No. 47581-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WYATT TAYLOR SEWARD,

Appellant.

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

The Honorable Gary R. Tabor, Judge
The Honorable Anne Hirsch, Judge
Cause No. 13-1-01458-4

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Decisions Of The Court Of Appeals

U.S. Supreme Court Decisions

Federal Court Decisions

Statutes and Rules

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a defendant who does not object in the trial court to the imposition of mandatory legal financial obligations has suffered a manifest constitutional error, allowing him to raise for the first time on appeal a challenge to the imposition of such costs without the trial court making an individualized finding of ability to pay.

2. Whether a defendant who has not established that he is constitutionally indigent has standing to claim that legal financial obligations imposed by statute violate substantive due process as applied to indigent defendants.

3. Whether the imposition of mandatory legal financial obligations at sentencing, in the absence of an individualized finding of ability to pay, violates substantive due process.

4. Whether the trial court was required to make an individualized inquiry into Seward's ability to pay mandatory financial obligations.

B. STATEMENT OF THE CASE.

The State accepts Seward's statement of the case.

C. ARGUMENT.

Seward raises, for the first time on appeal, a challenge to the statutorily required legal financial obligations (LFOs) that were imposed by the sentencing court. Those LFOs include a $500 victim assessment (RCW 7.68.035), a $200 filing fee (RCW 36.18.020(2)(h)), and a $100 DNA collection fee (RCW 43.43.7541). CP 20-21. He claims that the statutes requiring those LFOs violate substantive due process when applied to defendants who have not been shown to have the ability to pay. Without

citation to authority, his argument places the burden on the State to prove a defendant is not indigent, rather than on the defendant to prove that he is.[1] Appellant's Opening Brief at 4, 9.

Substantive due process protects against arbitrary or capricious government action. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006). The United States Constitution, Amendments V and XIV, as well as the Washington Constitution, art. 1, § 3, provide that no person may be deprived of life, liberty, or property without due process of law. The state and federal due process clauses are coextensive; the state Constitution offers no greater protection. State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009). Substantive due process requires that deprivations of property be substantively reasonable, supported by legitimate justification, and rationally related to a legitimate state interest. Nielsen v. Washington State Dept. of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013). This deferential standard requires the reviewing court to "assume the existence of any necessary state of facts which [it] can reasonably conceive in

1 It is the defendant's burden to prove indigency for the purpose of receiving appointed counsel. State v. Lundy, 176 Wn. App. 96,104, n.5, 308 P.3d 755 (2013).

determining whether a rational relationship exists between the challenged law and a legitimate state interest." Id. at 53.

Seward acknowledges that the State has a legitimate interest in collecting these LFOs, but argues that imposing them on defendants who cannot pay does not rationally serve that interest. Appellant's Opening Brief at 6. Because LFOs do not implicate a fundamental right, the rational basis standard applies to the analysis of Seward's claim. Nielsen, 177 Wn. App. at 53-54.

Seward cites extensively to State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), to bolster his argument that imposing financial obligations on indigent defendants is harmful to both the State and the defendants. Blazina addressed only discretionary LFOs. State v. Leonard, 184 Wn.2d 505, 507, 358 P.3d 1167 (2015). All of the LFOs imposed on Seward are mandatory. RCW 36.18.020(2)(h) ("Upon conviction or plea of guilty . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars."); RCW 7.68.035(1)(a) ("[T]here shall be imposed upon such convicted person . . . five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor . . ."); RCW 43.43.7541 ("Every sentence

imposed for a crime specified in RCW 43.43.7541 must include a fee of one hundred dollars.").

The sentencing court in Seward's case did not inquire into Seward's ability to pay the LFOs imposed, most likely because they are all mandatory and neither Blazina nor any other authority has required such an inquiry for mandatory fees and costs.

1. Because Seward did not object to the LFOs imposed at sentencing, he should not be allowed to raise the issue for the first time on appeal.

