ELECTRONICALLY FILED JAN 03, 2019 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-1366

Upon the Petition of

THE STATE OF IOWA,
Plaintiff-Appellee,

And Concerning

JANE DOE,
Defendant-Appellant

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE BECKY GOETTSCH,
DISTRICT ASSOCIATE JUDGE

APPELLANT'S FINAL REPLY BRIEF

Robert J. Poggenklass
IOWA LEGAL AID
1111 9th Street, Suite 230
Des Moines, IA 50314
Tel: 515-243-1198
Fax: 515-244-4618
Email: rpoggenklass@iowalaw.org
ATTORNEY FOR
DEFENDANT/APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3
ISSUES PRESENTED FOR REVIEW 5
ARGUMENT 7
I. The State May Not Use Denial of Expungement as a Tool to Collect Court-Appointed Attorney Fees 7
A. Doe Alleges Disparate Treatment, Not Merely Disparate Impact 8
B. *Doe is Similarly Situated to Other Defendants Who Seek Expungement* 10
II. Other Courts Have Not Adequately Addressed this Equal Protection Claim 14
III. There is No Rational Basis for the Extraordinary Remedy of Denial of Expungement to Collect Court-Appointed Attorney Fees 16
IV. The Trial Court's Reasons for Denying Expungement Do Not Withstand Scrutiny 18
CONCLUSION 19
COST CERTIFICATE 21
CERTIFICATE OF COMPLIANCE 22

TABLE OF AUTHORITIES

Cases

Ames Rental Property Ass'n v. City of Ames, 736 N.W.2d 255 (Iowa 2007) 11

James v. Strange, 407 U.S. 128 (1972) 7, 10, 17

King v. State, 818 N.W.2d 1 (Iowa 2012)...8, 9

McQuiston v. City of Clinton, 872 N.W.2d 817 (Iowa 2015)...................................8

People v. Bradus, 57 Cal.Rptr.3d 79 (Cal. Ct. App. 2007) 14, 15

People v. Covington, 98 Cal.Rptr.2d 852 (Cal Ct. App. 2000) 14

Rinaldi v. Yeager, 284 U.S. 305 (1966)...16

State v. Brown, 905 N.W.2d 846 (Iowa 2018)...10

State v. Campbell, 2016 WL 4543763 (Iowa Ct. App. Aug. 31, 2016) 13

State v. Colbert, No. 2015AP1880-CR, 2017 WL 5054306 (Wis. Ct. App. Nov. 1, 2017).. 15, 16

State v. Dudley, 766 N.W.2d 606 (Iowa 2009).. 9, 12, 17

State v. Ford, No. 18-0780, 2018 WL 6130310 (Iowa Ct. App. Nov. 21, 2018)....13

State v. Hanes, 79 P.3d 1070 (Ct. App. Idaho 2003)..15

State v. Snyder, 203 N.W.2d 280 (Iowa 1972) 16

United States v. Ledbetter, No. 92-30212, 1993 WL 280403 (9th Cir. July 26, 1993)...15

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) 11

Bills and Statutes

2015 Iowa Acts ch. 83, § 1 18

Iowa Code § 815.9 11

Iowa Code § 901C.2.. 6, 7, 8, 13, 16

Iowa Code § 909.1 14

ISSUES PRESENTED FOR REVIEW

I. The State May Not Use Denial of Expungement as a Tool to Collect Court-Appointed Attorney Fees

Cases

Ames Rental Property Ass'n v. City of Ames, 736 N.W.2d 255 (Iowa 2007)

James v. Strange, 407 U.S. 128 (1972)

King v. State, 818 N.W.2d 1 (Iowa 2012)

McQuiston v. City of Clinton, 872 N.W.2d 817 (Iowa 2015)

State v. Brown, 905 N.W.2d 846 (Iowa 2018)

State v. Campbell, 2016 WL 4543763 (Iowa Ct. App. Aug. 31, 2016)

State v. Dudley, 766 N.W.2d 606 (Iowa 2009)

State v. Ford, No. 18-0780, 2018 WL 6130310 (Iowa Ct. App. Nov. 21, 2018)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

Bills and Statutes

Iowa Code § 815.9

Iowa Code § 901C.2

II. Other Courts Have Not Adequately Addressed this Equal Protection Claim

Cases

People v. Bradus, 57 Cal.Rptr.3d 79 (Cal Ct. App. 2007)

People v. Covington, 98 Cal.Rptr.2d 852 (Cal Ct. App. 2000)

State v. Colbert, No. 2015AP1880-CR, 2017 WL 5054306 (Wis. Ct. App. Nov. 1, 2017)

