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Court of Appeals
Division III
State of Washington

NO. 32920-8-III Consolidated with no. 333205

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

CALIXTO RIVERA JR, Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. ASSIGNMENTS OF ERROR 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT 6

A. SUFFICIENT EVIDENCE SUPPORTS THE ELEMENTS OF BAIL JUMPING 6

B. THE TRIAL COURT PROPERLY ASSSESSED RIVERA'S CURRENT AND FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS 10

C. WHETHER THE TRIAL COURT PROPERLY ORDERED RIVERA TO PAY COSTS AND ASSESSMENTS WITHIN SIX OR NINE MONTHS AFTER HIS RELEASE FROM PRISON IS NOT YET RIPE FOR REVIEW 15

D. THE TRIAL COURT PROPERLY ORDERED THE $100 DNA COLLECTION FEE 15

E. THE TRIAL COURT PROPERLY ORDERED RIVERA TO SUBMIT TO DNA COLLECTION PURSUANT TO RCW 43.43.754 22

F. THIS COURT SHOULD DENY RIVERA'S REQUEST FOR RESENTENCING DUE TO HIS FAILURE TO REQUEST THE DRUG OFFENDER SENTENCING ALTERNATIVE AT THE TIME OF SENTENCING 23

IV. CONCLUSION 24

TABLE OF AUTHORITIES

CONSTITUTIONS

U.S. CONST. amend. XIV 20

WASH. CONST. art. 1 20

CASES

Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 143 P.3d 571 (2006) 19

In re Pers. Restraint of McNeil, 181 Wn.2d 582, 334 P.3d 548 (2014) 18

Nielsen v. Wash. State Dep't of Licensing, 177 Wn. App. 45, 309 P.3d 1221 (2013) 17-18

State v. Aguilar, 153 Wn. App. 265, 223 P.3d 1158 (2009) 6

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015) 10-13

State v. Carver, 122 Wn. App. 300, 93 P.3d 947 (2004) 7

State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992) 20

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) 17

State v. Downing, 122 Wn. App. 185, 93 P.3d 900 (2004) 6

State v. ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) 22

State v. Grayson, 154 Wn.2d 333, 111 P3d 1183 (2005) 23-24

State v. Huber, 129 Wn. App. 499, 119 P.3d 388 (2005) 9

State v. Jones, 171 Wn. App. 52, 286 P.3d 83 (2012) 23

State v. Joy, 121 Wn.2d 333, 851 P.2d 654 (1994) 6

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007) 16

State v. Lyle, 188 Wn. App. 848, 355 P.3d 327 (2015) 11

State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013) 15

State v. Olivas, 122 Wn.2d 73, 856 P.2d 1076 (1993) 20

State v. Santos, 163 Wn. App. 260 P.3d 982 (2011) 9

State v. Schaaf, 109 Wn.2d 1, 743 P.2d 240 (1987) 20

State v. Stoddard, 2016 Wash. App. LEXIS 38 (Wash. Ct. App. Jan. 12, 2016)

.....10-12, 15

State v. Strine, 176 Wn.2d 742, 293 P.3d 1177 (2013) 10-11

State v. Thornton, 188 Wn. App. 371, 353 P.3d 642 (2015) 22

STATUTES

RCW 7.68.035 12

RCW 10.01.160 13-14

RCW 10.82.090 19

RCW 35.20.090 12

RCW 36.18.020 12

RCW 43.43.754 .....21, 23, 24

RCW 43.43.7541 .....12, 16, 17, 20-21

RCW 9.94A.030 14

RCW 9.94A.660 24

RCW 9.94A.6333 17

RCW 9.94A.760 ……..……..……14

RULES

RAP 2.5 ……...……..…..11,16, 24

CR 34 ……..……..13

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

1. Was there sufficient evidence presented to support Rivera's two convictions of bail jumping?

2. Did the trial court properly assess Rivera's current or future ability to pay legal financial obligations?

3. Did the trial court properly order as a condition of Rivera's sentence that he pay costs and assessments within six or nine months after his release from prison?

