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April 22, 2015
Court of Appeals
Division I
State of Washington

NO. 73011-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

GARY NESKEY,

Appellant.

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

The Honorable Dean S. Lum, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE 2

C. ARGUMENT 4

1. RCW 43.43.7541 IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO LACK THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY THE DNA-COLLECTION FEE. 4

a. Facts 4

b. Argument 4

2. RCW 43.43.7541 VIOLATES EQUAL PROTECTION BECAUSE IT IRRATIONALLY REQUIRES SOME DEFENDANTS TO PAY A DNA-COLLECTION FEE MULTIPLE TIMES, WHILE OTHERS NEED PAY ONLY ONCE. 8

a. Facts 8

b. Argument 8

3. THE TRIAL COURT ERRED WHEN IT ORDERED NESKEY TO SUBMIT TO ANOTHER COLLECTION OF HIS DNA. 11

D. CONCLUSION 13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Amunrud v. Bd. of Appeals
158 Wn.2d 208, 143 P.3d 571 (2006) 4

DeYoung v. Providence Med. Ctr.
136 Wn.2d 136, 960 P.2d 919 (1998) 6, 9

Johnson v. Washington Dep't of Fish & Wildlife
175 Wn. App. 765, 305 P.3d 1130 (2013) 5

Nielsen v. Washington State Dep't of Licensing
177 Wn. App. 45, 309 P.3d 1221 (2013) 5, 6

State ex rel. Carroll v. Junker
79 Wn.2d 12, 482 P.2d 775 (1971) 11

State v. Blazina
__ Wn.2d __, 344 P.3d 680 (2015) 6, 7

State v. Bryan
145 Wn. App. 353, 185 P .3d 1230 (2008) 9

State v. Gaines
121 Wn. App. 687, 90 P.3d 1095 (2004) 9

State v. Rohrich
149 Wn.2d 647, 71 P.3d 638 (2003) 11

FEDERAL CASES

Mathews v. DeCastro
429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976) 5

RULES, STATUTES AND OTHER AUTHORITIES

RCW 43.43.752-7541 6

RCW 43.43.754 ..... 1, 2, 6, 9, 10, 11, 12

TABLE OF AUTHORITIES (CONT'D)

Page

RCW 43.43.7541 ..... 1, 2, 4, 6, 7, 8, 9, 10, 13

Russell W. Galloway, Jr.
Basic Substantive Due Process Analysis
26 U.S.F. L.Rev. 625 (1992)..... 5

U.S. Const. amend. V 4

U.S. Const. amend. XIV 4, 8

U.S. Const. amend. XIV, § 1 4

Wash. Const. art. I, § 3 4

Wash. Const. art. 1, § 12..... 8

A. ASSIGNMENTS OF ERROR

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

2. RCW 43.43.7541's mandatory DNA-collection fee violates equal protection when applied to defendants who have already paid the fee and had their DNA collected, analyzed, and entered into the DNA database.

3. The trial court erred when it ordered appellant to submit to another DNA collection under RCW 43.43.754.

Issues Pertaining to Assignments of Error

1. RCW 43.43.7541 requires trial courts impose a mandatory DNA-collection fee each time a felony offender is sentenced.[1] This ostensibly serves the State's interest in funding the collection, testing, and retention of a convicted defendant's DNA profile so this might help facilitate criminal investigations. However, the statute makes it mandatory that trial courts order this fee even when the defendant has no

[1] RCW 43.43.754 and 43.43.7541 require the courts to impose a mandatory $100 DNA-collection fee on any offender convicted of a felony or of a specifically designated misdemeanor. For clarity and ease of reading, appellant will refer only to felony defendants in this brief, but the arguments apply equally to defendants sentenced to other qualifying crimes.

ability to pay the fee. Does the statute violate substantive due process when as applied to defendants who do not have the ability – or the likely future ability – to pay the DNA collection fee?

