

No. 63219-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VIVIAN WINSTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

The Honorable Regina S. Cahan

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A. SUMMARY OF ARGUMENT

Vivian Winston appeals the trial court's order that she pay \$1,710.85 in restitution as a part of her sentence for second-degree theft of an access device. Because the alleged damages were not caused by the theft of the access device, but rather by a separate uncharged and unproven theft of the contents of the victim's purse, it was error for the sentencing court to order restitution for the items in the purse. Therefore, the restitution order must be reversed.

B. ASSIGNMENT OF ERROR

The sentencing court erred by ordering Vivian Winston to pay \$1710.85 in restitution although these damages were not causally connected to the crime with which Ms. Winston was charged and convicted.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The superior court's authority to order restitution is limited to loss or damage caused by the crime charged. Where Ms. Winston was charged with and convicted of Theft in the Second Degree – Access Device, which required the State to prove only that Ms. Winston stole an access device inside the victim's purse, did the court err by imposing restitution for other items the victim alleged were inside the purse?

D. STATEMENT OF THE CASE

Vivian Winston was charged with and convicted of theft in the second degree – access device, based on the theft of a purse containing several credit cards. CP 1, 5. At trial, the victim testified that the purse contained two credit cards, a debit card, and several other items, but did not discuss the specific value of those items. 2/10/09RP 36.

At the restitution hearing, the State requested \$1710.85 based on the value of the purse (\$40), the cost to replace the victim's keys, and items inside the purse, including a palm pilot (\$199), a palm pilot keyboard (\$100), a cell phone (\$120), a Bluetooth headset (\$60), a wallet with about \$30 in cash, and nine gift cards (total \$813). CP 45-46. The victim did not testify at the restitution hearing, and the State did not submit any sworn statement by the victim claiming that these were the contents of the purse. 5/5/09RP 157-58.

The defense argued that, because Ms. Winston was convicted for theft of only the access device, it was inappropriate for the court to order restitution for damages resulting from the uncharged crime of theft of the other items in the purse. CP 42-44. The sentencing court, nonetheless, concluded that the damages for

the other items in the purse were causally connected to the charged crime because, “[t]he credit card was in the purse,” and imposed \$1710.85 in restitution. 5/5/09RP 158.

Ms. Winston appeals. CP 34-41.

E. ARGUMENT

THE SENTENCING COURT ERRED BY ORDERING
RESTITUTION FOR DAMAGES NOT CAUSED BY
THE CRIME OF CONVICTION

1. Restitution is a strictly statutory remedy authorized only for damages causally connected to the crime of conviction.

"The authority to impose restitution is not an inherent power of the court, but is derived from statutes." State v. Enstone, 137 Wn.2d 675, 974 P.2d 828 (1999); State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). A restitution order is void when the trial court deviates from the parameters of the restitution statute. State v. Dauenhauer, 103 Wn.App. 373, 378, 12 P.3d 661 (2000); State v. Hefa, 73 Wn.App. 865, 866-67, 871 P.2d 1093 (1994).

RCW 9.94A.753(3) provides, in pertinent part, restitution:

shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages due to mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling related to the offense. . .

Additionally, 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. . . .

RCW 9.94A.753(5).

Restitution is permitted only for loss that is causally connected to the offense of conviction, and

may not be imposed for a “general scheme,” acts “connected with” the crime charged, or uncharged crimes unless the defendant enters into an express agreement to pay restitution in the case of uncharged crimes.

State v. Kinneman, 155 Wn.2d 272, 286, 119 P.3d 350 (2005)

(quoting State v. Woods, 90 Wn.App. 904, 907-08, 953 P.2d 835

(1998)); Dauenhauer, 103 Wn.App. at 378. A sufficient causal

connection exists if, “but for the criminal acts of the defendant, the

victim would not have suffered the damages for which restitution is

sought.” State v. Hiett, 154 Wn.2d 560, 565, 115 P.3d 274 (2005)

(quoting State v. Landrum, 66 Wn.App. 791, 799, 832 P.2d 1359

(1992)). The prosecution bears the burden of establishing a

sufficient causal connection by a preponderance of the evidence.

