SUPREME COURT NO. 99428-5
COA NO. 53428-2-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESSE JOHNS,

Petitioner.

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

The Honorable Brian Coughenhour, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Jesse Johns asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Johns requests review of the published decision in State v. Jesse James Johns, Court of Appeals No. 53428-2-II (slip op. filed Dec. 15, 2020), attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

Whether the crime lab fee is mandatory, such that it must be imposed even where the sentencing court finds the defendant indigent, or whether the fee is discretionary, such that indigency requires that it must be suspended?

D. STATEMENT OF THE CASE

Jesse Johns pleaded guilty to two counts of possession of a controlled substance. CP 11, 24-34. The court imposed 6+ months in confinement. CP 14. At sentencing, the State identified a $100 crime lab fee as a legal financial obligation and requested the court inquire into Johns's ability to pay. RP 106-07. The State pointed out Johns already had over $10,000 in LFO debt. RP 107. Defense counsel told the court that if Johns was employable, it would be a minimum wage job at best. RP 107. Counsel asked the court to only impose mandatory costs. RP 107.

The court inquired when Johns was last employed. RP 108. Johns answered that he was last employed in 2015 and had worked under the table since, though he did not "really consider that a job." RP 108. He was now on food stamps. RP 108. The trial court determined Johns was "legally defined as indigent." RP 108. The court nonetheless imposed a $100 crime lab fee as part of the sentence. CP 17; RP 108.

On appeal, Johns argued the crime lab fee should be stricken because the fee is discretionary for indigent defendants, the sentencing court found Johns to be indigent, and discretionary legal financial obligations cannot be imposed on indigent defendants. The Court of Appeals held the crime lab fee is mandatory and refused to remand for entry of an order striking the fee. Slip op. at 3.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER THE CRIME LAB FEE CAN BE IMPOSED ON AN INDIGENT DEFENDANT IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST WARRANTING REVIEW.

Discretionary legal financial obligations (LFOs) cannot be imposed on indigent defendants as a matter of law. The crime lab fee is a discretionary obligation because Johns is indigent, so the fee cannot be imposed. The Court of Appeals contrary conclusion exalts form over

substance and leads to an absurd result under the lab fee statute and the LFO statutory scheme as a whole.

a. In considering the purpose of the lab fee statute and the statutory scheme governing legal financial obligations as a whole, it is obvious the legislature did not intend to treat the fee as mandatory and did not intend to impose it on indigent defendants.

RCW 43.43.690(1) provides:

> When an adult offender has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was performed by a state crime laboratory, in addition to any other disposition, penalty, or fine imposed, the court *shall levy* a crime laboratory analysis fee of one hundred dollars for each offense for which the person was convicted. *Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee.* (emphasis added).

According to the Court of Appeals: "The legislature's use of the word 'shall' in the statute and the fact the legislature provided that a defendant who has been assessed the fee may challenge the fee only after it has been assessed, demonstrate that the crime laboratory analysis fee is a mandatory fee." Slip op. at 3.

This is a persnickety interpretation that does violence to the intent of the lab fee statute specifically and the LFO statutory scheme in general. The fee is "mandatory" when the defendant is not indigent but is discretionary when the defendant is indigent. In the latter circumstance,

the trial court is not commanded by statute to impose it. RCW 43.43.690(1). The only purpose of the verified petition is to confirm that the person does not have the ability to pay the fee. The verified petition of indigency serves no purpose where, as here, the court finds the defendant meets the legal definition of indigency at sentencing. RP 108.

It is established that "statutes should be construed to effect their purpose, and unlikely, absurd, or strained consequences should be avoided." State v. Smith, 189 Wn.2d 655, 662, 405 P.3d 997 (2017). Interpretations that defeat the statute's purpose cannot be sustained. State v. Peeler, 183 Wn.2d 169, 181, 349 P.3d 842 (2015). The legislature intended for the lab fee to be suspended for indigent defendants who do not have the ability to pay. That is obvious because the ultimate disposition of the fee is conditioned on confirming indigency and the corollary inability to pay. The Court of Appeals' interpretation of the statute countenances the imposition of this fee on indisputably indigent defendants because a useless, redundant procedure to verify indigency has not been followed. That is an absurd, unlikely, or strained result that should be avoided.

Johns meets the statutory indigency standard. He is on food stamps and the court found he meets the standard. RP 108. While Johns did not present a "verified petition" of indigency, there was no need to do

so in light of the undisputed facts and the trial court's finding of indigency. In that circumstance, a verified petition serves no purpose and amounts to pointless hoop jumping. Resolution of this case should be guided by the principle that courts do not exalt form over substance. Sloans v. Berry, 189 Wn. App. 368, 378, 358 P.3d 426 (2015); Rollins v. Bombardier Recreational Products, Inc., 191 Wn. App. 876, 891, 366 P.3d 33 (2015), review denied, 185 Wn.2d 1030, 377 P.3d 714 (2016); State v. Munoz-Rivera, 190 Wn. App. 870, 883, 361 P.3d 182 (2015).

