NO. 47523-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANDY P. MATHERS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

VPA and DNA fees are subject to the same evaluation for an ability to pay as other LFOs

Judge Evans recognized his discretion and struck the criminal filing fee, incarceration fee, and fees for court appointed counsel, but ordered Mr. Mathers to pay the Victim's Penalty Assessment of $500 and the DNA collection fee of $100 despite his acknowledged indigence. CP 24-25; RP 10. The prosecutor argues this was mandated by statute citing earlier opinions in Lundy and Kuster,[1] but fails to explain why those opinions still control following "the doctrinal tectonics"[2] of State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). SRB at 2-3 citing State v. Lundy, 176 Wn.App. at 102-03. Statutes, court rules, and principles of due process and equal protection coalesce to require the sentencing court consider indigence in the imposition of LFOs on an impoverished defendant.

The Legislature plainly mandated sentencing courts "not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The Supreme Court has in turn concluded

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[1] State v. Lundy, 176 Wn.App. 96, 103, 308 P.3d 755 (2013) and State v. Kuster, 175 Wn.App. 420, 306 P.3d 1022 (2013), citing RCW 7.68.035(1)(a) and RCW 43.43.7541.

[2] See Bjorgen, J., dissenting, in State v. Lyle, 188 Wn.App. 848, 854-55, 355 P.3d 327 (2015).

that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." Blazina, 182 Wn.2d at 830.

This requirement is based on sound public policy because imposing LFOs on indigent defendants causes problems including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." Id. at 835. The failure to consider a defendant's ability to pay also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. See RCW 9.94A.010.

The clear implication of Blazina was that the VPA and DNA statutes must be read in tandem with RCW 10.01.160, just like other LFOs, requiring courts inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. Blazina, 182 Wn.2d at 830, 838. Read together, these statutes only mandate imposition of the VPA and DNA fees upon those who can pay, and require that they not be ordered for indigent defendants such as Mr. Mathers.

1. The statutory framework supports broad discretion.

Basic tenets of statutory construction dictate that when the legislature means to depart from a process, it makes the departure clear by the use of different language. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753 (emphasis added). This language is absent from the VPA and DNA statutes, indicating that sentencing courts are to consider ability to pay in those contexts. See State v. Conover, 183 Wn.2d 706, __, 355 P.3d 1093, 1097 (2015) (the legislature's choice of different language in different provisions indicates different legislative intent).[3]

To that end, the Court in Blazina repeatedly described its holding as applying to "LFOs," not just to a particular cost. See Blazina, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a

[3] The Legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. Compare RCW 43.43.7541 (2002) with RCW 43.43.7541 (2008). But the Legislature did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the Legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160 (3).

defendant's current and future ability to pay before it imposes LFOs."); id. at 839 ("We hold that RCW 10.01.160(3) requires the record reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."). When listing the LFOs imposed on the two defendants at issue, the court cited, *inter alia*, the same LFOs Mr. Mathers challenges here: the VPA and DNA fees. Blazina, at 831-32. If the Court were limiting its decision to only a few of the LFOs imposed on those defendants, it presumably would have made such limitations clear.

In fact, it does not appear that the Supreme Court has ever held that the DNA fee (or the criminal filing fee) is exempt from the ability-to-pay inquiry. Although the courts in Lundy and Kuster did, they did not have the benefit of Blazina, which now controls. See Lundy, 176 Wn.App. at 102-03 and Blazina, 182 Wn.2d at 830-39.

2. Court rules guide the inquiry to avoid constitutional infirmity.

Similarly, GR 34, which also supports Mr. Mathers' position that broad application of RCW 10.01.060 is appropriate, was not addressed by the respondent. GR 34 provides in part:

> Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's

> ability to secure access to judicial relief from a judicial officer in the applicable court.

GR 34(a).

The Supreme Court's application of GR 34(a) in Jafar v. Webb, 177 Wn.2d 520, 303 P.3d 1042 (2013),[4] illustrates that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. Id. at 527-30. This is required because otherwise if courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. Id. at 528. A contrary reading "would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees." Id. at 529.

