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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. RCW 43.43.7541, RCW 7.68.035 and RCW 36.18.020(2)(h) violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay.

3. The trial court erred in imposing Legal Financial Obligations (LFOs) by failing to comply with RCW 10.01.130(3).

Issues Pertaining to Assignments of Error

1. Statutes mandate trial courts order LFOs even when the defendant has no ability to pay. Do the statutes violate substantive due process when applied to defendants who do not have the ability or the likely future ability to pay the fees?

2. Where the court imposed so-called mandatory LFOs without any consideration of his ability to pay should this Court remand with instructions to strike the LFOs and undertake a proper inquiry?

B. STATEMENT OF THE CASE

On September 30, 2013, Wyatt Seward was charged by information filed in the Thurston County Superior Court with one count of second degree assault. CP 4. The information alleged the aggravating circumstance that the named victim's injuries "substantially exceeded the level of bodily harm necessary to satisfy the elements" of second degree assault as charged. Id.

The State filed its First Amended Information on November 13, 2014. CP 5. The information charged Seward with first degree assault, and in the alternative second degree assault with the same aggravating factor that was initially charged. Id.

On March 6, 2015 the Sate filed a Second Amended Information. CP 17. The information charged Seward only with second degree assault with the same aggravating circumstance that was initially charged and charged in the alternative in the first amended information. Id.

That same day (March 6, 2015) a plea hearing was held. At the hearing the court reviewed Seward's plea statement, also filed March 6, 2015. CP 6-15; RP 5-6 (3/6/2015). In the plea statement Seward indicated he was entering an "Alford"[1] plea to the charge in the Second Amended Information. CP 13. At the plea hearing Seward stated he understood that if the court accepted his "Alford" plea he could be found guilty of charged offense. RP 8 (3/6/2015). Seward also stipulated to the probable cause statement, and agreed with the State's rendition of the victim's injuries. RP 9-10 (3/6/2015). The court found Seward guilty as charged. RP 11 (3/6/2015).

[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

A sentencing hearing was held on May 1, 2015. The State argued for an exceptional sentence of 120 months based on the aggravating factor that the victim's injuries exceeded the injury necessary to establish second degree assault, and that he was on community custody at the time of the offense. RP 4-9 (5/1/2015). Defense counsel indicated Seward entered the plea to avoid the possibility of a conviction on a greater charge. RP 10-13 (5/1/2015).

The court imposed an exceptional sentence of 120 months based on extreme nature of the victim's injuries. RP 14 (5/1/2015); CP 28. The court ordered Seward to pay the following legal financial obligations (LFOs): (1) $200 criminal filing fee; (2) $500 victim's assessment (VPA) fee; and (3) $100 DNA collection fee. CP 20-21. The court did not conduct an inquiry on Seward's ability to pay those financial obligations. The court also ordered restitution in the amount of $28,563.84. CP 41-42.

C. ARGUMENTS

1. 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 LFOS.

RCW 9.94A.760 permits the trial court to impose costs authorized by law when sentencing an offender for a felony. RCW 43.43.7541 authorizes the collection of a $100 DNA-collection fee. RCW 7.68.035

provides that a $500 VPA shall be imposed upon anyone who has been found guilty in a Washington Superior Court. RCW 36.18.020(2)(h) directs that following a conviction or guilty plea a defendant shall be liable for a $200 filing fee. However, these statutes violate substantive due process when applied to defendants who are not shown to have the ability or likely future ability to pay the fine. This Court should find the trial court erred in imposing these fees without first determining Seward's ability to pay.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV, § 1: Wash. Const. art. I, § 3. The due process clause of the Fourteenth Amendment confers both procedural and substantive protections. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures. Id. at 218 19. It requires that deprivations of life, liberty, or property be substantively reasonable; in other words, such deprivations are constitutionally infirm if not supported by some legitimate justification. Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221, 1225 (2013) (citing

Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625 26 (1992)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130, 1135 (2013). Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is lighter under this standard, the standard is not meaningless. Indeed, the United States Supreme Court has cautioned the rational basis test is not a toothless one. Mathews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional. DeYoung v. Providence Med. Ctr., 136 Wn. 2d 136, 144, 960 P.2d 919 (1998) (determining the statute at issue did not survive rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

RCW 43.43.7541 mandates all felony defendants pay the DNA-collection fee. This ostensibly serves the State s interest to fund the collection, analysis, and retention of a convicted offender s DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752-7541. This is a legitimate interest. However, the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

As for RCW 7.68.035, it mandates that all convicted defendants pay a $500 VPA. This ostensibly serves the State's interest in funding comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes. RCW 7.68.035(4). Again, while this may be a legitimate interest, there is nothing reasonable about requiring sentencing courts to impose the VPA upon defendants regardless of whether they have the ability or likely future ability to pay.

