

Honorable FRED VAN SICKLE

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

SHAWN HUSS, a single man, and
others similarly situated,

Plaintiff,

v.

SPOKANE COUNTY, a municipal
corporation,

Defendant,

and

ROB MCKENNA, WASHINGTON
STATE ATTORNEY GENERAL,

Defendant Intervenor.

NO. CV 05 180 FVS

ATTORNEY GENERAL'S
RESPONSE TO
PLAINTIFF'S MOTION
FOR PARTIAL
SUMMARY JUDGMENT

I. INTRODUCTION

COMES NOW Defendant Intervenor Washington State Attorney General, by and through Timothy D. Ford, Deputy Solicitor General, and hereby responds to Plaintiff's motion for partial summary judgment filed November 22, 2005. Plaintiff Shawn Huss's class action lawsuit seeks declaratory relief that Spokane County's official booking fee policy and Wash. Rev. Code § 70.48.390 are facially unconstitutional as depriving persons of their property without due process of law in

1 violation of the Fourteenth Amendment of the United States Constitution. Defendant
2 Attorney General responds to Plaintiff's partial summary judgment motion and herein
3 argues that Wash. Rev. Code § 70.48.390 is facially constitutional.

4 II. FACTS

5 Wash. Rev. Code § 70.48.390 provides statutory authority for Spokane County
6 to assess a booking fee, but does not mandate the assessment of booking fees or the
7 procedures to be used by the county to collect them. Plaintiff's statement of facts notes
8 that Spokane and other counties have implemented Wash. Rev. Code § 70.48.390
9 differently. Plaintiff's statement of facts claims that Wash. Rev. Code § 70.48.390
10 does not provide any provision for either a pre- or post-deprivation hearing before the
11 individual is deprived of his or her money. Wash. Rev. Code § 70.48.390 does not
12 preclude any governing unit from providing a deprivation hearing. Plaintiff does not
13 offer what type of pre- or post-deprivation hearing he believes is necessary to avoid a
14 constitutional violation of the Fourteenth Amendment to the United States
15 Constitution.

16 Plaintiff does not allege any error by Spokane County in the assessment of the
17 booking fee. Plaintiff does not claim that he was wrongfully booked. Plaintiff admits
18 to being arrested and booked at the Spokane County jail on or about October 31, 2004.
19 Therefore, Plaintiff was correctly assessed a booking fee pursuant to Wash. Rev. Code
20 § 70.48.390. The affidavit of Kay Donder states that Plaintiff had \$39.30 taken from
21 him at the time of booking. Plaintiff does not allege that the booking fee was assessed
22 in error due to miscalculation of the fee amount. Plaintiff does not provide any other
23 examples of error in the assessment of the booking fee for any of the other potential
24 class members.

1 Wash. Rev. Code § 70.48.390 requires that the booking fee shall be returned if a
2 person is not charged, is acquitted, or if all charges are dismissed. Plaintiff claims he
3 was released from jail the next day and that all the charges were dropped. The
4 affidavit of Kay Donder states that the sum of \$39.30 was returned to Plaintiff by
5 check dated February 23, 2005.

6 III. ANALYSIS

7 A. Wash. Rev. Code § 70.48.390 Is Not Mandatory And Does Not Preclude 8 Due Process Procedures

9 A successful facial challenge is one where no set of circumstances exists in
10 which the statute, as currently written, can be constitutionally applied. *Wash. State*
11 *Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 4 P.3d 808
12 (2000). The remedy for holding a statute facially unconstitutional is to render the
13 statute totally inoperative. *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790
14 (1999). Plaintiff must show that it is not possible for any county, city, or regional jail
15 to constitutionally implement Wash. Rev. Code § 70.48.390, which provides:

16 A governing unit may require that each person who is booked at a
17 city, county, or regional jail pay a fee based on the jail's actual booking
18 costs or one hundred dollars, whichever is less, to the sheriff's department
19 of the county or police chief of the city in which the jail is located. The
20 fee is payable immediately from any money then possessed by the person
21 being booked, or any money deposited with the sheriff's department or
22 city jail administration on the person's behalf. If the person has no funds
23 at the time of booking or during the period of incarceration, the sheriff or
24 police chief may notify the court in the county or city where the charges
25 related to the booking are pending, and may request the assessment of the
26 fee. Unless the person is held on other criminal matters, if the person is
not charged, is acquitted, or if all charges are dismissed, the sheriff or
police chief shall return the fee to the person at the last known address
listed in the booking records.

1 The language of this provision is not mandatory. No county is under any
2 obligation to assess a booking fee, or to use or not use any particular procedure to
3 assess a booking fee. Plaintiff's statement of facts notes that other counties implement
4 Wash. Rev. Code § 70.48.390 differently. Wash. Rev. Code § 70.48.390 does not
5 preclude the use of pre- or post-deprivation process appropriate to the circumstance.

6 Laws that do not expressly provide pre-deprivation procedures are not facially
7 unconstitutional where such procedures are not precluded. *MacPherson v. Dep't of*
8 *Admin. Servs.*, 340 Or. 117, ___ P.3d ___, 2006 WL 433953 (2006). In *MacPherson*, the
9 court examined whether Measure 37 violated procedural due process under the
10 Fourteenth Amendment where the measure did not provide explicit due process
11 procedures. Measure 37, a voter approved measure that required government to
12 compensate landowners for reductions of real property values or waive such
13 regulations, did not "preclude responsible governmental entities from implementing
14 such predeprivation procedures", even assuming that they are constitutionally required.
15 *Id.* at *12. The *MacPherson* court upheld the constitutionality of Measure 37 where
16 the plaintiff had failed the "heavy burden" of demonstrating that the statute cannot be
17 constitutionally applied under any circumstance. *Id.* at *11 (citing *United States v.*
18 *Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)).