4. Did the trial court properly order Rivera pay the $100 DNA collection fee as a condition of his sentence?

5. Did the trial court properly order Rivera to submit to DNA collection pursuant to RCW 43.43.754 as a condition of his sentence?

B. ANSWERS TO THE ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

1. There was sufficient evidence presented to support Rivera's convictions of bail jumping.

2. The trial court properly imposed legal financial obligations.

3. Whether the trial court properly ordered as a condition of the sentence that Rivera pay costs and assessments within six or nine months after his release from prison is not yet ripe for review.

4. The trial court properly ordered Rivera to pay the $100 DNA collection fee as a condition of his sentence.

5. The trial court properly ordered Rivera to submit to DNA collection pursuant to RCW 43.43.754 as a condition of his sentence.

II. STATEMENT OF THE CASE

The Appellant, Calixto Rivera Jr., was convicted of second degree possession of stolen property and two counts of bail jumping after a jury trial. The charges stem from the following facts:

Stolen Property

On May 2, 2013, Deputy Jesse Rojas of the Yakima County Sheriff's Office stopped a vehicle at 2:00 in the morning for not having a license plate on the trailer. RP at 63. The traffic stop was conducted in the area of Progressive Road off of Highway 97 in Yakima, Washington. *Id.* Deputy Rojas identified the driver as Calixto Rivera Jr., using a Washington Department of Licensing photo on his patrol car computer. *Id.* at 63. After identifying Rivera, Deputy Rojas discovered that Rivera was driving with a suspended license. *Id.* at 64.

During the traffic stop, Deputy Rojas inquired whether Rivera had a license plate for the trailer. *Id.* Rivera stated that he did not know where the license plate was. *Id.* Deputy Rojas then asked Rivera who owned the trailer. Rivera replied that he did not know who owned it. *Id.* Rivera further explained that he was picking up the trailer and transporting it as a favor to two friends. *Id.* Deputy Rojas issued Rivera a traffic citation, released him, and impounded the truck and trailer. *Id.* at 65.

The next day, Deputy Rojas was notified that the trailer was reported stolen. *Id.* Sergeant Randy Briscoe took the report of the stolen trailer from the pastor of a church located at 1030 East McDonald Road. *Id.* at 78-79.

David Ruiz, the owner of the stolen trailer, testified that he sold fencing supplies to the church on McDonald Road and let them borrow the trailer until they were able to unload all of the materials. *Id.* at 87. Ruiz estimated that the value of the trailer when it was stolen was around $2,000. *Id.* at 90. He also testified that no one except the church had permission to use the trailer. *Id.* at 91.

Deputy Steve Changala also identified Rivera in court. *Id.* at 125-27. He testified that he knew Rivera to live in a camp trailer with his girlfriend on the property at 200 South McKinley Road. *Id.* at 125-27.

Bail Jumping

The State admitted several certified documents through Deputy Rojas. These documents included a certified Department of Licensing (DOL) photo of Rivera. *Id.* at 66; SE 1. The DOL photo contained a color photo of Rivera as well as Rivera's name, address, date of birth, and signature. SE 1. It was admitted without objection. RP at 66.

Deputy Rojas testified that the case number he was subpoenaed to testify about was 13-1-01028-9. *Id.* at 67. This matched the case number in the information charging Rivera with one count of second degree

possession of stolen property and two counts of bail jumping. *Id.*; SE 2. Other certified court documents in case number 13-1-01028-9 admitted through Deputy Rojas included: a scheduling order dated January 24, 2014 which contained Rivera's signature; order authorizing a bench warrant dated February 7, 2014; order of agreed continuance dated April 18, 2014 signed by Rivera; order authorizing a bench warrant dated May 16, 2014; and an order quashing bench warrant dated February 11, 2014. RP at 70-74; SE 3-7.

Deputy Rojas also positively identified Rivera in court as the same person he contacted on May 2, 2013. RP at 64.

After deliberating, the jury returned a guilty verdict on all three counts. *Id.* at 190. The trial court then scheduled the sentencing hearing for November 7, 2014 at 9:30 in the morning. *Id.* at 200-01.