And, RCW 36.18.020(2)(h) ostensibly serves the State's interest in compensating court clerks for their official services. RCW 36.18.020(2). The imposition of a fee for that purpose is not reasonable where defendants do not have the ability or likely future ability to pay.

Imposing these fees on defendants who are unable to pay does not further the State s interest in funding DNA collection, victim-focused programs or clerk's fees. As the Washington Supreme Court recently

emphasized, the state cannot collect money from defendants who cannot pay. State v. Blazina, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). There is no legitimate economic incentive served in imposing these LFOs.

Likewise, the State's interest in enhancing offender accountability is also not served by requiring a defendant to pay mandatory LFOs when he does not have the ability to do so. In order to foster accountability, a sentencing condition must be something that is achievable in the first place. If it is not, the condition actually undermines efforts to hold a defendant answerable.

The Supreme Court also recognized that the State's interest in deterring crime via enforced LFOs is actually undermined when LFOs are imposed on people who do not have the ability to pay. Id. This is because imposing LFOs upon a person who does not have the ability to pay actually increase[s] the chances of recidivism. Id. at 836-37 (citing relevant studies and reports).

Likewise, the State's interest in uniform sentencing is not served by imposing mandatory LFOs on those who do not have the ability to pay. This is because defendants who cannot pay are subject to an undeterminable length of involvement with the criminal justice system and often end up paying considerably more than the original LFOs imposed

(due to interest and collection fees), and in turn, considerably more than their wealthier counterparts. Id. at 836-37.

When applied to indigent defendants, not only do the so-called mandatory fees fail to further the State s interest, they are pointless. It is irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue appellant's due process challenge is foreclosed by the Washington Supreme Court s rulings in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), which conclude due process was not violated with the imposition of the VPA regardless of whether there was an ability-to-pay inquiry. However, the constitutional principles at issue in those cases were considerably different than those implicated here.

Steward's constitutional challenge to the statutes is fundamentally different from that raised in Curry. In Curry, 118 Wn.2d at 917, the defendants challenged the constitutionality of a mandatory LFO order on the ground that its enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they are unable to pay LFOs. Hence, Curry s constitutional challenge was grounded in the well-established constitutional principle that due process does not tolerate the incarceration of people simply because they are poor. Id.

By contrast, Seward asserts there is no legitimate state interest in requiring sentencing courts to impose a mandatory fees without the State first establishing the defendant's ability to pay. In other words, rather than challenging the constitutionality of the LFO statute based on the fundamental unfairness of its ultimate enforcement potential (as was the case in Curry and Blank), Seward challenges the statute as an unconstitutional exercise of the State s regulatory power that is irrational when applied to defendants who have not been shown to have the ability to pay. As such, the holdings in Curry and Blank do not control.

The State s reliance on Curry and Blank would also be misplaced because when those cases are read carefully and considered in the light of the realities of Washington's current LFO collection scheme, they actually support Seward's position that an ability-to-pay inquiry must occur at the time that any LFO is imposed. Indeed, after Blazina's recognition of the Washington State's broken LFO system, 182 Wn.2d at 835, the Washington Supreme Court's holdings in Curry and Blank must be revisited in the context of Washington s current LFO scheme.

Currently, Washington's laws set forth an elaborate and aggressive collections process which includes the immediate assessment of interest, enforced collections via wage garnishment, payroll deductions, and wage assignments (which include further penalties), and potential arrest. It is a

vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See, Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay).

Washington's legislatively sanctioned debt cycle does not conform to the necessary constitutional safeguards established in Blank. In Blank, the Washington Supreme Court held that monetary assessments which are mandatory *may* be imposed against defendants without a per se constitutional violation. Blank, 131 Wn.2d at 240 (emphasis added). The Court reasoned that fundamental fairness concerns only arise if the government seeks to enforce collection of the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (referring to Curry, 118 Wn.2d at 917-18).

