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Division III
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No. 355292

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

RIGOBERTO CASTELLON VASQUEZ,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The Court erred in imposing the \$200 filing fee.
2. The Court erred in imposing the crime victim's assessment without a finding of ability to pay.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Does the defendant have standing to raise constitutional issues where there is no evidence he is in the class protected by the constitutional provision at issue?
2. Are the alleged errors manifest, and should they be reviewed by this Court?
3. Does the mandatory filing fee violate equal protection?
4. Is the mandatory filing fee mandatory?

III. STATEMENT OF THE CASE

Minimal facts are necessary to decide this issue. Mr. Vasquez was convicted of violation of a no contact order. The Court imposed the mandatory fees of the crime victims compensation assessment (CVCA) (\$500) and the filing fee (\$200).

IV. ARGUMENT

Appellant raises arguments that have already been rejected by the Court of Appeals. Several of these exact claims were recently rejected in

State v. Delgado, No. 49848-1-II, 2018 Wash. App. LEXIS 704 (Ct. App. Mar. 27, 2018)(Unpublished)¹.

A. Appellant lacks standing to raise the constitutional issue.

Mr. Vasquez presents an applied constitutional challenge to the victim assessment fee. He acknowledges the statute is rationally based and constitutional if someone has the ability to pay, but argues that it unconstitutional as applied to him because the court did not find he had the likely future ability to pay. While the court did find him statutorily indigent, and thus appointed a public defender, it did not undertake the more searching analysis required to find him constitutionally indigent. “*Bearden* essentially mandates that we examine the totality of the defendant's financial circumstances to determine whether he or she is constitutionally indigent in the face of a particular fine.” *State v. Johnson*, 179 Wn.2d 534, 553-554, 315 P.3d 1090 (2014) (citing *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)). It is up to the party seeking review of an issue to provide an adequate record

¹ Cited pursuant to GR 14.1 This decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. *Crosswhite v. Wash. Dep't of Social and Health Services*, 197 Wn. App. 539, 544, 389 P.3d. 731 (2017).

for review. *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004).

In *Johnson* the court examined a constitutional challenge to the driving while license suspended statute based on a claim of indigence. The State Supreme Court rejected the challenge because Johnson, while statutorily indigent, was not constitutionally indigent, and therefore not in the class protected by the due process clause. *Bearden* and *Johnson* require a more searching inquiry for constitutional indecency. *Johnson*, 179 Wn.2d at 554. Similarly here, the court determined Mr. Vasquez was statutorily indigent, but never inquired as to whether he could get a job, or was capable of working, or did a totality of circumstances analysis to determine if he was constitutionally indigent and would remain so. *See Bearden*, 41 U.S. at 663. There is simply an insufficient record to determine if Mr. Vasquez has standing to raise this issue. It is his burden to provide that record, thus this claim fails.

B. This is not a manifest or constitutional issue and should not be reviewed under RAP 2.5.

RAP 2.5 allows the appellate court to refuse to review any error raised for the first time on appeal. There was no objection to the CVCA fee in the trial court. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), is based on statutory, not constitutional concerns. Indeed the

Supreme Court noted in *Blazina* the Court of Appeals did not abuse its discretion by declining to review the issue under RAP 2.5. *Blazina* also implicated discretionary LFO's, not mandatory ones such as the DNA fee.

The State Supreme Court has already concluded there is no constitutional infirmity in not considering the defendant's ability to pay when imposing costs, as long as there is a requirement that the court determines there is an ability to pay before imposing punishment. *State v. Blank*, 131 Wn.2d 230, 239-42, 930 P.2d 1213 (1997). A court must consider a defendant's ability to pay before sanctions are imposed or enforced payment. *Id.* at 247. In addition once a defendant has paid his or her costs, the court may waive the interest if it is causing a significant hardship. RCW 10.82.090.

Blank, and the case it relies upon, *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), identify the rationale for imposing costs at sentencing, but allowing a claim of indigence at time of collection. At the time of sentencing the court's decision as to whether the defendant has the likely future ability to pay is, at best, an educated guess. It is perfectly rational to wait until the time of collection to make this determination, as better information will be available. There is simply no constitutional infirmity, and the court should decline to hear this issue.