Sentencing

At the sentencing hearing, the State urged the trial court to impose a top of the range sentence based on Rivera's extensive criminal history as well as the fact that there were three different convictions. *Id.* The State advised the court that Rivera had a base offender score of nine-plus. *Id.* The defense asked the court to impose a sentence of 51 months or bottom of the range. *Id.* at 201. In addressing the court, Rivera stated that he had three young children, had trouble making it to court because he was not able

to drive due to his suspended license, and that he did not intentionally avoid court, he was just confused by the two court dates. *Id.* at 203.

The court sentenced Rivera to 29 months for second degree possession of stolen property (count 1) and 58 months each on both counts of bail jumping (counts 2 and 3) with the time to run concurrent. *Id.* at 208.

The court then inquired whether Rivera had any work skills or if he had previously held any employment. Rivera stated that he went to college to become a custodian, that he manages his own business, and that he has his G.E.D. *Id.* at 209. Rivera also told the court he had three children and that his fiancée was struggling. *Id.* at 209.

The defense asked the court to cap the costs of incarceration at $250. *Id.* And, the defense advised the court that Rivera had the ability to pay, but did not have the present ability to pay because Rivera was not currently employed. The court capped the costs of incarceration at $250. *Id.* The State did not request restitution. *Id.*

The court signed the judgment and sentence and imposed costs, fines, and assessments of $1,960.00 (excluding costs of incarceration) against Rivera. *Id.*; CP 147. This timely appeal then followed.

III. ARGUMENT

A. SUFFICIENT EVIDENCE SUPPORTS THE ELEMENTS OF BAIL JUMPING.

Rivera challenges the bail jumping convictions on the grounds that he did not knowingly fail to appear. Evidence admitted at trial proved that Rivera had notice of the February 7, 2014 and May 16, 2014 court dates and failed to appear.

In evaluating challenges based on the sufficiency of the evidence, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Aguilar*, 153 Wn. App. 265, 275, 223 P.3d 1158 (2009). There is sufficient evidence to support a conviction "when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 275 (quoting *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1994)).

Washington courts have previously held that

> The elements of bail jumping are satisfied if the defendant (1) was held for, charged with, or convicted of a particular crime; (2) had knowledge of the requirements of a subsequent personal appearance; and (3) failed to appear as required.

State v. Downing, 122 Wn. App. 185, 192, 93 P.3d 900 (2004). Evidence admitted at trial demonstrated that Rivera was charged with second degree

of possession of stolen property in case number 13-1-01028-9, which satisfies the first prong. SE 2.

Moving to the second prong, and the primary point of contention for Rivera, is whether Rivera knew he had to appear for court on February 7, 2014 and May 16, 2014. Rivera argues that there was insufficient evidence to prove that he had knowledge of the court dates. Knowledge is an essential element of bail jumping. Courts have held that the knowledge element of the bail jumping statute is satisfied when the State is able to prove that the defendant received notice of the court date. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). To establish that Rivera had notice of the two court dates, the State admitted two certified copies of court orders signed by Rivera. With respect to the February 7, 2014 court date, a scheduling order dated January 24, 2014 was admitted. SE 3. That order contained the judge's signature, attorneys' signatures, and the signature of a person named "Calixto" above the line indicating copy received by the defendant. SE 3. Concerning the May 16, 2014 court date, an agreed continuance order dated April 18, 2014 was admitted. SE 4. This document contained the same signatures as the scheduling order.

Both orders contained the same defendant's name, date of birth, and case number. The case number in these documents also matched the case number of the information filed by the State against Rivera. *Cf.* SE 3 and 4

with SE 2. Additionally, both orders contained the same signature in the line denoting that a copy of the order was received by the defendant. The jury was free to compare the signatures in the court orders with the signature of the Rivera in the certified DOL photo. *Cf.* SE 3 and 4 *with* SE 1. The certified DOL photo contained a color photograph of Rivera as well as Rivera's name, date of birth, address, and signature. SE 1. A comparison of the signatures in these documents reveals substantial similarity. Reviewing the evidence in the light most favorable to the State and all reasonable inferences drawn from this evidence, there exists sufficient evidence to prove that Rivera had notice of the court hearings on February 7, 2014 and May 16, 2014 and failed to appear.