19 Plaintiff must conclusively demonstrate that Wash. Rev. Code § 70.48.390
20 "affirmatively permits the government to deprive plaintiffs of their property without
21 affording procedural due process." *MacPherson*, 2006 WL 433953, at *11. In
22 contrast to *MacPherson*, the Washington State Supreme Court held, in *City of*
23 *Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004), that statutes providing for the
24 mandatory suspension of drivers' licenses without an administrative hearing violated
25 procedural due process. While Measure 37 did not preclude implementation of
26 deprivation procedures, the express language of Washington's license suspension

1 statutes, at Wash. Rev. Code § 46.20.289 and .324(1), construed together, precluded
2 any opportunity for a formal hearing. *Moore*, 151 Wn.2d at 668. The plaintiffs in
3 *Moore* demonstrated that the lack of adequate procedural safeguards to ensure against
4 erroneous deprivation of the interest in a driver's license violated the Fourteenth
5 Amendment.

6 The significance of contrasting *MacPherson* and *Moore* could not be clearer
7 with regard to Plaintiff's facial challenge to the constitutionality of Washington State's
8 booking fee statute. *Moore* held that state law mandated the suspension of a driver's
9 license without an administrative hearing while *MacPherson* did not expressly
10 preclude the use of deprivation procedures. The language of Wash. Rev. Code
11 § 70.48.390, "[a] governing unit may require", is permissive, not mandatory, and does
12 not preclude deprivation procedures. This makes Washington's booking fee statute
13 more like the case of *MacPherson* than like *Moore*.

14 Even assuming for the sake of argument that due process is required, Plaintiff
15 cannot prevail on a facial challenge unless no set of circumstances exists in which
16 Wash. Rev. Code § 70.48.390, as currently written, can be constitutionally applied. As
17 Plaintiff's statement of facts note, some Washington counties implement Wash. Rev.
18 Code § 70.48.390 differently than other counties. Yet, Plaintiff's analysis of due
19 process has been limited to Spokane County's implementation of the booking fee
20 statute without regard to the differences in how other counties implement the same
21 law.

22 Local government is responsible for administering jails and has the authority,
23 consistent with state law, to decide how that is to be done. *See* Wash. Rev. Code
24 § 70.48.071, .180. In 2000, the Washington State Legislature passed an act directing
25 the Washington Association of Sheriffs and Police Chiefs to implement and operate
26 an electronic statewide city and county jail booking and reporting system. Wash.

1 Rev. Code § 36.28A.040(1) (Laws of 2000, ch. 3, § 1, as amended by Laws of 2001,
2 ch. 169, § 3).¹ If a county chooses to receive state or federal funding to implement
3 the booking system, the county shall implement the booking system. Jail booking
4 information includes a minimum of the name of the offender, vital statistics, the date
5 the offender was arrested, the offenses arrested for, the date and time an offender is
6 released or transferred from a city or county jail, and, if available, the mug shot.
7 Wash. Rev. Code § 36.28A.040(3). Counties may implement a booking fee policy
8 pursuant to Wash. Rev. Code § 70.48.390 to recover some of the actual costs of these
9 booking activities. Counties may implement a booking fee policy differently because
10 the plain language of the statute is permissive and it does not mandate any particular
11 process or preclude any deprivation procedures.

12 Pursuant to Spokane County Resolution 04-0160, the Spokane County jail
13 adopted an official policy to implement Wash. Rev. Code § 70.48.390 and collect
14 booking fees. This official policy is attached as Exhibit B to the Declaration of Breean
15 Beggs in Support of Plaintiff's Motion for Partial Summary Judgment.² The official
16 policy states: "The intake fee will be charged after it is determined that the inmate will
17 not be using their funds to bond out of custody." Beggs Decl. in Support of Pl's Partial
18 Mot. Summ. J., Ex. B (Policy 2.00.00 Booking at 11.3.b). From this policy, it is clear
19

20 ¹ This statute does not contain a definition of "booking", but it does list the
21 minimum information the booking and information system should contain. Wash.
22 Rev. Code § 36.28A.040.

23 ² Plaintiff later successfully moved to strike the motion for partial summary
24 judgment and resubmitted a motion for partial summary judgment on November 22,
25 2005, but without the exhibits of Spokane County's resolution and the county jail's
26 official policy.

1 that the county jail collection system has flexibility. The policy allows a pre-
2 deprivation process for determining whether an inmate chooses to use his or her funds
3 for bonding. The policy provides due process to ensure that the funds are available for
4 bonding, even if it means that there are no funds to pay the booking fee.

5 Plaintiff has not met his heavy burden of proving that under no set of
6 circumstances could Wash. Rev. Code § 70.48.390 be constitutional. Wash. Rev.
7 Code § 70.48.390 does not expressly preclude deprivation procedures and, therefore,
8 like in *MacPherson*, the booking fee statute is not facially unconstitutional under the
9 Fourteenth Amendment of the United States Constitution.

10 IV. CONCLUSION

11 Wash. Rev. Code § 70.48.390 is not mandatory and does not preclude the
12 application of a deprivation hearing. Plaintiff notes that other counties have
13 implemented Wash. Rev. Code § 70.48.390 differently than Spokane. A successful
14 facial challenge must demonstrate that no circumstances exist where an application of
15 Wash. Rev. Code § 70.48.390 could be constitutional. That would require an analysis
16 of the differences between each and every counties' implementation of Wash. Rev.
17 Code § 70.48.390. Plaintiff does not do this and so his facial challenge must
18 necessarily fail.

19 RESPECTFULLY SUBMITTED this 17th day of March, 2006.

20 ROB MCKENNA
21 Attorney General

22
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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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