33095-8-III

FILED
Oct 05, 2015
Court of Appeals
Division III
State of Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL LEWIS VICKERS,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 5889
Pasco, Washington 99301
(509) 545-3561

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction and sentencing of the Appellant.

III. ISSUES

1. Does the record support the court's finding that the Defendant has the ability to pay his legal financial obligations at a rate of $50/mo after release?
2. Is RCW 43.43.7541 constitutional as applied to this Defendant who has the ability to pay the $100 fee?

IV. STATEMENT OF THE CASE

The Brief of Appellant does not challenge the Defendant's conviction in this appeal, but only the imposition of fines under his sentence.

The Defendant Nathaniel Vickers was charged with delivering methamphetamine and delivering hydrocodone/dihydrocodeinone in a

public park. CP 10-12, 19-21. The informant testified at trial that the Defendant told her he could get just about anything. RP 149. On different days, he sold the informant methamphetamine for $40 and ten pills of hydrocodone for $50. RP 150, 159, 162-63. In each transaction, a young bicycle courier would deliver the drugs to the Defendant immediately before he collected the money and transferred the drugs to the informant. RP 137-42, 166-67, 202-03, 207-08, 223, 228-29.

Prior to trial, the Defendant represented that the jail was preventing him from communicating with anyone, such that he could not prepare for trial. RP 8-9. After the prosecutor and the jail sergeant contradicted that record, the Defendant acknowledged that he was in contact with friends and family. RP 9-10. His attorney acknowledged that he had met with his client in person "at least a dozen times," spoken with him over the phone, and read the file to him. RP 11-12. "I'm as prepared as a person can be." RP 12.

The jury convicted on the second count. CP 47-48. At sentencing, the court inquired as to the Defendant's employment. RP 291. The Defendant replied only that he was on disability. RP 291. The Defendant has been previously employed as a mail room worker. CP 5-6. His attorney requested a drug treatment sentencing alternative. RP 290. The

Defendant had no scorable criminal history. CP 71.

The court found the 52 year old Defendant had the ability or likely future ability to pay his legal financial obligations. CP 1, 72; RP 290. The court ordered the Defendant to pay $3256.70 at a rate of $50 per month beginning 90 days after release. CP 74. This amount includes the mandatory $100 DNA fee under RCW 43.43.7541. CP 73.

The Defendant Nathaniel Vickers challenges for the first time on appeal the record supporting the lower court's finding of his ability to pay legal financial obligations (LFO's). Brief of Appellant (BOA) at 3.

V. ARGUMENT

A. THE SENTENCING COURT'S UNCHALLENGED FINDING REGARDING THE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS IS SUPPORTED IN THE RECORD.

As the Defendant acknowledges, he did not object to the finding of ability to pay his LFO's or their imposition so as to preserve this claim for review. BOA at 8.

He cites *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 683 (2015) in support of his challenge. BOA at 8. There the Washington Supreme Court held that "it is well settled" that a defendant who fails to object at the time of sentencing, "is not automatically entitled to review."

State v. Blazina, 182 Wn.2d at 832. None of the exceptions in RAP 2.5(a) apply. *State v. Blazina*, 182 Wn.2d at 833. It held that the court of appeals "properly declined discretionary review" of the challenge. *State v. Blazina*, 182 Wn.2d at 834. The *Blazina* court only opted to review the challenge in an exercise of its discretion. *State v. Blazina*, 182 Wn.2d at 835.

The Defendant argues that it is more efficient to remand a case to the sentencing judge who is already familiar with the case to make the ability to pay inquiry. BOA at 4-5. But that court has already made the individualized inquiry. RP 291. The court was not impressed with the Defendant's claim to be on disability and was not willing to rely on the Defendant's representation alone. The Defendant had been dishonest with the court immediately before trial. RP 8-12.

(Even if court believed the Defendant was on disability, to be on SSDI, a claimant need only allege that he cannot return to a previous job and that the disability has lasted or will last at least one year.[1] People on SSI or SSDI in Washington State partake of WIPA (Work Incentive Planning & Assistance Projects) employment support programs.[2] Therefore, being on disability is not the same being unable to work and

[1] http://www.ssa.gov/planners/disability/dqualify4.html.
[2] https://www.dshs.wa.gov/ra/division-vocational-rehabilitation/benefits-planning

certainly not the same as being unable to earn a mere $50 a month.)

