

COA No. 34924-1-III
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NATHAN CALVERT, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brian C. O'Brien
Senior Deputy Prosecuting Attorney

Anastasiya E. Krotoff
Deputy Prosecuting Attorney
Attorney for Respondent

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

INDEX

I. APPELLANT’S BELATED ASSIGNMENT OF ERROR 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 1

 A. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL; THE \$200 FILING FEE IMPOSED IN HIS CASE IS A MANDATORY FINANCIAL OBLIGATION..... 1

 B. THERE IS NO EQUAL PROTECTION VIOLATION WHERE CRIMINAL DEFENDANTS ARE ONLY CHARGED A FEE AFTER A JUDGMENT HAS BEEN ENTERED AGAINST THEM AND CIVIL LITIGANTS ARE CHARGED A FEE UPON ENTRY INTO THE COURT SYSTEM. 4

V. CONCLUSION 7

TABLE OF AUTHORITIES

WASHINGTON CASES

City of Richland v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016)..... 7

Harris v. Charles, 171 Wn.2d 455, 256 P.3d 328 (2011)..... 5

In re Det. of Stout, 159 Wn.2d 357, 150 P.3d 86 (2007) 6

Jafar v. Webb, 177 Wn.2d 520, 303 P.3d 1042 (2013)..... 6

Petition of Williams, 111 Wn.2d 353, 759 P.2d 436 (1988)..... 4

State v. Hirschfelder, 170 Wn.2d 536, 242 P.3d 876 (2010)..... 5

State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013) 1

State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996) 6

State v. Price, 169 Wn. App. 652, 281 P.3d 331 (2012)..... 5

State v. Stoddard, 192 Wn. App. 222, 366 P.3d 474 (2016)..... 2

State v. Strine, 176 Wn.2d 742, 293 P.3d 1177 (2013)..... 2, 3

State v. Vance, 168 Wn.2d 754, 230 P.3d 1055 (2010) 5

State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994) 6

CONSTITUTIONAL PROVISIONS

Const. art. I, § 12..... 5

U.S. Const amend. XIV 5

STATUTES

RCW 10.01.160 7

RCW 36.18.020 1, 4, 5

RULES AND REGULATIONS

Fed. R. Crim. P. 51 3
Fed. R. Crim. P. 52 3
GR 34 5, 6, 7
RAP 2.5..... 3, 4, 7

I. APPELLANT'S BELATED ASSIGNMENT OF ERROR

The \$200 criminal filing fee imposed pursuant to RCW 36.18.020(2)(h) violates equal protection.

II. ISSUES PRESENTED

1. Should the belatedly filed claim, that the criminal filing fee imposed violates equal protection, be cognizable in this Court under RAP 2.5 where it was never raised or mentioned in the lower court?
2. Has the appellant established that this Court's prior decisions are both harmful and incorrect?
3. Has the appellant established that RCW 36.18.020(2)(h) violates equal protection?

III. STATEMENT OF THE CASE

Defendant, with an offender score of 20, was convicted of miscellaneous criminal felonies and misdemeanors and ordered to pay a \$200 filing fee under RCW 36.18.020(2)(h). CP 105-09.

IV. ARGUMENT

A. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL; THE \$200 FILING FEE IMPOSED IN HIS CASE IS A MANDATORY FINANCIAL OBLIGATION.

The \$200 criminal filing fee, is a mandatory legal financial obligation pursuant to RCW 36.18.020(2)(h). *State v. Lundy*,

176 Wn. App. 96, 102, 308 P.3d 755 (2013). Trial courts must impose such fees regardless of a defendant's indigency. *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016).

As in *Stoddard*, the constitutional issue (here equal protection) was not raised, preserved, or developed in the trial court with supporting facts that would enable this Court to properly review the claim. In *Stoddard*, this Court stated:

We consider whether the record on appeal is sufficient to review Gary Stoddard's constitutional arguments. Stoddard's contentions assume his poverty. Nevertheless, the record contains no information, other than Stoddard's statutory indigence for purposes of hiring an attorney, that he lacks funds to pay a \$100 fee. The cost of a criminal charge's defense exponentially exceeds \$100. Therefore, one may be able to afford payment of \$100, but not afford defense counsel. Stoddard has presented no evidence of his assets, income, or debts. Thus, the record lacks the details important in resolving Stoddard's due process argument.

Gary Stoddard underscores that other mandatory fees must be paid first and interest will accrue on the \$100 DNA collection fee. This emphasis helps Stoddard little, since we still lack evidence of his income and assets.

192 Wn. App. at 228-29.

This Court should not accept review of the equal protection claim based upon an undeveloped record. 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*, 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 do not favor consideration of the belatedly raised \$200 filing fee issue.

B. THERE IS NO EQUAL PROTECTION VIOLATION WHERE CRIMINAL DEFENDANTS ARE ONLY CHARGED A FEE AFTER A JUDGMENT HAS BEEN ENTERED AGAINST THEM AND CIVIL LITIGANTS ARE CHARGED A FEE UPON ENTRY INTO THE COURT SYSTEM.

