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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. JOSEPH JAMES CHESLEY, Appellant.	No. 50098-1-II UNPUBLISHED OPINION

WORSWICK, J. — Joseph James Chesley appeals the imposition of certain legal financial obligations (LFOs) mandated by statute: a criminal victim penalty assessment, a deoxyribonucleic acid (DNA) collection fee, and a criminal filing fee. Chesley argues that the imposition of mandatory LFOs violates substantive due process and that the trial court erred in failing to comply with former RCW 10.01.160(3) (2015)'s requirement that the court consider a defendant's ability to pay before imposing costs. Chesley raises additional issues in his statement of additional grounds for review (SAG). We affirm the imposition of the mandatory LFOs.

FACTS

The State charged Chesley with one count of failure to remain at injury accident,[1] attempting to elude a pursuing police vehicle,[2] and unlawful possession of a stolen vehicle,[3] as

[1] RCW 46.52.020.

[2] RCW 46.61.024(1).

[3] RCW 9A.56.068.

well as three counts of unlawful possession of a controlled substance.[4] Chesley pleaded guilty to all counts.

The trial court sentenced Chesley to 60 months of incarceration. The trial court also imposed $800 in mandatory LFOs: a crime victim penalty assessment of $500, a DNA collection fee of $100, and a criminal filing fee of $200. Chesley did not object to the trial court's imposition of LFOs at sentencing. Chesley appeals.

ANALYSIS

Chesley argues that the imposition of mandatory LFOs on indigent defendants violates substantive due process and that the trial court erred in failing to comply with former RCW 10.01.160(3)'s requirement that the court consider a defendant's ability to pay before imposing costs. We hold that Chesley waived his substantive due process argument and that former RCW 10.01.160(3) does not apply to mandatory LFOs.

I. SUBSTANTIVE DUE PROCESS

Chesley argues for the first time on appeal that the imposition of mandatory LFOs on indigent defendants violates substantive due process. The State argues that Chesley's claim is not ripe for review. The State also argues that Chesley waived this argument on appeal. We hold that Chesley's claim is ripe for our review, but we determine that his argument is waived.

[4] RCW 69.50.4013(1). The three unlawful possession of a controlled substance charges related to Chesley's alleged possession of hydrocodone, cocaine, and methamphetamine.

A. *Ripeness*

As an initial matter, the State argues that Chesley's claim is not ripe for review until the State attempts to enforce the collection of the LFOs. We disagree.

To determine whether a pre-enforcement challenge to the imposition of LFOs is ripe for review, we must find that "'the issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *State v. Sanchez Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (quoting *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008)).

Our Supreme Court addressed the ripeness of a pre-enforcement challenge to LFOs in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). There, the State similarly argued that the defendant's challenge to the imposition of LFOs was not ripe for review because the State had not yet attempted to collect the defendant's LFOs. 182 Wn.2d at 832 n.1. The Washington Supreme Court rejected the State's argument, determining that a trial court's entry of an LFO order satisfies all three conditions of ripeness. 182 Wn.2d at 832 n.1. Accordingly, Chesley's claim is ripe for our review.

B. *Constitutional Challenge*

Chesley argues that the imposition of mandatory LFOs on indigent defendants violates substantive due process. The State argues that Chesley waived his challenge because he did not object to the LFOs during sentencing. We agree with the State because Chesley fails to raise a manifest constitutional error.

Generally, we will not consider an issue raised for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). However, a defendant may raise an objection not properly preserved at trial if it is a manifest constitutional error. RAP 2.5(a)(3);

O'Hara, 167 Wn.2d at 98. An error is manifest if it is apparent in the record and actually affects the defendant's rights. *State v. Swetz*, 160 Wn. App. 122, 127, 247 P.3d 802 (2011). To determine whether the defendant claims a manifest constitutional error, we must review the substance of the claimed error. *See, e.g.*, *State v. Bobenhouse*, 166 Wn.2d 881, 891-95, 214 P.3d 907 (2009).

