SUPREME COURT NO. 94371-1

NO. 48437-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MANUEL GONZALES,

Petitioner.

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

The Honorable Elizabeth Martin, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Manuel Antonio Gonzales, the appellant below, seeks review of the Court of Appeals decision in State v. Gonzales, ___ Wn. App. ___, ___ P.3d ___, 2017 WL 986208 (March 14, 2017).

B. ISSUE PRESENTED FOR REVIEW

Is the $200 criminal filing fee provided in RCW 36.18.020(2)(h) a discretionary legal financial obligation that can be appropriately waived in cases involving indigent defendants?

C. STATEMENT OF THE CASE

The State charged Gonzales with two counts of third degree assault and with obstructing a law enforcement officer, resisting arrest, and bail jumping. CP 5-7. A jury acquitted him of both assaults and convicted him of the remaining charges. CP 34-38.

At sentencing, the State asked the court to impose a $500 victim penalty assessment (VPA), a $100 DNA database fee, a $200 filing fee, and $1,500 for court-appointed counsel. RP[1] 3. Defense counsel stated that, as a result of the charges, Gonzales had lost his job, had no income, and no means to pay for appointed counsel. RP 5, 7.

[1] Gonzales uses "RP" to refer to the verbatim report of proceedings of the November 12, 2015 sentencing hearing.

The trial court, relying on State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), determined Gonzales's indigency warranted waiving the costs of appointed counsel. RP 7. The court stated it would impose only the LFOs required by statute; with respect to the $200 filing fee, the court stated, "This Court has taken the position that $200 is statutorily required. I'm willing to listen to argument to the contrary. I think it's debatable." RP 8. Defense counsel objected to the fee. RP 8. The prosecution asserted the fee was mandatory and the trial court stated, "as I say, we have—it's debatable, but I will impose it." RP 9.

Gonzales appealed. CP 60. He asserted that the $200 filing fee listed in RCW 36.18.020(2)(h) was discretionary, not mandatory. Br. of Appellant at 3-7. He based these assertions in part on the difference between the language of RCW 36.18.020(2)(h) and the language of the truly mandatory LFOs, the VPA (RCW 7.68.035) and the DNA fee (RCW 43.43.7541). Br. of Appellant at 4-5. He also pointed out that the Washington Supreme Court had recently observed that the criminal filing fee had merely "been treated as mandatory by the Court of Appeals," suggesting that this was an open question. Br. of Appellant at 5-6 (quoting and discussing State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016)).

Without much analysis, the Court of Appeals disagreed with Gonzales. Appendix at 3-4. It acknowledged Gonzales's argument that "the

term "liable" ""can mean a situation from which a legal liability *might* arise."" Appendix at 4 (quoting Br. of Appellant at 6). But it concluded that because RCW 36.18.020(2)(h) says "shall be" before the term liable, that the legislature was imposing a mandatory obligation. Appendix at 4-5. The Court of Appeals, thus, avoided the meaning of the word "liable" altogether.

D. ARGUMENT IN SUPPORT OF REVIEW

THIS COURT SHOULD GRANT REVIEW TO DETERMINE, ONCE AND FOR ALL, WHETHER THE $200 CRIMINAL FILING FEE IS DISCRETIONARY OR MANDATORY

Division Two's decision that the filing fee listed in RCW 36.18.020(2)(h) is mandatory in State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), was not based on reasoned statutory analysis. Neither is the decision under review. The Court of Appeals reached its decision solely because RCW 36.18.020(2)(h) contains the word "shall." Appendix at 4-5. The Court of Appeals misapprehended the meaning of the word "liable" and overlooked the differences in text between RCW 36.18.020(2)(h) and the statutes providing truly mandatory LFOs, the differences in text between RCW 36.18.020(2)(h) and the other provisions of RCW 36.18.020(2), and at least one other criminal statute that provides a convicted defendant "shall be liable" for all costs of the proceedings against him or her. Gonzales asks that this court grant review pursuant to RAP 13.4(b)(4) to make an authoritative

determination that the criminal filing fee provided in RCW 36.18.020(2)(h) is not a mandatory LFO.

