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No. 51734-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

SAMMY B. WEAVER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Christopher Lanese, Judge

No. 17-1-02980-23

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

A. State's Counterstatements of Issues Pertaining to Appellant's Assignments of Error.....1

B. Facts and Statement of the Case.....1

C. Argument.....1

1) The State agrees with Weaver's contention that the $250 filing fee imposed by the trial court at sentencing should be reduced to the statutorily authorized amount of $200 (or, in the alternative, the State contends that the filing fee should be stricken entirely because Weaver is statutorily indigent).....1

2) Weaver has not shown that the equal protection argument that he raises now for the first time on appeal is manifest; therefore, this Court should deny review of this issue. But even if the Court allows review, Weaver's equal protection claim should fail because he has not met his burden of proving that the classification system at issue is unconstitutional beyond a reasonable doubt.....3

D. Conclusion.....11

Mason County Prosecutor
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TABLE OF AUTHORITIES

Table of Cases

State Cases

Page

Forbes v. City of Seattle, 113 Wn.2d 929, 943,
785 P.2d 431 (1990) 5

Harmon v. McNutt,
91 Wn.2d 126, 587 P.2d 537 (1978) 5

In re Boot,
130 Wn.2d 553, 925 P.2d 964 (1996) 8

State v. Coria,
120 Wn.2d 156, 839 P.2d 890 (1992) 7

State v. Handley,
115 Wn.2d 275, 796 P.2d 1266 (1990) 9

State v. Hirschfelder,
170 Wn.2d 536, 242 P.3d 876 (2010) 6

State v. Johnson,
194 Wn. App. 304, 374 P.3d 1206 (2016) 9

State v. Kalebaugh,
183 Wn.2d 578, 355 P.3d 253 (2015) 4

State v. Knapstad,
107 Wn.2d 346, 729 P.2d 48 (1986) 7

State v. Maciolek,
101 Wn.2d 259, 676 P.2d 996 (1984) 5, 10

State v. Osman,
157 Wn.2d 474, 139 P.3d 334 (2006) 5, 10

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

State v. Ramirez,
191 Wn.2d 732, 426 P.3d 714 (Sep. 20, 2018) 2, 11

State v. Rushing,
77 Wn. App. 356, 890 P.2d 1077 (1995) 8, 9

Statutes

RCW 10.101.010(3)(c) 2

RCW 3.62.090(1) 6

RCW 3.66.060 7

RCW 36.18.020(2)(h) 2, 3, 11

RCW 7.68.035 ..... passim

RCW 9A.52.025 3

Constitutions

U.S. Const. Amend. 14 4

Wash. Const. art. IV, § 6 7

Wash. Const. art. IV, § 12 ..... 2, 4, 7

Court Rules

RAP 2.5(a)(3) 4

RAP 10.3(b) 1

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1) The State agrees with Weaver's contention that the $250 filing fee imposed by the trial court at sentencing should be reduced to the statutorily authorized amount of $200 (or, in the alternative, the State contends that the filing fee should be stricken entirely because Weaver is statutorily indigent).

2) Weaver has not shown that the equal protection argument that he raises now for the first time on appeal is manifest; therefore, this Court should deny review of this issue. But even if the Court allows review, Weaver's equal protection claim should fail because he has not met his burden of proving that the classification system at issue is unconstitutional beyond a reasonable doubt.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Weaver's statement of facts, except where the State provides additional or contrary facts to develop its arguments, below. RAP 10.3(b).

C. ARGUMENT

1) The State agrees with Weaver's contention that the $250 filing fee imposed by the trial court at sentencing should be reduced to the statutorily authorized amount of $200 (or, in the alternative, the State contends that the filing fee should be stricken because Weaver is statutorily indigent).

At sentencing, the trial court ordered Weaver to pay Legal Financial Obligations (LFOs) totaling $750. CP 61. The LFOs included a

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

$500 victim assessment (RCW 7.68.035), and a $250 filing fee pursuant to RCW 36.18.020(2)(h) (2017). CP 61. At initiation of this case, Weaver filed a financial declaration with the court. CP 1-2. Review of this declaration leads to the conclusion that Weaver was indigent as the term as defined by RCW 10.101.010(3)(c), because his income was less than 125% of the federal poverty guideline. CP 1-2. After he was sentenced in this case, Weaver filed another financial declaration (this one for the purposes of filing the instant appeal). CP 64-65. This declaration, also, shows that Weaver is "'indigent'" as defined by RCW 10.101.010(3)(c), because his income is less than 125% of the federal poverty guideline. CP 64-65

After the judgment and sentence was entered in this case, but while the case was pending on direct appeal, the Supreme Court released its decision in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (Sep. 20, 2018). The Supreme Court noted that RCW 36.18.020(2)(h) had been amended by House Bill 1783 and that it now "prohibit[s] courts from imposing the $200 filing fee on indigent defendants." *Ramirez* at 739. The *Ramirez* Court held that these amendments apply prospectively to cases pending on direct review. *Id.* at 749. Accordingly, the State

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

concedes that these amendments apply to the instant case and that because he was indigent at the time of sentencing, the discretionary the $200 filing fee should be stricken from Smith's judgment and sentence.

