

FILED
MARCH 4, 2016
Court of Appeals
Division III
State of Washington

NO. 33441-4-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JARROD C. JOHNSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR YAKIMA COUNTY

BRIEF OF RESPONDENT

JOSEPH BRUSIC
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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	1
1. JOHNSON LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF RCW 43.43.7541	3
2. SINCE THE STATE HAS NOT ATTEMPTED TO COLLECT THE MANDATORY DNA FEE, JOHNSON'S CLAIM IS NOT RIPE FOR REVIEW.....	6
3. BECAUSE THE ALLEGED ERROR IS RAISED FOR THE FIRST TIME ON APPEAL AND NOT MANIFEST CONSTITUTIONAL ERROR, THIS COURT SHOULD DECLINE REVIEW UNDER RAP 2.5.....	7
4. JOHNSON HAS FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DNA FEE STATUTE VIOLATES SUBSTANTIVE DUE PROCESS AS APPLIED TO INDIGENT DEFENDANTS	8
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Bearden v. Georgia, 461 U.S. 660,
103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).....4,11

Lujan v. Defenders of Wildlife, 504 U.S. 555,
112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).....4

Witt v. Dep't of Air Force, 527 F.3d 805 (9th Cir. 2008)4

Washington State:

Amunrud v. Bd. of Appeals, 158 Wn.2d 208,
143 P.3d 571 (2006)..... 9-10

Branson v. Port of Seattle, 152 Wn.2d 862,
101 P.3d 67 (2004).....3

City of Spokane v. Neff, 152 Wn.2d 85,
93 P.3d 158 (2004)..... 5-6

Harmon v. McNutt, 91 Wn.2d 126,
587 P.2d 537 (1978).....18

High Tide Seafoods v. State, 106 Wn.2d 695,
725 P.2d 411 (1986)..... 3-4

Nielsen v. Washington State Dep't of Licensing,
177 Wn. App. 45, 309 P.3d 1221 (2013)..... 9-10

Org. to Preserve Agric. Lands v. Adams County,
128 Wn.2d 869, 913 P.2d 793 (1996).....4

State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.,
142 Wn.2d 328, 12 P.3d 134 (2000).....9

State v. Blank, 131 Wn.2d 230,
930 P.2d 1213 (1997)..... 4,6-7

<u>State v. Blazina</u> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	8,13
<u>State v. Curry</u> , 62 Wn. App. 676, 814 P.2d 1252 (1991).....	12
<u>State v. Curry</u> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	passim
<u>State v. Johnson</u> , 179 Wn.2d 534, 315 P.3d 1090 (2014).....	3-6
<u>State v. Kuster</u> , 175 Wn. App. 420, 306 P.3d 1022 (2013).....	12
<u>State v. Lundquist</u> , 60 Wn.2d 397, 374 P.2d 246 (1962).....	3
<u>State v. Lundy</u> , 176 Wn. App. 96, 308 P.3d 755 (2013).....	6-7,11-2
<u>State v. McCormick</u> , 166 Wn.2d 689, 213 P.3d 32 (2009).....	9
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	7-8
<u>State v. O’Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	8

Constitutional Provisions

Federal:

U.S. Const. amend. V.....	9
U.S. Const. amend. XIV	9

Washington State:

Const. art. I, § 3.....	9
-------------------------	---

Statutes

RCW 7.21.010	12
RCW 9.94A.200.....	12
RCW 9.94A.634.....	12
RCW 9.94B.040.....	12
RCW 10.01.160	12-3
RCW 10.82.090	13
RCW 43.43.753	10
RCW 43.43.7532	11
RCW 43.43.7541	passim

Rules and Regulations

RAP 2.5.....	1,7
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A. ISSUES PRESENTED

1. Does Johnson lack standing to challenge the constitutionality of RCW 43.43.7541?
2. Since the State has not attempted to collect the mandatory DNA fee from Johnson, is his claim unripe for review?
3. Because the alleged error is raised for the first time on appeal and is not manifest constitutional error, should this Court decline review under RAP 2.5?
4. Has Johnson failed to prove beyond a reasonable doubt that the DNA fee statute violates substantive due process as applied to indigent defendants?

B. STATEMENT OF THE CASE

The appellant, Jarrod Cody Johnson, was found guilty by a bench trial of possession of a controlled substance. CP 29. At sentencing, his attorney asked that the court give “whatever type of financial assistance it deems necessary.” RP 102. Defense counsel indicated that Johnson was self-employed and engaged in landscaping. RP 102. He indicated that Johnson made about \$300 per month and had no dependents. RP 102. Defense counsel indicated that his client did not have any “savings, stocks, bonds, dividends, gold bullion, or anything like that.” RP 103. He asked that the costs of incarceration be capped. RP 103.

