

NO. 74208-6-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

RICHARD LLEWELLYN DANIELS, JR.,
Appellant.

FILED
Aug 18, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Dave Needy, Judge

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
I. SUMMARY OF ARGUMENT.....	1
II. ISSUE.....	1
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT.....	3
1. SINCE THE DNA TESTING FEE IS MANDATORY IT WAS PROPERLY IMPOSED.	3
i. The fee is mandatory.....	4
ii. The fee imposition is not an equal protection violation	5
iii. The fee does implicate substantive due process.....	6
2. WHERE THE STATE IS NOT SEEKING APPELLATE COSTS, APPELLATE COSTS SHOULD NOT BE IMPOSED.	7
V. CONCLUSION.....	7

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON SUPREME COURT</u>	
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	4, 5
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	5, 6
<i>State v. Leonard</i> , 184 Wn.2d 505, 358 P.3d 1167 (2015).....	5
<u>WASHINGTON COURT OF APPEALS</u>	
<i>State v. Clark</i> , 191 Wn. App. 369, 362 P.3d 309 (2015)	5
<i>State v. Johnson</i> , 194 Wn. App 304, ___ P.3d ___ (2016).....	5
<i>State v. Lewis</i> , 194 Wn. App. 709, ___ P.3d ___. (2016).....	5
<i>State v. Lundy</i> , 176 Wn. App. 96, 308 P.3d 755 (2013)	6
<i>State v. Mathers</i> , 193 Wn. App. 913, ___ P.3d ___ (2016).....	5, 6
<i>State v. Shelton</i> , 194 Wn. App. 660, ___ P.3d ___ (2016)	5, 7
<u>UNITED STATES' SUPREME COURT</u>	
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).....	6
<u>WASHINGTON STATUTES</u>	
RCW 10.01.160.....	4, 5, 6
RCW 43.43.7532.....	3
RCW 43.43.754.....	3
<u>WASHINGTON COURT RULES</u>	
GR 34.....	4
RAP 14.2	7
RAP 2.5.....	3

I. SUMMARY OF ARGUMENT

Richard Daniels challenges the trial court's imposition of the statutory DNA testing fee, contending that since he was found to be "impoverished" the fee should not have been imposed.

Given the fee is mandatory, case law supports that the fee was properly imposed.

II. ISSUE

Is a particularized evaluation of ability to pay required prior to imposition of the mandatory DNA testing fee?

Does the imposition of the mandatory DNA testing fee result in an equal protection violation?

Does the imposition of the mandatory DNA testing fee result in violate substantive due process?

III. STATEMENT OF THE CASE

On June 8, 2015, Richards L. Daniels, Jr. was charged with Possession of a Controlled Substance - Methamphetamine, alleged to have occurred on April 10, 2015. CP 25. It was alleged that Daniels possessed methamphetamine in a pipe located pursuant to a consent search of his vehicle and methamphetamine located in a bag in the vehicle after a search warrant was issued and served. CP 2-4.

On July 16, 2015, the State filed an amended information adding a residential burglary charge. CP 13. The charge was based upon Daniels entering a residence and stealing unique coins and other personal property found on his person. CP 708 He admitted the burglary. CP 8

On October 22, 2015, Daniels pled guilty under an amended information to Attempted Residential Burglary. CP 39-48. The parties agreed to an offender score of seven and a sentence within the standard range of 24.75 months. 10/22/15 RP 2, 4, 9.¹

But Daniels challenged the imposition of the DNA testing fee contending that the fee should not be imposed if there was no submission of the DNA for testing. 10/22/15 RP 6.

Defense specifically indicated they were not challenging the imposition of the fee because he agreed it was mandatory. 10/22/15 RP 7, 8. The contention was based upon the fact that Daniels had already submitted a DNA sample. 10/22/15 RP 8.

The trial court imposed the \$100 DNA testing fee. 10/22/15 RP 9.

On October 26, 2015, Daniels timely filed a notice of appeal. CP 26

¹ The State will refer to the verbatim report of proceedings by using the date followed by “RP” and the page number. The single report of proceedings in this case is the plea and sentencing hearing on October 22, 2016.

IV. ARGUMENT

1. Since the DNA testing fee is mandatory it was properly imposed.

RCW 43.43.7541 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. This 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.

(Bold emphasis added). The statute provides the fee is mandatory for every sentence.

At the trial court, Daniels did not seek waiver of the mandatory fee. Instead he contended that his DNA need not be collected since it had been collected previously and therefore there was no need for the fee. 10/22/15 RP 6-8. Thus, this Court may choose to deny review for issues not raised below. RAP 2.5.

On appeal Daniels contends that mandatory fees are also subject to a requirement of the trial court making a determination of the ability to pay citing RCW 10.01.160, *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) and GR 34. He contends the fee violates equal protection. Opening Brief of Appellant at page 10. Daniels also contends the fee violates “substantive due process because it is not rationally related to a government interest.” Opening Brief of Appellant at page 13.