Or, in the alternative, the State agrees with Weaver's contention and concedes that the Weaver's judgment and sentence should be amended to reduce the filing fee from the imposed amount of $250 to the statutorily authorized amount of $200. CP 61; RCW 36.18.020(2)(h).

2) Weaver has not shown that the equal protection argument that he raises now for the first time on appeal is manifest; therefore, this Court should deny review of this issue. But even if the Court allows review, Weaver's equal protection claim should fail because he has not met his burden of proving that the classification system at issue is unconstitutional beyond a reasonable doubt.

In this case the State charged Weaver with one count of a violation of RCW 9A.52.025, residential burglary. CP 6-7. The trial court judge instructed the jury on the charged felony crime of residential burglary but also instructed the jury on the lesser-included, gross misdemeanor crime of trespassing in the first degree. CP 40, 45-47. The jury returned a not guilty verdict for the felony charge of residential burglary but returned a guilty verdict for the lesser-included charge of trespassing in the first degree. CP 51-52.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
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At sentencing, the trial court imposed a $500 "penalty assessment," as required by RCW 7.68.035(1) upon conviction of a crime in superior court. CP 61. For the first time on appeal, Weaver now contends that imposition of the $500 penalty assessment violates his right to equal protection under the United States and Washington constitutions. Br. of Appellant at 6-9. Generally, a party may not raise a new issue on appeal that was not presented to the trial court, but there is an exception for "manifest error affecting a constitutional right." RAP 2.5(a)(3). To be "manifest," the constitutional error must be one that was identifiable by the trial court. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). Despite its 30-plus year history, there is no precedent holding that imposition of the RCW 7.68.035(1)(a) penalty assessment, as argued by Weaver in in the instant case, violates equal protection; therefore, Weaver's argument is not "manifest," and accordingly, it should not be considered where it is raised for the first time on appeal.

But even if this Court considers Weaver's argument on the merits, his claim of error should fail.

The equal protection clauses of the Fourteenth Amendment of the United States Constitution and art. 1, § 12 of the Washington Constitution

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Shelton, WA 98584
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guarantee that "persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978). The legislature has directed that the penalty assessment collected pursuant to RCW 7.68.035 must be deposited "into a fund maintained exclusively for the support of comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035(4). Thus, it follows that the legitimate purpose of the victim penalty at issue here is to fund this program.

Statutes are presumed to be constitutional, and the party who challenges the constitutionality of a statute bears the burden of proving its unconstitutionality beyond a reasonable doubt. *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984). To evaluate an equal protection claim, the reviewing court must first determine whether the party alleging the violation is similarly situated to other persons. *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). "Where persons of different classes are treated differently, there is no equal protection violation." *Forbes v. City of Seattle*, 113Wn.2d 929, 943, 785 P.2d 431 (1990).

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PO Box 639
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Here, Weaver contends that RCW 7.68.035(1)(a) has "created two classes of persons convicted of misdemeanors: those convicted in superior court and those convicted in a court of limited jurisdiction."[1] Br. of Appellant at 8. But, in actual fact, RCW 7.68.035(1)(a) does not create any such classification. Instead, the statute creates the following two classifications: people who have not been found guilty of a crime in a superior court; and, people who have been "found guilty in any superior court of having committed a crime." RCW 7.68.035(1)(a). It then divides the second group (those convicted of a crime in superior court) into two additional groups: those whose convictions are for one or more felonies or gross misdemeanors; and, those whose convictions are for only one or more simple misdemeanors. RCW 7.68.035(1)(a).

"Absent a fundamental right or suspect class, or an important right or semisuspect class, a law will receive rational basis review." *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). The

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[1] Weaver also asserts that "[t]hose convicted in a court of limited jurisdiction do not have to pay a crime victim compensation fund assessment." Br. of Appellant at 8. However, RCW 3.62.090(1) requires courts of limited jurisdiction to collect a "public safety and education assessment" that is equal to 70% of any fine, penalty or forfeiture otherwise imposed by the court. Under the mandate of RCW 7.68.035(4), these funds supplement the penalty assessments collected under RCW 7.68.035(1)(a) for the specific purpose of funding "comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes."