State v. Hanes, 79 P.3d 1070, 1072 (Ct. App. Idaho 2003)

State v. Snyder, 203 N.W.2d 280 (Iowa 1972)

United States v. Ledbetter, No. 92-30212, 1993 WL 280403 (9th Cir. July 26, 1993)

Bills and Statutes

Iowa Code § 901C.2

Iowa Code § 909.1

III. There is no Rational Basis for the Extraordinary Remedy of Denial of Expungement to Collect Court-Appointed Attorney Fees

Cases

James v. Strange, 407 U.S. 128 (1972)

Rinaldi v. Yeager, 284 U.S. 305 (1966)

State v. Dudley, 766 N.W.2d 606 (Iowa 2009)

Bills and Statutes

Iowa Code § 901C.2

IV. The Trial Court's Reasons for Denying Expungement Do Not Withstand Scrutiny

Bills and Statutes

2015 Iowa Acts ch. 83, § 1

ARGUMENT

I. The State May Not Use Denial of Expungement as a Tool to Collect Court-Appointed Attorney Fees

In *James v. Strange*, 407 U.S. 128 (1972), the United States Supreme Court held that a State may not impose unduly harsh or discriminatory terms merely because an obligation for indigent defense fee reimbursement is to the public treasury rather than to a private creditor. The State can avail itself of a wide variety of collection methods, available to the ordinary civil judgment creditor, to induce payment of validly assessed court-appointed attorney fees from those who have the ability to pay — most notably, garnishment under Iowa Code chapter 642 and execution under Iowa Code chapter 626. The debtor who lacks the present ability to pay may in turn assert debtor's exemptions, protecting at least a portion of income and assets needed for basic economic self-sufficiency. Under current law, however, the State may also do what no ordinary civil judgment creditor can: deny the critical economic relief of expungement.

In its brief, the State argues that the prepayment of costs requirement in Iowa Code § 901C.2(1)(a)(2) is "rationally related to legitimate government interests in limiting expungement where outstanding debts remain." Appellee's Br. at 23. Further, the State contends that "conditional availability of expungement [is] the best incentive to offer to motivate repayment of indigent defense fees after an acquittal/dismissal." *Id.* at 25.

Through Iowa Code § 901C.2(1)(a)(2), the State can reach those who lack the ability to pay and who would otherwise be protected from garnishment by denying the critical economic relief of expungement. Denial of this relief constitutes an extraordinary collection method, available only through the exercise of state power. In this way, the State accomplishes exactly what the Kansas statute struck down in *Strange* attempted to do — bypass the protections afforded to a debtor who acquired counsel through the private market.

A. *Doe Alleges Disparate Treatment, Not Merely Disparate Impact*

The State has advanced two legal arguments as to why Doe's equal protection claim fails. First, the State mischaracterizes Doe as alleging disparate impact, rather than disparate treatment. Appellee's Br. at 14–17. In an equal protection analysis, the concepts of disparate treatment and disparate impact are used to determine whether two classes are indeed similarly situated. *McQuiston v. City of Clinton*, 872 N.W.2d 817, 830–31 (Iowa 2015). Generally, an equal protection violation requires a showing "that the defendants are treating similarly situated persons differently." *King v. State*, 818 N.W.2d 1, 24 (Iowa 2012).

In support of its argument, the State cites the test described by the Iowa Supreme Court in *King v. State*. *King*, however, dealt with claims that did not involve an affirmative state action, but rather the failure of the State to enact

standards and programs that the plaintiffs alleged led to disparate educational outcomes:

> A related way of saying the same thing is to point out that equal protection claims require 'state action.' Disparate treatment by someone other than the state (which the state, because of its inaction, failed to prevent) generally does not amount to an equal protection violation.

Id. at 25. The court explains that the *King* plaintiffs' disparate treatment theory failed because they alleged only that the defendants had not taken the proper affirmative steps to eliminate perceived differences in educational outcomes for various classifications of public school students. *Id*.

Here, unlike in *King*, there is no question that the denial of expungement for some but not all classes of defendants under Iowa Code § 901C.2(1)(a)(2) is an affirmative state action. The State has engaged in disparate treatment by requiring prepayment of court-appointed attorney fees for those reliant on the State for their defense before it will grant an expungement in a dismissed case. This debt collection method does not apply to criminal defendants who had the means to obtain — and may still owe fees to — counsel obtained through the private market.

