

FILED
11-25-15
Court of Appeals
Division I
State of Washington

NO. 73423-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD LITTLE,

Appellant.

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

The Honorable Richard T. Okrent, Judge
The Honorable Anita Farris, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The DNA collection fee under RCW 43.43.7541 and the Victim Penalty Assessment (VPA) under RCW 7.68.035 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay.

Issue Pertaining to Assignment of Error

RCW 43.43.7541 requires trial courts impose a DNA collection fee each time a felony offender is sentenced. This ostensibly serves the State's interest in funding the collection, testing, and retention of a convicted defendant's DNA profile. RCW 7.68.035 requires trial courts to impose a VPA of \$500. The purpose is to fund victim-focused programs.

These statutes, however, require that trial courts order these LFOs even when the defendant lacks the ability to pay. Do the statutes violate substantive due process when applied to defendants who do not have the ability – or the likely future ability – to pay the fees?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

Appellant Edward Little is appealing his conviction for unlawful possession of a firearm following an unsuccessful motion to suppress and subsequent bench trial on agreed documentary evidence. CP 1-15; RP 58; 1RP 1-6.

Before sentencing, Little underwent a drug offender sentencing alternative (DOSA) risk assessment. CP 16-36.

Regarding Little's financial situation, the evaluator wrote:

Financial: Mr. Little had no legal means of support at the time of his current arrest. He admits to supporting himself on criminal activity, and also received state-funded food benefits in the amount of \$189.00 per month. He reports no assets of value, and has debts that include \$4,000.00 in legal financial obligations. He has not made payments on these debts for some time.

CP 17.

At sentencing, the court granted Little's request for a DOSA, which consisted of 50.75 months of incarceration and 50.75 months of community custody. CP 37-50. The court imposed a \$500 Victim Penalty Assessment (VPA) and \$100 DNA fee but "waive[d]"

¹ This brief refers to the transcripts as follows: "RP" – CrR 3.6 hearing held 11/7/15; "1RP" – bench trial on agreed documentary evidence and sentencing on February 20 and April 23, 2015, respectively.

all other financial obligations based on indigency and [Little's] need for treatment." 1RP 20.

2. Motion to Suppress

Little moved to suppress the gun in his possession when he was arrested on an outstanding warrant. CP 105-111. Little argued he was illegally seized well before the warrant was discovered, when directed by officer Derek Carlile to stand in front of a parked Acura. CP 108. Carlile had entered an alleyway and observed Little standing outside the Acura, leaning into the front passenger seat. CP 106. Little asked if he could go to his car, but Carlile directed him to stand in front of the Acura and called for back-up. CP 106; see also RP 20.

Another officer thereafter requested Little's identification and learned of the warrant. Upon his arrest, Little informed the officer about the gun. CP 106.

In his motion to suppress, Little argued Carlile did not have a reasonable, articulable suspicion of criminal activity to justify curtailing Little's movement when he directed Little to the front of the Acura rather than allowing him to return to his own car. CP 105-111.

3. CrR 3.6 Testimony and Court's Ruling

At approximately 11:00 p.m. on May 11, 2014, officer Derek Carlile was patrolling southwest Marysville in a "Stay Out of Drug Area." RP 3-5. Carlile testified that when he turned east into the alleyway between First and Second Street, he noticed three cars "very strangely parked" in front on him to the west. RP 8.

Carlile testified it was unusual to see cars parked in the alleyway this late at night. RP 9. The car furthest to the west was a dark Dodge Neon. RP 9. Behind that to the east was a blue BMW and behind that, a dark Acura that "was kind of a grayish with green tint." RP 9, 14. According to Carlile, it was a "really dark alleyway," although there was a light north of the cars at one of the businesses. RP 10.

Carlile testified Edward Little, with whom Carlile had no prior involvement, was standing outside the front passenger window of the Acura, which appeared to have four occupants. RP 11. According to Carlile, Little "was kind of hunched over as he was talking inside the passenger window" and "his right arm was where the window would roll down," although Carlile could not recall "exactly where his hands were." RP 11. Little was speaking to a

woman in the front passenger seat, but Carlile could not determine the gender of the other occupants. RP 12, 24.