The remaining prong to address is whether Rivera failed to appear for court hearings on February 7, 2014 and May 16, 2014. In support of Rivera's failure to appear for court, the State admitted certified copies of orders authorizing bench warrants filed on February 7, 2014 and May 16, 2014. SE 4; 6. Both of these orders demonstrated Rivera failed to appear for triage hearings and further specified a special finding by the trial court that Rivera failed to appear after receiving proper notice:

> [T]he court finding that the defendant has not appeared for the hearing today after receiving proper notice of the hearing, it is now ORDERED that the Clerk shall issue a Bench Warrant for the arrest of the defendant.

SE 4; 6. Had the trial court determined Rivera did not receive proper notice for either of these hearings, it would not have authorized the bench warrants. Thus, a reasonable inference can be made that the trial court found Rivera had proper notice of the hearings and failed to appear. This, in turn, establishes that the third prong was satisfied.

1. There was sufficient evidence to prove identification.

Rivera further asserts that there was insufficient evidence to prove identification and cites several cases in support of this argument. The cases Rivera relies upon merit distinction from the facts of Rivera's case.

For example, in *State v. Santos*, 163 Wn. App. 780, 260 P.3d 982 (2011), no evidence other than certified court documents was presented to establish the defendant's previous convictions for driving under the influence. No evidence established that the person who was on trial for felony driving under the influence was the same person who was convicted of the previous offenses. Similarly, in *State v. Huber*, 129 Wn. App. 499, 119 P.3d 388 (2005), no evidence was presented to demonstrate that the person on trial was the same person who failed to appear for court. Instead, the State tried to argue in *Huber* that defense counsel's introduction of the defendant could be used as evidence to establish the defendant's identity. The *Huber* Court plainly rejected that argument and explained that

identification could be proven by booking photographs or fingerprints, eyewitness identification, or even distinctive personal information or traits. 129 Wn. App. at 503. Both *Santos* and *Huber* were plagued by an identification issue that was never remedied. That was not the case here.

Evidence other than just certified court documents were admitted in support of the bail jumping charges. Deputy Rojas positively identified Rivera as the person he contacted on May 2, 2013. RP at 64. Deputy Changala also positively identified Rivera. *Id.* at 125-27. Additionally, the certified DOL photo provided a basis for the jury to determine whether the person sitting in court was Calixto Rivera Jr. Deputy Rojas' and Deputy Changala's in-court identifications of Rivera and the certified DOL photo provided sufficient evidence to establish the identity of Rivera under *Huber*.

B. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS.

1. This Court should deny review of Rivera's legal financial obligations and ability to pay because this issue was not raised at the trial court level.

Rivera relies on *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) to support discretionary review of legal financial obligations (LFOs) and concedes that this issue was never raised below. Brief of Appellant at 12. It is commonly accepted that a party may not raise a new argument on appeal that was not raised before the trial court. *State v. Strine*, 176 Wn.2d

742, 749, 293 P.3d 1177 (2013); RAP 2.5(a). Post-*Blazina* courts have held that failure to object to the imposition of LFOs at sentencing waives the issue on appeal unless the appellate court utilizes its discretion to permit review of the issue. *State v. Lyle*, 188 Wn. App. 848, 853, 355 P.3d 327 (2015). This Court recently identified several reasons to decline to address issues not raised at the trial court level which are compelling.

> Good sense lies behind the requirement that arguments be first asserted at trial. The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.

State v. Stoddard, 2016 Wash. App. LEXIS 38, at *5-6, (Wash. Ct. App. Jan. 12, 2016) (internal quotations omitted). Even the *Blazina* Court recognized that: "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." 182 Wn.2d at 832. Rivera did not challenge LFOs below, and he should not be allowed to do so now. In the event that this Court exercises discretionary review, the record demonstrates that the trial court properly assessed Rivera's current and future ability to pay LFOs.

