73562-4

FILED
December 28, 2015
Court of Appeals
Division I
State of Washington

NO. 73562-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN GROTHAUS,

Appellant.

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

The Honorable Marybeth Dingledy, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. APPELLANT HAS STANDING.

Appellant Kevin Grothaus challenges the trial court's imposition of mandatory legal financial obligations (LFOs) imposed under RCW 43.43.7541 and RCW 7.68.035, asserting that the statutes are unconstitutional when applied to a defendant who has not been determined to have the ability to pay. Brief of Appellant (BOA) at 8-18. In response, the State argues Grothaus lacks standing to raise a substantive due process challenge. Brief of Respondent (BOR) at 13. The State is incorrect.

An appellate court looks at the record in the light most favorable to the person asserting standing. Mearns v. Scharbach, 103 Wn. App. 498, 512, 12 P.3d 1048 (2000). A party has standing if he: (1) is within the zone of interests protected or regulated by a statute; and (2) has suffered an injury in fact. Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 186, 157 P.3d 847 (2007); To–Ro Trade Shows, 144 Wn.2d at 414, 27 P.3d 1149 (quoting Seattle Sch. Dist. No. 1 v. State, 90 Wash.2d 476, 493–94, 585 P.2d 71 (1978)). To put it most succinctly, "[t]he doctrine of standing requires that a claimant must have a personal stake in the outcome

of a case in order to bring suit." Kleven v. City of Des Moines, 111 Wn. App. 284, 290, 44 P.3d 887 (2002).

Grothaus is within the zone of interests regulated by the statutes at issue here because he has been ordered to pay the DNA-collection fee and the VPA without the trial court first making an ability-to-pay determination.

With respect to the "injury-in-fact" requirement, "[e]ven a small financial loss is an injury for purposes of Article III standing." See, e.g., Natural Res. Def. Council, Inc. v. U.S. Food & Drug Admin., 710 F.3d 71, 85 (2d Cir. 2013) (finding the injury-in-fact requirement to be satisfied by allegations of expenses incurred in buying soap). Grothaus has suffered a financial loss in that the trial court imposed so-called mandatory LFOs as a condition of sentence. Grothaus is, therefore, required to make payments or he will be charged interest on that portion that is unpaid. This is a financial loss that gives Grothaus a personal stake in the constitutional challenge he has raised.

Moreover, the imposition of LFOs results in a financial debt that negatively impacts Grothaus' credit rating. See, State v. Blazina, 182 Wn.2d 827, 837, 344 P.3d 680, 684 (2015) (acknowledging that LFOs negatively impact credit ratings).

Damage to one's credit rating is a sufficient injury to confer standing. E.g., Adam v. United States, 532 Fed. Appx. 730, 731 (9th Cir. 2013); Lambert v. Hartman, 517 F.3d 433, 437 (6th Cir. 2008). Consequently, the imposition of this debt has resulted in an injury in fact to Grothaus.

The Supreme Court's decision in Blazina also indicates that Grothaus has standing. "Absent a party with standing, courts lack jurisdiction to consider the challenge." Postema v. Snohomish County, 83 Wn. App. 574, 579, 922 P.2d 176 (1996). The Supreme Court considered the merits of Blazina's challenge, thereby implicitly recognizing he had standing.

Grothaus and Blazina stand in the same position from a standing perspective. Both were ordered to pay LFOs and both were challenging the trial court's authority to order LFOs as a condition of sentence without an ability-to-pay inquiry. Both Blazina and Grothaus suffered the same injury (financial loss and negative credit ratings).

The only difference is that Blazina challenged the validity of the order on statutory grounds, while Grothaus challenges it on constitutional grounds. However, the difference in legal theories does not differentiate the injury or impact standing. Grothaus has

just as much of a personal stake in the outcome of this case as Blazina did in his case, and the Supreme Court's exercise of jurisdiction in Blazina indicates the same should happen here.

