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October 18, 2016
Court of Appeals
Division I
State of Washington

NO. 74547-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

VINOD RAM,

Appellant.

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

The Honorable Timothy Bradshaw, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

RCW 43.43.7541's DNA-collection fee and RCW 7.68.035's Victim Penalty Assessment (VPA) violate substantive due process when applied to defendants like the appellant, who have not been shown to have the ability, or likely future ability, to pay.¹

Issue Pertaining to Assignment of Error

RCW 43.43.7541 requires trial courts to impose a DNA-collection fee each time a felony offender is sentenced. This ostensibly serves the State's interest in funding the collection, testing, and retention of a convicted defendant's DNA profile. RCW 7.68.035 requires trial courts to impose a VPA of \$500. The purpose is to fund victim-focused programs. These statutes mandate that trial courts order these LFOs even when the State has not shown the defendant the ability to pay or the likely future ability to pay. Do the statutes violate substantive due process?

Potential Issue Presented²

In the event Appellant does not substantially prevail on appeal, should this Court exercise its discretion to deny a State's motion for costs?

¹ Counsel is aware of this Court's recent decisions in State v. Shelton, 194 Wn. App. 660, 378 P.3d 230 (2016) and State v. Lewis, 194 Wash. App. 709, ___ P.3d ___ (2016), which rejected arguments similar to those made here. A petition for review was filed in Lewis on July 27, 2016, so counsel raises the issues here in order to preserve them in the event the Washington Supreme Court reverses this Court's holdings in those cases.

² The second argument presented herein pertains to the potential for the assessment of the costs of the appeal under RCW 10.73.160 and RAP 14.4.

B. STATEMENT OF THE CASE

The King County Prosecutor charged appellant Vinod Ram with two counts of intimidating a witness, one count of felony harassment, and one count of felony violation of a court order. CP 100-02. The prosecution alleged that between July 24, 2014 and September 16, 2014, Ram, who was in trial at the time on numerous criminal charges, intimidated his wife, Eva Gumiran, to influence her testimony at that trial, and that on September 15, 2014, Ram threatened to kill Gumiran. CP 3-6, 100-02. The prosecution further alleged that between October 1, 2014 and October 5, 2014, Ram violated a court order by sending a letter intended to reach Gumiran and that was meant to intimidate her from acting against him in the prosecution for the earlier filed intimidation and harassment charges. CP 1-7, 101-02.

A trial was held October 27, 2015 through November 19, 2015, before the Honorable Timothy A. Bradshaw. RP 1-741, 768-91.³ A jury found Ram guilty as charged except as to the first of the two intimidating a witness charges, in which the jury found him guilty of the lesser included offense of witness tampering. CP 552-54, 556; RP 786-90.

³ There are eleven consecutively paginated volumes of verbatim report of proceedings referenced collectively as "RP." The final two volumes, which cover opening statements and verdicts, respectively, however, are out of order because they were ordered after the other volumes were prepared.

Sentencing was held December 22, 2015. RP 743-66. The court imposed high-end standard range 60-month sentences for all convictions except the intimidating a witness conviction, for which it imposed a midrange standard range sentence of 89.5 months, all to be served consecutively to sentences imposed in the earlier court matter. CP 577-86; RP 761-62. With regard to legal financial obligations (LFOs), the court stated it was waiving all non-mandatory fees, noting it did "not think the record would support an ability for Mr. Ram to pay any other fees." RP 763. The court did, however, order Ram to pay the \$500 Victim Penalty Assessment (VPA) and the \$100 DNA collection fee, but waived interest. CP 579.

Ram appeals. CP 590-601.

C. ARGUMENTS

1. THE VPA & DNA COLLECTION STATUTES ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS LIKE RAM, WHO DO NOT HAVE THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY.

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. However, these statutes

violate substantive due process when applied to defendants, like Ram, who are not shown to have the ability or likely future ability to pay the fine. Hence, this Court should find the trial court erred in imposing those fees without first determining Ram'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.

Turning first to RCW 43.43.7541, the statute 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.

Imposing these fees does not further the State's interest in funding DNA collection or victim-focused programs. For as the Washington Supreme Court recently emphasized, "the state cannot collect money from defendants who cannot pay." State v. Blazina, 182 Wn.2d 827, 344 P.3d 680, 684 (2015). Hence, 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 recognizes 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 owing much more than the original LFOs imposed (due to interest (waived here, CP 579) and collection fees (not waived here)), 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 ordered under RCW 43.43.7541 and RCW 7.68.035 fail to further the State's interest, they are utterly pointless. It is simply 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 by imposition of the VPA regardless of whether there was an ability-to-pay inquiry. However, the “constitutional principles” at issue in those cases were very different than those implicated here. Hence, any reliance on them here is misplaced.

Ram's constitutional challenge to the statute authorizing the DNA-collection fee and VPA 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, Ram 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), Ram 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 Ram's position that an ability-to-pay inquiry must occur at the time the LFO is imposed. Indeed, after Blazina's recognition of 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 (absent waiver), 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, through 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. It emphasized the following triggers for this inquiry:

- "The relevant time [to conduct an ability-to-pay inquiry] is the point of collection and when sanctions are sought for nonpayment." Id. at 242.
- "[I]f the State seeks to impose some additional penalty for failure to pay...ability to pay must be considered at that point. Id.
- "[B]efore enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." Id.

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. Unfortunately, neither the Legislature nor the courts are currently complying with Blank’s directives.

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 DNA-collection fee and VPA are imposed. Although Blank says that prior case law suggests that such an inquiry is not required at sentencing, the Supreme Court was not confronted with the realities of the State’s current collection scheme in that case. As shown below, Washington’s LFO collection scheme provides for immediate enforced collection processes, penalties, and sanctions. Consequently, Blank actually supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing when the DNA-collection fee and VPA are imposed.

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

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 that “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 to 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.

The examples set forth above 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 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. As such, any reliance on holdings of Curry and Blank by the State would be specious 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 irrational to impose a fee upon a person who does not have the ability to pay. Hence, when applied to defendants such as Ram who have not been shown to 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 and RCW 7.68.035 violate substantive due process and vacate the LFO order.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Ram "unable by reason of poverty to pay for any of the expenses of appellate review" and "cannot contribute anything towards the costs of appellate review[,]" and was therefore indigent and entitled to appointment of appellate counsel and production of an appellate record at public expense. CP 587-89. If Ram does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Ram's ability to pay must be determined before discretionary costs are imposed. Without a basis to rebut the trial court's determination that Ram is indigent, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

For reasons stated above, this Court should find that the statutes authorizing mandatory LFOs violated substantive due process as applied in this case and should reverse the order.

Dated this 17th day of October 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'C. Gibson', is written over a horizontal line. The signature is stylized with a large loop at the beginning and a long horizontal stroke at the end.

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