Carlile did not know, but thought he might have interrupted a drug transaction. RP 12, 39. Carlile claimed he had a heightened safety concern that day as well, because there had been a drive-by shooting in Lake Stevens with a blue or green "Honda-type vehicle." RP 13. Reportedly, there were two female and two male passengers in the suspect "Honda-type vehicle." RP 13. Carlile claimed he was concerned because the Acura was "a similar car that could be involved in this drive-by shooting where five or six rounds were popped off only a few hours previous in a close jurisdiction to us and it was occupied by four people." RP 14.

Carlile parked about ten feet from the Acura and began to get out. RP 14. According to Carlile: "as I stepped up and looked over my roof of my car, Mr. Little popped his head up and his eyes were just big." RP 14. As Carlile further claimed: "And his eyes locked on mine and he stood up and pushed away from the car in a real fast manner." RP 14.

According to Carlile, Little "was walking actually in a really brisk pace and he was looking at the ground not trying to make eye contact with me." RP 15. Carlile testified Little walked from the

front to the rear passenger side of the Acura toward Carlile, "because he had to go that way to get to his car." RP 34-35. Carlile walked around to the front of his car and said, "Hey, what are you guys up to back here?" RP 16. Little stopped, approached and met Carlile between the trunk of the Acura and front of Carlile's police car. RP 16, 33-35.

According to Carlile, Little seemed "real nervous." RP 16. Carlile claimed Little was turned at an angle toward him, "keeping his right side away from me." RP 16. Carlile testified in his experience, people who are trying to hide something from police "keep sides away from us where there might be illegal narcotics or pipes or weapons or drug paraphernalia of any type bulging out of a pocket and that seemed to be what Mr. Little was doing." RP 19. Carlile claimed that when he asked Little if he had any weapons, Little said no, but continued to keep his right side away from Carlile. RP 23.

Reportedly, Little "kind of stuttered a little bit" and said "I got a flat tire and my friends are helping me change my flat." RP 16. When asked which car, Little pointed to the Dodge Neon, which had the driver's door open. RP 17. Carlile could not see the front driver's side tire, but claimed none of the other tires were flat. RP

17. The car did not appear "canted." RP 17. Carlile thought the alleyway was a poor choice to change a tire, as there were gas stations nearby. RP 18-19.

Although there were no jacks or spare tires in view, Carlile admitted he did not know if the tire had already been changed. RP 17, 40.

Little told Carlile, "I just want to go over to my car." RP 20. But Carlile responded, "I'd actually like you to come to the front of the vehicle [meaning the Acura] so I can keep my eyes on everybody here." RP 20. Carlile testified he probably would have stopped Little if he left. RP 41.

The parties agreed Little was seized when he said he wanted to go to his car and Carlile said "I'd actually like you to come to the front of the vehicle." RP 20, 47, 51, 55. Little argued the circumstances did not provide the officer with a reasonable articulable suspicion of criminal activity to justify the seizure. RP 47.

The court agreed Little was seized once Carlile directed him to the front of the Acura. CP 57. However, the court concluded: "From the whole of the circumstances presented, Defendant's apparently false statements as to the reason he was in the alleyway

included, Officer Carlile possessed a reasonable, articulable suspicion of defendant's involvement in criminal activity sufficient to warrant a brief detention of the defendant to maintain the status quo while the officer continued with his investigation." CP 60.

C. ARGUMENT

RCW 43.43.7541 AND RCW 7.68.035 ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS LIKE LITTLE WHO DO NOT HAVE THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY.

The mandatory \$100 DNA collection fee authorized under RCW 43.43.7541 and the mandatory \$500 VPA authorized by RCW 7.68.035 violate substantive due process when applied to defendants who do not have the present or likely future ability to pay the fines. This Court should find trial court erred in imposing such fees when the record showed Little's inability to pay.

1. The record demonstrates Little is unable to pay

As a preliminary matter, the record indicates that Little does not have the ability to pay the LFOs imposed by the court. The DOSA risk assessment indicated Little had no job, no assets, was receiving food stamps and had other legal financial obligations of \$4,000, toward which he had not made any payments in a

considerable time. CP 17. The court expressly recognized Little's indigence when it waived all other fees. 1RP 20.

Moreover, Little was represented by appointed counsel at trial, and the court found him indigent on appeal. Supp. CP ____ (sub no. 57, Order of Indigency, 4/23/15).

