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FILED
September 30, 2015
Court of Appeals
Division I
State of Washington

NO. 72953-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH STRANGE,

Appellant.

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

The Honorable Linda C. Krese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mandatory fee collection under RCW 43.43.7541 violates substantive due process when applied to defendants who do not have the ability or likely future ability to pay.

2. RCW 43.43.7541's mandatory DNA-collection fee violates equal protection when applied to defendants who have already paid the fee and had their DNA collected, analyzed, and entered into the DNA database.

Issues Pertaining to Assignments of Error

1. RCW 43.43.7541 requires trial courts to impose a mandatory DNA collection fee each time a felony offender is sentenced. This ostensibly serves the State's interest in funding the collection, testing, and retention of a convicted defendant's DNA profile in order to facilitate criminal investigations. By statute, however, it is mandatory that trial courts order this fee, even when a defendant lacks the ability to pay. Does the statute violate substantive due process when applied to defendants who do not have the ability—or the likely future ability—to pay the DNA collection fee?

2. Under RCW 43.43.7541, defendants who have only been sentenced once pay only a single \$100 DNA collection fee. However, defendants who are sentenced more than once are statutorily required to

pay multiple fees. This is so despite the fact that a defendant's DNA profile need only be collected, analyzed, and entered into the DNA database one time to fulfill the purpose of the statute. As such, is the statute unconstitutional as applied to defendants who are required to pay the DNA-collection fee multiple times?

B. STATEMENT OF THE CASE

The Snohomish County prosecutor charged appellant Joseph Strange with one count each of first degree murder, second degree felony murder, and possession of a stolen vehicle for an incident that occurred May 12, 2013. CP 113-14; 1RP¹ 3-4. A jury found Strange guilty of the charged counts of second degree felony murder and possession of a stolen vehicle. CP 34-35; 9RP 2-3. The jury also found Strange guilty of a lesser charge of first degree manslaughter. CP 37; 9RP 2. The jury did not reach a verdict as to first degree murder. CP 38; 9RP 2.

The first degree manslaughter conviction was dismissed at sentencing. CP 22, 24; 10RP 2. The trial court imposed an exceptional sentence, finding that Strange's multiple current offenses and high

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – February 28, 2014; 2RP – November 10, 2014; 3RP – November 12, 2014; 4RP – November 13, 2014; 5RP – November 14, 2014; 6RP – November 17, 2014; 7RP – November 18, 2014; 8RP – November 19, 2014; 9RP – November 20, 2014; 10RP – January 9, 2015.

offender score would result in the possession of a stolen vehicle conviction going unpunished. CP 32-33; 10RP 15-18. The court sentenced Strange to consecutive prison sentences of 397 months on the second degree murder conviction and 75 months on the possession of a stolen vehicle conviction. The court also sentenced Strange to 36 months community custody on the second degree murder conviction. CP 21-33; 10RP 15-18.

The court imposed legal financial obligations (LFOs) totaling \$600, including a \$100 DNA collection fee under RCW 43.43.7541.² CP

² Former RCW 43.43.7541 (2011), in effect at the time of sentencing, 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.

The statute was amended in 2015 to add a provision that “[t]his fee shall not be imposed on juvenile offenders if the state has previously collected

26; 10RP 20. The court ordered Strange to pay restitution to be determined but waived all other fees and interest charges. CP 26.

Despite prior felony convictions, for which DNA would have been collected under the then-applicable statute,³ the court ordered Strange to provide a DNA sample and pay the related fee. CP 22-23, 26-27; 10RP 20. The judgment and sentence, contains “boilerplate” language stating that Strange’s ability to pay was considered. CP 23 (paragraph 2.5). The trial court recognized however that Strange would likely have difficulty finding employment after serving his lengthy prison sentence. 10RP 20. Strange timely appeals. CP 1-20.

C. ARGUMENT

1. RCW 43.43.7541 IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS LIKE STRANGE WHO DO NOT HAVE THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY THE DNA COLLECTION FEE.

The mandatory \$100 DNA collection fee authorized under RCW 43.43.7541 violates substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fine. This

the juvenile offender’s DNA as a result of a prior conviction.” Laws of 2015, ch. 265, § 31 (eff. July 24, 2015).

³ See former RCW 43.43.754 (2002) (requiring collection of biological samples for DNA testing from all adult and juveniles convicted of any felony and certain misdemeanors); see former RCW 43.43.7541 (2002) (requiring payment of related fee by those sentenced under chapter 9.94A RCW).

