

73093-2

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Court of Appeals
Division I
State of Washington

73093-2

NO. 73093-2-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

GEOVANNI HERRERA-PELAYO,
Appellant.

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

The Honorable Susan K. Cook, Judge

RESPONDENT’S BRIEF

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I. SUMMARY OF ARGUMENT

Geovanni Herrera-Pelayo was convicted of Unlawful Imprisonment with Domestic Violence. His challenges to the legal financial obligations imposed in his case fail because he did not contest the ability to pay legal financial obligations in the trial court, there was information indicating the ability to pay, he lacks standing to challenge the DNA collection fee, his claim is not ripe and the DNA testing assessment fee is not unconstitutional as applied.

II. ISSUES

1. Where a defendant does not contest the ability to pay legal financial obligations in the trial court should the trial court permit the issue to be raised for the first time on appeal?
2. Were legal financial obligations imposed mandatory?
3. Where the testimony at trial was that the defendant had been employed in his job for more than a year, was there sufficient evidence of future ability to pay the obligations?
4. Where a defendant has not established he is constitutionally indigent, is there standing to raise a claim?
5. Where there has been no attempt at enforcement by punishment, is the matter ripe for review?

6. Has the defendant established the DNA testing assessment fee is unconstitutional as applied to him?

III. STATEMENT OF THE CASE

On October 15, 2013, Geovanni Herrera-Pelayo was charged with Assault in the Second Degree by strangulation or suffocation with a Domestic Violence allegation. CP 72. Herrera-Pelayo had gotten into an argument with his wife because he believed she was cheating. CP 3. She said when she went to the window to call for help, he grabbed her from behind, pulled her to the ground and began choking her. CP 3. He admitted the argument, grabbing her, choking her and threatening to kill her. CP 3.

On November 4, 2014, the information was amended to include Felony Harassment and Unlawful Imprisonment. CP 5-6. During the trial, the court dismissed the charge of Unlawful Harassment because of lack of information the victim believed he would carry out his threat to kill. 12/2/14 RP 137.¹ The victim testified she did not recall being choked, indicating she did not have much memory of what happened. 12/2/14 RP 48, 58.

¹ The State will refer to the verbatim report of proceedings by using the date followed by “RP” and the page number. The report of proceedings in this case are as follows:

11/19/14 RP	3.5 Hearing
12/2/14 RP	Trial Day 1 (in volume with 12/3/14)
12/2/14 RP	Trial Day 2 (In volume with 12/2/14)
12/3/14 RP	Trial Day 3 (In volume with 1/22/15)
1/22/15 RP	Sentencing (In volume with 12/3/14).

On December 3, 2014, Herrera-Pelayo was found guilty of Unlawful Imprisonment and not guilty of Assault in the Second Degree. CP 110, 111, 12/3/14 RP 67-8. The jury returned a special verdict finding the offense was domestic violence. CP 109, 12/3/14 RP 68.

On January 22, 2015, Herrera-Pelayo was sentenced to 45 days of confinement on the Unlawful Imprisonment. CP 63, 71, 1/22/15 RP 79.

At sentencing the parties did not address Herrera-Pelayo's ability to pay legal financial obligations. 12/3/14 RP 74-8. At trial, Herrera-Pelayo testified at that time he was thirty-nine years old, lived in Burlington and was a chef at the Ixtapa restaurant in Stanwood. 12/3/14 RP 138. He had worked there almost a year. 12/3/14 RP 138. Prior to that, he had worked at Lorenzo's Mexican restaurant in Mount Vernon, working either full days or half days. 12/3/14 RP 139. He was married to the victim and they had two small children. 12/2/14 RP 46, 12/3/14 RP 139.

The Judgment and Sentence contains language that reads:

Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160) the court finds:

[X] That the defendant has the ability or likely future ability to pay legal financial obligations imposed herein. RCW 9.94A.753.

CP 63. The fees imposed were as follows:

Crime Victim's Assessment	RCW 7.68.035	\$500
Domestic Violence Assessment	RCW 10.99.080	\$100
Criminal Filing Fee		\$200
DNA Collection Fee	RCW 43.43.7541	\$100.

