

No. 47614-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LEO BUNKER,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Should the Court consider Bunker's challenge to RCW 43.43.7541, the statute requiring the trial court to impose a DNA collection fee at the time of sentencing, when Bunker has not shown that any error in imposing the fee is manifest constitutional error?
- B. When Bunker asked the trial court to impose the DNA collection fee has any claim of error been invited?
- C. Does RCW 43.43.7541, the mandatory DNA collection fee statute, violate substantive due process?
- D. Does RCW 43.43.7541, the mandatory DNA collection fee statute, violate Bunker's right to equal protection?

II. STATEMENT OF THE CASE

Bunker was charged with and convicted of two counts of Rape in the Second degree, one count of Harassment – Threats to Kill, and two counts of Violation of a No Contact Order (VNCO). CP 32. The charges stemmed from Bunker's relationship with L.H., whom he had a dating relationship with and eventually married. CP 30. According to L.H. Bunker was possessive, demanding and aggressive sexually and physically towards her, regularly forcing her to engage in sexual acts against her will. CP 30. L.H. sought and obtained a protection order restraining Bunker from contacting her. CP 31. Bunker had a third party contact L.H. and Bunker called and messaged L.H. CP 31. Bunker also wrote L.H. a letter. CP 331-32.

At sentencing the trial court imposed an exceptional sentence. CP 32. Bunker appealed his conviction and sentence. CP 26-50. The State conceded in the appeal that the trial court violated Bunker's right to a unanimous jury verdict for Count IV, one of the VNCO counts, and it erred by imposing community custody conditions that included prohibitions regarding minors. CP 30. This Court affirmed the remaining convictions and remanded the case for resentencing, with the vacation of Count IV. CP 30.

The trial court vacated Bunker's prior judgment and sentence. CP 1. At the resentencing hearing the State acknowledged that Bunker had significant medical issues and asked that he only be sentenced to the required assessments for financial costs. RP 4. Bunker's trial counsel similarly requested the trial court "impose only those costs that are necessary or required under statute." RP 7. The trial court sentenced Bunker to an exceptional sentence 400 months. CP 9-10. Bunker timely appeals his sentence. CP 25.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. WHETHER THE COURT ERRED IN IMPOSING THE MANDATORY DNA FEE HAS NOT BEEN PRESERVED FOR REVIEW. ALTERNATIVELY THE COURT SHOULD NOT REVIEW THE ISSUE BECAUSE THE ALLEGED ERROR WAS INVITED.

Bunker raises two constitutional challenges to the DNA fee imposed at sentencing. First he argues that the statute requiring the fee violates substantive due process. Second he argues that imposing the fee for each conviction violates equal protection. Bunker did not raise either challenge in the trial court.

Generally the appellate court will not consider a matter raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 826, 155 P.3d 125 (2007). An exception exists for claims of error that constitute manifest constitutional error. RAP 2.5(a)(3). If a cursory review of the alleged error suggests a constitutional issue then Bunker bears the burden to show the error was manifest. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Error is “manifest” if Bunker shows that he was actually prejudiced by it. If the court reaches the merits of the claimed error it may still be harmless. *Kirkman*, 159 Wn.2d at 927.

Bunker does not address his burden of proof under RAP 2.5. The error is not manifest because Bunker was not prejudiced when the fee was imposed on him pursuant to the statute.

Courts have held that statutes imposing mandatory financial obligations are not unconstitutional on their face. *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (crime victims penalty assessment); *State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (crime victims penalty assessment, DNA collection fee); *State v. Lundy*, 176 Wn. App. 96, 308 P.3d 755 (2013) (restitution, crime victims penalty assessment, DNA collection fee). Constitutional principles are only implicated if the State seeks to enforce the debt at a time when Bunker through no fault of his own is unable to comply. *Curry*, 118 Wn.2d at 917.