Court should find the trial court erred in imposing that fee given Strange's inability to pay.

a. The record demonstrates Strange is unable to pay.

As a preliminary matter, the record clearly indicates Strange does not have the ability to pay. He was sentenced to 472 months incarceration and faces an additional 36 month term of community custody upon his release. CP 21-33; 10RP 15-18. He has no assets and no income. Supp. CP ____ (sub no. 96, Motion & Declaration For Order Authorizing The Defendant to Seek Review at Public Expense and Appointing an Attorney on Appeal, filed 1/14/15, at 2-3). Moreover, the trial court recognized that Strange would have few employment options upon his release and accordingly waived all non-mandatory fees and interest. 10RP 20; CP 26.

b. RCW 43.43.7541 violates substantive due process.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV § 1; 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), cert. denied, 549 U.S. 1282 (2007).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” Id. at 218-19. It requires that “deprivations of life, liberty, or property be substantively reasonable.” In other words, 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)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dep’t of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130, rev. denied, 179 Wn.2d 1006 (2013). 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. Indeed, the United States Supreme Court has 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 has 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 at issue currently requires that all felony defendants pay the DNA-collection fee. RCW 43.43.754. This ostensibly serves the State’s interest to fund the collection, analysis, and retention of a convicted offender’s DNA profile so this might help facilitate future criminal identifications. See RCW 43.43.752 through RCW 43.43.7541. This is a legitimate interest. However, the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

There is nothing reasonable about requiring 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. This does not further the State’s interest in funding DNA collection and preservation. As the Washington Supreme Court recently emphasized, “the state cannot collect money from defendants who cannot pay.” State

v. Blazina, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). Imposing LFOs upon a person who does not have the ability to pay actually “increase[s] the chances of recidivism.” Id. at 836-37. When applied to such defendants, not only do the mandatory fee orders under RCW 43.43.7541 fail to further the State’s interest, they are pointless. It is irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue that—standing alone—the \$100 DNA collection fee is of such a small amount that most defendants would likely be able to 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. This means the fee is paid *after* restitution, the victim’s compensation assessment, and all other LFOs have been satisfied. As such, the statute makes this the least likely fee to be paid by indigent defendants.

In sum, when applied to defendants who do not have the ability, or likely future 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 the defendant’s DNA. This Court

should therefore find that RCW 43.43.7541 violates substantive due process as applied and vacate the order.

c. Prior case law does not control this Court's inquiry.

Strange anticipates the State will, nonetheless, argue that the current substantive due process challenge is foreclosed by the Supreme Court's decision in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992). In Curry and its progeny State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), the Court held that, as to mandatory LFOs, "constitutional principles will be implicated . . . only if the government seeks to enforce collection of the assessment at a time when [the defendant is] unable, though no fault of his own, to comply." Id. at 241 (citing Curry, 118 Wn.2d at 917 (internal quotes omitted)). The "constitutional principles" at issue in those cases were different than those implicated here.

Strange's constitutional challenge to the statute authorizing the DNA collection fee is fundamentally different from that raised in Curry. In Curry, the defendants challenged the constitutionality of a mandatory LFO order on the ground that its enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they were unable to pay. 118 Wn.2d at 917. Thus, the constitutional challenge was grounded in the well-established constitutional principle that due process does not tolerate incarceration of

people simply because they are poor. Id.

In contrast, Strange asserts there is no legitimate state interest in requiring sentencing courts to impose a mandatory DNA collection fee without the State first establishing a defendant's ability to pay. In other words, rather than challenging the constitutionality of a statute based on the fundamental unfairness of its ultimate enforcement potential (as was the case in Curry and Blank), Strange challenges the statute as an unconstitutional exercise of the State's regulatory power that is irrational when applied to defendants shown not to have the ability to pay. As such, the Curry and Blank decisions do not control.

In addition, read carefully, and considered in the light of the realities of Washington's LFO current collection scheme, those cases actually support Strange's position in this case. Indeed, after Blazina's recognition of the Washington State's "broken LFO system," 182 Wn.2d at 835, the Court's decisions in Curry and Blank should be revisited in the context of the realities of Washington's current LFO scheme.

Currently, Washington's laws permit for an elaborate and aggressive collections process that includes the immediate assessment of interest, enforced collections via wage garnishment, payroll deductions, and wage assignments (which include further penalties), and potential arrest. It is a vicious cycle of penalties and sanctions that has devastating

effects on the persons involved in the process and, often, their families. See Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay). This cycle does not, for example, conform to the necessary constitutional safeguards established in Blank.

