No. 100858-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JACOB TIMOTHY CLEMENT

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Clement, No. 82476-7-I (March 21, 2022, unpublished).

C. STATEMENT OF THE CASE

On March 16, 2020, Jacob Clement held a knife to a man's neck on a downtown-Seattle street and robbed him. CP 3. The State charged him with first-degree robbery. CP 1.

Clement pleaded guilty to a reduced charge of second-degree robbery. CP 14-30. In doing so, Clement agreed to join in an agreed sentencing recommendation, which included asking the court to impose a low-end six months in jail, which he had already served, along with a mandatory $500 Victim Penalty Assessment (VPA) and a mandatory $100 DNA fee. CP 39-40; 3/17/21RP 12, 18. The superior court found Clement's guilty plea to be knowing, intelligent and voluntary. 3/17/21RP 16-17. At sentencing in the same hearing, the court

readily accepted the parties' recommended sentence and imposed the $500 VPA and $100 DNA fee as part of that joint recommendation. CP 7; 3/17/21RP 20.

D. ARGUMENT

RAP 13.4 governs review by the Washington Supreme Court "of a Court of Appeals decision terminating review…" It states in relevant part that "[a] petition for review will be accepted by the Supreme Court only":

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b); RAP 13.5A.

Clement argues review is warranted in this case under RAP 13.4. Clement's petition does not specify which subsection of the rule he is relying upon. Petition at 1, 36.

1. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE UNDERLYING CONSTITUTIONAL ISSUES BECAUSE CLEMENT INVITED ANY ERROR.

The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create, even when the alleged error involves constitutional rights. State v. Carson, 179 Wn. App. 961, 973, 320 P.3d 185 (2014). "The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal…" In re Pers. Restraint of Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014).

"In determining whether the invited error doctrine applies, [this Court has] considered whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it." Coggin, 182 Wn.2d at 119. Appellate

courts strictly enforce the invited error doctrine without regard to whether the error was intentional. State v. Ortiz-Triana, 193 Wn. App. 769, 777, 373 P.3d 335 (2016). This Court has previously found the doctrine applicable when "defendants were sentenced pursuant to plea bargains and later challenged their sentences on appeal." In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 312-13, 979 P.2d 417 (1999).

In this case, Clement made a knowing, intelligent and voluntary plea bargain. CP 39-40; 3/17/21RP 12. As part of his plea contract, he agreed the trial court should impose the VPA and DNA fee. CP 19, 39-40; RP 83. In pleading guilty, Clement was personally and specifically asked about the $100 DNA fee and $500 VPA and affirmed that he accepted those fees as part of an agreed recommendation to the sentencing court, i.e., Clement affirmatively asked the judge to impose a sentence that included those fees. 3/17/21RP 12. At sentencing, Clement asked the court to follow the agreed recommendation, which included those fees. CP 7; 3/17/21RP

20. Clement thus both affirmatively assented to the error and materially contributed to it. State v. Cooper, 63 Wn. App. 8, 14, 816 P.2d 734 (1991).

Moreover, Clement benefitted from the bargain. See Coggin, 182 Wn.2d at 119. In return for his plea and agreed sentencing recommendation, the State reduced the charge against him from first-degree robbery, a Class A felony, to second-degree robbery, a Class B felony, sparing him up to four years in prison.[1] By all relevant measures, Clement invited any error in the imposition of the VPA and DNA fee. Clement did not have to agree to the fees. Had Clement sought to contest the fees, however, the State would have been unlikely to agree to a resolution of the case. Because Clement elected to accept

[1] Clement had an offender score of one. CP 6. Second-degree robbery carries a seriousness level of four, creating a standard range of six-to-12 months. CP 6. First-degree robbery carries a seriousness level of nine, which would have created a standard range of 36 to 48 months. See 2020 Washington State Adult Sentencing Guidelines Manual, ver. 20201103, p. 432, https://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2020.pdf.

and ask for the fees in return for a significant benefit, any error was invited.

The court of appeals in this case, in affirming the constitutionality of the VPA and DNA fee on the merits, declined to find invited error. The reasoning was not sound. The court of appeals regarded Clement's plea agreement to those fees as "boilerplate" and concluded that Clement's agreed sentencing recommendation was thus not "some affirmative action" by Clement. Slip. op. at 2, fn 3. The court of appeals cited to this Court's opinion in State v. Weaver, 198 Wn.2d 459, 465, 496 P.3d 1183 (2021), but that case is inapt.

In Weaver, the State argued invited error as to a jury instruction, but this Court noted that "Weaver did not propose the challenged jury instruction," but instead "it was the prosecution that provided proposed jury instructions to the court." 198 Wn.2d at 465. That is very different from affirmatively asking a sentencing judge to impose fees as part of a joint and agreed sentencing recommendation upholding a

plea contract. Regardless of whether Clement's agreement to affirmatively ask the court to impose those fees was "boilerplate" or "mandatory," it was still part of the contractual agreement Clement made knowingly, intelligently and voluntarily in return for the benefit of having his charge significantly reduced and being immediately freed from jail instead of going to prison. 3/17/21RP 19. Clement should be held to that agreement.

