NO. 97805-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIA BEATRICE WALKER,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks this court to grant review of issue (3) set out below. The State asks the court to deny the petitioner's request for review of issue (1). If the court does grant review of that issue, the State asks the court to also review issue (2).

II. ISSUES

A. ISSUES RELATING TO DENIAL OF DOSA

(1) [Raised by petitioner:] "Should this court grant review where the judge's behavior denied Ms. Walker her right to an impartial proceeding before a judge who meaningfully exercises discretion, raising an issue of substantial public importance?" [The respondent asks the court to deny review of this issue.]

(2) [Conditionally raised by respondent:] When a party is aware of a basis for challenging a judge's impartiality, can she withhold any challenge, await the judge's ruling, and then raise the challenge on appeal if the ruling is adverse? [The respondent asks the court to consider this issue only if it grants review of issue (1).]

B. ISSUE RELATING TO LEGAL FINANCIAL OBLIGATIONS

(3) [Raised by respondent:] RCW 2.30.030(5) grants trial courts discretion to waive or reduce drug court fees if the defendant

is indigent. Did the 2018 amendments to a different statute amend this statute *sub silentio,* so as to *require* sentencing courts to waive drug court fees for indigent defendants? [The respondent asks the court to grant review of this issue, regardless of its disposition of the other issues.]

III. STATEMENT OF THE CASE

A. ACCEPTANCE INTO DRUG COURT

On February 3, 2016, the defendant (petitioner), Bria Walker, stole a purse from a gym locker. The purse hold the owner's keys and wallet. The defendant drove away from the gym in the owner's car. She then used the owner's credit cards at four nearby businesses. 1 CP 80-81.

On December 1, an information was filed charging the defendant with second degree possession of stolen property, theft of a motor vehicle, and two counts of second degree identity theft. 1 CP 183-84. On February 8, 2017, she was accepted into Adult Drug Treatment Court (ADTC). CP 168. Her treatment contract included the following provision:

> I agree to pay a non-refundable participant fee regardless of the amount of time I spend in the program. Participant fees must be paid in full prior to my successful completion of the ADTC. If I am terminated from the program, any unpaid fees may be

> entered as a judgment against me and bear interest like any other judgment debt.

1 CP 164.

A Final Acceptance Hearing was set for the afternoon of February 8. 1 CP 168. Several participants, including this defendant, were involved in this hearing. The judge pointed out the circularity of the defendant's rationale for continuing to use drugs: she used them because she was an addict, and she was an addict because she used them. The judge asked her if she was "uncomfortable." The defendant said that she wasn't. The judge responded, "I haven't even begun yet." 2/8 RP 8-9.

The judge challenged the participants' excuses for continued drug use. When the defendant said that she used drugs for the lifestyle, the judge said that this was "bullshit." The defendant then admitted, "It's uncomfortable for me to be clean." 2/8 RP 17.

The judge told the participants that to get off drugs, they had to confront the voice within themselves that said that they didn't deserve to be clean and sober. It would be the hardest thing they would ever do in their lives, but there was no other path. 2/8 RP 19-20.

The judge asked the defendant when she started using drugs. She said when she was 13. The judge replied:

> Thirteen. You have no idea who you are, which is kind of sad. But it's kind of cool in the sense that now you can define who you want to be. They say that until your brains are fully developed at the age of 25, if you dump a bunch of mood into the mild-altering [*sic*] substances on top of it, it stops the natural growth and progression.
>
> So I got a ... 13 year old in a 27-year-old body over here, who's trying to search and find out who she is, but the beauty of it is you can write your own damn story if you have the courage to do so.

2/8 RP 20-21. He concluded by welcoming her to drug court. 2/8 RP 25.

B. DRUG COURT TERMINATION AND SENTENCING

Between August 9 and 11, the defendant violated her treatment conditions by using methamphetamine, failing to appear for a urine test, missing a group session and a doctor's appointment, and failing to appear for court. A warrant was issued for her arrest. 1 CP 39. On September 3, she was arrested for shoplifting. In her purse, the arresting officer found items that are used to prepare and smoke heroin. 1 CP 47.

As a result of these violations, the defendant was terminated from Drug Court. She was then found guilty at a stipulated trial.

9/15 RP 2-3; 1 CP 39-40. The court authorized a delay of sentencing to obtain a DOSA assessment. 9/15 RP 3-4.