CP 65-6.

On February 4, 2015, Herrera-Pelayo timely filed a notice of appeal.

CP 79.

IV. ARGUMENT

- 1. Since there was no challenge below to the finding the defendant has the ability to pay legal financial obligations, this Court should deny review.**

Herrera-Pelayo did not object to the DNA collection or to imposition of the DNA fee in the trial court. 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. *State v. 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, Herrera-Pelayo's constitutional claim depends on his present and future inability to pay the mandatory fees. But as discussed below, there is no evidence in the record to show that Herrera-Pelayo is constitutionally indigent, so the error is not manifest within the meaning of RAP 2.5(a).

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

2. Except for the domestic violence assessments, the fees or assessments imposed here were mandatory.

A trial court is not required to inquire about the individual's ability to pay when imposing mandatory costs. Evidence of ability to pay was unnecessary to support the mandatory financial obligations imposed by the court. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (noting that, for these costs, "the legislature has directed expressly that a defendant's ability to pay should not be taken into account"). *Lundy* provides:

As a preliminary matter, we note that Lundy does not distinguish between mandatory and discretionary legal financial obligations. This is an important distinction because for *mandatory* legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. 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. *See, e.g., State v. Kuster*, 175 Wn. App. 420, 306 P.3d 1022 (2013). And our courts have held that these mandatory obligations are constitutional so long as "there are sufficient safeguards in the current sentencing scheme to prevent *imprisonment* of indigent defendants." *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992) (emphasis added).

...

Additionally, a \$500 victim assessment is required by RCW 7.68.035(1)(a), a \$100 DNA collection fee is required by RCW 43.43.7541, and a \$200 criminal filing fee is required by RCW 36.18.020(2)(h), irrespective of the defendant's ability to pay. *See State v. Curry*, 62 Wn. App. 676, 680-81, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911, 829 P.2d 166; *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009). Because the legislature has mandated imposition of these legal financial obligations, the trial court's "finding" of a defendant's current or likely future ability to pay them is surplusage.

State v. Lundy at 102-3, Footnote omitted emphasis in original).

Because the language of the domestic violence assessment statute is permissive, it was the only discretionary financial obligation.

All superior courts, and courts organized under Title 3 or 35 RCW, **may impose** a penalty assessment not to exceed one hundred dollars on any adult offender convicted of a crime involving domestic violence. The assessment shall be in addition to, and shall not supersede, any other penalty, restitution, fines, or costs provided by law.

RCW 10.99.080(1).

3. There was adequate factual basis for the trial court's determination the defendant had the ability to pay legal financial obligations.

Herrera-Pelayo testified at trial that he was thirty-nine years old and was a chef at the Ixtapa restaurant in Stanwood. 12/3/14 RP 138. He had worked there almost a year. 12/3/14 RP 138. Prior to that, he had worked at Lorenzo's Mexican restaurant in Mount Vernon, working either full days or half days. 12/3/14 RP 139. He was married to the victim and they had two small children. 12/2/14 RP 46, 12/3/14 RP 139.

Despite the ability to pay not being addressed at sentencing on the record, given the testimony at trial, the trial court would have been within its authority to determine that Herrera-Pelayo had the future ability to pay the discretionary \$100 domestic violence victim assessment. 12/3/14 RP 74-8. His sentence was not so lengthy that it would affect his ability to pay the obligations.

4. Herrera-Pelayo lacks standing to challenge the statute.

Herrera-Pelayo asks this Court to find that RCW 43.43.7541 violates the constitutional guarantees of substantive due process and equal protection when applied to defendants who lack the present or likely future ability to pay the \$100 fee. Because Herrera-Pelayo has not been found to be

constitutionally indigent and has suffered no injury in fact, he lacks standing to challenge the statute.