2. Under RCW 43.43.7541, defendants who have only been sentenced once pay only a single $100 DNA collection fee. However, defendants who are sentenced more than once are statutorily required to pay multiple fees. This is so despite the fact that a defendant's DNA profile need only be collected, analyzed, and entered into the DNA database one time to fulfill the purpose of the statute. As such, is the statute unconstitutional as applied to defendants who are required to pay the DNA-collection fee multiple times?

3. RCW 43.43.754 expressly states a defendant need not provide a DNA sample upon sentencing if he has already provided a sample pursuant to the statute. Where the record sufficiently shows the defendant's DNA has already been collected pursuant to the statute, does the trial court abuse its discretion when it orders a defendant to submit to yet another DNA collection?

B. STATEMENT OF THE CASE

On October 28, 2014, appellant Gary Neskey pleaded guilty in King County Superior Court to one count of attempted failure to register

as a sex offender. CP 8-41; 1RP[2] 4-9. Sentencing was held November 14, 2014. 2RP. Based on an offender score calculation of 15, the court imposed a standard range 32.25-month sentence, waived all fees and costs except for the $500 Victim Penalty Assessment and the $100 DNA collection fee, and ordered Nesky to provide a DNA sample. CP 44-46; 2RP 4.

Nesky appeals. CP 58-59. The trial court concluded poverty prevented Nesky from contributing anything towards the costs of his appeal and therefore appointed counsel and preparation of the record at State expense. Supp CP __ (sub no. 66, Order Authorizing Appeal In Forma Pauperis, Appointment of Counsel and Preparation of Record, filed 01/14/15).

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[2] There are three volumes of verbatim report of proceedings referenced as follows: 1RP - October 28, 2014 (plea hearing); 2RP - November 14, 2014 (sentencing); and 3RP - December 17, 2014 (post trial hearing regarding credit for time served).

C. ARGUMENT

1. RCW 43.43.7541 IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO LACK THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY THE DNA-COLLECTION FEE.

The mandatory $100 DNA-collection fee authorized under RCW 43.43.7541 violates substantive due process when applied to defendants who lack the ability or likely future ability to pay the fine.

a. Facts

Neskey is indigent. Supp CP __ (sub no.66, supra). At sentencing, Neskey made no statements and the neither the court, the prosecutor, nor defense counsel made any comments regarding Neskey's ability to pay, or the fact that with eleven adult felony convictions between 1992 and 2014, Neskey's DNA was likely already in a law enforcement database. RP 349.

b. Argument

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3. "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) (citation omitted).

"Substantive due process protects against arbitrary and capricious

government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. 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)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is lighter under this standard, the standard is not meaningless. Indeed, 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 389 (1976). As the Washington Supreme Court has explained, "the court's role is to assure that even under this deferential standard of review the challenged legislation is

constitutional." DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

Here, the statute mandates all felony defendants pay the DNA-collection fee. RCW 43.43.754. This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile so this might help facilitate future criminal identifications. RCW 43.43.752-7541. This is a legitimate interest. However, the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

There is nothing reasonable about requiring sentencing courts to impose the DNA-collection fee upon all felony defendants regardless of whether they have the ability – or likely future ability – to pay. This does not further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court recently emphasized, "the state cannot collect money from defendants who cannot pay." State v. Blazina, __ Wn.2d __, 344 P.3d 680, 684 (2015). When applied to such defendants, not only do the mandatory fee orders under RCW 43.43.7541 fail to further the State's interest, they are utterly pointless. It is simply

irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue that – standing alone – the $100 DNA collection-fee is of such a small amount that most defendants would likely be able to pay. The problem with this argument, however, is this fee does not stand alone.

The Legislature expressly directs that the fee is "payable by the offender after payment of all other legal financial obligations included in the sentence." RCW 43.43.7541. This means the fee is paid after restitution, the victim's compensation assessment, and all other LFOs have been satisfied. As such, the statute makes this the least likely fee to be paid by indigent defendants.