The assessment report listed four occasions when the defendant had been through inpatient drug treatment. 2 CP 186. It noted that she had been convicted of similar crimes in 2014 and sentenced to 14 months in prison. On release, she returned to her drug addicted, criminal lifestyle. She had also demonstrated a pattern of participation in organized criminal activity that targeted individuals and businesses. The report recommended against a DOSA sentence. 2 CP 188.

In imposing sentence, the court pointed out that the defendant had been through multiple treatment modalities. She had previously been through King County Drug Court. The judge concluded that she had not "given [her]self any permission to be clean and sober." 11/3 RP 11-13. The court imposed sentences at the top of the standard sentence ranges, for a total of 57 months' confinement. The court also imposed a $900 drug court fee, $500 victim assessment, $200 filing fee, and $100 DNA fee. All other fees were waived. 11/3 RP 13-14; 1 CP 20. No objection was raised to any of these financial assessments.

On appeal, the defendant challenged the denial of a DOSA sentence. She also objected to the imposition of financial obligations other than the victim assessment. The court upheld the trial court's decision to deny DOSA. Slip op. at 4-13. Based on legislation enacted since the defendant's sentencing, the court struck the filing fee and the DNA collection fee. Slip op. at 14-15. (The State is not challenging this portion of the decision.)

The court also struck the drug court fee. It recognized that the subsequent legislation did not "directly affect" RCW 2.30.030(5), the statute dealing with such fees. "But it amended RCW 10.01.160(3) to prohibit sentencing courts from imposing discretionary costs on indigent defendants." Based on the amendment to that other statute, the court held that the defendant's indigence prevented imposition of a drug court fee. Slip op. at 14-15.

The State moved for reconsideration. It pointed out that court's had both misinterpreted RCW 10.01.160(3) and turned it into an unconstitutional amendment. The court denied the motion for reconsideration without explanation.

IV. ARGUMENT

A. THE COURT OF APPEALS' APPLICATION OF THE ESTABLISHED TEST FOR JUDICIAL BIAS DOES NOT CREATE AND ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

In her petition for review, the defendant claims that the sentencing judge was biased against her. The Court of Appeals concluded that she had "fail[ed] to establish that a reasonable person might question the impartiality of the superior court judge." Slip op. at 13. That is the standard set out in this court's decisions: "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts." State v. Solis-Diaz, 187 Wn.2d 535, 540 ¶ 6, 387 P.3d 703 (2017). The petition does not claim that any different test should apply. See PRV at 10 (citing Solis-Diaz). The application of a well-established legal standard does not warrant review by this court.

Moreover, the Court of Appeals was correct in rejecting the defendant's claims. The judge did not exhibit any "unreasonable hostility" towards this defendant. To the contrary, in welcoming her into drug court, he spoke of her opportunity to "define who you want to be." 2/8 RP 20. But he refused to accept her excuses for her criminal lifestyle. He called one justification "bullshit" — and the

defendant immediately admitted that it was false. 2/8 RP 17. He suggested that she should be "uncomfortable" with her reasons for using drugs. 2/8 RP 8-9. That is the purpose of Drug Court — to end the participants' drug usage and accompanying criminal behavior. If a participant is comfortable with her lifestyle, why would she change?

The Final Acceptance Hearing was the first stage in the therapeutic process of Drug Court. The judge used this opportunity to discuss what the participants needed to do to end their drug-addled lifestyles. 2/8 RP 21-24. In doing so, he used some coarse language and allowed others to do the same. See 2/8 RP 15 (participant said that he uses drugs "[t]o not deal with shit"). In a therapeutic session, it may be appropriate to communicate with drug abusers in the language that they are accustomed to using. But even if this court considers it inappropriate, it is not evidence of bias.

The petitioner claims that the sentencing court improperly denied a DOSA sentence "because it deemed her drug court termination rendered her incapable of rehabilitation through treatment." PRV at 11. She cites no authority that it is improper to deny DOSA based on a single valid reason. Cf. State v. Grayson,

154 Wn.2d 333, 342 ¶ 17, 111 P.3d 1183 (2005) ("categorical denial" of DOSA is improper). Even if that were improper, however, the record does not support the petitioner's factual claims. Even after the defendant's termination from Drug Court, the same judge authorized a delay of sentencing to obtain a DOSA evaluation. 9/15 RP 3-4. In denying DOSA, the judge pointed to the multiple occasions that she had chosen to return to drug use after going through treatment. 11/3 RP 11. Ultimately, the judge simply did not believe that the defendant was committed to changing her behavior: "[Y]ou haven't, in any respect, given yourself any permission to be clean and sober." 11/3 RP 12.

