No. 93887-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WYATT SEWARD,

Petitioner.

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

The Honorable Gary R. Tabor, Judge
The Honorable Anne Hirsch, Judge
Cause No. 13-1-01458-4

ANSWER OF RESPONDENT TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Decisions Of The Court Of Appeals

U.S. Supreme Court Decisions

Statutes and Rules

A. IDENTITY OF RESPONDENT.

Respondent State of Washington was also the respondent in the Court of Appeals.

B. COURT OF APPEALS DECISION.

The petitioner is seeking review of State v. Seward, 196 Wn. App. 579, 384 P.3d 620 (2016), entered on November 1, 2016. The State incorporates herein by reference the briefs it filed in the Court of Appeals in this case.

C. ISSUES PRESENTED FOR REVIEW.

1. Whether RCW 43.43.7541, RCW 7.68.035, and RCW 36.18.020(2)(h) violate substantive due process as applied to defendants whom the trial court has not found to have the likely ability to pay mandatory fees.

2. Whether this Court's holdings in State v. Curry[1] and State v. Blank[2] require that trial courts inquire into a defendant's ability to pay at the time mandatory legal financial obligations are imposed.

3. Whether the criminal filing fee required under RCW 36.18.020(2)(h) is a mandatory fee.

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1 118 Wn.2d 911, 829 P.2d 166 (1992).
2 131 Wn.2d 230, 930 P.2d 1213 (1997)

D. ARGUMENT.

1. This court should not accept review of the question of substantive due process because well-established law has already answered that question, and the petitioner has not offered any persuasive reason to change the law.[3]

Seward argues that his due process challenge raises a significant question of Constitutional law which is of substantial public interest, thus justifying review under RAP 13.4(b)(3) and RAP 13.4(b)(4). While the question may be of substantial public interest, it has already been addressed by this Court and Seward offers no persuasive reason why the well-settled law should be changed. In a nutshell, he argues that even imposing certain legal financial obligations (LFOs) on defendants found to be statutorily indigent violates substantive due process because it does not rationally serve a legitimate public interest. He specifically challenges RCW 7.68.035 ($500 victim penalty assessment), RCW 36.18.020(2)(h) (convicted defendant liable for a $200 filing fee), and RCW 43.43.7541 ($100 DNA fee).

Statutes are presumed constitutional. The party challenging a statute bears a heavy burden of proving the statute

3 Seward has listed six cases which he believes are pending petitions for review in this court concerning this same issue. Review has been denied in five of those cases. In State v. Robert Lee Tyler, 93770-2, the court has stayed the case pending a decision in another case. The issue there does not concern LFOs.

unconstitutional beyond a reasonable doubt. Blank, 131 Wn.2d at 235. If at all possible statutes should be construed to be constitutional. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

Substantive due process forbids certain arbitrary, capricious government actions regardless of the fairness of the procedures used to implement them. Amunrud, 158 Wn.2d at 219. The level of review depends on the nature of the right at issue. Id. Seward concedes that he is not claiming violation of a fundamental right, and therefore the standard of review is a rational basis. Id. at 222. He further concedes that the challenged statutes rationally serve the State's interest in funding important services, but argues that as applied to indigent defendants that legitimate interest is not served. He does not offer any substantial reason why this court should reconsider the holdings in Curry and Blank.

a. Indigency.

Seward states that he is indigent. Presumably that is based on the fact that he received a publicly-funded attorney in the trial and appellate courts. RCW 10.73.150. For that purpose, indigency is defined in RCW 10.101.010(3) as a person receiving certain types of public assistance, being involuntarily committed to a

mental health facility, having an annual income of less than 125 per cent of the federal poverty level, or having insufficient available funds to retain counsel.

In State v. Johnson, 179 Wn.2d 534, 315 P.3d 1090 (2014), this court reiterated that the United States Constitution[4] requires only that the trial court inquire into a defendant's ability to pay before he or she is confined for non-willful failure to pay LFOs. Id. at 552. Only *constitutionally indigent* defendants are excused from the obligation to pay. Id. at 553, citing to Blank and Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983). While there is no precise definition of "constitutional indigence," it is more than poverty but less than "absolute destitution." It is not the same as statutory indigence. Johnson, 179 Wn.2d. at 553, 555. The constitution does not forbid all hardship. Id. at 555. While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. Bearden, 461 U.S. at 668; State v. Woodward, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003).

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4 The Washington due process clause does not give greater protection than the 14th Amendment. State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009); Amunrud, 158 Wn.2d at 216 n. 2.

