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Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL SAECHANG MA, Appellant.	No. 47226-1-II UNPUBLISHED OPINION

MAXA, J. – Michael Ma appeals the sentence for his residential burglary conviction, challenging the imposition of certain legal financial obligations (LFOs) mandated by statute: a crime victim penalty assessment (RCW 7.68.035(1)(a)), a DNA fee (RCW 43.43.7541), and a criminal filing fee (RCW 36.18.020(2)(h))[1]. The Supreme Court in *State v. Blazina* emphasized that the trial court must make an individualized inquiry into a defendant's current and future ability to pay before imposing *discretionary* LFOs under RCW 10.01.160. 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Ma argues that the trial court must make the same inquiry before imposing *mandatory* LFO's under other statutes. He also argues that imposing mandatory LFOs on a

[1] RCW 7.68.035 and 36.18.020 were amended in 2015. LAWS OF 2015, ch. 265, §§ 8 and 28, respectively. These amendments do not affect the issues in this case. Accordingly, we refrain from including the word "former" before these statutes.

defendant who is unable to pay them violates equal protection and substantive due process guarantees.

We hold that (1) under the plain language of the applicable statutes, a sentencing court is required to impose mandatory LFOs and therefore has no obligation to assess the defendant's ability to pay them; and (2) imposing mandatory LFOs on indigent criminal defendants does not violate equal protection or substantive due process. Accordingly, we affirm Ma's sentence and the imposition of mandatory LFOs consisting of the crime victim penalty assessment, DNA fee, and criminal filing fee.

FACTS

The State charged 32-year-old Ma with one count of residential burglary. A jury found him guilty of this charge.

The trial court sentenced Ma to four months of incarceration. The trial court also imposed $800 in mandatory LFOs: a crime victim penalty assessment of $500, a DNA fee of $100, and a criminal filing fee of $200. Ma appeals his sentence.

ANALYSIS

A. IMPOSITION OF MANDATORY LFOS

Ma argues that trial court has an obligation to assess a defendant's current and future ability to pay before imposing mandatory LFOs. We disagree.

1. Statutory Language

Specific statutes required the trial court to impose the challenged LFOs as part of Ma's sentence. RCW 7.68.035(1)(a) provides that a $500 crime victim penalty assessment "*shall be imposed*" for every felony conviction and the amount of the penalty "*shall be*" $500. (Emphasis

added.) Former RCW 43.43.7541 (2011) provides that every felony sentence "*must include*" a $100 fee, 80 percent of which must be deposited in the DNA database account. (Emphasis added.) RCW 36.18.020(2)(h) provides that upon conviction in superior court, the defendant "*shall be liable*" for a $200 fee for services of the court clerk. (Emphasis added.) None of these statutes requires that the trial court consider the defendant's ability to pay these fees.

RCW 7.68.035(1)(a) and RCW 36.18.020(2)(h) expressly use the word "shall" when discussing fees. The word "shall" presumptively creates an imperative duty rather than conferring discretion. *Blazina*, 182 Wn.2d at 838. The word "must" as used in former RCW 43.43.7541 has the same meaning.[2] *State v. Thornton*, 188 Wn. App. 371, 375, 353 P.3d 642 (2015).

In *State v. Curry*, the Supreme Court addressed the crime victim penalty assessment in RCW 7.68.035(1)(a). 118 Wn.2d 911, 917-18, 829 P.2d 166 (1992). The court held that the penalty was mandatory and noted that, unlike RCW 10.01.160[3], RCW 7.68.035(1)(a) did not provide that the penalty could be waived for indigent defendants. *Id.*

In *State v. Lundy*, this court discussed the same three mandatory LFOs imposed here. 176 Wn. App. 96, 102, 308 P.3d 755 (2013). The court stated that "the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations.

[2] Regarding the DNA fee, former RCW 43.43.7541 (2002) required trial courts to impose a DNA fee "unless the court finds that imposing the fee would result in undue hardship on the offender." In 2008 the legislature removed the hardship language to make the DNA fee mandatory regardless of hardship. *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009).

