

No. 47299-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint of

David Troupe,

Petitioner.

Pierce County Superior Court

Cause No. 99-1-02498-4

**Petitioner's Supplemental Brief
Regarding Respondent's Motion to Modify
Commissioner's Ruling on Filing Fee Waiver**

Jodi R. Backlund
Manek R. Mistry
Attorneys for Petitioner
BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES 1

PRIOR PROCEEDINGS 1

ARGUMENT..... 1

I. The Court of Appeals has inherent authority to waive a personal restraint petitioner’s filing fee..... 1

II. The clerk and commissioner acted correctly by waiving Mr. Troupe’s filing fee..... 2

A. RAP 16.8 governs waiver of the fee for filing a personal restraint petition..... 2

B. RCW 4.24.430 does not apply to personal restraint petitions..... 3

C. If applicable to personal restraint petitions, RCW 4.24.430 violates due process and equal protection..... 7

CONCLUSION 8

TABLE OF AUTHORITIES

FEDERAL CASES

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) 7

Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956)..... 7

WASHINGTON STATE CASES

Ellensburg Cement Products, Inc. v. Kittitas Cnty., 179 Wn.2d 737, 317 P.3d 1037 (2014)..... 5, 6

Fellows v. Moynihan, 175 Wn.2d 641, 285 P.3d 864 (2012) 5, 6

In re Det. of Hawkins, 169 Wn.2d 796, 238 P.3d 1175 (2010) 4

Jafar v. Webb, 177 Wn.2d 520, 303 P.3d 1042 (2013)..... 1, 7

O'Connor v. Matzdorff, 76 Wn.2d 589, 458 P.2d 154 (1969) 1, 6

Potter v. Washington State Patrol, 165 Wn.2d 67, 196 P.3d 691 (2008)... 5

State v. Davis, 160 Wn. App. 471, 248 P.3d 121 (2011)..... 3

State v. Delgado, 148 Wn.2d 723, 63 P.3d 792 (2003) 3

State v. Engel, 166 Wn.2d 572, 210 P.3d 1007 (2009)..... 3

State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012) 5

State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005)..... 3, 4

State v. Punsalan, 156 Wn.2d 875, 133 P.3d 934 (2006)..... 3

State v. Williams, 171 Wn.2d 474, 251 P.3d 877 (2011)..... 3

Washington State Republican Party v. Washington State Pub. Disclosure Comm'n, 141 Wn.2d 245, 4 P.3d 808 (2000) 4

WASHINGTON STATUTES

RCW 10.73.090 2
RCW 4.24.430 1, 2, 3, 4, 5, 6, 7, 8
RCW 7.36 2
RCW 7.36.250 2

OTHER AUTHORITIES

GR 34 5
RAP 16.15 2, 4
RAP 16.4 2, 4
RAP 16.8 1, 2, 5, 7, 8
RAP 16.8.1 2

STATEMENT OF ISSUES

1. Did the clerk and commissioner properly waive Mr. Troupe's filing fee for his personal restraint petition?
2. Does the Court of Appeals have inherent authority to waive any litigant's filing fee, regardless of the statutory limitation imposed by RCW 4.24.430?
3. Does RAP 16.8 govern waiver of the fee for filing a personal restraint petition in the Court of Appeals?
4. Does RCW 4.24.430 apply only to civil actions and appeals other than personal restraint petitions?
5. If applicable to personal restraint petitions, does RCW 4.24.430 violate the constitutional separation of powers and the state and federal rights to due process and equal protection?

PRIOR PROCEEDINGS

David Troupe filed a Personal Restraint Petition, challenging the conditions of his confinement. He requested and received waiver of fees for this filing. The state moved to modify the waiver of fees. Counsel was appointed to represent Mr. Troupe on this issue of the waiver of fees.

ARGUMENT

I. THE COURT OF APPEALS HAS INHERENT AUTHORITY TO WAIVE A PERSONAL RESTRAINT PETITIONER'S FILING FEE.

Washington courts have the “inherent power” to waive filing fees for indigent parties. *O'Connor v. Matzdorff*, 76 Wn.2d 589, 600, 458 P.2d 154 (1969). Under *O'Connor*, “courts have a duty to waive filing fees for any indigent litigant.” *Jafar v. Webb*, 177 Wn.2d 520, 531, 303 P.3d 1042 (2013) (emphasis in original) (citing *O'Connor*.)

