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Court of Appeals
Division II
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No. 50731-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GINA BUSH-FORD
Appellant.

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

The Honorable Mary Sue Wilson
Cause No. 15-1-01419-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether this court should decline to review a constitutional challenge to mandatory legal financial obligations that is neither ripe for review nor amounts to manifest constitutional error.

2. Whether the legal financial obligations ordered conflict with the anti-attachment provision of 42 U.S.C. § 407(a), and whether the statutes authorizing mandatory financial obligations violate the Supremacy Clause of the United States Constitution.

B. STATEMENT OF THE CASE.

The appellant, Gina Bush-Ford was charged in Thurston County Superior Court with unlawful possession of a controlled substance, methamphetamine, with intent to deliver, while armed with a firearm and unlawful possession of a controlled substance, hydromorphone. CP 6. Pursuant to a plea agreement, Bush-Ford entered a plea of guilty to one count of unlawful possession of a controlled substance methamphetamine, with intent to deliver. CP 9-19.

Pursuant to the plea agreement, the prosecutor agreed to recommend 20 months and one day, 12 months of community

custody, a \$500 crime victim assessment, \$200 court cost, a \$100 DNA fee, a \$100 drug court fine, a \$2000 VUSCA fine, with standard drug conditions while on community custody. CP 12. The parties specifically wrote into the plea, “agreed recommendation.” Id. Bush-Ford acknowledged that she understood the agreed recommendation. 2 RP 8.

At sentencing, the prosecutor asked the trial court to follow the agreed recommendation. 3 RP 5. Bush-Ford’s defense counsel also asked the court to accept the agreed recommendation. 3 RP 6. During her allocution, Bush-Ford indicated that she wants to be a drug counselor. 3 RP 8. On its own initiative, the trial court inquired regarding the discretionary fees and it was pointed out that Bush-Ford received Social Security. 3 RP 11. Bush-Ford added, “My disability isn’t something that I can be employed, employable for,” and then asked the trial court to keep her in the county for a couple months to make sure her family is okay. 3 RP 11-12. No party actually objected to the imposition of costs or fees, mandatory or discretionary.

The trial court imposed the agreed sentence, with the \$500 crime victim assessment, \$200 court costs, and \$100 DNA fee, but waived the discretionary fees that were in the agreed

recommendation. 3 RP 12, CP 23-33. A Notice of Appeal was filed on June 5, 2017, and this appeal follows.

C. ARGUMENT.

1. Bush-Ford's challenge is not ripe for review and does not amount to manifest error warranting review under RAP 2.5(a)(3).

For the first time on appeal, Bush-Ford argues that the imposition of \$800 in mandatory legal financial obligations is contrary to 42 U.S.C. § 407(a) and as applied, RCW 7.68.035, RCW 36.18.020(2)(H), and RCW 43.43.7541 violate the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2. The legal financial obligations that were imposed in this case are mandatory.

RCW 7.68.035 requires the trial court impose a crime victim assessment.

When any person is found guilty in any superior court of having committed a crime, [other than certain motor vehicle crimes], there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

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RCW 7.68.035(1)(a).

The victim assessment of \$500 is mandatory. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992); State v. Suttle, 61 Wn. App. 703, 714, 812 P.2d 119 (1991); State v. Eisenman, 62 Wn. App. 640, 646, 810 P.2d 55 (1991) (victim assessment is not a “cost”); State v. Bower, 64 Wn. App. 808, 812, 827 P.2d 308 (1992).

Although the criminal filing fee is listed with court costs on the judgment and sentence, the \$200 filing fee is mandatory and cannot be waived. CP 28, RCW 36.18.020(2)(h). RCW 36.18.020(2)(h) provides:

Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, a defendant in a criminal case shall be liable for a fee of two hundred dollars.

Because the court has no discretion regarding the filing fee, a court’s failure to find the defendant has the ability to pay is not error. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

A fee for DNA collection is required by RCW 43.43.7541: “Every sentence imposed for a crime specified in RCW 43.43.754 *must* include a fee of one hundred dollars.” (Emphasis added.) Even if the state patrol crime lab already has a DNA sample from

the defendant, the fee must be ordered for each sentence imposed for crimes specified in RCW 43.43.754. All other financial obligations take precedence and the DNA collection fee is the last to be collected, but it is mandatory. The fee is a “court-ordered legal financial obligation as defined in RCW 9.94A.030.” RCW 43.43.754.

The imposition of a \$100 DNA collection fee has been mandatory since June 12, 2008. RCW 43.43.7541; State v. Thompson, 153 Wn. App. 325, 336, 338, 223 P.3d 1165 (2009).

