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02463-6

NO. 62463-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PATRICIA DAVENPORT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN P. ERLICK

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. As part of a misdemeanor sentencing, the superior court may order an offender to make restitution to any person who has suffered loss or damage, so long as the court finds by a preponderance of the evidence a causal connection between the crime and the victim's loss. In this case, Davenport pled guilty to the amended charge of Assault in the Fourth Degree. Davenport hit the victim multiple times in the chest and stomach area with a closed fist, causing the victim to fall backwards against a piece of medical equipment and an exam table's edge. Two doctors' reports state unequivocally that Davenport's assault on the victim was the direct cause of a shoulder injury which resulted in months of doctor's visits, diagnostic tests, physical therapy, surgery, and lost wages. Did the court act within its statutory authority by ordering restitution for all medical expenses and lost wages suffered by the victim?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY.

Defendant Patricia Davenport was charged by information with the crime of Assault in the Third Degree under King County

Cause No. 07-1-07002-4. CP 1. The State alleged that on October 3, 2006, Davenport intentionally assaulted Pamela Erhardt, a licensed nurse, who was at the time working in the medical facility of the King County Jail, while she was performing her nursing duties. CP 1. Following plea negotiations, Davenport entered an Alford¹ plea of guilty to the amended charge of Assault in the Fourth Degree, stipulating in her plea statement that the court may review the Certification for Determination of Probable Cause to find a factual basis for the plea. CP 4, 5-8. Following a plea colloquy, the trial court reviewed the Certification for Determination of Probable Cause and found Davenport guilty of the amended charge. CP 8, 1RP 3-5².

At the plea hearing, Davenport, along with her attorney and the assigned prosecutor, signed the Non-Felony Plea Agreement, and by doing so agreed to two important provisions. CP 12. First, she agreed to "Real Facts" by stipulating that the facts set forth in

¹ North Carolina v. Alford, 400 U.S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970).

² The Verbatim Report of Proceedings will be referred to as follows: 1RP is the plea hearing, which took place on 12/11/07; 2RP is the sentencing hearing, which occurred 12/21/07; and 3RP contains the transcripts of the four restitution hearings, which occurred on 5/21/08, 6/25/08, 8/6/08, and 9/10/08.

the Certification for Determination of Probable Cause and the prosecutor's summary are real and material facts for purposes of sentencing. CP 12. Second, she agreed to pay restitution in full to the victim on the charged count, though a specific amount owed is not stated. CP 12.

The defendant was subsequently sentenced to a 12-month suspended sentence with one day credit for time served; no probation; \$500 Victim Penalty Assessment; restitution to be determined at a future date; and no contact with Pamela Erhardt. CP 14-16. During the ten months following the sentencing, a variety of hearings were held to determine the extent of the restitution owed.

2. FACTS PERTAINING TO THE ORDER OF RESTITUTION.

On October 3, 2006, Davenport was incarcerated in the King County Jail and brought to the jail infirmary for treatment. CP 2. Without provocation, Davenport struck Nurse Erhardt four to six times with a closed fist in her stomach and chest area while Erhardt was attempting to take Davenport's blood pressure. CP 2. As a result of the blows, Erhardt fell into a piece of medical equipment

and then into the edge of an exam table. CP 2. She suffered an achy, burning sensation in her neck and shoulders accompanied by chest pain. CP 2.

Following this incident, Erhardt was unable to work due to a shoulder injury sustained as a result of the assault. CP 2. She immediately sought extensive medical treatment from both urgent care and her primary care physician, who then referred her to Dr. Richard Martin, an orthopedic surgeon. CP 2. Dr. Martin ordered intensive physical therapy, injections, and a third MRI (her primary care physician had ordered two previous MRIs). CP 2. Because Erhardt's injured shoulder was not improving despite all measures taken, Dr. Martin finally performed surgery in May 2007, whereupon he discovered a significant labral tear affecting her biceps tendon attachment, and chronic inflammatory tissue around the rotator cuff. CP 44.

In addition to the basic facts to which Davenport stipulated for purposes of plea and sentencing, Judge Erlick reviewed numerous medical records and doctors' reports documenting Erhardt's injuries and treatment following the assault in order to come to a decision regarding the restitution owed. See CP 40-365.