1. The word "liable" does not denote a mandatory obligation

By directing that a defendant be "liable" for the criminal filing fee, the legislature did not create a mandatory fee. The term "liable" signifies a situation in which legal liability might or might not arise. Black's Law Dictionary confirms that "liable" might make a person obligated in law for something but also defines liability as a "future possible or probable happening that may not occur." BLACK'S LAW DICTIONARY 915 (6th ed. 1990). Based on the meaning of the word liable—giving rise to a contingent, possible future liability—the legislature did not intend to create a mandatory obligation.

The Court of Appeals reasoned that because the statute states "shall be liable," it "clarifies that there is not merely a risk of liability" given that the word "shall" is mandatory. Appendix at 5. This clarifies nothing, however, because it ignores the meaning of the word "liable." There is no difference in meaning between "shall be liable" and "may be liable." From mandatory liability a mandatory obligation does not follow; rather, a contingent obligation does. Even if a person must be liable for some monetary amount, it does not mean that they must actually pay the monetary amount or that the liability cannot be waived or otherwise resolved. Again, liability is, by

definition, something that might or might not impose a concrete obligation. The legislature's use of the word "liable" in RCW 36.18.020(2)(h) shows it intended the criminal filing fee to be discretionary. Only by avoiding the meaning of the word "liable" could the Court of Appeals reach its contrary result.[2]

In any event, given the contingent meaning of the word "liable," the meaning of the phrase "shall be liable" is, at best, ambiguous. Under the rule of lenity, RCW 36.18.020(2)(h) must be interpreted in Gonzales's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2015). To the extent that the Court of Appeals decision conflicts with the rule-of-lenity precedent of this court, review is warranted under RAP 13.4(b)(1).

2. The linguistic differences in the other provisions of RCW 36.18.020(2) supports Gonzales's interpretation that "shall be liable" does not impose a mandatory obligation

Gonzales's interpretation is supported by the language of other provisions of RCW 36.18.020(2).

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[2] The Court of Appeals also invoked the doctrine of legislative acquiescence, reasoning that because the legislature has not amended RCW 36.18.020, it must agree with Lundy. Appendix at 5 n.4. This is not so. "[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions . . . . We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation." Jones v. Liberty Glass Co., 332 U.S. 524, 533-34, 68 S. Ct. 229, 92 L. Ed. 142 (1947); see also Helvering v. Reynolds, 313 U.S. 428, 432, 61 S. Ct. 971, 85 L. Ed. 1438 (1941) ("While [legislative acquiescence] is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change.").

The beginning of the statutory subsection reads, "Clerks of superior courts shall collect the following fees for their official services," and then lists various fees in subsections (a) through (i). With the exception of RCW 36.18.020(2)(h), the fees are listed directly without reference to the word "liable" or "liability." E.g., RCW 36.18.020(2)(a) ("In addition to any other fee required by law, the party filing the first or initial document in any civil action . . . shall pay, at the time the document is filed, a fee of two hundred dollars . . . ." (emphasis added)); RCW 36.18.020(2)(b) ("Any party, except a defendant in a criminal case, filing the first or initial document on appeal from a court of limited jurisdiction or any party on any civil appeal, shall pay, when the document is filed, a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(c) ("For filing of a petition for judicial review as required under RCW 34.05.514 a filing fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(d) ("For filing of a petition for unlawful harassment under RCW 10.14.040 a filing fee of fifty-three dollars." (emphasis added)); RCW 36.18.020(2)(e) ("For filing the notice of debt due for the compensation of a crime victim under RCW 7.68.120(2)(a) a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(f) ("In probate proceedings, the party instituting such proceedings, shall pay at the time of filing the first document therein, a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(g) ("For filing any petition to contest a will admitted to probate

or a petition to admit a will which has been rejected, or a petition objecting to a written agreement or memorandum as provided in RCW 11.96A.220, there shall be paid a fee of two hundred dollars." (emphasis added)).

