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COURT APPEALS

2007-11-01 PM 1:01

CLERK OF COURT

BY 7 JN

NO. 34236-7-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Appellant/Cross-Respondent,

vs.

KATHLEEN I. HARRSCH,

Respondent/Cross-Appellant.

AMENDED BRIEF OF APPELLANT/CROSS-
RESPONDENT IN
RESPONSE TO RESPONDENT'S CROSS APPEAL

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PM 10/30/06

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I. ISSUES

- 1. IS A CONSTITUTIONAL CHALLENGE TO A LAW RIPE FOR REVIEW WHEN THE PERSON CHALLENGING THE LAW HAD NOT BEEN HARMED BY THE PART OF THE LAW ALLEGED TO BE UNCONSTITUTIONAL?**
- 2. DID THE SUPERIOR COURT ABUSE ITS DISCRETION BY IMPOSING LEGAL FINANCIAL OBLIGATIONS?**

II. SHORT ANSWERS

- 1. NO. A CONSTITUTIONAL CHALLENGE TO A LAW IS NOT RIPE FOR REVIEW WHEN THE PERSON CHALLENGING THE LAW HAD NOT BEEN HARMED BY THE PART OF THE LAW ALLEGED TO BE UNCONSTITUTIONAL.**
- 2. NO. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING LEGAL FINANCIAL OBLIGATIONS.**

III. ARGUMENTS

- 1. RESPONDENT/CROSS APPELLANT'S APPEAL SHOULD BE DENIED BECAUSE THE UNCONSTITUTIONALITY OF A LAW IS NOT RIPE FOR REVIEW WHEN SHE IS NOT HARMED BY THE PART OF THE LAW ALLEGED TO BE UNCONSTITUTIONAL.**

The United States Supreme Court held that recoupment statutes must satisfy several conditions to be constitutional. *Fuller v. Oregon*, 417 U.S. 40 (1974). The Washington State Supreme Court identified the requirements articulated in *Fuller* that a recoupment statute must follow to be constitutional. The requirements are:

- (1) Repayment must not be mandatory;
- (2) Repayment may be imposed only on convicted defendants;
- (3) Repayment may only be ordered if the defendant is or will be able to pay;
- (4) The financial resources of the defendant must be taken into account;
- (5) A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
- (6) The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;
- (7) The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Barklind, 87 Wash.2d 814, 817-818 (1976).

In *Barklind*, the court found these requirements were met and that the Washington recoupment statute was constitutional. *Id.* at 818. The court stated, "We fail to perceive the constitutional deficiency in the system which allows the trial court discretion to grant probation and in effect, as a condition, tell the defendant that he should recognize some obligation to society for the crime which he voluntarily committed." *Id.* at 816.

A trial court's discretion and authority to impose legal financial obligations in the State of Washington is governed by RCW 10.01.160.

The superior court has discretion to impose legal financial obligations pursuant to RCW 9.94A.760. Statutes are presumed to be constitutional and appellant does not challenge their constitutionality. In *State v. Curry*, the Supreme Court of Washington stated, “imposition of fines is within the trial court’s discretion. Ample protection is provided from an abuse of that discretion. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified.” *State v. Curry*, 118 Wash.2d 911, 916 (1992). “The imposition of the penalty assessment, standing alone, is not enough to raise constitutional concerns.” *Id.* at 918.

“The unconstitutionality of a law is not ripe for review unless the person seeking review is harmed by the part of the law alleged to be unconstitutional.” *State v. Ziegenfuss*, 118 Wash.App. 110, 113, (2003). In *Ziegenfuss*, the defendant was convicted of possessing cocaine, *Id.* at 112, and sought a waiver of all her “legal financial obligations on grounds that she is disabled, has never been employed, and is unlikely ever to have the means to satisfy any such obligations.” *Id.* at 113. The court found that defendant’s due process challenge was not ripe for review because defendant had not failed to make any payments, had not been incarcerated or sanctioned for violating the terms of her community custody, and had not suffered any harm. *Id.* at 113-115.

As in *Ziegenfuss*, respondent/cross appellant was convicted for possessing methamphetamine and ordered to pay court costs. The respondent/cross appellant has not failed to make payments and has not been incarcerated or sanctioned for non-payment of her financial obligations. Therefore, she has not suffered any harm and her equal protection and constitutional challenges are not ripe for review. The respondent/cross appellant's appeal should be denied and the decision of the Cowlitz County superior court should be affirmed.

2. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING FINANCIAL OBLIGATIONS

In the alternative, should this court find that the respondent/cross appellant's appeal be ripe for review, her appeal should nevertheless be denied because she is not indigent for purposes of her legal financial obligations and the Cowlitz County superior court did not abuse its discretion in imposing financial obligations.

In *State v. Blank*, the Supreme Court of Washington noted that "common sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before enforced collection or any sanction is

imposed for nonpayment, there must be an inquiry into ability to pay.” *State v. Blank*, 131 Wash.2d. 230, 242 (1997). “The Constitution does not require an inquiry into ability to pay at the time of sentencing. Instead, the relevant time is the point of collection and when sanctions are sought for nonpayment.” *Id.* at 242.

In *Blank*, the defendant sought a waiver of his legal financial costs based on his indigent trial and appellate status, incarceration, and potential difficulties in finding housing and obtaining steady employment upon his release. *Id.* at 251-253. The court held that the defendant “failed to offer any compelling argument,” *Id.* at 253, and found that “there is no reason at this time to deny the state’s cost request based upon speculation about future circumstances.” *Id.* at 253. In *State v. Mayer*, the court held that the impact that incarceration would have on the defendant’s earning capacity alone is an insufficient ground to waive his financial obligation. *State v. Mayer*, 120 Wash.App. 720, 728 (2004).

In *State v. Gropper*, the court held that merely claiming indigence alone would not relieve a defendant of his financial obligations. *State v. Gropper*, 76 Wash.App. 882, 887 (1995). “Rather, an offender must show that he or she has made a real effort to fulfill the financial obligation, but was unable to do so,” *Id.* at 887. In *State v. Woodward*, the court held that “a defendant who claims indigency must do more than simply plead

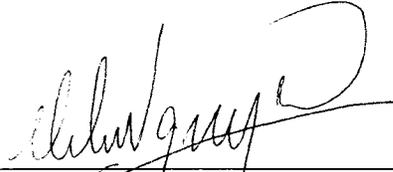
poverty in general terms.” *State v. Woodward*, 116 Wash.App. 697, 704 (2003). A defendant “should be prepared to show the court his actual income, his reasonable living expenses, his efforts, if any, to find steady employment, his efforts, if any, to acquire resources from which to pay his court-ordered obligations.” *Id.* at 704.

In the present case, respondent/cross appellant seeks to waive her financial obligations because of her current disability and lack of income. The superior court correctly imposed financial obligations because merely claiming indigency alone is an insufficient basis to waive her financial obligations. The respondent/cross appellant has made no efforts to repay her financial obligations and “nothing...precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law.” 118 Wash.2d at 918. “[Respondent/cross appellant’s] poverty in no way immunizes [her] from punishment.” *Id.* at 918.

IV. CONCLUSION

The respondent/cross appellant’s appeal should be denied because the Washington statute is constitutional and the superior court did not abuse its discretion by imposing financial obligations.

Respectfully submitted this 30 day of October 2006.

A handwritten signature in black ink, appearing to read "Mike K. Nguyen", written over a horizontal line.

Mike K. Nguyen / WSBA 31641
Deputy Prosecuting Attorney
Attorney for Appellant/Cross-Respondent

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
Appellant/Cross-Respondent,)
v.) NO. 34236-7
) 05-1-01060-3
KATHLEEN HARRSCH,) AFFIDAVIT OF MAILING
)
Respondent/Cross-Appellant.)

AUDREY J. GILLIAM, being first duly sworn, on oath deposes and says: That on October 30, 2006, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

JOHN HAYS
ATTORNEY AT LAW
1402 BROADWAY
LONGVIEW, WA 98632

CLERK, COURT OF APPEALS
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TACOMA, WA 98402

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BY [Signature]

each envelope containing a copy of the following documents:

1. AMENDED BRIEF OF APPELLANT/CROSS-RESPONDENT IN RESPONSE TO RESPONDENT'S CROSS APPEAL
2. Affidavit of Mailing.

Audrey Gilliam

SUBSCRIBED AND SWORN to before me this October 30, 2006.

Julie J. [Signature]
Notary Public in and for the State
of Washington residing in Cowlitz
Co. My commission expires: 10-19-09

AFFIDAVIT OF MAILING