2. The trial court properly imposed mandatory LFOs.

Stoddard makes it clear that a trial court is not required to assess a defendant's ability to pay mandatory LFOs. In no uncertain terms, this Court held "Trial courts must impose such fees regardless of a defendant's indigency." *Stoddard*, 2016 Wash. App. LEXIS at *3. Thus, Rivera's reliance on *Blazina* to challenge the imposition of mandatory LFOs is misplaced.

The mandatory LFOs imposed by the court included the: $500 crime penalty assessment; $200 criminal filing fee; $100 DNA collection fee; and $250 jury fee. CP at 147. The crime penalty assessment of $500 is mandated by RCW 7.68.035(1)(a). The DNA collection fee is mandated by RCW 43.43.7541. The criminal filing fee is mandated by RCW 36.18.020(2)(h). The jury fee is mandated by RCW 35.20.090. Consistent with *Stoddard*, the trial court properly imposed mandatory LFOs.

3. The trial court properly imposed discretionary LFOs.

What then remains after *Stoddard* is whether the court's imposition of discretionary LFOs was proper. Rivera is correct that both *Blazina* and RCW 10.01.160(3) require trial courts to assess a defendant's present and future ability to pay discretionary LFOs at sentencing. The extent of what is required in the trial court's "individualized inquiry" is disputed. *Blazina*,

182 Wn.2d at 838. Rivera argues that because the trial court did not inquire about other circumstances such as his incarceration, other debts, restitution, and the indigency factors outlined in CR 34, the court erred in imposing discretionary LFOs. Neither *Blazina* nor RCW 10.01.160(3) have formulated an exhaustive list of what constitutes an adequate "individualized inquiry" into a defendant's present and future ability to pay discretionary LFOs.

In this case, the trial court did more than just sign the "boilerplate language" of the judgment and sentence. Brief of Appellant at 20. The trial court inquired about Rivera's work skills and his employment history. RP at 208. Rivera replied that he went to college to be a custodian, had a G.E.D., and managed his own business. *Id.* Rivera further told the court that he had three children and a fiancée who was struggling. *Id.* at 209. Defense counsel asked the court to cap the costs of incarceration because Rivera was not working. *Id.* Defense counsel also advised the court "Even though he has the ability to pay, your Honor, he doesn't have the present ability to pay 'cause he doesn't have a job." *Id.* After considering the statements of Rivera and defense counsel, the court found that "although [Rivera] has the ability to work he certainly hasn't been working, because he's been jail, and doesn't have the present ability to earn anything." *Id.* at 210. The trial court then capped the costs of incarceration at $250 and

imposed other costs, assessments, and fines in the amount of $1,960 (not including the $250 costs of incarceration fee). *Id.*; CP at 147. These costs included the following discretionary LFOs: $600 court appointed attorney recoupment; $300 warrant fee; $10 sheriff service fee; and $250 costs of incarceration fee. RP at 210; CP at 147.

Significantly, all of these discretionary LFOs are authorized by statutes. The court appointed attorney recoupment fee is authorized by RCW 9.94A.760(1) and is considered a LFO under RCW 9.94A.030(31). The costs of incarceration fee is authorized by RCW 9.94A.760(2). And, the warrant fee and sheriff service fee are authorized by RCW 10.01.160.

As the record demonstrates, the trial inquired about Rivera's present and future ability to pay based on factors such as his occupational skills and employment history. The trial court was also aware that Rivera had three children and a fiancée who was struggling as well as a lengthy criminal history. The record is devoid of any evidence demonstrating that Rivera would not be able to obtain gainful employment after being released from prison. The information presented at the sentencing hearing by Rivera and his attorney provided the trial court with sufficient information to make an "individualized inquiry" into Rivera's ability to pay. The trial court, therefore, properly imposed discretionary LFOs.

C. WHETHER THE TRIAL COURT PROPERLY ORDERED RIVERA TO PAY COSTS AND ASSESSMENTS WITHIN SIX OR NINE MONTHS AFTER HIS RELEASE FROM PRISON IS NOT YET RIPE FOR REVIEW.

