

NO. 34924-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

NATHAN CALVERT,

Appellant.

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

The Honorable James M. Triplet, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE'S ARGUMENT CONFLATES THE QUESTION OF DUE PROCESS VOLUNTARINESS WITH THE QUESTION OF A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF THE RIGHT AGAINST SELF-INCRIMINATION

The State focuses on the issue of the voluntariness of Calvert's confession as a matter of due process, thereby glossing over Calvert's actual argument on appeal—that the State failed to carry its heavy burden of proving Calvert understood and waived his Miranda¹ rights. By repeatedly arguing that Calvert has not demonstrated that his confession was the product of police coercion, the State misconstrues what is at issue in this appeal. See Br. of Resp't at 10-12 (conflating due process voluntariness and Miranda voluntariness), 13-14 (same), 16 (stating “[m]ost importantly, the record is devoid of any evidence of police coercion” and noting there “were no threats, coercive measures, or promises made by Corporal Thurman or Deputy Hilton in order to get Mr. Calvert to answer questions”).

The due process voluntariness test and the Miranda voluntariness test are not the same. See, e.g., State v. Reuben, 62 Wn. App. 620, 623-26, 814 P.2d 1177 (1991) (discussing and separately analyzing due process voluntariness and Miranda's requirement of proper advisement and knowing, voluntary, and intelligent waiver); State v. Vannoy, 25 Wn. App. 464, 468-

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

69, 610 P.2d 380 (1980) (“The [Miranda voluntariness] test is a separate one from the due process test of voluntariness because the issue here is not whether the confession was voluntary, but rather whether an accused who has been informed of his rights thereafter knowingly and intelligently waived those rights before making a statement.”). The State remarkably devotes almost all its brief to respond to arguments Calvert hasn’t made.

The question is not whether Calvert was coerced into confessing. The question is whether the State’s officers properly advised Calvert of his Miranda rights and secured a knowing, voluntary, and intelligent waiver of these rights. For the reasons stated in the opening brief, which the State fails to analyze under the proper standard, the answer to this question is no.

The officer who read the Miranda warnings stated Calvert was not paying attention at all, ostensibly because he had just been attacked by a police dog. RP 27. Calvert did not at all acknowledge the reading of the Miranda rights or respond at all to the officer’s question of whether he understood these rights. RP 27, 30, 35. Based on the officers’ testimony, there is no way for the State to demonstrate Calvert understood his rights and thereafter knowingly and intelligently waived them. The trial court seemed to believe that a mere reading of Miranda warnings, regardless of context, established a knowing, voluntary, and intelligent waiver, and also seemed to believe that Calvert bore the burden of proving otherwise. See CP 96

(concluding “Although the defendant did not verbally acknowledge those rights, there is no evidence that he didn’t understand these rights”); Br. of Appellant at 10-13 (discussing evidence from CrR 3.5 hearing and trial court’s erroneous findings of fact and conclusions of law). Because the burden was misplaced, the State never carried its burden of proof that it adequately informed Calvert of his Miranda rights or obtained a knowing, voluntary, and intelligent waiver of these rights. On appeal, the State points to nothing that shows Calvert understood his rights and waived them because there is nothing to point to. Calvert’s confession must be suppressed.

The State complains that Calvert is improperly challenging the suggestive nature of the show-up for the first time on appeal. Br. of Resp’t at 19-22. This State misunderstands the purpose of Calvert’s arguments. Calvert has not assigned error to the admission of the show-up identification, so, here too, the State devotes much of its harmlessness discussion to an argument Calvert has not made. As he must, Calvert discussed the quality and quantity of evidence presented at trial, including evidence of identity, to argue that the error in admitting Calvert’s confession was not harmless beyond a reasonable doubt. See State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968) (reviewing court must consider harmlessness by examining the entire record on appeal).

Without Calvert's confession, there is a reasonable doubt that the jury would have reached the same verdict. The reasonable doubt exists in part because the identification evidence was weak and contradictory. Br. of Appellant at 14-15. It is appropriate to consider the suggestive nature of show-up evidence in addressing the question of harmlessness, along with the rest of the evidence presented at trial. Defense counsel below certainly argued the issue at trial, pointing out several problems with the State's show-up identifications in his closing argument to the jury. RP 226-29. Under the State's logic, unless the defense challenges the admission of certain evidence, it may not otherwise argue inferences from the admitted evidence that differ from the State's. There is no support for such a position.

Although Calvert concedes he does not challenge the admission of the show-up identification, he maintains his argument that, without the admission of Calvert's confession, the State would not have been able to prove the burglary beyond a reasonable doubt, even considering the suggestive and equivocal show-up identification the State introduced at trial.

Calvert asks that his residential burglary conviction be reversed.

