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Court of Appeals
Division II
State of Washington
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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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

- 1. Any court order requiring Ms. Bush-Ford to pay mandatory legal financial obligations is void under federal law, and the Washington statutes that require a social security recipient to use social security funds to pay off legal financial obligations violate the Supremacy Clause.**

Federal law prohibits the State from compelling an individual to satisfy a debt through social security income. 42 U.S.C. § 407(a). Gina Bush-Ford has several physical disabilities that render her unable to work. 1RP 7; 2RP 5; 3RP 3. Due to her conditions, she receives social security disability income, which is the only source of income for her and her family. 3RP 8-12.

The sentencing court ordered Ms. Bush-Ford to pay \$800 in mandatory legal financial obligations. 3RP 12; CP 28. Because Ms. Bush-Ford can only pay this debt with her social security income, the court's order is void under federal law. Additionally, as applied to a social security recipient like Ms. Bush-Ford, Washington's mandatory legal financial obligation statutes are at odds with the Supremacy Clause.

In response, the State argues this Court should not reach the merits of Ms. Bush-Ford's arguments, claiming the arguments Ms. Bush-Ford raises are neither ripe for review nor subject to review under RAP 2.5.

Resp. Br. at 3-11. Alternatively, the State argues that, “as applied to the record” here, the court order requiring Ms. Bush-Ford to pay mandatory LFOs does not conflict with the anti-attachment provision of the social security act; therefore, the statutes that authorize mandatory LFOs are not in violation of the Supremacy Clause. Resp. Br. at 11-17. All of these arguments are untenable, and this Court should reject them.

- a. A defendant can raise a constitutional claim surrounding the sentencing court’s imposition of fines at the time of sentencing.

A defendant may assert a constitutional challenge to the sentencing court’s imposition of fines at the time the sentencing court imposes them. *See, e.g., State v. Barklind*, 87 Wn.2d 814, 815, 557 P.2d 314 (1976), *Southern Union Co. v. United States*, 567 U.S. 343, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012).

And critically, a defendant may challenge a court order requiring her to pay mandatory LFOs on the basis that the court order is inimical to 42 U.S.C. § 407(a) and therefore in violation of the Supremacy Clause *before* the State attempts to enforce the debt. *See State v. Catling*, ___ Wn. App. ___, 413 P.3d 27 (2018) (reaching the merits of a Supremacy Clause/anti-attachment challenge to the sentencing court’s imposition of mandatory LFOs on a social security recipient). Therefore, this Court should reject the State’s claim that this challenge is not ripe and that Ms.

Bush-Ford is “procedurally barred” from raising this challenge before this Court. Resp. Br. at 4-11.

The record amply suggests that Ms. Bush-Ford possesses no other means to pay off her LFOs other than her social security income. When the sentencing court inquired as to Ms. Bush-Ford’s “work and pay” in recent years, Ms. Bush-Ford stated she was on social security and that her disability renders her unemployable. 3RP 11-12. She qualified for a public defender at trial and for this appeal. 3RP 11-12. Nothing in the record suggests Ms. Bush-Ford has any other assets that could satisfy the LFO debt the court imposed on her. Therefore, this Court should reject the State’s claim that the record is insufficient to support Ms. Bush-Ford’s claim that the court’s imposition of mandatory LFOs is contrary to 42 U.S.C. § 407(a) and the Supremacy Clause.

Additionally, for the reasons stated in pages 15-18 of Ms. Bush-Ford’s opening brief, this Court should exercise its RAP 2.5 discretion and reach the merits of Ms. Bush-Ford’s claim.

- b. Because Ms. Bush-Ford must satisfy her \$800 mandatory LFO debt with her social security income, the court's order is void under the Supremacy Clause and our Supreme Court's ruling in *Wakefield*.

Because Ms. Bush-Ford is left with no choice but to satisfy her \$800 mandatory LFO debt with her social security income, the court's order is void under the Supremacy Clause and our Supreme Court's ruling in *Wakefield*. See Br. of Appellant at 4-14. However, the State argues our Supreme Court's ruling in *Wakefield* is inapplicable to the present case because the court order at issue here does not specifically require Ms. Bush-Ford to satisfy her LFO debt with her social security income. This argument is misplaced.

To summarize, in *Wakefield*, the petitioner (a social security recipient) challenged a court order requiring her to pay discretionary LFOs because she could only satisfy the court order with her social security income. *City of Richland v. Wakefield*, 186 Wn.2d 596, 607-09, 380 P.3d 459 (2016). The court order did not explicitly require the petitioner to pay LFOs with her social security income, but the petitioner argued the order implicitly required her to use her social security income to pay off the debt because she had no other source of income. *Id.* at 608. Thus, the State is mistaken in claiming that our Supreme Court's ruling in *Wakefield* applies only to orders explicitly requiring LFO debtors to pay with their social

security income. Resp. Br. at 14. Instead, the ruling in *Wakefield* falls squarely within the circumstances of this case.

- c. This Court should adopt the ruling the dissent would employ in *Catling* and find that Washington’s statutory scheme is inimical to the anti-attachment provision of the social security act.

This Court should adopt the ruling the dissent would employ in *Catling* and find that Washington’s statutory scheme is inimical to the anti-attachment provision of the social security act.

