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Division II
State of Washington

NO. 50098-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH JAMES CHELSEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend, Presiding Judge

No. 16-1-01097-2

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court adhere to settled law and decline to review an unripe substantive due process challenge to the mandatory legal financial obligations?

2. Should this court adhere to settled law and decline to review an unpreserved claim of error in imposing mandatory legal financial obligations where such error has been held not to amount to manifest constitutional error?

3. Has the defendant failed to show that the mandatory legal financial obligations are unconstitutional beyond a reasonable doubt?

B. STATEMENT OF THE CASE.

On February 9, 2017, Joseph James Chelsey, hereinafter "defendant" entered a plea of guilty to the charges of failure to remain at the scene of an injury accident, attempted to elude a pursuing police vehicle, unlawful possession of a stolen vehicle, and three counts of unlawful possession of a controlled substance. CP 29-38. As part of the

plea agreement, the State requested the mandatory legal financial obligations (LFOs) of $500 crime victim penalty assessment, $200 filing fee, and $100 DNA testing fee. *Id.* The defendant did not request any deviation from the State's recommendation. RP 14-15. The court imposed the low end of the standard range as well as the mandatory LFOs. RP 15. The court found the defendant indigent and waived all discretionary costs. RP 16. This timely appeal follows.

C. ARGUMENT.

1. THE DEFENDANT'S CHALLENGE IS NOT RIPE FOR REVIEW AND DOES NOT AMOUNT TO MANIFEST ERROR UNDER RAP 2.5(a).

For the first time on appeal, the defendant challenges the constitutionality of RCW 7.68.035, which requires trial courts to impose a $500 CVPA, RCW 43.43.7541, which requires courts to impose a $100 DNA fee, and RCW 36.18.020(2)(h), which requires a $200 filing fee. Because the defendant's substantive due process claims are both unpreserved and unripe for review, and because he lacks standing to assert such claims, this court should decline to review the issue.

The court held in ***State v. Shelton***, 194 Wn. App. 660, 378 P.3d 230, *review denied*, 187 Wn.2d 1002 (2017), that a defendant is procedurally barred from raising a substantive due process challenge to a mandatory LFO statute for the first time on appeal. *Id.* at 674-675. The

court in ***Shelton*** relied on ***State v. Curry***, 118 Wn.2d 911, 917, 29 P.2d 166 (1992), in which our supreme court held that constitutional principles are implicated only when the State seeks to enforce collection of the mandatory assessment. Because there is no evidence that the State had attempted to enforce the collection of LFOs, or to impose a sanction for failure to pay, the court held that Shelton's "constitutional challenge requires further factual development, and the potential risk of hardship does not justify review before the relevant facts are fully developed." ***Shelton***, 194 Wn. App. 672-73 (*citing* ***State v. Lundy***, 176 Wn. App. 96, 108, 308 P.3d 755 (2013)).

The defendant in this case fails to address how this substantive due process claims are ripe for review and fails to address the holding of ***Shelton***. At best the defendant asserts, in the abstract, that future nonpayment may result in "wage garnishment, payroll deductions, wage assignments (which include further penalties) and potential arrest." BOA, page 8. The defendant fails to point to any evidence that he has been subject to any enforced collections, sanctions or other negative consequence of his criminal debt. *See* CP 44-58 (no indication on the judgment and sentence of when or how the defendant is to pay LFOs, except as to say "per clerk."). *See also*, ***State v. Seward***, 196 Wn. App. 579, 586, 384 P.3d 620 (2016) ("Although Seward asserts that enforced

collections and sanctions immediately follow entry of the judgment and sentence, nothing in the record supports this argument").

It is only at the point of enforced collection that constitutional principles are implicated by the prospect of sanctions for nonpayment, and it is only if sanctions for nonpayment are imposed and the defendant is "constitutionally indigent" that a constitutional violation occurs. ***Shelton***, 194 Wn. App. at 671 (*citing* ***Curry***, 118 Wn.2d at 917); ***State v. Johnson***, 179 Wn.2d 534, 553, 315 P.3d 1090 (2014). Because there has been no attempt to collect on the defendant's LFOs and no finding that the defendant is constitutionally indigent at the time of collection[1], the facts necessary to consider the defendant's claim do not yet exist. The defendant does not address how his case is distinguishable from ***Curry***. As in ***Curry***, the defendant's claim is not ripe.

