

NO. 34450-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

DERRICK HANEY,

Appellant.

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

The Honorable Bruce A. Spanner, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. RCW 43.43.7541's DNA-collection fee and RCW 7.68.035's Victim Penalty Assessment (VPA) violate substantive due process when applied to defendants who do not have the ability – or likely future ability – to pay.

2. If the State seeks appellate fees, those should be denied.

Issues Pertaining to Assignments of Error

1. RCW 43.43.7541 requires trial courts impose a DNA-collection fee each time a felony offender is sentenced. This ostensibly serves the State's interest in funding the collection, testing, and retention of a convicted defendant's DNA profile when applied to non-indigent persons, but not indigent persons. RCW 7.68.035 requires trial courts to impose a VPA of \$500. The purpose is to fund victim-focused programs. These statutes mandate that trial courts order these LFOs even when the defendant has no ability to pay. Do the statutes violate substantive due process when applied to defendants who do not have the ability – or the likely future ability – to pay the fees?

2. Appellant is indigent and has been found not to have the ability or likely future ability to pay LFOs. If the State seeks

appellate costs, should those be denied?

B. STATEMENT OF THE CASE

On June 7, 2012, the Benton County prosecutor charged appellant Derrick Stephen Haney with three counts of second degree rape of a child. CP 1-3. After pleading guilty, he was sentenced to an indeterminate sentence of sixteen years to life. RP 8-34. He was ordered to pay \$1,960.00 in costs, fines and fees, which included the following: \$200 filing fee; \$60 sheriff fee; \$600 attorney fee; \$500 fine; \$100 DNA fee; and \$500 VPA. CP 23-24, 34; RP 6-7. He was also ordered to pay \$612.70 in restitution. RP 7, CP 35-36. Interest was to begin accruing immediately. CP 24.

On December 28, 2015, Haney moved to modify or terminate his LFOs because the sentencing court had not first conducted an ability-to-pay inquiry. CP 41-45 (citing State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)). The Benton County Superior Court granted Haney a new sentencing hearing. CP 59-60.

At the sentencing hearing, Haney explained that he had not been employed for the two years prior to his incarceration. Before that, his only job was with the Transportation Security Administration (TSA). He confirmed that the TSA required a

security clearance, which he could no longer obtain with his criminal history. He also explained that even if he were released in 16 years, that would make him 55 years old entering the job market with no marketable skills and while owing thousands of dollars in LFOs, due to the interest that accrued on his legal debt while he was in prison. He also stated that he has to pay child support. RP 7-10.

The sentencing court ruled Haney did not have the ability, or likely future ability, to pay LFOs. RP 9; CP 75-76. It waived all LFOs except the DNA fee and the VPA because it considered those “mandatory.” Id. Haney promptly appealed and established his indigency again on appeal. CP 77-81.¹

C. ARGUMENT

- I. RCW 43.43.7541 AND RCW 7.68.035 ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY LFOS.

RCW 9.94A.760 permits the trial court to impose costs “authorized by law” when sentencing an offender for a felony.

¹ On July 18, 2016, the sentencing judge signed the same sentencing order waiving the LFOs again because the clerk’s office had apparently not received the first. This prompted an amended notice of appeal that was filed on July 28, 2016. This Court accepted that and calendared the appeal accordingly. See, Letter from Renee S. Townsley to the parties, dated 8-24-2016.

RCW 43.43.7541 authorizes the collection of a \$100 DNA-collection fee. RCW 7.68.035 provides that a \$500 VPA “shall be imposed” upon anyone who has been found guilty in a Washington Superior court. However, these statutes violate substantive due process when applied to defendants, like Haney, who have not been determined have the ability or likely future ability to pay the fine.² Hence, this Court should find the trial court erred in imposing these fees without first determining Haney’s ability to pay.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3. “The due process clause of the Fourteenth Amendment confers both procedural and substantive protections.” Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action

