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Court of Appeals
Division I
State of Washington

72811-3

NO. 72811-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER WITTMAN,

Appellant.

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

The Honorable Elizabeth Berns, Judge
The Honorable John Chun, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. RCW 43.43.7541 IS UNCONSTITUTIONAL AS APPLIED TO THOSE WHO HAVE NOT BEEN FOUND TO HAVE THE ABILITY TO PAY.

In his opening brief, Wittman asserts RCW 43.43.7541, the statute requiring defendants to pay a \$100 DNA-collection fee, is unconstitutional as applied to those who have not been found to have the ability to pay such a fee.¹ Brief of Appellant (BOA) at 4-8 (citing State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)). In response, the State claims appellant lacks standing, the issue is not ripe, the issue cannot be raised under RAP 2.5, and the issue has been previously settled by the courts. Brief of Respondent (BOR) at 4-18. For reasons stated below, this Court should reject those claims.

- a. Wittman Has Standing

The doctrine of standing prevents “a plaintiff from asserting another’s legal rights.” Trinity Universal Ins. Co. of Kan. v. Ohio Cas. Ins. Co., 176 Wn. App. 185, 199, 312 P.3d 976 (2013). The doctrine performs this task by requiring a plaintiff show, among other things, “a personal injury fairly traceable to the challenged conduct and likely to be

¹ To clarify, when appellant uses the term “ability to pay” in this brief, he is referring to a defendant’s current ability to pay and probable future ability to pay.

redressed by the requested relief.” High Tide Seafoods v. State, 106 Wn.2d 695, 702, 725 P.2d 411 (1986).

Well-established Washington case law supports Wittman’s standing to raise his constitutional challenge to a sentencing condition. “[A] criminal defendant always has standing to challenge his or her sentence on grounds of illegality.” State v. Bahl, 164 Wn. 2d 739, 750, 193 P.3d 678, 684 (2008). This is so even though he has not yet been charged with violating them. Id.; State v. Riles, 86 Wn. App. 10, 14, 936 P.2d 11 (1997).

As the Washington Supreme Court’s recent decision in Blazina demonstrates, a defendant who has been ordered to pay a legal financial obligation as a condition of sentence has standing to challenge the legality of that order. The only difference here is the source of the illegality. In that case, the illegality stemmed from the trial court’s failure to comply with a statute. Here, the illegality stems from the trial court’s application of an unconstitutional law.

As a citizen who is subject to the DNA-collection fee via court order for which there was no ability-to-pay inquiry, Wittman has established an injury that is fairly traceable to the challenged conduct. Moreover, this injury can be redressed by the requested relief. As such,

Wittman is not merely asserting the rights of others; instead, he falls squarely within the zone of interests at issue here and, thus, has standing.

b. The Issue Is Ripe for Review.

The State claims appellant's challenge to the imposition of the DNA-collection fee is not ripe until the State attempts to collect or impose punishment for failure to pay. BOR at 9-10. However, this same argument was made and categorically rejected in Blazina, 182 Wn.2d at 832, n. 1. As shown below, the same ripeness principles raised in Blazina apply with equal force here.

The State's ripeness claim fails to distinguish between a constitutional challenge to the statute based on notions of fundamental fairness and equal protection as they pertain to potential enforcement consequences (arguably not ripe until enforcement occurs), and a challenge attacking the constitutionality of the statute as applied at the time the fees were imposed (ripe at the point the LFO is ordered). This case involves the latter and meets all the criteria for ripeness. Id.

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. Bahl, 164 Wn.2d at 751. Additionally, when considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Id.

First, the issue raised here is primarily legal, with Wittman challenging the trial court's ordering of the LFO pursuant to a mandatory statute. Neither time nor future circumstances pertaining to enforcement will change whether the RCW 43.43.754, as applied to Wittman, is constitutionally infirm. As such, Wittman meets the first prong of the ripeness test. State v. Valencia, 169 Wn.2d 782, 788, 239 P.3d 1059 (2010) (citing United States v. Loy, 237 F.3d 251 (3d Cir. 2001)).