It has been traditionally recognized in Washington that challenges to LFOs that do not limit a defendant's liberty are not ripe for review until the State attempts to enforce these obligations by curtailing a defendant's liberty. *State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). Presently, Rivera is an inmate at the Coyote Ridge Correctional Facility serving the 58 month sentence imposed by the trial court. The State also has not made any attempt to enforce financial obligations against Rivera. Accordingly, the issue of whether the trial court abused its discretion in ordering Rivera to pay costs and assessments within six or nine months after his release from prison is not yet ripe for review.

D. THE TRIAL COURT PROPERLY ORDERED THE $100 DNA COLLECTION FEE.

Stoddard, as discussed above in the context of mandatory LFOs, definitively settles the non-constitutional aspect of the DNA collection fee. *Stoddard* held that trial courts are not required to assess a defendant's present and future ability to pay mandatory LFOs before imposing these fees. 2016 Wash. App. LEXIS at *3. The $100 DNA fee is mandated by

RCW 43.43.7541. Therefore, the trial court properly imposed this fee as a mandatory LFO.

1. This Court should refuse to consider constitutional challenges to RCW 43.43.7541 when raised for the first time on appeal.

At the trial court level, Rivera did not challenge the constitutionality of RCW 43.43.7541 just as he did not challenge the trial court's imposition of LFOs. Rivera should be precluded from challenging the statute on equal protection or substantive due process grounds here. In no uncertain terms, RAP 2.5(a) states that "The appellate court may refuse to review any claim of error which was not in the trial court." The same rule also carves out an exception for claims rising to the level of manifest constitutional error. RAP 2.5(a)(3). An error is considered "manifest" when the challenging party is able to demonstrate that he or she was actually prejudiced by it. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

Rivera argues that because the $100 DNA is paid only after all other LFOs have been fulfilled, it is the least likely fee to be paid. Brief of Appellant at 26. Rivera further argues that the 12 percent interest rate that attaches to unpaid DNA fees will only further contribute to his indigency. *Id.* at 27. The problem with these arguments is that they fail to demonstrate how Rivera has been actually prejudiced by the DNA fee. Rivera also does not face any punitive sanctions for failure to pay the DNA fee due to his

indigency pursuant to the safeguards built into the Sentencing Reform Act. RCW 9.94A.6333. The possibility of prejudice is not the standard. There must be actual prejudice. The State has not made any attempt to enforce and/or collect the DNA fee or any other LFO. Thus, constitutional principles are not yet implicated. *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992).

If this Court grants review and finds that constitutional principles are implicated, RCW 43.43.7541 should be found constitutional. Rivera has not demonstrated how either his substantive due process or equal protection rights have been actually violated by RCW 43.43.7451.

2. RCW 43.43.7541 does not violate substantive due process rights.

Rivera argues that RCW 43.43.7541 violates substantive due process rights of defendants who do not have a present or future ability to pay the $100 DNA fee. "Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Nielsen v. Wash. State Dep't of Licensing*, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013). In order to successfully challenge the constitutionality of a statute, the challenging party must prove beyond a reasonable doubt that the statute is

unconstitutional. *In re Pers. Restraint of McNeil*, 181 Wn.2d 582, 590-91, 334 P.3d 548 (2014). That standard has not been met.

Although Rivera was found indigent for purposes of this appeal, there is no evidence to demonstrate that he will be indigent indefinitely. Based on Rivera's employment history and occupational skills, Rivera may likely find employment after he is released from prison. He would then have the ability to pay the fee. At this point, Rivera has not been harmed by the DNA fee.

Entertaining the possibility that Rivera has been harmed by the DNA fee, Rivera is correct that the rational basis standard of review applies. Brief of Appellant at 24; *see also Nielsen*, 177 Wn. App. at 52-53 (holding that where a fundamental right is not at issue, the rational basis standard of review applies). Under the rational basis standard, the State is required to show that the statute is rationally related to a legitimate State interest. Rivera concedes that the State's interest in funding, collecting, analyzing, and retaining an offender's DNA profile to assist in future prosecutions is a legitimate interest. Brief of Appellant at 25. Rivera then argues that imposing the DNA fee on indigent defendants does not rationally serve that interest. *Id.* at 25. This argument is flawed because it assumes Rivera will be indigent indefinitely. Rivera's status could change: he could receive a

gift of funds or he could obtain work while in prison or when he is released from prison.