The Supreme Court found the Sentencing Reform Act contained adequate safeguards to prevent imprisonment of indigent defendants. Those safeguards included former RCW 9.94A.200 that allowed a defendant the opportunity to show cause why he should not be incarcerated for a violation of his sentence. *Id.* at 918. Those same protections still exist. RCW 9.94A.6333. Because Bunker will not face any punitive sanction for failure to pay if he is indigent, he has not shown that he was actually prejudiced by imposition of the

DNA collection fee under RCW 43.43.7541 without a determination of his ability to pay beforehand. For that reason the court should not consider Bunker's challenge to that statute for the first time on appeal.

Alternatively the court should decline to consider the issue because Bunker invited the alleged error. Under the invited error doctrine a defendant may not seek appellate review of an error that he helped create, even when the alleged error involves constitutional rights. *State v. Studd*, 137 Wn.2d 533, 545-546, 973 P.2d 1049 (1999). In order for the error to be invited Bunker must engage in some kind of affirmative act through which he knowingly and voluntarily set up the error. *State v. Mercado*, 181 Wn. App. 624, 630, 326 P.3d 154 (2014).

Here the Bunker's trial counsel specifically asked the court to impose the DNA collection fee. RP 7. That was reasonable under the circumstances, given the court's recent decisions in *Lundy* and *Kuster*. A request to impose only mandatory obligations that had been upheld as constitutional allowed the defense to persuasively argue to mitigate his financial obligations by waiving other discretionary legal financial obligations. If it was error to impose the fee, Bunker knowingly and voluntarily set up that error.

In *Mercado* the court held that even if the defendant had invited the error at issue in that case, the defendant could nonetheless raise the issue for the first time on appeal because it involved an error in fixing punishment. Because a defendant cannot agree to an illegal sentence, the court held that the invited error doctrine did not apply. *Mercado*, 181 Wn. App. at 631. Here the asserted error does not relate to the fixing of punishment. This court has held that the DNA collection fee is not punitive. *State v. Brewster*, 152 Wn. App. 856, 860, 218 P.3d 249 (2009), *review denied*, 168 Wn.2d 1030 (2010); *State v. Thompson*, 153 Wn. App. 325, 337, 223 P.3d 1165 (2009). The invited error doctrine should therefore preclude review of the issues raised on appeal.

B. THE DNA COLLECTION FEE DOES NOT VIOLATE BUNKER'S DUE PROCESS RIGHT.

If the court finds that the invited error doctrine does not apply, the court may in its discretion accept review even if the issues raised for the first time on appeal are not manifest constitutional error. *State v. Blazina*, 182 Wn.2d 827, 834-835, 344 P.3d 680 (2015). If the court accepts review then it should reject Bunker's constitutional challenges to RCW 43.43.7541.

Constitutional challenges are reviewed de novo. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 257-58, 241 P.3d 1220

(2010). A statute is presumed constitutional and it is the burden of the party attacking the statute to prove the statute is unconstitutional beyond a reasonable doubt. *City of Bellevue v. Lee*, 166 Wn.2d 581, 585, 210 P.3d 1011 (2010), *citing Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). If at all possible statutes should be construed to be constitutional. *State v. Farmer*, 116 Wn.2d 414, 419-20, 805 P.2d 200 (1991).

1. The Statute Does Not Violate Bunker's Due Process Rights.

Bunker first argues that the DNA collection statute violates substantive due process as applied to defendants like himself who are currently indigent. Except in circumstances not relevant here a party may generally only challenge a statute if he is harmed by the feature of the statute that is claimed to be unconstitutional. *State v. Cates*, 183 Wn.2d 531, 540, 354 P.3d 832 (2015). The State agrees that if the court reaches the constitutional challenges, Bunker currently has standing to challenge the statute as it applies to indigent defendants.

