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Court of Appeals
Division II
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NO. 50032-9-II

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

STATE OF WASHINGTON, Respondent

v.

KAREN ANN CONWAY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.07-1-00287-1

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The Superior Court did not violate Conway's due process and equal protection rights when it denied her motion to remit mandatory fees and assessments.
- II. There was no enforcement action taken against Conway for her failure to pay mandatory fees and assessments.
- III. The Superior Court lacked the authority to waive mandatory fees and assessments.
- IV. *Fuller* does not support waiver of mandatory fees and assessments.

STATEMENT OF THE CASE

On March 26, 2007 Karen Conway (hereafter "Conway") pleaded guilty to one count of Maintaining a Dwelling for Controlled Substances under Clark County Superior Court cause number 07-1-00287-1. CP 1-8. Conway was sentenced to a standard range and was ordered to pay various costs, fines, and fees. CP 15-27. She was ordered to pay a \$200 criminal filing fee pursuant to RCW 9.94A.505, and a \$500 victim assessment pursuant RCW 7.68.035. CP 18.

The Superior Court collections unit periodically sent citations to Conway for her to appear for a payment review. CP 41-45. The purpose of the payment review hearings were for Conway to either make a payment or explain why she could not make a payment. She was informed that if she failed to pay or failed to appear she could be placed in custody. CP 41,

44. There is no record of Conway ever having been jailed or sanctioned by the Superior Court for a failure to pay her legal financial obligations (hereafter “LFOs”).

On February 17, 2016, Conway filed a motion to remit/waive the fines on case 07-1-00287-1. CP 73-79. Conway argued for the Superior Court to suspend collection efforts on her outstanding fines and waive all the remaining fines and interest, but conceded that the Superior Court could not waive the criminal filing fee or the victim assessment. CP 73.

The Superior Court issued its ruling on Conway’s motion on October 25, 2016 through written findings of fact and conclusions of law. CP 307-10. In the Court’s findings of fact, the Court found that Conway was disabled, her only source of income was Supplemental Security Income (hereafter “SSI”) of \$733 a month, and she has been on SSI for 27 years. CP 308. The State did not challenge that Conway was indigent. CP 308. The Court waived the balance of interest owing, the criminal fine, the court appointed attorney fine, the DNA fine (that was discretionary at the time it was imposed), the crime lab fine, the drug fund fine, and the balance of collection fees. CP 310. The Court did not waive the victim assessment or the criminal filing fee, and Conway still owes \$493.55 for the victim assessment and \$197.41 for the filing fee. CP 310. The Court

also ordered that it could not require her to pay the remaining mandatory fees because her only source of income was SSI. CP 310.

Conway filed a motion to reconsider in Superior Court on December 9, 2016. CP 365-74. Conway now argued, in part, that the Superior Court's failure to waive mandatory fines violated her right to equal protection and due process. CP 372-74. The Superior Court denied the motion to reconsider, and ruled that the imposition of mandatory fines against Conway did not violate her constitutional rights. CP 399-401. The Superior Court also disagreed with Conway's contention that because she had been on SSI for 27 years, and did not anticipate ever being off of SSI, all fines should have been waived. CP 400. The Court stated that it could conceive of circumstances where Conway may be able to pay the fines in the future. CP 400. The Superior Court also found that there had been no enforced collection in Conway's case, because no sanctions for non-payment were ever imposed and she was never brought to court for non-payment. CP 400. The Court also found that Conway had paid \$1,105 towards her LFOs since November 5, 2007. CP 376.

Conway then filed a notice of appeal with this Court, which was then converted to a motion for discretionary review. That motion was granted, and this appeal follows.

ARGUMENT

I. **The Superior Court did not violate Conway's due process and equal protection rights when it denied her motion to remit mandatory fees and assessments.**

Conway argues that her due process and equal protection rights were violated when the Superior Court denied her motion to remit/waive mandatory LFOs. She argues there is no rational basis between requiring her to provide proof of her indigency and the costs incurred by the Superior Court in monitoring her ability to pay. However, denying Conway's motion to remit the mandatory LFOs does not run afoul of the due process or equal protection clauses of the U.S. and Washington Constitutions. Conway has failed to show that denying her motion to remit the mandatory LFOs does not pass the rational basis standard of review. Her claim fails.

