

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
Respondent,)
)
v.)
)
DARYL LAMAR BERRY,)
)
Appellant.)
)

No. 75579-0-I
DIVISION ONE
UNPUBLISHED OPINION
FILED: September 25, 2017

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
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PER CURIAM. Daryl Berry appeals the victim penalty assessment (VPA) imposed following his conviction for first degree criminal trespass. For the first time on appeal, he contends the statute authorizing the mandatory VPA assessment is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay them. He concedes this contention is not ripe for review under our decision in State v. Shelton, 194 Wn. App. 660, 671-74, 378 P.3d 230 (2016), review denied, 187 Wn.2d 1002, 386 P.3d 1088 (2017),¹ but contends Shelton is wrongly decided because it relied on a distinguishable case -- State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992). We adhere to our decision in Shelton.

Regardless of whether Curry is distinguishable in some respect, it still supports Shelton's holding that an *as applied substantive due process challenge* to financial obligations is not ripe until the State attempts to collect them. Curry, 118 Wn.2d at 917; see also State v. Curry, 62 Wn. App. 676, 681, 814 P.2d 1252 (1991), aff'd, 118 Wn.2d 911, 917, 829 P.2d 166 (1992). We adhere to that

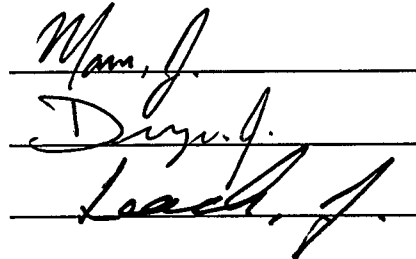
¹ Accord State v. Lewis, 194 Wn. App. 709, 714-15, 379 P.3d 129, review denied, 186 Wn.2d 1025, 385 P.3d 118 (2016).

holding in Shelton, which applies equally to DNA and VPA assessments/fees.² We also adhere to Shelton's holding that as-applied due process claims cannot constitute manifest constitutional error under RAP 2.5(a) until the State seeks to enforce collection of the fees or imposes a sanction for failure to pay.³ While this court does have discretion to review Berry's claim under RAP 2.5(a) in the absence of manifest constitutional error, the claim is not ripe and Berry has not demonstrated that a significant risk of hardship will result from declining review at this time. See Shelton, 194 Wn.App. at 670; State v. Cates, 183 Wn.2d 531, 536, 354 P.3d 832 (2015).

Finally, even if Berry's contentions were ripe for review and could be raised for the first time on appeal, they would fail under State v. Seward, 196 Wn. App. 579, 384 P.3d 620 (2016), review denied, 188 Wn.2d 1015, 396 P.3d 349 (2017) (imposition of VPA, DNA collection fee, and criminal filing fee prior to any individualized determination of ability to pay is rationally related to a legitimate state interest).

Affirmed.

For the court:



² State v. Tyler, 195 Wn. App. 385, 404 n.11, 382 P.3d 699 (2016) (applying Shelton to mandatory VPA and rejecting argument that RCW 10.01.160(3) applies to mandatory financial obligations);

³ Shelton, at 672-73 (RAP 2.5(a)(3) bars challenge to VPA, DNA fee and filing fee for the first time on appeal because the claimed error is not "manifest" "[u]ntil the State attempts to enforce collection of the . . . fee or impose sanctions for failure to pay."); accord Lewis, 194 Wn. App. at 715.