For cases that result in dismissal of or acquittal on all counts, court-appointed attorney fees are the only type of debt that can be validly assessed. *See State v. Dudley*, 766 N.W.2d 606, 624 (Iowa 2009) ("As an acquitted defendant, Dudley may have been liable for the costs of his defense, but certainly not for the court costs.

This distinction is obvious, not subtle"); *see also State v. Brown*, 905 N.W.2d 846, 856–57 (Iowa 2018). Consequently, while Iowa Code § 901C.2(1)(a)(2) speaks broadly about repayment of court debt writ large, the only type of validly assessed debt that might bar relief are court-appointed attorney fees.

B. *Doe is Similarly Situated to Other Defendants Who Seek Expungement*

The second argument raised by the State is that Doe fails to satisfy the equal protection requirement that she is similarly situated to others affected by the law. Appellee's Br. at 17–20. The State mischaracterizes the classes Doe seeks to compare by raising several different and inconsistent formulations throughout its brief — for example, between indigents and non-indigents generally, or between people who have and have not paid their debts to the State. The classification raised by Doe, however, is the same as that raised in *Strange*: i.e., those who must repay the State for their defense versus those who must repay an attorney acquired through the private market. As stated by the *Strange* Court:

> The indigent's predicament under this statute comes into sharper focus when compared with that of one who has hired counsel in his defense. Should the latter prove unable to pay and a judgment be obtained against him, his obligation would become enforceable under the relevant provisions of the Kansas Code of Civil Procedure. But, unlike the indigent under the recoupment statute, the code's exemptions would protect this judgment debtor.

Strange at 137.

“The first step of an equal protection claim is to identify the classes of similarly situated persons singled out for differential treatment.” *Ames Rental Property Ass’n v. City of Ames*, 736 N.W.2d 255, 259 (Iowa 2007). Equal protection “does not require all laws to apply uniformly to all people.” *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009). In *Ames Rental*, the court quickly identified the classes: related persons and unrelated persons living in single-family zones. *Ames Rental* at 259. The court then moved on to the next step of the equal protection analysis. *Id*.

In *Varnum*, the court spent considerably more time addressing the defendants’ argument that homosexual couples and heterosexual couples were not similarly situated. *Varnum* at 884. The court found that the plaintiffs were “similarly situated in every important respect, but for their sexual orientation.” *Id.* The court further noted, “this distinction cannot defeat the application of equal protection analysis through the application of the similarly situated concept because, under this circular approach, all distinctions would evade equal protection review.” *Id*. The *Varnum* Court questioned the usefulness of the threshold “similarly situated” analysis, leaving future parties to argue its applicability. *Id*. at 884 n.9.

The State’s argument demonstrates why the Iowa Supreme Court has expressed skepticism about the threshold test. First, the State claims Doe is not

similarly situated because she has not repaid her debt, stating this puts her in a different position than applicants for expungement who have repaid their debts. This tautology seeks to avoid the equal protection question altogether. The State's method of collecting court-appointed attorney fees — by denying expungement — violates equal protection.

Second, the State points out that there are several different groups of indigent defendants: those who avoid the requirement of paying court-appointed attorney fees by waiving their right to counsel and those whose cases were dismissed before appointed counsel can render billable services. The State further notes that indigency is a broad category, and the legislature's definition allows courts to include defendants with higher incomes who would face substantial hardship in hiring a private attorney. *See* Iowa Code § 815.9(1)(b)-(c). This portion of the State's argument relies on an overbroad misidentification of the two classes. Doe has not alleged disparate treatment of every indigent defendant versus every non-indigent defendant. Rather, she has alleged disparate treatment of those individuals who owe court-appointed attorney fees to the State, versus those who retained counsel through the private market.

The State then pivots to *State v. Dudley*, which held that courts must determine a defendant's reasonable ability to pay before imposing court-appointed attorney fees in dismissed cases. *Dudley*, 766 N.W.2d 606. The parties agree on

what *Dudley* stands for. Where the parties differ is that the State assumes that the *Dudley* reasonable ability to pay assessment happens in every dismissed case, or at least that it happened here. Appellee's Br. at 18–19. Neither is true. The Iowa Court of Appeals recently vacated a defendant's sentence where the trial court issued an order stating that the defendant had the reasonable ability to pay his attorney fees, a finding was not supported by the record. *State v. Ford*, No. 18-0780, 2018 WL 6130310 (Iowa Ct. App. Nov. 21, 2018); *see also State v. Campbell*, No. 15-1181, 2016 WL 4543763, at *4 (Iowa Ct. App. Aug. 31, 2016) (vacating a defendant's sentence where the ability to pay determination "was premature and lacked evidentiary support"). Doe's case was dismissed on September 15, 2009, less than four months after *Dudley* was decided. The court's only reference to attorney fees is a handwritten imposition on the dismissal order: "Costs to Δ." App. 23.