State v. DeDonado, 99 Wn.App. 251, 256, 991 P.2d 1219 (2000).

2. Damages related to the items in the purse other than the access device were not causally connected to the crime of conviction. In this case, the State charged Ms. Winston with Theft in the Second Degree – Access Device, which required the State to prove only that Ms. Winston stole the victim’s credit card. CP 1-4 (Information). The “to convict” instruction did not require the jury to find that Ms. Winston stole any other items, or that the stolen property was worth a certain amount of money. CP 17. Accordingly, the State did not present any evidence at trial of the cost of the items the victim alleged were inside her purse.

2/10/09RP 36.

The damages related to the other items in the purse are not causally related to the crime of conviction – the theft of the access device – because the victim still would have suffered these damages even if the access device had not been stolen. That is, there is no “but for” causation between the charged crime and the damages. The only possible damages that could have resulted from the crime of conviction would have been the costs of charges made on the stolen credit cards.

The sentencing court erred when it concluded that the damages were causally connected to the crime of conviction

because the credit card was in the purse. This would only be true if Ms. Winston had been convicted for theft of the purse. But, she was convicted only for theft of the access device inside the purse, which had no effect on the alleged theft of the other items in the purse. As in Kinneman, the alleged theft of the other items in the purse is merely an uncharged crime “connected with” the crime of conviction, where the court may not impose restitution.

The State relied on Hiett and Landrum for the proposition that the court may look beyond the charged crime to the defendant’s actual conduct. CP 47. In Hiett, the defendants were convicted of taking a vehicle without permission, and the Court upheld a restitution order for damages related to property inside the vehicle and damage to the vehicle after the defendants jumped out of the vehicle. 154 Wn.2d at 565-66. The Court reasoned that “[b]ut for the taking of the vehicle, the personal property would not have gone missing,” and the damage to the vehicle would not have occurred. Id. at 566.

This case is different from Hiett because the loss of the items in the purse was not a consequence of the charged crime. It was, however, a consequence of a separate crime that the State, in

its discretion, did not charge and more importantly did not prove:
Theft in the First Degree of the purse and its contents.

In Landrum, where the defendants were originally charged with first-degree child molestation and pleaded guilty to fourth-degree assault, the Court upheld a restitution order to compensate the victims for counseling related to the sexual contact. 66 Wn.App. at 794, 799. The Court reasoned that it was entitled to look “to the underlying facts of the charged offense, not the name of the crime to which the defendant entered a plea.” Id. at 799. As a result, the Court looked beyond the elements of fourth-degree assault to find that the touching – for which the defendants were convicted – was sexual in nature, and was therefore causally connected to the requested restitution.

Here, in contrast, to find a causal connection between the charged crime and the restitution ordered, the court would have to look to conduct beyond that for which Ms. Winston was convicted. Whereas the Landrum defendants were convicted of the offensive touching, Ms. Winston was not convicted of stealing the purse. Furthermore, Ms. Winston was convicted as charged, and any inconsistencies between the actions she was accused of doing and

those she was convicted of doing are a result of the State's charging decision.

If the State had charged Ms. Winston with first-degree theft, and if the jury had convicted her, the restitution ordered here would have been statutorily authorized. However, the State chose to pursue a conviction for Theft in the Second Degree – Access Device, which allowed the State to avoid the burden of proving that the items in the purse were worth over \$1,500. The State may not have it both ways. Without a conviction for the theft of the purse, the court had no authority to order restitution for the contents of the purse.

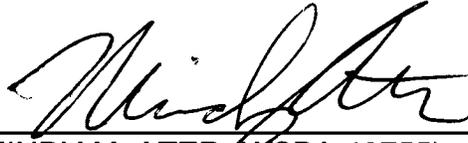
3. The Court must reverse the restitution order. The damages for items in the purse other than the access device are not causally connected to the charged crime. Therefore, the State did not meet its burden of proof, and the trial court erred in imposing restitution.

F. CONCLUSION

For the reasons above, Ms. Winston respectfully requests that this Court reverse the restitution order entered in this case.

DATED this 18th day of September 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mindy Ater", written in a cursive style. The signature is positioned above a horizontal line.

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