Substantive due process bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. *State v. Beaver*, 184 Wn. App. 235, 243, 336 P.3d 654 (2014) *affirmed*, 184 Wn.2d 1020 (2015). The level of

review depends on the nature of the right at issue. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 219, 143 P.3d 571 (2006), *cert denied*, 549 U.S. 1282 (2007). Bunker does not claim that his property interest in a monetary assessment is a fundamental right. As a result, the claim is subject to the rational basis review. *In re Metcalf*, 92 Wn. App. 165, 176-177, 963 P.2d 911 (1998), *cert denied*, 572 U.S. 1041 (1999). Under that standard a statute must be rationally related to a legitimate state interest. *Amunrud*, 158 Wn.2d at 222.

The legislature found that DNA databases are important tools in criminal investigations, in excluding people who are the subject of investigations or prosecutions, detecting recidivist acts, and identifying the location of missing and unidentified persons. RCW 43.43.753. It created a DNA identification system to serve those purposes. RCW 43.43.754. Monies collected under RCW 43.43.7541 are put into an account administered by the state treasurer. They may be used only to create, operate, and maintain the DNA database. RCW 43.43.7532; *Brewster*, 152 Wn. App. at 860. Bunker concedes that these are legitimate state interests. Brief of Appellant 5.

Bunker argues however the interest in collecting money to support the objectives of the DNA database statute do not apply to persons who are indigent at the time of sentencing. He argues that since the State cannot collect from those defendants who cannot pay, it is irrational to impose that obligation on indigent defendants. Brief of Appellant 5-6. Bunker relies on the court's reasoning in Blazina.

Blazina dealt with error resulting from the trial court's failure to comply with RCW 10.01.160(3). That statute requires trial courts to make an individualized determination of the defendant's ability to pay court costs before imposing those costs as part of the sentence. Blazina, 182 Wn.2d at 837-38. Bunker relies on a discussion by the court regarding the problems associated with the current system of imposing legal financial obligations. He claims that this supports his position that imposing the fee in RCW 43.43.7541 on indigent defendants bears no rational relationship to its legitimate purpose. That discussion in Blazina related to the court's reasons for accepting discretionary review of the otherwise unpreserved error. *Id.* 835-836. It does not support the conclusion that there the statute as written does not further a legitimate state interest.

While Bunker may have no current ability to make even minimal payments on the financial obligation, that status may not always exist. As noted there is the opportunity for employment in the prison, while admittedly not likely in Bunker's case. RCW 72.09.100. The legislature recognized that inmates are paid for their work in that program. It provided for a percentage of the inmates' income to be paid toward the inmates legal financial obligations. RCW 72.09.111(1)(a)(iv). Further Bunker may be given funds, through an inheritance or otherwise. If such funds come into the inmate's actual possession, a portion is paid toward those court ordered obligations. RCW 72.11.020, 72.11.030.

In the context of RCW 10.73.160 relating to appellate costs, the court observed that it is not necessary to inquire into a defendants ability to pay or inquire into a defendant's finances before a recoupment order may be entered against an indigent defendant "as it is nearly impossible to predict ability to pay over a period of 10 years or longer." *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). The same is true for the DNA collection fee. Because it is unknown whether Bunker will gain employment in the prison or obtain funds otherwise, Bunker's indigent status at sentencing does

not impair the rational basis for the fee as applied to indigent defendants.

Bunker's argument attempts to graft onto the rational basis test an additional requirement that the DNA fee not be unduly oppressive on individuals. He points to RCW 10.82.090 imposing interest on legal financial obligations accruing from the date of judgment. This argument should be rejected for two reasons.

First, the statute Bunker relies on does not result in enforced collection for indigent defendants. While interest may accrue on the DNA fee that interest is not necessarily collected. The interest may be reduced or waived in certain instances; it must be waived if it accrued during the time the defendant was in total confinement if the interest "creates a hardship for the offender or his or her immediate family." RCW 10.82.090(2).

Second, the court rejected the claim that the rational basis test had an "unduly oppressive" component in *Amunrud*, 158 Wn.2d at 226. Instead the test was only that the law bears a reasonable relationship to a legitimate state interest. The State has a legitimate interest in creating and maintaining a DNA database. Providing a funding mechanism for that database is reasonably related to that interest.