In *Catling*, Division Three of this Court assessed whether sentencing courts possessed the authority to require a social security recipient to pay mandatory LFOs. 413 P.3d at 28. The majority held, “although the LFO order remains valid, the judgment and sentence must be modified to specify that repayment cannot be made from the proceeds of Social Security disability payments.” *Id.* But this is inconsistent with our Supreme Court’s ruling in *Wakefield*. The remedy employed in *Wakefield* was to strike the offending court order in its entirety, as the court held that social security recipients were insulated from such orders. 186 Wn.2d at 609.

The dissent in *Catling* would hold that Washington’s LFO scheme, which requires individuals to pay off their mandatory LFOs before they can vacate their records, constitutes “other legal process” under the anti-

attachment provision of the Social Security Act. 413 P.3d at 32. This is because Washington's LFO scheme 1) compels social security recipients to indefinitely report their income to the clerk; and 2) coerces a social security recipient into using her social security funds to pay off her LFOs so that she may obtain a certificate of discharge and vacate her record. *Id.* at 32, 40. The dissent's arguments are consistent with the arguments made in Ms. Bush-Ford's briefing. *See* Br. of Appellant at 15-18.

Unlike the majority in *Catling*, the dissent would hold that unless a sentencing court determines that a social security recipient will receive income other than social security in the foreseeable future, the sentencing court cannot impose mandatory LFOs on social security recipients. *Id.* at 41. This Court should do the same. *See Matter of Arnold*, __ Wn.2d __, 410 P.3d 1133 (2018) ("the divisions of the Court of Appeals have traditionally treated decisions from other divisions as persuasive rather than binding because it allows for rigorous debate and improves the quality of appellate advocacy and the quality of judicial decision making") (internal citations and quotations omitted).

- d. Pursuant to recent legislation, on remand, this Court should direct the sentencing court to strike the criminal filing fee and the DNA fee because they are no longer mandatory.

At minimum, this Court should remand so that the sentencing court can strike the criminal filing fee and the DNA fee because they are no longer mandatory. The legislature recently amended various LFO statutes. The revamped LFO statutes unequivocally direct that courts “shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” Laws of 2018, ch. 269, § 6. Pursuant to RCW 10.101.030, a person is indigent if she receives public assistance, is committed to a mental health facility against her will, or receives “an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level.” RCW 10.101.010(3). Because Ms. Bush-Ford receives public assistance (social security), the State is barred from ordering her to pay any discretionary LFOs.

The government must still impose mandatory LFOs. But, pursuant to recent legislation, the only two remaining mandatory legal financial obligation consist of the Victim Penalty Assessment (\$500 for a felony conviction) and the DNA fee (\$100), which can now only be imposed one

time. *See* Laws of 2018, ch. 269 § 18, 19.¹ It is almost certain that a court has previously ordered Ms. Bush-Ford to pay the \$100 DNA fee, as she was convicted of a crime in 2014 when the DNA fee was still mandatory. CP 24; *see also State v. Mathers*, 193 Wn. App. 913, 917, 376 P.3d 1163 (2016). Under the circumstances present here, the only mandatory fee that remains is the victim penalty assessment.

Two principles support this Court’s application of the 2018 LFO amendments to the present case. First, this Court presumes that statutes apply retroactively when the statutes are remedial. *See State v. Blank*, 131 Wn.2d 230, 248, 930 P.2d 1213 (1997); *see also State v. Humphrey*, 139 Wn.2d 53, 62, 983 P.2d 1118 (1999). Statutory language is remedial where it “applies to practice, procedure, or remedies and does not affect a substantive or vested right.” *Humphrey*, 139 Wn.2d at 62. The legislative changes to Washington’s LFO statutory scheme are remedial because they provide more concrete guidelines for the legislature’s previous directive that individuals not be burdened with costs they cannot pay. As such, the legislation applies retroactively.

Moreover, for purposes of a retroactivity analysis, this Court determines finality by assessing whether the direct appeal has been

¹ It still remains true, however, that a sentencing court must waive the DNA fee if the defendant has a qualifying mental health condition. *See* RCW 9.94A.777.

exhausted and the petition of certiorari denied or the time permitted to file such a petition elapsed. *State v. Wences*, 189 Wn.2d 675, 682, 406 P.3d 267 (2017) (citing *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992)). Thus, “a new rule applies prospectively to all cases pending on direct review or not yet final.” *State v. Hanson*, 151 Wn.2d 783, 790, 91 P.3d 888 (2004). Because Ms. Bush-Ford’s case remains pending on direct review, this Court may apply the 2018 legislation to the LFO statutory scheme prospectively here.

B. CONCLUSION

The sentencing court's imposition of mandatory LFOs is void under federal law, and the statutes that force courts to impose mandatory LFOs on social security recipients are also unlawful under the Supremacy Clause.

For these reasons, Ms. Bush-Ford asks this court to strike the court's order requiring her to pay \$800 in mandatory LFOs.

DATED this 30th day of April, 2018.

Respectfully submitted,

/s Sara S. Taboada

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 50731-5-II
)	
GINA BUSH-FORD,)	
)	
Appellant.)	

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