In this case, the Court of Appeals has the inherent authority to waive Mr. Troupe's filing fee. *Id.* The clerk and commissioner properly waived Mr. Troupe's filing fee. *Id.* The ruling should not be modified.

II. THE CLERK AND COMMISSIONER ACTED CORRECTLY BY WAIVING MR. TROUPE’S FILING FEE.

A. RAP 16.8 governs waiver of the fee for filing a personal restraint petition.

Personal Restraint Petitions are governed by RAP 16.4-16.15.

These rules address payment of a filing fee. RAP 16.8. In indigent cases, “[t]he statute governing payment of a fee for filing a petition for writ of habeas corpus is controlling.” RAP 16.8.

Chapter 7.36 RCW governs writs of habeas corpus. RAP 16.8’s reference is to RCW 7.36.250, captioned “Proceeding in forma pauperis.” Under the statute, “the court may, if satisfied that the proceeding or appeal is instituted or taken in good faith, order that such proceeding, including appeal, may be prosecuted without prepayment of fees or costs or the giving of security therefor.” RCW 7.36.250.

The standard for waiver of the filing fee in personal restraint petitions is thus “good faith.” RCW 7.36.250. Neither RAP 16.8 nor RCW 7.36.250 makes any reference to RCW 4.24.430’s procedural bar. *Cf.* RAP 16.8.1 (referring to petitions “clearly barred by RCW 10.73.090.”) Nor does either provision directly impose restrictions based on prior filings by the same petitioner.

Mr. Troupe’s personal restraint petition must be judged under the “good faith” standard of RCW 7.36.250. There is no indication that he has

undertaken this proceeding in bad faith; accordingly, the clerk and commissioner acted properly by waiving the filing fee.

B. RCW 4.24.430 does not apply to personal restraint petitions.

1. The statute is unambiguous and does not apply.

In interpreting a statute, the court's duty is to "discern and implement the legislature's intent." *State v. Williams*, 171 Wn.2d 474, 477, 251 P.3d 877 (2011). A statute's plain meaning is derived from "the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009); *see also State v. Punsalan*, 156 Wn.2d 875, 879, 133 P.3d 934 (2006) ("Plain language does not require construction."). A court "will not engage in judicial interpretation of an unambiguous statute." *State v. Davis*, 160 Wn. App. 471, 477, 248 P.3d 121 (2011). Nor may a reviewing court "add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Title 4 RCW governs civil procedure. It does not purport to govern original actions filed in the Court of Appeals or the Supreme Court. When examined in context, RCW 4.24.430 does not apply to personal restraint petitions, which are governed by RAP 16.4-16.15.

Furthermore, by its plain terms, the statutory limitation applies to “filing fees in any civil action or appeal against the state...” RCW 4.24.430. It does not specifically refer to personal restraint petitions.

The statute’s plain language does not apply in Mr. Troupe’s case. Accordingly, the ruling waiving Mr. Troupe’s filing fee must be upheld. *Jacobs*, 154 Wn.2d at 600.

2. Even if the statute were ambiguous, additional tools of statutory construction require an interpretation favoring Mr. Troupe.

If a statute is “susceptible to two or more reasonable interpretations, it is ambiguous,” and courts “may turn to additional tools of statutory construction in determining the meaning of the statute.” *In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010).

Where possible, courts construe statutes so as to avoid unconstitutionality. *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 280, 4 P.3d 808 (2000). Furthermore, statutes that are in derogation of the common law are strictly construed. *See, e.g., Fellows v. Moynihan*, 175 Wn.2d 641, 649, 285 P.3d

864 (2012); *Potter v. Washington State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008). Finally, under the *maxim expressio unius est exclusio alterius*, any omissions from a statute are presumed intentional. *Ellensburg Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014).

In keeping with these rules, RCW 4.24.430 must be construed to apply to civil actions other than personal restraint petitions.

First, a procedural statute that conflicts with a court rule violates the constitutional separation of powers. *State v. Gresham*, 173 Wn.2d 405, 428-29, 269 P.3d 207 (2012). When examining a statute that appears to conflict with a court rule, a reviewing court

will first attempt to harmonize them and give effect to both. If the statute and the rule cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters.