[3] RCW 10.01.160 was amended in 2015. LAWS OF 2015, 3d Spec. Sess., ch. 35, § 1. This amendment does not affect the issues in this case. Accordingly, we refrain from including the word "former" before this statute.

For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that *a defendant's ability to pay should not be taken into account*." *Id.* (emphasis added). This court described the sentencing court's finding of the defendant's present or future ability to pay as "surplusage." *Id.* at 103.

This court recently confirmed the mandatory nature of the victim penalty assessment and DNA fee in *State v. Mathers*, 193 Wn. App. 913, 918, ___ P.3d ___ (2016), *petition for review filed*, No. 93262-0 (Wash. June 16, 2016). Other courts have agreed that imposition of the LFOs at issue here is mandatory for all sentences regardless of the defendant's ability to pay. *State v. Clark*, 191 Wn. App. 369, 373, 362 P.3d 309(2015) (victim penalty assessment, DNA fee and criminal filing fee); *Thornton*, 188 Wn. App. at 374-75 (DNA fee); *State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (victim penalty assessment and DNA fee); *State v. Thompson*, 153 Wn. App. 325, 336, 338, 223 P.3d 1165 (2009) (DNA fee).

Ma points out that RCW 9.94A.753 states that restitution "shall" be ordered, but also states that "the court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." He argues that because the legislature did not use similar language in the mandatory LFO statutes, it must have intended to allow trial courts to waive mandatory LFOs if the offender lacks the ability to pay.

Ma cites *State v. Conover*, in which the Supreme Court stated that "the legislature's choice of different language indicates a different legislative intent." 183 Wn.2d 706, 713, 355 P.3d 1093 (2015). But in *Conover* the legislature used different language in subsections of the same statute. Ma cites no authority for the proposition that we should compare the language of

statutes in different RCW chapters that involve different legislative intent. Therefore, we reject this argument. *See Mathers*, 193 Wn. App. at 918-21.

We hold that under the plain language of the applicable statutes, a trial court must impose mandatory LFOs and therefore is not required to assess the defendant's ability to pay them.

2. Inapplicability of RCW 10.01.160(3) and *Blazina*

Ma argues that RCW 10.01.160(3) requires that a trial court consider a defendant's ability to pay before imposing mandatory LFOs and that the Supreme Court's application of that statute in *Blazina* controls over *Curry* and *Lundy*. We disagree.

RCW 10.01.160(1) states that a trial court may require a defendant to pay "costs." RCW 10.01.160(3) states that a trial court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." In *Blazina*, the Supreme Court held that RCW 10.01.160(3) requires the trial court to make an individualized inquiry into a defendant's current and future ability to pay before imposing LFOs. 182 Wn.2d at 838.

But RCW 10.01.160(3) clearly applies only to "costs" awarded under RCW 10.01.160(1). RCW 10.01.160(2) states that "[c]osts shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program . . . or pretrial supervision." The victim penalty assessment, DNA fee, and criminal filing fee do not fall within this definition. As a result, these fees are not subject to RCW 10.01.160(3). *See Clark*, 191 Wn. App. at 374.

Ma claims that *Blazina* applies broadly to all LFOs, discretionary and mandatory. But the court's holding was expressly limited to whether RCW 10.01.160(3) requires the trial court to consider a defendant's ability to pay. *Blazina*, 182 Wn.2d at 839. Because RCW

10.01.160(3) applies only to costs awarded under RCW 10.01.160(1), we do not interpret *Blazina* as addressing mandatory LFOs. Further, although the court in *Blazina* does refer generally to "LFOs" throughout the opinion, the opinion makes clear that it was discussing only discretionary LFOs. *Id.* at 837 (framing the defendants' argument that the sentencing court had certain obligations "in order to impose discretionary LFOs under RCW 10.01.160(3)").

We hold that RCW 10.01.160(3) and *Blazina* are inapplicable to the imposition of mandatory LFOs.

3. Inapplicability of GR 34(a)

Ma argues that General Rule (GR) 34(a) supports a holding that a trial court can waive mandatory LFOs. We disagree.

