

63353-8

63353-8

NO. 63353-8-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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STATE OF WASHINGTON, RESPONDENT

V

VAN TINH TRAN, APPELLANT

AND DEFENDANT

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

THE HONORABLE PARIS K. KALLAS

BRIEF OF APPELLANT

THE LAW OFFICES OF DEAN D. NGUYEN

By: Dean D. Nguyen
WSBA NO. 30148
Of attorney for Appellant
321 10th Avenue South, Ste. 612
Seattle WA 98104
(206) 438-4344

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A. SUMMARY OF ARGUMENT

Van Tinh Tran, the appellant, plead guilty to a deferred sentence on an amended fourth degree assault on December 12, 2008. Following his sentencing, the Trial court scheduled a restitution hearing for February 12, 2009. After several continuances the trial court allowed the time to determine restitution expire under Revised Code of Washington (RCW) 9.94A.753. The trial court then granted another continuance one week after the expiration date and ultimately held the hearing 21 days after time had expired to determine restitution.

The authority to impose restitution is purely statutory and the time limit for setting restitution mandatory. Any order imposing restitution is void if statutory provisions are not followed. The trial court committed error because it continued the restitution hearing after the time allowed under RCW 9.94A.753 had expired.

At the hearing, Mr. Bews, who did not appear, sought \$28,000.00 in loss income. The State was allowed to submit, on his behalf, document from Mr. Bews former employer that was not signed or dated, and a note from a medical provider that was written over one year after the assault. This medical provider did not see Mr. Bews as a patient until three months after the assault and after the period that Mr. Bews claim he was unable to work had past.

A restitution order must not be based on speculation and conjecture. The trial court committed error by relying on the above-

mentioned documents that resulted in an order based on speculation and conjecture. The document from his former employer does not clearly state how much Mr. Bews would have made. The note from the medical provider was drafted over well over one year after the allege assault occurred. The provider is unclear how she concluded that Mr. Bews could not have worked considering she did not see Mr. Bews, as a patient, prior to the dates Mr. Bews claimed was unable to work.

Restitution may be ordered based on unsworn statements if they conform to simple statutory requirements under RCW 9A.72.085. They must be certified or declared that the statement is true under penalty of perjury, signed, have the date and place of execution on the document, and certified under the laws of State of Washington.

Neither of the two letters meet the requirement for admissibility of an unsworn statement under RCW 9A.72.085 as one document was unsigned with no place and date of execution and both were not certified under the laws of Washington that their statements are true and correct under penalty of perjury.

The restitution order issued by the trial court must be vacated because it is in violation of RCW 9.94A.753 and therefore void. There can be no remand of this restitution order because it will result in an order that is set past the 180-day limit as prescribed under RCW 9.94A.753.

B. ASSIGNMENTS OF ERROR

1. The trial court committed error in ordering restitution because it lacked the authority to grant a continuance following the expiration of the time limit for determining restitution as prescribed by RCW 9.94A.753 (1).
2. The trial court committed error in ordering restitution order to Mark Bews for \$28,000.00 in income loss because the order was based on speculation and conjecture.
3. The trial court committed error in ordering restitution for loss income where it was based on legally insufficient documents, which failed to meet the mandatory requirements of RCW 9A.72.085

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court commit error in ordering restitution because it lacked the authority to grant a continuance following the expiration of the time limit for determining restitution as prescribed by RCW 9.94A.753 (1)?
2. Did the trial court commit error in ordering restitution to Mr. Bews for \$28,000.00 in income loss because the order was based on speculation and conjecture?
3. Did the trial court commit error in ordering restitution for loss income where it was based on legally insufficient documents,

which failed to meet the mandatory requirements of RCW 9A.72.085?

4. Must this court vacate the restitution order because a remand will result in restitution set outside the 180-day period for determining restitution?

D. STATEMENT OF THE CASE

Van Tinh Tran plead guilty on December 12, 2008, in King County Superior Court Cause No. 07-1-08661-3 SEA to a deferred sentence on an amended fourth degree assault, against Mark Bews. CP 39.