The other flaw in Rivera's argument is that he attempts to add another requirement to the rational basis standard of review. This additional requirement proposed by Rivera is that the DNA fee not be unduly oppressive on defendants who do not have the present or future ability to pay. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 226, 143 P.3d 571 (2006) *cert. denied*, 549 U.S. 1282 (2007) (recognizing that the rational basis standard of review does not contain an "unduly oppressive" component). Rivera also fails to mention the fact that the 12 percent interest rate for unpaid DNA fees may be waived or reduced in some cases. RCW 10.82.090(2) (providing that interest may be waived if it accrues during the time that a defendant was in total confinement or if the interest "creates a hardship for the offender or his or her immediate family.").

The DNA fee furthers the State's legitimate interest in creating and maintaining a DNA database. The DNA fee is reasonably related to furthering the State's interest in creating and maintaining a DNA database. Rivera has, therefore, failed to demonstrate how the DNA fee violates substantive due process.

3. RCW 43.43.7541 does not violate equal protection rights.

Pursuant to the constitutional guarantee of equal protection of the laws, similarly situated persons are to receive like treatment. U.S. CONST. amend. XIV; WASH. CONST. art. 1, § 2. The rational basis test applies here as it did above in the substantive due process analysis because a fundamental right was not infringed and a suspect classification was not implicated. *State v. Olivas*, 122 Wn.2d 73, 94-95, 856 P.2d 1076 (1993) (recognizing that an equal protection challenge to the DNA statute does not implicate fundamental rights and does not create a suspect classification; thus the rational basis standard of review applies.). Under the rational basis standard of review, "a law is subjected to minimal scrutiny and will be upheld unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective." *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987).

The party challenging the statute then has the burden to prove that the legislative classification is arbitrary. *State v. Coria*, 120 Wn.2d 156, 172, 839 P.2d 890 (1992). The rational basis standard of review requires only that the means employed by the statute are rationally related to a legitimate state interest, not that the means used have to be the best way to advance that interest. *Id.* at 173.

Rivera argues that he is similarly situated with all defendants who are subjected to the DNA collection fee. Brief of Appellant at 28. He further argues that RCW 43.43.7541 applies not equally to all defendants because those defendants who are sentenced more than once have to pay the fee multiple times. *Id.* at 30. This argument does not pass muster because defendants who are convicted once and sentenced once are not "similarly situated" with defendants who are convicted and sentenced multiple times. Even assuming for the sake of argument that Rivera is "similarly situated," this argument also fails because there is a rational basis for imposing the DNA fee every time a person is convicted and sentenced. The DNA fee contributes to a DNA system that may be accessed every time an individual is prosecuted for a new crime. There is a rational relationship between the assessment of the DNA fee each time a defendant is sentenced and the legitimate state interest in funding the collection, analysis, and retention of the DNA profiles of offenders' in the DNA database.

Imposing the DNA fee each time a defendant is convicted and sentenced does not violate equal protection. To argue along these lines incorrectly presumes that the only purpose of the DNA fee is related to the collection of the DNA sample. This fee is imposed after "every sentence" per RCW 43.43.754. The DNA fee does not merely fund the collection of the samples. It also helps fund the DNA database where the original sample

is retained. The original sample may then be used in the investigation and prosecution of any future offenses the defendant may commit.

