No. 82333-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES ROBERT NASON,

Petitioner.

MEMORANDUM OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Decisions of Other Jurisdictions

Constitutional Provisions

Rules

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 24,000 members, dedicated to the preservation of civil liberties. The ACLU strongly supports one of the most fundamental of constitutional rights: due process of law. It has participated in numerous cases involving due process as *amicus curiae*, as counsel to parties, and as a party itself.

ISSUES ADDRESSED BY *AMICUS*

1. Is a constitutional issue warranting this Court's review presented when a county adopts a policy allowing the courts to preemptively order future terms of incarceration for failure to keep pace with LFO payments, without inquiry into whether the missed payments were due to inability to pay and were therefore not willful? RAP 13.4(b)(3).
2. Should this Court allow courts all over the state to issue orders requiring defendants to report to jail on a specified date to serve months of incarceration when the evidence indisputably shows a defendant currently lacks ability to pay LFOs due to such things as homelessness, unemployment despite persistent effort to obtain employment, and lack of income other than food stamps or other minimal benefits necessary for basic survival? RAP 13.4(b)(3), (4).

STATEMENT OF THE CASE

In 2006, Spokane County adopted an "automatic jail" policy for defendants who do not keep up with their monthly legal financial obligations (LFOs). Under this scheme, defendants who do not comply with the court-ordered payment schedule must report to jail on a particular date to serve a predetermined sentence. There is no provision for a hearing to inquire into the defendant's current ability to pay before he goes to jail, and thus no hearing to determine whether the failure to pay was willful. Rather, the onus is on the defendant to either report to jail or move for a stay.

Petitioner James Nason has spent nearly 300 days in jail – 10 times his original sentence – in part because of this "auto-jail" policy. In 1999, at age 18, Mr. Nason pled guilty to second-degree burglary because he "helped [a friend] take a couple of bags out of a storage shed." 7/8/99 RP 6. Based on an offender score of zero, the court imposed a sentence of 30 days in confinement, and legal financial obligations ("LFOs") totaling $735.00. 7/8/99 RP 11.

Although Mr. Nason made some payments, he could not keep pace with his obligations and was repeatedly sanctioned. CP 21, 31, 38-39, 116, 122-23. In February of 2006, the county clerk filed a violation report for failure to pay and failure to report to the clerk's office. CP 46-47. Mr.

Nason did not receive actual notice of the violation hearing and was arrested on a bench warrant after he failed to appear. CP 49-50, 124-27.

The court held a violation hearing on July 7, 2006. By this time, Mr. Nason's LFOs had more than doubled due to interest. 7/7/06 RP 11. A county clerk testified:

> I went over to the jail with Deputy Kyle to see Mr. Nason to ask him why he has not been paying on his LFOs. He stated that he has no income, that he is homeless, and he's living out of his car with his brother. I asked him if he's made any type of attempts to seek employment. And he stated that he's been walking up and down Sprague looking for employment different places, such as McDonald's. He said he also had applied at Manpower; however, he had failed the preemployment test.

7/7/06 RP 5-6. According to the clerk, Mr. Nason reported that his only income was $152 in food stamps. 7/7/06 RP 6.

Mr. Nason agreed with the clerk's representation of his poverty and ongoing efforts to secure employment. He mentioned that his mother was also trying to get him a job through her employer. 7/7/06 RP 10. He stated that although he had attempted to gain employment, he had no source of income and was therefore unable to pay. 7/7/06 RP 8.

The prosecutor argued that Mr. Nason willfully failed to pay. She reasoned, "you can collect aluminum cans in order to pay your LFOs," and

"we don't have any evidence that he did that."[1] 7/7/06 RP 8.

Over Mr. Nason's objections, the court found him in willful violation of its orders and imposed a 60-day jail sanction. CP 51. Also over his objections, the court ordered him to start paying LFOs on August 15, 2006. Mr. Nason had argued that he would not have enough time to earn money between his August 10th release date and the August 15th due date. 7/7/06 RP 11. Without any discussion on the record, the court also imposed an automatic sanction for any future failure to pay:

> The defendant shall pay **$25** or more monthly, effective **8/15/06**. The case is to be reviewed **1/10/07** for compliance. If the defendant has not complied with the payment schedule, nor filed a motion with the court for a stay by the review date, the defendant is to report to jail on **1/17/07** by 4:00pm to serve **60 days** in jail.