Second, no further factual development is necessary. As explained above Wittman is challenging the sentencing court's application of an unconstitutional statute. The facts necessary to decide this issue (the statutory language and the sentencing record) are fully developed. Either the sentencing court applied a statute that is unconstitutional, or it did not. If it did, the sentencing condition is not valid, regardless of the particular circumstances of attempted enforcement.

Third, the challenged action is final. Once LFOs are ordered, that order is not subject to change. The fact that the defendant may later seek to modify the LFO order through a remission hearing does not change the finality of the trial court's original sentencing order. While a defendant's obligation to pay may be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the sentencing order that authorizes that debt in the first place is not subject to change. In other words, while the

defendant's obligation to actually pay off LFOs may be conditional, the original sentencing order imposing those LFOs is final.

Finally, withholding consideration of an unconstitutionally imposed LFO places significant hardships on defendants due to the immediate consequences of those LFOs and the heavy burdens of the remission process.

An LFO order imposes an immediate debt upon a defendant and if he does not pay, subjects him to arrest or a myriad of other penalties that arise from enforced collection efforts.² The hardships for the defendant and his family that result from the erroneous imposition of LFOs cannot be understated. A study conducted by the Washington State Minority and Justice Commission looking into the impact of LFOs, concludes that for many people, erroneously imposed LFOs result in a horrible chain of events:

...reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnaring some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

² See argument, section C.3., infra.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008)³; see also, Blazina, 182 Wn.2d at 833-37 (acknowledging these hardships).

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has been erroneously burdened with LFOs is the remission process. Unfortunately, reliance on Washington's remission process to correct the error imposes its own hardships. During the remission process, the defendant is saddled with a burden he would not otherwise bear. During sentencing, it is the State's burden to establish the defendant's ability to pay prior to the trial court imposing any LFOs. State v. Lundy, 176 Wn. App. 96, 105-06, 308 P.3d 755(2013). However, if the LFO order is not reviewed on direct appeal and is left for correction through the remission process, however, the burden shifts to the defendant to show a manifest hardship. RCW 10.01.160(4).

Moreover, an offender who is left to fight his erroneously ordered LFOs though the remission process will have to do so without appointed legal representation. See, State v. Mahone, 98 Wn. App. 342, 346, 989

³ This report can be found at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf

P.2d 583 (1999) (recognizing an offender is not entitled to publicly funded counsel to file a motion for remission). Given the petitioner's financial hardships, he will likely be unable to retain private counsel and, therefore, have to litigate the issue pro se. For a person unskilled in the legal field, proceeding pro se in a remission process can be a confusing and daunting prospect, especially if this person is already struggling to make ends meet. See, Washington State Minority and Justice Commission, supra, at 59-60 (documenting the confusion that exists among legal debtors regarding the remission process). Indeed, some are so overwhelmed, they simply stop paying, subjecting themselves to further possible penalties and potentially forgoing legitimate constitutional claims. Id. at 46-47.

Finally, reviewing the validity of LFO orders on direct appeal, rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that will otherwise be wasted by efforts to collect from individuals who will likely never be able to pay. See, State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing an LFO because it involved a purely legal question and would likely save future judicial resources).

For the reasons stated above, this Court should follow Blazina and find Wittman's challenge to the validity of this sentencing condition is ripe for review.

c. This Argument is Reviewable under RAP 2.5.

The State claims the issue raised by Wittman is not a manifest constitutional error and should not be reviewed under RAP 2.5. BOR at 10-12. The State's argument should be rejected, however, because this case meets the criteria for review.

Under RAP 2.5(a)(3), an "appellate court may refuse to review any claim of error which was not raised in the trial court," but there are exceptions to this general rule. One exception is that "a party may raise ... manifest error affecting a constitutional right" for the first time on appellate review. Id. This exception recognizes that "[c]onstitutional errors are treated specially because they often result in serious injustice...." State v. Lamar, 180 Wn.2d 576, 582, 327 P.3d 46, 49 (2014) (citation omitted).

An error qualifies as a manifest error affecting a constitutional right, if it is shown to be a constitutional error that actually prejudiced the defendant's rights. Id. at 583. In this context, "prejudice" means that the claimed error had practical and identifiable consequences on the trial or sentencing. Id.