In Blank the Washington Supreme Court held that “monetary assessments which are mandatory *may* be imposed against defendants without a per se constitutional violation.” Blank, 131 Wn.2d at 240 (emphasis added). The Court reasoned that fundamental fairness concerns arise only if the government seeks to collect the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (referring to Curry, 118 Wn.2d at 917-18).

Blank also states, however, that in order for Washington’s LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry *before*: (1) the State engages in any “enforced” collection; (2) any additional “penalty” for nonpayment is assessed; or (3) any other “sanction” for nonpayment is imposed.⁴ 131 Wn.2d at 241-42. But under

⁴ “Penalty” means: “a sum of money which the law exacts payment of by way of punishment for . . . not doing some act which is required to be

the current scheme, neither the Legislature nor the courts satisfy Blank's directives.

Although Blank says that prior case law suggests that such an inquiry is not required at sentencing, id. at 240-42, that Court was not confronted with the realities of the State's current collection scheme. The current scheme provides for immediate enforced collections processes, penalties, and sanctions. Consequently, Blank supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing, when the DNA collection fee is imposed.

First, under RCW 10.82.090(1), LFOs generally accrue interest at a rate of 12 percent, an astounding level given the historically low interests rates of the last several years. Blazina, 182 Wn.2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013)). This sanction has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be

done.” Black's Law Dictionary, Sixth Edition, at 1133. “Sanction” means: “Penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations.” Id. at 1341. “Enforce” means: “To put into execution, to cause to take effect, to make effective; as to enforce . . . the collection of a debt or a fine.” Id. at 528.

decades. See Harris, supra at 1776-77 (explaining that “those who make regular payments of \$50 a month toward a typical legal debt will remain in arrears 30 years later). Yet, in general, there is no requirement for the court to have conducted an inquiry into ability to pay before interest is assessed.

Washington law also permits courts to order an immediate “payroll deduction.” RCW 9.94A.760(3). This can occur immediately upon sentencing. RCW 9.94A.760(3). Beyond the actual deduction to cover the outstanding LFO payment, employers are authorized to deduct other fees from the employee’s earnings. RCW 9.94A.760(4). This constitutes an enforced collection process with an additional sanction. Yet, there is no provision requiring an ability-to-pay inquiry occur before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; see also, Harris, supra, at 1778 (providing examples of wage garnishment as an enforcement mechanism used in Washington). As for garnishment, this enforced collection may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment is a collection mechanism that may be used within 30 days of a defendant’s failure to pay the monthly sum ordered. RCW 9.94A.7701.

Again, employers are permitted to charge a “processing fee.” RCW 9.94A.7705. Contrary to Blank, however, there are no provisions requiring courts to conduct an ability-to-pay inquiry prior to the use of these enforced collection mechanisms.

Washington law also permits courts to use collections agencies or county collection services to actively collect LFOs. RCW 36.18.190. Any penalties or additional fees these agencies decide to assess are paid by the defendant. Id. There is nothing in the statute that prohibits the courts from using collections services immediately after sentencing. Yet there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement. Id.

These examples demonstrate that under Washington’s currently “broken” LFO system, there are many instances where the Legislature provides for “enforced collection” and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms may be used immediately after the judgment and sentence is entered. If the constitutional requirements set forth in Curry and Blank are to be met, trial courts must conduct a thorough ability-to-pay inquiry at the time of sentencing when the LFOs are imposed. In summary, this Court should reject any argument that Curry and Blank control because Washington’s LFO system does not meet the constitutional safeguards

mandated in those holdings.

2. RCW 43.43.7541 VIOLATES EQUAL PROTECTION BECAUSE IT IRRATIONALLY REQUIRES SOME DEFENDANTS TO PAY A DNA-COLLECTION FEE MULTIPLE TIMES, WHILE OTHERS NEED PAY ONLY ONCE.

Imposition of the mandatory DNA-collection fee under RCW 43.43.7541 violates equal protection when applied to defendants who have previously provided a sample and paid the \$100 DNA-collection fee.

Under the Equal Protection Clause, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. U.S. Const. amend. XIV; Wash. Const. Art. 1, § 12. A valid law administered in a manner that unjustly discriminates between similarly situated persons, violates equal protection. State v. Gaines, 121 Wn. App. 687, 704, 90 P.3d 1095, 1103-04 (2004) (citations omitted).