Although an appellate court may consider a claim of error raised for the first time on appeal, it also may refuse to do so unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Guzman Nunez, 160 Wn. App. 150, 157, 248 P.3d 103 (2011). In State v. Lazcano, 188 Wn. App. 338, 354 P.3d 233 (2015), *review denied*, 2016 Wash. LEXIS 2003 (2015), the Court of Appeals identified three formulations for "manifest error": (1) one "'truly of constitutional magnitude'"; (2) a showing that the alleged error actually affected the defendant's rights; and (3) a record on appeal that contains the facts necessary to adjudicate the claimed error. Id. at 357. If a cursory review of an alleged error suggests a constitutional issue, the appellant bears the burden to show that the error was manifest. Only then will the court address the merits of

the claim. Even then it may be found to be harmless. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Here, Seward's constitutional claims depend on whether he has the present or future ability to pay a total of $800 in LFOs.[2] He does not claim that imposing such costs on non-indigent defendants violates due process. He does not demonstrate that he is constitutionally indigent. He simply asserts that the identified statutes violate due process as applied to "defendants such as Seward" who do not have the ability to pay. Appellant's Opening Brief at 14. The party seeking review bears the burden of perfecting the record so that the appellate court has all of the relevant evidence necessary to make a decision. Dash Point Village Assocs. v. Exxon Corp., 86 Wn. App. 596, 612, 937 P.2d 1148 (1997). When the appellant fails to establish the facts necessary in the record to adjudicate the claim on the record, the error is not manifest within the meaning of RAP 2.5. Lazcano, 188 Wn. App. at 357.

Because he has not shown that the court committed an error of constitutional magnitude, Seward should not be permitted to raise his claim for the first time on appeal.

2 Seward was also ordered to pay $28,563.84 in restitution. CP 41. He has not challenged the statute requiring restitution, RCW 9.94A.753.

> Good sense lies behind the requirement that arguments be first asserted at trial. The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. . . There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.
>
> . . . . . .
>
> The theory of preservation by timely objection also addresses several other concerns. The rule serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

Lazcano, 188 Wn. App. at 356 (internal cites omitted).

> 2. Seward does not have standing to raise a constitutional due process challenge to the imposition of mandatory LFOs.

Except under circumstances not relevant here, a party may generally challenge a statute only if he is harmed by the feature of the statute that is claimed to be unconstitutional. Kadoranian v. Bellingham Police Dep't., 119 Wn.2d 178, 191, 829 P.2d 1061 (1992). Seward's claim is that, as applied to indigent offenders, the statute is an unreasonable exercise of the State's power to recoup

costs from defendants. To establish that he has standing, he must satisfy both prongs of a two-pronged test. First, he must show "'a personal injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief.'" State v. Johnson, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014), *quoting* High Tide Seafoods v. State, 106 Wn.2d 695, 702, 725 P.2d 411 (1986). The injury must be "(a) concrete and particularized; and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Witt v. Dep't. of Air Force, 527 F.3d 805, 811 (9th Cir. 2008), *quoting* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Second, Seward must establish that his claim falls "within the zone of interests protected by the statute or constitutional provision at issue." Johnson, 179 Wn.2d at 552.

The due process clause of the United States Constitution prevents a state from arbitrarily punishing indigent defendants for failing to pay court-imposed costs that they cannot pay. Bearden v. Georgia, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983). A constitutional violation occurs when the State sanctions an indigent person without demonstrating a contumacious failure to pay. Johnson, 179 Wn.2d at 553. The individual, however, must be constitutionally indigent. Id. While recognizing that there is no

"precise definition" of constitutional indigence, it is not mere poverty. Id. The court must consider the totality of a defendant's financial status to determine constitutional indigence or lack of same. Id. at 553-54. Statutory indigence is not enough. Id. at 555.

> While we do not question the State may not punish an indigent defendant for the fact of his or her indigence, these constitutional considerations protect only the constitutionally indigent. . . . Requiring payment of the fine may have imposed a hardship on [Johnson], but not such a hardship that the constitution forbids it. Lewis, 19 Cal. Rptr. at 422[3] (the constitution does not require the trial court to allow a defendant the same standard of living he had become accustomed).