In addition when the appellant fails to provide the facts necessary in the record to adjudicate the claim on the record, the error is not manifest within the meaning of RAP 2.5. *State v. Lazcano*, 188 Wn. App. 338, 355-56, 354 P.3d 233 (2015). As discussed above, there is no evidence in this record that Mr. Vasquez was constitutionally indigent, thus the alleged error is not manifest within the meaning of RAP 2.5. Courts have also given other definitions of the word manifest. An error is “manifest” where the “error is so obvious on the record that the error warrants appellate review.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). Expanding on this meaning, our State Supreme Court has looked to the legal dictionary definition of “manifest error”: ““an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence on the record.”” *Id.* at 100 n.1 (quoting BLACK’S LAW DICTIONARY 622 (9th ed. 2009)). Here there are multiple controlling decisions requiring the court to impose the CVCA. E.g. *State v. Lundy*, 176 Wn. App. 96, 308 P.3d 755 (2013), citing *State v. Kuster*, 175 Wn. App. 420, 306 P.3d 1022 (2013), and *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992). Mr. Vasquez asks the court to disregard several Court of Appeals and Supreme Court cases to reach the conclusion he advocates for. The alleged error here is not plain and undisputable, therefor the error is not manifest.

C. The imposition of the filing fee does not violate equal protection.

Mr. Vasquez argues that the imposition of the \$200 filing fee in his case violates equal protection because indigent civil litigants can have their costs and fees waived. This Court has previously addressed this identical argument and found that imposition of mandatory costs and fees does not violate equal protection. As such, Mr. Vasquez's claim should be denied.

The Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington State Constitution require that similarly situated persons are treated similarly under the law. *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978). All persons need not be treated identically, but any distinctions that are made must have some relevance to the purpose for which the classification was made. *In re Det. of Thorell*, 149 Wn.2d 724, 745, 72 P.3d 708 (2003) (quoting *Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966)). Here, in analyzing an equal protection claim, this Court should use the rational basis test, as no fundamental right is at issue and the challenged classification (between criminal defendants and civil litigants) is not a suspect classification. *State v. Mathers*, 193 Wn. App. 913, 925, 376 P.3d 1163 (2016) (citing *State v. Scherner*, 153 Wn. App. 621, 648, 225 P.3d

248 (2009)). Rational basis review looks to whether there is a legitimate governmental objective being served and whether the means of achieving it are rational. *In re Det. of Turay*, 139 Wn.2d 379, 410, 986 P.2d 790 (1999). There is a strong presumption of constitutionality, and here, as the party challenging the constitutionality of the mandatory criminal filing fee, Mr. Vasquez must show the classification is purely arbitrary. *In re Det. of Ross*, 114 Wn. App. 113, 118, 56 P.3d 602 (2002).

In *Mathers*, this court addressed a challenge nearly identical to Mr. Vasquez's current challenge. There, this Court found that GR 34, which allows some waiver of fees and costs for civil litigants, is akin to RCW 10.01.160, a statute which allows courts to recoup some of the costs associated with criminal prosecution. *Mathers*, 193 Wn. App. at 925-26. This Court found that GR 34 served a different purpose from fees imposed pursuant to RCW 10.01.160, like DNA fees and victim fees, because those fees are imposed only after a conviction, whereas the civil filing fee is required prior to a civil litigant being able to access the court. *Id.* at 926. The *Mathers* Court found the defendant did not establish that criminal defendants and civil litigants are similarly situated individuals receiving disparate treatment, and thus his equal protection claim failed. *Id.*

The same is true for Mr. Vasquez. Mr. Vasquez's claim involves GR 34 and civil litigants, and RCW 36.18.020(2)(h), the criminal filing

fee statute, as opposed to DNA and victim program fees; however, the reasoning in *Mathers, supra*, is equally applicable. The *Mathers* Court found that GR 34 serves a different purpose than RCW 10.01.160, the statute which may require a defendant to pay costs, mainly focusing its finding on the fact that the civil filing fee is a pre-requisite to obtaining access to court for civil litigants, whereas the criminal costs are imposed only post-conviction, after the criminal defendant has had full access to justice. The same is true for the criminal filing fee pursuant to RCW 36.18.020(2)(h) – it is assessed only after a defendant has been convicted of a crime. Its purpose is different than that of GR 34, and the defendant is not prevented from accessing justice due to its imposition after his case is finished in superior court.

There is a rational basis for treating civil litigants differently than indigent criminal defendants. The waiver of the mandatory civil filing fee is allowed to provide equal access to justice. *Jafar v. Webb*, 177 Wn.2d 520, 523, 303 P.2d 1042 (2013). Without this waiver, some civil litigants would not be able to access the courts. However, criminal defendants do not pay any fees prior to accessing the courts for trials, hearings or sentencing. Thus, there is a rational basis for treating civil litigants differently than criminal defendants and the mandatory criminal filing fee pursuant to RCW 36.18.020(2)(h) does not violate equal protection.

