NO. 72933-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ELYAS KEROW,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Whether Kerow invited error as to the timeliness of a restitution determination where the prosecution timely petitioned the court for restitution, the court had all information necessary to make its decision, but where the hearing was delayed at to a date Kerow specifically requested; a date that was beyond the 180-day limit imposed by statute.

B. STATEMENT OF THE CASE

Elyas Kerow was charged by information with Possession of a Stolen Vehicle after he was caught running from a car which had been stolen and appeared stripped. CP 1, 18. The State alleged that Elyas Kerow did knowingly receive, retain, possess, conceal and dispose of a stolen car belonging to Brettt Braaten. Kerow later pled guilty to an amended information charging Vehicle Prowl in the Second Degree. CP 7-16, 17.

The plea agreement included an agreement to pay restitution. CP 22. At sentencing on May 16, 2014, the court ordered restitution to be determined at a future hearing and Kerow waived his presence. CP 24-26.

A restitution hearing took place on October 29, 2014, within the 180-day requirement.[1] Counsel for Mr. Kerow did not dispute the claim by United Services Automobile Association but did question a $1,000 deductible owed to the named victim Brett Braaten because the insurance policy holder was Austin Wolff. 1RP 8. Counsel for Mr. Kerow did not doubt there was a connection between Brett Braaten and Austin Wolff but insisted there needed to be a connection established between the parties. 1RP 7-8.

Despite finding that there was documentation sufficient for restitution, the trial court requested the State to provide additional information establishing the relationship between Brett Braaten and Austin Wolff. 1RP 5, 10. The court continued the hearing *sua sponte* and asked the parties to find "...a date they agree on." 1RP 10.

Kerow and the State agreed upon November 18, 2014; a date that was 186 days after sentencing. At the November 18th

[1] RCW 9.94A.753(1) states "When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause. The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have."

hearing, the State provided the trial court with a letter from the insurance policy holder explaining that Austin Wolff is Brett Braaten's father and that Wolff was paying Braaten's automobile insurance. 2RP 5-6. Counsel for Mr. Kerow then asserted that the court could not impose restitution because the time for determining restitution had expired, and counsel cited several cases supporting his position. 2RP 6-9.

The hearing was again continued and the trial court requested "case law" from counsel to determine whether the trial court lost "...jurisdiction." 2RP 11. On December 3, 2015, after receiving argument from the parties and reviewing the audio recording from the October 29, 2014 hearing, the trial court ordered restitution in the amount of $4,641.71 to USAA ($3,641.71) and Brett Braaten ($1,000). 2RP 19; CP 31-32.

C. ARGUMENT

KEROW INVITED ERROR AS TO THE TIMELINESS OF RESTITUTION BY PROPOSING A HEARING DATE BEYOND THE STATUTORILY ALLOWED PERIOD.

Kerow contends that the trial court did not make a finding of "good cause" to continue his initial restitution hearing on October 29, 2014 and that the trial court was thus precluded from ordering

restitution. However Kerow's argument should be rejected because he invited any error as to the timing of the hearing because he proposed a date for the hearing.

A sentencing court's authority to order restitution is statutory. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). The State is obligated to establish the amount of restitution by a preponderance of the evidence. State v. Dennis, 101 Wn. App. 223, 226, 6 P.3d 1173 (2000). Restitution is appropriate when the victim's injuries are causally related to the defendant's crime. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999). The time limit under statute is mandatory unless extended for good cause. State v. Krall, 125 Wn.2d 146, 148-49, 881 P. 2d 1040 (1994).

The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183, citing State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds by State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995); see State v. Pierson, 105 Wn.App. 160, 167, 18 P.3d 1154 (2001) (error invited where defendant agreed to amount of restitution owed but objected to entry of order based on timeliness; restitution

order valid because determination was made within 180-day requirement).

Kerow agreed to the amount claimed, and did not dispute the property lost or its causal connection to his conduct. 1RP 8. The trial court continued Kerow's hearing to address one issue only, the relationship between Braaten and Wolff. 1RP 10. Whether the trial court found "good cause" to continue is immaterial because Kerow invited error by proposing a date beyond 180 days.