Ignoring Blazina's implicit recognition of a defendant's standing to challenge LFOs, the State urges this Court to find no standing here because the facts arguably support a finding that Grothaus has the ability to pay. BOR 14-16. In essence, the State is arguing that if this Court finds there was sufficient evidence from which the trial court could have determined Grothaus had the ability to pay, there is no injury in fact. The State's argument misses the point.

First, the State must make its factual argument regarding Grothaus' alleged ability to pay to the trial court so that it can procure the necessary findings to support its factual claim on appeal. This Court is not in the position to make factual findings about ability to pay where the issue was not litigated below and the trial court did not make its own factual findings beyond boilerplate.

Second, from a standing perspective, the concrete injury does not hinge on whether Grothaus ultimately may be found to have the ability to pay. Instead, the injury stems from the fact that LFOs were imposed upon Grothaus pursuant to an unconstitutional

statute and this has resulted in a damaged credit rating and financial loss. It is this injury that establishes standing.

For the reasons stated above, this Court should reject the State's argument regarding standing.

II. APPELLANT'S SUBSTANTIVE DUE PROCESS CHALLENGE IS REVIEWABLE UNDER RAP 2.5(a).

Pursuant to RAP 2.5(a)(3), a manifest constitutional error may be raised for the first time on appeal. Review is appropriate where the appellant identifies a constitutional error and shows how the alleged error actually affected his rights at trial. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (quoting State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007)). A constitutional error is manifest where there is a showing of actual prejudice. Actual prejudice is established by showing the asserted error had practical and identifiable consequences in the trial or, in this case, the sentencing. Id. at 99, 217 P.3d 756 (quoting Kirkman, 159 Wn.2d at 935).

Grothaus has identified an error that is of true constitutional dimension. He asserts a substantive due process challenge to RCW 43.43.7541 and RCW 7.68.035 because they authorize sentencing courts to impose the DNA-collection fee and VPA

without any consideration of ability to pay. Hence, the scope of his challenge is undoubtedly constitutional.

Second, Grothaus has established prejudice. On their face, the statutes do not require an ability-to-pay inquiry and mandate the trial court impose the DNA-collection fee and the VPA in every felony case. The consequence is Grothaus now has a sentence that imposes these fees without the trial court first determining he has the ability to pay. Given these circumstances, Grothaus has shown the error he complains of has had practical and identifiable consequences in his sentencing. As such, review is appropriate under RAP 2.5(a)(3).

Alternatively, this Court should exercise its own discretion under RAP 2.5(a) and decide the merits of this case because: (1) it raises a substantial constitutional issue regarding Washington's broken LFO system; (2) the parties have fully briefed the issue and amicus briefs have been filed; and (3) the constitutional error raised here impacts criminal sentencings that take place across the State on a daily basis. Hence, prompt appellate review of this issue is necessary, appropriate, and will ultimately save judicial resources since this issue will likely be repeatedly raised.

For the reasons stated above and in appellant's opening brief, this Court should find the issue reviewable under RAP 2.5(a).

III. RESOLUTION OF THE LEGAL ISSUE RAISED BY GROTHAUS DOES NOT REST ON WHETHER THE STATE COULD HAVE PROCURED A FINDING THAT GROTHAUS HAS THE ABILITY TO PAY THE FEES.

The State suggests that this Court may resolve the legal issue raised by Grothaus by simply finding that Grothaus has the ability to pay. BOR at 14-16, 22, 29. However, this ignores the fact that such a finding must come from the trial court, not the appellate court.

In Washington, Superior Courts are fact finding courts of original jurisdiction. Const. art. 4, § 6. The Court of Appeals is not. Const. art. 4, § 4, 30; see also, Community Care Coalition of Washington v. Reed, 165 Wn.2d 606, 617, 200 P.3d 701 (2009).

The Rules of Appellate Procedure recognize that the constitutional function of a reviewing court is to review facts of record, not to make evidentiary rulings, admit evidence, or to try facts that were not tried below. RAP 9.1 - 9.4. Hence, it is not appropriate for the State to be attempting to procure an ability-to-pay finding from this Court.