Trial courts must impose mandatory LFO's. State v. Malone, 193 Wn.App. 762, 765, 376 P.3d 443 (2016). (“[F]or *mandatory* legal financial obligations, the legislature has divested courts of the discretion to consider a defendant’s ability to pay when imposing these obligations. 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.” State v. Lundy, 176 Wn. App. at 102 (Emphasis in original).

A defendant is procedurally barred from raising an as applied constitutional challenge to a mandatory LFO statute for the first time on appeal. State v. Shelton, 194 Wn. App. 660, 674-75, 378 P.3d 230 (2016), rev. denied, 187 Wn.2d 1002, 386 P.3d 1088

(2017) (specifically addressing a constitutional due process challenge). The Court 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 was no evidence that the State had attempted to enforce collection of the LFO, 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. at 672 -73 (citing State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013)). This Court reiterated that view in State v. Lewis, 194 Wn. App. 709, 715, 379 P.3d 129, rev. denied, 186 Wn.2d 1025, 385 P.3d 118 (2016). Our supreme court denied review in both cases.

Bush-Ford's challenge under the Supremacy Clause is a constitutional challenge, much like the due process claim in Shelton. The trial court has not ordered Bush-Ford to pay obligations using Social Security and there has been no attempt to enforce collection of the financial obligations.

“Monetary assessments that are mandatory may be imposed on indigent offenders at the time of sentencing without raising constitutional concern because constitutional principles will be implicated...only if the government seeks to enforce collection of the assessments at a time when [the defendant is] unable, through no fault of [her] own, to comply, and it is at the point of enforced collection..., where an indigent may be faced with the alternatives of payment or imprisonment, that [she] may assert a constitutional objection on the ground of [her] indigency.”

State v. Kuster, 175 Wn.App. 420, 424-425, 306 P.3d 1022 (2013), citing State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997)(internal quotations omitted) (quoting State v. Curry, 118 Wn.2d at 917). Because the trial court did not specifically order that mandatory financial obligations be collected from Social Security benefits, the issue raised by Bush-Ford is not ripe for review.

Moreover, Bush-Ford’s as applied challenge to her legal financial obligations under 42 U.S.C. § 407(a) and U.S. Const. art. VI, cl. 2 is not a manifest error subject to review under RAP 2.5(a)(3). To review the merits of a constitutional challenge to mandatory legal financial obligations for the first time on appeal, the appellant must show the error is manifest and implicates a

constitutional interest. RAP 2.5(a)(3); State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

Manifest error requires a showing of actual prejudice, meaning there must be a plausible showing that the asserted error had practical and identifiable consequences to the case.” State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). In addition, such consequences should have been reasonably obvious to the trial court, and the facts necessary to adjudicate the claimed error must be in the record.” Id. at 108.

“[RAP 2.5] serves judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review, facilitates appellate review by ensuring that a complete record of the issues will be available, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.”

State v. Stoddard, 192 Wn.App. 222, 227, 366 P.3d 474 (2016).

Whether the error is identifiable and the defendant can raise a claim for the first time on appeal turns on whether the record is sufficient to determine the merits of the claim. State v. O’Hara, 167 Wn.2d at 99; State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the

error is not manifest.” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

In this case, no record was made regarding whether or not Bush-Ford has other assets with which to pay the imposed mandatory legal financial obligations. The trial court followed the recommendation that Bush-Ford agreed to. While her financial situation was briefly discussed, there was no record made regarding other current or future abilities that Bush-Ford may be able to utilize to meet those obligations. Moreover, and important to the arguments now raised, there was no direction or finding from the trial court that Bush-Ford must satisfy her obligations using her Social Security benefits. Unless and until such an order is entertained by the trial court, Bush-Ford’s anti-attachment and Supremacy Clause claims are neither ripe for review nor meet the manifest error standard of RAP 2.5(a)(3). This court should not now consider the claims for the first time on appeal.

Bush-Ford argues that this court should exercise its discretion to reach the merits of her claims because the same policy reasons as those noted in State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015), apply. However, a similar argument was considered and rejected in State v. Shelton, where the court

noted that Blazina did not address the imposition of mandatory fees and RCW 10.01.160(3) specifically required the sentencing court to make an inquiry into the defendant's ability to pay discretionary legal financial obligations. Shelton, 194 Wn.App. at 674.

Bush-Ford further cites to the several cases where the Court of Appeals has exercised discretion to reach unpreserved issues regarding legal financial obligations. The only case cited that applied to mandatory LFOs was the unpublished decision in State v. Pendell, No. 34887-3-III (Wash. Ct. App. Jan. 4, 2018), cited with no precedential value pursuant to GR 14.1(a). In that case, the appellant raised a due process issue claim due to constitutional indigence for the first time on appeal. Id. at 4-5. The court elected to exercise its discretion to consider the merits of the claim, but noted "mandatory obligations survive constitutional scrutiny because the sentencing scheme prevents imprisonment of indigent defendants," and affirmed the imposition of the mandatory legal financial obligations. Id. at 11, 12, citing State v. Mathers, 193 Wn.App. 913, 376 P.3d 1163, review denied, 186 Wn.2d 1015, 380 P.3d 482 (2016).