These records were provided for the purpose of proving the causal link between the assault and the injury sustained. CP 17 – 25.

One of the records provided was an email from Dr. Richard Martin to Deputy Prosecuting Attorney Lynda Stone, wherein he describes Erhardt's shoulder injuries in detail and unequivocally links the assault of 10/3/06 to those injuries. CP 44. Dr. James Kopp, an orthopedic surgeon and independent medical examiner hired by King County Safety and Claims Management to evaluate Erhardt's Worker's Compensation claim, came to the same conclusion as Dr. Martin and concurred with the necessity of the treatment provided. CP 45-56.

In a written ruling, Judge Erlick granted the State's request for restitution in the amount of \$71,988.89 (time loss of \$53,119.20 and medical expenses of \$18,869.79). CP 27. In the letter, he states the basis for his ruling:

The State has provided expert medical evidence through the evaluation and report of Dr. James Kopp that Ms. Erhardt's injuries and treatments were causally related to the October 3, 2006 assault for which Ms. Davenport was convicted. The conclusions are further supported by the medical notes and records of treating physician Dr. Richard Martin and the other records. I appreciate that there are differences of opinion on reading these notes and the

defense has argued inconsistencies in the conclusions regarding the required causal relationship. Nonetheless, applying the preponderance standard, and given the absence of controverting expert testimony, this Court has reached the conclusion that the State has carried its burden of showing that the injuries and resulting treatment were more likely than not caused by the October incident. Accordingly, I award restitution in the amount of \$71,988.89.

CP 27.

C. ARGUMENT

- 1. THE COURT ACTED WITHIN ITS STATUTORY AUTHORITY TO ORDER FULL RESTITUTION UPON THE DEFENDANT'S PLEA TO ASSAULT IN THE FOURTH DEGREE BECAUSE THERE WAS A CAUSAL CONNECTION BETWEEN THE ASSAULT AND THE INJURIES SUSTAINED.**

Davenport contends that the court exceeded its statutory authority under RCW 9.92.060(2) and RCW 9.95.210(2) by ordering restitution of \$71,988.89, claiming that this amount constituted compensation for "substantial bodily harm" to the victim (an element of Assault in the Second Degree, a felony) rather than compensation for losses associated with a plea to Assault in the Fourth Degree (a misdemeanor). Moreover, she argues that this is an order to pay restitution on an uncharged crime to which she did not expressly agree. These arguments have no merit. At a

misdemeanor sentencing where a suspended sentence is imposed, a superior court has the authority under RCW 9.92.060(2) to order restitution of any easily ascertainable amount where there is a causal connection between the commission of the crime (regardless of the name of the crime the defendant pled guilty to) and the victim's losses. Here, Davenport pled guilty to assaulting Erhardt, and the losses suffered by Erhardt were the direct result of that assault.

- a. The Court's Authority To Order Restitution In Misdemeanor Sentencings Is Not More Limited Than In Felony Sentencings.

A court's authority to order restitution as a condition of sentence for either a misdemeanor or felony offense is purely statutory. State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). Restitution ordered as part of a felony conviction is governed by the Sentencing Reform Act (SRA) under RCW 9.94A.753. Restitution ordered as part of a misdemeanor conviction in Superior Court is governed by two statutes: RCW 9.92.060(2) applies when the court orders restitution as a condition of a suspended sentence, and RCW 9.95.210(2) applies when the

court orders restitution as a condition of probation. State v. Marks, 95 Wn. App. 537, 977 P.2d 606 (1999). In this case, RCW 9.92.060(2) is the controlling statute because the defendant received a suspended sentence, but she was not ordered to serve probation. CP 14-16.

Regardless of the underlying statutory authority, the language of all the restitution statutes is intended to grant broad powers of restitution to the courts. State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991). The courts reject an overly technical construction of the statutes that would allow an offender to avoid just punishment. Davison, 116 Wn.2d at 922.

Imposition of restitution is generally within the sound discretion of the trial court and is reviewed under an abuse of discretion standard. Id. at 919. A trial court's factual findings are upheld as long as there is substantial evidence to support them in the record; a reversal occurs only if the record lacks sufficient evidence from which a rational person could conclude the challenged finding is true. State v. Halstien, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993).

