

FILED  
MARCH 21, 2017  
Court of Appeals  
Division III  
State of Washington

NO. 34887-3-III

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

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STATE OF WASHINGTON,

Respondent,

v.

WILLICE PENDELL, III,

Appellant.

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

The Honorable Raymond F. Clary, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

RCW 7.68.035, RCW 43.43.7541, and RCW 36.18.020(2)(h) violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay.

Issue Pertaining to Assignment of Error

RCW 7.68.035 requires trial courts to impose a victim penalty assessment whenever a person is found guilty in any superior court. RCW 43.43.7541 requires trial courts to impose a DNA collection fee whenever a person is convicted of a felony or certain misdemeanors. RCW 36.18.020(2)(h) requires trial courts to impose a \$200 filing fee whenever an adult is convicted in a criminal case. While these statutes ostensibly serve the state's interests, they mandate payment even when the defendant has no ability to pay. Do mandatory legal financial obligations (LFOs) violate substantive due process when imposed on defendants who do not have the ability or likely future ability to pay?

B. STATEMENT OF THE CASE

The Spokane County Prosecutor's Office charged Willice Pendell, III, with one count of Assault in the Third Degree. CP 3. Evidence at trial revealed that, on December 23, 2015, Pendell – a homeless man who lives under a bridge – was found intoxicated and

unresponsive outside a church. RP 121-124, 147-148. Paramedics arrived, aroused Pendell to the point he could answer some basic questions, and transported him to Sacred Heart Medical Center. RP 123-125, 131-132. Once there, Pendell attempted to get off a gurney to which he had been belted for his safety. RP 107-108, 127. When medical staff attempted to restrain Pendell, he punched an EMT in the face. RP 109, 127-129. A jury convicted Pendell, rejecting his claim that he had acted in self-defense. RP 205-214, 222; CP 18-19, 21.

The Honorable Raymond Clary sentenced Pendell to 33 months' confinement and 12 months' community custody. CP 36-37. Judge Clary imposed only those LFOs that were mandatory: a \$200 criminal filing fee, a \$500 victim penalty assessment (VPA) and a \$100 DNA collection fee. CP 38-39. When doing so, Judge Clary indicated:

It's interesting. I don't know that he can pay the LFOs. There's a new case that talks about, without being incumbent on the court, to not impose the \$800 if the person can't pay and they are indigent. And I just don't have it at the tip of my tongue. But at this point, I'm ordering them, but I'm pointing it out to counsel in the event that there is a way to manage that. I just don't know how he's going to pay the LFOs. But absent some briefing and description for the Court's ability to not impose the LFOs, I'm doing so. And it's \$800, which consists of the \$500 victim assessment

fee, \$200 filing fee and \$100 for DNA collection fee. And then Ms. Ervin [the prosecutor] pointed out that she wanted notice of payroll deduction, which I will impose, although I don't, as she has indicated, I don't think that's likely.

RP 241. Judge Clary ordered Pendell to pay off this debt at a rate of \$5.00 per month beginning in January 2018. RP 242; CP 39.

Pendell submitted a declaration of indigency, which indicates he has no assets or income, and was permitted to appeal at public expense. CP 48-53.

C. ARGUMENT

RCW 7.68.035, RCW 43.43.7541, AND RCW 36.18.020(2)(h) ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY OR LIKELY FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS

RCW 7.68.035 provides that a \$500 VPA "shall be imposed" upon anyone who has been found guilty in a Washington superior court. RCW 43.43.7541 provides that every sentence following conviction for a felony or certain misdemeanors "must include" a DNA fee of \$100. RCW 36.18.020(2)(h) provides that, upon conviction, an adult defendant in a criminal case "shall be liable" for a fee of \$200. These statutes violate substantive due process when applied to defendants who are not shown to have the ability or likely future

ability to pay. This court should hold that the sentencing court erred in imposing these LFOs in light of Pendell's inability to pay them.

a. Imposing mandatory LFOs without any ability-to-pay finding fails to serve a rational state interest

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. amend. XIV, § 1; CONST. art. I, § 3. The due process clauses confer both procedural and substantive protections. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006).