The Court ordered Johnson to pay the following costs:

\$500 Crime Penalty Assessment
\$200 Criminal Filing Fee
\$100 DNA collection fee

\$250 Drug enforcement fund
\$100 Crime lab fee

CP 33. His court-appointed attorney recoupment fee of \$600 and the \$1000 fine to the State of Washington were waived. RP 104, CP 33. Costs of incarceration were also capped at zero. RP 103, CP 33. The Court found that Johnson had the ability to pay the legal financial obligations imposed in the judgment and sentence. CP 30. Johnson did not object to this finding. RP 98-105. Johnson also did not object to the \$100 DNA collection fee. RP 98-105. Johnson also did not raise any constitutional claims regarding the DNA collection fee. RP 98-105

C. ARGUMENT

For the first time on appeal, Johnson challenges the constitutionality of RCW 43.43.7541, which requires trial courts to impose a \$100 DNA fee on any offender convicted of a felony or specified misdemeanor. Because Johnson's claim is both unpreserved and unripe for review, and because he lacks standing to assert it, this Court should decline to review the issue. This Court should reject the claim on the merits, if reached, because Johnson has failed to establish that the DNA fee statute is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the DNA collection fee.

1. JOHNSON LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF RCW 43.43.7541.

Johnson asks this Court to find that RCW 43.43.7541 violates the constitutional guarantees of substantive due process and equal protection when applied to defendants who lack the present or likely future ability to pay the \$100 fee. However, Johnson never claimed at sentencing that he lacked the ability to pay the \$100 fee. And he does not argue on appeal that he lacks that ability. He vaguely argues that the fee should be vacated because of his “indigent status.” Brief of Appellant at 8. Because the court did not find Johnson to be *constitutionally* indigent and he has not suffered an injury in fact, he lacks standing to challenge the statute.

A person cannot challenge the constitutionality of a statute unless he or she has been adversely affected by the provisions claimed to be unconstitutional. State v. Lundquist, 60 Wn.2d 397, 401, 374 P.2d 246 (1962). To establish standing, Johnson must show (1) that he is within the zone of interests to be protected by the constitutional guarantee in question, and (2) that he has suffered an injury in fact, economic or otherwise. Branson v. Port of Seattle, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004). The injury must be “fairly traceable to the challenged conduct and likely to be redressed by the requested relief.” State v. Johnson, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014) (quoting High Tide Seafoods v.

State, 106 Wn.2d 695, 702, 725 P.2d 411 (1986)). The injury also must be “(a) concrete and particularized, and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Witt v. Dep’t of Air Force, 527 F.3d 805, 811 (9th Cir. 2008) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Where a party lacks standing to assert a claim, courts must refrain from reaching the merits of that claim. Id. at 552 (citing Org. to Preserve Agric. Lands v. Adams County, 128 Wn.2d 869, 896, 913 P.2d 793 (1996)).

Johnson does not attempt to establish standing to challenge the statute in this case. Presumably, he would argue that the imposition of the mandatory fee unfairly subjects him to the possibility of future punishment if he is unable to pay due to indigence. Indeed, “the due process and equal protection clauses prevent a state from invidiously discriminating against, or arbitrarily punishing, indigent defendants for their failure to pay fines they cannot pay.” Johnson, 179 Wn.2d at 552 (citing Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)).

But in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), our State Supreme Court clarified the imposition of fees against an indigent party as a part of sentencing is not constitutionally forbidden. Rather, constitutional principles are implicated only if the State seeks to *enforce* collection of the fee “at a time when the defendant is unable, through no

fault of his own, to comply.” 131 Wn.2d at 241 (quoting State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (internal quotation marks omitted). Thus, it is at the point of enforced collection that a defendant may assert a constitutional objection on the ground of indigency.¹ Id. Even at the point of collection, it is only if the defendant is “constitutionally indigent” that a constitutional violation occurs. Johnson, 179 Wn.2d at 553.

While there is no precise definition of constitutional indigence, “Bearden essentially mandates that we examine the totality of the defendant’s financial circumstances to determine whether he or she is constitutionally indigent in the face of a particular fine.” Johnson, 179 Wn.2d at 553. A finding of statutory indigence does not establish constitutional indigence. Id. at 553, 555. Thus, in Johnson, our Supreme Court rejected a challenge to the driving while license suspended statute based on a claim of indigence because Johnson, while statutorily indigent, was not constitutionally indigent and therefore not in the class protected by the Due Process Clause. 179 Wn.2d at 555.

It is up to the party seeking review of an issue to provide an adequate record for review. City of Spokane v. Neff, 152 Wn.2d 85, 91,

¹ As argued in the following section of this brief, the fact that the State has not yet attempted to enforce collection makes Johnson’s claim unripe.