"We review constitutional challenges de novo." *State v. Beaver*, 184 Wn.2d 321, 331, 358 P.3d 385 (2015). Our state and federal constitutions prohibit the deprivation of life, liberty, or property without due process of law. U.S. CONST. amends. V, XIV; WASH. CONST. art I, § 3. The due process clause of the federal constitution confers both procedural and substantive protections. *Beaver*, 184 Wn.2d at 332. Substantive due process bars wrongful and arbitrary government conduct. 184 Wn.2d at 332. Government action violates substantive due process if a deprivation of life, liberty, or property is substantively unreasonable or is not supported by a legitimate justification. *Nielsen v. Dep't of Licensing*, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013).

Where, as here, the government's action does not interfere with a fundamental right, we apply a rational basis standard. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 571 (2006). Under rational basis review, we determine whether a rational relationship exists between the challenged law and a legitimate state interest. 158 Wn.2d at 222. In making this determination, we "may assume the existence of any necessary state of facts which [we] can reasonably conceive." 158 Wn.2d at 222. The rational basis standard is highly deferential to the challenged action. *Nielsen*, 177 Wn. App. at 53.

Chesley concedes that the State has a legitimate interest in collecting mandatory LFOs.[5] But Chesley argues that imposing mandatory LFOs on indigent defendants violates substantive due process because imposing fees on defendants who are unable to pay them does not rationally serve any state interest. We disagree.

The imposition of mandatory LFOs is rationally related to the legislature's interest in collecting those fees for two reasons. First, imposing mandatory LFOs on all convicted defendants without assessing their ability to pay is rationally related to collection because although some defendants may be unable to pay mandatory LFOs, some defendants will be able to pay the fees. *State v. Seward*, 196 Wn. App. 579, 585, 384 P.3d 620 (2016), *review denied*, 188 Wn.2d 1015, 396 P.3d 349 (2017). Imposing mandatory LFOs on all defendants allows the State to collect some of those fees.

Second, imposing mandatory LFOs on defendants like Chesley who are indigent at the time of sentencing is rationally related to collection because the defendant's indigency may not always exist. *Seward*, 196 Wn. App. at 585. We can conceive a situation in which a defendant who is indigent at sentencing is able to pay mandatory LFOs at some future time. As a result, it

[5] In *State v. Seward*, 196 Wn. App. 579, 384 P.3d 620 (2016), *review denied*, 188 Wn.2d 1015, 396 P.3d 349 (2017), this court noted that

> (1) the DNA collection fee serves the legitimate state interest of funding the collection, analysis, and retention of convicted offenders' DNA profiles to facilitate future criminal identifications, (2) the [criminal victim penalty assessment] serves the legitimate state interest of funding comprehensive programs to encourage and facilitate testimony by victims and witnesses of crimes, and (3) the filing fee serves the legitimate state interest in compensating the court clerks for their official services.

is not unreasonable to believe that imposing mandatory LFOs on all indigent defendants would allow the State to collect some of those fees.

Accordingly, Chesley fails to show that there is no rational relationship between imposing mandatory LFOs against indigent defendants, and his substantive due process argument fails. Because the imposition of mandatory LFOs on indigent defendants does not violate substantive due process, Chesley fails to raise a manifest constitutional error. Therefore, Chesley's argument is waived on appeal.

II. ABILITY TO PAY INQUIRY

Chesley also argues that the trial court erred in failing to comply with former RCW 10.01.160(3)'s requirement that the court consider a defendant's ability to pay before imposing costs. We disagree.

Former RCW 10.01.160(1) provides that a trial court may require a defendant to pay "costs." However, the trial court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." Former RCW 10.01.160(3). In *Blazina*, the Washington Supreme Court held that former 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 discretionary LFOs. 182 Wn.2d at 838.

The crime victim penalty assessment, DNA collection fee, and criminal filing fee are all authorized by statute. RCW 7.68.035(1)(a); former RCW 43.43.7541 (2015); former RCW 36.18.020(2)(h) (2015). The crime victim penalty assessment statute states that "[w]hen any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035(1)(a).