Id. (internal quotation marks and citations omitted).

RCW 4.24.430 appears to conflict with RAP 16.8; however, the two rules can be harmonized if RCW 4.24.430 applies to civil actions other than personal restraint petitions.¹ Since both are procedural, this

¹ RCW 4.24.430 is likely unconstitutional because it directly conflicts with GR 34, and there does not appear to be a way to harmonize the two provisions. *Gresham*, 173 Wn.2d at 428-29. By its terms, GR 34 applies only to actions in “trial court,” and so is not implicated by Mr. Troupe’s current petition. GR 34(a).

interpretation of RCW 4.24.430 is compelled by the separation of powers doctrine. *Id.*

Second, RCW 4.24.430 is in derogation of common law, because it purports to limit the inherent authority of courts to waive filing fees. *O'Connor*, 76 Wn.2d at 598-600. It must therefore be strictly construed. *Fellows*, 175 Wn.2d at 649. Considering the provision's context, the statutory scheme as a whole, and the plain language (which makes no reference to personal restraint petitions or to matters filed initially in the Court of Appeals), a strict construction of RCW 4.24.430 would limit the phrase "any civil action or appeal against the state" to mean lawsuits filed in trial courts.

Third, the omissions from the statute are deemed intentional. *Ellensburg Cement*, 179 Wn.2d at 750. This court should presume that the legislature would have used the phrase "any civil action or appeal or personal restraint petition" had it meant to limit cases such as the one filed by Mr. Troupe. *Id.*

For all these reasons, if the statute is ambiguous, it must be interpreted to cover civil actions and appeals other than personal restraint petitions. The clerk and commissioner were correct to waive Mr. Troupe's filing fee.

- C. If applicable to personal restraint petitions, RCW 4.24.430 violates due process and equal protection.

Due process and equal protection “require that indigent litigants have access to the courts and require a complete waiver of fees.” *Jafar*, 177 Wn.2d at 529 (citing *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) and *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)).

A person with means may file a new personal restraint petition challenging conditions of confinement, even if she or he has previously had cases dismissed as “frivolous or malicious.” RCW 4.24.430. If the new petition is frivolous, it can be summarily dealt with under the “preliminary review” procedure set forth in RAP 16.8.1.

As Commissioner Schmidt noted in his ruling, applying the statute to Mr. Troupe “would deprive [him] of his only mechanism for challenging the conditions of his confinement.” Ruling (filed June 18, 2015). Mr. Troupe should not be made to suffer unconstitutional confinement without any recourse, simply because he lacks funds. The clerk and commissioner correctly waived his filing fee. The commissioner’s ruling should not be modified.

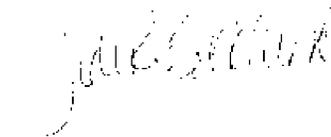
CONCLUSION

The Court of Appeals has inherent authority to waive Mr. Troupe's filing fee. In addition, RAP 16.8 requires waiver of the filing fee because there is no indication that Mr. Troupe is acting in bad faith. Furthermore, RCW 4.24.430 does not apply to personal restraint petitions. Finally, if the statute does apply, it is unconstitutional.

For all these reasons, the clerk correctly waived the filing fee and the commissioner acted appropriately by reaffirming that decision. The motion to modify should be denied.

Respectfully submitted on October 20, 2015.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Petitioner



Manek R. Mistry, WSBA No. 22922
Attorney for the Petitioner

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Petitioner's Supplemental Brief, postage prepaid, to:

David Troupe, DOC #765714
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

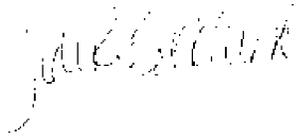
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Office of the Attorney General
aaronw@atg.wa.gov

I filed the Petitioner's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 20, 2015.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Petitioner

BACKLUND & MISTRY

October 20, 2015 - 3:47 PM

Transmittal Letter

Document Uploaded: 5-472996-Supplemental Appellant's Brief.pdf

Case Name: In re the PRP of David Troupe

Court of Appeals Case Number: 47299-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Supplemental Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

aaronw@atg.wa.gov