² Appellant recognizes that this issue was determined not ripe by Division I in State v. Lewis, 194 Wn. App. 709, ___ P.3d ___ (2016). However, appellant respectfully disagrees with that decision. He also notes that Lewis is currently being petitioned to the Supreme Court because it conflicts with Blazina, which held that a defendant’s challenge to an LFO order is ripe for review regardless of whether imprisonment for nonpayment is being actively pursued by the State. See, Blazina, 182 Wn.2d at 832, n. 1.

is pursuant to constitutionally adequate procedures.” Id. at 218–19. It requires that “deprivations of life, liberty, or property be substantively reasonable;” in other words, such deprivations are constitutionally infirm if not “supported by some legitimate justification.” Nielsen v. Washington State Dep’t of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221, 1225 (2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dep’t of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130, 1135 (2013). Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is lighter under this standard, the standard is not meaningless. Indeed, the United States Supreme Court has cautioned the rational basis test “is not a toothless one.” Mathews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, “the

court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional.” DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining the statute at issue did not survive rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

Turning first to RCW 43.43.7541, the statute mandates all felony defendants pay the DNA-collection fee. This on its face may serve the State’s interest to fund the collection, analysis, and retention of a convicted offender’s DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752-7541. This is a legitimate interest. However, the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

As for RCW 7.68.035, it mandates that all convicted defendants pay a \$500 VPA. This on its face may serve the State’s interest in funding “comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes.” RCW 7.68.035(4). Again, while this may be a legitimate interest when applied to non-indigent persons, there is nothing

rationale about requiring sentencing courts to impose the VPA upon defendants regardless of whether they have the ability – or likely future ability – to pay.

Imposing these fees does not further the State's interest in funding DNA collection or victim-focused programs. For as the Washington Supreme Court recently emphasized, "the state cannot collect money from defendants who cannot pay." Blazina, 344 P.3d at 684. Hence, there is no legitimate economic incentive served in imposing these LFOs.

Likewise, the State's interest in enhancing offender accountability is also not served by requiring a defendant to pay mandatory LFOs when he does not have the ability to do so. In order to foster accountability, a sentencing condition must be something that is achievable in the first place. If it is not, the condition actually undermines efforts to hold a defendant answerable.

The Supreme Court also recognized that the State's interest in deterring crime via enforced LFOs is actually undermined when LFOs are imposed on people who do not have the ability to pay. Id. This is because imposing LFOs upon a person who does not have the ability to pay actually "increase[s] the chances of recidivism."

Id. at 836-37 (citing relevant studies and reports).

Likewise, the State's interest in uniform sentencing is not served by imposing mandatory LFOs on those who do not have the ability to pay. This is because defendants who cannot pay are subject to an undeterminable length of involvement with the criminal justice system and often end up paying considerably more than the original LFOs imposed (due to interest and collection fees), and in turn, considerably more than their wealthier counterparts. Id. at 836-37.

When applied to indigent defendants, not only do the so-called mandatory fees ordered under RCW 43.43.7541 and RCW 7.68.035 fail to further the State's interest, they are utterly pointless. It is simply irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue appellant's due process challenge is foreclosed by the Washington Supreme Court's rulings in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), which conclude due process was not violated with the imposition of the VPA regardless of whether there was an ability-to-pay inquiry. However, the "constitutional principles" at issue in those cases were considerably

different than those implicated here. Hence, any reliance on these cases would be misplaced.

Haney's constitutional challenge to the statute authorizing the DNA-collection fee and VPA is fundamentally different from that raised in Curry. In Curry, 118 Wn.2d at 917, the defendants challenged the constitutionality of a mandatory LFO order on the ground that its enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they are unable to pay LFOs. Hence, Curry's constitutional challenge was grounded in the well-established constitutional principle that due process does not tolerate the incarceration of people simply because they are poor. Id.