The State argues that the real classification is between the expungement applicants who have paid their debts and those who are ineligible because they were found reasonably able to pay and failed to do so. Doe, however, does not fit in either of these two classes. She is an indigent defendant who was assessed court-appointed attorney fees without any finding of her reasonable ability to pay.

Moreover, even if Doe had been validly found to have the ability to pay, her situation could have changed since the determination, making her unable to pay now.

The alternative remedies available to the State and any other civil judgment creditor take into consideration the present ability to pay at time of collection. Foremost among these alternative methods are garnishment under Iowa Code Chapter 642 and execution under Iowa Code Chapter 626. The basic self-sufficiency of a debtor without the present ability to pay is at least partially protected by a variety of debtor's exemptions that can be raised during the garnishment process. In contrast, Iowa Code § 901C.2(1)(a)(2) does not consider an applicant's present ability to pay — exactly like the Kansas statute struck down in *Strange*.

II. Other Courts Have Not Adequately Addressed this Equal Protection Claim

The cases from other jurisdictions cited by the State are inapposite to the present situation. In *People v. Covington*, 98 Cal.Rptr.2d 852 (Cal Ct. App. 2000), the court denied expungement because the defendant still owed $88,000 in victim restitution, not court-appointed attorney fees. Unlike court-appointed attorney fees, victim restitution can be owed by both indigent defendants and defendants able to retain counsel, and therefore does not raise the same equal protection implications. In a more analogous case, a California appellate court granted expungement where the defendant owed only court-appointed attorney fees and probation supervision fees. *People v. Bradus*, 57 Cal.Rptr.3d 79 (Cal. Ct. App. 2007). Although

California policy strongly favors recoupment, the court found that reimbursement of such costs "shall not be a prerequisite" to expungement. *Id.* at 84.

Unlike Iowa Code § 901C.2, the Idaho statute addressed in *State v. Hanes*, 79 P.3d 1070, 1072 (Ct. App. Idaho 2003), gives broad discretion to courts on whether to grant the "extraordinary remedy" of expungement. It is also not clear Hanes owed any court debt when his expungement request was denied, and the decision does not mention court-appointed attorney fees. In *United States v. Ledbetter*, No. 92-30212, 1993 WL 280403 (9th Cir. July 26, 1993), the defendant argued the trial court should not have considered several predicate convictions because his indigency prevented him from paying his restitution, and therefore the convictions ought to have been expunged. Citing the trial court's factual finding that defendant's "failure to pay his restitution fines did not stem from indigence," the Ninth Circuit rejected the argument. Like the other distinguishable cases, the decision does not mention court-appointed attorney fees or *James v. Strange*. Moreover, although imprecise on the nature of the restitution Ledbetter owed, the decision refers to fines on two occasions. *Id.* at *3. Because fines may be imposed whenever the legislature has authorized them, *see* Iowa Code § 909.1, Ledbetter's claim is inapposite to the much narrower equal protection argument raised by Doe.

The closest case cited by the State is *State v. Colbert*, No. 2015AP1880-CR, 2017 WL 5054306 (Wis. Ct. App. Nov. 1, 2017). In *Colbert*, the defendant asked

the court to expunge his case even though he had not paid a $220 supervision fee. *Id.* The court decided it could not address Colbert's equal protection argument because he had made "no meaningful attempt to connect the dots" between his own case and the Wisconsin analog to *State v. Snyder*, 203 N.W.2d 280 (Iowa 1972) (holding that the State may not imprison a person solely because indigence prevents the person from paying a fine). Moreover, like *Strange* and unlike in *Colbert*, Doe's claim is specifically based on nonpayment of court-appointed attorney fees, implicating a narrower classification for equal protection analysis.

III. There is No Rational Basis for the Extraordinary Remedy of Denial of Expungement to Collect Court-Appointed Attorney Fees

In *James v. Strange*, the Court rejected the rationality of singling out those who owed the State for their cost of defense for harsher treatment than those who obtained counsel per the private market. Citing the earlier case of *Rinaldi v. Yeager*, 284 U.S. 305 (1966), which struck down a law imposing transcript fees on appeal against incarcerated defendants but not others, the *Strange* Court stated:

> Rinaldi affirmed that the Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out.' This requirement is lacking where, as in the instant case, the State has subjected indigent defendants to such discriminatory conditions of repayment. This case to be sure, differs from Rinaldi in that here all indigent defendants are treated alike. But to impose these harsh conditions on a class of debtors who were provided counsel as required by the Constitution is to practice, no less than in Rinaldi, a discrimination which the Equal Protection Clause proscribes.

