

34887-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLICE PENDELL, III, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brian C. O'Brien
Senior Deputy Prosecuting Attorney
Attorneys for Respondent/Appellant

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT’S ASSIGNMENT OF ERROR..... 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 2

 A. THIS COURT SHOULD DECLINE TO ADDRESS THE
 DUE PROCESS CLAIM WHERE IT IS BELATEDLY
 RAISED FOR THE FIRST TIME ON APPEAL..... 5

 B. DEFENDANT’S CLAIM THAT THE MANDATORY
 COSTS ARE UNCONSTITUTIONAL AS APPLIED TO
 DEFENDANTS THAT DO NOT HAVE THE ABILITY
 TO PAY IS UNSUPPORTED BY PRECEDENT. 7

V. CONCLUSION 9

TABLE OF AUTHORITIES

WASHINGTON CASES

Amunrud v. Bd. of Appeals, 158 Wn.2d 208,
143 P.3d 571 (2006)..... 3

City of Federal Way v. Koenig, 167 Wn.2d 341,
217 P.3d 1172 (2009)..... 8

Harbison v. Garden Valley Outfitters, Inc.
69 Wn. App. 590,
849 P.2d 669 (1993)..... 3

In re Pers. Restraint of Yates, 177 Wn.2d 1,
296 P.3d 872 (2013)..... 8

Matter of Arnold, 34018-0-III, 2017 WL 1483993
(Wash. Ct. App., Apr. 25, 2017)..... 8

Nielsen v. Washington State Dept. of Licensing,
177 Wn. App. 45, 309 P.3d 1221 (2013) 4

Riehl v. Foodmaker, Inc., 152 Wn.2d 138,
94 P.3d 930 (2004)..... 8

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

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992)..... 8

State v. Johnson, 194 Wn. App. 304, 374 P.3d 1206 (2016)..... 7

State v. Leonard, 184 Wn.2d 505, 358 P.3d 1167 (2015)..... 4

State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013) 3, 7

State v. Mathers, 193 Wn. App. 913, 376 P.3d 1163,
review denied, 186 Wn.2d 1015 (2016)..... 7

State v. McCormick, 166 Wn.2d 689, 213 P.3d 32 (2009) 4

State v. Seward, 196 Wn. App. 579, 384 P.3d 620 (2016) 8

<i>State v. Shelton</i> , 194 Wn. App. 660, 378 P.3d 230 (2016), <i>review denied</i> , 187 Wn.2d 1002 (2017).....	7
<i>State v. Stoddard</i> , 192 Wn. App. 222, 366 P.3d 474 (2016).....	6, 7
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177 (2013).....	5, 6
<i>State v. Tyler</i> , 195 Wn. App. 385, 382 P.3d 699 (2016).....	7

CONSTITUTIONAL PROVISIONS

Const. art. 1, § 3	3
U.S. Const. amend. V.....	3
U.S. Const. amend. XIV	3

STATUTES

RCW 36.18.020	3, 4
RCW 43.43.7541	3, 5
RCW 7.68.035	3, 5

RULES

Fed. R. Crim P. 51	5
Fed. R. Crim P. 52	5
RAP 2.....	5
RAP 9.11.....	3

I. APPELLANT'S 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.

II. ISSUES PRESENTED

1. Whether a defendant who does not object in the trial court to the imposition of mandatory legal financial obligations has suffered a manifest constitutional error, allowing him to raise, for the first time on appeal, a challenge to the imposition of such costs without the trial court making an individualized finding of ability to pay.

2. Whether the imposition of mandatory legal financial obligations at sentencing, in the absence of an individualized finding of ability to pay, violates substantive due process.

III. STATEMENT OF THE CASE

The defendant was tried and convicted in Spokane County Superior Court of third degree assault for striking a health care worker. CP 21. The defendant provided a sentencing brief, but raised no issue regarding whether the mandatory costs could be waived. CP 22-25. At sentencing, the court, sua sponte, raised a question regarding the trial court's ability to not impose mandatory court costs, but noted that it had not been supplied either briefing

or enough factual description to enable it to determine that issue, unraised by the defendant's sentencing brief:

THE COURT: It's interesting. I don't know that he can pay the LFOs. There's a new case out 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 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.