Following Mr. Tran's sentencing, the court set a restitution hearing date for February 12, 2009 to determine the amount of restitution, if any, that Mr. Tran would be require to pay. CP 47. The matter was continued to February 26, 2009, at the request of the State in order for them to provide additional documentation to support Mr. Bews claim of \$28,000.00 in income loss. On February 26, 2009, Mr. Tran appeared with counsel, but the matter was continued to March 5, 2009 due to inclement weather. CP 49. On March 5, Mr. Tran appeared again with counsel and the matter was continued to March 10th, in order Mr. Bews to be present. CP 50. The court noted that the last day of speedy restitution would be on March 10th.Id. On March 10th, Mr. Tran appeared for the third time for his restitution hearing. CP 51, 3/10/09 RP 2. Although the hearing was previously continued in order for Mr. Bews to be present, Mr. Bews did not appear. 3/10/09 RP 3-4. This time the matter was continued

because a court certified Vietnamese interpreter was unavailable in spite of the fact that there was always an interpreter available for all of his previous court dates. CP 51 3/10/09 RP 12.

On March 17th after one week after time for speedy restitution had expired, the matter was continued yet again as the court was unable to secure an interpreter for Mr. Tran. CP53-54. On March 31st, 21 days after time for speedy restitution had expired the court finally held the restitution hearing. Mr. Bews did not appear in court to seek \$28,000.00 in income loss but simply submitted two documents. 3/10/09 RP 5-8. One was a note from a medical provider whom Mr. Bews saw three months after the assault and who wrote the note for Mr. Bews over one year after the assault. 3/10/09 RP 5. The other was an unsigned letter from the Mr. Bews former employer that indicated that Mr. Bews could have worked for him during the period that Mr. Bews alleged that he was unable to work. 3/10/09 RP 5-6. This document indicated that the income that Mr. Bews lost as a result was anywhere from \$22,000.00-\$28,000.00. ¹

Mr. Tran objected to the income loss sought by the Mr. Bews. Counsel for Mr. Tran argued that the income loss had not been proven by preponderance of the evidence. 3/10/09 RP 10-11. The letter from his former employer was not signed or dated and it was unclear on how

¹ Attached, as Appendix is the document Mr. Bews submitted in support of \$28,000.00 loss income claim.

much he would have actually made but rather a range of how much he could have made. 3/10/09 RP 5-6. The note from the medical provider did not explain how she reached her conclusion that Mr. Bews was unable to work considering she saw Mr. Bews over three months after the assault and well after the dates that he was claiming his income loss. 3/10/09 RP 10-11. There is no evidence of any examination or her review of medical records to support her conclusion. 3/10/09 RP 10-11.

Also the two documents were legally insufficient under RCW 9A.72.085. 3/10/09 RP 10-11. Both documents were not certified and one was not even sign or dated. 3/10/09 RP 10-11.

The trial court ruled that the documents were sufficient evidence and issued a restitution order for Mr. Tran to pay Mr. Bews \$28,000.00 in loss income. CP 55. Mr. Tran timey appealed the ruling. CP 56

E. ARGUMENT

1. The Trial Court Committed Error In Ordering Restitution Because It Lacked The Authority To Grant A Continuance Following The Expiration Of The Time Limit For Determining Restitution As Prescribed By RCW 9.94A.753(1).

A court's authority to impose restitution is statutory. State v. Smith, 119 Wn.2d 385, 388-389, 831 P. 2d 1082 (1992). A trial court lacks authority to grant a continuance of a restitution hearing following the expiration of the time limit prescribed by RCW 9.94A.142(1) for determining the amount of restitution. Former RCW 9.94A.142(1) was construed in State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994), as

meaning the time limit for setting restitution is mandatory. A restitution order is void if statutory provisions are not followed. State v. Duback, 77 Wn. App. 330, 332, 891 P.2d 40 (1995); State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Generally, the choice, interpretation, and application of a statute are matters of law reviewed de novo. See Clark v. Falling, 92 Wn. App. 805, 809-10, 965 P.2d 644 (1998).

It is well settled that the word "shall" in a statute is presumptively imperative and operates to create a duty. . . . The word "shall" in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent. State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994).