The issues raised by Daniels have been decided recently contrary to Daniel’s position in recent cases from Division I and Division II from the Court of Appeals. The State primarily refers to those opinions.

i. The fee is mandatory.

By its language, the court in *State v. Blazina* was addressing only discretionary legal financial obligations. *State v. Blazina*, 182 Wn.2d at 830, 837. The Washington Supreme Court has recognized that *Blazina* applied to discretionary costs.

In *Blazina*, the superior court imposed **discretionary legal financial obligations** under RCW 10.01.160 consisting of the costs of appointed counsel. We held that before the superior court may impose **such costs**, it must comply with the mandate of the statute to determine whether the defendant can or will be able to pay these costs by conducting on the record an individualized inquiry into the defendant’s current and future ability to pay. *Blazina*, 182 Wn.2d at 838-39; see RCW 10.01.160(3).

State v. Leonard, 184 Wn.2d 505, 507, 358 P.3d 1167 (2015) (bold emphasis added). The Court of Appeals recognizes the distinction.

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), does not support Shelton's argument that his constitutional challenge to the DNA fee statute is ripe for review. The court in *Blazina* did not address imposition of mandatory fees. The court held RCW 10.01.160(3) requires the sentencing court to make an individualized inquiry into the defendant's ability to pay *discretionary* legal financial obligations. *Blazina*, 182 Wn.2d at 837-38.

State v. Shelton, 194 Wn. App. 660, 673, ___ P.3d ___ (2016) (emphasis in original).

Washington courts have consistently held that a trial court need not consider a defendant's past, present, or future ability to pay when it imposes either DNA or VPA fees. *See State v. Curry*, 118 Wn.2d 911, 917-18, 829 P.2d 166 (1992) (VPA fees are mandatory notwithstanding defendant's ability to pay); *State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015) (victim assessment, filing fee, and DNA collection fee are mandatory obligations not subject to defendant's ability to pay).

State v. Mathers, 193 Wn. App. 913, 918-19, ___ P.3d ___ (2016).

ii. The fee imposition is not an equal protection violation

We hold that because there is a rational basis to impose the fee for every felony sentence for the cost of collection as well as to fund the ongoing cost to operate and maintain the DNA database, the DNA fee statute does not violate equal protection.

State v. Lewis, 194 Wn. App. 709, 720, ___ P.3d ___, (2016), citing *State v. Johnson*, 194 Wn. App 304, 307-8, ___ P.3d ___ (2016) (rejecting equal protection claim to the mandatory DNA fee statute, RCW 43.43.7541).

Mathers also argues that treating DNA and VPA fees as mandatory violates equal protection under *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). There the United States Supreme Court upheld the Oregon statute on which RCW 10.01.160 was based. *Curry*, 118 Wn.2d at 915; *Fuller*, 417 U.S. 40. In that case, the Court reviewed nonmandatory costs accumulated from prosecuting a specific defendant. *Fuller*, 417 U.S. at 45. Mathers improperly relies on this case to demonstrate that the Fourteenth Amendment is only satisfied if RCW 10.01.160(3) is read in tandem with specific cost and fee statutes. *Fuller* asserts no such precedent. The case does not address mandatory cost and fee statutes. Following our Supreme Court precedent, we conclude the imposition of DNA and VPA fees on Mathers did not violate equal protection.

State v. Mathers, 193 Wn. App. 913, 926 ___ P.3d ___ (2016).

iii. The fee does implicate substantive due process.

Mathers argues his “substantive due process” rights were violated, Br. of Appellant at 11, but because the same issues have already been addressed unfavorably to Mathers by Washington courts, we disagree with him. In *Curry*, our Supreme Court held that the VPA statute did not violate due process because “no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.” 118 Wn.2d at 918. *Lundy* followed this precedent in the context of the DNA statute. 176 Wn. App. at 102-03.

State v. Mathers, 193 Wn. App. 913, 928, ___ P.3d ___ (2016)

We hold that because imposition of the mandatory DNA fee does not implicate constitutional principles until the State seeks to enforce collection of the DNA fee or impose a sanction for failure to pay, the as-applied substantive due process challenge to RCW 43.43.7541 is not ripe for review.

State v. Shelton, 194 Wn. App. 660, 674, ___ P.3d ___ (2016).

Since these decisions control the issues raised by Daniels, his appeal of the imposition of the DNA testing fee must be denied.

2. Where the State is not seeking appellate costs, appellate costs should not be imposed.

The State is not seeking to request appellate costs. RAP 14.2. In the absence of a cost bill request, appellate costs cannot be sought.

V. CONCLUSION

For the foregoing reasons, this Court must affirm the imposition of the DNA testing fee. Appellate costs are not sought by the State.

DATED this 18th day of August, 2016.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
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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: Thomas M. Kummerow, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. 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 18th day of August, 2016.


KAREN R. WALLACE, DECLARANT