By contrast, Haney asserts there is no legitimate state interest in requiring sentencing courts to impose a mandatory DNA-collection fee without the State first establishing the defendant's ability to pay. In other words, rather than challenging the constitutionality of the LFO statute based on the fundamental unfairness of its ultimate enforcement potential (as was the case in Curry and Blank), Haney challenges the statute as an unconstitutional exercise of the State's regulatory power that is irrational when applied to defendants who have not been shown to

have the ability to pay. As such, the holdings in Curry and Blank do not control.

The State's reliance on Curry and Blank would also be misplaced because when those cases are read carefully and considered in the light of the realities of Washington's current LFO collection scheme, they actually support Haney's position that an ability-to-pay inquiry must occur at the time any LFO is imposed. Indeed, after Blazina's recognition of the Washington State's "broken LFO system," 182 Wn.2d at 835, the Washington Supreme Court's holdings in Curry and Blank must be revisited in the context of Washington's current LFO scheme.

Currently, Washington's laws set forth an elaborate and aggressive collections process which includes the immediate assessment of interest, enforced collections via wage garnishment, payroll deductions, and wage assignments (which include further penalties), and potential arrest. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See, Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010)

(reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay).

Washington's legislatively sanctioned debt cycle does not conform to the necessary constitutional safeguards established in Blank. In Blank, the Washington Supreme Court held that "monetary assessments which are mandatory may be imposed against defendants without a per se constitutional violation." Blank, 131 Wn.2d at 240 (emphasis added). The Court reasoned that fundamental fairness concerns only arise if the government seeks to enforce collection of the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (referring to Curry, 118 Wn.2d at 917-18).

The Washington Supreme Court also noted, however, that the constitutionality of Washington's LFO statutes was dependent on trial courts conducting an ability-to-pay inquiry at certain key times. It emphasized the following triggers for this inquiry:

- "The relevant time [to conduct an ability-to-pay inquiry] is the point of collection and when sanctions are sought for nonpayment." Id. at 242.
- "[I]f the State seeks to impose some additional penalty for failure to pay...ability to pay must be considered at that point. Id.

- “[B]efore enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay.” Id.

Blank thus makes clear that in order for Washington’s LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry before: (1) the State engages in any “enforced” collection; (2) any additional “penalty” for nonpayment is assessed; or (3) any other “sanction” for nonpayment is imposed.³ Id.

Given Washington’s current LFO collection scheme, the only way to regularly comply with Blank’s safeguards is for sentencing courts to conduct a meaningful ability-to-pay inquiry at the time the VPA or DNA-collection fee is imposed. Although Blank says that prior case law suggests that such an inquiry is not required at sentencing, the Supreme Court was not confronted with the realities of the State’s current collection scheme in that case. As shown below, Washington’s LFO collection scheme provides for

³ “Penalty” means: “a sum of money which the law exacts payment of by way of punishment for... not doing some act which is required to be done.” Black’s Law Dictionary, Sixth Edition, at 1133.
“Sanction” means: “Penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations.” Id., at 1341.
“Enforce” means: “To put into execution, to cause to take effect, to make effective; as to enforce ... the collection of a debt or a fine.” Id. at 528.

immediate enforced collection processes, penalties, and sanctions. Consequently, Blank actually supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing when the VPA or DNA-collection fee is imposed.

First, under RCW 10.82.090(1), LFOs accrue interest at a compounding rate of 12 percent – an astounding level given the historically low interests rates of the last several years. Blazina, 182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013)). Interest on LFOs accrues from the date of judgment. RCW 10.82.090. This sanction has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. See, Harris, supra at 1776-77 (explaining that “those who make regular payments of \$50 a month toward a typical legal debt will remain in arrears 30 years later). Yet, there is no requirement for the court to have conducted an inquiry into ability to pay before interest is assessed.

