NO. 47581-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

WYATT SEWARD,

Appellant.

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

The Honorable Gary R. Tuber, Judge
The Honorable Anne Hirsch, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ISSUES

This Court requested supplemental briefing addressing its recent decision in State v. Mathers, 193 Wn. App. 913, ___ P.3d ___, (2016) WL 2865576 (May 10, 2016). In response, appellant raises the following supplemental issues:

1. Where Mathers did not address the same substantive due process claim raised by Seward does its rejection of Mathers's substantive due process claim foreclose this Court's consideration of Seward's substantive due process claim?

2. Is imposition of the criminal filing fee under RCW 36.18.020(2)(h) mandatory so that the trial court was not required to conduct an inquiry into Seward's ability to pay the fee?

B. SUPPLEMENTAL ARGUMENTS

1. THE MATHERS DECISION DID NOT ADDRESS SEWARD'S SUBSTITIVE DUE PROCESS CLAIM THAT RCW 43.43.7541, 7.68.035 AND 36.18.020(2)(h) ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY LEGAL FINANCIAL OBLIGATIONS (LFO'S).

Mathers held the trial court was not required to inquire into Mathers's particular ability to pay a $100 deoxyribonucleic acid (DNA) fee and a $500 Victim Penalty Assessment (VPA) fee. Mathers, 193 Wn. App. 913, ___ P.3d ___, (2016) WL 2865576, at *8. The Mathers court

rejected Mathers's arguments that imposition of the fees without an ability to pay inquiry constituted error, violated equal protection, and violated due process.

Seward does not challenge the trial court's failure to inquire into his ability to pay those same fees as a violation of an equal protection. Seward does challenge the imposition of the fees without conducting an ability to pay inquiry as a violation of substantive due process. Seward's substantive due process claim, however, is different than the substantive due process claim addressed in Mathers.

Mathers argued that the imposition of fees under the DNA (RCW 43.43.7541) and the VPA (RCW 7.68.035) statutes violated his substantive due process rights. The Mathers court rejected Mathers's challenge but did not reject all substantive due process challenges to the DNA or VPA statutes. Its reason for rejecting Mathers's challenge is "because the same issues have already been addressed unfavorably to Mathers by Washington Courts" in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), and State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013). Mathers, 193 Wn. App. 913, ___ P.3d ___, (2016) WL 2865576, at *7.

Both Lundy and Curry, the cases relied on in Mathers, were limited to the procedural question of assessing whether the VPA and DNA

collection statutes had sufficient constitutional safeguards "to prevent defendants from being sanctioned for nonwillful failure to pay." State v. Duncan, 185 Wn.2d 430, ___ P.3d ___, (2016) WL 1696698, at *2 n.3 (citing Curry, 118 Wn.2d at 917); see also Lundy, 176 Wn. App. at 102-03 (applying Curry to hold that there were sufficient safeguards to prevent imprisonment of indigent defendants for nonwillful failure to pay mandatory LFOs).

Rather than challenging the constitutionality of the LFO statutes based on the fundamental unfairness of possible future enforcement (as was the case in Curry and Blank), Seward challenges the statute as an unconstitutional exercise of the State's regulatory power based on the fact that the mandatory imposition of LFOs on a person who cannot pay does not rationally serve the State goal of funding the DNA collection or the database the State's interest in funding comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes or collection of filing fees. Brief of Appellant (BOA) at 3-7. Curry and Blank do not decide this issue. BOA at 9-13.

While the DNA, VPA and criminal filing fee statutes arguably serve legitimate state interests, the imposition of mandatory fees upon defendants who cannot pay the fees does not rationally serve those interests. There is simply nothing reasonable or rational about requiring sentencing courts to

impose these mandatory LFOs upon all felony defendants regardless of whether they have the ability or likely future ability to pay. This does not further the State's interest in funding DNA collection and preservation or in ensuring programs for victims and witnesses of crimes. This does not further the state's interest because "the state cannot collect money from defendants who cannot pay." State v. Blazina, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). When imposed on defendants who cannot pay, not only do the fees fail to further the State's interest, they are pointless. It is irrational for the state to mandate the imposition of this debt upon defendants who cannot pay.