Kerow relies upon State v. Granthum, 174 Wn. App. 399, 919 P.3d 21 (2013), a recent Division II decision, which found that a trial court must make express findings of good cause to continue beyond the 180 day requirement, and that agreement by a defendant or his attorney to a subsequent date does not constitute waiver. Id. at 406.

In Granthum, counsel for the defendant motioned to revoke Granthum's previous waiver of appearance and then submitted a withdrawal as counsel. Id. at 401. After granting the requested motions, the court remarked that the next date for restitution was "not going to be appropriate" and continued the hearing for an additional three weeks to allow new counsel adequate time. Based on an incorrect calculation, the hearing was set a week beyond the

180-day requirement. Id. After additional continuances, Granthum objected.

Unlike Granthum, Kerow had entered a plea agreement to pay restitution. There was an amount determined at his initial hearing which was not disputed. Furthermore, the trial court did not propose a hearing date to which Kerow merely acquiesced. Rather Kerow and the prosecutor by agreement *proposed* hearing date which was beyond 180 days. Proposing a date to determine restitution is different from simply agreeing to a date set by the court. The trial court was entitled to rely on the date proposed by Kerow. Indeed, counsel have a duty of candor to the court, and counsel may not propose a date he knows will be a legal futility. Clearly, Kerow invited the error he now claims. To permit him to challenge on appeal the timing of the restitution hearing when he controlled the timing, would allow defendants to pursue gamesmanship and purposely evade their agreed upon restitution obligations and avoid the purpose for which the restitution statute was intended.

Kerow relies upon State v. Tetreault, 99 Wn. App. 435, 998 P.2d 330, review denied, 141 Wn.2d. 1015, 10 P.3d 1072 (2000), State v. Johnson, 96 Wn. App 813, 981 P.2d 25 (1999) and State

v. Moen, 129 Wn.2d. 535, 919 P.2d 69 (1996) to argue that his hearing was untimely. In Tetreault, a restitution hearing, set prior to the 180-day requirement, was struck by the State because they were unable to obtain the insurer's Kerow did not dispute the property lost or its causal condocumentation of expenses. Restitution was denied when State later attempted to seek restitution beyond 180 days. Id. at 436.

Here, the State was prepared to proceed within the required time and all necessary information was presented to the court at that time. In Johnson, a restitution hearing was not set as ordered within 30 days. Id. at 815. Johnson remained silent until his restitution hearing 235 days later. Id. In Moen, the court held that waiver was not found because there had been no hearing at all, and counsel for Moen had signed an order but only as to copy received and notice of presentation waived. Id. at 540.

Kerow's circumstances are distinguishable from each of these cases. First, in none of the above cases did the defendant propose a date to the court that was outside the statutory time limits. Moreover, in this case, a restitution hearing was set within the 180-day statutory requirement and the trial court made clear, on

the record, its intention to order restitution and the reasons to support good cause to continue the hearing. RP 10.

The purpose of the restitution statute is not finality but rehabilitation. State v. Barr, 99 Wn.2d 75, 79, 658 P.2d 1247 (1983). When interpreting the State's restitution statutes, the Court of Appeals recognizes that there were intended to require the defendant to face the consequences of his or her criminal conduct. State v. Davison, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991). Kerow agreed to pay restitution as part of his plea agreement and there was no dispute as to the amount owed or property lost. He should not be permitted to mislead the sentencing court into scuttling its efforts to fulfill the statutory mandate by proposing a self-defeating hearing date.

D. CONCLUSION

Kerow proposed the date on which his restitution hearing should be held; he cannot claim now that the date was erroneously set. The docrine of invited error bars review of this claim

DATED this 28 day of September, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Casey Grannis, containing a copy of the Respondent's Brief, in STATE V. ELYAS KEROW Cause No. 72933-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

09-28-15

Name

Date

Done in Seattle, Washington