Additionally, the defendant will be saddled with a 12% rate on his unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. Indeed, it actually can impede rehabilitation. Hence, the imposition of mounting debt upon people who cannot pay actually works against another important State interest – reducing recidivism. See, Blazina, __ Wn.2d at __, 344 P.3d at 683-84 (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).

In sum, 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 funding the collection, testing, and retention of the defendant's DNA. Hence, this Court should find RCW 43.43.7541 violates substantive due process as applied and vacate the order based on Neskey's indigent status.

2. RCW 43.43.7541 VIOLATES EQUAL PROTECTION BECAUSE IT IRRATIONALLY REQUIRES SOME DEFENDANTS TO PAY A DNA-COLLECTION FEE MULTIPLE TIMES, WHILE OTHERS NEED PAY ONLY 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 paid the $100 DNA-collection fee.

a. Facts

It is undisputed that prior to his attempted failure to register conviction, Neskey had been previous convicted and sentenced for numerous adult felony offenses in Washington. CP 50.

b. Argument

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 (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, Nesky is similarly situated to other affected persons within this affected group. See, RCW 43.43.754 and .7541.

The next step is determining the standard of review. Where neither a suspect/semi-suspect class nor a fundamental right are 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. DeYounq, 136 Wn.2d at 144. 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. 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, tested, 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 to collect with respect to defendants who have 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 been sentenced by requiring them to pay multiple DNA-collection fees, while other felony defendants need only pay one DNA-collection fee. The mandatory 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, and this Court must vacate the DNA-collection fee order.

3. THE TRIAL COURT ERRED WHEN IT ORDERED NESKEY TO SUBMIT TO ANOTHER COLLECTION OF HIS DNA.

The sentencing court ordered Neskey to submit to DNA collection pursuant to RCW 43.43.754(1). CP 45, 52. Yet, the record strongly supports the fact that Neskey's DNA was already collected pursuant to that statute. CP 50. Given this record, the trial court abused its discretion when it ordered Neskey to submit to yet another collection of his DNA.

A trial court abuses its discretion if its decision is "manifestly unreasonable," based on "untenable grounds," or made for "untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

RCW 43.43.754(1) requires a biological example "must be collected" when an individual is convicted of a felony offense. However, RCW 43.43.754(2) expressly provides: "If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required." Thus, the trial court has discretion as to whether to order the collection of an offender's DNA under such circumstances.

It is manifestly unreasonable for a sentencing court to order a defendant's DNA to be collected pursuant to RCW 43.43.754(1) where the record adequately supports the fact that the defendant's DNA has already been collected. The Legislature clearly recognizes that collecting more than one DNA sample from an individual is unnecessary. Moreover, it is an utter waste of judicial, state, and local law enforcement resources when sentencing courts issue duplicative DNA collection orders. The plain fact is multiple DNA collections are wasteful and pointless.

In sum, the record establishes Neskey was not statutorily required to submit to yet another collection of his DNA and it was pointless to make him do so. Under these circumstances, it was manifestly unreasonable for the sentencing court to impose the requirement. As such, the DNA collection order must be reversed.

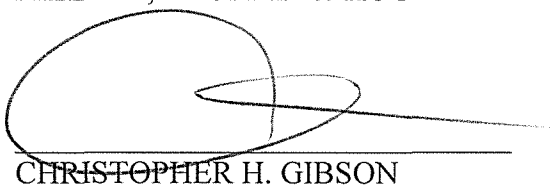
D. CONCLUSION

For reasons stated above, this Court should find RCW 43.43.7541 violates the due process and/or equal protection clauses and vacate the $100 DNA-collection fee order. This Court should also vacate the court's order authorizing the collection of Neskey's DNA.

Dated this 22nd day of April, 2015.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73011-8-I
	)	
GARY NESKEY,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

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

THAT ON THE 22ND DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GARY NESKEY
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MONROE CORRECTIONS CENTER
P.O. BOX 777
CONNELL, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF APRIL 2015.

x Patrick Mayovsky