Erection Co. v. Department of Labor & Indus., 121 Wn.2d 513, 518, 852 P.2d 288 (1993). This [use of "may" and "shall" in the statute] indicates that the Legislature intended the two words to have different meanings: "may" being directory while "shall" being mandatory. State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985).

In State v. Johnson, 69 Wn. App. 189, 191, 87P. 2d 950 (1993)², the defendant was convicted on his guilty plea of attempted first-degree assault. At sentencing on March 31, 1997, a restitution hearing was ordered to be set within 30 days from his sentencing date. Id. at 814. Mr. Johnson did not waive his right to be present at the restitution hearing. Id. at 815. Mr. Johnson was at some point sent to the Shelton Correction

² State v. Johnson, 69 Wn. App. 189, 191, 87 P.2d 950 (1993) attached as Appendix B

Facility. Id. On July 15, 1997, the court ordered Mr. Johnson to be transported back to Spokane "as soon as possible." Id. No date for the restitution hearing was set. Mr. Johnson was not returned to Spokane pursuant to the July 15th order. Id. On September 30, 1997, 183 days after sentencing the trial court entered another transportation order and set a restitution hearing for November 21, 1997. Id.

At the scheduled restitution hearing, 235 days after sentencing, Mr. Johnson's counsel argued the delay violated the 180-day limit set in RCW 9.94A.142(1). Id. The trial court, however, concluded good cause existed for the delay because it was beyond the prosecutor's control to obtain Mr. Johnson's presence at an earlier date. Id. The trial court then entered a restitution schedule, ordering Mr. Johnson to pay \$12,631.83 to the Crime Compensation Program and \$22,230.22 to the Department of the Air Force. Id.

The court in Johnson held that the trial court acted without statutory authority. Id. at 816. Additionally, inadvertence or attorney oversight does not establish good cause under RCW 9.94A.142(1). Id. at 817. Necessarily, the trial court interpreted RCW 9.94A.142(1) to give it the power to exercise its discretion to grant a continuance on September 30, after the expiration of the 180-day limit. Id. at 816. This presented the threshold question of whether the trial court correctly interpreted RCW 9.94A.142(1) as giving it that authority. Id. at 816.

First, in view of the mandatory nature of the statute it would be

illogical to allow consideration of a continuance that is raised after the time limit has expired. Id. Second, the statute does not provide for requests for continuances made after the expiration of the time limit. Id. Third, to permit such a practice is inconsistent with the purposes of the restitution statute and would not advance finality. Id. at 817. To accept the State's argument would be to permit an order nunc pro tunc without a record action within the time limits. Id. This, the court in Johnson refused to do and concluded the trial court lacked statutory authority to grant a continuance. Id.

In the case at bar the threshold question is identical to Johnson. Did the trial court interpret 9.94A.753 as giving it the authority to continue the restitution hearing after the expiration date? Following the mandatory nature of the statute, it would be illogical to allow consideration of a continuance that is raised after the time limit has expired. Second, the statute does not provide for requests for continuances made after the expiration of the time limit. Third, to permit such a practice is inconsistent with the purposes of the restitution statute would not advance finality. To accept the State's argument would be to permit an order nunc pro tunc without a record action within the time limits. This the court should not do. The court must rule that trial court here lack the authority to grant a continuance after the expiration date for ordering restitution.

2. The Trial Court Committed Error In Ordering Restitution To Mr. Bews For \$28,000 In Loss Income Because The Amount Was Based On Speculation And Conjecture?

The amount of restitution an offender must pay must be based on easily ascertainable damages for injuries, to loss of property, actual expenses incurred for treatment for injury persons, and lost wages resulting from injury. Former RCW 9.94A.142 (2000) (recodified in 2001 as RCW 9.94A.753) "Easily ascertainable" damages are those tangible damages proven by sufficient evidence to exist. State v. Bush, 34 Wn. App. 121, 123, 659 P.2d 1127, review denied, 99 Wn. 2d 1017 (1983). Evidence is sufficient if it provides a reasonable basis for estimating the loss and is not subject the trier of fact to speculation or conjecture. State v. Awawdeh, 72 Wn. App. 373, 379, 864 P. 2d 965, 969, review denied, 124 Wn.2d 1004, 877 P.2d 1288, cert. denied, 513 U.S. 970, 115 S. Ct. 441, 130 L. Ed 2d 352 (1994); Bush, 34 Wn. App. At 123.