Strange at 140-141. Like the denial of debtor's exemptions struck down in *Strange*, the denial of expungement only to those who owe their attorney fees to the State rather than a private party lacks a rational basis.

The *Strange* Court recognized that recoupment statutes can "betoken legitimate state interests." *Strange* at 141. However, the State in the present case conflates that interest with the methods used to achieve that interest. This was the central issue resolved by *Strange*, i.e. recoupment itself is a rational undertaking, but using methods not available to ordinary civil judgement creditors was not. Furthermore, this Court ruled in *Dudley* that an attempt to circumvent the protection of debtor's exemptions through other means, in that case a court ordered installment plan that ignored debtor's exemptions, was similarly not based on rational classification. *Dudley* at 616–17. In the context of court-appointed attorney fees, Iowa Code § 901C.2(1)(a)(2) attempts to do the same thing — circumvent the protections otherwise available to those who are most economically vulnerable, and "blight[s] in such discriminatory fashion the hopes of indigents for self- sufficiency and self-respect." *Strange* at 141. In order to afford the promise of equal protection under the United States and Iowa Constitutions, the additional barrier to expungement imposed only for those who relied upon the state for their defense cannot withstand rational basis scrutiny.

IV. The Trial Court's Reasons for Denying Expungement Do Not Withstand Scrutiny

Finally, there are a few more points in the trial court's order worthy of attention. In its order denying expungement, the trial court stated, "Defendant was made aware of reimbursing attorney fees and that expungement could not occur until all fees and assessed costs were paid. This was part of the bargain defendant negotiated. She has had several years to pay and may still obtain expungement when the fees are paid." App. 34.

The court's reference to Doe's awareness of the reimbursement requirement apparently refers to the financial affidavit and application for the appointment of counsel she signed in April 2009. App. 15. That document includes some bold print above the signature line: "I understand I may be required to repay the State for my attorney fees and costs." *Id*.

Doe's acknowledgment of the repayment requirement at the time she applied for an attorney does not mean the court that imposed the fees complied with *Dudley* or the subsequent version of Iowa Code § 815.9, nor does it relieve the equal protection problem created by the court's denial of expungement nine years later. Moreover, Doe has requested expungement of her criminal case, not forgiveness of the court-appointed attorney debt owed in that case. Expungement removes a case from the public record, eliminating potential barriers to

employment and housing. Cancellation of debt is a different remedy, and something Doe has not requested in this appeal.

The next two parts of the court's statement, that Doe knew expungement could not occur until she paid these fees and that this was part of the bargain she negotiated, is inaccurate. The dismissal-acquittal expungement law was not enacted until 2015, six years after Doe's case was dismissed. 2015 Iowa Acts ch. 83, § 1. Doe could not have known what the expungement law said at the time her case was dismissed, because the law did not exist.

Finally, the trial court refers to the bargain Doe negotiated. The only record of that bargain is contained in the motion for withdrawal filed by her first court-appointed attorney. The agreement was that Doe would complete a family violence services class by September 15, 2009. "Upon the Defendant's successful completion of said class this case will be dismissed." App. 21–22. The summary of this bargain does not reference the assessment of court-appointed attorney fees and it could not have included an agreement to expunge the case upon dismissal and payment of costs, as the expungement remedy did not exist for several more years.

CONCLUSION

For the reasons stated herein, Doe respectfully asks that this Court reverse the ruling of the district court and grant her request for expungement.

CERTIFICATE OF SERVICE

I certify that this document was served upon the following parties pursuant to Iowa R. Elec. P. 16.316, on January 3, 2019:

Iowa Attorney General's Office by EDMS;

Jane Doe by U.S. Mail.

_/S/___________________________
ROBERT J. POGGENKLASS,
ATTORNEY FOR APPELLANT

COST CERTIFICATE

Pursuant to Iowa R. App. P. 6.903(2)(j) the undersigned hereby certifies that the actual cost of reproducing the necessary copies of this document was $0.

_/S/___________________________
ROBERT J. POGGENKLASS,
ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

   [X] This brief contains 3,076 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

   [ ] This brief uses a monospaced typeface and contains _______ lines of text excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) or the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

   [X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 pt. Times New Roman or

   [ ] This brief has been prepared in a monospaced type face using _____________ with ________________.

/s/ Robert J. Poggenklass — 1/3/2019

Signature — Date