

FILED

August 29, 2016  
Court of Appeals

NO. 74558-1-I

Division I

State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

NATHAN ANDERSON,

Appellant.

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

The Honorable John Chun, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	3
1. RCW 7.68.035 IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY OR LIKELY FUTURE ABILITY TO PAY THE VICTIM PENALTY ASSESSMENT.....	3
2. APPEAL COSTS SHOULD NOT BE IMPOSED.....	8
D. <u>CONCLUSION</u> .....	9

**TABLE OF AUTHORITIES**

	Page
<u>WASHINGTON CASES</u>	
<u>Amunrud v. Bd. of Appeals</u> 158 Wn.2d 208, 143 P.3d 571 (2006).....	3
<u>DeYoung v. Providence Med. Ctr.</u> 136 Wn.2d 136, 960 P.2d 919 (1998).....	4
<u>Johnson v. Dep’t of Fish &amp; Wildlife</u> 175 Wn. App. 765, 305 P.3d 1130 (2013).....	4
<u>Nielsen v. Dep’t of Licensing</u> 177 Wn. App. 45, 309 P.3d 1221 (2013).....	4
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	8
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	5
<u>State v. Curry</u> 118 Wn.2d 911, 829 P.2d 166 (1992).....	6, 7
<u>State v. Duncan</u> 185 Wn.2d 430, 374 P.3d 83 (2016).....	6
<u>State v. Lundy</u> 176 Wn. App. 96, 308 P.3d 755 (2013).....	6, 7
<u>State v. Mathers</u> ___ Wn. App. ___, ___ P.3d ___, 2016 WL 2865576 (May 10, 2016) .	6, 7
<u>State v. Sinclair</u> 192 Wn. App. 380, 367 P.3d 612 <u>rev. denied</u> , 185 Wn.2d 1034, ___ P.3d ___ (2016).....	8

**TABLE OF AUTHORITIES**

Page

FEDERAL CASES

Mathews v. DeCastro  
429 U.S. 181, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976)..... 4

RULES, STATUTES AND OTHER AUTHORITIES

RAP 14..... 8

RCW 7.68.035 ..... 1, 3, 5, 7, 8

RCW 10.73.160 ..... 8

U.S. CONST. amend. XIV ..... 3

CONST. art. I, § 3 ..... 3

A. ASSIGNMENT OF ERROR

RCW 7.68.035's Victim Penalty Assessment (VPA) violates substantive due process when applied to defendants who have not been shown to have the ability, or likely future ability, to pay.

Issue Pertaining to Assignment of Error

RCW 7.68.035 requires trial courts to impose a victim penalty assessment at each gross misdemeanor sentencing. This ostensibly serves the state's interest in funding programs to encourage and facilitate victims and witnesses to give testimony. However, the statute mandates this assessment be imposed even when the defendant has no ability to pay it. Does RCW 7.68.035 violate substantive due process when imposed on defendants who do not have the ability or likely future ability to pay?

B. STATEMENT OF THE CASE

The King county prosecutor charged appellant Nathan Anderson with one count each of second degree assault, third degree assault, and unlawful imprisonment, for incidents that occurred between March 19 and 20, 2015. CP 1-7, 9-11, 40-42. The State also charged Anderson with misdemeanor violation of a no contact order for an incident which occurred between May 5 and June 1, 2015. CP 1-7, 9-11, 40-42. The State further alleged that each of the offenses involved domestic violence against a family or household member. CP 1-7, 9-11, 40-42.

A jury found Anderson not guilty of second degree assault, third degree assault, and unlawful imprisonment. CP 56, 58-59; 1RP<sup>1</sup> 72. The jury found Anderson guilty of misdemeanor violation of a no contact order and two lesser counts of fourth degree assault. CP 57, 60-61; 1RP 72. The jury also returned special verdicts finding that each of the offenses involved domestic violence. CP 62-63; 1RP 72-73.

The trial court sentenced Anderson to concurrent jail sentences of 364 days on each of the fourth degree assault convictions with credit for time already served. The court imposed a consecutive 364 day jail sentence on the misdemeanor violation of a no contact order, suspended the sentence, and imposed 12 months of supervised probation. CP 106-09; 1RP 94.

The trial court waived all non-mandatory legal financial obligations (LFOs), imposing only a mandatory \$500 victim penalty assessment. CP 107; 1RP 94. Anderson timely appeals. CP 113-14.

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<sup>1</sup> This brief refers to the verbatim reports of proceedings as follows: 1RP – November 3, 2015, December 17, 2015, and January 11, 2016; 2RP – December 7, 2015 (afternoon venue hearing session); 3RP – December 7, 2015 (morning session), December 8, 9, 10, 15, and 16, 2015; 4RP – December 14, 2015.

C. ARGUMENT

1. RCW 7.68.035 IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY OR LIKELY FUTURE ABILITY TO PAY THE VICTIM PENALTY ASSESSMENT

When indigent defendants do not have the ability or likely future ability to pay the \$500 Victim Penalty Assessment (VPA), RCW 7.68.035 violates substantive due process because it does not rationally serve a legitimate state interest. Anderson asks this court to strike this LFO from his sentence.