This court should also conclude that the defendant's claim is not a manifest constitutional error warranting review under RAP 2.5. An error is manifest when it has "practical and identifiable consequences." ***Shelton***, 194 Wn. App. at 675. In ***Shelton***, this court held that, absent evidence that the State sought to enforce collection or impose a sanction

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[1] While there is no precise definition of "constitutionally indigent," our supreme court has indicated that it means more than poverty and less than absolute destitution, and that determining constitutional indigence requires consideration of the totality of the defendant's financial circumstances. ***Johnson***, 179 Wn.2d 553-554. A finding of statutory indigence does not establish constitutional indigence. *Id.* at 553, 555.

for nonpayment, an appellant cannot show a manifest constitutional error justifying review under RAP 2.5. ***Shelton***, 194 Wn. App. at 674; ***State v. Lewis***, 194 Wn. App. 709, 715, 379 P.3d 129 (2016).

Although ***Shelton*** only considered the constitutionality of the DNA fee statute, RCW 43.43.7541, its reasoning applies with equal force to the crime victim penalty assessment and filing fee. Nothing in the record reflects that the State has attempted to collect the defendant's LFOs. This court should adhere to the analysis of ***Shelton*** and decline to reach the defendant's unpreserved, unripe challenge to the trial court's imposition of the DNA fee, crime victim penalty assessment, and filing fee.[2]

2. MANDATORY LFOS DO NOT VIOLATE THE DEFENDANT'S DUE PROCESS RIGHTS.

Even if this court exercises its discretion to review the defendant's claim, it should reject constitutional challenges to RCW 43.43.7541, 7.68.035, and 36.18.020(2)(h). A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond reasonable doubt. ***State ex re. Peninsula Neighborhood Ass'n v. Dep't of Transp.***, 142 Wn.2d 328, 12

[2] Additionally, the ***Shelton*** court concluded that the defendant lacked standing because he could not show harm until the State sought to enforce the collection of the LFOs. 194 Wn. App. at 674, n. 8. Because the defendant has not been found to be constitutionally indigent and has suffered no injury in fact, he also lacks standing to challenge the statutes.

P.3d 134 (2000). 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). The defendant cannot meet this heavy burden and his claim should be rejected.

Substantive due process bars arbitrary and capricious government action regardless of the fairness of the procedures used to implement them. ***State v. Beaver***, 184 Wn. App. 235, 243, 336 P.3d 654 (2014), *aff'd* 184 Wn.2d 321 (2015). The level of review applied depends on the nature of the interest involved. *Id.* (*citing* ***Amunrud v. Bd. of Appeals***, 158 Wn.2d 208, 219, 143 P.3d 571 (2006)). Where no fundamental right is at issue, as in this case, the rational basis standard applies. ***Amunrud***, 158 Wn.2d at 222. Under this standard, the challenged statute need only be "rationally related to a legitimate state interest." *Id.* In determining whether this relationship exists, the reviewing court may "assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest." *Id.*

In 1973, the legislature created a crime victims compensation account to aid victims of criminal acts. ***State v. Humphrey***, 139 Wn.2d 53, 57, 983 P.2d 1118 (1999) (citing LAWS of 1973, 1st Ex. Sess., ch. 122, §1). To help fund the account, the legislature added a provision in

1977 directing trial courts to impose a penalty assessment upon those found guilty of certain classes of crimes. *Id.* The victim penalty assessment is thus designed to fund "comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes". RCW 7.68.035. In addition to encouraging participation at trial, these programs work to assist victims of a crime in learning about and applying for benefits, in navigating the restitution and adjudication process, and in preparing and presenting their claims to the department of labor and industries. RCW 7.68.035.

The $100 DNA testing fee also does not violate substantive due process, as it provides funding for the State to collect, analyze and store DNA. ***State v. Seward***, 196 Wn. App. 579, 584-85, 384 P.3d 620 (2016). Similarly, the ***Seward*** court has already determined that the $200 filing fee does not violate due process, as it is related to the legitimate state interest of compensating court clerks for their official services. ***Seward***, 196 Wn. App. 579 at 585.