The judge was entitled to make that determination. The Court of Appeals correctly held that the sentencing court's decisions reflected neither bias nor an abuse of discretion. That holding does not warrant review.

B. IF THIS COURT GRANTS REVIEW OF THE PETITIONER'S CLAIM OF JUDICIAL BIAS, IT SHOULD ALSO CONSIDER WHETHER A PARTY WHO IS AWARE OF THE BASIS FOR SUCH A CLAIM CAN HOLD IT IN RESERVE AGAINST AN UNFAVORABLE RULING.

If this court nevertheless decides to review that issue, it should consider whether the defendant's claim of bias can be raised for the first time on appeal. Most of the incidents supporting

the defendant's claim relate to the judge's actions at the time she was formally accepted into drug court. These incidents were, of course, well known to the defendant prior to sentencing. Yet she made no effort to obtain a change of judge.

According to Division Three of the Court of Appeals, claims under the "appearance of fairness" doctrine are not constitutional and cannot be raised for the first time on appeal.

> Once a basis for recusal is discovered, prompt action is required. Delaying a request for recusal until after the judge has issued an adverse ruling is considered tactical and constitutes waiver.

State v. Blizzard, 195 Wn. App. 717, 725–26 ¶ 13, 381 P.3d 1241 (2016), review denied, 187 Wn.2d 1012 (2017) (citations omitted). In the present case, however, Division One examined the petitioner's claims on the merits before deciding that they were not "manifest" and could not be raised. Slip op. at 6-7, 13.

The procedure followed here is particularly disturbing in light of defense counsel's remarks at sentencing. He told the judge that the defendant had "kind of surrendered to the Court and to you" and would "absolutely be at peace with whatever decision you make today." 11/3 RP 10-11. If these remarks were sincere, they indicate that counsel did *not* consider the judge to be biased. If

counsel did believe that the judge was biased, then he was apparently trying to flatter him into imposing a lenient sentence, while reserving the right to complain if the sentence was unfavorable.

When a party is aware of a basis for claiming judicial bias, she should be required to bring that claim to the court's attention. Otherwise, parties have a strong incentive to save such claims as insurance against unfavorable rulings. Such a procedure is unfair to the judge, opposing parties, and the judicial system itself. If this court grants review of the defendant's claim of bias, it should also consider whether the claim can be raised in this fashion.

C. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' DISREGARD OF A STATUTE THAT SPECIFICALLY ALLOWS IMPOSITION OF THERAPUETIC COURT FEES ON INDIGENT DEFENDANTS.

Although this court should not review the decision to deny DOSA, it should review the Court of Appeals' reversal of drug court fees. That decision disregards a statute and increases the financial burden on local jurisdictions, rendering it less likely that drug courts will exist at all.

This case is squarely governed by RCW 2.30.030. That statute authorizes therapeutic courts, such as the drug court involved in this case. Such courts are to "incorporate the therapeutic court principles of best practices as recognized by state and national therapeutic court organizations in structuring a particular program." Among other things, such practices may include "[e]nsuring a sustainable program." RCW 2.30.030(4)(j).

The statute expressly addresses the imposition of fees on indigent participants: "Upon a showing of indigence under RCW 10.101.010, fees may be reduced or waived." RCW 2.30.030(5). The statute thus clearly indicates that fees *may* be imposed when a participant is indigent. It lies within the discretion of the court to impose the fees, reduce them, or waive them entirely. In doing so, the court can take into account the needs of that particular program and best practices for that kind of program.

There are obvious reasons that may explain why the legislature chose not to provide an automatic fee waiver for indigent program participants. To begin with, it is likely that *most* drug program participants will be indigent. Automatically waiving fees for them would usually mean that there would be no participant fees at all. This would increase the financial burden on local jurisdictions,

making it more difficult for them to establish or maintain such programs.

Automatic fee waivers may also conflict with best practices for therapeutic programs. It is well known that people tend to undervalue things that are "free." Moreover, if payment is excused for anyone who is terminated from the program, that practice would create a financial incentive for failure. These reasons counsel against any rigid rule, such as the one created by the Court of Appeals. Rather, the extent to which indigence should excuse payment is properly left for each judge to decide.