These other provisions of RCW 36.118.020(2), unlike RCW 36.18.020(2)(h), state a flat fee for filing certain documents or specify that a certain fee shall be paid. RCW 36.18.020(2)(h) is unique in providing only liability for a fee. "Just as it is true that the same words used in the same statute should be interpreted alike, it is also well established that when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word." Simpson Inv. Co. v. Dep't of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000); see also In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 821, 177 P.3d 675 (2008) ("When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings."). The Court of Appeals decision conflicts with these cases and this canon of statutory interpretation, warranting review under RAP 13.4(b)(1).

Because RCW 36.18.020(2)(h) contains the only provision in the statute where "liable" appears (in contrast to the other provisions that are clearly intended as mandatory), it should be interpreted as giving rise to only potential liability to pay the fee rather than imposing a mandatory obligation.

3. RCW 10.46.190 provides that every person convicted of a crime "shall be liable to all the costs of the proceedings against him or her," yet all the costs of proceedings are obviously not mandatorily imposed in every criminal case

RCW 10.46.190 provides,

> Every person convicted of a crime or held to bail to keep the peace shall be liable to all the costs of the proceedings against him or her, including, when tried by a jury in the superior court or before a committing magistrate, a jury fee as provided for in civil actions for which judgment shall be rendered and collected. The jury fee, when collected for a case tried by the superior court, shall be paid to the clerk and applied as the jury fee in civil cases is applied.

(Emphasis added.) This statute plainly requires that any person convicted of a crime "shall be liable" for all the costs of the proceedings.

But, even though RCW 10.46.190 employs the same "shall be liable" language as RCW 36.18.020(2)(h), the legislature and this court have indicated that all costs of criminal proceedings are not mandatory obligations. Indeed, RCW 10.01.160(3) does not permit a court to order a defendant to pay costs "unless the defendant is or will be able to pay them." This court confirmed this in Blazina. 182 Wn.2d at 838-39 (holding that RCW 10.01.160(3) requires the trial court to make an individualized ability-to-pay inquiry before imposing discretionary LFOs). Even though a defendant "shall be liable" for such costs, the legislature nonetheless forbids the imposition of such costs unless the defendant can pay. This signifies that the legislature's use of the phrase "shall be liable" does not impose a mandatory obligation but

a contingent one. RCW 36.18.020(2)(h)'s criminal filing fee should likewise be interpreted as discretionary.

4. The legislature knows how to make LFOs mandatory and chose not to do so with respect to the criminal filing fee

The language of RCW 36.18.020(2)(h) differs markedly from statutes imposing mandatory LFOs. The VPA statute is recognized as imposing a mandatory fee given that it states, "When a person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035 (emphasis added). This statute is unambiguous in its command that the VPA shall be imposed.

The DNA collection fee statute is likewise unambiguous. It states, "Every sentence imposed for a crime specific in RCW 43.43.754[3] must include a fee of one hundred dollars." RCW 43.43.7541 (emphasis added). Like the VPA, there can be no question that the legislature mandated a $100 DNA fee to be imposed in every felony sentence.

RCW 36.18.020(2)(h) is different. As discussed, it does not state that a criminal sentence "must include" the fee or that the fee "shall be imposed," but that the defendant is merely liable for the fee. Despite the fact that the legislature knows how to create an unambiguous mandatory fee, which must

[3] RCW 43.43.754(1)(a) requires the collection of a biological sample from "[e]very adult or juvenile individual convicted of a felony . . . ."

be imposed in every judgment and sentence, the legislature did not do so in this statute.

This court recently acknowledged as much in Duncan. This court observed that RCW 36.18.020(2)(h)'s criminal filing fee had merely "been treated as mandatory by the Court of Appeals." Duncan, 185 Wn.2d at 436 n.3 (citing Lundy, 176 Wn. App. at 102). That the Duncan court would identify those LFOs designated as mandatory by the legislature on one hand and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory on the other hand strongly indicates there is a distinction. The Court of Appeals decision does not address this point, placing it in conflict with Duncan. RAP 13.4(b)(1).

