FILED
Court of Appeals
Division II
State of Washington
1/13/2020 2:08 PM

COA NO. 53428-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JESSE JOHNS,

Appellant.

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

The Honorable Brian Coughenhour, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ARGUMENT IN REPLY 1

THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE THE CRIME LAB FEE ON JOHNS DUE TO INDIGENCY 1

B. CONCLUSION 6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In Re Pers. Restraint of Fleming,
129 Wn.2d 529, 919 P.2d 66 (1996) 5

Pierce County v. Magnuson,
70 Wash. 639, 127 P. 302 (1912) 5

Rollins v. Bombardier Recreational Products, Inc.,
191 Wn. App. 876, 366 P.3d 33 (2015),
review denied, 185 Wn.2d 1030, 377 P.3d 714 (2016) 3

Sloans v. Berry,
189 Wn. App. 368, 358 P.3d 426 (2015) 3

State v. Blazina,
182 Wn.2d 827, 344 P.3d 680 (2015) 4

State v. Bowman,
__Wn. App. 2d__, 52907-6-II, 2020 WL 71299 (slip op. filed Jan. 7,
2020) (unpublished) 4

State v. Clark,
195 Wn. App. 868, 381 P.3d 198 (2016),
review granted, cause remanded,
187 Wn.2d 1009, 388 P.3d 487 (2017) 1, 2

State v. Glover,
4 Wn. App. 2d 690, 423 P.3d 290 (2018) 5

State v. Hunter, 102 Wn. App. 630, 9 P.3d 872 (2000),
review denied, 142 Wn.2d 1026, 21 P.3d 1150 (2001) 6

State v. Ingalsbe,
__Wn. App. 2d__, 52036-2-II, 2020 WL 70810 (slip op. filed Jan. 7,
2020) (unpublished) 4

State v. Malone
193 Wn. App. 762, 376 P.3d 443 (2016) 1

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Martinez-Ledesma,
9 Wn. App. 2d 1071, 2019 WL 3307534 (2019) (unpublished) 4

State v. Mata, 1 Wn. App. 2d 1063, 2018 WL 287310,
review denied, 190 Wn.2d 1016, 415 P.3d 1198 (2018) 4

State v. Moen,
129 Wn.2d 535, 919 P.2d 69 (1996) 6

State v. Munoz-Rivera,
190 Wn. App. 870, 361 P.3d 182 (2015) 3

State v. Nolan,
98 Wn. App. 75, 988 P.2d 473 (1999),
aff'd, 141 Wn.2d 620, 8 P.3d 300 (2000) 5

State v. Nunez Nunez, 2 Wn. App. 2d 1057, 2018 WL 1256608 (2018)
(unpublished) 4

State v. Paulson,
131 Wn. App. 579, 128 P.3d 133 (2006) 5

State v. Ramirez
191 Wn.2d 732, 426 P.3d 714 (2018) 3, 4

State v. Smith,
5 Wn. App. 2d 1048, 2018 WL 5278258 (2018) (unpublished) 4

RULES, STATUTES AND OTHER AUTHORITIES

Former RCW 10.01.160(3) (2015) 3

GR 14.1(a) 4

RAP 2.5 5

TABLE OF AUTHORITIES

Page

RULES, STATUTES AND OTHER AUTHORITIES

RCW 10.01.160(3) 2, 3, 5

RCW 10.101.010(3) 3

RCW 43.43.690(1) 1, 2

A. ARGUMENT IN REPLY

THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE THE CRIME LAB FEE ON JOHNS DUE TO INDIGENCY.

The plain language of the lab fee statute shows the fee is discretionary when the defendant is indigent. RCW 43.43.690(1). The trial court found that John is "legally defined as indigent." RP 108. The State does not challenge that determination on appeal.

Instead, it argues the lab fee is not really discretionary. According to the State, State v. Malone, 193 Wn. App. 762, 376 P.3d 443 (2016) supports its position. It doesn't. Addressing the legal financial obligations (LFOs) at issue in that case, Malone states: "*The discretionary financial obligations are*: $600 court appointed attorney recoupment, $200 warrant fee, $250 drug enforcement fund, and *$100 crime lab fee* for a total of $1,150 in discretionary fees." The Court of Appeals remanded to the trial court to conduct an individualized inquiry on ability to pay the discretionary LFOs. Id. at 768. Contrary to the State's argument, Malone characterized the lab fee as discretionary and granted relief.

Malone is a Division Three decision. Incongruously, Division Three in State v. Clark, 195 Wn. App. 868, 873, 381 P.3d 198 (2016), review granted, cause remanded, 187 Wn.2d 1009, 388 P.3d 487 (2017) characterized the lab fee as "mandatory" because the trial court "shall

levy" it, while recognizing the court has the ability to suspend the fee when presented with a verified petition of indigency.[1] "Unlike discretionary costs, the laboratory fee is assessed and, then, perhaps, revised if the defendant provides adequate proof. In contrast, the process is reversed under RCW 10.01.160(3). Under that provision, discretionary costs may only be imposed if the court has first determined ability to pay." Id.

This is an exceedingly fussy interpretation of the statutory scheme and amounts to semantic brinksmanship when applied to a case like John's, where there is no dispute about indigency. The fee is "mandatory" when the defendant is not indigent but is discretionary when the defendant is indigent. In the latter circumstance, the trial court is not commanded by statute to impose it. RCW 43.43.690(1).