A. **THIS COURT SHOULD DECLINE TO REVIEW CONWAY'S POTENTIAL EQUAL PROTECTION CLAIM.**

As an initial matter, Conway's brief mention of the equal protection clause is confusing. She initially states in her argument section of her brief that the trial court's denial of her motion to waive mandatory LFOs violates equal protection. However, Conway never argues that she is a member of a class of individuals, never argues that she has been treated differently from a class of similarly situated individuals, and never argues

the State treated this class of individuals improperly under the rational basis test. The Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington State Constitution require that similarly situated persons be treated similarly under the law. *Harmon v. McNutt*, 91 Wn.2d 126, 587 P.2d 537 (1978). All persons need not be treated identically, but any distinctions that are made and applied to a certain class of people must have some relevance to the purpose for which the classification was made. *In re Det. Of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003) (quoting *Baxstrom v. Herold*, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966)).

When this Court evaluates an equal protection claim, it must first determine whether the individual is a member of a class of similarly situated individuals, and then it determines what level of scrutiny to apply in evaluating the state's action. *State v. Osman*, 157 Wn.2d 474, 139 P.3d 334 (2006) (internal citations omitted). Conway never claims she is a member of a class of similarly situated individuals, nor does she ever explain in her brief how she believes the trial court violated equal protection. The State is therefore unable to respond to Conway's equal protection claim as it is left to guess at what Conway's argument is. Is she contending that she and all defendants are members of a class that are being treated differently from another class, such as those not convicted of

crimes? Or is she contending that she is a member of a class of individuals, those who are indigent, and that class has been treated differently for no rational reason? Whereas here, the appellant has failed to develop or explain her claim, this Court should decline to review it.

“Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *Holland v. City of Tacoma*, 90 Wn. App. 533, 954 P.2d 290 (1998).

B. THE TRIAL COURT’S ACTIONS DID NOT VIOLATE DUE PROCESS.

Conway argues that the trial court’s action in denying her request to waive the mandatory LFOs in her case violates her substantive due process rights. Her substantive due process rights were not violated as there is a rational basis for imposing the mandatory costs. Her claim fails.

Conway has the burden of showing that her due process rights were violated. *State v. Seward*, 196 Wn. App. 579, 384 P.3d 620 (2016), *review denied*, 188 Wn.2d 1015, 396 P.3d 349 (2017) (citing *State v. McCuiston*, 174 Wn.2d 369, 275 P.3d 1092 (2012); *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997)). Statutes are presumed constitutional. *Id.* When state action does not threaten any fundamental or important rights, rational basis review applies. *Id.*

Rational basis review is the most lenient and highly deferential standard of review for due process violation claims. *Seward*, 196 Wn. App. at 584. Rational basis review looks to whether there is a legitimate governmental objective being served by the statute and whether the means of achieving it are rational. *In re Det. Of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999). There is a strong presumption of constitutionality, and here, as the party challenging the constitutionality of the bar to waiving the mandatory criminal filing fee and victim assessment, Conway must show no rational relationship exists between the statute and a legitimate statute interest. *Nielsen v. Dep't of Licensing*, 177 Wn. App. 45, 309 P.3d 1221 (2013). Conway cannot meet this burden.

It is important at this point to clarify into which category each legal financial obligation falls, because they are frequently described as “costs” when only some of them meet that definition. “Costs” include discretionary attorney’s fees, but they do not include restitution, the mandatory victim assessment, the criminal filing fee, or the mandatory DNA collection fee. In considering a motion to remit under RCW 10.01.160, the court must first determine which legal financial obligations are costs and which are non-costs. Fines and restitution are not costs. Regarding fines, *see generally* RCW 10.01.170, RCW 9.92.070, RCW 10.82.010, *State v. Clark*, 191 Wn. App. 369, 362 P.3d 309 (2015).