Johnson, 179 Wn.2d at 555.

Seward has not shown that he is indigent. Apart from a passing reference in his brief to "defendants such as Seward who do not have the ability to pay LFOs," nothing in the record indicates that he is indigent. Even if he qualified for court-appointed counsel, which may well be the case, that is a finding of statutory indigence, not constitutional indigence. Seward has not shown himself to be in the class protected by the due process clause.

In addition to failing to show indigence, Seward has failed to show that he was harmed by the imposition of the costs. While he recites a parade of horribles regarding the "broken" LFO system in

---

3 People v. Lewis, 19 Cal. App. 3d 1019, 97 Cal. Rptr. 419, 421 (1971).

this state, he does not claim that the State has attempted to collect any of these monies. A constitutional violation occurs when the State sanctions a constitutionally indigent individual who did not contumaciously fail to pay. Johnson, 179 Wn.2d at 553.

Seward has not shown indigence or harm from the statute he challenges. He lacks standing to bring these claims, and the court should not reach the merits of those claims.

3. Seward fails to demonstrate that the statutes imposing mandatory LFOs on a convicted defendant violate substantive due process.

Constitutional challenges are reviewed de novo. Lummi Indian Nation v. State, 170 Wn.2d 247, 257-58, 241 P.3d 1220 (2010). A statute is presumed constitutional and it is the burden of the party attacking the statute to prove it unconstitutional beyond a reasonable doubt. City of Bellevue v. Lee, 166 Wn.2d 581, 585, 210 P.3d 1011 (2010), *citing* Island County v. State, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). If at all possible, statutes should be construed to be constitutional. State v. Farmer, 116 Wn.2d 414, 419-20, 805 P.2d 200 (1991).

Seward asserts that there is no legitimate State interest in requiring courts to impose mandatory fees unless the State first proves the defendant's ability to pay. Appellant's Opening Brief at

9. He distinguishes his challenge from that in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), where the claim was that the defendants faced incarceration for being poor. He also attempts to distinguish State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997). In that case, the defendants raised an equal protection challenge to court ordered appellate costs. Seward further argues that the holdings of these two cases must be re-examined in light of Blazina, 182 Wn.2d 827. Appellant's Opening Brief at 8-9.

Blazina was decided on statutory, not constitutional, grounds. It did little more than re-emphasize the already existing statutory requirement that a court consider a defendant's current and future ability to pay before imposing discretionary LFOs. Blazina, 182 Wn.2d at 839. It did not even hold that an appellate court must consider a challenge to LFOs for the first time on appeal. Id. at 830, 832. The discussion regarding the many problems associated with the current system of imposing LFOs in Blazina related to the court's reasons for accepting discretionary review of the otherwise unpreserved error. Id. at 835. It does not support the conclusion that the statutes as written do not further a legitimate state interest. Both Curry and Blank held that the sentencing scheme contained sufficient safeguards to protect the

constitutional rights of indigent defendants. Curry, 118 Wn.2d at 918; Blank, 131 Wn.2d at 238, 253.

A defendant always has the opportunity to seek relief from at least some legal financial obligations.

> RCW 10.01.160(4): A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

If a court finds at a later time that the costs will impose a manifest hardship, it has the authority to modify the monetary obligations. Curry, 118 Wn.2d at 914. Courts may refuse to address a request for remission until the State attempts to collect the financial obligations. State v. Bertrand, 165 Wn. App. 393, 405, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012).

Due process precludes incarcerating offenders for failure to pay fines if the offender is indigent. The burden is on the offender to show that nonpayment was not willful, but the court still must inquire into the offender's ability to pay when sanctions are sought

for nonpayment. State v. Nason, 168 Wn.2d 936, 945, 233 P.3d 848 (2010).

Seward maintains that Blazina shows that the remission process is "not an effective vehicle to alleviate the harsh realities recognized in that decision." Appellant's Opening Brief at 18. The Blazina opinion does not address remission; Seward apparently extrapolates this conclusion from the court's discussion of the difficulties in collecting LFOs from indigent defendants.