Mr. Vasquez cannot sustain his burden to show that he is similarly situated with civil litigants. Mr. Vasquez's claim that the trial court violated equal protection by imposing the \$200 filing fee is without merit.

D. The \$200 filing fee is mandatory.

Mr. Vasquez argues that the \$200 criminal filing fee is not mandatory and therefore the trial court erred in imposing the fee without first inquiring into Mr. Vasquez's ability to pay. Our courts have repeatedly found the \$200 criminal filing fee is not a discretionary fee and therefore the trial court must impose it pursuant to statute. The trial court did not err in imposing the \$200 filing fee in Mr. Vasquez's case.

The criminal filing fee provision is codified in RCW

36.18.020(2)(h). That statute states in part:

(2) Clerks of superior courts shall collect the following fees for their official services:

...

(h) Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

RCW 36.18.020(2)(h). Whether this statute creates a mandatory legal financial obligation is a question of statutory interpretation. *State v. Gonzales*, 198 Wn. App. 151, 153, 392 P.3d 1158 (2017). This Court reviews issues of statutory interpretation de novo. *State v. Armendariz*,

160 Wn.2d 106, 110, 156 P.3d 201 (2008). The first step in a statutory interpretation analysis is to look at the plain language of the statute. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). If the plain language of the statute is unambiguous, the court need not inquire further. *Armendariz*, 160 Wn.2d at 110.

Mr. Vasquez makes the identical argument that the defendant in *Gonzales, supra*, made to this Court. Mr. Vasquez, like Gonzales, argues that the use of the word “liable” is ambiguous because the term can mean a situation from which legal liability might arise. Br. of Appellant, pp. 10-21; *Gonzales*, 198 Wn. App. at 154-55. In *Gonzales*, this Court found that the use of the word “shall” immediately preceding the term “liable” clarifies that “there is not merely a risk of liability because “[t]he word ‘shall’ in a statute ... imposes a mandatory requirement unless a contrary legislative intent is apparent.”” *Id.* at 155 (quoting *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting *Erection Co. v. Dep’t of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993))). The Legislature has not made any contrary intent apparent, or has the Legislature taken action to change the treatment of criminal filing fees as mandatory obligations in the four years since the opinion in *State v. Lundy*, 176 Wn. App. 96, 308 P.3d 755 (2013); thus this Court presumes the Legislature approves of its interpretation of this statute. *See State v.*

Mathers, 193 Wn. App. 913, 918, 376 P.3d 1163 (2016), *rev. denied*, 186 Wn.2d 1015, 380 P.3d 482 (2016) (stating “[w]here the legislature has had time to correct a court’s interpretation of a statute and has not done so, we presume the legislature approves of our interpretation”).

This Court has heard and rejected the same argument Mr. Vasquez makes in this case. This Court should abide its prior holdings and reject Mr. Vasquez’s arguments. He has not made any showing of why the Court’s prior decisions are incorrect. Mr. Vasquez’s claim should be rejected.

Mr. Vasquez argues that the court should take judicial notice of the variance in treatment of the criminal filing fee amongst different counties in Washington. Appellate Courts may take judicial notice of facts that are capable of immediate and accurate demonstration from easily accessible sources of indisputable accuracy and verifiable certainty. *Fusato v. Wash. Interscholastic Activities Ass'n*, 93 Wn. App. 762, 772, 970 P.2d 774 (1999); ER 201. However, Mr. Vasquez does not identify or include such sources in the record and his reference to “any of the hundreds of judgments and sentences from criminal cases available in the Court of Appeals” does not meet this requirement. In addition even if the court were to look at the judgement and sentences and find some that do not include the criminal filing fee, there would be no indication of why the

trial courts disregarded the controlling precedent from the Court of Appeals declaring such a fee mandatory. *Gonzales*, 198 Wn. App. at 154-55. Nor does Mr. Vasquez explain what the court should do with such information.

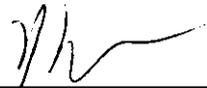
V. CONCLUSION

Mr. Vasquez raises issues that have been repeatedly rejected by the Appellate Courts. He has not been found to be constitutionally indigent and cannot be on this record. His statutory construction arguments have repeatedly been rejected. The trial court should be affirmed in all respects.

Dated this 27th day of April 2018.

Respectfully submitted:

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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

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Dated: April 27, 2018.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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