The Washington Supreme Court also noted, however, that the constitutionality of Washington's LFO statutes was dependent on trial courts conducting an ability-to-pay inquiry at certain key times: (1) the point of collection and when sanctions are sought for nonpayment; (2) if the State seeks to impose some additional penalty for failure to pay; and

(3) before enforced collection or any sanction is imposed for nonpayment. Id. at 242

Given Washington s current LFO collection scheme, the only way to regularly comply with Blank's safeguards is for sentencing courts to conduct a meaningful ability-to-pay inquiry at the time the fee is imposed. Although Blank found that prior case law suggests that such an inquiry is not required at sentencing, the Court was not confronted with the realities of the State's current collection scheme in that case. Washington's LFO collection scheme provides for immediate enforced collection processes, penalties, and sanctions. Consequently, Blank supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing when the VPA, DNA-collection fee, and filing fee are imposed.

First, under RCW 10.82.090(1), LFOs accrue interest at a compounding rate of 12 percent an astounding level given the historically low interests rates of the last several years. Blazina, 182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013). Interest on LFOs accrues from the date of judgment. RCW 10.82.090. This sanction has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what

might be decades. See, Harris, supra at 1776-77 (explaining those who make regular payments of $50 a month toward a typical legal debt will remain in arrears 30 years later). Yet, there is no requirement for the court to have conducted an inquiry into ability to pay before interest is assessed.

Washington law also permits courts to order a payroll deduction. RCW 9.94A.760(3). This can be done immediately upon sentencing. RCW 9. 94A.760(3). Beyond the actual deduction to cover the outstanding LFO payment, employers are authorized to deduct other fees from the employee's earnings. RCW 9.94A.7604(4). This constitutes an enforced collection process with an additional sanction. Yet, there is no provision requiring an ability-to-pay inquiry before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; see also, Harris, supra, at 1778 (providing examples of wage garnishment as an enforcement mechanism). As for garnishment, this enforced collection may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment is a collection mechanism that may be used within 30 days of a defendant s failure to pay the monthly sum ordered. RCW 9.94A.7701. And, employers are permitted to charge a processing fee. RCW 9.94A.7705. Contrary to

Blank, however, there are no provisions requiring courts to conduct an ability-to-pay inquiry prior to the use of these enforced collection mechanisms.

Washington law also permits courts to use collections agencies or county collection services to actively collect LFOs. RCW 36.18.190. The defendant pays any penalties or additional fees these agencies decide to assess. Id. There is nothing in the statute that prohibits the courts from using collections services immediately after sentencing. Yet, there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement. Id.

These examples show that under Washington's currently broken LFO system, there are many instances where the Legislature provides for enforced collection and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms may be used immediately after the judgment and sentence is entered. If the constitutional requirements in Curry and Blank are to be met, trial courts must conduct a thorough ability-to-pay inquiry at the time of sentencing when the LFOs are imposed. Any reliance on holdings of Curry and Blank by the State would miss the mark because Washington s current LFO system does not meet the constitutional safeguards mandated in those holdings.

In sum. Washington s LFO system is broken in part because the courts have not followed through with the constitutional requirement that LFOs only be imposed upon those that have the ability or likely ability to pay. It is not rational to impose a fee upon a person who does not have the ability to pay. Hence, when applied to defendants such as Seward who do not have the ability to pay LFOs, the mandatory imposition of the DNA-collection fee and VPA does not reasonably relate to the State interests served by those statutes. Consequently, this Court should find RCW 43.43.7541, RCW 7.68.035 and RCW 36.18.020(2)(h) violate substantive due process and vacate the LFO order.

2. THE LFO ORDER SHOULD BE STRICKEN BECAUSE THE TRIAL COURT FAILED TO COMPLY WITH RCW 10.01.160(3).

RCW 10.01.160(3) permits the sentencing court to order an offender to pay LFOs, but only if the trial court has first considered his individual financial circumstances and concluded he has the ability.[2] Here, the trial court imposed legal financial obligations with no analysis of Seward's ability to pay. The judgment and sentence includes a boilerplate finding that the defendant has the present or likely future ability to pay the

[2] RCW 10.01.160(3) provides: "The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose."

legal financial obligation imposed. Yet, the parties and the court did not discuss this finding. As such, the trial court did not comply with RCW 10.01.160(3) and the LFO order should be stricken.

The Supreme Court recently emphasized: 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 827. There is good reason for this requirement. Imposing LFOs on indigent defendants causes significant problems, including increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. Id. at 835. LFOs accrue interest at a rate of 12%, so even a person who manages to pay $25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. Id. at 836. In turn, this causes background checks to reveal an active record, producing serious negative consequences on employment, on housing, and on finances. Id. at 837. All of these problems lead to increased recidivism. Id. A failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. See RCW 9. 94A.010.