2. RCW 43.43.7541 and RCW 7.68.035 violate substantive due process.

The Washington and United States Constitutions establish that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV § 1; Const. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. at 218-19. It requires that "deprivations of life, liberty, or property be substantively reasonable." In other words, such deprivations are constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Washington State Dep't of Licensing, 177

Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625-26 (1992)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is lighter under this standard, the standard is not meaningless. Indeed, the United States Supreme Court has cautioned that the rational basis test "is not a toothless one." Mathews v. DeCastro, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976). As the Washington Supreme Court has also explained, "the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional." DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); Nielsen, 177 Wn. App. at 61

(same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

Turning first to the DNA collection fee, the statute currently requires that all felony defendants pay the DNA collection fee. RCW 43.43.754. This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile to help facilitate future criminal identifications. See RCW 43.43.752 through RCW 43.43.7541. This is a legitimate interest. However, the imposition of this mandatory fee upon defendants who cannot pay it does not rationally serve that interest. Turning to RCW 7.68.035, the statute requires that all convicted defendants pay a \$500 VPA. This ostensibly serves the State's interest in funding "comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035(4). Again, while this may be a legitimate interest, there is nothing reasonable about requiring sentencing courts to impose the VPA upon defendants regardless of whether they have the ability or likely future ability to pay.

Imposing these fees on defendants who are unable to pay does not further the State's interest in funding DNA collection or

victim-focused programs. As the Washington Supreme Court recently emphasized, “the state cannot collect money from defendants who cannot pay.” State v. Blazina, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). Hence, there is no legitimate economic reason to impose these LFOs.

Likewise, the State’s interest in enhancing offender accountability is also not served by requiring a defendant to pay mandatory LFOs when he does not have the ability to pay. To foster accountability, a sentencing condition must be something that is achievable for the convicted person. If it is not, the condition actually undermines efforts to hold a defendant answerable.

Similarly, in Blazina, the Supreme Court recognized that the State’s interest in deterring crime via enforced LFOs is actually undermined when LFOs are imposed on people who do not have the ability to pay. Id. This is because imposing LFOs upon a person who does not have the ability to pay actually “increase[s] the chances of recidivism.” Id. at 836-37 (citing relevant studies and reports).

Likewise, the State’s interest in uniform sentencing is not served by imposing mandatory LFOs on those who do not have the

ability to pay. Defendants who cannot pay are subject to lengthy involvement with the criminal justice system and often end up paying considerably more than the original LFOs imposed (due to interest and collection fees), and in turn, considerably more than their wealthier counterparts. Id. at 836-37.

When applied to indigent defendants, not only do the so-called mandatory fees ordered under RCW 43.43.7541 and RCW 7.68.035 fail to further the State's interest, they are senseless. It is irrational to require trial courts to impose such debts upon defendants who do not have the present or future ability to pay.

3. Prior case law does not control this Court's inquiry.

Little anticipates the State will, nonetheless, argue the current substantive due process challenge is foreclosed by the Supreme Court's decision in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992). In Curry and its offshoot, State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), the Court held that, as to mandatory LFOs, "constitutional principles will be implicated . . . only if the government seeks to enforce collection of the assessment at a time when [the defendant is] unable, though no fault of his own, to comply." Id. at 241 (citing Curry, 118 Wn.2d at 917, internal quotes omitted). The "constitutional principles" at

issue in those cases were different than those implicated here.

Little's constitutional challenge to the statute authorizing the DNA collection fee is fundamentally different from that raised in Curry. In Curry, defendants challenged the constitutionality of a mandatory LFO order on the ground that its enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they were unable to pay. 118 Wn.2d at 917. Thus, the constitutional challenge was grounded in the well-established constitutional principle that due process does not tolerate incarceration of people simply because they are poor. Id.

In contrast, Little asserts there is no legitimate state interest in requiring sentencing courts to impose these fees without the State first establishing a defendant's ability to pay. In other words, rather than challenging the constitutionality of a statute based on the fundamental unfairness of its ultimate enforcement potential (as was the case in Curry and Blank), Little challenges the statute as an unconstitutional exercise of the State's regulatory power that is irrational when applied to defendants shown not to have the ability to pay. As such, the Curry and Blank decisions do not control.