Restitution is not a cost and cannot be remitted under RCW 10.01.160(4). See RCW 9.94A.753(4). The victim assessment is a penalty rather than a cost. See RCW 7.68.035(1)(a); see also RCW 10.82.070(1) (distinguishing costs from penalties). Likewise, the DNA collection fee is a fee, not a cost. Further, it is not subject to remission. See RCW 43.43.7541 (providing that “every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law”). The criminal filing fee, like the DNA fee, is a fee rather than a cost. Although termed a criminal filing fee, this fee only becomes due (and mandatory) after conviction. See RCW 36.10.020; *State v. Lundy*, 176 Wn. App. 96, 308 P.3d 755 (2013). Thus, the two remaining legal financial obligations in this case, the criminal filing fee and the victim assessment, are not costs; they are mandatory fees not subject to waiver or remission. *State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163 (2016); *State v. Shirts*, 195 Wn. App. 849, 381 P.3d 1223 (2016); *Lundy*, 176 Wn. App. at 102.

Mandatory LFOs are not subject to a motion to remit under RCW 10.01.160(1). *Shirts*, 195 Wn. App. at 862 n.7. When Conway brought her motions to remit legal financial obligations, the Superior Court had no authority to waive the criminal filing fee and the victim assessment. Regardless of whether or not the Superior Court properly decided that

Conway could potentially pay these mandatory obligations in the future, the Superior Court could not waive them.

Seward, supra, addressed the initial imposition of mandatory LFOs and not, as the court below considered, the constitutionality of remitting mandatory LFOs. However, this Court's reasoning in *Seward* for upholding the imposition of these LFOs is applicable to denying their remission. In *Seward*, the defendant argued that imposing mandatory LFOs on defendants without inquiring into their present or future ability to pay did not rationally serve legitimate state interests¹. 196 Wn. App. at 585. This Court disagreed and held that *Seward* had failed to show that there was no rational relationship between imposing mandatory LFOs against all offenders. *Id.* at 585-86. Imposing the mandatory LFOs was rationally related to legitimate state interests for two reasons. *Id.* at 585. The first was that imposing the mandatory LFOs on all felony offenders without considering ability to pay will result in some offenders being able to pay, which creates funding sources for the purposes of the LFOs. *Id.* The second was that an offender's indigency may not always exist, and

¹ The legitimate state interests for the two mandatory LFOs at issue in this case were conceded by *Seward* and adopted by this Court. Those interests are:
(1) The victim assessment serves the legitimate state interest of funding comprehensive programs to encourage and facilitate testimony by victims and witnesses of crimes; and
(2) The filing fee serves the legitimate state interest in compensating the court clerks for their official services.

Seward, 196 Wn. App. at 584-85.

this Court could conceive of situations where an offender who was indigent at sentencing would be able to pay the mandatory LFOs in the future. *Id.* This Court found that it is not unreasonable to believe that imposing the mandatory LFOs on all indigent offenders would result in some funding. *Id.*

The reasoning in *Seward* is applicable to this case, because preventing remission of mandatory LFOs serves the same legitimate state interests as requiring their imposition. Preventing remission of mandatory LFOs for all offenders creates funding for the purposes behind the fees and assessments because the offenders may be able to pay in the future. When an offender files a motion to remit their mandatory LFOs while they are currently indigent, and if there are conceivable situations where they could pay in the future, then they are in the same situation as when the mandatory LFOs were imposed. Therefore, just as in *Seward*, there is a rational basis for preventing remission of mandatory LFOs for all offenders.