Seward has not distinguished between statutory and constitutional indigency. Statutory indigency does not necessarily mean the defendant is constitutionally indigent nor does an inquiry at the time of sentencing have, in most cases, any real chance of predicting the ability to pay at some future time when the State attempts to collect LFOs. It is simply more logical to make the inquiry at the time of collection rather than the time of imposition.

b. The statutory collection process is not as draconian as Seward portrays it.

Seward argues that aggressive enforced collections begin immediately, including "the authorization of numerous additional penalties and sanctions." Petition for Review at 11. He mentions the immediate assessment of interest. Id. RCW 10.82.090(1) provides that interest begins on the date of judgment, but it does not require immediate collection. RCW 10.82.090(2)(e), provides that the court *shall* waive all interest on LFOs other than restitution that accrues while the offender is in custody, upon a showing that it creates a hardship for the defendant or his or her family. Interest on restitution may be reduced once the principal is paid. RCW 10.82.090(2)(b). If the defendant can show a good faith effort to pay interest on non-restitution LFOs, the court may reduce or waive

the interest. RCW 10.82.090(2)(c). It is true that obtaining a reduction or waiver of interest requires some effort on the part of the offender. RCW 10.92.090(c),(d). It is not, however, the automatic and crushing burden that Seward portrays.

There are a number of statutes which protect defendants from the parade of horribles that Seward suggests. For example, if the defendant is under supervision of the Department of Corrections (DOC), the Department may either modify the payment schedule or recommend to the court that it be modified when circumstances change. RCW 9.94A.760(7)(a). If DOC is not involved, the clerk's office may recommend changes to the payment schedule. RCW 9.94A.760(7)(b). Payroll deductions are limited to 25 per cent of disposable earnings. RCW 9.94A.7603(1). The offender may bring a motion to quash, modify, or terminate payroll deductions if he demonstrates hardship. RCW 9.94A.7605.

There is a statute which allows for payroll deduction. RCW 9.94A.7605(1). The same statute allows the offender to file a motion in superior court to quash, modify, or terminate such a deduction. It logically follows that if one has a wage, one has an income from which one can pay something toward LFOs.

There are statutory mechanisms to ensure that monthly payments are based on the offender's ability to pay. When collection is attempted an inquiry into the offender's ability to pay is done administratively, either by the Department of Corrections or the clerk's office. RCW 9.94A.760(5)-(7). A wage assignment is achieved through a petition and court order. RCW 9.94A.7701. The amount withheld for legal financial obligations from one or more judgments is capped at 25 percent of the offender's wages. RCW 9.94A.7703(2),(3). Likewise, an employer's service fee is capped at a minimal amount. RCW 9.94A.7705(4). An offender who is subject to a wage assignment may petition the court to quash, modify, or terminate the order upon showing that the order causes extreme hardship or substantial injustice. RCW 9.94A.7708.

These protections weaken Seward's argument that it is unconstitutional to impose the challenged costs or assessments without an inquiry into the defendant's ability to pay at the time they are imposed. There is little, if any, danger that anyone will be sanctioned for failing to pay LFOs because of inability to pay. The money may be collected earlier than the offender would like, but that is not a sanction or a penalty.

c. The constitution forbids incarcerating an offender for a non-willful failure to pay. It does not forbid collection efforts.

Washington courts, as well as federal courts, have consistently held that it is incarceration for non-willful debt that is prohibited by the constitution.

> It is at the point of enforced collection . . . where an indigent may be faced with the alternatives of payment or imprisonment, that he "may assert a constitutional objection on the ground of his indigency."

Curry, 118 Wn.2d 911, 917, citing to the Court of Appeals opinion which quoted United States v. Pagan, 785 F.2d 378, 381-82 (2d Cir.), *cert. denied*, 479 U.S. 1017 (1986); Blank, 131 WN.2d 230, 241. "Due process precludes the jailing of an offender for failure to pay a fine if the offender's failure to pay was due to his or her indigence." State v. Mathers, 193 Wn. App. 913, 927, 376 P.3d 1163, *review denied*, 186 Wn.2d 1015, 380 P.3d 482 (2016), citing to State v. Nason, 168 Wn.2d 936, 845, 233 P.3d 848 (2010). "The due process clause protects an indigent offender from incarceration based solely on inability to pay court ordered fees." State v. Shelton, 194 Wn. App. 660, 670, 378 P.3d 230 (2016), *review denied*, 187 Wn.2d 1002, 386 P.3d 1088 (2017).