GR 34(a) provides that a person may seek, on the basis of indigent status, the waiver of mandatory filing fees or surcharges required to obtain access to judicial relief. This rule was adopted to "ensure that indigent litigants have equal access to justice." *Jafar v. Webb*, 177 Wn.2d 520, 523, 303 P.2d 1042 (2013).

However, GR 34(a) clearly applies only to civil litigants who must pay filing fees to seek relief in the courts. It has no application to criminal defendants, who are not required to pay filing fees, have access to the courts, and already have been convicted. And the payment of LFOs imposed as part of a criminal sentence is completely different than a civil filing fee. *See Mathers*, 193 Wn. App. at 923-24.

We hold that GR 34(a) is inapplicable to the imposition of mandatory LFOs.

C. EQUAL PROTECTION CHALLENGE

Ma argues that requiring trial courts to impose mandatory LFOs without the possibility of waiver violates equal protection because trial courts can waive mandatory filing fees for indigent *civil* litigants under GR 34 but cannot waive mandatory LFOs for criminal defendants.[4] We disagree.

1. Legal Principles

The Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution guarantee equal protection under the law. "Equal protection requires that similarly situated individuals receive similar treatment under the law." *Harris v. Charles*, 171 Wn.2d 455, 462, 256 P.3d 328 (2011). We review constitutional challenges de novo. *State v. Schmeling*, 191 Wn. App. 795, 798, 365 P.3d 202 (2015).

The appropriate level of review in equal protection claims depends on the nature of the classification or the rights involved. *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). We apply a strict scrutiny standard when state action involves suspect classifications like race, alienage and national origin and/or fundamental rights. *Id.* We apply intermediate scrutiny for semi-suspect classifications and/or important rights. *Id.* Otherwise, we apply rational basis review. *Id.*

[4] Ma also argues that the imposition of mandatory LFOs violates equal protection (and implicates the right to travel) because some counties waive fees for indigent defendants and some do not. We decline to address this argument because nothing in the record establishes the inconsistent imposition of mandatory LFOs in different counties.

Ma is not a member of a suspect or semi-suspect class, and he does not argue that the imposition of mandatory LFOs implicates a fundamental or important right. Therefore, we assume without deciding that rational basis review applies here.

Rational basis review is a highly deferential standard, and we will uphold a statute under this standard unless " 'it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.' " *In re Det. of Stout*, 159 Wn.2d 357, 375, 150 P.3d 86 (2007) (quoting *State v. Thorne*, 129 Wn.2d 736, 771, 921 P.2d 514 (1996)). Rational basis requires only that the means employed by the statute be rationally related to a legitimate State goal, and not that the means be the best way of achieving that goal. *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996).

2. Different Treatment for Indigent Criminal and Civil Litigants

Ma's equal protection argument is cursory. He bases his claim on *Jafar*, in which the Supreme Court held that under GR 34, trial courts must waive all filing fees for indigent civil litigants even though the filing fee statutes are mandatory. 177 Wn.2d at 526-31. He also cites *James v. Strange*, in which the United States Supreme Court held that removing protections from criminal defendants that applied to civil judgment debtors violated equal protection. 407 U.S. 128, 135, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972).

Here, there is a rational basis for treating civil litigants differently than indigent criminal defendants. As noted above, GR 34 allows the waiver of mandatory filing fees for indigent civil litigants to provide equal access to justice. *Jafar*, 177 Wn.2d at 526. Without such a waiver, indigent parties would not be able to seek relief in the courts. *Id.* at 529-31. Criminal defendants

facing sentencing are not required to pay filing fees, have access to the courts, and already have been convicted.

Ma's reliance on *James* also is misplaced. There, the Court held unconstitutional a Kansas statute that allowed the State to obtain a civil judgment against a defendant to recover the cost of counsel in a criminal trial. 407 U.S. at 135, 141-42. The statute expressly treated criminal defendants subject to civil judgments for counsel costs differently than other civil judgment debtors, stripping from criminal defendants all of the exemptions provided to civil judgment debtors to prevent enforcement of such a judgment. *Id.* at 135. There are no similar circumstances here.