In Conway's case, she fails to show there is no rational relationship between preventing remission of mandatory LFOs for all offenders and a legitimate state interest. Conway argues that there is no rational relationship between the costs incurred by the Superior Court in monitoring her finances and one day collecting her owed mandatory

LFOs. While the Superior Court agreed that Conway had been on SSI for 27 years and that Conway herself did not anticipate ever being off of SSI, it was not error for the Superior Court to conceive of ways Conway could pay the mandatory LFOs in the future. CP 400. The Superior Court fully considered Conway's current and future ability to pay all of her LFOs, which included evidence that Conway had made payments towards her LFOs totaling \$1,105 since November 5, 2007. CP 376. Conway was on SSI during this time and shows that she was still able to make payments towards her LFOs. After a diligent search of the record below, the State has found no evidence that Conway will be on SSI for the rest of her life. Conway argues it is speculative for the Superior Court to conceive of ways for her to pay in the future, but it is also speculative to assume that Conway will always be on SSI or will never have the means to pay her mandatory LFOs. Conway has failed to show how the Superior Court monitoring her ability to pay mandatory LFOs is not rationally related to the legitimate state interests behind the imposition of these LFOs as articulated in *Seward*. 196 Wn. App. at 584–85. Conway has not shown how preventing remission of mandatory LFOs does not pass rational basis review. Her claim fails.

II. **There was no enforcement action taken against Conway for her failure to pay mandatory fees and assessments.**

Conway argues that the Superior Court clerk's office is enforcing collection on her mandatory LFOs despite her indigency. She argues that the Superior Court is enforcing collection by requiring Conway to present yearly proof of her SSI income. However, requiring Conway to provide proof of her SSI income is not enforced collection, because no money is being collected from her. Requiring Conway to provide proof of her SSI income is actually what prevents any collection of her mandatory LFOs. Her claim fails.

An inquiry into an offender's ability to pay is required at the point of collection and when sanctions are sought for nonpayment. *Blank*, 131 Wn.2d at 242. "It 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. Curry*, 118 Wn.2d 911, 829 P.2d 166, 168 (1992) (internal citations omitted). For the victim assessment, it is a mandatory penalty and there is no statutory provision to waive the penalty. *Id.* at 168. However, there are safeguards in place to prevent imprisonment of offenders who do not pay this mandatory penalty. *Id.* at 169. Those safeguards are a show cause hearing, discretion for the court to treat a non-

willful violation more leniently, and incarceration only if the failure to pay was willful. *State v. Shelton*, 194 Wn. App. 660, 378 P.3d 230 (2016), review denied, 187 Wn.2d 1002, 386 P.3d 1088 (2017) (citing *Curry*, 118 Wn.2d at 917-918; RCW 9.94B.040(3)(b); RCW 9.94B.040(3)(d); RCW 9.94A.6333.

Conway has failed to prove that she has been subject to enforced collection for her mandatory LFOs. The definition of “collect” found in RCW 9.94A.030(2) does not support Conway’s argument. That definition states that collecting requires three steps: (1) monitoring and enforcing LFOs; (2) receiving payment of the LFOs; and (3) delivering the payment to the clerk’s office. RCW 9.94A.030(2). Requiring Conway to provide proof of her SSI status is simply monitoring her and is not an enforced collection. Enforced collection occurs when the offender is faced with the alternatives of payment or imprisonment. *State v. Crook*, 146 Wn. App. 24, 189 P.3d 811, 813 (2008) (internal citations omitted). Conway presents no evidence that she was ever faced with the possibility of imprisonment when she was required to show proof of her SSI status. The Superior Court did not err when it found there had been no enforced collection against Conway. Her claim fails.

III. The Superior Court lacked the authority to waive mandatory fees and assessments.

Conway argues that the Superior Court had discretion to waive her mandatory LFOs and erred by refusing to waive them. Conway cites to several statutes and provisions of the SRA for support. However, the Superior Court had no authority to waive mandatory LFOs, because the waiver of mandatory LFOs is explicitly forbidden under statutes and case law. Her claim fails.