Substantive due process protects against arbitrary and capricious government action even when the decision to act 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. Wash. State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (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.

Wash. Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as 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 at its lightest under this standard, the rational basis standard is not a toothless one. Mathews v. DeCastro, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976). Even under the deferential rational basis test, the court's role is to assure the challenged legislation is constitutional. DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining 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 due process clauses. Id.

RCW 7.68.035 ostensibly services 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). RCW 43.43.7541 services the collection, analysis, and storage of convicted defendants' DNA samples to facilitate identification of individuals who commit crimes. See RCW 43.43.753;

RCW 43.43.754. And RCW 36.18.020(2)(h) helps provide funding for state and county spending, including costs associated with maintaining judicial operations and law libraries. See RCW 36.18.020(1), (5); RCW 36.18.025. These are legitimate interests. But there is nothing reasonable about requiring sentencing courts to impose these LFOs, or any others, on defendants regardless of whether they have the ability or likely future ability to pay.

Imposing fees and fines on defendants who are unable to pay does not further the state's interests. As the Washington Supreme Court recently emphasized, the state cannot collect money from defendants who cannot pay. State v. Blazina, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). There is no legitimate economic incentive served in imposing LFOs without first determining ability or likely future ability to pay.

Likewise, the state's interest in enhancing offender accountability is also not served by requiring a defendant to pay mandatory LFOs when he or she cannot do so. To foster accountability, a sentencing condition must be something achievable in the first place. If it is not, the condition actually undermines efforts to hold a defendant answerable for his or her conduct.

The Washington Supreme Court reached this conclusion in Blazina, recognizing that the state's interest in deterring crime through LFOs is actually undermined when LFOs are imposed without regard to ability to pay. 182 Wn.2d at 836-37. Indeed, imposing LFOs upon those who do not have the ability to pay increases the chances of recidivism. Id. (citing studies and reports).

Imposing LFOs on persons who cannot pay them also undermines the state's interest in uniform sentencing. Defendants who cannot pay LFOs are subject to an indeterminate length of involvement with the criminal justice system, often end up paying considerably more than the original LFO amounts imposed due to interest and collection fees, and, in turn, often pay considerably more than their wealthier counterparts. Id. at 836-37.

When applied to indigent defendants—those defendants who cannot pay and do not have the likely future ability to pay—not only do mandatory LFOs fail to further any state interest, they are pointless. It is irrational for the State to mandate that trial courts impose these criminal debts on defendants who cannot pay.

Judge Bjorgen recently explained precisely how the imposition of mandatory LFOs fails to serve a rational state interest:

Without the individualized determination required by Blazina for discretionary LFOs, mandatory LFOs will be imposed in many instances on those who have no hope of ever paying them. In those instances, the levy of mandatory LFOs has no relation to its purpose. In those instances, the only consequence of mandatory LFOs is to harness those assessed them to a growing debt that they realistically have no ability to pay, keeping them in the orbit of the criminal justice system and within the gravity of temptations to reoffend that our system is designed to still. Levying mandatory LFOs against those who cannot pay them thus increases the system costs they were designed to relieve. In those instances, the assessment of mandatory LFOs not only fails wholly to serve its purpose, but actively contradicts that purpose. The self-contradiction in such a system crosses into an arbitrariness that not even the rational basis test can tolerate.

State v. Seward, 196 Wn. App. 579, 589, 384 P.3d 620 (2016) (Bjorgen, J., dissenting).<sup>1</sup>

To permit the blind imposition of mandatory LFOs without an ability to pay may be justified only through “dragnet rationales.” Id. at 590. “These rationales attempt to save a law that contradicts its purpose in some instances by pointing out that the law will serve its purpose in others or by hypothesizing that the contradiction may someday cease.” Id. As Judge Bjorgen correctly surmised, if such a dragnet approach to rational basis review “is sufficient to relieve the contradictions in assessing mandatory LFOs with no consideration of

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<sup>1</sup> Our office filed a petition for review in Seward on December 5, 2016. On March 7, 2017, the Supreme Court ordered the State to file an answer addressing the due process issues.

ability to pay, then the rational basis test must tolerate the irrationality of clearly antagonistic purpose and effect. That irrationality itself contradicts the core of the rational basis test.” Id. at 591.