We hold that requiring trial courts to impose mandatory LFOs against indigent criminal defendants even though filing fees can be waived for indigent civil litigants does not violate equal protection.

C. SUBSTANTIVE DUE PROCESS CHALLENGE

Ma briefly argues that imposition of mandatory LFOs on indigent defendants violates substantive due process. We disagree.

1. Legal Principles

The Fifth and Fourteenth Amendments to the United States Constitution and article I, section 3 of the Washington Constitution provide that no person may be deprived of life, liberty, or property without due process of law. "Substantive due process protects against arbitrary and capricious government action." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006). An action violates substantive due process if a deprivation of life, liberty or property is substantively unreasonable or is not supported by legitimate justification. *Nielsen v. Dep't of*

Licensing, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013). Again, we review constitutional challenges de novo. *Schmeling*, 191 Wn. App. at 798.

As with equal protection, the level of review we apply to a due process challenge depends on the nature of the right involved. *Amunrud*, 158 Wn.2d at 219. We apply a strict scrutiny standard when state action interferes with a fundamental right. *Id.* at 220. But we apply a rational basis standard when a fundamental right is not affected. *Id.* at 222.

Once again, Ma does not argue that the imposition of mandatory LFOs implicates a fundamental right and seems to suggest that we should apply rational basis review. Therefore, we assume without deciding that rational basis review applies here.

Under rational basis review, we determine whether a rational relationship exists between the challenged law and a legitimate state interest. *Id.* In making this determination, we "may assume the existence of any necessary state of facts which it can reasonably conceive." *Id.* The rational basis standard is highly deferential to the challenged action. *Nielsen*, 177 Wn. App. at 56. "The rational basis test is the most relaxed form of judicial scrutiny." *Amunrud*, 158 Wn.2d at 223.

2. Imprisonment for Nonpayment of LFOs

Ma argues that imposition of mandatory LFOs on indigent defendants violates due process because indigent defendants may be imprisoned for failure to pay LFOs. We disagree.

In *Curry*, the Supreme Court addressed the constitutionality of the mandatory victim penalty assessment under RCW 7.68.035(1). 118 Wn.2d at 917. The defendants argued that "the statute could operate to imprison them unconstitutionally in the future if they are unable to pay the penalty." *Id.* The court determined that the victim penalty assessment contained

safeguards to prevent imprisonment and that no defendant would be incarcerated for the inability to pay the assessment unless nonpayment was willful. *Id.* at 918. Therefore, the court held that 'the victim penalty assessment is neither unconstitutional on its face nor as applied to indigent defendants." *Id.*; *see also State v. Blank*, 131 Wn.2d 230, 240-42, 930 P.2d 1213 (1997).

This court in *Lundy* cited to *Curry* in discussing imposition of mandatory LFOs. 176 Wn. App. at 102-03. This court stated, "[O]ur courts have held that these mandatory obligations are constitutional so long as " 'there are sufficient safeguards in the current sentencing scheme to prevent *imprisonment* of indigent defendants.' " *Id.* (quoting *Curry*, 118 Wn.2d at 918). Relying on *Curry* and *Lundy*, this court recently rejected a defendant's claim that the DNA fee violated his due process rights based on the risk of imprisonment. *Mathers*, 193 Wn. App. at 927-29.[5]

We reject the argument that imposition of mandatory LFOs on indigent defendants violates substantive due process because those defendants may be imprisoned for failure to pay LFOs.

3. Rational Basis Analysis

Ma concedes that the State has a legitimate interest in collecting mandatory LFOs. But he argues that imposing mandatory LFOs on indigent defendants violates substantive due process

[5] Ma argues that indigent defendants are regularly imprisoned for failing to pay fines. But he presents no convincing authority that supports this claim. *See State v. Nason*, 168 Wn.2d 936, 945, 233 P.3d 848 (2010) (state may imprison an offender capable of paying his cost if the defendant willfully refuses to pay without violating constitutional protections).

because imposing fees on offenders who are unable to pay them does not rationally serve any state interest.[6] We disagree.