Mason County Prosecutor
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360-427-9670 ext. 417

classifications created by RCW 7.68.035 do not infringe upon a fundamental right or create a suspect classification; therefore, the constitutionality of this statute must be analyzed under the "rational relationship test." *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). "Under the rational relationship test, the law being challenged must rest upon a legitimate state objective, and the law must not be wholly irrelevant to achieving that objective." *Id.*

Weaver contends that RCW 7.68.035(1)(a) violates his equal protection right because, he contends, a prosecutor might arbitrarily decide to charge an offense in the superior court, rather than the district court, so as to thereby trigger the statute's penalty assessment. Br. of Appellant at 8. In the instant case, however, the prosecutor had no choice but to file the charge in superior court because Weaver was charged with a felony, and only the superior court has jurisdiction over felonies. Wash. Const. art. IV, § 6; Wash. Const. art. IV, § 12; RCW 3.66.060. If a prosecutor were to file a felony charge in a misdemeanor case so as to obtain superior court jurisdiction to trigger the RCW 7.68.035(1)(a) penalty assessment, the defendant's remedy would be to "file a motion under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), in order to challenge the sufficiency

Mason County Prosecutor
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of the State's evidence" in regards to the over-charged felony. *In re Boot*, 130 Wn.2d 553, 574, 925 P.2d 964 (1996) (finding that *Knapstad* provides a remedy "[i]f a prosecutor overcharges a young person in the hope of securing adult court jurisdiction").

The equal protection claim here is similar to the issue faced by this Court in *State v. Rushing*, 77 Wn. App. 356, 890 P.2d 1077 (1995). In *Rushing*, the defendant was charged with both a felony and a non-felony DWI. *Id.* The defendant claimed an equal protection violation because the prosecutor chose to charge the DWI offense in superior court, rather than district court, which denied the defendant the opportunity to petition for a deferred prosecution. *Id.* On appeal, this Court reasoned that the defendant was "a member of a class charged with both a felony and a DWI, which arose out of the same incident" and that there was, therefore, "a rational basis for filing the DWI charges in the superior court." *Id.* at 359-60.

Similarly, in the instant case Weaver was a member of a class for whom there was probable cause to prosecute a felony offense (residential burglary) which happened to correspond to a lesser-included gross misdemeanor offense (first degree trespassing). "A valid law,

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administered in a manner that unjustly discriminates between similarly situated persons, violates equal protection." *Id.* at 359 (citing *State v. Handley*, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990)). But Weaver has not shown that he was treated any differently than any other member of the same class or that RCW 7.68.035(1)(a) was applied in a manner that unjustly discriminated against him. "Without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional." *State v. Johnson*, 194 Wn. App. 304, 308, 374 P.3d 1206 (2016).

"A criminal defendant claiming an equal protection violation must establish that he or she is similarly situated with other persons or a court will not engage in equal protection scrutiny." *Id.* (citing *Handley* at 289-90). In *Rushing* this Court found a rational basis for filing the gross misdemeanor DWI charge in superior court because the defendant was also charged with a felony offense. *Rushing* at 359-60. Here, there is similarly a rational basis for charging the felony offense of residential burglary in superior court because only the superior court had jurisdiction over the offense, and allowing the jury to return a verdict on the lesser include offense of trespassing should not alter this analysis.

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"Equal protection does not require that all persons be treated identically, but it does require any classification to be relevant to the purpose of the disparate treatment." *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). As argued above, the purpose of RCW 7.68.035(1)(a) is to provide funding "for the support of comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035(4). In furtherance of this goal, RCW 7.68.035(1)(a) assesses fees against those who are convicted of a crime in superior court. This statutory fee applies equally to all members of the class of persons who are convicted of a crime in superior court. *Id.* The affected class is further divided into two subclasses: those who are convicted of a felony or gross misdemeanor, and those who are convicted of only one or more simple misdemeanors. *Id.* Weaver has not met his burden of proving beyond a reasonable doubt that this classification system unjustly discriminates against him as compared to other members of the same class or that the classification system is not rationally related to the legislative purpose of funding victim programs. Therefore, Weaver's equal protection challenge should be denied. *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984).

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D. CONCLUSION

At sentencing of this case the trial court imposed a filing fee of $250, but pursuant to RCW 36.18.020(2)(h) (2017) the court was only authorized to impose a filing fee of $200. Also, however, Weaver was indigent at the time of sentencing, and the recent case of *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (Sep. 20, 2018), which applies to cases pending on direct review, stands for the proposition that Weaver was indigent he should not be required to pay the $200 filing fee. Therefore, the State concedes that the judgment and sentence should be amended to reduce the filing fee to $200 or to eliminate it entirely due to indigence.

Finally, this Court should deny Weaver's equal protection claim against RCW 7.68.035(1)(a) because he has not met his burden of proving the unconstitutionality of the statute beyond a reasonable doubt.

DATED: December 31, 2018.

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