5. Judicial notice is appropriate that not all superior courts agree the criminal filing fee is mandatory

Finally, as the trial judge in this case noted it was "debatable" whether RCW 36.18.020(2)(h) creates a mandatory LFO. RP 8-9. Indeed, in several counties, including Washington's most populous, King, the $200 filing fee is always waived.

Gonzales asks this court to take judicial notice of the variance in treatment of the criminal filing fee when determining whether to take review. "Judicial notice, of which courts may take cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible

sources of indisputable accuracy and verifiable certainty." State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 779, 380 P.2d 735 (1963). This court should consult any of the hundreds of judgments and sentences from criminal cases available in pending cases to establish that not all courts, counties, and judges agree that the $200 criminal filing fee is mandatory. Given the disparity, the mandatory or discretionary nature of the criminal filing fee presents an issue of substantial public interest that should be authoritatively determined by this court, once and for all. RAP 13.4(b)(4).

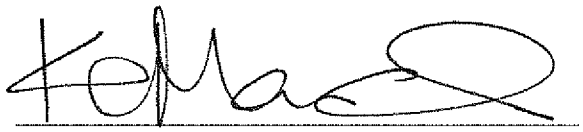
E. CONCLUSION

Because he meets the review criteria in RAP 13.4(b)(1) and (4), Gonzales asks that this petition be granted.

DATED this 12th day of April, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

March 14, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MANUEL ANTONIO GONZALES, Appellant.	No. 48437-4-II PUBLISHED OPINION

SUTTON, J. — Manuel Antonio Gonzales appeals the imposition of a $200 criminal filing fee following his jury trial convictions for bail jumping, obstructing a law enforcement officer, and resisting arrest. We hold that the trial court did not err in imposing the $200 criminal filing fee because RCW 36.18.020(2)(h)[1] creates a mandatory legal financial obligation (LFO). We affirm. Gonzales also asks that we waive appellate costs. A commissioner will consider appellate costs in due course. *See* RAP 14.2.

FACTS

After a jury found Gonzales guilty of bail jumping, obstructing a law enforcement officer, and resisting arrest, the State requested that the trial court impose various mandatory and discretionary LFOs. These LFOs included: (1) a $500 crime victim penalty, (2) a $200 criminal

[1] The legislature amended RCW 36.18.020 in 2015. LAWS OF 2015, ch. 265, § 28. Because this amendment is not relevant to the issues in this case, we cite to the current version of the statute.

filing fee, (3) a $100 deoxyribonucleic acid (DNA) testing fee, and (4) $1,500 in attorney fees and costs.

Defense counsel informed the trial court that Gonzales was born in Nicaragua, that he was orphaned at a young age and came to the United States with his aunt in the mid-1980s, and that he is now a United States citizen. Although Gonzales had worked as a janitor, he lost his job because of the criminal charges. Counsel also informed the trial court that Gonzales had "some form of a vocational certificate from Bates College" and was taking courses to improve his English. Report of Proceedings (Nov. 12, 2015) (RP) at 5. Defense counsel asked the trial court to waive the attorney fees and costs.

After verifying that Gonzales was currently unemployed and that he had no other means of paying for counsel, the trial court found that Gonzales did not have the ability to pay and waived the discretionary attorney fees and costs. The trial court then commented that it was imposing only those LFOs that were "statutor[ily] required." RP at 8. But the trial court also stated that whether the $200 filing fee was required was "debatable" and told counsel that it would listen to argument on this issue. RP at 8. Defense counsel objected "for the record." RP at 8. The State argued that the filing fee was mandatory.

The trial court imposed the $200 criminal filing fee. The trial court also imposed a $500 crime victim assessment and a $100 DNA database fee, for a total of $800 in LFOs. The trial court also entered an order of indigency allowing Gonzales to seek review at public expense.

Gonzales appeals the $200 criminal filing fee.