Now, belatedly, defendant raises a new claim, not advanced in the lower court, requesting this Court find, contrary to case law, that the mandatory cost statutes violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay.

IV. ARGUMENT

To the extent defendant cites to the post-sentencing record regarding his declaration of indigency for purposes of appeal, the State would object to these documents in the determination of this case, other than for the decision as to whether costs should be awarded on appeal. An appellate court will not accept additional evidence on appeal unless all six criteria of

RAP 9.11(a) are satisfied. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 849 P.2d 669 (1993). None of the criteria are met here.

Pendell raises, for the first time on appeal, a challenge to the statutorily required legal financial obligations (LFOs) that were imposed by the sentencing court. Those LFOs include a \$500 victim assessment (RCW 7.68.035), a \$200 filing fee (RCW 36.18.020(2)(h)), and a \$100 DNA collection fee (RCW 43.43.7541). CP 38-39. He claims that the statutes requiring those LFOs violate substantive due process when applied to defendants who have not been shown to have the ability to pay. Without citation to authority, his argument places the burden on the State to prove a defendant is not indigent, rather than on the defendant to prove that he is.¹ Appellant's Br. at 3-4, 6.

Substantive due process protects against arbitrary or capricious government action. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218- 19, 143 P.3d 571 (2006). The United States Constitution, Amendments V and XIV, as well as the Washington Constitution, art. 1, § 3, provide that no person may be deprived of life, liberty, or property without due process of law. The state and federal due process clauses are coextensive; the state

¹ See *State v. Lundy*, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013) (it is the defendant's burden to prove indigency for the purpose of receiving counsel).

Constitution offers no greater protection. *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32 (2009). Substantive due process requires that deprivations of property be substantively reasonable, supported by legitimate justification, and rationally related to a legitimate state interest. *Nielsen v. Washington State Dept. of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013). This deferential standard requires the reviewing court to “assume the existence of any necessary state of facts which [it] can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest.” *Id.* at 53.

Pendell acknowledges that the State has a legitimate interest in collecting these LFOs, but argues that imposing them on defendants who are unable to pay does not rationally serve that interest. Appellant’s Br. at 5-6. Because LFOs do not implicate a fundamental right, the rational basis standard applies to the analysis of Pendell’s claim. *Nielsen*, 177 Wn. App. at 53-54.

Pendell cites extensively to *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), to bolster his argument that imposing financial obligations on indigent defendants is harmful to the State and to defendants. *Blazina* addressed only discretionary LFOs. *State v. Leonard*, 184 Wn.2d 505, 507, 358 P.3d 1167 (2015). All of the LFOs imposed on Pendell are mandatory. RCW 36.18.020(2)(h) (“Upon conviction or plea of

guilty ... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars”); RCW 7.68.035(1)(a) (“[T]here shall be imposed upon such convicted person ... five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor”); RCW 43.43.7541 (“Every sentence imposed for a crime specified in RCW 43.43.7541 must include a fee of one hundred dollars”). Indeed, the sentencing court invited counsel to address whether there was law or facts available regarding the imposition of the mandatory fees,² but, by their silence on this issue, neither Pendell nor his attorney deemed it necessary to raise the issue at that time.

A. THIS COURT SHOULD DECLINE TO ADDRESS THE DUE PROCESS CLAIM WHERE IT IS BELATEDLY RAISED FOR THE FIRST TIME ON APPEAL

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied federally in Fed. R. Crim P. 51 and 52, and in Washington under RAP 2.5.

RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*,

² RP 241.

176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Therefore, policy and RAP 2.5 favor not allowing review of this belatedly raised issue, especially where, as here, the trial court *invited* the defendant to raise any issue regarding the mandatory costs. RP 241. *See State v. Stoddard*, 192 Wn. App. 222, 226-27, 366 P.3d 474 (2016) (alleged substantive due process violation was not manifest error; refusing to consider it as unpreserved).

Additionally, any error in the trial court's imposition of mandatory costs is neither manifest, nor ripe. *State v. Shelton*, 194 Wn. App. 660, 670-72, 378 P.3d 230 (2016), *review denied*, 187 Wn.2d 1002 (2017). While defendant alleges a constitutional claim, it is apparent that the imposition of mandatory fines is not error, never mind obvious error, as the imposition of such fines is supported by case law. *Id.* This Court should not accept defendant's invitation to review an issue he failed to raise in the lower court.