2. THERE ARE TWO GOOD REASONS TO ADDRESS CALVERT'S STATUTORY ANALYSIS REGARDING THE CRIMINAL FILING FEE

The State claims that Calvert “provides no basis for review of this unpreserved issue on appeal.” Br. of Resp’t at 22. The State is mistaken for two reasons.

First, as the State tacitly acknowledges, this court has discretion to address whatever it wants. Br. of Resp’t at 23 (acknowledging the existence of discretion but making tenuous, unsupported claim that “it is less certain whether that discretionary authority applies to post-Blazina^[2] sentencings, such as this one, involving an unchallenged inquiry”). Although the State asserts that this case “does not warrant the exercise of that discretionary authority, assuming it does exist,” the State doesn’t say why. Br. of Resp’t at 23.

For all the reasons the Blazina court opted to exercise discretion and address LFO issues, so should this court. See Blazina, 182 Wn.2d at 835-37 (discussing pernicious effects of LFOs and 12 percent interest rate).

The second reason to address Calvert’s arguments is that no court has considered or addressed them. The cases that hold RCW 36.18.020(2)(h)’s filing fee is mandatory provide no statutory analysis to support their holdings. State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016)

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

(without analysis, court concluding, “Trial courts must impose such fees regardless of a defendant’s indigency. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013)”); Lundy, 176 Wn. App. at 103 (without analysis, concluding the \$200 criminal filing fee is mandatory). The State does not address Calvert’s statutory analysis either; Calvert assumes the reason is the State’s lack of cogent response. Instead of simplistically concluding that the word “shall” appears in the statute and makes the imposition of the filing fee mandatory, the appellate courts should meaningfully consider Calvert’s statutory arguments based on the plain language of the statute, the structure of RCW 36.18.020(2), and other statutes that impose discretionary and mandatory LFOs. See Dep’t of Ecology v. Cambell & Gwinn, LLC, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002) (“[T]he plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.”).

3. IF THE CRIMINAL FILING IS TRULY MANDATORY,
THEN ITS MANDATORY IMPOSITION VIOLATES
EQUAL PROTECTION

a. There is no merit to the State’s waiver argument

The State does not dispute Calvert’s RAP 2.5(a)(3)’s “manifest error affecting a constitutional right” analysis. See Suppl. Br. of Appellant at 4-6. Instead, the State argues that the record is not sufficiently well developed to

review Calvert's equal protection claim, relying on Stoddard. Suppl. Br. of Resp't at 2. The State is mistaken.

In Stoddard, this court declined to consider Stoddard's substantive due process challenge because there was not a sufficient record to support his claim of indigency: "Thus, the record lack[ed] the details important to resolving Stoddard's due process argument." 192 Wn. App. at 228-29. The record is not deficient here. Calvert's motion and declaration for an order of indigency specifies he owns no real or personal property of any kind, has no assets of any kind, and has no income of any kind. CP 136-37. Calvert owes at least \$1,200 in back child support. CP 136-37. Calvert also owes more than \$6,100 in restitution. CP 99. Pursuant to this court's general order on appellate costs, Calvert has provided further information about his finances. He again confirmed his lack of income and assets. Mot. on Appellate Costs, Appendix at 1. He indicated he owes more than \$24,000 in LFOs, owes \$1,228 in child support arrears, has no employment history, has received no job training of any kind, and has a ninth grade education. Mot. on Appellate Costs, Appendix at 1-2. Unlike Stoddard, there are ample details in the record beyond Calvert's mere "contentions" that "assume his poverty." Stoddard, 192 Wn. App. at 228.

In any event, Calvert's financial status is not necessary to address his equal protection claim. 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). Calvert’s equal protection claim is entirely legal—either the mandatory imposition of the criminal filing fee violates equal protection or it does not. No further factual development is necessary and the action is final given that the criminal filing fee was imposed in the judgment and sentence. This court should address Calvert’s equal protection claim on the merits.

- b. In light of the purpose of the filing fee statute, there is no rational basis to treat civil and criminal litigants differently

The State asserts that Calvert “takes aim at the wrong target” in claiming that RCW 36.18.020(2)(h) violates equal protection. Suppl. Br. of Resp’t at 4. Calvert does not argue that RCW 36.18.020(2)(h) in isolation violates equal protection, as the State suggests. Instead, Calvert argues that the mandatory imposition of the \$200 criminal filing under RCW 36.18.020(2)(h) is what violates equal protection. In other words, it is the judiciary’s unanalyzed insistence that the criminal filing fee is mandatory that causes the equal protection violation to occur. See Suppl. Br. of Appellant at 4 (“Because there is no rational basis to treat criminal litigants differently than civil litigants under a statute whose purpose is to collect filing fees to fund the state, counties, and county law libraries, interpreting and applying the RCW 36.18.020(2)(h) criminal filing fee as a nonwaivable,

mandatory financial obligation violates equal protection.” (emphasis added)). Contrary to the State’s claim, Calvert has the correct target in his sights.