Although the rules of evidence do not apply at restitution hearings, the evidence supporting restitution must be reasonably reliable, and the defendant must be given an opportunity to refute it. State v. Kisor, 68 Wn. App. 610, 620, 844 P. 2d 1038 (1993). Once the fact that damage is established, the amount need not be shown with mathematical certainty, State v. Mack, 36 Wn. App. 428, 434, 675 P. 2d 1250 (1984). However it must not be based on mere conjecture or speculation. State v. Awawdeh, 72 Wn. App. At 379; Bush, Wn. App. At 123.

In State v. Dedonado, 99 Wn. App. 251, 253, 991 P.2d 1216 (2000), the defendant pled guilty to the crime of taking a motor vehicle without permission. Id. The sentencing court ordered restitution and at

the delayed restitution hearing, the State presented a form titled "Property Restitution Estimate" from the manager of the auto repair Shop. Id. The form was signed under penalty of perjury, and stated that the property damage included a glass window for \$753.41 and an irreparable Adret Signal Generator that was replaced with an HP ESG 3000A for \$10,968.60. Id.

The defendant, Kim Dedonado, objected to restitution for the generator, stating that there was not enough documentation before the court to show a connection between the Adret Signal Generator and the HP model or that the generators were of comparable value and function. Id.

Ms. Dedonado then objected to the documentation the State submitted concerning the damage to the van. Id. at 255. The insurance company's file was lost, and the State presented a preliminary estimate from a mechanic for damage to the van that totaled \$1,064.67. Id. In addition to damage obviously related to a damaged ignition switch, the preliminary estimate included items that appeared questionable in terms of its relation to the crime. Id.

In responding to Dedonado's objections, which included all of the objections previously raised concerning the generator, the trial court noted that the insurance company for the van paid a sum which was identical to the amount of the preliminary estimate and was thus "satisfied

that the state has met its burden of proving the restitution claims." Id.
Ms. Dedonado appealed.

The court in Dendonado held that the State did not meet its burden of proving the restitution amounts by a preponderance of the evidence with the documentation it provided. Id. at 257. The court reasoned that a causal connection is not established simply because an insurer submits proof of expenditures for replacing property stolen or damaged by the person convicted. Id. Such expenditures may be for items of substantially greater or lesser value than the actual loss. Id.

The trial court committed error in its restitution order of \$28,000 lost wages for Mr. Bews because the order was based on speculation and conjecture. Mr. Bews produced a letter by his former employer that was not dated or signed and claimed that the work would have been eight to ten weeks. There is no indication on that unsigned document Mr. Bews would have worked 'but for' his injuries. Further, there is no one to determine who and when the letter in question was written because it was unsigned and undated. The only additional evidence Mr. Bews provided was a note from his medical provider dated over a year after the assault. In addition, the medical provider did not see Mr. Bews until three months after the accident. There is no explanation how the provider was able to determine one year after the assault and seeing Mr. Bews after the income loss period that Mr. Bews could not have worked during that time.

3. The Trial Court Committed Error In Finding Restitution For Loss Income Where It Was Based On Legally Insufficient Documents That Failed To Meet The Mandatory Requirements Of RCW 9A.72.085?

Although the setting restitution is an integral part of sentencing, the rules of evidence do not apply at restitution hearing. State v. Pollard, 66 WN. App. At 779, 784, 834 P.2d 51 (1992). Evidence presented at restitution hearings, however, must meet due process requirements, such as providing the defendant with an opportunity to refute the evidence presented, and being reasonably reliable. Pollard, 66 Wn. App. 784-85, 834 P.2d 51 (citing State v. Strauss, 119 Wn. 2d 401, 418, 832 P.2d 78 (1992). In other words, the amount of restitution must be established with “substantial credible evidence,” which “does not subject the trier of fact to mere speculation or conjecture.” Citations omitted.) State v. Farnbrough, 66 Wn. App. 223, 225, 831 P.2d 789 (1992). When evidence is comprised of hearsay statements, the degree of corroboration required by due process is not proof of the truth of hearsay statements “beyond a reasonable doubt”, but rather, through which gives the defendant a sufficient basis for rebuttal. State v. S.S., 67 Wn. App. 800, 807-808, 840 P. 2d 891 (1992).

