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Court of Appeals
Division II
State of Washington

NO. 53428-2-11
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JESSE JOHNS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 18-1-00519-05

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether this Court should decline to consider Johns' challenge to the imposition of \$100 crime laboratory fee for the first time on appeal because Johns did not object and the fee is mandatory and not subject to RCW 10.01.160?
2. Whether the crime laboratory fee should be affirmed because it was properly imposed as a mandatory assessment?
3. The State concedes that paragraph 4.3 in the judgment and sentence should be modified so that it is consistent with RCW 10.82.090(1).

II. STATEMENT OF THE CASE

On Mar. 21, 2019, the defendant entered a plea of guilty to two counts of Possession of a Controlled Substance. CP 11. The State recommended that the court impose legal financial obligations (LFOs). RP 106. The State recommended a \$500 victim assessment, \$500 court appointed attorney fee, \$200 court costs, and a \$100 crime laboratory fee. RP 106. The State emphasized that it was not requesting the \$100 DNA collection fee because the fee was previously imposed on prior felony convictions. RP 107. The defense requested the court to find Johns indigent and only impose the mandatory fees. RP 107.

The court inquired into Johns' ability to pay and asked about Johns' prior employment. RP 107–08. Johns stated that he was last employed in 2015 and worked at Frugal's. RP 108. Johns had been working since then and had worked under the table for the person he was living with. RP 108. Johns did not consider that to be a real job. RP 108. Johns stated that he received food stamps. RP 108.

The trial court found that Johns was legally indigent and decided to follow the recommendations and imposed only the \$500 victim assessment and \$100 crime laboratory fee. RP 108. The court did not impose the court appointed attorney fee or court costs. RP 108. The court inquired if Johns could pay the LFOs at a rate of \$40 per month and Johns agreed that he would try that. RP 109.

III. ARGUMENT

A. THE COURT SHOULD DECLINE TO REVIEW THE CHALLENGE TO THE CRIME LABORATORY FEE BECAUSE JOHNS FAILED TO OBJECT AND IT IS A MANDATORY FEE AND NOT SUBJECT TO RCW 10.01.160(3).

Johns argues that the crime laboratory fee should be stricken because it is a discretionary LFO and the court was prohibited from imposing it after finding Johns to be legally indigent. Johns' argument fails because the crime laboratory fee is mandatory.

When an adult offender has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was

performed by a state crime laboratory, in addition to any other disposition, penalty, or fine imposed, the court *shall* levy a crime laboratory analysis fee of one hundred dollars for each offense for which the person was convicted. Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee.

RCW 43.43.690(1) (emphasis added).

RCW 10.01.160 pertains to the imposition of discretionary LFOs only and “[t]he statutory inquiry is required only for discretionary LFOs.” *State v. Clark*, 191 Wn. App. 369, 373, 362 P.3d 309 (2015) (citing *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013); *State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013)); *see also* RCW 10.01.160(1) (“Except as provided in subsection (3) of this section, the court *may* require a defendant to pay costs.” (emphasis added)).

Trial courts are required to impose mandatory fees regardless of a defendant’s indigency. *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (citing *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013)). “[The crime laboratory assessment] is mandatory if a laboratory analysis was conducted.” *State v. Clark*, 195 Wn. App. 868, 873, 381 P.3d 198 (2016) *review granted in part on other grounds in State v. Clark*, 187 Wn.2d 1009 (2017).

In *Clark*, the Court of Appeals pointed out that unlike discretionary costs under RCW 10.01.160(3) which requires a determination of ability

to pay *prior to imposing*, the laboratory fee under RCW 43.43.690(1) is first assessed and then only after that, upon a “verified petition” by the offender, the court may suspend the fee if it finds the defendant does not have the ability to pay it. *Id.* (emphasis added). Thus, the laboratory fee is mandatory while court’s authority to suspend the fee is discretionary.