93 P.3d 158 (2004). Here, Johnson asserts that he is “indigent” but the record at sentencing indicates that he has the ability to work and does, in fact, work, as a landscaper. RP 102, CP 30. On appeal, he does not assert how he is constitutionally indigent. Because the relevant constitutional considerations protect only the constitutionally indigent and Johnson has not suffered any injury in fact, he lacks standing. Johnson, 179 Wn.2d at 555. Accordingly, this Court should decline to address the merits of his constitutional claims.

2. THE COURT SHOULD NOT REACH THE MERITS OF THE CLAIM BECAUSE IT IS NOT RIPE FOR REVIEW.

Even if Johnson has standing to bring this constitutional challenge, the issue is not ripe for review. Generally, “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). It is only when the State attempts to collect or impose punishment against an indigent person for failure to pay that constitutional principles are implicated. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992).

Our State Supreme Court adhered to this position in Blank, when it held that an inquiry into defendant’s ability to pay is not constitutionally

required before imposing a repayment obligation in a judgment and sentence, as long as the court determines whether the defendant is able to pay before sanctions are sought for nonpayment. Blank, 131 Wn.2d at 239-42. The point of enforced collection or sanctions for nonpayment is the appropriate time to discern the individual's ability to pay because before that point, "it is nearly impossible to predict ability to pay[.]" Id. at 242. "If at that time defendant is unable to pay through no fault of his own, Bearden and like cases indicate constitutional principles are implicated." Id. at 242.

Where nothing in the record reflects that the State has attempted to collect the DNA fee, any challenge to the order requiring payment on hardship grounds is not yet ripe for review. Lundy, 176 Wn. App. at 109. That is so in this case. Because the issue is unripe, this Court should decline to reach its merits.

3. THE ALLEGED ERRORS ARE NOT MANIFEST CONSTITUTIONAL ERRORS AND SHOULD NOT BE REVIEWED UNDER RAP 2.5.

Johnson did not object to imposition of the DNA fee at sentencing. Accordingly, RAP 2.5(a) bars consideration of his claims.

A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every

constitutional error falls within this exception; the defendant must show that the error occurred and that it caused actual prejudice to the defendant's rights. McFarland, 127 Wn.2d at 333. If the facts necessary to adjudicate the issue are not in the record, the error is not manifest. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Here, Johnson's constitutional claims depend on his present and future inability to pay the mandatory DNA fee. But as discussed above, the error is not manifest within the meaning of RAP 2.5(a).

In State v. Blazina, our supreme court recognized that “[a] defendant who makes no objection to the imposition of discretionary [legal financial obligations (LFOs)] at sentencing is not automatically entitled to review.” 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Thus, where defendants fail to object to the LFOs at sentencing, it is appropriate for appellate courts to decline review. Id. at 834. Because Johnson failed to object to the DNA fee, precluding the development of an adequate record, this Court should decline review.

4. JOHNSON FAILS TO SHOW THAT THE DNA FEE STATUTE VIOLATES DUE PROCESS.

Johnson presents an as-applied constitutional challenge to RCW 43.43.7541. Even if this Court reaches the merits of the issue, Johnson

cannot meet his burden to prove that the DNA fee statute is unconstitutional.

A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp., 142 Wn.2d 328, 335, 12 P.3d 134 (2000). Constitutional challenges are questions of law subject to de novo review. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

The federal and Washington State Constitutions guarantee that an individual is not deprived of “life, liberty, or property, without due process of the law.” U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. Washington’s due process clause is coextensive with that of the Fourteenth Amendment, providing no greater protection. State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009). It confers both procedural and substantive protections. Amunrud, 158 Wn.2d at 216. “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. Washington State Dep’t of Licensing, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013) (quoting Amunrud, 158 Wn.2d at 218-19).

The level of scrutiny applied to a due process challenge depends upon the nature of the interest involved. Nielsen, 177 Wn. App. at 53 (citing Amunrud, 158 Wn.2d at 219). Where no fundamental right is at issue, as in this case, the rational basis standard applies. Amunrud, 158 Wn.2d at 222. Rational basis review merely requires that a challenged law be “rationally related to a legitimate state interest.” Nielsen, 177 Wn. App. at 53 (quoting Amunrud, 158 Wn.2d at 222). This deferential standard requires the reviewing court to “assume the existence of any necessary state of facts which [it] can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest.” Nielsen, 177 Wn. App. at 53 (quoting Amunrud, 158 Wn.2d at 222).