In all cases, the court must find that the loss is causally connected to the crime. State v. Kinneman, 155 Wn.2d 272, 286, 119 P.3d (2005); RCW 9.92.060(2) and RCW 9.95.210(2)³; RCW 9.94A.753⁴. Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007); Kinneman, 155 Wn.2d at 287-88. In determining whether a causal connection exists, the court must look to the underlying facts of the charged offense, not the name of the crime to which the defendant entered a plea. State v. Landrum, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992). It is the State's burden to prove the causal relationship by a preponderance of the evidence. Tobin, 161 Wn.2d at 524.

Davenport argues that the misdemeanor restitution statutes place greater restrictions on the court than does the felony

³ RCW 9.92.060(2) and RCW 9.95.210(2) (both have identical language): “[T]he superior court may require the convicted person to make such monetary payments, on such terms as the superior court deems appropriate under the circumstances, as are necessary: ... (b) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question...”

⁴ RCW 9.94A.753(5): “Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property...unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record.”

restitution statute under the SRA, and thus the court exceeded its statutory authority by ordering the restitution in this case. The State disagrees with this assertion.

There are obvious differences between the statutes that suggest the SRA statute is more restrictive procedurally than the misdemeanor restitution statutes. Under the SRA, the imposition of restitution by the court is mandatory – the court “shall” order restitution whenever the offender is convicted of an offense that results in injury to person or property, with only extraordinary exceptions. RCW 9.94A.753(5). In contrast, under the misdemeanor statutes, restitution is within the discretion of the court – it “may” require the defendant to make restitution. RCW 9.92.060(2), RCW 9.95.210(2). Restitution ordered under the SRA must be resolved within 180 days of sentencing absent a waiver by the defendant. RCW 9.94A.753(1). Restitution ordered on a misdemeanor has no time restrictions. Marks, 95 Wn. App. at 540.

To support her argument that the court’s authority to order restitution in misdemeanors is limited in some way, Davenport relies only on a slight and overly technical difference in language between the two sets of statutes: in RCW 9.94A.753(2), it says that restitution shall be ordered whenever the offender is convicted of

“an offense” which results in injury, whereas in both RCW 9.92.060(2) and 9.95.210(2), restitution is available to a person who suffers a loss by reason of the “commission of the crime in question.”

The State found no authority to suggest this difference in wording makes any difference in the practical application of the statutes by the courts in their efforts to hold offenders accountable and to make victims whole. Upon convictions of both felonies and misdemeanors, an offender is expected to pay restitution for losses causally related to his or her criminal acts, whether or not the conviction is described as “an offense” or as “the crime in question.” Moreover, this semantic difference has no practical distinction given that the court must look not to the name or even the elements of the crime the defendant was convicted of, but rather at the underlying facts that constitute the criminal acts.

Washington case law is replete with examples of this fundamental legal concept. Most on point is State v. Landrum, where juvenile respondents Landrum and Keating entered Alford pleas to the amended charge of Assault in the Fourth Degree, having both originally been charged with Child Molestation in the First Degree. 66 Wn. App. 791, 793-94, 832 P.2d 1359 (1992). In

the plea agreement, both authorized the juvenile court to review the police incident report, which described how some sexual contact occurred. Id. at 794. Despite the fact that neither respondent pled guilty to a crime whose name or elements suggest sexual assault, the trial court's order of restitution for the victim's counseling bills and sexual assault examination was upheld because the underlying facts described in the police report supported such losses. Id. at 799.

In State v. Selland, the juvenile court declined to recognize the limits of the actual elements of the crime of Malicious Mischief in the Third Degree (damage under \$250), focusing on the causal relationship rather than the technical definitions. 54 Wn. App. 122, 124, 772 P.2d 534, review denied, 113 Wn.2d 1011 (1989). The appellate court upheld the trial court's order of restitution in the amount of \$552 because that was the true loss associated with the respondent's criminal acts. 54 Wn. App. at 124.

Davenport claims that the Selland court ignored the law and "eviscerated the statutory rules of restitution" (App. Brief at 16), but in fact the sound principle so clearly enunciated in both Selland and Landrum – that it is not the name or elements of the crime pled to

but rather the underlying facts of the criminal acts that determine the scope of restitution – was already and remains the established law in both juvenile and adult restitution cases.

