

FILED
September 30, 2015
Court of Appeals
Division I
State of Washington

NO. 73403-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTAPHER WHITE,

Appellant.

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

The Honorable Beth Andrus, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Mandatory fee collection under RCW 43.43.7541 violates substantive due process when applied to defendants who do not have the ability or likely future ability to pay.

Issue Pertaining to Assignment of Error

RCW 43.43.7541 requires trial courts to impose a mandatory DNA collection fee each time a felony offender is sentenced. This ostensibly serves the State's interest in funding the collection, testing, and retention of a convicted defendant's DNA profile in order to facilitate criminal investigations. By statute, however, it is mandatory that trial courts order this fee, even when a defendant lacks the ability to pay. Does the statute violate substantive due process when applied to defendants who do not have the ability—or the likely future ability—to pay the DNA collection fee?

B. STATEMENT OF THE CASE

The State charged Christopher White with second degree assault, two counts of first degree rape, and unlawful imprisonment. CP 1-14. The State also charged two counts of second degree rape as alternatives to the first degree charges. CP 11-14.

A jury found White guilty of the alternative second degree rape charges as well as the remaining counts. CP 30.

The court sentenced White to a high-end minimum standard range sentence¹ on the two second degree rape charges but ruled the offenses were the “same criminal conduct.”² CP 18, 21. The court sentenced White to high-end standard range sentences on the remaining counts. CP 18, 21. The court ordered the sentences on each count to run concurrently to the other counts. CP 21.

White appealed. CP 15-16. He argued, in part, that the sentencing court miscalculated his offender score on the assault conviction as five rather than four and erred in imposing a 36-month community custody term as to assault because the term authorized by statute is 18 months. CP 30.

This Court agreed and remanded for resentencing. CP 31, 47-48.

A resentencing hearing occurred on March 12, 2015. RP 1. White’s appointed counsel argued that more was known about White’s mental health issues than at the first sentencing, and his mental health diagnosis warranted a low-end standard range sentence on the rape counts. RP 8-11. Rejecting White’s argument, the superior court imposed the same sentence as before on those convictions. CP 55, 57; RP 8-16. Based on a corrected offender score of four, the court also imposed a reduced

¹ RCW 9.94A.507(3).

² RCW 9.94A.589(1)(a).

standard range sentence on the assault conviction, and it reduced the community custody term on the assault to 18 months. CP 55, 57; RP 15.

The court imposed legal financial obligations (LFOs) totaling \$600, including a \$100 DNA collection fee under RCW 43.43.7541.³ CP 56. The court ordered White to pay restitution “to be determined” but waived all other fees and interest charges. CP 56.

³ Former RCW 43.43.7541 (2011), in effect at the time of sentencing, provides:

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.

The statute was amended in 2015 to add a provision that “[t]his fee shall not be imposed on juvenile offenders if the state has previously collected the juvenile offender’s DNA as a result of a prior conviction.” Laws of 2015, ch. 265, § 31 (eff. July 24, 2015).

Despite two 2006 juvenile felony convictions, for which DNA would have been collected under the then-applicable statute,⁴ the court ordered White to provide a DNA sample and pay the related fee. CP 59, 61-62.

The court did not engage in analysis on the record regarding White's ability to pay. RP 14-18. The judgment and sentence, however, contains boilerplate language stating that his ability to pay was considered. CP 56 (paragraph 4.2).

White timely appeals. CP 67-68.

C. ARGUMENT

RCW 43.43.7541 IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS LIKE WHITE WHO DO NOT HAVE 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 do not have the ability or likely future ability to pay the fine. This Court should find trial court erred in imposing that fee without first determining White's ability to pay.

⁴ See former RCW 43.43.754 (2002) (requiring collection of biological samples for DNA testing from all adult and juveniles convicted of any felony and certain misdemeanors); see former RCW 43.43.7541 (2002) (requiring payment of related fee by those sentenced under chapter 9.94A RCW, i.e., adults, only).