Seward makes much of the "astounding" interest that accrues on unpaid LFOs, as well as the mechanisms by which the State may collect those costs. Appellant's Opening Brief at 11-12. However, in addition to the remission statute set forth above, RCW 10.82.090 provides that when the offender is released from confinement and brings a motion before the court, it "shall" waive all interest on all LFOs other than restitution that accrued during confinement if he shows that paying it creates a hardship on him or his family. RCW 10.82.090(2)(a). If the offender has paid the restitution, the interest on that may be reduced. RCW 10.82.090(2)(b). All non-restitution interest may be reduced or waived if the offender shows a good faith attempt to pay and that

the interest presents a significant hardship. RCW 10.82.090(2)(c). The interest on LFOs in not so draconian as Seward argues.

Seward argues that it is irrational to impose LFOs on a defendant who cannot pay, and thus the constitution requires an inquiry into the defendant's ability to pay at the time the costs are imposed. The State agrees that such an inquiry is statutorily mandated, RCW 10.01.160(3), but there is no constitutional prohibition against imposing mandatory costs on indigent defendants.

> Monetary assessments that are mandatory may be imposed on indigent defendants at the time of sentencing without raising constitutional concern because "'[c]onstitutional principles will be implicated . . . only if the government seeks to enforce collection of the assessments at a time when [the defendant is] unable, through no fault of his own, to comply,'" and "'[i]t is at the point of enforced collection . . . where an indigent may be faced with the alternatives of payment or imprisonment, that he may assert a constitutional objection on the ground of his indigency.'"

State v. Kuster, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013), *quoting* Blank, 131 Wn.2d at 241.

While there is the statutory requirement to inquire into a defendant's financial circumstances at the time LFOs are imposed, it is reasonable to postpone any constitutional concerns until the

State attempts to collect on them. "[T]he meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation." State v. Baldwin, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991). An inquiry at the time of sentencing will shed light primarily on the defendant's current ability to pay. His future ability to pay is speculative and "does not necessarily threaten incrimination." Id. at 311. A defendant who cannot afford LFOs at the time of sentencing may be able to pay them at a later date. Curry, 118 Wn.2d at 915, n. 2.

> We live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise. A defendant in a criminal case who is just above the line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship.

Fuller v. Oregon, 417 U.S. 40, 53-54, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). The court in this case was obviously addressing a requirement that the defendant repay the State for the cost of his defense, but the principle should apply to all LFOs.

At his guilty plea hearing, Seward's counsel told the court that he was self-employed at the time. 03/06/15 RP 11. He was born in 1978, making him making him 35 years old at the time of sentencing. CP 18. Even if he serves the entire 120 months, CP 22, he will be less than 50 years old when he is released. Nothing in the record indicates that he is disabled or otherwise unable to work. The Declaration of Prosecutor Supporting Probable Cause, CP 2-3, establishes reason to believe that Seward is in good physical condition. Seward may someday inherit money or other property of value, win the lottery, or be given gifts that improve his financial situation. Further, there is the opportunity for employment in the prisons. RCW 72.09.100. The legislature recognized that inmates are paid for their work and provided for a percentage of the inmates' income to be paid toward the inmates' LFOs. RCW 72.09.111(1)(a)(iv). While he is incarcerated, all of Seward's basic needs will be paid by the State, freeing up income to be paid toward his LFOs.

In the context of RCW 10.73.160, relating to appellate costs, the court in Blank observed that it is not necessary to inquire into a defendant's ability to pay or his finances before a recoupment order may be entered against an indigent defendant "as it is nearly

impossible to predict ability to pay over a period of 10 years or longer." Blank, 131 Wn.2d at 242. A current inability to pay is not proof that he will never be able to meet his LFOs.

Seward's argument attempts to graft onto the rational basis test an additional requirement that the mandatory LFOs not be unduly oppressive on individuals. This argument should be rejected for two reasons. First, as discussed above, there are statutes providing for the remission or reduction of interest as well as the underlying costs other than restitution. Second, the Washington Supreme Court rejected the claim that the rational basis test has an "unduly oppressive" component in Amunrud, 158 Wn.2d at 226. Instead, the test is only that the law bear a "reasonable relationship to a legitimate state interest." Id. Seward has conceded that such a relationship exists with the statutes he challenges.