In fact, there is now a statutory mandate that costs cannot be imposed on indigent defendants. RCW 10.01.160(3). The law has overtaken Clark. Clark addressed the old version of RCW 10.01.160(3),

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[1] The Supreme Court in Clark granted the petition for review and remanded for inquiry into ability to pay discretionary LFOs, but the grant order does not specify whether the lab fee is included. Clark, 187 Wn.2d 1009. The petition for review in that case sought relief from discretionary LFOs but did not specifically contest the Court of Appeals' characterization of the lab fee as mandatory. See https://www.courts.wa.gov/content/petitions/93740-1%20Petition%20for%20Review.pdf

which only tied costs to inquiry into ability to pay. Former RCW 10.01.160(3) (Laws of 2015 3rd sp.s. c 35 § 1). Clark pre-dates the 2018 amendments to the LFO statute, including the amendment to RCW 10.01.160(3), which now flatly prohibits imposition of discretionary costs on those who meet the statutory definition of indigency under RCW 10.101.010(3). State v. Ramirez, 191 Wn.2d 732, 749, 426 P.3d 714 (2018).

Here, there is no dispute that Johns meets the statutory indigency standard. He is on food stamps and the court found he meets the standard. RP 108. While Johns did not technically present a "verified petition" of indigency, there was no need to do so in light of the undisputed facts and the trial court's finding of indigency. In that circumstance, a verified petition serves no purpose and amounts to pointless hoop jumping. Resolution of this case should be guided by the principle that courts do not exalt form over substance. Sloans v. Berry, 189 Wn. App. 368, 378, 358 P.3d 426 (2015); Rollins v. Bombardier Recreational Products, Inc., 191 Wn. App. 876, 891, 366 P.3d 33 (2015), review denied, 185 Wn.2d 1030, 377 P.3d 714 (2016); State v. Munoz-Rivera, 190 Wn. App. 870, 883, 361 P.3d 182 (2015).

Resolution should also be guided by the legislative effort to systematically reform a broken LFO system that the 2018 amendments

were intended to accomplish. Ramirez, 191 Wn.2d at 747 ("House Bill 1783's amendments modify Washington's system of LFOs, addressing some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction.").

In light of the 2018 amendments to the LFO statute, Division Two of the Court of Appeals has consistently held the crime lab fee cannot be imposed on indigent defendants. State v. Bowman, __Wn. App. 2d__, 52907-6-II, 2020 WL 71299, at *2 (slip op. filed Jan. 7, 2020) (unpublished);[2] State v. Ingalsbe, __Wn. App. 2d__, 52036-2-II, 2020 WL 70810, at *2 (slip op. filed Jan. 7, 2020) (unpublished); State v. Martinez-Ledesma, 9 Wn. App. 2d 1071, 2019 WL 3307534, at *5 (2019) (unpublished); State v. Smith, 5 Wn. App. 2d 1048, 2018 WL 5278258, at *2, 4 (2018) (unpublished); see also State v. Nunez Nunez, 2 Wn. App. 2d 1057, 2018 WL 1256608, at *1 (2018) (unpublished) (Division One remanding to strike lab fee because it is discretionary and trial court did not intend to impose discretionary LFOs). Division Three has joined in. State v. Mata, 1 Wn. App. 2d 1063, 2018 WL 287310, at *9, review denied, 190 Wn.2d 1016, 415 P.3d 1198 (2018).

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[2] GR 14.1(a) permits citation to unpublished decisions as non-binding, persuasive authority.

The State says this Court should not review the issue because it was not raised below. "In the wake of Blazina,[3] appellate courts have heeded its message and regularly exercise their discretion to reach the merits of unpreserved LFO arguments." State v. Glover, 4 Wn. App. 2d 690, 693, 423 P.3d 290 (2018). There is no reason to treat Johns differently.

More than that, this is a statutory authority issue because, unlike the old version of the statute that merely addressed inquiry into ability to pay, RCW 10.01.160(3) now outright prohibits imposition of costs on indigent defendants. A court may impose only a sentence that is authorized by statute. State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). It has long been held "costs are the creature of statute" and that "there is no inherent power in the courts to award costs, and that they can be granted in any case or proceeding solely by virtue of express statutory authority." Pierce County v. Magnuson, 70 Wn. 639, 641, 127 P. 302 (1912); accord State v. Nolan, 98 Wn. App. 75, 78-79, 988 P.2d 473 (1999), aff'd, 141 Wn.2d 620, 8 P.3d 300 (2000).

"[A] sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional." In Re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996)

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[3] State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).

(citing State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996)). Erroneous imposition of LFOs without statutory authority falls within this established rule. Moen, 129 Wn.2d at 543-48 (challenge to untimely restitution order may be raised for first time on direct appeal); State v. Hunter, 102 Wn. App. 630, 633-34, 9 P.3d 872 (2000) (challenge to the sentencing court's authority to impose drug fund contribution, which constitutes a legal financial obligation, reviewable for first time on appeal), review denied, 142 Wn.2d 1026, 21 P.3d 1150 (2001).

Finally, this case is going back anyway because the State has correctly conceded the judgment and sentence needs to be amended to remove the unlawful interest provision. The lab fee can be struck at the same time.

B. CONCLUSION

For the reasons stated above and in the opening brief, Johns requests the $100 crime lab fee be stricken, the interest provision in the judgment and sentence be modified, and imposition of interest be stricken.

DATED this 10th day of January 2020

Respectfully Submitted,

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January 13, 2020 - 2:08 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington, Respondent v. Jesse Johns, Appellant
Superior Court Case Number:	18-1-00519-1

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