This case does not present a sufficiency of the evidence claim precisely because there was no legitimate finding regarding ability to pay. Without such a determination, one cannot engage in the question of whether there was sufficient evidence to support the finding. This is completely illogical.

Instead, this case presents a constitutional challenge to a statute that requires the imposition of LFOs regardless of whether there is an ability-to-pay determination. In this context, what facts the State could have proved is irrelevant. Instead, for the purpose of Grothaus' constitutional argument, the relevant focus must be on the fact that the trial court applied a statute and there was no ability-to-pay determination.

For the reasons stated above, this Court should reject the State's attempt to refocus the issue on what facts might have been proved if there had been an ability-to-pay determination below.

IV. THE FACT THAT EACH DEFENDANT PRESENTS UNIQUE FINANCIAL CIRCUMSTANCES IS NOT A RATIONAL BASIS SUPPORTING THE MANDATORY IMPOSITION OF LFOs.

The State suggests RCW 43.43.7541 and RCW 7.68.035 rationally further the State's interest in funding DNA collection and victims programs because each defendant's case presents different

circumstances and the defendant might not be constitutionally indigent or may develop the ability to pay in the future. BOR at 21-22. However, the fact that each defendant has different circumstances actually amplifies the irrationality of a mandatory LFO.

It makes no rational sense to impose a fee for the purpose of funding certain programs unless the defendant has the ability to pay that fee. In other words, the statutes do not further the State's legitimate purposes unless the defendant is able to pay. Hence, the statute cannot be constitutionally applied until there is a judicial determination that the defendant has the ability to pay the LFO.

Requiring an ability-to-pay determination allows the State to consider a defendant's unique financial circumstances. The State can make its best argument regarding future ability to pay at the hearing. As it stands now, however, the statutes' mandatory nature means that trial courts are required to impose these LFOs on defendants, regardless of their ability or likely future ability to pay. As argued in detail in appellant's opening brief, this blanket approach is constitutionally untenable.

V. UNDER CURRY AND BLANK,[1] THE TRIGGER FOR AN ABILITY-TO-PAY INQUIRY IS WHEN THERE IS ENFORCED COLLECTION OR ADDITIONAL PENALTIES OR FEES.

The State suggests that, under Curry and Blank, an ability-to-pay analysis is not required until a defendant faces imprisonment for non-willful failure to pay. BOR at 24. From this premise, the State argues that the statutes cited by appellant regarding the various enforcement mechanisms for LFOs do not trigger an ability-to-pay inquiry because the statutes do not contemplate imprisonment. However, the State's premise is wrong.

As discussed in detail in appellant's opening brief, the Washington Supreme Court has made clear 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. Blank, 131 Wn.2d at 242. Hence, the State's suggestion that, under Blank and Curry, the only government action that triggers an ability-pay-inquiry is when a defendant faces imprisonment is plain wrong.

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[1] State v. Curry, 118 Wn.2d 763, 829 P.2d 166 (1992) and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997).

As Grothaus discussed in his opening brief, the Legislature has authorized a plethora of enforcement mechanisms with additional fees and sanctions that can be imposed without a judicial determination regarding ability to pay. Given this statutory scheme and the Blank and Curry decisions, it is constitutionally necessary for the trial court to consider ability-to-pay at the time it is imposing LFOs.

B. CONCLUSION

For the reasons stated above and those set forth in appellant's opening brief, this Court should reverse the LFOs and remand for a proper ability-to-pay inquiry.

DATED this 28TH day of December, 2015.

Respectfully submitted,

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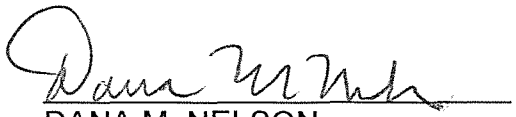

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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 73562-4-I
	)	
KEVIN GROTHAUS,	)	
	)	
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 28TH DAY OF DECEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEVIN GROTHAUS
12904 44TH AVE SE
EVERETT, WA 98208

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF DECEMBER 2015.

X Patrick Mayovsky