Following Judge Bjorgen’s persuasive reasoning, Pendell asks that this court reach the same conclusion: imposing \$800 on him without first establishing his ability or likely future ability to pay violates substantive due process.

b. Pendell’s substantive due process challenge is ripe for review

Pendell acknowledges that Division One recently determined a nearly identical challenge was not ripe for review. State v. Shelton, 194 Wn. App. 660, 671-74, 378 P.3d 230 (2016), review denied, 187 Wn.2d 1002, 386 P.3d 1088 (2017). The court’s analysis rested on a fundamental misunderstanding of the nature of Shelton’s challenge, however. As such, this court should address Pendell’s challenge because it is amply ripe for review.

In Shelton, the court relied primarily on the reasoning in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), to conclude that “constitutional principles are implicated only when the State seeks to enforce collection of the mandatory assessment . . . .” Shelton, 194 Wn. App. at 672. The Shelton court misapprehended the difference

between the substantive due process challenge raised here and the constitutional principles discussed in Curry.

A claim is fit for judicial determination if the issues are primarily legal, do not require further factual development, and the challenged action is final. State v. Bahl, 164 Wn.2d 739, 751, 793 P.3d 678 (2008). When considering whether a claim is ripe, a reviewing court must also consider the hardship to the parties of withholding a decision on the merits. Id. The Shelton court concluded that the substantive due process challenge to mandatory LFOs was primarily legal and that the challenged action is final. Shelton, 194 Wn. App. at 672-73. However, the court erred in relying on Curry to conclude that the substantive due process claim requires further factual development. Shelton, 194 Wn. App. at 672-74.

The Curry court considered a completely different constitutional challenge. There, the defendants challenged the constitutionality of a mandatory LFO because its future enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they are unable to pay LFOs. Curry, 118 Wn.2d at 917. Thus, the constitutional challenge in Curry was grounded in the principle that due process cannot tolerate the incarceration of people simply because they are poor. Id.

This due process issue raised in Curry is not the same due process issue raised here or in Shelton. Pendell asserts there is no legitimate state interest in requiring sentencing courts to impose a mandatory LFO without first establishing a defendant's ability to pay. Unlike a challenge to an LFO statute based on the fundamental unfairness of its future enforcement potential (as was the case in Curry), Pendell asserts RCW 7.68.035, RCW 43.43.7541, and RCW 36.18.020(2)(h) do not rationally serve any legitimate state interest. While Curry asked the Washington Supreme Court to consider whether the speculative future operation of a statute would be unconstitutional, Pendell asks for the Washington courts to consider whether the statutes—as they operate at this moment—are unconstitutional. These are two different due process challenges. The court's attempt in Shelton to apply Curry as a barrier to review of different constitutional challenges, such as the one Pendell raises here, is deeply flawed.

Once the nature of Pendell's substantive due process challenge is recognized for what it is, it becomes clear that no further factual development is necessary. Cf. Shelton, 194 Wn. App. at 672 (“But his constitutional challenge requires further factual development, and the potential risk of hardship does not justify review

before the relevant facts are fully developed.”). Judge Clary never made any finding that Pendell has the ability or likely future ability to pay LFOs. Indeed, Judge Clary expressed his concern that Pendell had no such ability. See RP 241. As was the case in Blazina, the facts necessary to decide this issue—the statutory language and sentencing record—are fully developed. See Blazina, 192 Wn.2d at 832 n.1. Either Judge Clary employed statutes that are unconstitutional as applied to those who cannot pay the VPA, the DNA fee, and the filing fee or he did not. No further factual development is necessary.<sup>2</sup>

Curry does not create a ripeness barrier to Pendell’s substantive due process challenge. Consistent with Blazina, this court should review his challenge because it is ripe for review.

