

74467-4

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Court of Appeals
Division I
State of Washington

74467-4

NO. 74467-4-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

JASON ELI MARTIN,
Appellant.

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

The Honorable Brian L. Stiles, Judge

BRIEF OF RESPONDENT

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I. SUMMARY OF ARGUMENT

Jason Martin challenges the trial court's imposition of the statutory DNA testing fee, contending that since he was found to be "impoverished" the fee should not have been imposed.

Given the fee is mandatory, case law supports that the fee was properly imposed.

II. ISSUE

Is a particularized evaluation of ability to pay required prior to imposition of the mandatory DNA testing fee?

Does the imposition of the mandatory DNA testing fee result in an equal protection violation?

Does the imposition of the mandatory DNA testing fee result in violate substantive due process?

III. STATEMENT OF THE CASE

On June 10, 2015, Jason E. Martin was charged with Possession of a Stolen Motor Vehicle, Possession of Stolen Property in the Second Degree for a credit card and Theft in the Third Degree, all alleged to have occurred on June 7, 2015. CP 17-18. A Puget Sound Blood Center van that had been stolen from Bellingham was located in Sedro Woolley. CP 4. Martin and another person were seen in the van, and Martin had a credit card from the

blood center in his pocket when arrested. CP 4. The other person with Martin claimed that Martin had given him the keys to take the van. CP 5. Martin also stole food and beer from a mini-mart in Sedro Woolley, CP 4-5. Clothes Martin had been wearing on surveillance video from the store were found in the van. CP 5.

On December 5, 2015, pursuant to a plea agreement, the State filed an amended information changing the charges to Taking a Motor Vehicle Without Permission in the Second Degree and Theft in the Third Degree.. CP 13.

Martin plead guilty to both charges. CP 41. The parties agreed to an offender score of one and a sentence within the standard range of 30 days. CP 44, 12/4/15 RP 34.¹

But Martin challenged the imposition of the DNA testing fee contending that the fee should not be imposed if there was no submission of the DNA sample for testing. 12/4/15 RP 34. The contention was based upon the claim that Martin had already submitted a DNA sample. 12/4/15 RP 34.

¹ The State will refer to the verbatim report of proceedings by using the date followed by “RP” and the page number. The report of proceedings in this case is as follows:

8/10/15 RP	Volume I:	Mental Health Court Observation
8/24/15 RP	Volume II:	Mental Health Court Observation
9/14/15 RP	Volume III:	Mental Health Court Observation
9/28/15 RP	Volume IV:	Mental Health Court Decline
12/4/15 RP	Volume V:	Plea and Sentence.

He contended the Court was not required to order taking of another DNA sample and therefore the fee should not be imposed. 12/4/15 RP 36, 45.

The trial court imposed the \$100 DNA testing fee. 12/4/15 RP 47.

On December 18, 2015, Martin timely filed a notice of appeal. CP 20.

IV. ARGUMENT

1. **Since the DNA testing fee is mandatory it was properly imposed.**

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 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.

At the trial court, Martin contended that his DNA need not be collected since it had been collected previously and therefore there was no need for the fee. 12/4/15 RP 34, 36, 45. This Court may choose to deny review for issues not raised below. RAP 2.5.

On appeal Martin contends that mandatory fees are also subject to a requirement of the trial court making a determination of the ability to pay citing RCW 10.01.160, *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) and GR 34. He contends the fee violates equal protection. Opening Brief of Appellant at page 8. Martin also contends the fee violates “substantive due process because it is not rationally related to a government interest.” Opening Brief of Appellant at page 11.

The issues raised by Martin have been decided recently contrary to Martin’s position in recent cases from Division I and Division II from the Court of Appeals. The State refers to those opinions and provides the following excerpts showing Martin’s claims have been rejected.

- i. The fee is mandatory as opposed to discretionary and therefore is not subject to a determination of ability to pay upon imposition.**

By its language, the court in *State v. Blazina* was addressing only discretionary legal financial obligations. *State v. Blazina*, 182 Wn.2d at 830, 837. The Washington Supreme Court has recognized that *Blazina* applied to discretionary costs.

