-collection fee. Despite Division One's ruling to the contrary, there appears to be no rational basis for this. Given that the DNA fee is an important piece of Washington's broken LFO system and ordered in nearly every felony sentence, it is important that this Court determine whether RCW 43.43.7541 violates constitutional equal protection.

G. CONCLUSION

For the reasons stated, this Court should grant review.

Dated this 30th day of January, 2017.

Respectfully submitted
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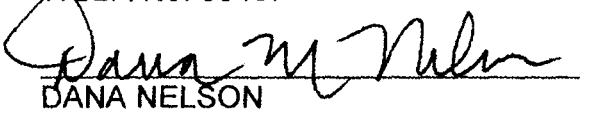

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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. STEPHEN EDWARD HUTSELL, Appellant.	No. 74157-8-I DIVISION ONE UNPUBLISHED OPINION FILED: January 17, 2017

LEACH, J. — Stephen Hutsell challenges the trial court's imposition of the mandatory $100 deoxyribonucleic acid (DNA) testing fee required by RCW 43.43.7541. He claims the fee, as applied to a repeat felony offender, violates equal protection. Our recent opinion in State v. Lewis[1] considered and rejected the same argument. We affirm.

FACTS

On May 22, 2015, the State charged Hutsell with possession of a controlled substance (heroin). He pleaded guilty as charged. Because the State had Hutsell's DNA on file as a result of a prior conviction, the trial court did not require Hutsell to undergo a DNA test. It did, however, impose a $100 DNA testing fee. At sentencing, Hutsell challenged the imposition of the DNA testing fee. Concluding that a statute required the fee, the court rejected Hutsell's challenge. Hutsell appeals.

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[1] 194 Wn. App. 709, 379 P.3d 129 (2016), review denied, No. 93420-7 (Wash. Dec. 7, 2016).

ANALYSIS

Hutsell claims that the mandatory DNA collection fee required by RCW 43.43.7541, as applied to a repeat felony offender, violates equal protection. But in Lewis, this court considered and rejected the same challenge. We held that a rational basis exists to impose a fee for every felony sentence because the fee funds both the cost of collection and the costs to operate and maintain the state DNA database.[2] Following Lewis, we affirm the trial court's imposition of the DNA testing fee.

Hutsell asks the court to waive his appellate costs. RAP 14.2 permits an appellate court to bar an award of costs in a decision terminating review. Here, the State states that it does not intend to request appellate costs. This makes Hutsell's request moot, and we do not consider it.

CONCLUSION

We affirm.

Leach, J.

WE CONCUR:

Dwyer, J.

Schindler, J.

[2] Lewis, 194 Wn. App. at 719-20 (citing State v. Johnson, 194 Wn. App. 304, 307-08, 374 P.3d 1206 (2016)).