Under the state and federal constitutions, no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. XIV; 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).

“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. Deprivations of life, liberty, or property must be substantively reasonable and are constitutionally infirm if not “supported by some legitimate justification.”

Nielsen v. Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013).

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

To survive rational basis scrutiny, the law or regulation in question must be rationally related to a legitimate state interest. Id. This is undoubtedly a deferential standard, but it “is not a toothless one.” Mathews v. DeCastro, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976). The role of the court 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 statute at issue unconstitutional under rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). When a statute does not rationally relate to a legitimate State interest, it must be struck down as unconstitutional under the due process clauses.

Here, RCW 7.68.035(1)(a) mandates that all gross misdemeanor defendants pay the VPA fee. The VPA fee serves the state interest of supporting “comprehensive programs to encourage and facilitate

testimony by the victims of crimes and witnesses to crimes.” RCW 7.68.035(4). While this statute serves a legitimate state interest, the imposition of the mandatory fee upon defendants who cannot pay the fee does not rationally serve those interests.

There is nothing reasonable or rational about requiring sentencing courts to impose this mandatory LFO upon all defendants regardless of whether they have the ability or likely future ability to pay. This does not further the state’s interest in funding or in ensuring programs for victims and witnesses of crimes. This does not further the state’s interest because “the state cannot collect money from defendants who cannot pay.” State v. Blazina, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). When imposed on defendants who cannot pay, not only does the mandatory fee under RCW 7.68.035 fail to further the State’s interest, they are utterly pointless. It is irrational for the state to mandate the imposition of this debt upon defendants who cannot pay.

While the \$500 VPA fee may not seem like much, defendants against whom these LFOs are imposed will be saddled with a compounding 12 percent interest rate on the unpaid fees. This makes the debt incurred by these LFOs even more onerous and impedes rehabilitation and reentry into society following incarceration. State v. Blazina, 182 Wn.2d at 836-37 (discussing cascading effect of LFOs with a

compounding 12 percent interest and examining the detrimental impact to rehabilitation that comes with ordering LFOs that cannot be paid). Thus, imposition of the VPA collection fee on those who cannot pay them actually undermines another legitimate interest of the State — reducing recidivism. See id.

In response, the State might cite Division Two’s recent decision in State v. Mathers, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2016 WL 2865576 (May 10, 2016), and assert it forecloses Anderson’s substantive due process claim. However, Mathers did not reject all substantive due process challenges to the VPA statute; it just rejected Mathers’s challenge “because the same issues have already been addressed unfavorably to Mathers by Washington Courts” in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), and State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013). Mathers, 2016 WL 2865576, at \*7. Both Lundy and Curry were limited to the procedural question of assessing whether the VPA collection statutes contained sufficient constitutional safeguards “to prevent defendants from being sanctioned for nonwillful failure to pay.” State v. Duncan, 185 Wn.2d 430, 436, n. 3, 374 P.3d 83 (2016) (citing Curry, 118 Wn.2d at 917); see also Lundy, 176 Wn. App. at 102-03 (applying Curry to hold that there were sufficient safeguards to prevent imprisonment of indigent defendants for nonwillful failure to pay mandatory LFOs).

Mathers thus did not address the type of substantive due process claim Anderson raises here, and therefore Mathers does not foreclose Anderson's substantive due process challenge to RCW 7.68.035.

The Mathers court also explicitly left the door wide open to novel substantive due process challenges like Anderson's. The court indicated that "because Mathers does not assert any new arguments, instead rearguing issues that have been clearly addressed, we follow Curry and Lundy and conclude that the imposition of DNA and VPA fees did not violate Mathers's due process right." Mathers, 2016 WL 2865576, at \*8 (emphasis added). As discussed, Anderson's due process challenge is different than the challenges in Lundy and Curry. The Mathers court's indication that it was denying relief to Mathers because he did not assert new arguments strongly indicates that courts should be receptive to considering new or different arguments and that neither Curry nor Lundy control when such new or different arguments are raised.

Anderson raises new and different arguments that have not yet been addressed by the Washington Courts. When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of VPA fees in the judgment and sentence does not rationally relate to a legitimate state interest. The state is unable to collect these fees from those who cannot pay, so without ascertaining whether Anderson can

pay, it is irrational to impose these LFOs. Therefore, Anderson asks this court to hold that RCW 7.68.035 violates substantive due process as applied and vacate these LFOs in Anderson's judgment and sentence.

## 2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Anderson was entitled to seek review at public expense, and therefore appointed appellate counsel. CP 110-12. If Anderson does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair<sup>2</sup> (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant's brief). RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State's request for costs. Sinclair, 192 Wn. App. at 388.

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, Anderson's ability to pay must be determined before

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<sup>2</sup> State v. Sinclair 192 Wn. App. 380, 367 P.3d 612, rev. denied, 185 Wn.2d 1034, \_\_\_ P.3d \_\_\_ (2016).

discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees. CP 107; 1RP 94.

Without a basis to determine that Anderson has a present or future ability to pay, 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 vacate the \$500 victim assessment collection fee order. This Court should also decline to impose appellate costs against Anderson.

DATED this 29<sup>th</sup> day of August, 2016.

Respectfully submitted,

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