1. The record demonstrates White is unable to pay.

As a preliminary matter, the record indicates that White does not have the ability to pay this or any fee. The court entered a boilerplate finding indicating it had considered White's ability to pay the fees imposed as part of his sentence. CP 56 (paragraph 4.2).

Under RCW 10.01.160(3), however, "[i]n determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3) thus requires a sentencing court to do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). The record must reflect the trial court made an "individualized inquiry" into a defendant's current and future ability to pay. Id. Within this inquiry, the court must consider important factors such as incarceration and other debts, including restitution, when determining a defendant's ability to pay. Id.

Here, the record clearly indicates White does not have the ability to pay. White has significant mental health issues. RP 9. He was sentenced to an indeterminate sentence of 147 months of incarceration and faces lifetime community custody restrictions and registration requirements. CP 58, 63-65. He has no assets and no income. Supp. CP ___ (sub no. 237,

Apr. 13, 2015 Declaration of Indigency); Supp. CP ____ (sub no. 185, Dec. 5, 2012 Order of Indigency). Moreover, the court appears to have recognized this by waiving all non-mandatory fees and interest. CP 56.

2 RCW 43.43.7541 violates substantive due process.

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; 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 at issue currently requires that 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. See RCW 43.43.752 through RCW 43.43.7541.

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.” Blazina, 182 Wn.2d at 837. Imposing LFOs upon a person who does not have the ability to pay actually “increase[s] the chances of recidivism.” Id. at 836-37. 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 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—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.

In sum, when applied to defendants who do not have the ability, or likely future 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. This Court should therefore find that RCW 43.43.7541 violates substantive due process as applied and vacate the order.

3. Prior case law does not control this Court’s inquiry.

White anticipates the State will, nonetheless, argue that the current substantive due process challenge is foreclosed by the Supreme Court’s decision in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992). In Curry and its progeny State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), the Court held that, as to mandatory LFOs, “constitutional principles will be implicated . . . only if the government seeks to enforce collection of the assessment at a time when [the defendant is] unable, though no fault of his own, to comply.” Id. at 241 (citing Curry, 118 Wn.2d at 917 (internal quotes omitted)). The “constitutional principles” at issue in those cases were different than those implicated here.

White's constitutional challenge to the statute authorizing the DNA collection fee is fundamentally different from that raised in Curry. In Curry, the defendants challenged the constitutionality of a mandatory LFO order on the ground that its enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they were unable to pay. 118 Wn.2d at 917. Thus, the constitutional challenge was grounded in the well-established constitutional principle that due process does not tolerate incarceration of people simply because they are poor. Id.

In contrast, White asserts there is no legitimate state interest in requiring sentencing courts to impose a mandatory DNA collection fee without the State first establishing a defendant's ability to pay. In other words, rather than challenging the constitutionality of a statute based on the fundamental unfairness of its ultimate enforcement potential (as was the case in Curry and Blank), White challenges the statute as an unconstitutional exercise of the State's regulatory power that is irrational when applied to defendants shown not to have the ability to pay. As such, the Curry and Blank decisions do not control.

In addition, read carefully, and considered in light of Washington's current LFO collection scheme, those cases actually support White's position in this case. Indeed, following Blazina's recognition of the Washington State's "broken LFO system," 182 Wn.2d at 835, the

decisions in Curry and Blank should be revisited in the context of the current reality of LFO collection in Washington.

At present, Washington's laws permit for an elaborate and aggressive collections process that includes the immediate assessment of interest, enforced collections via wage garnishment, payroll deductions, and wage assignments (which include further penalties), and potential arrest. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay). This cycle does not, for example, conform to the necessary constitutional safeguards established in Blank.

In Blank the Washington Supreme Court held that "monetary assessments which are mandatory *may* be imposed against defendants without a per se constitutional violation." Blank, 131 Wn.2d at 240 (emphasis added). The Court reasoned that fundamental fairness concerns arise only if the government seeks to collect the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (referring to Curry, 118 Wn.2d at 917-18).

