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Court of Appeals
Division I
State of Washington

NO. 73532-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

LAVONDA BECK,

Appellant.

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

The Honorable Laura Middaugh, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. BECK'S CHALLENGE TO THE LFO ORDER IS RIPE.

The State claims appellant's challenge to the imposition of the DNA-collection fee and the Victim's Penalty Assessment (VPA) is not ripe until the State attempts to collect or impose punishment for failure to pay. BOR at 15-16. However, this same argument was made and categorically rejected in State v. Blazina, 182 Wn.2d 827, 832, n. 1., 344 P.3d 680, 684 (2015). As shown below, the same ripeness principles raised in Blazina apply with equal force here.

The State's ripeness claim fails to distinguish between a challenge to the statute based on notions of fundamental fairness pertaining to potential enforcement consequences (arguably not ripe until enforcement occurs), and a challenge attacking the constitutionality of the statute as applied at the time the fees were imposed (ripe at the point the LFO is ordered). This case involves the latter and meets all the criteria for ripeness. Id.

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. State v. Bahl, 164 Wn.2d 739, 751, 193

P.3d 678 (2008). Additionally, when considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Id.

First, the issue raised here is primarily legal, with appellant Lavonda Beck challenging the trial court's ordering of the LFO pursuant to a mandatory statute. Neither time nor future circumstances pertaining to enforcement will change whether RCW 43.43.754, as applied to Beck, is constitutionally infirm. As such, Beck meets the first prong of the ripeness test. State v. Valencia, 169 Wn.2d 782, 788, 239 P.3d 1059 (2010) (citing United States v. Loy, 237 F.3d 251 (3d Cir. 2001)).

Second, no further factual development is necessary. As explained above, Beck is challenging the sentencing court's application of an unconstitutional statute. The facts necessary to decide this issue (the statutory language and the sentencing record) are fully developed. Either the sentencing court applied a statute that is unconstitutional, or it did not. If it did, the sentencing condition is not valid regardless of the particular circumstances of attempted enforcement.

Third, the challenged action is final. Once LFOs are ordered, that order is not subject to change. The fact that the defendant may later seek to modify the LFO order through a remission hearing does not change the finality of the trial court's original sentencing order. While a defendant's obligation to pay may be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the sentencing order that authorizes that debt in the first place is not subject to change. In other words, while the defendant's obligation to actually pay off LFOs may be conditional, the original sentencing order imposing those LFOs is final.

Finally, withholding consideration of an unconstitutionally imposed LFO places significant hardships on defendants due to the immediate consequences of those LFOs and the heavy burdens of the remission process.

An LFO order imposes an immediate debt upon a defendant and if she does not pay, subjects her to arrest or a myriad of other penalties that arise from enforced collection efforts. The hardships for the defendant and her family that result from the erroneous imposition of LFOs cannot be understated. A study conducted by the Washington State Minority and Justice Commission looking into

the impact of LFOs, concludes that for many people, erroneously imposed LFOs result in a horrible chain of events:

...reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnaring some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008)¹; see also, Blazina, 182 Wn.2d at 682-84 (acknowledging these hardships).

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has been erroneously burdened with LFOs is the remission process. Unfortunately, reliance on Washington's remission process to correct the error imposes its own hardships. During the remission process, the defendant is saddled with a burden she would not otherwise have to bear. During sentencing, it is the State's burden

¹ This report can be found at:
http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf

to establish the defendant's ability to pay prior to the trial court imposing any LFOs. State v. Lundy, 176 Wn. App. 96, 105-06, 308 P.3d 755(2013). However, if the LFO order is not reviewed on direct appeal and is left for correction through the remission process, the burden shifts to the defendant to show a manifest hardship. RCW 10.01.160(4).

Moreover, an offender who is left to fight her erroneously ordered LFOs though the remission process will have to do so without appointed legal representation. See, State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999) (recognizing an offender is not entitled to publicly funded counsel to file a motion for remission). Given the appellant's financial hardships, she will likely be unable to retain private counsel and, therefore, have to litigate the issue pro se. For a person unskilled in the legal field, proceeding pro se in a remission process can be a confusing and daunting prospect, especially if this person is already struggling to make ends meet. See, Washington State Minority and Justice Commission, supra, at 59-60 (documenting the confusion that exists among legal debtors regarding the remission process). Indeed, some are so overwhelmed, they simply stop paying,

subjecting themselves to further possible penalties and potentially forgoing legitimate constitutional claims. Id. at 46-47.

