

NO. 47942-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

DENISE LORRAINE WEISS,

Appellant.

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

The Honorable Christopher Melly, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1319
Winthrop, WA 98862
(509) 996-3959

TABLE OF CONTENTS

	Page
A. ASSIGNMENT OF ERROR	1
The trial court erred when it ordered Ms. Weiss to pay a \$100 DNA collection fee.	1
B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR	1
Does the mandatory \$100 DNA-collection fee authorized under RCW 43.43.7541 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fee?	1
C. STATEMENT OF THE CASE	1
D. ARGUMENT	2
RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory \$100 DNA collection fee.....	2
E. CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

Page

Cases

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

DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 960 P.2d 919 (1998) 4

Mathews v. DeCastro, 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976)
..... 4

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

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680, 684 (2015)..... 5, 6

Statutes

RCW 10.82.090(1)..... 5

RCW 43.43.752–.7541 4

RCW 43.43.7532 4

RCW 43.43.754 4

RCW 43.43.7541 1, 2, 4, 5, 6

RCW 9.94A.030 4

Other Authorities

U.S. Const. Amends. V, XIV	2
Russell W. Galloway, Jr., <i>Basic Substantive Due Process Analysis</i> , 26 U.S.F. L.Rev. 625, 625–26 (1992).....	3
Wash. Const. Art. I, § 3	2

A. ASSIGNMENT OF ERROR

The trial court erred when it ordered Ms. Weiss to pay a \$100 DNA collection fee.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Does the mandatory \$100 DNA-collection fee authorized under RCW 43.43.7541 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fee?

C. STATEMENT OF THE CASE

Denise Weiss was convicted at a bench trial of Possession of a Controlled Substance Other Than Marijuana. CP 24; RP 114.

At sentencing Ms. Weiss told the court she had not worked for six years. RP 125. Although she previously worked as a house painter, she only had the use of one hand to hold a paint brush and her neck bothered her. RP 126. She received public assistance. RP 125. An attorney was assisting her on an appeal of denial of Social Security Disability. RP 124-26. The court responded by striking all of the discretionary legal financial obligations (LFOs) fees and fines from her judgment and sentence. RP 126; CP 14-15.

The court ordered Ms. Weiss to provide a biological sample for DNA analysis and pay a \$100 DNA collection fee. CP 15, 16.

This appeal followed. CP 7.

D. ARGUMENT

RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory \$100 DNA collection fee.

Both the Washington and United States Constitutions mandate that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. Amends. V, XIV; 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.” *Amunrud*, 158 Wn.2d at 218–19. It requires that “deprivations of life, liberty, or property be substantively reasonable;” 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)).

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. The United States Supreme Court 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 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 43.43.7541¹. This ostensibly serves the state's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile to help facilitate future criminal identifications. RCW 43.43.752–.7541. This is a legitimate interest. But imposing this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

It is unreasonable to require 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. The blanket requirement does not further the state's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, “the state cannot collect money from defendants who cannot pay.” *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 684 (2015). When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the

¹ 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.”

state to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the state may argue the \$100 DNA collection fee is of such a small amount that most defendants could likely 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. The fee is paid only after restitution, the victim’s compensation assessment, and all other LFOs have been satisfied. The statute makes this the least likely fee to be paid by an indigent defendant.

Ms. Weiss, defendant, will be saddled with a 12% rate on her unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond her financial situation. RCW 10.82.090(1). Imposing mounting debt upon people who cannot pay works against another important state interest – reducing recidivism. See *Blazina*, 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).

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 an individual defendant's DNA. RCW 43.43.7541 violates substantive due process as applied. Based on Ms. Weiss's indigent status and the sentencing court's acknowledgment of her inability to pay any discretionary legal financial obligations, the order to pay the \$100 DNA collection fee should be vacated.

E. CONCLUSION

The order to pay the \$100 DNA collection fee should be vacated.

Respectfully submitted December 18, 2015.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Denise Lorraine Weiss

CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Clallam County Prosecutor's Office, at jespinoza@co.clallam.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Denise Weiss, 292 Mt. Pleasant Rd., Port Angeles, WA 98362.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed December 18, 2015, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Denise Lorraine Weiss, Appellant

LISA E TABBUT LAW OFFICE

December 18, 2015 - 2:58 PM

Transmittal Letter

Document Uploaded: 8-479427-Appellant's Brief.pdf

Case Name: State v. Denise Lorraine Weiss

Court of Appeals Case Number: 47942-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lisa E Tabbut - Email: ltabbutlaw@gmail.com

A copy of this document has been emailed to the following addresses:

jespinoza@co.clallam.wa.us