The DNA collection statute provides: "Every sentence imposed for a crime specified in [former] RCW 43.43.754 must include a fee of one hundred dollars." Former RCW 43.43.7541. Former RCW 36.18.020(2)(h) states that "an adult defendant in a criminal case shall be liable for a fee of two hundred dollars" after a guilty plea.

Chesley argues that former RCW 10.01.160(3) requires this court to consider a defendant's ability to pay prior to imposing *any* LFOs and to refrain from imposing LFOs on indigent defendants. Former RCW 10.01.160(3) clearly applies only to "costs" awarded under former RCW 10.01.160(1). "Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program . . . or pretrial supervision." Former RCW 10.01.160(2). The crime victim penalty assessment, DNA collection fee, and criminal filing fee do not fall within this definition. Moreover, this court has previously recognized that the crime victim penalty assessment, DNA collection fee, and criminal filing fee are mandatory. *State v. Mathers*, 193 Wn. App. 913, 919-21, 376 P.3d 1163 (2016); *State v. Clark*, 191 Wn. App. 369, 372-74, 362 P.3d 309 (2015). Accordingly, neither former RCW 10.01.160(3) nor *Blazina* apply to the particular LFOs Chesley challenges. *See Seward*, 196 Wn. App. at 587.

III. APPELLATE COSTS

Chesley asks that this court refrain from awarding appellate costs against him because he is indigent. A commissioner of this court can consider whether to award appellate costs in due course under RAP 14.2 if the State files a cost bill and if Chesley objects to that cost bill.

STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Chesley contends that he received ineffective assistance of counsel because his attorney promised him a more favorable plea deal than he received and because his discovery contained another person's name and incident number yet his attorney instructed him to sign his guilty plea. The record on appeal does not contain any facts regarding Chesley's conversations with his trial attorney. The record also does not contain any discovery containing a different name or cause number than Chesley's. Because Chesley's claims depend entirely on facts outside the record on appeal, we do not address his claims. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).[6]

We affirm the imposition of the mandatory LFOs.

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.

Worswick, P.J.

Sutton, J.

[6] "If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

BJORGEN, J. (dissenting) — For the reasons set out in my dissent in *State v. Seward*, 196 Wn. App. 579, 384 P.3d 620, *review denied*, 188 Wn.2d 1015, 396 P.3d 349 (2017), I believe that the mandatory legal financial obligations (LFOs) here assessed fail the rational basis test and deprive Joseph Chesley of substantive due process.

I agree that we apply the highly deferential rational basis test in determining whether these mandatory LFOs offend the requirements of substantive due process. The basic demand of the test 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, without doubt a legitimate state interest. Imposing these obligations on those with ability to pay serves that interest. On the other hand, requiring monetary payments from those who cannot and reasonably will not be able to pay them does nothing to serve that purpose. To the contrary, the principal consequence of imposing mandatory LFOs on such persons is to harness them to a debt that they realistically have no ability to pay, keeping them in the orbit of the criminal justice system and within the gravity of temptations to reoffend that our system is designed to still. Levying mandatory LFOs against those who cannot pay them thus increases the system costs they were designed to relieve. Without a *Blazina*-like[7] individualized determination of ability to pay, the assessment of mandatory LFOs not only fails

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

to serve its purpose, but actively contradicts that purpose. The self-contradiction in such a system crosses into an arbitrariness that not even the rational basis test can tolerate.

The majority analysis would salvage a reasonable relationship through a type of 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 be able to pay at some point in the future.

These rationales attempt to save a law that contradicts its purpose in some instances by pointing out that the law will serve its purpose in others or by hypothesizing that the contradiction may someday cease. This contradiction between purpose and effect in some instances is not effaced by its absence in others. Nor is the contradiction relieved by the doubtful hope that it may some day pass away. These uses of the imagination are far removed from positing different ways in which a law may serve its purpose, which is the sort of speculation invited by the rational basis standard.

For these reasons, I would conclude that Chesley has raised a manifest constitutional error and that the assessment of mandatory LFOs with no inquiry into ability to pay fails the rational basis test and deprives the defendant of substantive due process. Therefore, I dissent.

Bjorgen, J.

BJORGEN, J.