

NO. 47942-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

DENISE LORRAINE WEISS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00326-8

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether a challenge to an order for legal financial obligations is ripe before the State attempts to enforce the order?
2. Whether the imposition of the mandatory DNA fee violates substantive due process when the current statutory sentencing scheme has sufficient safeguards to prevent imprisonment due to inability to pay fines?
3. Whether there is a sufficient record establishing an inability to pay the DNA fee and whether the constitutionality of RCW 43.43.7541 was preserved for appeal?

II. STATEMENT OF THE CASE

The State adopts the Statement of facts as presented by the appellant, Denise Weiss. Additionally, after the State recommended that the trial court impose legal financial obligations, defense counsel only objected to discretionary legal financial obligations. RP 124. If fact, the defendant asked the court to limit the legal financial obligations to no more than \$800 which represented the mandatory DNA fee (\$100), Victim Assessment (\$500), and Court Costs (\$200). CP 14, 15; RP 124.

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III. ARGUMENT

A. THE APPELLANT'S CLAIM IS NOT RIPE FOR REVIEW BECAUSE THERE IS NO RECORD SHOWING THE STATE ATTEMPTED TO ENFORCE THE ORDER FOR LEGAL FINANCIAL OBLIGATIONS.

Ms. Weiss's claim is not ripe for review. "[G]enerally 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).

The Washington Supreme Court pointed out as follows:

The Court of Appeals here correctly relied on a Second Circuit decision, stating: [c]onstitutional principles will be implicated ... only if the government seeks to enforce collection of the assessments " 'at a time when [the defendant is] unable, through no fault of his own, to comply.' " It is at the point of enforced collection ..., where an indigent may be faced with the alternatives of payment or imprisonment, that he "may assert a constitutional objection on the ground of his indigency." *Curry*, 62 Wash.App. at 681-82, 814 P.2d 1252 (quoting *United States v. Pagan*, 785 F.2d 378, 381-82 (2d Cir.), cert. denied, 479 U.S. 1017, 107 S.Ct. 667, 93 L.Ed.2d 719 (1986)).

State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992).

Here, there is no record that the State had made any attempt to curtail Ms. Weiss' liberty by enforcing the order to pay the mandatory DNA fee. Therefore, Ms. Weiss' claim is not ripe for review and this appeal should be dismissed.

B. THE MANDATORY DNA FEE DOES NOT VIOLATE DUE PROCESS ON ITS FACE OR AS APPLIED BECAUSE THERE ARE SUFFICIENT SAFEGUARDS TO PREVENT IMPRISONMENT OF INDIGENT DEFENDANTS.

[F]or 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*, No. 30548-1-III, 2013 WL 3498241 (Wash.Ct.App., July 11, 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 Wash.2d 911, 918, 829 P.2d 166 (1992) (emphasis added).

State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013).

Furthermore, the *Curry* Court held “that there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants.” *Curry*, 118 Wn.2d at 918; *see also State v. Nason*, 168 Wn.2d 936, 945, 233 P.3d 848 (2010) (pointing out a defendant may not be jailed for failure to pay due to indigence and that a defendant has an opportunity to prove the violation was not willful).

Therefore, the \$100 mandatory DNA fee is not unconstitutional as applied because there are sufficient safeguards to prevent imprisonment due to inability to pay.

C. THE RECORD IS INSUFFICIENT TO SHOW THE APPELLANT WILL NEVER BE ABLE TO PAY THE DNA FEE AND THE APPELLANT DID NOT PRESERVE THE ARGUMENT FOR APPEAL.

Ms. Weiss argues that RCW 43.43.7541 requiring a DNA fee to be paid by all offenders is unconstitutional as applied because requiring a person who will never be able to pay the fee does not rationally relate to the purpose of the statute.

In *State v. Stoddard*, the defendant argued “that the imposition of a mandatory DNA collection fee without inquiry into ability to pay violates substantive due process principles.” No. 32756-6-III, 2016 WL 275318, at *3 (Wn. Ct. App. Jan. 12, 2016). The *Stoddard* Court declined to decline to address the argument because Stoddard did not challenge the constitutionality of the DNA collection fee before the trial court. *Id.* at *2.

Here, the appellant through counsel only objected to discretionary legal financial obligations. In fact, the defendant asked the court to limit the legal financial obligations to no more than \$800 which represented the mandatory DNA fee (\$100), Victim Assessment (\$500), and Court Costs (\$200). CP 14, 15; RP 124. After questioning Weiss, the trial court followed the defendant’s recommendation as to the legal financial obligations. Therefore, because Weiss agreed to the DNA fee, and other mandatory fees, the doctrine of invited error precludes raising this issue on appeal. *See State v. Stoddard*, at *1 (citing *State v. Young*, 63 Wn. App.

324, 330, 818 P.2d 1375 (1991)).

Furthermore, although Weiss indicated her difficulties in continuing with her prior employment of house painting due to problems holding a paint brush and her back and neck issues, she did not make any record of inability to perform other types of work. There was also no record of her assets, debts, and actual income.

Therefore, the Court should decline to review this issue.

IV. CONCLUSION

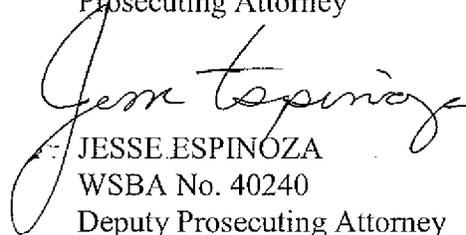
Ms. Weiss has not shown her claim is ripe for review having provided no record showing the State sought enforcement of the order to pay the \$100 DNA fee. Further, the \$100 DNA fee is not unconstitutional because the statutory sentencing scheme has safeguards to prevent imprisonment due to inability to pay.

Therefore, Ms. Weiss' appeal should be dismissed.

Respectfully submitted this 16th day of February, 2016.

Respectfully submitted,

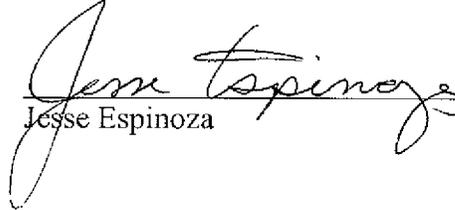
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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Lisa Tabbutt on February 16, 2016.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

CLALLAM COUNTY PROSECUTOR

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