Finally, reviewing the validity of LFO orders on direct appeal, rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that will otherwise be wasted by efforts to collect from individuals who will likely never be able to pay. See, State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing an LFO because it involved a purely legal question and would likely save future judicial resources).

For the reasons stated above, this Court should follow Blazina and find Beck's challenge to the validity of this sentencing condition is ripe for review.

II. APPELLANT'S SUBSTANTIVE DUE PROCESS CHALLENGE IS REVIEWABLE UNDER RAP 2.5(a).

The State claims Beck's substantive due process challenge is not reviewable under RAP 2.5(a)(3) because there was no objection during sentencing. BOR at 23-25. As explained below, this claim should be rejected.

Pursuant to RAP 2.5(a)(3), a manifest constitutional error may be raised for the first time on appeal. Review is appropriate where the appellant identifies a constitutional error and shows how the alleged error actually affected his rights at trial. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (quoting State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007)). A constitutional error is manifest where there is a showing of actual prejudice. Actual prejudice is established by showing the asserted error had practical and identifiable consequences in the trial or, in this case, the sentencing. Id. at 99, 217 P.3d 756 (quoting Kirkman, 159 Wn.2d at 935).

Beck has identified an error that is of true constitutional dimension. She asserts a substantive due process challenge to RCW 43.43.7541 and RCW 7.68.035 because they authorize sentencing courts to impose the DNA-collection fee and VPA without any consideration of ability to pay. Hence, the scope of her challenge is undoubtedly constitutional.

Second, Beck has established prejudice. On their face, the statutes do not require an ability-to-pay inquiry and mandate the trial court impose the DNA-collection fee and the VPA in every felony case. The consequence is Beck now has a sentence that

imposes these fees without the trial court first determining she has the ability to pay. Given these circumstances, Beck has shown the error she complains of has had practical and identifiable consequences in her sentencing. As such, review is appropriate under RAP 2.5(a)(3).

Alternatively, this Court should exercise its own discretion under RAP 2.5(a) and decide the merits of this case because: (1) it raises a substantial constitutional issue regarding Washington's broken LFO system, (2) the parties have fully briefed the issue, and (3) the constitutional error raised here impacts criminal sentencings that take place across the State on a daily basis. Hence, prompt appellate review of this issue is necessary, appropriate, and will ultimately save judicial resources since this issue will likely be repeatedly raised.

For the reasons stated above and in appellant's opening brief, this Court should find the issue reviewable under RAP 2.5(a).

III. BECK IS SUBJECTED TO IMMEDIATE PENALTIES AND SANCTIONS UNDER WASHINGTON'S LFO SCHEME.

The State suggests that because the trial court waived interest fees in Beck's case, she is not subject to immediate

penalties and sanctions as part of Washington's collection process. BOR at 29-30. However, interest is only one form of action.

In addition to the other sanctions and penalties listed in appellant's opening brief, the law establishes defendants who cannot pay off their LFOs immediately are subject to an immediate \$100 account fee that is charged annually for any unpaid LFO account. RCW 36.18.016 (29). Washington law also permits DOC to enforce LFOs by collecting 20% of any money a defendant obtains while in custody. RCW 72.09.111, 72.09.480. Additionally, the law also permits courts to transfer the debt to collections immediately with a transfer fee up to \$100, and then the collections agency can add their own penalties and sanctions. RCW 19.16.500; RCW 36.18.190. These examples show once again Washington statutes are littered with various collection mechanisms and fees that defendants are regularly subjected to without a judicial determination of her ability to pay.

As shown here and in appellant's opening brief, the Legislature has set forth a scheme that allows for immediate enforced collection, fees, and sanctions for nonpayment of LFOs. These go beyond just the 12% interest rate. As such, Beck has made a showing that despite the interest waiver, she is still subject

to additional fees, sanctions, and enforced collection without ever being determined by the court to have the ability to pay.

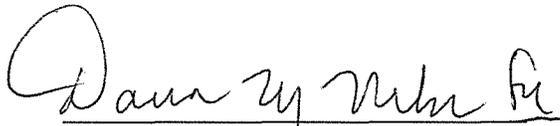
B. CONCLUSION

As argued in the opening brief, this Court should reverse Beck's convictions because the trial court improperly commented on the evidence. For the reasons stated in the opening brief and this reply, this Court should strike the DNA fee and VPA.

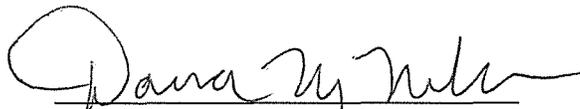
DATED this 15th day of March, 2016.

Respectfully submitted,

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