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NO. 36400-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

LARRY POWELL,
Appellant.

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

The Honorable Annette S. Plese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in denying Powell's Petition for Relief from Non-Restitution Legal Fee Obligations.
2. The \$3,938 Legal Fee Obligation should be stricken from Powell's judgment and sentence.
3. In the alternative, June 7, 2018 Amendment to RCW 10.73.160(4), which prohibits an offender from petitioning for relief until after release from total confinement, violates Powell's right to equal protection under the Fourteenth Amendment and Wash. Const. art. I, § 12.

B. ISSUES PRESENTED ON APPEAL

1. Did the trial court abuse its discretion in denying Powell's Petition for Relief from Non-Restitution Legal Fee Obligations when Powell qualified as indigent under GR 34 and he stated he had no income and no ability to pay and that the outstanding balance was creating a manifest hardship?
2. Should the \$3,938 Legal Fee Obligation be stricken from Powell's judgment and sentence when the legislature has made the proscription against these legal fee obligations remedial and the issue of whether Powell must pay the

previously imposed Legal Fee Obligations had not yet been finally determined?

3. Does the June 7, 2018 Amendment to RCW 10.73.160(4) which prohibits an offender from petitioning for relief until after release from total confinement violate Powell's right to equal protection under the Fourteenth Amendment and art. I, § 12 when it does not allow an offender serving a sentence of life without the possibility of parole to petition for remittance of fees but allows other offenders an opportunity to do so?

C. STATEMENT OF THE CASE

1. Procedural History

Larry Powell is indigent. CP 35. He was sentenced to life without the possibility of parole on August 22, 2011. CP 7-8. Powell brought a motion to waive or reduce the interest on his legal fee obligations including \$3,938 in non-restitution Legal Fee Obligations (LFOs) and interest. CP 22. The court waived future interest on Powell's LFOs but denied Powell's motion to remit the LFOs imposed as a cost on appeal, even though the trial court entered an order of indigency. CP 29, 35, 37-40. This timely appeal follows. CP 28.

2. Substantive Facts

Powell's sentence was affirmed on appeal and the Court ordered him to pay costs. CP 27; *State v. Powell*, 172 Wn. App. 455, 457, 290 P.3d 353 (2012), unpublished.¹ Powell made some payments toward his balance but as of June 20, 2018, his balance was \$3,338.18 in costs for his appeal, and \$633.49 in interest. CP 27. Powell petitioned the trial court for remittance of those fees on August 21, 2018. CP 22-24. Although Powell submitted a form titled Motion for Order Waiving or Reducing Interest on Legal Financial Obligations, it is clear from the information he provided and the Court's response that Powell intended to request relief from the underlying LFOs as well as interest. CP 22-24, 29.

As part of his motion to remit the LFOs, Powell submitted a financial declaration stating he had no income and no ability to pay. CP 23. Powell further stated that the interest was causing him "stress and mental anguish" because he had no ability to pay the debt currently or in the future. CP 24.

¹ Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. See GR 14.1.

The trial court denied Powell's motion stating that Powell "has all living expenses (such as food and housing) provided for by the State" and he has continued to make monthly payments despite stating he has no income. CP 38.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING POWELL'S PETITION FOR RELIEF FROM NON-RESTITUTION LFOs

The trial court abused its discretion in denying Powell's petition for relief from non-restitution LFOs.

This court reviews a trial court denial of a motion to remit LFOs for abuse of discretion. *State v. Sorrell*, 2 Wn. App. 2d 156, 181-82, 408 P.3d 1100 (2018). The trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices considering the facts and applicable legal standard. *Littlefield*, 133 Wn.2d at 46.

RCW 10.73.160(4) provides in relevant part:

A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time after release from total confinement petition the court that sentenced the defendant ... for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs...

RCW 10.73.160(4).

Powell is not in contumacious default. The only issue is the court's abuse of discretion determining that the LFOs do not constitute manifest hardship.

Manifest hardship is not defined in RCW 10.73.160 (4), but the Washington Supreme Court held the trial court should use GR 34 as a guide. *City of Richland v. Wakefield*, 186 Wn.2d 596, 606, 380 P.3d 459 (2016). Under GR 34, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Wakefield*, 186 Wn.2d at 607. "If someone meets the GR 34 standard for indigency, courts should seriously question that person's ability to pay financial obligations." *Sorrell*, 2 Wn. App. 2d at 181 (citing *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015); *Wakefield*, 186 Wn.2d at 607)). "Possessing some

ability to pay does not necessarily preclude payment from creating a 'manifest hardship.'" *Sorrell*, 2 Wn. App. 2d at 181 (citing *Wakefield*, 186 Wn.2d at 605-06)).