Concededly, restitution may be made by affidavit. The use of declarations and legal affidavits as authorized by RCW 9A.72.085 states in part:

Whenever, under any law of the state or in under any rule, order, or requirement made under the law of this state, any

matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or prove in the official proceeding by unsworn statement, declaration, verification, or certificate, which: (1) recites that it is certified or declared by the person to be true under penalty of perjury; (2) is subscribed by the person; (3) states that date and place of execution; and (4) state that it is so certified or declared under the laws of the State of Washington.

Additionally, General Rule13 provide in part as follows:

(a) 1 Except as provided in section (b), whenever a matter is required or permitted to be supported or prove the affidavit, the matter may be supported or proven by unsworn written statement, declaration, verification, or certificate executed in accordance with RCW 9A.75.085.

In the case at bar, the State submitted one a document from a former employer that was not signed or dated. Both that note and the from the medical provider were uncertified. The two documents fail to meet the minimal threshold for admissibility and should not have been considered by the trial court.

4. The Court Must Vacate The Restitution Order Because A Remand Will Result In Restitution Set Outside The 180-Day Period For Determining Restitution.

If a restitution order is set-aside on appeal because of an insufficient factual basis, additional evidence cannot be introduced on a remand, because that will result in restitution set outside the 180-day period. State v. Dennis, 101 Wn. App. 233, 228-30, 6 P.3d 1173, 1176 (2000).

Based on the fact that the restitution matter was well past the 180-day period, a remand would result in restitution set outside the 180-day period. This court must vacate the restitution order.

F. CONCLUSION

The appellant respectfully request the Court to vacate the order on restitution because the trial court did not have the authority to grant a continuance after the expiration date for ordering restitution had expired. Further, the trial committed error by admitting two documents that failed to meet the minimum threshold of RCW 9A.72.085 for admissibility. Substantively, the documents fail to prove by preponderance of the evidence that Mr. Bews sustain loss income in the amount of \$28,000.00.

December 4, 2009

Respectfully submitted,

Dean D. Nguyen
Attorney for Appellant
Washington State Bar Association
membership number 30148

APPENDIX A

GO GO DESIGNS & CONSTRUCTION
36024 13 AVE SW
FEDERAL WAY WA. 98023
CELL 253-569-0163

TO WHOM IT MAY CONCERN,

I HAD CONTACTED MARK BEWS APPROXIMATLY DECEMBER 21ST OF 2007 FOR WORK. HE WAS UNABLE TO WORK FOR ME AT THAT TIME. I HAD TWO HOUSES TO FRAME ABOUT 8 TO 10 WEEKS OF WORK.

MARK HAD WORKED FOR ME IN THE PAST, MAY THRU AUGUST OF 2006 IN WHICH I PAID HIM \$70 AN HOUR FOR A TOTAL OF \$22,521.73.

BRIAN JOHNSTON, OWNER

APPENDIX B

96 Wn. App. 813
STATE v. JOHNSON
981 P.2d 25

96 Wn. App. 813, STATE v. JOHNSON

[No. 17119-1-III. Division Three. July 27, 1999.]

THE STATE OF WASHINGTON, Respondent, v. CHARLES A. JOHNSON, Appellant.

[1] Criminal Law - Punishment - Restitution - Statutory Provisions - Violation - Effect. A trial court's authority to impose restitution is statutory. A restitution order entered in violation of statutory requirements is void.

[2] Statutes - Construction - Question of Law or Fact - Review. A trial court's choice, interpretation, and application of a statute are questions of law subject to de novo review.

[3] Criminal Law - Punishment - Restitution - Amount - Hearing - Continuance - Timeliness - Statutory Provisions. A trial court lacks authority to grant a continuance of a restitution hearing following the expiration of the time limit prescribed by RCW 9.94A.142(1) for determining the amount of restitution.