The conviction fee and victim assessment at issue in this case are mandatory LFOs. *Mathers*, 193 Wn. App. at 918-19; *Shirts*, 195 Wn. App. at 862 n.7; *Lundy*, 176 Wn. App. at 102. In enacting the statutes mandating these LFOs, the legislature has divested the courts of the discretion of whether or not to impose them. *Lundy*, 176 Wn. App. at 102.

These mandatory LFOs are not subject to a motion to remit under RCW 10.01.160(1). *Shirts*, 195 Wn. App. at 862 n.7; *Curry*, 118 Wn.2d at 917-18. This shows that the Superior Court had no authority to remit or waive Conway's mandatory LFOs and therefore did not commit error.

Conway's reliance on RCW 9.94A.6333 and RCW 10.01.180(4) is misplaced. RCW 9.94A.6333(2) is a general provision for when offenders fail to comply with conditions or requirements of their sentences, and states that if a violation was not willful a court "may modify its previous

order regarding payment of legal financial obligations...” RCW 9.94A.633(2)(d). This statute does not specify what legal financial obligations it is referring to and only grants a court discretion to modify a previous order. Noticeably absent is the grant of authority to a court to remit mandatory LFOs. Therefore, RCW 9.94A.633(2)(d) does not grant a Superior Court the authority to waive mandatory LFOs.

RCW 10.01.180(4) also does not grant the Superior Court authority to remit mandatory LFOs. This statute states that if an offender’s default in payment of a *fine or costs* is not contempt, then a court may enter an order allowing for more time to pay, reducing the amount of the *fine or costs*, or revoke the *fine or costs*. RCW 10.01.180(4) (emphasis added). This statute only grants a court discretion to remit a fine or costs, and as argued above, mandatory LFOs are not fines or costs. The victim assessment is a penalty rather than a cost. See RCW 7.68.035(1)(a). (*See also* RCW 10.82.070(1), distinguishing costs from penalties.). The criminal filing fee is not a cost, and while termed a criminal filing fee, this fee only becomes due (and mandatory) after conviction. *See* RCW 36.10.020; *Lundy*, 176 Wn. App. at 102-03. This shows that RCW 10.01.180(4) does not apply to mandatory LFOs, and the Superior Court lacked the authority to remit them for Conway.

RCW 9.94A.6333 and RCW 10.01.180(4) are only applicable when an offender has failed to pay or is in default, and the Superior Court never found Conway to be in default or violated her for failing to pay. A court taking action against an offender who has failed to pay LFOs is what triggers a court's review of LFOs in both of these statutes, and no such action was taken by the Superior Court against Conway. Therefore, even if these statutes applied to mandatory LFOs, they would not apply to Conway.

The Superior Court does not have the authority to waive mandatory LFOs under its general jurisdictional powers. Conway relies on *State v. Johnson*, 54 Wn. App. 489, 774 P.2d 526 (1989), for its holding that where statutory language is absent, a sentencing court retains jurisdiction to enforce a sentence. However, *Johnson* does not apply in this case. First, *Johnson* applies to the enforcement of a sentence and makes no mention of modification or remission of a sentence. Second, there is statutory authority explicitly preventing remission of mandatory LFOs, so *Johnson* does not apply. RCW 10.01.160(4) grants the Superior Court explicit authority to remit costs at any time. However, RCW 10.01.160 applies only to a motion to remit costs, so Conway's mandatory LFOs are not eligible for remission. *Shirts*, 195 Wn. App. at 862 n.7;

Curry, 118 Wn.2d at 917-18. Therefore, there is no general authority for the Superior Court to remit Conway's mandatory LFOs.

The Superior Court did not have discretion to remit Conway's mandatory LFOs. Therefore, the Superior Court did not err in denying Conway's motion to remit. Her claim fails.

IV. ***Fuller* does not support waiver of mandatory fees and assessments.**

Conway argues that *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct 2116, 40 L.Ed. 642 (1974), should be interpreted by this Court to allow for remission or waiver of mandatory LFOs. She claims that portions of the SRA and other statutes can only be interpreted to satisfy *Fuller* if they permit remission of mandatory LFOs. However, *Fuller* does not apply to mandatory LFOs, and this Court has previously held that mandatory LFOs are not subject to a motion to remit. Conway's claim fails.