In *Sorrell*, the Court concluded that some minimal ability to pay does not mean that an offender is not suffering a manifest hardship from the LFO, because everyone can pay some amount- and if some amount was the barometer then "remission would never be available and RCW 10.01.160(4) would be rendered meaningless." *Sorrell*, 2 Wn. App. 2d at 183. *Sorrell* once made a payment of 2 cents.

Nevertheless, *nominal* payments create conditions under which the offender endlessly remains within the legal financial obligation system. The offender constantly suffers from the collateral consequences of the judgment, including frequent returns to court.

Sorrell, 2 Wn.App.2d at 183.

Most recently in *State v. Ramirez*, the state supreme court required sentencing courts to conduct an individualized inquiry by considering other important factors such as the defendant's debts, income, assets, financial resources, monthly living expenses, and employment history. *State v. Ramirez*, 191 Wn.2d 732, 742, 744, 426 P.3d 714 (2018). In *Ramirez*, the trial court failed to satisfy this

requirement when it directed its questions to the state about Ramirez's ability to work, and it failed to inquire about any other important factors. *Ramirez*, 191 Wn.2d at 736.

Here, in direct contradiction to the Supreme Court's guidelines, the trial court found Powell did not demonstrate a manifest hardship because he had some ability to pay. CP 38; *Sorrell*, 2 Wn. App. 2d at 183. Powell's payments do not demonstrate an ability to pay; they demonstrate he is not in contumacious default and was therefore entitled to bring a petition.

Further, Powell stated that he had no income, which qualifies him as indigent under GR 34. Therefore, the trial court should have "seriously questioned" Powell's ability to pay and considered Powell's situation to create a manifest hardship, rather than erroneously believing that the ability to make nominal payments precluded such a finding. *Sorrell*, 2 Wn. App. 2d at 183. Similar to *Ramirez*, the trial court here only focused on that fact that Powell made nominal payments, to the exclusion of other important considerations. Under *Ramirez* and *Sorrell*, the trial court did not make an adequate individualized inquiry. *Ramirez*, 191 Wn.2d at 736; CP 37-38.

Given the facts presented to the trial court and the legal standards outlined in GR 34, RCW 10.73.160(4), *Wakefield, Sorrell*, and *Ramirez*, denying Powell's petition for remittance was error because the trial court failed to make a proper individualized inquiry into Powell's ability to pay, and failed to understand that Powell's indigency and circumstances of incarceration for life created a manifest hardship for purposes of remitting LFOs.

2. THE \$3,938 LFO SHOULD BE STRICKEN FROM POWELL'S JUDGMENT AND SENTENCE

In *Ramirez*, the Court held that sentencing courts are now categorically prohibited from imposing any discretionary costs on indigent defendants. *Ramirez*, 191 Wn.2d at 739. The Court further held that House Bill 1783 applied prospectively to Ramirez because Ramirez's case was on direct appeal and was not yet final when House Bill 1783 was enacted. *Ramirez*, 191 Wn.2d at 747, 750; accord *State v. Catling*, 193 Wn.2d 252, 258, 438 P.3d 1174 (2019).

Here, the issue of whether Powell must pay the previously imposed LFOs is currently on direct appeal. When the trial court denied Powell's petition for remittance it affirmed the LFOs previously imposed. Because Powell's case is now on direct appeal

of the LFO issue, House Bill 1783 applies to categorically prohibit the LFOs imposed. *Ramirez*, 191 Wn.2d at 750. Therefore, the appropriate remedy is to reverse the trial court's denial of Powell's petition for remittance and remand for the trial court to amend the judgment and sentence to strike the improperly affirmed LFOs. *Ramirez*, 191 Wn.2d at 750; *Catling*, 193 Wn.2d at 258.

3. IN THE ALTERNATIVE, THE JUNE 7, 2018 AMENDMENT TO RCW 10.73.160(4) VIOLATES POWELL'S RIGHT TO EQUAL PROTECTION BECAUSE IT CREATES A DISPARATE APPROACH TOWARD INMATES SERVING LIFE WITHOUT THE POSSIBILITY OF PAROLE

This Court should review the trial court's denial of Powell's petition to remit fees because the trial court reached a decision on the merits. CP 37-38. However, if this Court finds Powell had no standing to bring a motion for remittance of his LFOs under the current version of RCW 10.73.160(4) then this Court should find the June 7, 2018 amendment to RCW 10.73.160(4) violates Powell's right to equal protection because the amendment creates a disparate approach toward inmates serving life without the possibility of parole.