The Court of Appeals relied on the 2018 enactment concerning legal financial obligations. Laws of 2018, ch. 269. Chapter 269 amended several specific statutes dealing with specific types of obligations. In particular, it precluded imposition of several kinds of obligations on indigent defendants. Id. § 6 (costs), § 12 (appellate costs), § 16 (criminal conviction fee in courts of limited jurisdiction), § 17 (criminal filing fee). The legislature did not, however, amend RCW 2.30.030. Consequently, that statute remains unchanged: it authorizes courts to waive or reduce drug court fees for indigent participants, but it does not require such waiver.

The Court of Appeals nonetheless believed that the amendment in § 6 to RCW 10.01.160(3) "prohibit[ed] sentencing courts from imposing discretionary costs on indigent defendants." Slip op. at 15. There are two fundamental problems with this reasoning. First, RCW 10.01.160(3) does not refer to "discretionary costs." Rather, it deals with "costs." That term is specifically defined in the statute: "Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision." RCW 10.01.160(2). Drug court fees are not "costs" under this definition. Rather, they are a component of a therapeutic court program that is specifically authorized by a different statute.

Second, if Chapter 269 implicitly amended RCW 2.30.030, that would violate Const., art. 2, § 37: "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." RCW 2.30.030 is not set out at full length (or even mentioned) in Chapter 269. Consequently, it could not have been amended by that Chapter.

Article 2, § 37 has two purposes. One is to "avoid confusion, ambiguity, and uncertainty in the statutory law through the existence of separate and disconnected legislative provisions,

original and amendatory, scattered through different volumes or different portions of the same volume." Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 245, 11 P.3d 762 (2000). The other is to ensure that "legislators are aware of the nature and content of the law which is being amended and the effect of the amendment upon it." Id. at 246. Both of these purposes would be violated by an implicit amendment to RCW 2.30.030. That statute expressly gives courts discretion to impose therapeutic court fees on indigent participants. A person reading that statute would not know that another statute could be interpreted as taking away that discretion. Nor would legislators voting on Chapter 269 have any way to know that they might be making it more difficult to operate therapeutic courts by removing part of their funding.

Article 2, § 37 is not violated by an act that is "complete in itself, independent of prior act, and stands alone as the law on the particular subject of which it treats." The test for a complete act is whether "the scope of the rights or duties created or affected by the legislation action can be determined without referring to any other statute or enactment." Amalgated Transit Union, 142 Wn.2d at 246. Chapter 269, however, does not stand alone as the law governing legal financial obligations. Rather, it amends several statutes

dealing with specific kinds of assessments. Other kinds of assessments continue to be addressed by other statutes that were not amended.

In particular, a court's power to assess therapeutic court fees cannot be determined solely by reading Chapter 269. That issue must be determined by consulting another statute, RCW 2.30.030. Since Chapter 269, is neither complete of itself nor independent of other statutes, it cannot be construed as amending statutes that are not set forth in the chapter. Any such construction would violate Article 2, § 37.

Although the Court of Appeals decision is unpublished, that fact means less than it once did. Unpublished decisions can now be cited and "accorded such persuasive value as the court deems appropriate." GR 14.1(a). It is likely that a specific decision from the Court of Appeals will be highly persuasive to trial courts. The effect of the decision is to make it unlikely that drug court fees will be assessed in future cases.

The Court of Appeals has disrupted the carefully-crafted scheme for therapeutic courts. In place of the legislature's specific grant of judicial discretion, the court has substituted an arbitrary rule that no costs can be imposed against indigent defendants —

which is almost all of them. This creates an issue of substantial public interest that should be reviewed under RAP 13.4(b)(4).

The Court of Appeals' decision, however, goes even further. The court has created a broad rule that RCW 10.01.160 applies to all kinds of "discretionary costs." Such a rule is not justified by any language in that statute. If the statute did establish such a rule, it would be unconstitutional. It would be an attempt to amend other statutes without proper notice to the public or legislators, in violation of art. 2, § 37. The constitutional violation created by the Court of Appeals gives rise to a significant question of constitutional law that should be reviewed under RAP 13.4(b)(3).

V. CONCLUSION

This court should deny the defendant's petition for review. The court should grant the State's petition under RAP 13.4(b)(3) and (4). The decision of the Court of Appeals should be reversed insofar as it struck the drug court fees. In other respects, the decision should be affirmed.

Respectfully submitted on November 18, 2019.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, BRIA BEATRICE WALKER, Petitioner.	No. 97805-1 DECLARATION OF DOCUMENT FILING AND E-SERVICE

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The undersigned certifies that on the 18th day of November, 2019, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO PETITION FOR REVIEW

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 18th day of November, 2019, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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