E. THE TRIAL COURT PROPERLY ORDERED RIVERA TO SUBMIT TO DNA COLLECTION PURSUANT TO RCW 43.43.754.

Rivera argues for the first time that the trial court abused its discretion in requiring him to submit to another collection of his DNA, but this is not supported by the record below. Rivera correctly outlines the standard for abuse of discretion. Brief of Appellant at 31. Discretionary decisions of trial courts will not be disturbed absent a "clear showing or abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

At the sentencing hearing, no evidence was presented to demonstrate that Rivera had previously submitted a DNA sample when he was sentenced in his other felony cases. RP at 198-211. Although it was brought to the court's attention that Rivera had an offender score of nine-plus based on his prior felony convictions, no information was presented to suggest that Rivera's DNA had been collected in any of those prior felony convictions. An argument similar to Rivera's argument was rejected in *State v. Thornton*, 188 Wn. App. 371, 373-74, 353 P.3d 642 (2015). In *Thornton*, both the State and defense concurred at the sentencing hearing

that the defendant's DNA had not been collected in her previous felony conviction. The defendant then argued on appeal that her DNA had been collected previously. The *Thornton* Court ruled that there was insufficient facts to support that the defendant's DNA had been previously collected.

Nothing more than cursory statements about Rivera's criminal history and offender score were provided to the trial court at the sentencing hearing. Absent was any evidence demonstrating that Rivera had previously submitted a sample of his DNA when he was sentenced in his other felony cases. In light of the evidence presented at the sentencing hearing, the trial court did not abuse its discretion in requiring Rivera to provide a DNA sample under RCW 43.43.754.

F. RIVERA IS PRECLUDED FROM REQUESTING THE DRUG OFFENDER SENTENCING ALTERNATIVE ON APPEAL WHEN HE DID NOT REQUEST IT AT THE TIME OF SENTENCING.

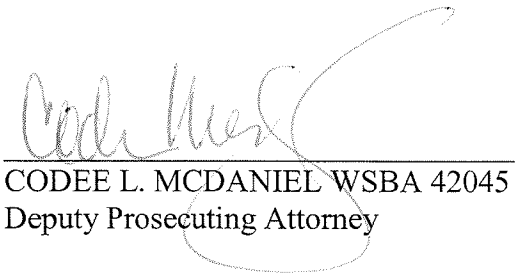
Rivera argues in a personal restraint petition filed on April 21, 2015 that he should be resentenced under the drug offender sentencing alternative (DOSA). The trial court did not err by not granting a DOSA when Rivera never requested it. RP 203-09. Washington courts have recognized that "every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Jones*, 171 Wn. App. 52, 55, 286, P.3d 83 (2012) (quoting *State v. Grayson*, 154 Wn.2d 333,

338, 111 P3d 1183 (2005)). A request for a DOSA may be made by the court, defendant, or the state. RCW 9.94A.660(2). However, the court is under no obligation to request the sentencing alternative for a defendant. No reasons were advanced at the sentencing hearing by Rivera or the defense to suggest that Rivera wished to be considered for the sentencing alternative or that Rivera had an alcohol or substance abuse problem. RP 203-09. The trial court properly declined to sentence Rivera to the sentencing alternative when Rivera never requested it.

IV. CONCLUSION

First, sufficient evidence was presented at trial to support the bail jumping convictions. Second, since Rivera neither challenged the imposition of LFOs nor the constitutionality of LFOs below, Rivera should not now be allowed to do so under RAP 2.5. If discretionary review is granted, *Stoddard* supports that the trial court's imposition of mandatory LFOs was proper. Third, the issue of whether Rivera must begin paying LFOs within six or nine months from his release from prison is not yet ripe for review because the State has made no attempt to collect these financial obligations. Fourth, neither DNA collection nor the $100 DNA collection fee violate substantive due process or equal protection clauses. And finally, the trial court did not abuse its discretion in requiring Rivera to submit to collection of his DNA under RCW 43.43.754.

Respectfully submitted this 16th day of February, 2016,



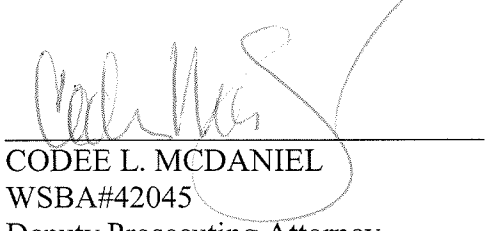
CODEE L. MCDANIEL WSBA 42045
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Codee L. McDaniel, state that on February 16, 2016, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Ms. Susan Gasch at gaschlaw@msn.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of February, 2016 at Yakima, Washington.



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