Both the United States and Washington Constitution guarantee equal protection under the law. U.S. Const. Amend. XIV;

art. I, § 12; *State v. Smith*, 117 Wn.2d 263, 281, 814 P.2d 652 (1991). Equal protection requires “that persons similarly situated with respect to the legitimate purpose of the laws receive like treatment.” U.S. Const. Amend. XIV; art. I, § 12; *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). A law violates equal protection if it creates an arbitrary classification. *Washington Pub. Employees Ass’n v. State*, 127 Wn. App. 254, 263, 110 P.3d 1154 (2005).

If the challenged statute does not affect a suspect class this Court applies the rational basis test. *State v. Schaaf*, 109 Wn.2d 1, 21, 743 P.2d 240 (1987). Inmates are not a suspect class. *Matter of Troupe*, 4 Wn. App. 2d 715, 733, 423 P.3d 878 (2018) (citing *King Cty Dep’t of Adult & Juvenile Det. v. Parmelee*, 162 Wn. App. 337, 359, 254 P.3d 927 (2011)).

To survive an equal protection challenge under rational basis review “the challenged law must serve a legitimate state objective, the law must not be wholly irrelevant for achieving that objective, and the means must be rationally related to the objective.” *State v. Berrier*, 110 Wn. App. 639, 649, 41 P.3d 1198 (2002).

A court-ordered LFO is an obligation imposed by the superior

court, usually at the time of sentencing, which can include victim restitution, crime victims' compensation fees, court costs, court appointed attorney fees and costs, fines, payment to a county or interlocal drug fund, or any other LFO assessed as a result of the felony conviction. *Anderson v. State, Dep't of Corr.*, 159 Wn.2d 849, 852, 154 P.3d 220 (2007) (citing RCW 72.11.010(1); RCW 9.94A.760).

An inmate serving a sentence of life without the possibility of parole is not exempt from paying LFOs. *Anderson*, 159 Wn.2d at 852, 864. To the contrary, the Department of Corrections (DOC) may make deductions from inmate accounts to pay LFOs. *Anderson*, 159 Wn.2d at 864. These deductions are not limited to work related income but may include gratuities or other sources such as an inmate's family. *Anderson*, 159 Wn.2d at 851-52.

Previously, a defendant who was ordered to pay LFOs could bring a petition for remission of costs at any time. RCW 10.73.160(4) (2015) (West). However, in 2018, the Legislature enacted House Bill 1783, which amended former RCW 10.73.160(4) to prohibit an offender from petitioning for remission until after their release from total confinement. HB 1783, 2018 c 269 § 12.

RCW 10.73.160 (4) now provides in relevant part:

A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment **may at any time after release from total confinement** petition the court that sentenced the defendant ...

RCW 10.73.160(4) (emphasis added).

Thus, an inmate sentenced to life without the possibility of parole is now precluded from petitioning for remission even though they may suffer a manifest hardship through account garnishments. The 2018 statutory amendment serves no legitimate state objective. A person who is released from total confinement is given the opportunity to demonstrate a manifest hardship and to petition for remittance of discretionary LFOs while a person serving life without the possibility of parole is not given that same opportunity. RCW 10.73.160(4).

This violates equal protection because it creates an arbitrary distinction between an offender who faces the possibility of being released and one who does not. *Pub. Employees Ass'n*, 127 Wn. App. at 263. Therefore, Powell was entitled to bring this petition for remittance and this Court should review it on the merits.

E. CONCLUSION

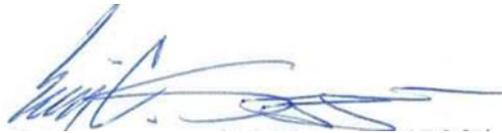
Larry Powell respectfully requests that this Court reverse the trial court's order denying remittance of his non-restitution LFOs and remand to remit them.

DATED this 11th day of July 2019.

Respectfully submitted,

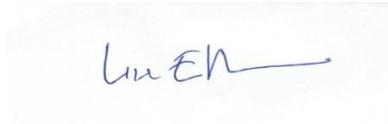


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I, Lise Ellner, a person over the age of 18 years of age, served the Spokane County Prosecutor's Office SCPAappeals@spokanecounty.org and Larry Powell/DOC#245691, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001 a true copy of the document to which this certificate is affixed on July 11, 2019. Service was made by electronically to the prosecutor and Larry Powell by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

Signature

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