Seward argues that the only way to comply with the safeguards required in Blank is for the court to conduct a meaningful inquiry into a defendant's ability to pay at the time the financial obligation is imposed. Appellant's Opening Brief at 11. However the court in that case, addressing costs on appeal, said that "it is not fundamentally unfair to impose a repayment obligation

without notice and an opportunity to be heard prior to the decision to appeal, provided that before enforced payment or sanctions for nonpayment may be imposed, there is an opportunity to be heard regarding ability to pay." Blank, 131 Wn.2d at 245.

Even if this court exercises its discretion to review Seward's claims, they should be rejected.

4. The trial court was not required to inquire into Seward's financial circumstances when imposing mandatory costs.

Seward argues that a trial court must consider the defendant's financial circumstances before imposing any financial obligations. He maintains that the problems identified in Blazina occur with all financial obligations. He also argues that because the restitution statute prohibits the court from reducing the total amount of restitution even in the face of the defendant's inability to pay, the lack of a similar provision in other LFO statutes indicates that the sentencing court is to consider ability to pay when imposing any other LFO.

RCW 10.01.160(3) reads:

> 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 the payment of costs will impose.

RCW 10.01.160(1) says that the court *may* impose costs. RCW 10.01.160(2) defines costs:

> Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program . . . or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of governmental agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees . . . may be included in costs the court may require the defendant to pay. . . .

This subsection goes on to limit the amount the court may impose for costs of administering a deferred prosecution program, pretrial supervision, a sobriety program, preparing and serving warrants for failure to appear, and incarceration. It directs the order in which payments will be allocated and for what purpose they will be used. RCW 10.01.160(4) provides for the remission of costs as discussed at length in the previous section. RCW 10.01.160(5) provides that this section, with certain exceptions, does not apply to costs related to medical or mental health services received by the defendant while in custody of any governmental unit.

The "costs" addressed in RCW 10.01.160 are discretionary with the court. Blazina addressed this statute in the context of discretionary costs. Leonard, 184 Wn.2d at 507. As noted above, none of the LFOs imposed on Seward come within the category of costs as defined in RCW 10.01.160. While it may be true that negative consequences follow an inability to pay mandatory LFOs, the opinion in Blazina cannot be stretched to require that the court make an individualized finding of ability to pay amounts that it has no discretion to waive. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) ("[F]or *mandatory* legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. For victim restitution, victim assessments, DNA fees, and criminal filing fees the legislature has directed expressly that a defendant's ability to pay should not be taken into account." (Emphasis in original.)). Seward makes a policy argument that Blazina should be extended to require that by finding those statutes unconstitutional, but our Supreme Court has not done that. In Leonard, the defendant challenged the imposition of incarceration costs under RCW 9.94A.760(2) ("If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration,

the court may require the offender to pay for the cost of incarceration at a rate of fifty dollars per day of incarceration . . . "). This is clearly discretionary with the court and specifically requires the court to determine that the offender has the ability to pay. Leonard, 184 Wn.2d at 507. Blazina did not, as Seward argues, require an inquiry into ability to pay before imposing any LFO other than restitution.

> As a general rule, we treat the word "shall" as presumptively imperative—we presume it creates a duty rather than confers discretion.

Blazina, 182 Wn.2d at 838. The court was discussing RCW 10.01.160(3), finding that the court had a duty to make an inquiry before imposing discretionary costs. However, the statutes requiring the costs imposed on Seward use similar language. The crime victim assessment is required by RCW 7.68.035(1)(a), which says "there shall be imposed by the court" "five hundred dollars for each case or cause of action." The clerk's filing fee is required by RCW 36.18.020(2)(h)—"Upon conviction or plea of guilty . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars." The DNA fee is required by RCW 43.43.7541—"Every sentence imposed for a crime specified in 43.43.7541 must include a fee of one hundred dollars." Seward argues that these

statutes must be read "in tandem" with RCW 10.01.160(3), Appellant's Opening Brief at 16, but reading statutes in tandem does not permit overlooking plain and mandatory language.