While the $800 for the DNA, VPA and criminal filing fees may not seem like much, defendants against whom these LFOs are imposed will be saddled with a compounding 12 percent interest rate on the unpaid fees.[1] This makes the debt incurred by these LFOs even more onerous and impedes rehabilitation and reentry into society following incarceration. State v. Blazina, 182 Wn.2d at 836-37 (discussing cascading effect of LFOs with a compounding 12 percent interest and examining the detrimental impact to rehabilitation that comes with ordering LFOs that cannot be paid). Thus, the

[1] Moreover, the DNA fee is "payable by the offender after payment of all other legal financial obligations included in the sentence." RCW 43.43.7541. Thus, the DNA collection fee is paid after restitution, the VPA, and all other LFOs have been satisfied. Seward was ordered to pay $28,563.84, thus, the DNA fee is the least likely fee to be paid.

imposition of these fees on those who cannot pay them actually undermines another legitimate interest of the State—reducing recidivism. See Id.; BOA at 7.

In sum, Mathers simply did not address the type of substantive due process claim Seward raises here. Seward's substantive due process challenge to RCW 43.43.7541, RCW 7.68.035 and RCW 36.18.020(2)(h) is not foreclosed under the Mathers decision.

2. THE $200 CRIMINAL FILING FEE IS NOT MANDATORY AND THE TRIAL COURT SHOULD HAVE INQUIRED INTO SEWARDS ABILITY TO PAY BEFORE IMPOSING IT.

Further, Mathers does not address RCW 36.18.020(2)(h), the criminal filing fee. While Seward makes the same due process challenge to fee that he makes to the DNA and VPA statutes, given the Mathers court's focus on the statutory language of the DNA and VPA statutes, the decision raises the issue of whether the criminal filing fee statute is mandatory. It is not.

In Lundy, this court has indicated that the $200 criminal filing fee is mandatory, not discretionary. State v. Lundy, 176 Wn. App. at 102-103. The Lundy court provided no rationale or analysis of the statutory language supporting its conclusion that the fee is mandatory. See Id.; see also State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (Division Three's

mere citation to Lundy for proposition that filing fee must be imposed regardless of indigency without statutory analysis). It now appears Lundy was wrongly decided and the pernicious effects of LFOs recognized in Blazina demonstrate the harmfulness of imposing discretionary LFOs without an adequate ability-to-pay inquiry.

The language of RCW 36.18.020(2)(h), which provides authority to impose a filing fee, differs from other statutes authorizing mandatory fees. For instance, the victim penalty assessment statute provides, "When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035 (emphasis added). This statute is unambiguous in its mandate that the assessment "shall be imposed." The same is true of the DNA collection fee statutes, which provides, "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." RCW 43.43.7541 (emphasis added). The Mathers court reiterated previous holdings that the language in these statutes expressed the legislative intent to make those fees mandatory. Mathers, 193 Wn. App. 913 (2016) WL 2865576, at *2-3 (citations omitted).

The language in RCW 36.18.020(2)(h) is not the same. It provides that, upon conviction, "an adult defendant in a criminal case shall be liable for a fee of two hundred dollars." (Emphasis added.) In contrast to the

DNA collection and VPA statutes—both of which demonstrate that the legislature knows how to unambiguously mandate the imposition of a legal financial obligation—RCW 36.18.020(2)(h) does not mandate the imposition or inclusion of a $200 criminal filing fee.

Nowhere in RCW 36.18.020(2)(h)'s language is the requirement that trial courts must impose the $200 filing fee upon conviction. Although RCW 36.18.020(2) states that "[c]lerks of superior courts shall collect" the fee, the statute's language does not indicate that the fee cannot be waived by a judge. Many superior courts never impose the $200 filing fee. The $200 filing fee is a discretionary LFO, not a mandatory one.

Moreover, liability for a fee and being required to pay a fee are different. "Liability" for a fee does not make the fee mandatory given that the term "liable" encompasses a broad range of possibilities, from making a person "obligated" in law to pay to imposing a "future possible or probable happening that may not occur." BLACK'S LAW DICTIONARY 915 (6th ed. 1990). Thus, "liable" can mean a situation that *might* give rise to legal liability. At best, the statutory language is ambiguous as to whether it is mandatory. Under the rule of lenity, the statutory language must be interpreted in Seward's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

Lundy was wrongly decided and the pernicious effects of LFOs recognized in Blazina demonstrate the harmfulness of imposing discretionary LFOs without an adequate ability-to-pay inquiry.[2] This court should abandon that part of the Lundy decision that found the criminal filing fee mandatory because there is no reasoning to support its conclusion and its conclusion is undermined by the reasoning in Mathers.