First, Defendant takes aim at the wrong target. He claims that RCW 36.18.020(2)(h) violates equal protection. However, *his argument* is that GR 34, authorizing civil litigants a waiver of fees authorized under the statute, does not do the same for criminal defendants. It is the court rule, not the statute, that authorizes the waiver. The statute makes the fees mandatory to all within its application. Defendant fails to make a claim that GR 34 violates equal protection.

Secondly, Defendant's equal protection argument is perfunctory. He cites no cases dealing with the application of GR 34. Appellate courts should not be placed in a role of crafting issues for the parties; thus, mere "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *Petition of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988) (internal quotation marks omitted) (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)). Therefore, this Court should not consider this new argument.

Furthermore, there is no equal protection violation present in either the challenged statute, RCW 36.18.020(2)(h), or the court rule, GR 34. The Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution guarantee equal protection under the law. “Equal protection requires that similarly situated individuals receive similar treatment under the law.” *Harris v. Charles*, 171 Wn.2d 455, 462, 256 P.3d 328 (2011). This court reviews constitutional challenges de novo. *State v. Vance*, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010); *State v. Price*, 169 Wn. App. 652, 655-56, 281 P.3d 331 (2012).

The appropriate level of review in equal protection claims depends on the nature of the classification or the rights involved. *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). Appellate courts apply a strict scrutiny standard when state action involves suspect classifications like race, alienage and national origin and/or fundamental rights. *Id.* Intermediate scrutiny is applied for semi-suspect classifications and/or important rights. *Id.* Otherwise, courts apply rational basis review. *Id.* Defendant concedes he is not a member of a suspect or semi-suspect class and agrees that rational basis review applies here. Appellant’s Supp. Br. at 2.

Rational basis review is a highly deferential standard, and courts will uphold a statute under this standard unless it rests on grounds wholly

irrelevant to the achievement of legitimate state objectives. *In re Det. of Stout*, 159 Wn.2d 357, 375, 150 P.3d 86 (2007). The rational basis test requires only that the means employed by the statute be rationally related to a legitimate state goal; the means do not have to be the best way to achieve the goal. *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996). “[T]he Legislature has broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest.” *State v. Ward*, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994).

There is a rational basis for treating civil litigants *entering* the justice system differently than indigent criminal defendants *already in* the system and convicted of a criminal offense. The former group seeks access to justice; the later has received access to justice. Indeed, the State graciously provided this defendant access to justice *free of charge* when it filed the information. There was no *advance* requirement that he pay a filing fee to get into court, as there is in civil cases. It is only upon a criminal defendant’s conviction that he or she is required to pay a filing fee. GR 34 allows the waiver of mandatory filing fees for indigent civil litigants *to provide equal access to justice*. *Jafar v. Webb*, 177 Wn.2d 520, 526-32, 303 P.3d 1042 (2013). Without such a waiver, indigent parties would not be able to seek relief in the courts. *Id.* at 529-31.

Lastly, the criminal defendants are authorized to seek remission of these mandatory costs under RCW 10.01.160(4), under the same criteria as that providing waiver of fees to indigent civil litigants under GR 34. “[C]ourts can and should use GR 34 as a guide for determining whether someone has an ability to pay costs.” *City of Richland v. Wakefield*, 186 Wn.2d 596, 606, 380 P.3d 459 (2016). There is no real difference in the procedure. The defendant has failed to establish, as is his burden, an equal protection violation.

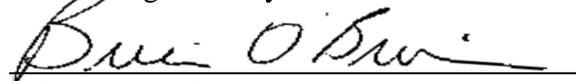
V. CONCLUSION

The failure of defendant to raise this issue below should prevent review of this issue under RAP 2.5. This Court should find that requiring trial courts to impose mandatory legal financial obligations against indigent criminal defendants, even though filing fees can be waived for indigent civil litigants, does not violate equal protection

Dated this 18 day of August, 2017.

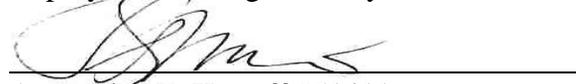
LAWRENCE H. HASKELL

Prosecuting Attorney



Brian C. O'Brien #14921

Deputy Prosecuting Attorney



Anastasiya E. Krotoff #51411

Deputy Prosecuting Attorney

Attorneys for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

NATHAN CALVERT,

Appellant.

NO. 34924-1-III

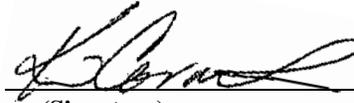
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 18, 2017, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kevin A. March
marchk@nwattorney.net; sloanej@nwattorney.net

8/18/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

August 18, 2017 - 10:06 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34924-1
Appellate Court Case Title: State of Washington v. Nathan John Calvert
Superior Court Case Number: 15-1-03097-4

The following documents have been uploaded:

- 349241_Briefs_20170818100511D3439765_2847.pdf
This File Contains:
Briefs - Respondents - Modifier: Supplemental
The Original File Name was Supp Br - Resp - AEK-BCO 081617 - 349241.pdf

A copy of the uploaded files will be sent to:

- MarchK@nwattorney.net
- Sloanej@nwattorney.net
- akrotoff@spokanecounty.org
- nielsene@nwattorney.net

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 20170818100511D3439765