In 2002, the legislature created a DNA database to store DNA samples of those convicted of felonies and certain misdemeanor offenses. RCW 43.43.753. The legislature identified such databases as “important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts.” Id. To fund the DNA database, the legislature enacted RCW 43.43.7541, which originally required courts to impose a \$100 DNA collection fee with every sentence imposed for specified crimes “unless the court finds that imposing the fee would result in undue hardship on the offender.”

Former RCW 43.43.7541 (2002). In 2008, the legislature amended the statute to make the fee mandatory regardless of hardship: “Every sentence ... must include a fee of one hundred dollars.” RCW 43.43.7541. Eighty percent of the fee goes into the “state DNA database account.” Id. Expenditures from that account “may be used only for creation, operation, and maintenance of the DNA database[.]” RCW 43.43.7532.

Johnson recognizes that requiring those convicted of felonies to pay the DNA collection fee serves a legitimate state interest in operating the DNA database. Brief of Appellant at 7. He argues, however, that imposing the fee upon those who cannot pay does not rationally serve that interest. Brief of Appellant at 7. This Court should reject that argument.

In Curry, our State Supreme Court upheld the constitutionality of the mandatory victim penalty assessment (VPA) as applied to indigent defendants. 118 Wn.2d 911, 829 P.2d 166 (1992). Like the DNA fee, the VPA is mandatory and must be imposed regardless of the defendant’s ability to pay. Lundy, 176 Wn. App. at 102. The appellants in Curry argued that the statute could operate to imprison them unconstitutionally if they were unable to pay the penalty. 118 Wn.2d at 917. It is fundamentally unfair to imprison indigent defendants solely because of their inability to pay court-ordered fines. Bearden, 461 U.S. at 667-68. The Curry court agreed with this Court that the sentencing scheme

includes sufficient safeguards to prevent unconstitutional imprisonment of indigent defendants:

Under RCW 9.94A.200^[2], a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. Moreover, contempt proceedings for violations of a sentence are defined as those which are *intentional*. RCW 7.21.010(1)(b). Thus, 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 (citing State v. Curry, 62 Wn. App. 676, 682, 814 P.2d 1252 (1991)) (emphasis in original).

While Curry addressed the mandatory VPA, the same principle has been extended to all mandatory legal financial obligations, including the DNA collection fee required by RCW 43.43.7541. See Lundy, 176 Wn. App. at 102-03; State v. Kuster, 175 Wn. App. 420, 424-26, 306 P.3d 1022 (2013). Although RCW 9.94A.200 has been recodified, the same safeguards against imprisonment of indigent defendants discussed in Curry apply. See RCW 9.94B.040; RCW 7.21.010(1)(b). Additionally, any defendant who is not in “contumacious default” may seek relief “at any time ... for remission of the payment of costs or any unpaid portion thereof” on the basis of hardship. RCW 10.01.160(4). A defendant may

² Recodified in 2001 as RCW 9.94A.634 and in 2008 as RCW 9.94B.040.

also seek reduction or waiver of interest on LFOs upon a showing that the interest “creates a hardship for the offender or his or her immediate family.” RCW 10.82.090(2)(a), (c).

As in Curry, these safeguards are sufficient to prevent sanctions and imprisonment for mere inability to pay. Accordingly, like the VPA, the mandatory DNA fee in RCW 43.43.7541 does not violate substantive due process as applied to indigent defendants.

Johnson cites Blazina to support his due process claim. Blazina held that a different statute, RCW 10.01.160(3), requires the trial court to conduct an individualized inquiry into the defendant’s ability to pay before imposing discretionary LFOs. 182 Wn.2d 837-38. Johnson’s reliance on Blazina is misplaced. First, Blazina involved a claimed violation of a statute, not due process, and its holding is based on statutory construction. Second, Blazina concerned *discretionary* LFOs, not mandatory fees like the one involved here. 182 Wn.2d 837-38. Nothing in Blazina changes the principle articulated in Curry that mandatory LFOs may be constitutionally imposed at sentencing without a determination of the defendant’s ability to pay so long as there are sufficient safeguards to prevent imprisonment of indigent defendants for a noncontumacious failure to pay.

Johnson fails to show that the mandatory DNA fee required by RCW 43.43.7541 violates substantive due process as applied to indigent defendants. Should this Court reach the merits of this issue, it should affirm.

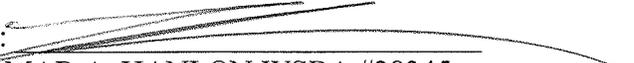
D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Johnson's conviction and sentence.

DATED this 4th day of March, 2016.

Respectfully submitted,

JOSEPH BRUSIC
Yakima County Prosecuting Attorney

By: 
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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on March 4, 2016, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to David 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 4th day of March, 2016 at Yakima, Washington.



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