Moreover, RCW 43.43.690(1) cannot be read in isolation. Whenever possible, statutes are to be read together to achieve a "harmonious total statutory scheme." State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp., 142 Wn.2d 328, 342, 12 P.3d 134 (2000) (quoting Employco Pers. Servs., Inc. v. City of Seattle, 117 Wn.2d 606, 614, 817 P.2d 1373 (1991)). In 2018, the legislature reformed the LFO statutory scheme. House Bill 1783 amended the discretionary LFO statute, RCW 10.01.160(3), "to prohibit trial courts from imposing discretionary LFOs on defendants who are indigent at the time of sentencing." State v. Ramirez, 191 Wn.2d 732, 738, 426 P.3d 714 (2018). "House Bill 1783's amendments modify Washington's system of LFOs, addressing some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction." Id. at 747.

Interpretation of the lab fee statute should therefore be guided by the legislative effort to systematically reform a broken LFO system that the 2018 amendments were intended to accomplish. Under RCW 10.01.160(3), as amended in 2018, "[t]he court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." RCW 10.01.160(3). RCW 10.101.010 defines "indigent" as a person (a) who receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines. RCW 10.101.010(3).

RCW 10.01.160(3) flatly prohibits imposition of discretionary costs on those who meet the statutory definition of indigency under RCW 10.101.010(3). Ramirez, 191 Wn.2d at 749. "The purpose of reading statutory provisions in pari materia with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provisions 'as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.'" In re Estate of Kerr, 134 Wn.2d 328, 336, 949 P.2d 810, 814 (1998) (quoting State v. Williams, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980)). The lab fee statute, RCW 43.43.690(1), must therefore be read together with RCW 10.01.160(3) as a unified whole, representing the

legislature's overarching intent in dealing with LFOs and indigency. That overarching intent is to prevent imposition of discretionary LFOs on indigent defendants.

In other cases, Division Two of the Court of Appeals held the crime lab fee is discretionary and cannot be imposed on indigent defendants, without requiring a verified petition of indigency. State v. Stoken, 13 Wn. App. 2d 1073, 2020 WL 2850976, at *3, 6, review denied, 196 Wn.2d 1016, 473 P.3d 251 (2020) (unpublished)[1]; State v. Bowman, 11 Wn. App.2d 1066, 2020 WL 71299, at *2 (2020) (unpublished); State v. Ingalsbe, 11 Wn. App. 2d 1065, 2020 WL 70810, at *2 (2020) (unpublished); State v. Martinez-Ledesma, 9 Wn. App. 2d 1071, 2019 WL 3307534, at *5, review denied, 194 Wn.2d 1012, 452 P.3d 1232 (2019) (unpublished); State v. Smith, 5 Wn. App. 2d 1048, 2018 WL 5278258, at *2, 4 (2018) (unpublished). Division One and Division Three have held the same. State v. Chase, 14 Wn. App. 2d 1041, 2020 WL 5757666, at *3-4 (2020) (Division One) (unpublished); State v. Nunez Nunez, 2 Wn. App. 2d 1057, 2018 WL 1256608, at *1 (2018) (Division Two) (unpublished); State v. Mata, 1 Wn. App. 2d 1063, 2018 WL 287310, at *9 (2018)

[1] GR 14.1(a) permits citation to unpublished decisions as non-binding, persuasive authority.

(Division Three) (unpublished), review denied, 190 Wn.2d 1016, 415 P.3d 1198 (2018).

The Court of Appeals in Johns's case took it upon itself to buck this tide, in a published decision no less. Its decision conflicts with other Court of Appeals decisions, demonstrating appellate confusion on the matter. This is a common issue. A decision that potentially affects numerous proceedings in the lower courts warrants review as an issue of substantial public interest where review will avoid unnecessary litigation and confusion on a common issue. State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Johns therefore seeks review under RAP 13.4(b)(4).

b. Even if the issue becomes moot, it should still be reviewed as an issue of substantial and continuing public importance.

The Court of Appeals remanded for the trial court to amend the interest provision to exclude any nonrestitution LFOs, noting Johns could present a verified petition of indigency to suspend the lab fee at that time. Slip op. at 1. Again, that is pointless paperwork. Limited judicial resources should not need to be expended on empty formality. Following the Court of Appeals decision, Johns, through appointed counsel, filed a motion seeking to remove the lab fee in the superior court. That motion has not been decided as of the filing of this petition. Johns anticipates the

motion may be granted by the time this petition is considered. If that turns out to be the case, review is still appropriate.

This Court has "the power to decide a moot case to resolve issues of 'continuing and substantial public interest' if guidance would be helpful to public officers and the issue is likely to recur." In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 819, 177 P.3d 675 (2008). "To determine whether a case involves the requisite public interest, we consider (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur." In re Pers. Restraint of Smith, 130 Wn. App. 897, 900, 125 P.3d 233 (2005).