Although GR 34 and Jafar deal specifically with access to courts for indigent civil litigants, the same principles apply here. See e.g. the Supreme Court's discussion of GR 34 in Blazina. 182 Wn.2d at 838.

To construe the VPA and DNA statutes as precluding consideration of ability to pay would raise additional constitutional

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[4] There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. Id. at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay $50 within 90 days. Id. at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. Id. This was so even though the statues at issue, like those at issue here, appear to mandate that the fees and costs "shall" be imposed. See RCW 36.18.020.

concerns because holding that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. See U.S. Const. amend XIV; Const. art. I, sec. 3; James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) (holding Kansas statue violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors).

Treating the VPA and DNA fees costs at issue here as mandatory and non-waivable is also suspect under Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). There the Supreme Court upheld an Oregon costs statute only after noting it required consideration of the ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. Fuller, at 45-46. Thus, under Fuller, the Fourteenth Amendment is satisfied only if courts read RCW 10.01.160(3) in tandem with the more specific costs and fee statutes, by considering the ability to pay before imposing LFOs, including VPA and DNA fees.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. See Nielsen v. Washington State

Dep't of Licensing, 177 Wn.App. 45, 309 P.3d 1221 (2013) (citing the test). While the State may have a legitimate interesting in collecting costs and fees, imposing costs and fees on impoverished people like Mr. Mathers is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." Blazina, 182 Wn.2d at 837. Imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. See RCW 9.94A.010; Blazina, 182 Wn.2d at 837. For this reason, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

3. Older caselaw upon which the State relies no longer controls.

Lundy and Kuster rely upon the Supreme Court's opinion in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992). Although the Supreme Court did the state that the VPA was mandatory notwithstanding the defendant's inability to pay, Curry addressed an argument that the VPA itself was unconstitutional. See 118 Wn.2d at 917-18. Curry simply assumed that the statute mandated imposition of the VPA on indigent and solvent defendants alike. "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the

statute to waive the penalty for indigent defendants." Id. 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not. In any event, Blazina must supersede Curry to the extent they are inconsistent.

In Blank the Court rejected an argument that the constitution requires consideration of ability to pay at the time appellate costs are imposed, however, subsequent developments have clearly undercut this analysis. See State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997). The Blank Court noted that due process prohibits imprisoning people for inability to pay fines, but assumed that LFOs could still be imposed on poor people because "incarceration would result only if failure to pay was willful" and no due to indigence. Id. at 241. Unfortunately, this assumption was not borne out.

Studies post-dating Blank indicate that indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs.[5] In other words, the risk of unconstitutional imprisonment for poverty is very real.

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[5] Katherine A. Beckett, Alexes M. Harris & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008) (citing accounts of

Thus, it has become clear since Curry and Blank that courts must consider ability to pay at sentencing in order to avoid due process and equal protection problems.

This Court should, therefore, reverse and remand with instructions to strike the VPA and DNA fees or for further proceedings as appropriate. Mr. Mathers plainly presented his objection to the sentencing court, the court was aware he was indigent and waived other presumptively discretionary costs and fees. Where the court mistakenly believed was required to impose the VPA and DNA fees he is entitled to a new hearing. RP 10. Blazina mandated that sentencing courts consider ability to pay before imposing all LFOs. 182 Wn.2d at 838.

Instead of this individualized inquiry, the trial court made no inquiry at all before imposing the VPA and DNA fees, apparently believing itself bound by Lundy or the isolated statutory language which for the reasons outlined above, is no longer true. As a result, the sentencing court's failure to conduct the necessary inquiry on the record and mistake regarding the scope of its authority constitutes an abuse of discretion for which Mr. Mathers is entitled to relief. State ex

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indigent defendants jailed for inability to pay). Available at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

rel Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1983) (discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons).

B. CONCLUSION

For the reasons stated herein, Mr. Mathers asks this court to reverse his sentence and remand for further proceedings.

Respectfully submitted this 4th day of November 2015.

s/ David Donnan

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Attorneys for Appellant

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	)	
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	)	
ANDY MATHERS,	)	
	)	
APPELLANT.	)	

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