In *Blazina*, the superior court imposed **discretionary legal financial obligations** under RCW 10.01.160 consisting of the costs of appointed counsel. We held that before the superior court may impose **such costs**, it must comply with the mandate of the statute to determine whether the defendant can or will be able to pay these costs by conducting on the record an individualized inquiry into the defendant's current and future ability to pay. *Blazina*, 182 Wn.2d at 838-39; see RCW 10.01.160(3).

State v. Leonard, 184 Wn.2d 505, 507, 358 P.3d 1167 (2015) (bold emphasis added). The Court of Appeals recognizes the distinction.

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), does not support Shelton's argument that his constitutional challenge to the DNA fee statute is ripe for review. The court in *Blazina* did not address imposition of mandatory fees. The court held RCW 10.01.160(3) requires the sentencing court to make an individualized inquiry into the defendant's ability to pay *discretionary* legal financial obligations. *Blazina*, 182 Wn.2d at 837-38.

State v. Shelton, 194 Wn. App. 660, 673, ___ P.3d ___ (2016) (emphasis in original).

Washington courts have consistently held that a trial court need not consider a defendant's past, present, or future ability to pay when it imposes either DNA or VPA fees. See *State v. Curry*, 118 Wn.2d 911, 917-18, 829 P.2d 166 (1992) (VPA fees are mandatory notwithstanding defendant's ability to pay); *State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015) (victim assessment, filing fee, and DNA collection fee are mandatory obligations not subject to defendant's ability to pay).

State v. Mathers, 193 Wn. App. 913, 918-19, ___ P.3d ___ (2016).

ii. The fee imposition is not an equal protection violation.

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, 194 Wn. App. 709, 720, ___ P.3d ___, (2016), citing *State v. Johnson*, 194 Wn. App. 304, 307-8, ___ P.3d ___ (2016) (rejecting equal protection claim to the mandatory DNA fee statute, RCW 43.43.7541).

Mathers also argues that treating DNA and VPA fees as mandatory violates equal protection under *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). There the United States Supreme Court upheld the Oregon statute on which RCW 10.01.160 was based. *Curry*, 118 Wn.2d at 915; *Fuller*, 417 U.S. 40. In that case, the Court reviewed nonmandatory costs accumulated from prosecuting a specific defendant. *Fuller*, 417 U.S. at 45. Mathers improperly relies on this case to demonstrate that the Fourteenth Amendment is only satisfied if RCW 10.01.160(3) is read in tandem with specific cost and fee statutes. *Fuller* asserts no such precedent. The case does not address mandatory cost and fee statutes. Following our Supreme Court precedent, we conclude the imposition of DNA and VPA fees on Mathers did not violate equal protection.

State v. Mathers, 193 Wn. App. 913, 926 ___ P.3d ___ (2016).

iii. The fee does implicate substantive due process.

Mathers argues his “substantive due process” rights were violated, Br. of Appellant at 11, but because the same issues have already been addressed unfavorably to Mathers by Washington courts, we disagree with him. In *Curry*, our Supreme Court held that the VPA statute did not violate due process because “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. *Lundy* followed this precedent in the context of the DNA statute. 176 Wn. App. at 102-03.

State v. Mathers, 193 Wn. App. 913, 928, ___ P.3d ___ (2016).

We hold that because imposition of the mandatory DNA fee does not implicate constitutional principles until the State seeks to enforce collection of the DNA fee or impose a sanction for failure to pay, the as-applied substantive due process challenge to RCW 43.43.7541 is not ripe for review.

State v. Shelton, 194 Wn. App. 660, 674, ___ P.3d ___ (2016).

Since these decisions control the issues raised by Martin, 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.

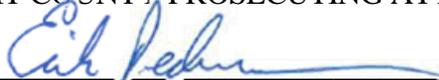
The State is not seeking to request appellate costs. RAP 14.2. In the absence of a cost bill request, appellate costs cannot be sought.

V. CONCLUSION

For the foregoing reasons, this Court must affirm the imposition of the DNA testing fee. Appellate costs are not sought by the State.

DATED this 19th day of August, 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: Maureen Cyr, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. 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 19th day of August, 2016.



KAREN R. WALLACE, DECLARANT