2. Imposition Of The DNA Fee On Repeat Offenders Does Not Violate Equal Protection.

Bunker next argues that RCW 43.43.7541 violates equal protection as to those offenders who have already provided a DNA sample and paid the collection fee pursuant to a prior conviction. Equal protection under the Fourteenth Amendment and Art, 1, §12 of the Washington Constitution requires that “persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” *State v. Phelan*, 100 Wn.2d 508, 512, 671 P.2d 1212 (1983).

When considering an equal protection claim one of three tests applies. Strict scrutiny applies when a suspect class or fundamental right is affected. Intermediate scrutiny applies to classifications that affect an important right and a semi-suspect class not accountable for its status. Under the rational relationship test a law will be upheld unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective. *Westerman v. Cary*, 125 Wn.2d 277, 294-295, 829 P.2d 1067 (1994). Bunker concedes that the rational relationship test applies to his challenge. Brief of Appellant 8.

To prevail on an equal protection challenge Bunker must first establish that he is similarly situated with other persons in a class who have received different treatment under the same law. Whether

the person is similarly situated is determined by the purpose of the challenged law. *State v. Pedro*, 148 Wn. App. 932, 945-946, 201 P.3d 398 (2009), *review denied*, 169 Wn.2d 1007 (2010). The statute “furthers the purpose of funding for the state DNA database and agencies that collect samples...” *State v. Thornton*, 188 Wn. App. 371, 375, 353 P.3d 642 (2015). Every offender who is convicted of a felony or qualifying gross misdemeanor enumerated in RCW 43.43.754 must pay the collection fee. RCW 43.43.7541. The class of persons involved are those who are convicted of a qualifying offense. The statute does not discriminate between persons who are convicted of one or multiple qualifying offenses. For that reason Bunker fails to show that he is in a class of persons who are treated differently under the statute. Bunker’s equal protection claim should therefore fail.

Bunker seeks to distinguish himself on the basis that RCW 43.43.754(2) does not require multiple submissions if the Washington State Patrol crime lab has already received DNA from a person collected upon conviction for a qualifying offense. This is a distinction without a difference since all convicted offenders are subject to the same fee regardless of whether the offender has been convicted once or as in Bunker’s case on multiple prior occasions.

CP 2-4. Moreover, the court recently found that there is no conflict between RCW 43.43.7541 and the collection provisions in RCW 43.43.754(1) and (2). *Thornton*, 188 Wn. App. at 375.

Even if Bunker were correct the statute does not violate equal protection principles. Under the rational basis test a statute's means must only be rationally related to its goal. It does not require that the means are the best way of achieving that goal. *In re Salinas*, 130 Wn. App. 772, 778, 124 P.3d 665 (2005). Requiring each offender to pay a fee upon each conviction for a qualifying offense is related to funding collection of samples and maintenance and operation of the DNA databases. *Brewster*, 152 Wn. App. at 860. Thus there is a rational relationship between the purpose of the statute and the means of accomplishing that purpose.

Nevertheless the defendant claims that the means of administering the statute is not rationally related to its purpose because that the fee is imposed even when the database is not used to investigate subsequent crimes or because a portion of the fee is used for collection. These arguments amount to a claim that for repeat offenders the fee is not the best way of achieving the goal. That argument fails for the reasons stated above.

IV. CONCLUSION

The court should decline consideration of Bunker's constitutional challenges to RCW 43.43.7541 because he did not preserve the claim of error below and, if it was error, it was invited. If the court does exercise its discretion to consider the issue, then the State asks the court to find that the statute does not violate Bunker's substantive due process or equal protection rights.

RESPECTFULLY submitted this 16th day of November,
2015.

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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. LEO BUNKER, Appellant.	No. 47614-2-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On November 16, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to John A. Hays, attorney for appellant, at the following email address: Ltabbutlaw@gmail.com.

DATED this 16th day of November, 2015, at Chehalis, Washington.



Teri Bryant, Paralegal
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