ANALYSIS

I. MANDATORY FILING FEE

Gonzales argues that the trial court erred in concluding that the filing fee was mandatory. Acknowledging that in *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), we previously considered the filing fee to be mandatory, Gonzales argues that this conclusion was not based on any reasoned analysis. He contends that the filing fee is not mandatory because the language in RCW 36.18.020(2)(h) is ambiguous and differs from that of other mandatory LFO statutes. We disagree.

Whether RCW 36.18.020(2)(h) creates a mandatory or discretionary LFO is an issue of statutory interpretation. We review issues of statutory interpretation de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "'Our purpose in interpreting the statute is to determine and enforce the intent of the legislature.'" *In re Det. of Coppin*, 157 Wn. App. 537, 551, 238 P.3d 1192 (2010) (quoting *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009)).

When interpreting a statute, we look first to the statute's plain language. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). To ascertain the plain meaning, we examine the statute's language, other provisions of the same act, and related statutes. *Coppin*, 157 Wn. App. at 552. If the statute's plain language is unambiguous, our inquiry is at an end. *Armendariz*, 160 Wn.2d at 110.

> RCW 36.18.020 provides 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.

(Emphasis added.)

Gonzales argues that the use of the word "liable" is ambiguous because, unlike the phrases used in other mandatory LFO statutes, such as "there shall be imposed by the court upon such convicted person a [victim] penalty assessment"[2] and "[e]very sentence . . . must include a [DNA testing] fee,"[3] the term "'liable' can mean a situation from which a legal liability *might* arise." Br. of Appellant at 6. But this argument requires us to ignore the language immediately preceding the term "liable."

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[2] The victim penalty assessment statute, RCW 7.68.035(1)(a), provides in part:

> When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, *there shall be imposed by the court upon such convicted person a penalty assessment.*

(Emphasis added.) The legislature amended RCW 7.68.035 in 2015. LAWS OF 2015, ch. 265, § 8. Because this amendment is not relevant to the issues in this case, we cite to the current version of the statute.

[3] The DNA collection statute, RCW 43.43.7541, provides in part:

> Every sentence imposed for a crime specified in RCW 43.43.754 *must include a fee* of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law.

(Emphasis added.) The legislature amended RCW 43.43.7541 in 2015. LAWS OF 2015, ch. 265, § 31. Because this amendment is not relevant to the issues in this case, we cite to the current version of the statute.

RCW 36.18.020(2)(h) requires that the defendant "*shall* be liable," which 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.'" *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)). There is no such contrary intent apparent in the statute.[4] Accordingly, Gonzales fails to demonstrate why we should decline to follow *Lundy*. We therefore hold that the trial court did not err in imposing this mandatory LFO.[5]

II. APPELLATE COSTS

Gonzales requests that we exercise our discretion under RCW 10.73.160(1) and decline to impose appellate costs based on his continued indigency. Under RAP 14.2, a commissioner or clerk of this court has the ability to determine whether appellate costs should be imposed based on the appellant's ability to pay and prior determinations regarding indigency. Accordingly, a commissioner of this court, in due course, will consider whether to award appellate costs under the newly revised provisions of RAP 14.2 if the State decides to file a cost bill and if Gonzales objects to that cost bill.

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[4] Furthermore, we have treated the filing fee as a mandatory fee since we filed *Lundy* in 2013, and the legislature has not taken any action to correct this approach. "Where 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." *State v. Mathers*, 193 Wn. App. 913, 918, 376 P.3d 1163, *review denied*, 186 Wn.2d 1015 (2016).

[5] We note, as we did in *Mathers*, that the imposition of LFOs on indigent defendants creates a substantial burden on those defendants, regardless of whether the LFOs are mandatory or discretionary, but "we must recognize th[is] distinction[] and adhere to the principles of *stare decisis*," until there are changes in the law or Supreme Court precedent. *Mathers*, 193 Wn. App. at 916.

Accordingly, we affirm the imposition of the $200 criminal filing fee.

SUTTON, J.

We concur:

WORSWICK, P.J.

JOHANSON, J.

NIELSEN, BROMAN & KOCH, PLLC
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