The substantive due process challenge Wittman raises is a constitutional question. Moreover, the error (i.e. the trial court's imposition of a DNA-collection fee without first conducting a meaningful ability-to-pay inquiry) had practical and identifiable consequences (i.e. the trial court imposed the DNA-collection fee).

This is a straight-forward constitutional claim that requires no further factual development. See, argument above. Contrary to the State, Wittman's constitutional challenge to the statute is not dependent on facts about his future ability to pay. The essence of the challenge here is that without the State first showing the defendant has an ability to pay, there is no rational basis for imposing a mandatory DNA-collection fee. BOA at 4-8. Here, the record established the State never proved Wittman's ability to pay the DNA-collection fee and, despite this, the trial court imposed the fee. This is sufficient to show manifest constitutional error.

Even if this Court disagrees, it should exercise its discretion and grant review. 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. 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. Blazina, 182 Wn.2d at 832.

Hence, 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 simply 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 the issue on direct appeal. As the Supreme Court recognized in Blazina, the plain fact is “the state cannot collect money from defendants who cannot pay.” 182 Wn.2d at 837. 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.

Finally, the DNA-collection fee is part of a systemic problem with Washington’s broken LFO system that requires a prompt and thoughtful response from this Court to avoid the issue taking up considerable more

judicial resources in the cases to come. This fee is mandated in all qualifying cases without first requiring an ability-to-pay inquiry. The fee is imposed on a daily basis throughout the State in criminal sentences. This issue will not go away simply because this Court decides not to look at the issue in this case. Here, the parties have fully brief the issue and it is ready for consideration. Thus, it would result in an unnecessary waste of state and judicial resources to deny review now and permit the systemic problem to persist.

For these reasons, this Court should review the constitutional challenge put forth by Wittman.

d. The Supreme Court's Prior Opinions as to the Constitutionality of Washington's LFO Statutes are not Controlling.

The State argues appellant's substantive due process challenge is foreclosed by the Washington Supreme Court's ruling in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992). BOR at 12-17. In Curry, and its progeny State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), the Supreme Court held that when it comes to mandatory LFOs, "constitutional principles will be implicated... only if the government seeks to enforce collection of the assessment at a time when [the defendant is] unable, though no fault of his own, to comply." Id. at 241 (citing Curry, 118 Wn.2d at 917 (internal quotes omitted)). However, the

“constitutional principles” at issue in those cases were considerably different than those implicated here. Hence, the State’s reliance on Curry is misplaced.

Wittman’s constitutional challenge to the statute authorizing the DNA-collection fee 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, Wittman asserts there is no legitimate state interest for requiring sentencing courts to impose a mandatory DNA-collection fee 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), Wittman 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. Hence, as much as the State wants to reframe the issue into a

question of “constitutional indigency” so that it may assert that Curry controls (BOR at 6-8, 14-16), the actual issue raised here focuses on whether RCW 43.43.7541 constitutes a legitimate exercise of the State’s regulatory power. As such, the holdings in Curry and Blank do not control.

The State’s reliance on Curry and Blank is also misplaced because when those cases are read carefully and considered in the light of the realities of Washington’s LFO current collection scheme, they actually support Wittman’s position that an ability-to-pay inquiry must occur at the time the DNA-collection fee 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 permit for 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). Importantly, this cycle does not conform with 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).

Blank thus makes clear that in order for Washington’s LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry before: (1) the State engages in any “enforced” collection; (2) any additional “penalty” for nonpayment is assessed; or (3) any other “sanction” for nonpayment is imposed.⁴ Id. But under the current scheme, neither the Legislature nor the courts satisfy Blank’s directives.

⁴ “Penalty” means: “a sum of money which the law exacts payment of by way of punishment for . . . not doing some act which is required to be done.” Black’s Law Dictionary, Sixth Edition, at 1133. “Sanction” means: “Penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations.” Id. at 1341. “Enforce” means: “To put into execution, to cause to take effect,

Although Blank says that prior case law suggests that such an inquiry is not required at sentencing, id. at 240-42, that Court was not confronted with the realities of the State's current collection scheme. The current scheme provides for immediate enforced collections processes, penalties, and sanctions. Consequently, Blank supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing, when the DNA collection fee is imposed.