The State next asserts that Calvert’s claim is perfunctory given that “[h]e cites no cases dealing with the application of GR 34” in this context. Suppl. Br. of Resp’t at 4. The State also characterizes Calvert’s claim as a naked casting into the constitutional sea. Br. of Resp’t at 4. Calvert finds no case addressing an equal protection claim based on the filing fee waiver GR 34 provides to civil litigants. Since the State hasn’t cited any case either, Calvert assumes there is none. If a case directly on point were necessary to address every legal argument, then the law would never change.

Although Calvert’s equal protection claim is straightforward, it is not a naked casting into the constitutional sea. Calvert has relied on standards set forth in Washington Supreme Court and Court of Appeals precedent to address whether ““persons similarly situated with respect to the legitimate purpose of [RCW 36.18.020] must receive like treatment.”” Suppl. Br. of Appellant at 2 (quoting State v. Johnson, 194 Wn. App. 304, 307, 374 P.3d 1206 (2016) (quoting State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992))). Calvert then sets forth straightforward analysis mirroring the analyses in Johnson and Coria to demonstrate that persons similarly situated with respect to the purpose of RCW 36.18.020 do not receive like treatment.

Suppl. Br. of Appellant at 2-4. The analysis of this issue is plain and simple, but its simplicity does not render it perfunctory, as the State seems to think.

It is the State's analysis that falls short, not Calvert's. The State fails to apprehend that the purpose of the law in question is what controls the equal protection analysis. The purpose of filing fees is indisputably to provide revenue to fund counties, regional and county law libraries, and the state general fund. RCW 36.18.020(1); RCW 36.18.025; RCW 27.24.070; Suppl. Br. of Appellant at 2-3. The State does not even attempt to address the legitimate, stated purpose of RCW 36.18.020 filing fees in asserting that there is a rational basis for treating civil and criminal litigants differently.

The State instead relies on the timing of the filing fee's payment. Suppl. Br. of Resp't at 6. But when the filing fee is paid has no bearing on the legitimate purpose filing fees serve, which, as discussed, is to supply money to counties, law libraries, and the state general fund. The purpose of requiring payment of filing fees does not change simply because criminal defendants are not required to pay the filing fee when the State files the information.³

³ The State also claims that it has "graciously provided this defendant access to justice *free of charge* when it filed the information." Suppl. Br. of Resp't at 6. It is not graciousness but our state's constitutional command that a criminal defendant be provided counsel, an impartial jury, compulsory process, and a fair trial. CONST. art. I, §§ 21, 22.

The State's timing argument also fails to account for a civil litigant who obtains waiver of a filing fee and then loses the case. GR 34 provides that civil plaintiffs may obtain a waiver of their filing fees, even if their arguments are completely meritless. According to the State, an indigent civil plaintiff who ultimately loses his or her case should receive a greater benefit than a similarly situated indigent criminal defendant. There is no rational reason to treat the two parties differently with respect to statutory filing fees, however, given that that purpose of the filing fee remains the same in either case. It is this purpose, not when the filing fee is paid, that matters in addressing Calvert's equal protection claim. Because there is no rational basis to treat indigent civil litigants and indigent criminal litigants differently with respect to the purpose of filing fees, mandating the imposition of a filing fee against a criminal defendant in every case violates equal protection.

Finally, the State asks the court not to consider the equal protection claim because the RCW 10.01.160(4) remission procedure exists. Suppl. Br. of Resp't at 7. As an initial matter, Calvert is unsure that a filing fee imposed under RCW 36.18.020(2)(h) qualifies as a "cost" under RCW 10.01.160, and the State certainly cites no authority to suggest it does. Even assuming it does, the remission procedure affords a criminal defendant no counsel, no evidentiary hearing, and no appeal. State v. Shirts, 195 Wn. App. 849, 860-61, 381 P.3d 1223 (2016); State v. Smits, 152 Wn. App. 514,

524, 216 P.3d 1097 (2009). In the eyes of a pro se litigant, the remission procedure provides an illusory remedy at best. As Division One concluded with respect to the imposition of appellate costs, the future availability of a remission proceeding cannot displace a reviewing court's obligation to consider a party's current arguments. State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016). Calvert asks this court to consider his equal protection claim regardless of the hypothetical existence of a future remission proceeding. Upon consideration, the \$200 criminal filing fee should be stricken or Calvert's financial circumstances should be considered before imposing it.

B. CONCLUSION

For the reasons stated here and in his opening brief, Calvert asks that this court reverse his burglary conviction and remand for a new and fair trial. The criminal filing fee is not mandatory and, if it is mandatory, then it violates Calvert's right to the equal protection of the laws.

DATED this 1st day of September, 2017.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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