CP 52. The phrase "the case is to be reviewed [on X date] for compliance" does not mean there is a review hearing; it means a county clerk reviews the file in his or her office.

The clerk reviewed the case as planned in January of 2007, and determined Mr. Nason had neither paid nor filed a motion to stay. She filed a violation report stating, "Therefore, Mr. Nason is required to report to jail on 1/24/07 by 4 p.m. to serve the 60 days specified in the attached

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[1] Mr. Nason would have to collect approximately 320,000 cans to pay off his LFOs. See http://www.earthworksrecycling.com/prices/index.html (prices per pound as of 12/5/08); http://www.recycle.novelis.com/Recycle/EN/Educators/Library/Recycling+Pop+Quiz/ (weight of aluminum can).

Order Enforcing Sentence. The defendant is in further violation for not turning himself in to the jail on [1/17/07]." CP 53.

Mr. Nason was once again arrested on a bench warrant in April 2007. At the subsequent hearing the clerk explained, "we're here today because we had to do a warrant. He did not turn himself in to jail," which he was required to do automatically upon failure to pay. 4/6/07 RP 4.

Defense counsel stipulated to the current violation but challenged the auto-jail scheme as unconstitutional and objected to any auto-jail orders. 4/6/07 RP 5-7. She said, "my clients are getting thrown in jail without a hearing if they haven't filed a stay." 4/6/07 RP 10. Counsel argued that due process requires a court to determine whether nonpayment was willful before ordering confinement. 4/6/07 RP 6-8 (citing Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)). She described the new scheme's circumvention of due process as "disgraceful." 4/6/07 RP 12.

Judge Michael Price, who is apparently a member of the committee that created the new auto-jail plan, presided over the hearing to determine its constitutionality. 4/6/07 RP 9-13; 4/27/07 RP 1-10. The judge ruled that auto-jail orders pass constitutional muster because "a defendant has a right to ask for a stay hearing prior to that report date." 4/27/07 RP 8, 9. He denied the motion to strike the report date for future

violations. The judge ordered **120** days' confinement for the current violations, and, over Mr. Nason's objections, imposed another auto-jail order requiring him to report for incarceration in the future if he again failed to pay:

> The defendant shall pay **$30** or more monthly, effective **8/1/07**. The case is to be reviewed **10/31/07** for compliance. If the defendant has not complied with the payment schedule, nor filed a motion with the court for a stay by the review date, the defendant is to report to jail on **11/14/07** by 4:00pm to serve **60 days** in jail.

CP 109.

Mr. Nason appealed and argued, inter alia, that the auto-jail orders violate due process. The Court of Appeals affirmed, erroneously characterizing the auto-jail orders as "agreed" orders that "do not impose a jail term." State v. Nason, 146 Wn. App. 744, 192 P.3d 386 (2008).

Mr. Nason filed a petition for review urging this Court to hold that the auto-jail scheme violates due process. The petition should be granted.

ARGUMENT

Spokane County's "auto-jail" scheme violates due process because it allows courts to order the future incarceration of individuals who do not keep pace with their LFO payments, without a hearing to determine whether the failure to pay was willful or instead due to present inability to pay.

Spokane County is attempting to save costs by preemptively ordering incarceration for future failure to pay, thereby obviating the need for hearings. Whether the new scheme furthers the cost-saving goal is

questionable.[2] Regardless, it is undeniably unconstitutional. The right to a hearing on ability to pay before being jailed is a hallmark of due process, not an optional formality. The new automatic jail policy creates an unconstitutional debtors' prison, and must be struck down.

A court violates due process where, as here, it "automatically turn[s] a fine into a prison sentence." Bearden, 461 U.S. at 674. Equal protection concerns are also implicated in the "fundamentally unfair" decision to revoke probation when an indigent is unable to pay. Id. at 666-67. The Constitution requires that "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for failure to pay," and cannot order imprisonment unless the individual willfully refused to pay. Id. at 672; U.S. Const. amend. 14. "Washington law ... follows Bearden in requiring the court to find that a defendant's failure to pay a fine is intentional before remedial sanctions may be imposed." Smith v. Whatcom County District Court, 147 Wn.2d 98, 112, 52 P.3d 485 (2002).