This case is distinguishable from Pendell. In Pendell, the trial court stated, "I don't know that he can pay the LFOs." Pendell,

at 3. Moreover, the record indicated that the appellant was “an unemployed homeless man,” who was “living under a bridge when [the] incident occurred.” Id. at 8. While the court reached the merits of the substantive due process claim, the court denied the claim despite the record. Bush-Ford’s argument is based on the anti-attachment provisions of the Social Security Act and the Supremacy Clause. Unlike, Pendell, the specific issue raised cannot be decided on the current record. As stated above, the issues raised are neither ripe for review nor constitute manifest error such that review is appropriate under RAP 2.5(a)(3).

2. As applied to the record in this case, the legal financial obligations ordered do not conflict with the anti-attachment provision of 42 U.S.C. § 407(a) and therefore, the RCW’s authorizing them do not violate the Supremacy Clause.

Bush-Ford correctly notes that the anti-attachment provision of the Social Security Act prohibits individuals and other entities from using a legal process to reach a social security recipient’s social security funds. Under 42 U.S.C. § 407(a),

“none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or the operation of any bankruptcy or insolvency law.”

Bush-Ford cites to several cases which stand for the premise that the anti-attachment provision applies to states seeking to recoup money from an individual's social security funds. However, in this case, the trial court did not seek to recoup money from Bush-Ford's social security funds. The cases Bush-Ford cites are easily distinguishable from the facts of this case. In Philpott v. Essex County Welfare Bd., 409 U.S. 413, 414, 93 S.Ct. 590, 34 L.Ed. 2d 608 (1973), the State of New Jersey sought reimbursement from a person who had received state benefits, specifically targeting retroactive Social Security payments. Bennet v. Arkansas, 485 U.S. 395, 396, 108 S.Ct. 1204, 99 L.Ed. 2d 455 (1988), addressed an Arkansas statute that specifically authorized collection of a prisoner's property, including federal Social Security benefits, in order to help defray the costs of incarceration.

In City of Richland v. Wakefield, the Washington State Supreme Court looked at a challenge of discretionary costs imposed as the result of a district court conviction. 186 Wn.2d 596, 601, 380 P.3d 459 (2016). Wakefield did not challenge fines or nondiscretionary LFOs. Id. At a fine review hearing, Wakefield testified regarding her financial situation and Social Security benefits, and had an expert witness testify regarding self-sufficiency

standards. Id. The expert specifically testified that ordering Wakefield to pay court costs would be ordering Wakefield to “put her basic survival needs aside.” Id. at 602.

The underlying proceedings in Wakefield involved a motion to remit costs under RCW 10.01.160(4). The LFO’s addressed in this case are not covered by RCW 10.01.160. State v. Kuster, 175 Wn.App. at 424 (statutorily mandated financial obligations are not discretionary costs governed by RCW 10.01.160). Important in the decision of Wakefield, was the court’s determination that the trial court failed to apply the correct legal standard of “manifest hardship” under RCW 10.01.160. Wakefield, 186 Wn.2d at 605-606.

The Wakefield court went on to discuss the anti-attachment provision of the Social Security Act. In regard to the provision, the court stated:

“[C]ourts in Montana and Michigan have held that states cannot order individuals to pay LFOs such as restitution from social security disability benefits. See In re Lambert, 306 Mich.App. 226, 856 N.W. 2d 192 (2014); State v. Eaton, 2004 MT 283. 323 Mont. 287, 293, 99 P.3d. 661. The Montana Supreme Court went further and held that a defendant’s social security disability income could not be included in a person’s total income for purposes of calculating the monthly amount he could pay, as it would improperly

burden his social security benefits. Eaton, 323 Mont. At 293.”

Id. at 608-609 (internal quotations omitted).

The Court continued:

“These courts have rejected the view that the antiattachment provisions prohibit only direct attachment and garnishment, and have instead held that a court ordering LFO payments from a person who receives only social security disability payments is an other legal process, by which to reach those protected funds. This comports with the Supreme Court’s key ruling on the definition of other legal process, which explained that it is a process that involves some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability. Wash. State Dep’t of Soc. Health Servs. V. Guardianship Estate of Keffler, 537 U.S. 371. 385. 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003). In this case, the court ordered Wakefield to turn over \$15 from her social security disability payments each month. That meets the Supreme Court’s definition of other legal process. Accordingly, we hold that federal law prohibits courts from ordering defendants to pay LFOs, if the person’s only source of income is social security disability.”