State v. Rogers, 30 Wn. App. 653, 638 P.2d 89 (1981) is the Selland precursor in the adult context. The defendant was convicted at bench trial of the crime of Possessing Stolen Property in the Second Degree.⁵ Rogers, 30 Wn. App. at 654. The trial judge made a factual finding that the defendant's "possession" of the vehicle was part of a scheme to dispose of stolen property, which led to the victim's permanent deprivation of the property. Id. at 656. Restitution was ordered first in the amount of over \$27,000, and then reduced to \$9,500. Id. at 655. The appellate court held that the trial judge was not limited to ordering restitution of \$1,499 as long as the State demonstrated that the victim's loss exceeded that amount, but remanded the case for the entry of findings as to the actual amount of the loss suffered by the victims. Id. at 658-59.

Most recently, in State v. Thomas, 138 Wn. App. 78, 155 P.3d 998 (2007), the same principle was applied but in the context

⁵ At the time of the Rogers decision, a person was guilty of possessing stolen property in the second degree if he possessed a stolen motor vehicle of a value less than \$1,500. Former RCW 9A.56.160.

of a partial acquittal at trial. The appellate court upheld the trial court's factual finding that a defendant convicted of Driving Under the Influence but acquitted of Vehicular Assault was still responsible for the vehicular assault victim's medical costs because those damages were proven by a preponderance of the evidence to be causally connected to the defendant's criminal act of driving while intoxicated. Thomas, 138 Wn. App. at 83-85.

Davenport relies on State v. Taylor, 86 Wn. App. 442, 936 P.2d 1218 (1997), for the proposition that restitution losses must be attributed to the "precise crime" of conviction. This is not an entirely accurate statement of the holding given the unique facts of that case.

In Taylor, the State charged the defendant with one count of Theft in the First Degree (welfare fraud), requiring proof that the defendant received over \$1,500 in fraudulent benefits over a period of nineteen months (the total loss alleged by the State was \$9,074). 86 Wn. App. at 444-46. At trial, the jury convicted only on the lesser degree offense of Theft in the Second Degree, indicating proof beyond a reasonable doubt that there were fraudulently obtained benefits during that time period valued between \$250 and \$1,500. Id. at 444. The Court of Appeals reversed the trial court's

restitution order of the full amount of loss because “the jury’s verdict does not establish an underlying criminal act that could serve as the basis for a restitution award greater than \$1,500.” Id. at 445. The appellate court also mentioned that the evidence presented by the defendant disputed most of the State’s arguments regarding ongoing ineligibility for benefits for the entire 19 months. Id. at 445-46.

Taylor is best understood within the narrow confines of its facts because it is a theft of money where the actual loss to the victim is limited to a finite amount of money that corresponds to the statutory designation of the crime, unlike the factual scenarios presented in Selland, Rogers, and Thomas. The decision is entirely consistent with the principle that the court must look at the underlying facts of the case that are proven by a preponderance of the evidence to determine the scope of the restitution. Taylor at 445.

Davenport does not assign error to the trial court’s factual finding that a causal relationship exists between her criminal act of assault and the victim’s injuries, and there is substantial evidence in the record supporting this finding. CP 26-27; CP 40-365. She also does not suggest that Judge Erlick abused his discretion in making

this finding. Rather, she argues that he exceeded his statutory authority to order any restitution, given Davenport's plea to simple assault rather than assault in the second degree.⁶ Given the clear requirement that the court must examine the underlying facts of the case rather than just the name or the elements of the crime of conviction to determine the restitution owed, there is no question that Judge Erlick was well within his broad statutory authority under RCW 9.92.060(2) to order restitution of \$71,988.89 to compensate Pamela Erhardt for her injuries and lost wages.

b. Davenport Need Not Expressly Agree To Restitution Because The Restitution Ordered Is Not Associated With An Uncharged Crime.