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), involved a claimed violation of RCW 10.01.160(3), which requires the trial court to make an individualized determination of a defendant's ability to pay before imposing *discretionary* LFOs as part of a sentence. *Id.* at 837-38. If this court reaches the merits of the defendant's constitutional challenge,

departing from ***Shelton*** and many other cases, it should follow the majority opinion in ***Seward*** and conclude that the defendant has not shown that the mandatory LFOs are unconstitutional.

3. RCW 10.01.160(3) DOES NOT APPLY TO THE MANDATORY LFOS THAT WERE IMPOSED IN THIS CASE.

The defendant asserts that the CVPA, DNA testing fee, and filing fee should be stricken because the trial court failed to comply with RCW 10.01.160(3). That statute, however, is inapplicable to mandatory LFOs, as this court held in ***State v. Lundy***, 176 Wn. App. 96, 308 P.3d 755 (2013). In ***Lundy***, this court held that "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." *Id.* at 102-03 (emphasis added), *citing* ***State v. Kuster***, 175 Wn. App. 420, 306 P.3d 1022 (2013), ***State v. Curry***, 62 Wn. App. 676, 680-81, 814 P.2d 1252 (1991), ***State v. Thompson***, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009). The court in ***Lundy*** concluded that "because the legislature has mandated imposition of these legal financial obligations" the trial court's finding regarding Lundy's ability to pay was unnecessary.

The defendant seeks to have this court overrule ***Lundy*** on the basis that RCW 43.43.7541, 7.68.035, and 36.18.020(2)(h) must be "read in tandem" with RCW 10.01.160(3). Such argument fails for several

reasons. First, RCW 10.01.160(3) addresses defendants who have been ordered to pay "costs." RCW 43.43.7541 and 36.18.020(2)(h) do not use the word "costs" but rather describe those mandatory LFOs as "fees." RCW 7.68.035 describes the CVPA as an "assessment." If the legislature had desired RCW 10.01.160(3) to apply, they would have included the terms "fee" or "assessment" in its language, but they did not do so which demonstrates that RCW 10.01.160(3) does not apply to these mandatory LFOs.

Second, it is a principle of statutory construction that a specific statute prevails over a general statute where there is a conflict. *See*, ***O.S.T. v. BlueShield***, 181 Wn.2d 691, 701, 335 P.3d 416 (2014). Even assuming, without conceding, that a conflict exists, RCW 43.43.7541, 7.68.035, and 36.18.020(2)(h) are more specific than RCW 10.01.160(3). RCW 43.43.7541 states that a DNA testimony fee "must" be imposed. RCW 7.68.035 states that a penalty assessment "shall" be imposed." RCW 36.18.020(2)(h) states that a filing fee "shall" be paid. Because the mandatory LFO statutes are more specific than RCW 10.01.160(3), their language controls.

The defendant asserts that this court should not only overrule existing caselaw, but ignore critical language in the relevant statutes. He offers no explanation or argument as to why RCW 10.01.160 uses the

word "costs" when the statutes for mandatory LFOs do not. He also offers no argument as to why this court should ignore the plain language of the LFO statues requiring imposition of such LFOs.

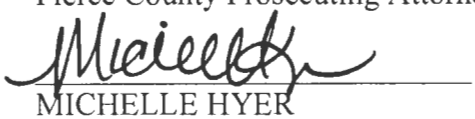
The defendant further relies upon the restitution statute, RCW 9.94A.753, to support his claim that the legislature intended RCW 10.01.160(3) to apply to mandatory LFOs. Such reliance is misplaced as it ignores the plain language of RCW 43.43.7541, 7.68.035, and 36.18.020(2)(h). Because this court has previously held that the mandatory LFOs are not subject to RCW 10.01.160(3), and the plain meaning of those statutes is clear, this court should deny the defendant's claim.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this court affirm the imposition of the mandatory LFOs and reject the defendant's claim.

DATED: October 11, 2017.

MARK LINDQUIST
Pierce County Prosecuting Attorney



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The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant ~~and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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PIERCE COUNTY PROSECUTING ATTORNEY

October 12, 2017 - 10:05 AM

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