B. DEFENDANT'S CLAIM THAT THE MANDATORY COSTS ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS THAT DO NOT HAVE THE ABILITY TO PAY IS UNSUPPORTED BY PRECEDENT.

This court has refused to consider or has rejected the challenges to mandatory LFOs made by Pendell in *Lundy*, 176 Wn. App. at 102, (generally rejecting constitutional challenges); *Stoddard*, 192 Wn. App. at 228-29 (alleged substantive due process violation was not manifest error; refusing to consider it as unpreserved); *State v. Mathers*, 193 Wn. App. 913, 919, 376 P.3d 1163, *review denied*, 186 Wn.2d 1015 (2016) (rejecting challenges based on RCW 10.01.160, *Blazina*, GR 34, equal protection, and substantive due process on the merits); *State v. Johnson*, 194 Wn. App. 304, 308-09, 374 P.3d 1206 (2016) (rejecting equal protection challenge alleging disparate impact where no discriminatory intent shown); *State v. Tyler*, 195 Wn. App. 385, 404 n.11, 382 P.3d 699 (2016); (rejecting constitutional

challenge and challenge based on RCW 10.01.130(3), *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), and RCW 10.01.160(3) on the merits). *See also State v. Curry*, 118 Wn.2d 911, 917 n.3, 829 P.2d 166 (1992) (rejecting constitutional challenge as premature).

Most recently, the exact issue framed by defendant was rejected in *State v. Seward*, 196 Wn. App. 579, 586-87, 384 P.3d 620 (2016) (rejecting challenges based on substantive due process). To the extent the defendant relies on the dissenting opinion of Judge Bjoren in *Seward*, the State will rely on the majority opinion. *See Matter of Arnold*, 34018-0-III, 2017 WL 1483993, at *2 (Wash. Ct. App. Apr. 25, 2017) (“Adherence to past decisions through the doctrine of stare decisis promotes clarity and stability in the law, thereby enabling those impacted by the courts’ decisions to make personal and professional decisions that comply with legal mandates. *See In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)”).

Moreover, when a party urges an appellate court to overrule an earlier decision, that party must make a clear showing that the established rule is both incorrect and harmful. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 25, 296 P.3d 872 (2013); *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346-47, 217 P.3d 1172 (2009); *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). Defendant Pendell has failed to

clearly demonstrate that the holdings in *Lundy*, *Stoddard*, *Mathers*, and *Seward*, are all incorrect, and that they are all harmful.

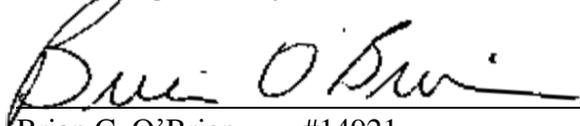
If Mr. Pendell had any challenges to mandatory LFOs that he believed were not foreclosed by this precedent, he should have taken steps to preserve those arguments and any claimed error at the time of his sentencing.

V. CONCLUSION

Any error in the trial court's imposition of mandatory costs is neither manifest, nor ripe. Any claim in that regard is not preserved. The issue is well-settled. The judgment of the lower court should be affirmed.

Dated this 16 day of May, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

WILLICE PENDELL, III,

Appellant,

NO. 34887-3-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 16, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

David B. Koch

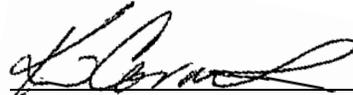
kochd@nwattorney.net; sloanej@nwattorney.net

5/16/2017

(Date)

Spokane, WA

(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

May 16, 2017 - 1:47 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34887-3
Appellate Court Case Title: State of Washington v. Willice Albert Pendell, III
Superior Court Case Number: 15-1-04833-4

The following documents have been uploaded:

- 348873_Briefs_20170516134619D3977727_6384.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Pendell Willice - 348873 - Resp Br BCO.pdf

A copy of the uploaded files will be sent to:

- nielsene@nwattorney.net
- bobrien@spokanecounty.org
- scpaappeals@spokanecounty.org
- kochd@nwattorney.net
- SloaneJ@nwattorney.net
- scpaappeals@spokanecounty.org

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Brian Clayton O'Brien - Email: bobrien@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20170516134619D3977727