Indeed, our Supreme Court recently appeared skeptical that the $200 filing fee was mandatory, noting it has only "been treated as mandatory by the Court of Appeals." State v. Duncan, 185 Wn.2d 430, ___ P.3d ___, (2016) WL 1696698, at *2 n.3.[3] In indentifying those fees designated as mandatory by the legislature on the one hand, and then identifying the criminal filing fee as one that has merely been *treated* as mandatory on the

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[2] See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis "requires a clear showing that an established rule is incorrect and harmful before it is abandoned").

[3] The Court noted:

> We recognize that the legislature has designated some of these fees as mandatory. E.g., RCW 7.68.035 (victim assessment); RCW 43.43.7541 (DNA (deoxyribonucleic acid) collection fee); RCW 10.82.090(2)(d) (effectively making the principal on restitution mandatory). Others have been treated as mandatory by the Court of Appeals. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (holding that the filing fee imposed by RCW 36.18.020(2)(h) is mandatory and courts have no discretion to consider the offender's ability to pay). While we have not had occasion to consider the constitutionality of all of these statutes, we have found that the victim penalty assessment statute was not unconstitutional on its face or as applied to the defendants in the case because there were sufficient safeguards to prevent the defendants from being sanctioned for nonwillful failure to pay. See Curry, 118 Wn.2d at 917, 829 P.2d 166.

Duncan, 185 Wn.2d 430, ___ P.3d ___, (2016) WL 1696698, at *2 n.3.

other, shows the Supreme Court believes there is a distinction. Seward contends that distinction is because the under the plain language of criminal filing fee statute, that fee is not mandatory. This court should not follow Lundy, but instead hold that the criminal filing fee is a discretionary LFO.

If this Court's finds Seward's substantive due process rights were not violated by the trial court imposing the DNA, VPA and criminal filing fees without inquiring into Seward's ability to pay them, it should find the trial court erred by failing to conduct an inquiry into Seward's ability to pay the criminal filing fee because that fee is not mandatory. This Court should order that fee stricken or remand the case back to the trial court to conduct that inquiry.

3. APPELLATE COSTS SHOULD BE DENIED

In the event Seward does not prevail on appeal, any request by the State for appellate costs should be denied.[4]

This court indisputably has discretion to deny appellate costs. RCW 10.73.160(1) ("The court of appeals . . . may require an adult offender convicted of an offense to pay appellate costs." (emphasis added)); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016) (holding RCW

[4] Steward did not make this argument in his opening brief. He requests leave to raise this supplemental issue here. Granting this request will not prejudice the State because it will have the opportunity to respond in its supplemental brief.

10.73.160 "vests the appellate court with discretion to deny or approve a request for an award of costs").

Undersigned counsel was appointed to represent Seward because of his indigency. Seward was sentenced to 120 months, and it is reasonable to presume he remains indigent throughout this review. RAP 15.2(f). Furthermore, Seward has been ordered to pay over twenty-eight thousand dollars in restitution. The additional obligation of paying appellate costs will unjustly increase his financial burden. Accordingly, this court should presume Seward is indigent and deny any request by the State for appellate costs.

C. CONCLUSION

The Mathers decision does not address Seward's substantive due process clam. That decision implicitly raises the additional issue of whether the criminal filing fee is mandatory.

For above reasons and reasons in Seward's opening brief, this Court should vacate the trial court's order that Seward pay the ordered LFOs. Alternatively, this Court should strike the court ordered LFOs and remand for a hearing on Sward's ability to pay.

Should this Court find the DNA and VPA ordered fees were properly imposed without an inquiry into Seward's ability to pay those fees because they are mandatory, this Court should find the criminal filing

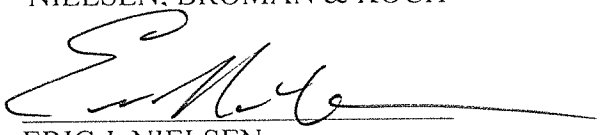
fee discretionary and either strike that fee or remand for a hearing on Sward's ability to pay.

In the event Seward does not prevail in this appeal, this Court should exercise its considerable discretion and deny any appellate cost.

DATED this 26 day of July, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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