The court's finding relies instead upon other evidence on the record. The court was aware that the Defendant was a 52 year old man who could get just about any illegal substance to sell. The court was aware that the Defendant had arranged for a sophisticated courier service such that only he handled the money and the risk of him being found in possession of illegal substances was kept to a minimum. The court was aware that the Defendant had previously been employed in a mail room, before choosing this criminal occupation. The court knew the Defendant had no previous felony convictions, which meant that he owed no fines under any other felony sentences. The court knew that the Defendant had requested a DOSA (drug offenders sentencing alternative), and that the program requires an offender attend treatment usually at the offender's expense. RCW 9.94A.660.

As the *Duncan* opinion explains, at imposition, the State's burden of proof is so low that it can be met by a single reference in a presentence report in which the defendant described himself as employable. *State v. Duncan*, 180 Wn. App. at 250, (citing *State v. Lundy*, 176 Wn. App. 96, 106, 308 P.3d 755 (2013)). That burden is met here.

The Defendant has worked in the past, although more recently he

has preferred to support himself through criminal enterprise. He is an English speaker. He is resourceful as evidenced by his illegal drug selling scheme. Although the Defendant claims to be illiterate, whether on his own or with the assistance of others, he has filed letters and a Statement of Additional Grounds with the courts demonstrating that he has the support of friends and the ability to influence others for his own interests. CP 17, 52-69, 146-54. He believed he could come up with funds for treatment if a DOSA were entered. Because the State's burden is low, on this record, the record is more than sufficient to justify the lower court's finding that he will be find some employment sufficient to earn $50/month.

The Defendant's argument that indigency equals no ability to pay is faulty logic. Indigency alone is not a prohibition against the imposition of legal financial obligations. *State v. Lundy*, 176 Wn. App. 96, 99, 308 P.3d 755 (2013). There is a significant difference between one's ability to pay $50/mo (which can be earned by mowing one lawn every other week) and being immediately able to come up with the thousands of dollars necessary to retain an attorney and transcribe a record. In any case, indigency is a condition, not an ability. And it is not a static condition. The challenge must be denied.

B. THE DEFENDANT HAS NO STANDING TO RAISE A CONSTITUTIONAL CHALLENGE TO RCW 43.43.7541 WHERE HE PLAINLY HAS THE ABILITY TO PAY THE $100 FINE.

This Court has recently decided that regardless of previous felony convictions and sample collection, a criminal defendant is mandated to pay the $100 DNA collection fee, which will be used to fund the state DNA database and agencies that collect samples. *State v. Thornton,* 188 Wn. App. 371, 353 P.3d 642 (2015).

The Defendant now argues that a mandatory LFO, in particular the one required under RCW 43.43.7541 for a mere $100 fee, is unconstitutional as applied to a defendant who lacks the ability to pay. The Defendant's premise fails. The court has found that *he* does not lack the ability to pay. Therefore, *he* is not a member of that class. Accordingly, he does not have standing to make this challenge on behalf of other criminal defendants who may lack the ability to pay. RAP 3.1 (only an aggrieved party may seek review by the appellate court).

Even were there standing, the challenge must fail. Substantive due process protects against arbitrary or capricious government action. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006). The collection of a mere $100 after a guilty plea or finding of guilt beyond

reasonable doubt of a felony in order to support a criminal database is not arbitrary or capricious government action. Substantive due process requires that deprivations of property be substantively reasonable, supported by legitimate justification, and rationally related to a legitimate state interest. *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013). The Defendant acknowledges that the State has a legitimate interest in collecting the fee, but argues that imposition upon defendants who cannot pay does not rationally serve that interest. BOA at 13. The collection of a small fee from convicted criminals in order to police those same criminals is rationally related to a state interest. The Defendant acknowledges the $100 fee "is such a small amount that most defendants would likely be able to pay." BOA at 14.

The Defendant argues that because the fee is not prioritized, it *could* be the cause for the accumulation of significant interest. BOA at 14. Again, an appeal cannot be based on a hypothetical. The appellant must be actually aggrieved. However, *if* down the road a payment of $50/mo comes to impose a manifest hardship on the Defendant, the legislature and the courts have provided a mechanism for relief. Under RCW 10.01.160(4), a defendant may petition for remission of any portion of unpaid costs, including interest, if it imposes a hardship on the defendant

or his immediate family. The court has created court forms CR 08.0800 and CR 08.0810 to assist a defendant in filing such a petition. And legal aid offices have additional forms for this purpose. The law has provided for this hypothetical should it come into existence.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: October 5, 2015.

Respectfully submitted:

Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Susan Marie Gasch <gaschlaw@msn.com> Nathaniel Lewis Vickers (#380236) Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 5, 2015, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**