Fuller is inapplicable to Conway's case because it dealt with the discretionary costs and the Oregon recoupment statute. *Id.* at 43-44. The Court did not address the imposition of mandatory cost and fee statutes. *Mathers*, 193 Wn. App. at 926. The Court in *Fuller* upheld the Oregon recoupment statute as constitutional because the statute provided safeguards against oppressive application. *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976) (citing *Fuller*, 417 U.S. at 44-47). RCW

10.01.160 was based off of the Oregon statute that was upheld in *Fuller*, *Mathers*, 193 Wn. App. at 926 (citing *Curry*, 118 Wn.2d at 915; *Fuller*, 417 U.S. at 40). This shows that *Fuller* does not apply to the imposition or waiver of mandatory LFOs.

This Court has previously been presented with the opportunity to expand *Fuller* to mandatory LFOs and has declined to do so. In *Mathers*, this Court stated that the defendant improperly relied on *Fuller* to argue “that the Fourteenth Amendment is only satisfied if RCW 10.01.160(3) is read in tandem with specific cost and fee statutes.” 193 Wn. App. at 926. This Court then held that *Fuller* did not set such a precedent and that *Fuller* did not address mandatory cost and fee statutes. *Id.* Conway makes a similar argument that was rejected in *Mathers*: that *Fuller* must be read in conjunction with RCW 9.94A.6333 and RCW 10.01.180 in order for those statutes to be constitutional. This shows *Fuller* does not support Conway’s argument, and that a *Fuller* analysis is not required when dealing with mandatory LFOs. Furthermore, as argued by the State above, those statutes do not apply to a motion to remit mandatory LFOs, so *Fuller* has even less applicability. Therefore, *Fuller* does not apply to a motion to remit mandatory LFOs, and it does not give the Superior Court authority to remit mandatory LFOs. Conway’s claim fails.

Conway also argues that this Court should take it upon itself to reform how LFOs are enforced in Washington by granting sentencing courts authority to remit mandatory LFOs. However, Conway has presented no authority for this result, and this Court should not follow this line of reasoning.

The imposition and monitoring of all LFOs is done by statute. Because of this, any change in how LFOs are assessed or remitted must come from the legislature. Washington courts have repeatedly acknowledged this reality. *See, e.g., Lundy*, 176 Wn. App. at 102 (stating “the legislature has divested courts of the discretion to consider a defendant’s ability to pay when imposing [mandatory LFOs]); *Mathers*, 193 Wn. App. at 919-21 (finding the legislature did not intend for trial courts to have discretion when imposing the DNA fee and the victim assessment); *State v. Clark*, 195 Wn. App. 868, 381 P.3d 198 (2016), *review granted in part*, 187 Wn.2d 1009, 388 P.3d 487 (2017) (holding there is a statutory obligation for courts to consider an offender’s ability to pay before imposing costs other than those mandated by the legislature); *State v. Gonzales*, 198 Wn. App. 151, 392 P.3d 1158 (2017), *review denied*, 188 Wn.2d 1022, 398 P.3d 1140 (2017) (stating “we have treated the filing fee as a mandatory fee since we filed *Lundy* in 2013, and the legislature has not taken any action to correct this approach.”). These

cases show that the imposition, modification, and waiver of all LFOs is within the discretion of the legislature. Therefore, any sweeping changes to LFO enforcement must come from the legislature, not this Court.

Conway has provided no authority for this Court to extend *Fuller* to the remission of mandatory LFOs or for why this Court should break from established precedent and substantially change the law surrounding LFOs. *Fuller* does not apply to mandatory LFOs, and it is up to the legislature whether or not to modify the LFO statutes. Conway's claim fails.

CONCLUSION

The State respectfully asks this Court to deny Conway's claims for relief.

DATED this 9 day of April, 2018.

Respectfully submitted:

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