NO. 47523-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANDY P. MATHERS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to make an individualized inquiry into Mr. Mathers' current and future ability to pay before it imposed Legal Financial Obligations (LFOs) in the form of the Victim Penalty Assessment (VPA) and DNA Collection Fee.

2. The trial court erred in concluding it lacked discretion to consider Mr. Mathers' ongoing indigency before imposing the statutory VPA and DNA collection fee.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Trial courts have a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs. Where no specific inquiry was made before imposing the VPA and DNA collection fee, but the record established Mr. Mathers was indigent at least to the extent that counsel was appointed, did the court err by imposing these LFOs without an individualized inquiry?

2. Although the VPA and DNA collection statutes appear to use language which has been interpreted to mean they are mandatory, subsequent caselaw indicates that the discretion provided by RCW 10.01.060 and GR 34 should extend to these LFOs as well. Did the

trial court err in concluding that it was required to impose the VPA and DNA collection fee notwithstanding Mr. Mathers' indigency?

C. STATEMENT OF THE CASE

Andy Mathers was charged in Cowlitz County Superior Court with burglary in the second degree. CP 4. According to the probable cause statement, after having been "trespassed" from Kelso's Three Rivers Mall in March of this year, Mr. Mathers returned in April and shoplifted a $64 sweatshirt from the Sportsman's Warehouse. CP 1-2.

Pursuant to a subsequent agreement, the charge was amended to allege the less serious offense of theft in the second degree. CP 6; RP 1-3.[1] Before the Honorable Michael Evans, Mr. Mather's then entered a change of plea pursuant to In re Barr to the reduced charge and the prosecutor recommended a sentence at the bottom of the sentencing range.[2] CP 8-17; RP 3-8.

At sentencing, Mr. Mathers requested the court follow the prosecutor's low end recommendation. RP 9. Defense counsel noted that Mr. Mathers had a drug problem, but

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[1] The report of proceedings consists of a single volume from the April 23, 2015, at which Mr. Mathers entered his change of plea and was sentenced.

[2] In re Barr, 102 Wn.2d 265, 684 P.2d 712 (1984). See also North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

> He is hoping while he is in jail for the next few months that he gets clean and then goes into treatment before he gets out of fail directly into a treatment bed and because of that, we would ask that you follow the low-end recommendation.

Id.

Defense counsel then objected to the imposition of legal financial obligation based on Blazina, and asked the court to strike those obligations.[3] RP 9. Mr. Mathers also conveyed his apologies to the court and everyone involved. Id.

Judge Evans reviewed Mr. Mathers' criminal history and concurred that he was in need of treatment, therefore, the court agreed to impose the low-end sentence. CP 10. As to legal financial obligations, Judge Evans ruled:

> I'm enclosing [sic] the restitution of $64.99. You'll need to be responsible for a $500.00 victim assessment fee and also the $100.00 DNA collection fee. All other fees are waived and I've stricken those.

RP 10; CP 19-30.

Mr. Mathers' timely appealed seeking relief from the remaining legal financial obligations. CP 32-44.

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[3] State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).

D. ARGUMENT

The remaining legal financial obligations should be stricken, or the case remanded to provide the sentencing court with an opportunity to consider waiving the VPA and DNA fees.

1. The sentencing court recognized Mr. Mathers' indigency but imposed the VPA and DNA fees with regard to the ability to pay.

Judge Evans exercised his discretion and struck the criminal filing fee ($200), incarceration fee ($150), and fees for court appointed counsel ($825). RP 10; CP 24. Mr. Mathers was required, however, to pay the Victim's Penalty Assessment of $500 and the DNA collection fee of $100.[4] CP 24-25.

The Judgment and Sentence includes boilerplate in section 2.5 which states:

> The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160).

[4] The court also imposed restitution in the amount of $64.99 for the sweatshirt. CP 25. Mr. Mathers did not object to this aspect of the sentence and it is not challenged on this direct appeal. RP 9.

CP 22. The paragraph goes on to allow specific findings regarding restitution, incarceration and emergency response costs, none of which were checked. Id.[5]

2. The imposition of LFOs on an impoverished defendant is improper under the relevant statutes and court rules, and violates principles of due process and equal protection.

The legislature has mandated that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The Supreme Court recently emphasized that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." Blazina, 182 Wn.2d at 830.

This requirement is based on sound public policy. Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of

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[5] The Judgment and Sentence further directed that:

> All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth a rate [sic] here: Not less than $25.00 per month commencing _____. RCW 9.94A.760.
>
> The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information requested. RCW 9.94A.760(7)(b).

CP 25.

money by the government, and inequities in administration." Id. at 835. LFOs accrue interest at a rate of 12%, so it is very possible for a person who manages to pay $25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. Id. at 836.

This in turn, causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on finances." Id. at 837. These problems lead almost inexorably to increased recidivism. Id. Therefore, a failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. See RCW 9.94A.010.

In Mr. Mathers' case the court mistakenly believed it had to impose these fees without regard to indigency, presumably because the statutes in question use the word "shall" or "must." See RCW 7.68.035 (victim penalty assessment "shall be imposed"); RCW 43.43.7541 (every felony sentence "must include" a DNA fee); State v. Lundy, 176 Wn.App. 96, 102-03, 308 P.3d 755 (2013).[6] These statutes must be

[6] See also RCW 36.18.020(h) (convicted criminal defendants "shall be liable" for a $200 case filing fee).

read, however, in tandem with RCW 10.01.160, which requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); Blazina, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the VPA and DNA fees upon those who can pay, and require that they not be ordered for indigent defendants such as Mr. Mathers.

a. The statutory framework supports broad discretion.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753 (emphasis added). This language is absent from the LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. See State v. Conover, __ Wn.2d __, 2015 WL 4760487, at *4 (filed Aug. 13, 2015) (the legislature's choice of

different language in different provisions indicates different legislative intent).[7]

The Court in Blazina, therefore, repeatedly described its holding as applying to "LFOs," not just to a particular cost. See Blazina, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before it imposes LFOs."); id. at 839 ("We hold that RCW 10.01.160(3) requires the record reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."). When listing the LFOs imposed on the two defendants at issue, the court cited, *inter alia*, the same LFOs Mr. Mathers challenges here: the VPA and DNA fees. Blazina, at 831-32. If the Court were limiting its decision to only a few of the LFOs imposed on those defendants, it presumably would have made such limitations clear.