Restitution may be ordered when an offender pleads guilty to a lesser offense or fewer offenses and expressly agrees with the State's recommendation that he or she be required to pay restitution for offenses which "are not prosecuted pursuant to the plea agreement." RCW 9.92.060(2); RCW 9.95.210(2); and RCW

⁶ The State assumes that to Davenport, the restitution is an all-or-nothing proposition, since the remedy requested of this Court is outright reversal of the restitution order rather than remand for further evidentiary hearings to somehow parse out the difference between assault in the fourth degree damages versus assault in the second degree damages.

9.94A.753(5). Davenport argues that her restitution award is unlawful because it is for an uncharged crime to which she did not expressly agree to pay damages.

In the plea agreement signed by Davenport, nowhere does it list crimes that the State agreed not to prosecute in exchange for the defendant's agreement to restitution. CP 12. Instead, the State agreed to amend the charge from Assault in the Third Degree to the lesser degree crime of Assault in the Fourth Degree; the defendant agreed to real facts as described in the Certification for Determination of Probable Cause and to pay restitution of an undetermined amount for the crime charged. CP 12. An amendment to a reduced charge in exchange for a plea occurs for any number of reasons, and there is nothing in the record to tell us why the State agreed to such a reduction in this case.⁷

The State found, and Davenport cites, no legal authority for the proposition that a negotiated plea to a reduced or different charge means that restitution associated with the original charge (or with a crime that the original offense could have been filed at

⁷ Davenport speculates that the State's decision to initially charge the case as Assault in the Third Degree rather than Assault in the Second Degree and the subsequent reduction to Assault in the Fourth Degree was because of causation and credibility issues in the case. App. Brief at 1-2. There is no support for this statement in the record.

but for the filing discretion of the prosecutor) is now restitution associated with an uncharged crime to which the defendant must expressly agree. In fact, the “uncharged crime” argument was expressly rejected by the court in Landrum, *supra*. Landrum unsuccessfully argued that by ordering restitution for the victim’s medical examination, he was being punished for an uncharged crime since he pled guilty to Assault in the Fourth Degree rather than a sex offense. Landrum, 66 Wn. App. at 800-01.

This argument also defies common understanding of an uncharged crime in the context of a plea agreement. State v. Ashley, 40 Wn. App. 877, 700 P.2d 1207 (1985), provides a clear example of what kind of restitution for uncharged crimes might require the express agreement of the offender at the time of the plea. In Ashley, the juvenile respondent was convicted of Assault in the Second Degree for pulling a knife on the victim. 40 Wn. App. at 878. Earlier in the evening, the victim’s friend may have been assaulted by one of Ashley’s friends, and the confrontation between Ashley and the victim arose from that prior event. Id. Ashley was not charged with the first assault, but the juvenile court ordered restitution for the uncharged assault because of the close proximity in time and place of the two assaults. Id. The appellate court

reversed the order because clearly the first assault was an uncharged crime for which the respondent did not expressly agree to pay restitution. Id. at 879 (referencing as controlling authority State v. Mark, 36 Wn. App. 428, 675 P.2d 1250 (1984), a case decided under RCW 9.95.210 which limited restitution in a theft case to the 13-month time period associated with the charges the defendant was convicted of at trial, not the three-year time period the victim alleged the thefts occurred).

In the case of Ms. Davenport, only one incident of assault occurred. CP 2. She stipulated to real facts as to the details of that assault in her plea agreement for purposes of plea and sentencing. CP 12. Those facts prove by a preponderance of the evidence that an assault occurred, regardless of the degree initially charged or eventually pled to, which resulted in a serious injury to Nurse Pamela Erhardt's right shoulder. CP 2, 26-27. This injury required medical treatment for many months, during which time Ms. Erhardt was unable to work. CP 2. Moreover, Davenport expressly agreed in the plea agreement to pay restitution. CP 12. To argue that she was actually ordered to pay restitution for an uncharged crime under these circumstances has no factual merit and no legal basis.

D. **CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm the restitution order in this case.

DATED this 29th day of June, 2009.

Respectfully submitted,

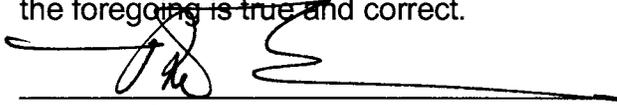
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver R. Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. PATRICIA DAVENPORT, Cause No. 62463-6-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.


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Done in Seattle, Washington

06/29/2009
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