In addition, read carefully, and considered in the light of the realities of Washington's LFO current collection scheme, those cases actually support Little's position. Indeed, after Blazina's recognition of the Washington State's "broken LFO system," 182 Wn.2d at 835, the Court's decisions in Curry and Blank should be revisited in the context of the realities of Washington's present LFO scheme.

Currently, Washington's laws allow for an elaborate and aggressive collections process that may include the immediate assessment of interest, enforced collections via wage garnishment, payroll deductions, and wage assignments (which include further penalties), and potential arrest. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay). This cycle does not, for example, conform to the necessary constitutional safeguards established in Blank.

In Blank the Washington Supreme Court held that “monetary assessments which are mandatory *may* be imposed against defendants without a per se constitutional violation.” Blank, 131 Wn.2d at 240 (emphasis added). The Court reasoned that fundamental fairness concerns arise only if the government seeks to collect the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (referring to Curry, 118 Wn.2d at 917-18).

Blank also states, however, that in order for Washington’s LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry *before*: (1) the State engages in any “enforced” collection; (2) any additional “penalty” for nonpayment is assessed; or (3) any other “sanction” for nonpayment is imposed.² 131 Wn.2d at 241-42. But under the current scheme, neither the Legislature nor the courts satisfy Blank’s directives.

Although Blank says prior case law suggests that such an inquiry is not required at sentencing, id. at 240-42, that Court was

² “Penalty” means: “a sum of money which the law exacts payment of by way of punishment for . . . not doing some act which is required to be done.” Black’s Law Dictionary, Sixth Edition, at 1133. “Sanction” means: “Penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations.” Id. at 1341. “Enforce” means: “To put into execution, to cause to take effect, to make effective; as to enforce . . . the collection of a debt or a fine.” Id. at 528.

not confronted with the current collection scheme. The scheme provides for immediate enforced collections processes, penalties, and sanctions.

First, under RCW 10.82.090(1), LFOs generally accrue interest at a rate of 12 percent, an astounding level given the historically low interests rates of the last several years. Blazina, 182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013)). This sanction has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. See Harris, supra at 1776-77 (explaining that “those who make regular payments of \$50 a month toward a typical legal debt will remain in arrears 30 years later). Yet, in general, there is no requirement for the court to have conducted an inquiry into ability to pay before interest is assessed.

Washington law also permits courts to order an immediate “payroll deduction.” RCW 9.94A.760(3). This can occur immediately upon sentencing. RCW 9.94A.760(3). Beyond the actual deduction to cover the outstanding LFO payment, employers

are authorized to deduct other fees from the employee's earnings. RCW 9.94A.7604(4). This constitutes an enforced collection process with an additional sanction. Yet, there is no provision requiring an ability-to-pay inquiry occur before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; see also, Harris, supra, at 1778 (providing examples of wage garnishment as an enforcement mechanism used in Washington). As for garnishment, this enforced collection may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment is a collection mechanism that may be used within 30 days of a defendant's failure to pay the monthly sum ordered. RCW 9.94A.7701. Again, employers are permitted to charge a "processing fee." RCW 9.94A.7705. Contrary to Blank, however, there are no provisions requiring courts to conduct an ability-to-pay inquiry prior to the use of these enforced collection mechanisms.

Washington law also permits courts to use collection agencies or county collection services to actively collect LFOs. RCW 36.18.190. Any penalties or additional fees these agencies

decide to assess are paid by the defendant. Id. There is nothing in the statute that prohibits the courts from using collections services immediately after sentencing. Yet there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement. Id.

These examples demonstrate that under Washington's currently "broken" LFO system, there are many instances where the Legislature provides for "enforced collection" and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms may be used immediately after the judgment and sentence is entered. Consequently, Blank, rather than defeating Little's arguments, actually supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing, when LFOs are imposed.

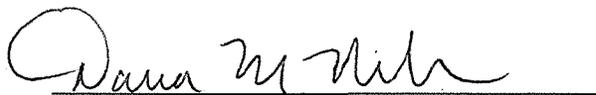
D. CONCLUSION

For the reasons stated above, this Court should strike the trial court's order that Little pay the challenged LFOs.

Dated this 25th day of November, 2015

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "Dana M. Nelson", is written over a horizontal line.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO.73423-7-1
)	
EDWARD LITTLE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF NOVEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] EDWARD LITTLE
DOC NO. 897866
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF NOVEMBER 2015.

X *Patrick Mayovsky*