Seward cites to State v. Jones, 172 Wn.2d 236, 257 P.3d 616 (2011), to support his argument that RCW 10.01.160(3) imposes a requirement that LFOs imposed under other statutes be subject to an individualized inquiry. In Jones, the defendant had served 81 months in prison before he established by way of a personal restraint petition that his offender score had been incorrectly calculated. He was resentenced to 51 months. Jones sought to apply the surplus 30 months he had served in custody toward the 36 months of community custody ordered in his judgment and sentence. The Court of Appeals and Supreme Court both declined to do. Jones relied on former RCW 9.94A.120(17), which required the trial court to credit a defendant for all time served solely on the offense being sentenced. Finding that this statute did not clearly permit applying confinement time to community custody, it looked to former RCW 9.94A.030(4), which unambiguously required that community custody be tolled during confinement for any reason. Jones, 172 Wn.2d at 243-44.

In other words, the principle that statutes should be read together still means that one cannot make an ambiguous statute permit something that another, related, statute clearly prohibits. The State agrees that the statutes imposing financial obligations should be read together, and when one does, one finds that some statutes clearly impose mandatory fees and some give courts discretion to waive or reduce others. The directive in RCW 10.01.160(3) to consider a defendant's financial circumstances before imposing discretionary costs does not transplant the same directive into every other statute imposing mandatory fees.

The fact that RCW 9.94A.753(4) provides that "the court may not reduce" the total amount of restitution because of an inability to pay does not mean that all other statutes which do not contain this language are subject to the requirement of an individualized inquiry. For one thing, restitution is very different from other LFOs because it is owed to the victim or the Department of Labor and Industries for money paid on behalf of the victim. Other LFOs are paid to government agencies for partial reimbursement of money spent dealing with the defendant. For another, RCW 9.94A.753(1) does require that the court consider "the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well

as any assets that the offender may have" when setting the minimum monthly restitution payment the defendant must make. While the court cannot reduce the amount of restitution, it can enlarge the period during which the defendant is required to pay the money.

While Seward is very concerned about correcting the systemic problems in the state's methods of imposing and collecting LFOs, he has not persuasively argued that he has suffered a due process violation. While it is true that the court did not conduct an individualized inquiry into his financial circumstances, it did not impose any discretionary fees or costs. There is little point in making such an inquiry where the court has no discretion to waive or reduce the amounts ordered. There is no statutory or constitutional requirement that it do so. The court in Blazina and Leonard accepted review of discretionary costs and remanded for resentencing based upon statutory grounds. Blazina, 182 Wn.2d at 839; Leonard, 184 Wn.2d at 507-08. Seward has not challenged the lack of individualized financial inquiry based upon statutory grounds, nor could he, because his LFOs were all mandatory and not subject to such an inquiry.

D. CONCLUSION.

Seward makes many policy arguments supporting changes he would like this court to make in the current statutory structure for imposing and collecting legal financial obligations. Not incidentally, he anticipates that these changes would benefit him in that his LFOs might be reduced or eliminated. Nevertheless, his argument is that the statutes in question violate due process as applied to him, and he has failed to show that such is the case. The State respectfully asks this court to affirm his sentence.

Respectfully submitted this 16th day of March, 2016.

Carol La Verne

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND TO--

ERIC J. NIELSEN
NIELSEN BROMAN & KOCH PLLC
1908 E. MADISON ST
SEATTLE, WA 988122-2842
NIELSENE@NWATTORNEY.NET

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

Dated this 18 day of March, 2016, at Olympia, Washington.

Caroline Jones

THURSTON COUNTY PROSECUTOR

March 17, 2016 - 7:39 AM

Transmittal Letter

Document Uploaded: 2-475812-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 47581-2

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Caroline Jones - Email: jonescm@co.thurston.wa.us

A copy of this document has been emailed to the following addresses:

nielsene@nwattorney.net