Because the laboratory fee is mandatory, it is not subject to RCW 10.01.160 which deals only with discretionary costs. *Clark*, 191 Wn. App. at 373 (citing *Lundy*, 176 Wn. App. at 102 (“mandatory fees, which include victim restitution, victim assessments, DNA fees, and criminal filing fees, operate without the court's discretion by legislative design”); *see also State v. Ramirez*, 191 Wn.2d 732, 739, 426 P.3d 714 (2018) (citing *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) (“We addressed former RCW 10.01.160(3) in *Blazina* and held that the statute requires trial courts to conduct an individualized inquiry into the financial circumstances of each offender before levying any discretionary LFOs.”)).

Johns cites to *State v. Malone*, 193 Wn. App. 762, 765, 376 P.3d 443 (2016), to support his argument that the crime laboratory fee is discretionary and therefore should be stricken because the trial court found Johns to be legally indigent. *See Br. of Appellant at 4; see also RCW 10.01.160(3)* (prohibiting the court from ordering 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)).

Malone does not support Johns' argument because RCW 10.01.160 pertains to only discretionary LFOs and *Malone* properly treated the crime laboratory fee as mandatory. *See Malone*, 193 Wn. App. at 764.

Further, as in the instant case, *Malone* raised his challenge to the mandatory DNA fee for the first time on appeal. The *Malone* Court recognized it had discretion to accept review of the challenged LFOs under *Blazina* when raised for the first time on appeal. *Malone*, 193 Wn. App. at 765 (citing *Blazina*, 182 Wn.2d at 835).

Accordingly, the *Malone* Court accepted review of the challenged discretionary LFOs but not the mandatory DNA fee while pointing out that there was no evidence in the record that the DNA fee had been collected or was still on file. *Id.* at 767. The *Malone* Court remanded the case to the trial court to determine whether the discretionary LFOs were still appropriate after *Blazina*'s "recent clarification of the requirements of RCW 10.01.160(3)." *Id.* at 766. The mandatory LFOs were not at issue.

Therefore, *Malone*, in which the crime laboratory fee is characterized as mandatory, does not support Johns' argument.

Moreover, "unpreserved LFO errors do not command review as a matter of right. . . ." *State v. Blazina*, 182 Wn.2d 827, 833, 344 P.3d 680

(2015). As in *Malone*, Johns did not object to the mandatory fees. The defense recommended that only mandatory LFOs be imposed. The trial court found Johns' to be statutorily indigent and imposed only the victim assessment and crime laboratory fee and no discretionary LFOs. There was no objection and there was no error.

The trial court did not run afoul of RCW 10.01.160(3) by imposing the mandatory crime laboratory fee and Johns failed to preserve the alleged error. Therefore, State requests that this Court decline to consider this issue for the first time on appeal.

B. THE STATE CONCEDES THAT PARAGRAPH 4.3 OF THE JUDGMENT AND SENTENCE REQUIRING ACCRUAL OF INTEREST FOR ALL LFOs SHOULD BE MODIFIED.

Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of *June 7, 2018*, no interest shall accrue on nonrestitution legal financial obligations.

All nonrestitution interest retained by the court shall be split twenty-five percent to the state treasurer for deposit in the state general fund, twenty-five percent to the state treasurer for deposit in the judicial information system account as provided in RCW 2.68.020, twenty-five percent to the county current expense fund, and twenty-five percent to the county current expense fund to fund local courts.

RCW 10.82.090(1).

The State concedes that the provision under paragraph 4.3 of the judgment and sentence as written requires the accrual of nonrestitution interest. Johns was sentenced on April 4, 2019.

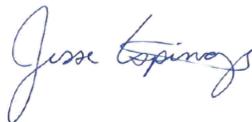
Therefore, the State requests that this case be remanded to modify the paragraph 4.3 so that no interest shall accrue on nonrestitution LFOs as of June 7, 2018. Any nonrestitution interest retained up until June 7, 2018 should be distributed according to RCW 10.82.090(1).

IV. CONCLUSION

The Court should decline to review Johns' challenge to the mandatory crime laboratory fee. Finally, the State concedes that the provision requiring interest on LFO's should be modified so that it does not require the accrual of nonrestitution interest.

Respectfully submitted this 13th day of December, 2019.

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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Casey Grannis, on December 13, 2019.

MARK B. NICHOLS, Prosecutor

A handwritten signature in blue ink, appearing to read "Jesse Espinoza", is written over a horizontal black line.

Jesse Espinoza

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

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Transmittal Information

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