Blank also states, however, that in order for Washington’s LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry *before*: (1) the State engages in any “enforced” collection; (2) any additional “penalty” for nonpayment is assessed; or (3) any other “sanction” for nonpayment is imposed.⁵ 131 Wn.2d at 241-42. But under the current scheme, neither the Legislature nor the courts satisfy Blank’s directives.

Although Blank says prior case law suggests that such an inquiry is not required at sentencing, *id.* at 240-42, that Court was not confronted with the realities of the State’s current collection scheme. The current scheme provides for immediate enforced collections processes, penalties, and sanctions. Consequently, Blank supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing, when the DNA collection fee is imposed.

First, under RCW 10.82.090(1), LFOs generally accrue interest at a rate of 12 percent, an astounding level given the historically low

⁵ “Penalty” means: “a sum of money which the law exacts payment of by way of punishment for . . . not doing some act which is required to be done.” Black’s Law Dictionary, Sixth Edition, at 1133. “Sanction” means: “Penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations.” *Id.* at 1341. “Enforce” means: “To put into execution, to cause to take effect, to make effective; as to enforce . . . the collection of a debt or a fine.” *Id.* at 528.

interests rates of the last several years. Blazina, 182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013)). This sanction has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. See Harris, supra at 1776-77 (explaining that “those who make regular payments of \$50 a month toward a typical legal debt will remain in arrears 30 years later). Yet, in general, there is no requirement for the court to have conducted an inquiry into ability to pay before interest is assessed.

Washington law also permits courts to order an immediate “payroll deduction.” RCW 9.94A.760(3). This can occur immediately upon sentencing. Id. Beyond the actual deduction to cover the outstanding LFO payment, employers are authorized to deduct other fees from the employee’s earnings. RCW 9.94A.7604(4). This constitutes an enforced collection process with an additional sanction. Yet there is no provision requiring an ability-to-pay inquiry occur before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW

6.17.020; RCW 9.94A.7701; see also Harris, supra, at 1778 (providing examples of wage garnishment as an enforcement mechanism used in Washington). As for garnishment, this enforced collection may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment is a collection mechanism that may be used within 30 days of a defendant's failure to pay the monthly sum ordered. RCW 9.94A.7701. Again, employers are permitted to charge a "processing fee." RCW 9.94A.7705. Contrary to Blank, however, there are no provisions requiring courts to conduct an ability-to-pay inquiry prior to the use of these enforced collection mechanisms.

Washington law also permits courts to use collections agencies or county collection services to actively collect LFOs. RCW 36.18.190. Any penalties or additional fees these agencies decide to assess are paid by the defendant. Id. There is nothing in the statute that prohibits the courts from using collections services immediately after sentencing. Yet there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement. Id.

These examples demonstrate that under Washington's currently "broken" LFO system, there are many instances where the Legislature provides for "enforced collection" and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection

mechanisms may be used immediately after the judgment and sentence is entered. If the constitutional requirements set forth in Curry and Blank are to be met, trial courts must conduct a thorough ability-to-pay inquiry at the time of sentencing when the LFOs are imposed. In summary, this Court should reject any argument that Curry and Blank control because Washington's LFO system does not meet the constitutional safeguards mandated in those holdings.

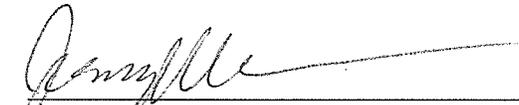
D. CONCLUSION

For the foregoing reasons, this Court should remand for removal of the DNA collection fee.

DATED this 30th day of September, 2015.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 73403-2-1
)	
CHRISTAPHER WHITE,)	
)	
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 30TH DAY OF SEPTEMBER, 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] CHRISTAPHER WHITE
DOC NO. 354893
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE WA, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER 2015.

X *Patrick Mayovsky*