A person cannot challenge the constitutionality of a statute unless he or she has been adversely affected by the provisions claimed to be unconstitutional. *State v. Lundquist*, 60 Wn.2d 397, 401, 374 P.2d 246 (1962). To establish standing, Herrera-Pelayo must show (1) that he is within the zone of interests to be protected by the constitutional guarantee in question, and (2) that he has suffered an injury in fact, economic or otherwise. *Branson v. Port of Seattle*, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004). The injury must be “fairly traceable to the challenged conduct and likely to be redressed by the requested relief.” *State v. Johnson*, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014) (quoting *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986)). The injury also must be “(a) concrete and particularized, and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Witt v. Dep’t of Air Force*, 527 F.3d 805, 811 (9th Cir. 2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Where a party lacks standing to assert a claim, courts must refrain from reaching the merits of that claim. *Id.* at 552 (citing *Org. to Preserve Agric. Lands v. Adams County*, 128 Wn.2d 869, 896, 913 P.2d 793 (1996)).

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

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

While there is no precise definition of constitutional indigence, “*Bearden* essentially mandates that we examine the totality of the defendant’s financial circumstances to determine whether he or she is constitutionally indigent in the face of a particular fine.” *State v. Johnson*, 179 Wn.2d at 553. A finding of statutory indigence does not establish constitutional indigence. *Id.* at 553, 555. Thus, in *Johnson*, our supreme court rejected a challenge to the driving while license suspended statute based on a claim of indigence because Johnson, while statutorily indigent, was not constitutionally indigent and therefore not in the class protected by the Due Process Clause. *State v. Johnson*, 179 Wn.2d at 555.

It is up to the party seeking review of an issue to provide an adequate record for review. *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). Here, Herrera-Pelayo asserts that he is “indigent” relying solely on the appointment of counsel but the record contains no evidence demonstrating *constitutional* indigence. Brief of Appellant at page 6, footnote 2.

On this record, Herrera-Pelayo fails to show that he is constitutionally indigent. Because the relevant “constitutional considerations protect only the constitutionally indigent,” Herrera-Pelayo can demonstrate no injury in fact and therefore lacks standing. *State v. Johnson*, 179 Wn.2d at

555. This Court should decline to address the merits of his constitutional claims

5. Herrera-Pelayo’s claim is not ripe for review.

Even if Herrera-Pelayo has standing to bring this constitutional challenge, the issue is not ripe for review. Generally, “challenges to orders establishing legal financial sentencing conditions that do not limit a defendant’s liberty are not ripe for review until the State attempts to curtail a defendant’s liberty by enforcing them.” *State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). It is only when the State attempts to collect or impose punishment against an indigent person for failure to pay that constitutional principles are implicated. *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992).

Our supreme court adhered to this position in *Blank*, when it held that an inquiry into defendant’s ability to pay is not constitutionally required before imposing a repayment obligation in a judgment and sentence, as long as the court must determine whether the defendant is able to pay before sanctions are sought for nonpayment. *State v. Blank*, 131 Wn.2d at 239-42. The point of enforced collection or sanctions for nonpayment is the appropriate time to discern the individual’s ability to pay because before that point, “it is nearly impossible to predict ability to pay[.]” *Id.* at 242. “If at

that time defendant is unable to pay through no fault of his own, *Bearden* and like cases indicate constitutional principles are implicated.” *Id.* at 242.

Where nothing in the record reflects that the State has attempted to collect the DNA fee, any challenge to the order requiring payment on hardship grounds is not yet ripe for review. *State v. 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.

6. Herrera-Pelayo cannot prove the constitutional due process violation beyond reasonable doubt.

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

A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. *State ex rel. Peninsula Neighborhood Ass’n v. Dep’t of Transp.*, 142 Wn.2d 328, 335, 12 P.3d 134 (2000). Constitutional challenges are questions of law subject to de novo review. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

The federal and Washington State Constitutions guarantee that an individual is not deprived of “life, liberty, or property, without due process

of the law.” U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. Washington’s due process clause is coextensive with that of the Fourteenth Amendment, providing no greater protection. *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32 (2009). It confers both procedural and substantive protections. *Amunrud*, 158 Wn.2d at 216. “Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Nielsen v. Washington State Dep’t of Licensing*, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013) (quoting *Amunrud*, 158 Wn.2d at 218-19).