The trial court excused the omission of a hearing requirement from the new auto-jail scheme by noting that a defendant could move for a stay.

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[2] "Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment." Tate v. Short, 401 U.S. 395, 399, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971).

4/27/07 RP 8, 9. But due process does not countenance such burden-shifting. It is the "court's duty to inquire" about the reasons for nonpayment. Bearden, 461 U.S. at 672; Smith, 147 Wn.2d at 112. It may not place the onus on the defendant to demand to be heard.

Nor may a court assume that any future failure to pay is willful simply because the defendant was able to pay in the past. "[I]f costs are imposed on a person who truly cannot pay, *or who later becomes truly unable to pay*, that person cannot be incarcerated." State v. Bower, 64 Wn. App. 227, 232, 823 P.2d 1171, review denied, 119 Wn.2d 1011, 833 P.2d 386 (1992) (emphasis added). The court must inquire into ability to pay at the time of enforcement. State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997).

A recent Court of Appeals decision is instructive. See In re Nagle, 146 Wn. App. 395, 190 P.3d 516 (2008). In Nagle, an attorney failed to appear at a scheduled pretrial hearing. The trial court automatically found him in contempt and imposed a two-day jail sentence, without holding a hearing and inquiring into the reasons for the lawyer's absence. Id. at 397-98. Although the trial court amended the jail sanction at a subsequent hearing, the Court of Appeals held that this *post hoc* procedure did not cure the initial violation. The inquiry into whether a violation is willful must be contemporaneous with the imposition of the sanction. The Court

of Appeals recognized the trial court's need "to expedite the resolution of cases." Id. at 404. "But summarily finding an attorney in contempt for nonappearance is not an available tool." Id.

Similarly, while there may be a need to expedite the resolution of failure-to-pay cases, preemptively holding a defendant in contempt is not an available tool. Indeed, "the argument cannot even be made here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody." Morrissey v. Brewer, 408 U.S. 471, 483, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (requiring notice, a hearing, and other protections before parole revocation); State v. Badger, 64 Wn. App. 904, 907-08, 827 P.2d 318 (1992) (applying Morrissey to Washington's sentence violation hearings).

As discussed in Mr. Nason's petition for review, the Florida Supreme Court properly struck down a similar automatic jail order imposed on a defendant in that state. Pet. for Review at 8-10 (citing Stephens v. State, 630 So.2d 1090 (Fla. 1994)). The Washington Court of Appeals, in contrast, erroneously characterized the auto-jail orders imposed upon Mr. Nason as "agreed" orders. Nason, 146 Wn. App. at 3, 13. The orders were not agreed. Mr. Nason vehemently contested (1) the State's allegation that his failure to pay was willful, (2) the court's conclusion that he should be able to start paying five days following

release from jail notwithstanding his homelessness and unemployment, (3) the court's order of a future report date and sentence in the event he could not pay, and (4) the constitutionality of the auto-jail scheme in general. 7/7/06 RP; 4/6/07 RP; 4/27/07 RP.[3]

In sum, Spokane's new automatic jail policy violates due process because it absolves the court of its duty to inquire – a duty this Court has recognized "Bearden plainly demands." Smith, 147 Wn.2d at 112. This Court should grant review.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court accept Mr. Nason's petition for review.

Respectfully submitted this ____ day of December, 2008.

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[3] The confusion appears to be based on the fact that the court uses the same preprinted forms for both agreed orders and orders entered after contested hearings like Mr. Nason's. The preprinted forms have footers that say "LFO Agreed Order," but the footer obviously doesn't accurately describe orders entered after contested hearings.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 82333-2
	)	
JAMES NASON,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF DECEMBER, 2008, I CAUSED THE ORIGINAL **MEMORANDUM OF *AMICUS CURIAE* AMERICAN CIVIL UNION OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF DECEMBER, 2008.

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