Seward discusses many of the State's collection procedures and the financial impact those have on convicted defendants, but he makes no claim that any of these individuals have been incarcerated for failure to pay. He asks this court to hold that the constitution requires an inquiry into the defendant's ability to pay, many times far into the future, before the specified LFOs are imposed, only because of possible or probable financial strain on the offender, not because he has been incarcerated or threatened with incarceration. Failure to make such an inquiry is not of constitutional magnitude. State v. Blazina, 182 Wn.2d 827, 840, 344 P.3d 680 (2015), J. Fairhurst, concurring.

> d. If it is the State's collection efforts that are causing the hardship on offenders, then the statutes authorizing those efforts should be challenged, not the constitutionality of imposing LFOs on indigent defendants in the first place.

Seward argues that Washington's LFO statutes are constitutional only if ability-to-pay inquiries are made at key times, and one of those times must be before the LFOs are imposed. Petition for Review at 12. It does not logically follow that a failure to inquire about ability to pay at sentencing affects the constitutionality of the collection statutes themselves. However, if that were the case, then it seems that his challenge should be to the statutes, not

to the absence of a pre-imposition inquiry into the defendant's ability to pay the filing fee, the DNA fee, and the crime victim assessment.

e. A broken system is not the same as an unconstitutional system.

The LFO systems in this state, as well as others, may well be "broken," as this court said in Blazina, 182 Wn.2d at 827. But a broken system is not the same as an unconstitutional system. In Blank, the court said that "it is nearly impossible to predict ability to pay over a period of 10 years or longer." 131 Wn.2d at 230. It makes no sense that the constitution would require that a court must make a determination that the statutorily indigent defendant being sentenced is, or will be, constitutionally indigent at some point far into the future. While Seward's focus is on the financial impact to those who have been convicted of crimes, he still acknowledges that the challenged LFOs have the rational purpose of funding important services or programs. It is not unfair to require those who committed crimes to shoulder at least some of the financial burden they have placed on their victims, as well as society as a whole, rather than expecting the taxpayers to carry the entire load. Those taxpayers may well have to sacrifice to pay the

taxes that allow an indigent defendant, who may be just as able to pay at least part of his LFOs, an escape from financial responsibility.

2. Whether RCW 36.18.020(2)(h) imposes a mandatory cost is not of sufficient public importance to warrant review, particularly as it applies in this case.

Seward is correct that this court has never specifically held that the filing fee is mandatory and can be imposed without an inquiry into the defendant's ability to pay. The Court of Appeals, however, has repeatedly said that it is. State v. Lundy, 176 Wn. App. 96,102,110, 308 P.3d 755 (2013); State v. Kuster, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013); State v. Clark, 191 Wn. app. 369, 374, 362 P.3d 309 (2015); State v. Clark, 195 Wn. App. 868, 872, 381 P.3d 198 (2016); State v. Malone, 193 Wn. App. 762, 763, 376 P.3d 443 (2016); State v. Gonzales, 198 Wn. App. 151, ___ P.3d ___ (2017).

Seward asserts that this court "appeared skeptical" that the filing fee was mandatory in State v. Duncan, 185 Wn.2d 430, 437 n.3, 734 P.3d 83 2016). Petition for Review at 18. In that footnote the court merely mentioned that the Court of Appeals had found it to be so. There is, however, no authority to the contrary.

This case is not the best vehicle for deciding that question. In addition to the filing fee, DNA fee, and victim assessment, Seward was ordered to pay restitution of $28,563.84. Petition for Review at 3. Restitution is mandatory and may not be reduced because of an inability to pay. RCW 9.94A.753(4). Restitution is to be paid before any other monetary obligations. RCW 9.94A.760. Before the $200 filing fee even becomes an issue for Seward, he will have paid at least $28, 563.84.

A defendant always has the opportunity to seek relief from legal financial obligations.

> RCW 10.01.160(4): A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

If a court finds at a later time that the costs will impose a manifest hardship, it has the authority to modify the monetary obligations. Curry, 118 Wn.2d at 914. Courts may refuse to address a request for remission until the State attempts to collect the financial obligations. State v. Bertrand, 165 Wn. App. 393, 405,

267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012). If, when the State eventually tries to collect the filing fee, Seward is constitutionally indigent, he can seek remission of that amount. He will suffer no incarceration because of inability to pay.

Seward does not present a compelling reason for this court to accept review of the question of the nature of the filing fee in this case.

E. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to deny Seward's petition for review.

Respectfully submitted this 27th day of April, 2017.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Answer of Respondent to Petition for Review on the date below as follows:

ELECTRONICALLY FILED TO SUPREME COURT OF THE STATE OF WASHINGTON
TO: SUPREME@COURTS.WA.GOV

VIA E-MAIL

TO: ERIC J. NIELSEN
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of April, 2017, at Olympia, Washington.

CYNTHIA WRIGHT, PARALEGAL