In fact, it does not appear that the Supreme Court has ever held that the DNA fee (or the criminal filing fee) is exempt from the ability-

[7] The Legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. Compare RCW 43.43.7541 (2002) with RCW 43.43.7541 (2008). But the Legislature did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the Legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160 (3).

to-pay inquiry. Although the Court in Lundy did, it did not have the benefit of Blazina, which now controls. Compare Lundy, 176 Wn.App. at 102-03 with Blazina, 182 Wn.2d at 830-39.

b. Court rules guide the inquiry to avoid constitutional infirmity.

GR 34, which was adopted in 2010, also supports Mr. Mathers' position that broad application of RCW 10.01.060 is appropriate. That rule provides in part:

> Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court.

GR 34(a).

The Supreme Court subsequently applied GR 34(a) in Jafar v. Webb, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. Id. at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay $50 within 90 days. Id. at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. Id. This was so even though the statues at issue, like those at issue here, appear to mandate that the fees and costs "shall" be imposed. See RCW 36.18.020.

The Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. Id. at 527-30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. Id. at 528. A contrary reading "would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees." Id. at 529. Given Ms. Jafar's indigence, the Court said, "We fail to understand how, as a practical matter, Jafar could make the $50 payment now, within 90 days, or ever." Id. That conclusion is even more inevitable for criminal defendants, who face barriers to employment beyond those others endure. See, Blazina, 182 Wn.2d at 837.

Although GR 34 and Jafar deal specifically with access to courts for indigent civil litigants, the same principles apply here. Indeed, the Supreme Court discussed GR 34 in Blazina, and urged trial courts in criminal cases to reference that rule when determining ability to pay. Blazina, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend XIV; Const. art. I, sec. 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but

may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. See James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) (holding Kansas statue violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). There the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. Fuller, at 45-46. Thus, under Fuller, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific costs and fee statutes, by considering the ability to pay before imposing LFOs.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. See Nielsen v. Washington State Dep't of Licensing, 177 Wn.App. 45, 309 P.3d 1221 (2013) (citing the test). Mr. Mathers acknowledges that the State may have a legitimate interesting in collecting costs and fees. But imposing costs and fees on

impoverished people like Mr. Mathers is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." Blazina, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. See RCW 9.94A.010; Blazina, 182 Wn.2d at 837. For this reason, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

c. Older caselaw no longer controls.

Although the Supreme Court did state more than 20 years ago that the VPA was mandatory notwithstanding the defendant's inability to pay, that case addressed a defense argument that the VPA was unconstitutional. See State v. Curry, 118 Wn.2d 911, 917-18, 829 P.2d 166 (1992). Curry simply assumed that the statute mandated imposition of the VPA on indigent and solvent defendants alike. "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." Id. 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not. In any event, Blazina must supersede Curry to the extent they are inconsistent.

In Blank the Court rejected an argument that the constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have clearly undercut this analysis. See State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997). The Blank Court noted that due process prohibits imprisoning people for inability to pay fines, but assumed that LFOs could still be imposed on poor people because "incarceration would result only if failure to pay was willful" and no due to indigence. Id. at 241. Unfortunately, this assumption was not borne out.

Studies post-dating Blank indicate that indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. Katherine A. Beckett, Alexes M. Harris & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008) (citing accounts of indigent defendants jailed for inability to pay).[8] In other words, the risk of unconstitutional imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar's civil petition would be dismissed due to failure to pay. See Jafar, 177 Wn.2d at 525 (holding Ms. Jafar's claim was ripe for review even

[8] Available at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

though trial court had given her 90 days to pay $50 and neither dismissed her petition for failure to pay nor threatened to do so).

Thus, it has become clear since Curry and Blank that courts must consider ability to pay at sentencing in order to avoid due process and equal protection problems.

3. This Court should reverse and remand with instructions to strike the VPA and DNA fees or for further proceedings as appropriate.

This Court should provide relief as Mr. Mathers plainly presented his objection to the sentencing court, the court was aware he was indigent and waived other discretionary costs and fees, but mistakenly believed the court was required to impose the VPA and DNA fees. RP 10.

Blazina mandated, however, that sentencing courts consider ability to pay before imposing all LFOs.

> Practically speaking, this imperative under RCW 10.01.060(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors … such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

182 Wn.2d at 838.

Instead of this individualized inquiry, the trial court made no inquiry at all before imposing the VPA and DNA fees, presumably believing itself bound by Lundy or the isolated statutory language which for the reasons outlined above, is no longer true.

As a result, the sentencing court's failure to conduct the necessary inquiry on the record and mistake regarding the scope of its authority constitutes an abuse of discretion for which Mr. Mathers is entitled to relief. State ex rel Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1983) (discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons).

E. CONCLUSION

For the reasons stated herein, Mr. Mathers asks this court to reverse his conviction and sentence and remand for further proceedings.

Respectfully submitted this 3rd day of September 2015.

s/ David Donnan

_____

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 47523-5-II
v.	)	
	)	
ANDY MATHERS,	)	
	)	
APPELLANT.	)	

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