Imposing mandatory LFOs is rationally related to the legislature's interest in collecting those fees on two levels. First, imposing mandatory LFOs on all convicted offenders without assessing their ability to pay is rationally related to collection because although some offenders may be unable to pay mandatory LFOs, some offenders will be able to pay. So imposing mandatory LFOs on all offenders will allow the State to collect some of those fees.

Second, imposing mandatory LFOs on offenders like Ma who are indigent at the time of sentencing is rationally related to collection because that indigency may not always exist. We can conceive of a situation in which an offender who is indigent at sentencing is able to pay the mandatory LFOs at some future time. So it is not unreasonable to believe that imposing mandatory LFOs on indigent offenders would allow the State to collect some of those fees.

We reject the argument that imposition of mandatory LFOs on indigent defendants violates substantive due process because some of those defendants may be unable to pay them.

CONCLUSION

We affirm Ma's sentence and the imposition as mandatory LFOs of the crime victim penalty assessment, DNA fee, and criminal filing fee.

[6] *Curry* and *Lundy* do not directly apply to this argument. In neither case is there any indication that the defendant made the argument Ma asserts – that imposing a mandatory fee on offenders who are unable to pay the fee does not rationally serve the legislature's interest in funding a DNA database. And in neither case did the court conduct a rational basis analysis. The same is true for *Mathers*.

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A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

I concur:

WORSWICK, J.

BJORGEN, C.J. (concurring) — I agree with the result reached by the majority, but disagree with its analysis of the substantive due process challenge to mandatory legal financial obligations (LFOs).

As the majority points out, the rational basis standard is highly deferential. Its basic demand is a rational relationship between the challenged law and a legitimate state interest. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 571 (2006). In making this determination, we may assume the existence of any necessary state of facts which can reasonably be conceived. *Id.*

The central purpose of mandatory LFOs is to raise money to help fund certain elements of the criminal justice system. Requiring monetary payments from those who cannot and will not be able to pay them does nothing to serve that purpose. Without a *Blazina*-like[7] individualized determination of ability to pay, these mandatory assessments will generate obligations having no reasonable relation to their purpose.

The majority analysis would salvage a reasonable relationship through a dragnet rationale: because these assessments would be imposed on some who can pay, their imposition on those who cannot serves the purpose of raising money. In a temporal variant of the same approach, the majority analysis also argues that imposing these obligations on those who cannot pay serves the same purpose, because they may not be indigent at some point in the future.

The rational basis test does allow us to posit any reasonably conceivable state of facts in finding the needed rational relationship. Thus, we posit that some, perhaps even many, who are assessed mandatory LFOs can and will pay, which plainly serves the purpose of raising money.

[7] *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

However, a license to engage in a *gedankenexperiment* to discover ways in which a measure could serve a purpose is not necessarily a license to impose that measure in ways that do nothing to serve the purpose. Without the individualized determination required by *Blazina*, mandatory LFOs will be imposed in many instances that have no relationship to their purpose. In those instances viewed by themselves, the assessment fails the rational basis test.

The rational basis test, though, does not demand the same tailored relationship between means and purpose typically found in strict scrutiny. It may be that the degree of over-inclusiveness found in the majority's dragnet rationales is tolerated in the rational basis test. On the other hand, imposing these obligations on those who cannot pay can keep these individuals in violation of their sentence terms long after any punishment has been satisfied, *see Blazina*, 182 Wn.2d at 835, thus increasing the system costs LFOs are intended to relieve. The self-contradiction in such a system lies close to the arbitrariness that not even the rational basis test can tolerate.

These issues are not discussed in the briefing. Without the treatment by the parties these questions of substantive due process require, we should not hold that our mandatory LFOs meet the requirements of substantive due process. Instead, I would affirm, holding that the briefing is inadequate for us to consider the challenge to mandatory LFOs based on substantive due process. *See Health Ins. Pool v. Health Care Auth.*, 129 Wn.2d 504, 511, 919 P.2d 62 (1996).

Bjorgen, C.J.

BJORGEN, C.J.