[4] Criminal Law - Punishment - Restitution - Amount - Hearing - Continuance - Timeliness - Good Cause - Inadvertence or Attorney Oversight. Inadvertence or attorney oversight does not constitute "good cause" to permit the continuance of a restitution hearing beyond the time limit prescribed by RCW 9.94A.142(1) for determining the amount of restitution.

[5] Criminal Law - Punishment - Restitution - Timeliness - Invalidity - Prejudice - Necessity. A criminal defendant claiming that a restitution order is invalid because it was untimely entered is not required to establish prejudice.

[6] Appeal - Decisions Reviewable - Advisory Opinion. Appellate courts do not issue advisory opinions.

Nature of Action: Prosecution for attempted first degree assault.

Superior Court: After entering a judgment on a guilty plea, the Superior Court for Spokane County, No. 96-1-01204-2, Robert D. Austin, J., on November 24, 1997, more

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than 180 days after sentencing, entered an order setting the restitution amount.

Court of Appeals: Holding that the trial court lacked statutory authority to continue the restitution hearing beyond the statutory time limit for determining the amount of restitution and that there was no "good cause" justifying the continuance, the court reverses the restitution order.

Dennis C. Cronin of Maxey Law Office, P.S., for appellant.

James R. Sweetser, Prosecuting Attorney, and Kevin M. Korsmo, Deputy, for respondent.

BROWN, J. - Charles A. Johnson was convicted on his guilty plea of attempted first degree assault. The order setting the restitution hearing was entered more than 180 days after sentencing, exceeding the limit provided in RCW 9.94A.142(1). The trial judge found good cause to continue the hearing and set restitution. Mr. Johnson, disputing good cause, appealed. We decide the trial court acted without statutory authority. Additionally, inadvertence or attorney oversight does not establish good cause under RCW 9.94A.142(1). Harmless error is inapplicable even without a showing of prejudice to Mr. Johnson. Accordingly, we reverse and vacate the restitution order.

FACTS

At sentencing on March 31, 1997, a restitution hearing was ordered to be set within 30 days. It was not. No agreement or stipulation regarding restitution is before us. Mr.

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Johnson did not waive his right to be present at the restitution hearing. Mr. Johnson was at some point sent to the Shelton Correction Facility. On July 15, 1997, the court ordered Mr. Johnson be transported back to Spokane "as soon as possible." No date for hearing was set. Mr. Johnson was not returned to Spokane pursuant to the July 15 order. The record is thereafter silent until September 30, 1997, 183 days after sentencing. Then, the trial court entered another transportation order and set a restitution hearing for November 21, 1997.

At the scheduled restitution hearing, 235 days after sentencing, Mr. Johnson's counsel argued the delay violated the 180-day limit set in RCW 9.94A.142(1). The court, however, concluded good cause existed for the delay. The court found it was beyond the prosecutor's control to obtain Mr. Johnson's presence at an earlier date. It then entered a restitution schedule, ordering Mr. Johnson to pay \$12,631.83 to the Crime Victim's Compensation Program and \$22,230.22 to the Department of the Air Force. Mr. Johnson appealed.

ANALYSIS**A. Statutory Authority**

The issue is whether the trial court erred by exceeding its statutory authority when ordering a restitution hearing beyond the 180-day limit set in RCW 9.94A.142(1), and concluding it had the authority to do so under the good cause provisions of that subsection.

[1] The authority to impose restitution is statutory. *State v. Martin*, 137 Wn.2d 149, 155, 969 P.2d 450 (1999) (citation omitted); *State v. Hennings*, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). The sentencing court in the context of restitution may not exceed the authority granted under the controlling statute. *Martin*, 137 Wn.2d at 155. A restitution order is void if statutory provisions are not followed. *State v. Duback*, 77 Wn. App. 330, 332, 891 P.2d 40 (1995); *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991).

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[2] Generally, the choice, interpretation, and application of a statute are matters of law reviewed de novo. See *Clark v. Falling*, 92 Wn. App. 805, 809-10, 965 P.2d 644 (1998). RCW 9.94A.142(1) provides in pertinent part:

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 (4) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause.