This Court has long adhered to the doctrine of invited error in cases in which defendants were sentenced pursuant to plea bargains and later challenged their sentences on appeal. Breedlove, 138 Wn.2d at 312. In Breedlove, the defendant "agreed to the imposition of a particular sentence in exchange for reduced charges and a presumably shorter sentence," and thus invited the error he claimed on appeal. Id. at 313. That the VPA and DNA fee were "boilerplate" or "mandatory" in Clement's case does not make a difference. The imposition of his sentence was "mandatory" too, and part of the bargain. If

the constitutionality of these fees were truly important to Clement, he could have challenged them instead of asking for them. But he affirmatively sought them, yet now complains they are unconstitutional. This Court should not accept review of a case where the defendant affirmatively sought certain fees in exchange for benefits of a plea bargain.

This Court, in Breedlove and other cases, has also long held that defendants can waive constitutional and statutory rights in exchange for the benefits of plea agreements, precluding them from complaining about those rights on appeal. 138 Wn.2d 298 at 311. These doctrines make sense as a basic issue of fairness. The State received benefits from Clement's plea agreement as well, one of which was the understanding that he would not appeal the VPA and DNA fee to the highest court in the state.[2]

[2] Division One recently addressed the invited error doctrine in State v. Tatum, __ Wn. App. 2d __, __ P.3d __, No. 82900-9, 2022 WL 3151840 (August 8, 2022), where it held that "Tatum's treatment of the issue in front of the trial court was

It is "well established policy" in Washington that courts should avoid addressing constitutional issues if the case can be resolved on other grounds. State v. Speaks, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992); Community Telecable of Seattle, Inc. v. City of Seattle, Dept. of Executive Admin., 164 Wn.2d 35, 41, 186 P.3d 1032 (2008). Because this case falls under the invited error doctrine, this Court would not reach Clement's substantive argument. His petition is thus a poor vehicle to address the abstract constitutional issues presented in his petition.

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more akin to failure to object to a potential error than affirmative invitation of one." Tatum is distinguishable because the defendant was being *re-sentenced*, and the court's reasoning was a direct result of that procedural posture. While Tatum had agreed to the imposition of the $500 VPA at his original sentence, this invitation to error was vitiated upon re-sentencing *de novo*, where counsel merely failed to object. Id. at *2 ("But this appeal arises out of Tatum's resentencing, not his original sentencing. The State, by focusing exclusively on that original proceeding, has not met its burden").

2. THIS CASE IS A POOR VEHICLE TO ADDRESS THE VPA AND DNA FEE BECAUSE CLEMENT'S CASE AND HIS PETITION DO NOT FULLY ADDRESS THE RELEVANT CASE LAW.

In this case below, Clement conspicuously failed to address Washington state precedent on the issue of whether the VPA and DNA fee are partially punitive, which is essential to a claim of excessive fines. See Brief of Appellant; Reply Brief of Appellant. His abstract constitutional arguments almost exclusively focused on whether the VPA and DNA fees were excessively harsh or unfair to indigent defendants, without discussing cases that have held the VPA and DNA fee to be constitutional and non-punitive.

The court of appeals in Clement's case held that the VPA is not partially punitive and thus does not violate the excessive fines clause.[3] It relied on court of appeals precedent, State v.

[3] The Court of Appeals referred to the fee as Crime Victim Assessment (CVA), noting that courts use both CVA and VPA to refer to the same fee.

Mathers, 193 Wn. App. 913, 920, 376 P.3d 1163, rev. denied, 186 Wn.2d 1015 (2016) ("The VPA fee is also not punitive in nature.") and this Court's opinion in State v. Humphrey, 139 Wn.2d 53, 62, 983 P.2d 1118 (1999) (VPA does not constitute punishment for purposes of ex post facto determination).

While the court of appeals' conclusions here were correct, it did not consider State v. Curry, 118 Wn.2d 911, 29 P.2d 166, 168 (1992), which would have bolstered its conclusion regarding the VPA. In Curry, this Court held "that the victim penalty assessment is neither unconstitutional on its face nor as applied to indigent defendants." Id. at 169. Like Clement, the defendants in Curry challenged the imposition of the mandatory victim penalty assessment. Id. This Court found the operative statute constitutional because "there are sufficient safeguards … to prevent imprisonment of indigent defendants … no defendant will be incarcerated for [their] inability to pay … unless the violation is willful." Id. at 169.

Subsequent to the court of appeals' unpublished opinion in this case, the court of appeals published Tatum. __ Wn. App. 2d __, __ P.3d __, No. 82900-9, 2022 WL 3151840 (August 8, 2022). In Tatum, Division One again rejected an excessive fines challenge to the VPA and the DNA fee but relied exclusively on Curry as to the VPA. Tatum, Slip. op. at 6-7.

Moreover, whereas the court of appeals in Clement's case declined to determine whether our state's excessive fines clause is more protective than the Eighth Amendment (because Clement inadequately briefed the issue), the court in Tatum underwent such an analysis and concluded that the state and federal constitutions are co-extensive on this point. Tatum, Slip op. at 8-10.

