

FILED
Dec 23, 2015
Court of Appeals
Division I
State of Washington

NO. 73722-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH MILLER,

Appellant.

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

The Honorable George Bowden, Judge

BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122

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A. ASSIGNMENT OF ERROR

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.

Issue Pertaining to Assignment of Error

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

Appellant Kenneth Miller was charged by the Snohomish County prosecutor with one count of first degree trafficking in stolen property. CP 55-56. On April 23, 2015, Miller pled guilty as charged. CP 31-47; 1RP¹ 4. The State's plea agreement and sentencing recommendation notes that Miller was not agreeing to imposition of legal financial obligations.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – April 23, 2015; 2RP – June 22, 2015.

CP 41. The trial court accepted Miller's plea, finding it was entered knowingly, voluntarily and intelligently. 1RP 4.

Miller was sentenced jointly on the first degree trafficking in stolen property and separate charges of attempting to elude a pursuing police vehicle and driving under the influence for which he had previously pleaded guilty on October 8, 2014 under cause number 14-1-00865-6.² 2RP 2.

The court sentenced Miller to a prison term of 26 months to be served concurrently with sentences imposed under cause number 14-1-00865-6. 2RP 9-10; CP 20-30. The court imposed legal financial obligations (LFOs) totaling \$600, including a \$100 DNA collection fee under RCW 43.43.7541.³ CP 25; 2RP 9. The court reserved imposition of

² This separate cause number is not part of this appeal; however, the sentence at issue in this appeal was entered simultaneously with that sentence, and the judgment and sentence in this appeal references 14-1-00865-6. CP 20-30.

³ 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

restitution pending a contested hearing or agreed order, but waived all other fees and interest charges. CP 25; 2RP 9.

Despite prior felony convictions, for which DNA would have been collected under the then-applicable statute,⁴ the court ordered Miller to pay a biological sample fee. CP 25; 2RP 9. As the judgment and sentence notes however, additional DNA testing was not required because Miller had previously provided a DNA sample. CP 26. Miller timely appeals. CP 1-12.

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

⁴ 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).

C. ARGUMENT

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, Miller 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 v. Providence Medical Center, 136 Wn.2d 136, 144, 960 P.2d 919 (1998). 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.

Miller 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, as in this case, no DNA collection is required.

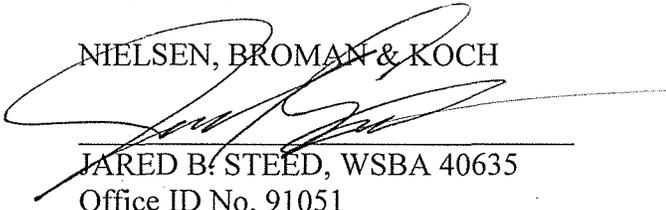
In sum, RCW 43.43.7541 discriminates against felony defendants who have previously been sentenced by requiring them to pay multiple DNA-collection fees, while other felony defendants need only pay one DNA-collection fee. The mandatory requirement that the fee be collected from such defendants upon each 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 equal protection clause and vacate the \$100 DNA-collection fee order.

Dated this 22nd day of December, 2015.

Respectfully submitted


NIELSEN, BROMAN & KOCH

JARED B. STEED, WSBA 40635
Office ID No. 91051

Attorney for Appellant

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DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 73722-8-1
)	
KENNETH MILLER,)	
)	
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 23RD DAY OF DECEMBER, 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] KENNETH MILLER
DOC NO. 712721
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF DECEMBER, 2015.

X *Patrick Mayovsky*