Most cases in which appellate courts utilize the exception to the mootness doctrine involve issues of constitutional or statutory interpretation. In re Pers. Restraint of Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002). These types of issues tend to be more public in nature, more likely to arise again, and the decisions helpful to guide public officials. Id.

The issue in this case is one of statutory interpretation. The crime lab fee is often imposed and appealed, as shown by the cases cited in section E.1.a., supra. The rigid precedent set by the Court of Appeals governing imposition of the fee will inevitably affect many other

defendants prosecuted and sentenced for crimes involving lab tests throughout the state. It is proper to take the effect on others into account in determining whether an issue is of continuing and substantial public interest. Smith, 130 Wn. App. at 900-01. The Court of Appeals decision is wayward. It represents form over substance. An authoritative decision from this Court is needed to provide future guidance to litigants and lower courts on a commonly recurring issue.

F. CONCLUSION

For the reasons stated, Johns requests that this Court grant review.

DATED this 14th day of January 2021.

Respectfully submitted,

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Filed
Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JESSE JAMES JOHNS, Appellant.	No. 53428-2-II PUBLISHED OPINION

CRUSER, J. – Jesse Johns appeals the sentencing court's imposition of interest on nonrestitution legal financial obligations (LFOs) and a crime laboratory analysis fee (crime lab fee). He argues that the interest provision and the crime lab fee were improper given his indigency. The State concedes that the interest provision should be limited to restitution. We accept the State's concession, but we hold that the sentencing court did not err when it imposed the crime lab fee because that fee is mandatory. Accordingly, we affirm the imposition of the crime lab fee, but remand for the trial court to amend the interest provision to exclude any nonrestitution LFOs. We note that on remand Johns may present "a verified petition" requesting that the court suspend payment of all or part of the crime lab fee based on his indigency. RCW 43.43.690(1),

FACTS

Johns pleaded guilty to two counts of unlawful possession of a controlled substance other than marijuana.

During the April 4, 2019 sentencing hearing, Johns asked the sentencing court to inquire as to his ability to pay legal financial obligations, including the crime lab fee. The sentencing court did so and concluded that Johns was "legally defined as indigent" and did not impose any discretionary LFOs. Verbatim Report of Proceedings at 108. But the court imposed the $100 crime lab fee and Johns did not move to suspend this fee. The sentencing court also ordered that Johns pay interest on "[t]he financial obligations imposed in this judgment" without excluding nonrestitution LFOs. Clerk's Papers at 18.

Johns appeals the interest provision and the crime lab fee.

ANALYSIS

I. INTEREST PROVISION

Johns argues that under RCW 10.82.090(1), the sentencing court erred in imposing interest on nonrestitution LFOs. The State concedes that this was error.

RCW 10.82.090(1) provides, in part, "[a]s of June 7, 2018, no interest shall accrue on nonrestitution [LFOs]." Johns was sentenced after June 7, 2018, so under this statute the sentencing court could not impose interest on nonrestitution LFOs. Accordingly, we accept the State's concession.[1]

[1] Although Johns did not object to the interest provision, we exercise our discretion to reach this issue. RAP 2.5(a); *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015) (appellate court has the discretion to reach unpreserved claims of error involving LFOs).

II. CRIME LAB FEE

Johns further argues that the trial court erred when it imposed the crime lab fee given his indigency. We disagree.

RCW 43.43.690(1) provides:

> When an adult offender has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was performed by a state crime laboratory. . . the court *shall* levy a crime laboratory analysis fee of one hundred dollars for each offense for which the person was convicted. Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee.

(Emphasis added). The legislature's use of the word "shall" in the statute and the fact the legislature provided that a defendant who has been assessed the fee may challenge the fee only after it has been assessed, demonstrate that the crime laboratory analysis fee is a mandatory fee. *State v. Clark*, 195 Wn. App. 868, 873, 381 P.3d 198 (2016).

Johns's reliance on *State v. Malone*, 193 Wn. App. 762, 376 P.3d 443 (2016), which he asserts establishes that the crime lab fee is discretionary, is not persuasive. *Malone* merely states, without any analysis or citation to authority, that the crime lab fee is discretionary. 193 Wn. App. at 764. And, for the reasons stated above, the statute's own language contradicts this conclusion.

Because the crime lab fee is mandatory, the trial court did not err when it imposed this fee. But, on remand Johns can submit a verified petition to request suspension of the crime lab fee in light of his indigency. RCW 43.43.690(1).

Accordingly, we affirm the imposition of the crime lab fee, but remand for the trial court to amend the LFO interest provision to exclude any nonrestitution LFOs. On remand, Johns may present "a verified petition" requesting that the court suspend payment of all or part of the crime lab fee based on Johns's indigence. RCW 43.43.690(1).

CRUSER, J.

We concur:

WORSWICK, P.J.

GLASGOW, J.

NIELSEN KOCH P.L.L.C.

January 14, 2021 - 10:45 AM

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