Former RCW 9.94A.142(1) was construed in *State v. Krall*, 125 Wn.2d 146, 881 P.2d 1040 (1994), as meaning the time limit for setting restitution is mandatory. Thus, under the present statute with the one exception provided, trial courts must determine the amount of restitution at the sentencing hearing or within 180-days unless good cause is shown. RCW 9.94A.142(1). Although it is possible to understand the language to mean the court may hear and decide a request for continuance made beyond the time limit, that is not the apparent intent of the statute or the way the parties have argued. Rather, the parties argue whether under these facts good cause was shown for a continuance.

[3] Accordingly, we proceed as did the parties and the trial court, with the understanding that the September 30 order effected a continuance based on a cause developed during the 180-day time limit, the failed transport order of July 15. Necessarily, the trial court interpreted RCW 9.94A.142(1) to give it the power to exercise its discretion to grant a continuance on September 30, after the expiration of the 180-day limit. Thus, the threshold question is whether the trial court correctly interpreted RCW 9.94A.142(1) as giving it that authority.

First, in view of the mandatory nature of the statute it would be illogical to allow consideration of a

continuance that is raised after the time limit has expired. Second, the statute does not provide for requests for continuances made after the expiration of the time limit. Third, to permit such

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a practice is inconsistent with the purposes of the restitution statute described in Krall and would not advance finality. To accept the State's argument would be to permit an order nunc pro tunc without a record action within the time limits. This we cannot do. See *State v. Nicholson*, 84 Wn. App. 75, 925 P.2d 637 (1996), review denied, 131 Wn.2d 1025 (1997). Therefore, we conclude the trial court lacked statutory authority to grant a continuance. Reaching this conclusion, it is not necessary to discuss good cause.

[4] However, even if the court had statutory authority to consider a continuance after the expiration of the time limit, good cause is not shown. Courts in other contexts have construed the term "good cause" to require a showing of some external impediment that did not result from a self-created hardship that would prevent a party from complying with statutory requirements. See *State v. Tomal*, 133 Wn.2d 985, 989, 948 P.2d 833 (1997) (regarding motion to dismiss appeal); *State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1994) (regarding notice of intent to seek the death penalty); *State v. Crumpton*, 90 Wn. App. 297, 302, 952 P.2d 1100 (regarding inclusion of testimonial affidavits with motion for new trial), review denied, 136 Wn.2d 1016 (1998). Inadvertence or attorney oversight is not "good cause." *Tomal*, 133 Wn.2d at 989; *Dearbone*, 125 Wn.2d at 180.

B. Harmless Error

[5, 6] The State contends that the court's error, if any, was harmless as Mr. Johnson was not prejudiced by the delay. This argument was rejected in *State v. Moen*, 129 Wn.2d 535, 548, 919 P.2d 69 (1996). However, in advancing its harmless error theory, the State asserts that because the victim was entitled to benefits under the Crime Victim's Compensation Act, the Department of Labor and Industries would have requested restitution if the prosecutor did not. RCW 9.94A.142(4); RCW 7.68.120. We do not consider this more than a speculative assertion. Our record does not indicate that the Department took such a step or is a party to this appeal. Thus, we decline to enter an advisory

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opinion on a subject not before us. *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994) (no advisory opinions given in Washington courts). Further, no authority is cited allowing the State to collaterally assert the Department's interest. *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991) (review of argument unsupported by legal authority may be declined), cert. denied, 506 U.S. 856 (1992); RAP 10.3(a)(5). Moreover, the record presented does not show the issue was argued below, normally a prerequisite for review. *Moen*, 129 Wn.2d at 543; RAP 2.5(a).

CONCLUSION

We hold the trial court incorrectly interpreted RCW 9.94A.142(1) to give it the statutory authority to order a restitution hearing beyond the 180-day mandatory time limit set in the statute. Even if it had the authority, good cause is not established through inadvertence or attorney oversight. A harmless error analysis is inapposite in view of the holding in *Moen*. Lack of prejudice to Mr. Johnson is thus, irrelevant. Finally, we decline to consider the State's argument that collaterally raises the exceptions recognized in RCW 9.94A.142(1) and RCW 9.94A.142(4), for petitions from the Department of Labor and Industries for recovery of benefits paid under the Crime Victim's Compensation Program. The restitution order is vacated

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