The State may argue that the court properly imposed these costs without regard to Seward's ability to pay because these are so-called mandatory LFOs and the authorizing statutes use the word shall or must. RCW 7. 68.035; RCW 43.43.7541; State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). However, these statutes must be read in tandem with RCW 10.01.160(3), which, as explained above, requires courts to inquire about a defendant s financial status and refrain from imposing costs on those who cannot pay. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants. See, State v. Jones, 172 Wn.2d 236, 243, 257 P.3d 616 (2011) (statutes must be read together to achieve a harmonious total statutory scheme).

When the legislature means to depart from a presumptive process, it makes the departure clear. 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. This clause is absent from other LFO 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 a different legislative intent). Although the legislature amended 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), it did not add a clause precluding waiver of the fee for those who cannot pay it. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

In response, the State may argue that this issue has been waived and should not be considered for the first time on appeal. Even though defense counsel did not object to the imposition of these LFOs below, this Court has the discretion to reach this error consistent with RAP 2.5. Blazina, 344 P.3d at 681. As shown below, given the trial court s failure to conduct any semblance of an inquiry into Sward's ability to pay and given his indigent status, this Court should exercise its discretion under RAP 2.5(a) and consider the issue.

First, Blazina provides compelling policy reasons why trial courts must undertake a meaningful inquiry into an indigent defendant s ability to pay at the time of sentencing and why, if that is not done, the problem should be addressed on direct appeal. The Supreme Court discussed in detail how erroneously imposed LFOs haunt those who cannot pay, not only impacting their ability to successfully exit the criminal justice system but also limiting their employment, housing and financial prospects for

many years beyond their original sentence. Blazina, 344 P.3d at 683-85. Considering these circumstances, the Supreme Court concluded that indigent defendants who are saddled with wrongly imposed LFOs have many reentry difficulties that ultimately work against the State s interest in reducing recidivism. Id.

As a matter of public policy, courts must do more to make sure improperly imposed LFOs are quickly corrected. As Blazina shows, the remission process is not an effective vehicle to alleviate the harsh realities recognized in that decision. Instead, correction upon remand is a far more reasonable approach from a public policy standpoint.

Second, there is a practical reason why appellate courts should exercise discretion and consider, on direct appeal, whether the trial court complied with RCW 10.01.160(3). As the Supreme Court recognized in Blazina, the state cannot collect money from defendants who cannot pay. Id. at 684. There is nothing reasonable about requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal. Remanding back to the same sentencing judge to make the ability-to-pay inquiry is more efficient, saving the defendant and the State from a wasted layer of administrative and judicial process.

The State may also argue that Seward agreed to the imposition of the LFOs in his guilty plea statement. In the guilty plea statement it states in part, "...the judge will order me to pay $500.00 as a victim's compensation fund assessment and any mandatory fines or penalties that apply to my case." CP 7 (6(e)). That argument would miss the mark. That part of the statement references the LFO statutes at issue. It is not an express waiver of the right to have the court determine his ability-to-pay those costs.

Finally, the erroneous ability-to-pay finding entered here is representative of a systemic problem that requires a systemic response. The Supreme Court has held that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before a court may impose legal financial obligations. Id. at 685. This did not happen.

In sum, RCW 10.01.160(3) requires that the trial court conduct an ability-to-pay inquiry for all LFOs. While other statutes purport to impose mandatory fees, these must be harmonized with RCW 10.01.160(3). As such, unless the statute specifically says that an LFO must be paid regardless of a defendant s financial situation, there must be an ability-to-pay inquiry. Consequently, this Court should exercise its discretion, consider the issue, and remand with instructions that the sentencing court

conduct a meaningful, on-the-record inquiry into Seward's ability to pay LFOs.

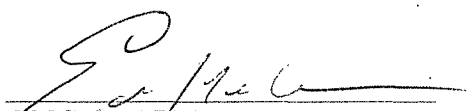
D. CONCLUSION

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

DATED this 29 day of January, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DIVISION TWO

STATE OF WASHINGTON	)	
Appellant,	)	
v.	)	COA NO. 47581-2-II
WYATT SEWARD,	)	
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLAT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WYATT SEWARD
DOC NO. 785972
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JANUARY 2016.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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