Consequently, Clement's case would be an insufficient vehicle to properly address the excessive fines clause as it applies to the VPA. Clement's petition for review, like his briefing below, does not mention Curry, and barely mentions

Humphrey or Mathers, the other operative cases on this issue, so it would not be apt to suddenly have these arguments in Clement's case for the first time before the Supreme Court.

Similarly, as for the DNA fee, the court of appeals in Clement's case relied on a Division One case, State v. Brewster, 152 Wn. App 856, 861, 218 P.3d 249 (2009), rev. denied, 168 Wn.2d 1030 (2010) ("The DNA collection fee is not punitive.") and a Division Two case, Mathers, 193 Wn. App. at 920 (DNA fee serves to fund the collection of samples and the maintenance and operation of DNA databases and "does not have a punitive purpose"). Clement's briefing below did not even mention these cases. His petition for review only tepidly argues that this Court should upend these two settled cases from two divisions of the court of appeals, neither of which this Court chose to review. Moreover, the court of appeals has now published Tatum, establishing again that the VPA and DNA fee are constitutional as a matter of precedent. These issues have been considered repeatedly and the outcomes

have never differed. Clement cannot show any conflict among the courts or a compelling legal reason that this Court needs to wade into this issue.

Clement's argument that Mathers and Brewster are in conflict with other cases is not compelling. First, his petition relies on this Court's more recent decision in State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015), which allowed a pre-collection challenge to LFO's. However, Clement largely glosses over the fact that Blazina analyzed *discretionary* LFO's. Id. at 834. All three divisions of the Court of Appeals have repeatedly, and correctly, concluded that Blazina's analysis does not apply to *mandatory* LFO's. Mathers, 193 Wn. App. at 921; State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016); State v. Shelton, 194 Wn. App. 660, 673, 378 P.3d 230 (2016).

Timbs v. Indiana, __ U.S. __, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019), does not compel a different result. Timbs involved the civil forfeiture of a legitimately purchased vehicle

worth $42,000, which was "more than four times the maximum … fine." Id. But Timbs simply held that the Eighth Amendment's Excessive Fines clause "is…incorporated by the Due Process Clause of the Fourteenth Amendment." Id. at 686. It did not even hold that Indiana's action was unconstitutional. Id. at 687 ("The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action…"). Rather, the Court simply determined that the Eighth Amendment provided the appropriate analytical framework upon remand. See id. at 689-91 ("The State of Indiana…argues that the Clause does not apply to its use of civil *in rem* forfeitures…").

The State does not dispute that it is bound by the Eighth Amendment. Nothing in Timbs, however, suggests a $100 or $500 mandatory fee are unconstitutionally oppressive, even for an indigent person. This is especially true where, as in

Washington, the fees do not accrue interest and failing to pay due to indigence cannot result in any penalty. RCW 10.82.090.

This Court's decision in City of Seattle v. Long, 198 Wn.2d 136, 493 P.3d 94 (2021), also does not compel review. The plaintiff in Long lived out of his truck, which was impounded for being illegally parked on city property. Id. at 143. The municipal court upheld an approximately $550 fine and required Long to pay $50 per month. Id. at 143. Long challenged the impound fees as unconstitutionally excessive. Id. at 161.[4]

This Court concluded that "the impoundment of Long's truck was partially punitive and constitutes a fine." Id. at 166. It then concluded the fine was unconstitutionally excessive as applied to Long because he was indigent and the parking offense at issue was *de minimis*. Id. at 173.

[4] The Court also ruled on challenges under the Homestead Act and article I, section 7, which are not relevant to Clement's petition. Long, 198 Wn.2d at 145.

Long was a highly distinguishable civil matter. Unlike Clement, Long was "subject to additional penalties in the form of late charges and collection efforts." Id. at 173-74. The impoundment also impacted Long's shelter and ability to work, prompting the Court's statement that "[t]he excessive fines clause prohibits the extraction of payment as punishment for some offenses that would deprive a person of his or her livelihood." Id. at 176-77. In contrast, imposing the VPA and DNA fee does not deprive Clement of shelter or the ability to work.[5]

Finally, nothing *required* the city to call a tow truck – impounding Long's vehicle was a discretionary act taken by the city. See SMC 11.30.060 ("A vehicle…**may** be impounded…") (emphasis added). Requiring courts to assess a

[5] The record reflects that Clement was eager to be released from jail so he could move to Florida to reside with his family there. 3/17/21RP 18-19.

person's ability to pay discretionary fines is consistent with Blazina, *supra*, which the State does not challenge.

Our appellate courts have repeatedly considered the constitutionality of the VPA and DNA fee and have never differed in result. None of the cases cited by Clement suggest a mandatory fee is unconstitutional when it does not affect the defendant's shelter or livelihood, there is no penalty for failing to pay due to indigence, and where interest does not accrue. Review is not required. Even if it were, Clement's case is a poor vehicle for these issues.

E. CONCLUSION

The State respectfully requests that Clement's petition for review be denied.

This document contains 2,956 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 25th day of August, 2022.

Respectfully submitted,

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