Washington law also permits courts to order a “payroll deduction.” RCW 9.94A.760(3). This can be done immediately upon sentencing. RCW 9.94A.760(3). Beyond the actual deduction to cover the outstanding LFO payment, employers are authorized to deduct other fees from the employee's earnings. RCW 9.94A.760(4). This constitutes an enforced collection process with an additional sanction. Yet, there is no provision requiring an ability-to-pay inquiry before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; see also, Harris, supra, at 1778 (providing examples of wage garnishment as an enforcement mechanism used in Washington). As for garnishment, this enforced collection may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment is a collection mechanism that may be used within 30 days of a defendant's failure to pay the monthly sum ordered. RCW 9.94A.7701. Again, employers are permitted to charge a “processing fee.” RCW 9.94A.7705. Contrary to Blank, however, there are no provisions

requiring courts to conduct an ability-to-pay inquiry prior to the use of these enforced collection mechanisms.

Washington law also permits courts to use collections agencies or county collection services to actively collect LFOs. RCW 36.18.190. Any penalties or additional fees these agencies decide to assess are paid by the defendant. Id. There is nothing in the statute that prohibits the courts from using collections services immediately after sentencing. Yet, there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement. Id.

The examples set forth above show that under Washington's currently "broken" LFO system, there are many instances where the Legislature provides for "enforced collection" and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms may be used immediately after the judgement and sentence is entered. If the constitutional requirements set forth in Curry and Blank are to be met, trial courts must conduct a thorough ability-to-pay inquiry at the time of sentencing when the LFOs are imposed. As such, any reliance on holdings of Curry and Blank by the State would be

specious because Washington's current LFO system does not meet the constitutional safeguards mandated in those holdings.

In sum, Washington's LFO system is broken in part because the courts have not followed through with the constitutional requirement that LFOs only be imposed upon those that have the ability – or likely ability – to pay. It is not rational to impose a fee upon a person who does not have the ability to pay. Hence, when applied to defendants such as Haney who do not have the ability to pay LFOs, the mandatory imposition of the DNA-collection fee and VPA does not reasonably relate to the State interests served by those statutes. Consequently, this Court should find RCW 43.43.7541 and RCW 7.68.035 violate substantive due process and vacate the LFO order.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Haney was represented below by appointed counsel. RP 4. The trial court found he did not have the likely ability to pay discretionary fees and found him indigent for purposes of this appeal. CP 79-80. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the

review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.”

The sentencing court imposed a \$500 VPA and \$100 DNA fee. CP 85-86. Haney is also obligated to also pay \$612.70 (with accrued interest from the day of the order was entered). RP 7, 9. He has child support obligations. RP 10. Haney faces considerably more financial debt if this Court were to impose appellate costs upon him with no reasonable prospects for payment. He had no employment for two years before incarceration. Prior to that, his job was working for TSA – a job that will not be available to him because of his criminal history. He has no other job skills and will be released at the earliest when he is 55 years old (but could be incarcerated until he is even older). He requests this court deny any costs sought.

Under RCW 10.73.160(1), appellate courts “*may* require an adult offender convicted of an offense to pay appellate costs.” (Emphasis added). The commissioner or clerk “*will*” award costs to the State if the State is the substantially prevailing party on review, “*unless the appellate court directs otherwise in its decision terminating review.*” RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the State.

State v. Sinclair, 192 Wn. App. 380, 389-91, 367 P.3d 612, 616 (2016), review denied, 185 Wn.2d 1034 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, Division I concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. Sinclair, 192 Wn. App. at 389-90. Moreover, ability to pay is an important factor that may be considered. Id.

Based on Haney’s indigence and bleak financial future, this Court should exercise its discretion and deny any requests for costs in the event the State is the substantially prevailing party.

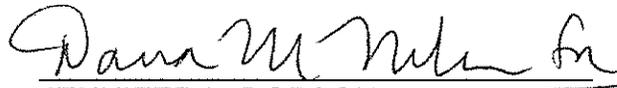
D. CONCLUSION

This Court should strike the trial court's order that Haney pay LFOs and remand for a hearing on his ability to pay.

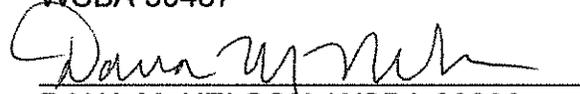
Dated this 5th day of October, 2016.

Respectfully submitted

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