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<sup>2</sup> Contrary to the court’s conclusion in Shelton, Division Two has held that, pursuant to Blazina, a substantive due process challenge to mandatory LFOs is ripe for review. State v. Graham, 194 Wn. App. 1044, 2016 WL 3598554, at \*5 (2016) (“In Blazina, the court clarified that a challenge to the trial court’s entry of an LFO order under RCW 10.01.160(3) is ripe for judicial determination. The same rationale applies to LFOs imposed pursuant to other statutes.”). Graham, an unpublished non-binding decision, is cited here merely for its persuasive value. See GR 14.1(a).

c. Pendell's constitutional challenge is reviewable pursuant to RAP 2.5(a)(3)

The Shelton court wrongly concluded a substantive due process challenge “is not a manifest error subject to review under RAP 2.5(a)(3).” Shelton, 194 Wn. App. at 674.

Under RAP 2.5(a)(3), the appellate court “may refuse to review any claim of error which was not raised in the trial court.” One exception is that a “party may raise . . . manifest error affecting a constitutional right” for the first time on appeal. RAP 2.5(a)(3). “[C]onstitutional errors are treated specially because they often result in serious injustice to the accused.” State v. Lamar, 180 Wn.2d 576, 582, 327 P.3d 46 (2014) (quoting State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988)).

Pendell's substantive due process challenge pertains to a manifest constitutional error. An error is “manifest” under RAP 2.5(a)(3) if it is a constitutional error that had practical and identifiable consequences at trial or at sentencing. Lamar, 180 Wn.2d at 583. Pendell's substantive due process rights were violated by the trial court's imposition of \$800 in LFOs without any showing of his ability or likely future ability to pay. This error has practical and identifiable consequences—a payment obligation of \$800 without any ability to

pay has the practical and identifiable consequence of unjustly burdening Pendell with criminal debt without any rational basis to conclude that the state will ever recoup this amount. The error Pendell raises qualifies as manifest constitutional error.

Furthermore, “[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations.” State v. Duncan, 185 Wn.2d 430, 436, 374 P.3d 83 (2016). From the United States Supreme Court’s decision in Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), our supreme court distilled several constitutional requirements, including that repayment must not be mandatory, repayment may be ordered only if the defendant is or will be able to pay, and the financial resources of the defendant must be taken into account. Duncan, 185 Wn.2d at 436 (quoting Curry, 118 Wn.2d at 915-16) (quoting State v. Eisenman, 62 Wn. App. 640, 644 n.10, 810 P.2d 55, 817 P.2d 867 (1991) (citing State v. Barklind, 87 Wn.2d 814, 817, 557 P.2d 314 (1976))))). These constitutional requirements have not been honored here or in any case that approves of the automatic imposition of mandatory LFOs.

The Fuller Court was clear: “Defendants with no likelihood of having the means to repay are not put under even a conditional

obligation to do so, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no 'manifest hardship' will result." 417 U.S. at 46. In conflict with Fuller, all criminal defendants who are found guilty of felonies in Washington superior courts are put under a mandatory obligation to repay a \$500 VPA, a \$100 DNA fee, and a \$200 filing fee without any inquiry into their financial circumstances. Had the Fuller Court been reviewing Washington's mandatory LFOs—and the dragnet rationale the courts have used to justify them, cf. Seward, 196 Wn. App. at 590 (Bjorgen, J., dissenting)—it would determine Washington's statutes are constitutionally infirm. The error in imposing \$800 without an ability-to-pay determination is a manifest constitutional error.

Finally, RAP 2.5 vests appellate courts with discretion to review Pendell's claim of error. Duncan, 185 Wn.2d at 437 ("But while appellate courts 'may refuse to review any claim of error which was not raised in the trial court,' they are not required to, RAP 2.5(a)."). Given the "ample and increasing evidence that unpayable LFOs 'imposed against indigent defendants' imposed significant burdens on offenders and our community, including 'increased difficulty in reentering society, the doubtful recoupment of money by

the government, and inequities in administration,” this court should exercise its discretion and address Pendell’s substantive due process challenge to the \$800 in LFOs on the merits. Id. (quoting Blazina, 182 Wn.2d at 835-37).

D. CONCLUSION

To comport with substantive due process, this court should vacate the trial court’s order that Pendell pay \$800 in LFOs.

DATED this 20<sup>th</sup> day of March, 2017.

Respectfully submitted,

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State V. Willice Pendell, III

No. 34887-3-III

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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03-21-2017  
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Done in Seattle, Washington