Before an equal protection analysis may be applied, a defendant must establish he is similarly situated with other affected persons. Gaines, 121 Wn. App. at 704. In this case, the relevant group is all defendants subject to the mandatory DNA-collection fee under RCW 43.43.7541. Having been convicted of a felony, Strange is similarly situated to other affected persons within this affected group. See, RCW 43.43.754 and .7541.

The next step is determining the standard of review. Where neither a suspect/semi-suspect class nor a fundamental right are at issue, a rational basis analysis is used to evaluate the validity of the differential treatment. State v. Bryan, 145 Wn. App. 353, 358, 185 P .3d 1230 (2008). That standard applies here.

Under rational basis scrutiny, a legislative enactment that, in effect, creates different classes will survive an equal protection challenge only if: (1) there are reasonable grounds to distinguish between different classes of affected individuals; and (2) the classification has a rational relationship to the proper purpose of the legislation. DeYoung, 136 Wn.2d at 144. Where a statute fails to meet these standards, it must be struck down as unconstitutional. Id.

Here, RCW 43.43.7541 does not apply equally to all felony defendants because those who are sentenced more than once have to pay the fee multiple times. This classification is unreasonable because multiple payments are not rationally related to the legitimate purpose of the law.

Once a defendant's DNA is collected, tested, and entered into the database, subsequent collections are unnecessary. This is because DNA – for identification purposes – does not change. Indeed, the statute itself contemplates this, expressly stating it is unnecessary to collect more than

one sample. RCW 43.43.754(2). Hence, there is nothing to collect with respect to defendants who have already had their DNA profiles entered into the database. As to these individuals, the imposition of multiple DNA-collection fees is not rationally related to the purpose of the statute, which is to fund the collection, analysis, and retention of a convicted defendant's DNA.

Strange anticipates the State will, nonetheless, argue that the fee pays for more than just collection, covering the costs for managing and using the DNA database to investigate crimes. However, this is not a legitimate reason for charging the DNA-collection fee in every qualifying case.

First, if the State's purpose for charging the fee is to recoup the costs of investigating a crime, then the State should charge the fee based on whether the DNA database was actually used to investigate the crime that is being sentenced. If the defendant commits multiple crimes that require use of the database, he will pay multiple fees. If not, the State has no legitimate interest in making him pay the fee. This recoupment structure is not unusual. For example, LFOs recouping the costs for public defense are not assessed against every defendant, only against those who use of that public service. There is no rational reason why the DNA-collection fee should be any different.

Second, even if we accept the premise that the DNA fee should be charged in every case to support database maintenance and usage, this still does not support charging \$100 every time a defendant is sentenced regardless of whether his DNA has already been collected. The statute actually breaks down how much of the \$100 fee is used for database management and usage (\$80) and how much is used for DNA collection (\$20). RCW 43.43.7541. Thus, at the very least, it is irrational to require all qualifying defendants to pay the entire DNA-collection fee when no DNA collection is required.

In sum, RCW 43.43.7541 discriminates against felony defendants who have previously been sentenced by requiring them to pay multiple DNA-collection fees, while other felony defendants need only pay one DNA-collection fee. The mandatory requirement that the fee be collected from such defendants upon each sentencing is not rationally related to the purpose of the statute. As such, RCW 43.43.7541 violates equal protection, and this Court must vacate the DNA-collection fee order.

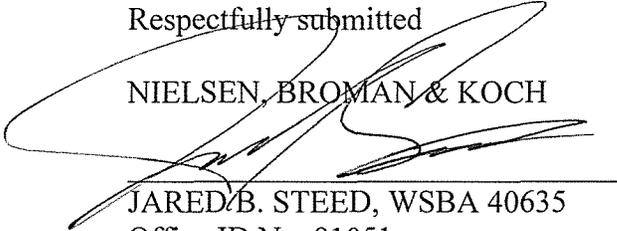
D. CONCLUSION

For reasons stated above, this Court should find RCW 43.43.7541 violates the due process and/or equal protection clauses and vacate the \$100 DNA-collection fee order.

Dated this 30th day of September, 2015.

Respectfully submitted

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Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 72953-5-1
)	
JOSEPH STRANGE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF SEPTEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSEPH STRANGE
 DOC NO. 852210
 CLALLAM BAY CORRECTIONS CENTER
 1830 EAGLE CREST WAY
 CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER 2015.

x *Patrick Mayovsky*