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FILED
July 14, 2016
Court of Appeals
Division I
State of Washington
NO. 74157-8-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

STEPHEN EDWARD HUTSELL,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
I. SUMMARY OF ARGUMENT.....	1
II. ISSUE.....	1
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT.....	2
1. SINCE THE DNA TESTING FEE WAS IMPOSED BASED UPON A NEW CONVICTION, IMPOSITION DOES NOT VIOLATE EQUAL PROTECTION.	2
2. WHERE THE STATE IS NOT SEEKING APPELLATE COSTS, APPELLATE COSTS SHOULD NOT BE IMPOSED.	4
V. CONCLUSION.....	4

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON COURT OF APPEALS</u>	
<i>State v. Johnson</i> , ___ Wn. App. ___, ___ P.3d ___, No. 32834-1-III (consol. with No. 32846-5-III), 2016 WL 3124893, at page 2 (Wash. Ct. App. June 2, 2016).....	4
<i>State v. Lewis</i> , ___ Wn. App. ___, ___ P.3d ___, No. 72637-4-I, 2016 Wash. App. LEXIS 1491, at *13 (Ct. App. June 27, 2016).....	4
<u>WASHINGTON STATUTES</u>	
RCW 43.43.7532	3
RCW 43.43.754	2
RCW 43.43.7541	2, 4
<u>WASHINGTON COURT RULES</u>	
RAP 14.2	4

I. SUMMARY OF ARGUMENT

Stephen Hutsell challenges the trial court's imposition of the statutory DNA testing fee, contending that since he previously paid the fee that imposition during a second case violates equal protection.

Given the mandatory fee was imposed due to a second felony conviction, there is a rational basis for imposition of the fee.

II. ISSUE

Does the imposition of the DNA testing fee constitute for an offender who is convicted of a felony offense in a second case constitute a violation of equal protection?

III. STATEMENT OF THE CASE

On May 22, 2015, Stephen Hutsell was charged with Possession of a Controlled Substance - Heroin, alleged to have occurred on February 20, 2015. CP 1. It was alleged that Hutsell possessed heroin that fell from his hat when he was searched following arrest on a warrant. CP 2.

On October 15, 2015, Stephen Hutsell pled guilty to possession of heroin. 10/15/15 RP 2-4. Hutsell had two prior felony convictions. 10/15/15 RP 2.¹

The parties agreed on the sentence of confinement of 30 days. 10/15/15 RP 4. But Hutsell challenged the imposition of the DNA testing fee contending that the fee should not be imposed because he had prior felonies for which the fee was imposed. 10/15/15 RP 5-7.

Defense specifically acknowledged that the statute, RCW 43.43.7541 was mandatory, that the Court should not impose the fee because Hutsell had the fee imposed in a recent Island County case. 10/15/15 RP 8-9.

The trial court imposed the \$100 DNA testing fee. 10/15/15 RP 10.

On October 19, 2015, Hutsell timely filed a notice of appeal.

IV. ARGUMENT

1. Since the DNA testing fee was imposed based upon a new conviction, imposition does not violate equal protection.

RCW 43.43.7541 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

¹ The State will refer to the verbatim report of proceedings by using the date followed by “RP” and the page number. The single report of proceedings in this case is the plea and sentencing hearing on October 15, 2016.

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. This 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.

(Bold emphasis added). The statute provides the fee is mandatory for every sentence. The statute also specifically provides that for juvenile offenders no fee may be imposed if the State previously collected the juvenile offender's DNA.

Hutsell contends the fee violates equal protection because "it does not apply equally to all felony defendants" contending that the fee is imposed even if the DNA is not tested. He contends that "multiple payments are not rationally related to the legitimate purpose of the law."

Hutsell fails to recognize that the fee is imposed not just to engage in the testing of his sample, but also for maintaining the database of samples.

The very issue raised has been decided recently contrary to Hutsell's position in recent cases from Division I and Division II from the Court of Appeals.

Rather than explaining the content of those rulings, the State respectfully cites to the cases as being contrary to Hutsell's position.

We hold that because there is a rational basis to impose the fee for every felony sentence for the cost of collection as well as to fund the ongoing cost to operate and maintain the DNA database, the DNA fee statute does not violate equal protection.

State v. Lewis, ___ Wn. App. ___, ___ P.3d ___, No. 72637-4-I, 2016 Wash. App. LEXIS 1491, at *13 (Ct. App. June 27, 2016) citing *State v. Johnson*, ___ Wn. App. ___, ___ P.3d ___, No. 32834-1-III (consol. with No. 32846-5-III), 2016 WL 3124893, at page 2 (Wash. Ct. App. June 2, 2016) (rejecting equal protection claim that the mandatory DNA fee statute, RCW 43.43.7541, results in a disparate impact on repeat offenders).

Since these decisions control the issue raised by Hutsell, his appeal of the imposition of the DNA testing fee must be denied.

2. Where the State is not seeking appellate costs, appellate costs should not be imposed.

The State is not seeking to request appellate costs. RAP 14.2. In the absence of a cost bill request, appellate costs cannot be sought.

V. CONCLUSION

For the foregoing reasons, this Court must affirm the imposition of the DNA testing fee. Appellate costs, not being sought by the State, they should be denied.

DATED this 14th day of July, 2016.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jennifer Dobson and Dana M. Nelson, addressed as Nielsen, Broman & Koch, PLLC, 1908 E Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 14th day of July, 2016.


KAREN R. WALLACE, DECLARANT