The level of scrutiny applied to a due process challenge depends upon the nature of the interest involved. *Nielsen*, 177 Wn. App. at 53 (citing *Amunrud*, 158 Wn.2d at 219). Where no fundamental right is at issue, as in this case, the rational basis standard applies. *Amunrud*, 158 Wn.2d at 222. Rational basis review merely requires that a challenged law be “rationally related to a legitimate state interest.” *Nielsen*, 177 Wn. App. at 53 (quoting *Amunrud*, 158 Wn.2d at 222). This deferential standard requires the reviewing court to “assume the existence of any necessary state of facts which [it] can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest.” *Nielsen*, 177 Wn. App. at 53 (quoting *Amunrud*, 158 Wn.2d at 222).

In 2002, the legislature created a DNA database to store DNA samples of those convicted of felonies and certain misdemeanor offenses. RCW 43.43.753. The legislature identified such databases as “important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts.” *Id.* To fund the DNA database, the legislature enacted RCW 43.43.7541, which originally required courts to impose a \$100 DNA collection fee with every sentence imposed for specified crimes “unless the court finds that imposing the fee would result in undue hardship on the offender.” Former RCW 43.43.7541 (2002). In 2008, the legislature amended the statute to make the fee mandatory regardless of hardship: “Every sentence ... must include a fee of one hundred dollars.” RCW 43.43.7541. Eighty percent of the fee goes into the “state DNA database account.” *Id.* Expenditures from that account “may be used only for creation, operation, and maintenance of the DNA database[.]” RCW 43.43.7532.

Herrera-Pelayo recognizes that requiring those convicted of felonies to pay the DNA collection fee serves a legitimate state interest in operating the DNA database. Brief of Appellant at 11. He argues, however, that imposing the fee upon those who cannot pay does not rationally serve that interest. This Court should reject that argument.

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

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

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

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

While *Curry* addressed the mandatory VPA, the same principle has been extended to all mandatory legal financial obligations, including the DNA collection fee required by RCW 43.43.7541. See *State v. Lundy*, 176 Wn. App. at 102-03; *State v. Kuster*, 175 Wn. App. 420, 424-26, 306 P.3d 1022 (2013). Although RCW 9.94A.200 has been recodified, the same safeguards against imprisonment of indigent defendants discussed in *Curry* apply. See RCW 9.94B.040; RCW 7.21.010 (1)(b). Additionally, any defendant who is not in “contumacious default” may seek relief “at any time ... for remission of the payment of costs or any unpaid portion thereof” on the basis of hardship. RCW 10.01.160 (4). A defendant may also seek reduction or waiver of interest on LFOs upon a showing that the interest “creates a hardship for the offender or his or her immediate family.” RCW 10.82.090(2)(a), (c).

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

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

Herrera-Pelayo's reliance on *Blazina* is misplaced. First, *Blazina* involved a claimed violation of a statute, not due process, and its holding is based on statutory construction. Second, *Blazina* concerned *discretionary* LFOs, not mandatory fees like the DNA assessment involved here. *State v. Blazina*, 182 Wn.2d 837-38. Nothing in *Blazina* changes the principle articulated in *Curry* that mandatory LFOs may be constitutionally imposed at sentencing without a determination of the defendant's ability to pay so long as there are sufficient safeguards to prevent imprisonment of indigent defendants for a noncontumacious failure to pay.

Herrera-Pelayo fails to show that the mandatory DNA fee required by RCW 43.43.7541 violates substantive due process as applied to indigent defendants. Should this Court reach the merits of this issue, it should affirm.

V. CONCLUSION

For the forgoing reasons, this Court should affirm the imposition of legal financial obligations.

DATED this 28th day of August, 2015.

SKAGIT COUNTY PROSECUTING ATTORNEY



By: _____
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Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jennifer Dobson/Dana Nelson, addressed as Nielsen Broman Koch PLLC, 1908 E. Madison Street, Seattle, WA 98122 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 28th day of August, 2015.



KAREN R. WALLACE, DECLARANT