First, under RCW 10.82.090(1), LFOs accrue interest at a 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 that “those who make regular payments of \$50 a month toward a typical legal debt will remain in arrears

to make effective; as to enforce . . . the collection of a debt or a fine.” Id. at 528.

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 an immediate “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 occur 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 used in Washington). 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. Again, 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. Any penalties or additional fees these agencies decide to assess are paid by the defendant. 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 demonstrate 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 set forth 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. In summary, this Court should reject any argument that Curry and Blank control because Washington's LFO system does not meet the constitutional safeguards mandated in those holdings.

2. RCW 43.43.7541 VIOLATES EQUAL PROTECTION.

Wittman asserts RCW 43.43.7541 violates equal protection because it irrationally requires some defendants to pay a DNA-collection fee multiple times, while others need pay only once. BOA at 8-11. In response, the State argues the fee pays for more than just collection, covering the costs for managing and using the DNA database to investigate crimes (possibly including crimes of the defendant). BOR at 21-23. However, this is not a legitimate reason for charging the DNA-collection fee in every qualifying case.

First, if the State's purpose for charging the fee is to recoup the costs of investigating a crime, then the State should charge the fee based on whether the DNA database was actually used to investigate the crime that is being sentenced. If the defendant commits multiple crimes that require use of the database, he will pay multiple fees. If not, the State has no legitimate interest in making him pay the fee. This recoupment structure is not unusual. For example, LFOs recouping the costs for public defense are not assessed against every defendant, only against those who use of that public service. There is no rational reason why the DNA-collection fee should be any different.

Second, even if we accept the premise that the DNA fee should be charged in every case to support database maintenance and usage, this still

does not support charging \$100 every time a defendant is sentenced regardless of whether his DNA has already been collected. The statute actually breaks down how much of the \$100 fee is used for database management and usage (\$80) and how much is used for DNA collection (\$20). RCW 43.43.7541. Thus, at the very least, it is irrational to require all qualifying defendants to pay the entire DNA-collection fee when no DNA collection is required.

For these reasons and those in appellant's opening brief, this Court should reject the States arguments and find RCW 43.43.7541 as applied here violates equal protection.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED WITTMAN TO SUBMIT A DNA SAMPLE.

In his opening brief, Wittman asserts the trial court erred in requiring him to submit to another DNA collection under RCW 43.43.754(1) given his previous qualifying offenses. BOA at 11-14. In response, the State claims that unless a defendant shows he has a sample in the State's database, the court must order the collection. BOR at 24-26. This argument should be rejected.

Given that the State maintains and manages the DNA database for its own investigatory purposes, it makes far more sense that, when a defendant's criminal history shows he has been previously convicted of a

qualifying offense, the State shoulder the burden of proving a DNA collection is necessary and not just a waste of judicial, state and local resources. The State may easily do so by accessing its own database. Consequently, this Court should find it was the State's burden to show another DNA sample from Wittman was necessary. Because it did not, the trial court erred when ordering Wittman's DNA be collected again.

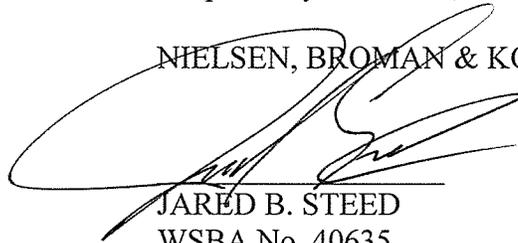
B. CONCLUSION

For the reasons discussed above and in the opening brief, this court should vacate the trial court's imposition of the DNA-collection fee and the DNA collection order.

DATED this 7th day of October, 2015.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 72811-3-I
)	
CHRISTOPHER WITTMAN,)	
)	
Appellant.)	

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 7TH DAY OF OCTOBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHRISTOPHER WITTMAN
DOC NO. 352027
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF OCTOBER 2015.

X *Patrick Mayovsky*