Id. at 609 (internal quotations omitted).

In context, the Court’s ruling was aimed at the very specific order of the district court that Wakefield pay her discretionary obligations out of her Social Security benefits. The order occurred after a hearing was held on a motion to remit pursuant to RCW

10.01.160(4), and a record had been made regarding the appellant's financial situation. That is a stark contrast to this case, where the court simply ordered mandatory financial obligations and no order that payments be made out of Social Security has occurred.

The distinction is clear in In re Lambert, which was cited in Wakefield. In Lambert, the Michigan Court of Appeals considered an order to pay restitution. Like the obligations ordered in this case, the Michigan statute authorizing restitution did not include a consideration of the defendant's ability to pay. Lambert, 306 Mich.App. at 233. The appellant sought review of the trial court's order denying a motion to modify or cancel the restitution obligation. Id. at 229 (internal quotations omitted).

The Lambert court noted, "if the trial court were in fact to use its contempt powers in a manner as would compel [appellant] to satisfy her restitution obligations using her SSDI benefits, we would find that the process employed falls within the definition of other legal process as the term is used in 42 U.S.C. 407(a)." Id. at 240. The court further noted that " the current record does not reflect whether [appellant] possesses any assets, other than as generated by her SSDI income, from which her restitution might be satisfied."

Id. at 241. The question was whether the judicial mechanism was being “used to pass control over property from one person to another, in a manner that runs afoul of 42 U.S.C § 407(a).” Id. at 239. Mandatory legal financial obligations could be imposed, as long as there was no collection of those obligations from Social Security benefits. Id. at 246.

In Keffeler, 537 U.S. at 384, the United States Supreme Court concluded that 42 U.S.C. § 407(a) uses the term other legal process restrictively. The court employed the interpretive canons of *noscitur a sociis* and *ejusdem generis*, to conclude that the term other legal process

“should be understood to be process much like processes of execution, levy, attachment, and garnishment, and a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability.”

Id. at 385.

Here, unlike the situation in Wakefield, the trial court made no order similar to a levy, attachment or garnishment that would require Bush-Ford to use her Social Security benefits to pay. The ordered obligations are very similar to the restitution order in

Lambert. The court's order does not run afoul of 42 U.S.C § 407(a) because the court did not use noncompliance proceedings to order that Bush-Ford use her Social Security to meet the obligations. As in Lambert, the record in this case does not include any discussion of whether Bush-Ford has other assets that may be used to meet her obligations.

Very recently, Division III of this Court considered the application of the Social Security anti-attachment provision to mandatory LFOs. State v. Catling, No. 34852-1-III, ___ Wn.App. ___ (March 15, 2018). The Court held that the statute distinguishes between the imposition of LFOs and the compelled payment of LFOs from the exempt proceeds of a Social Security payment. Id. at 8.

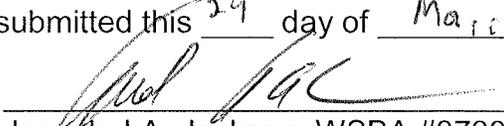
Because the court has not ordered that Bush-Ford use Social Security to pay, as applied to this case RCW 7.68.035, RCW 36.18.020(2)(h), and RCW 43.43.7541 do not conflict with the anti-attachment provisions of the Social Security Act and therefore do not violate the Supremacy Clause. U.S. Const. art. VI, pt. II.

D. CONCLUSION.

The trial court ordered mandatory legal financial obligations at sentencing pursuant to the agreement of the parties. The trial court did not order Bush-Ford to use Social Security benefits to pay her financial obligations. The issue should not be raised for the first time on appeal and there has not been a sufficient record made to consider the matter. As applied to the facts of this case, the trial court's imposition of mandatory legal financial obligations does not run afoul of 42 U.S.C. § 407, and as such, there is no violation of the Supremacy Clause of the United States Constitution, U.S.

Const. art. VI, pt. II. The State respectfully asks that this court affirm the conditions of Bush-Ford's sentence.

Respectfully submitted this 29 day of March, 2018.



Joseph J.A. Jackson, WSBA #37306
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CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent on the date below as follows:

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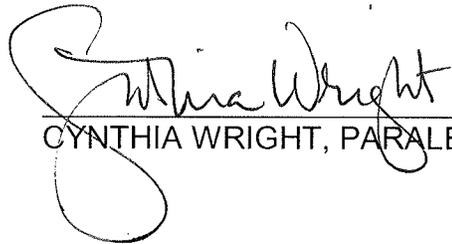
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 29th day of March, 2018, at Olympia,
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THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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