

63473-9

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No. 63473-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN DEAN,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

In the absence of sufficient proof to establish either an actual loss by the victim or a causal connection between such loss and Kevin Dean's crimes, the trial court erred in entering the restitution order in this case.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The superior court's authority to order restitution is limited to loss or damage caused by the crime in question. Where the trial court found there was no easily ascertainable damages resulting from Mr. Dean's crimes did the court err in imposing restitution?

2. Restitution is limited to those losses which are causally connected to the defendant crimes of conviction. A person cannot be criminally liable for the actions of a coconspirator unless the person has knowledge of the specific acts. If a person cannot be convicted of acts of which he is unaware, can he nonetheless be required to pay restitution for damages arising from those acts?

C. STATEMENT OF CASE

Ron Rennebohm purchased Frontier Ford in Anacortes in 1990. 1/18/06 RP* 130.¹ At the time of Mr. Rennebohm's

¹ Mr. Dean has filed a motion asking the court to take judicial notice of the record in State v. Dean, 59389-7-I, Mr. Dean's appeal of the convictions which gave rise to this restitution award. To differentiate the citations to the

purchase, Lisa Mullen was employed in the bookkeeping department of the dealership and soon Mr. Rennebohm made her the comptroller. 1/18/06 RP* 132. Mr. Dean was hired as the dealership's general manager in 1996. Richard Rekdal, and his firm Clothier and Head, were retained as both Frontier Ford's accountant as well as Mr. Rennebohm's personal accountant beginning in the early 1990's.

Every employee at Frontier Ford had an account receivable which allowed them to take preauthorized draws on their salaries or, in some instances, loans from the dealership. 1/9/06 RP* 91; 1/18/06 RP* 172. The account balances were then deducted from subsequent salary. 1/21/06 RP* 91.

In their most basic form, the alleged thefts concerned Ms. Mullen using draws from her own account receivable, as well as those of other current and former employees, to purchase nonbusiness items for personal use. Through the machinations of the bookkeeping process, Ms. Mullen was then able to "pay off" the debts reflected in the accounts receivable by transferring funds from other accounts within Frontier Ford's ledger, but without ever

verbatim report of proceeding and clerk's paper in that matter from the those pertaining to restitution, the reports and clerk's papers from the trial are designated with an "*".

actually paying money back to Frontier Ford. Given the fact that Frontier Ford's annual sales totaled nearly \$80 million dollars, Ms. Mullen's mispostings within the ledger went unnoticed for years, even as the alleged accumulated misstatements surpassed \$1,200,000. 1/25/06 RP* 82, 181

Because the Anacortes Police Department did not have the ability to investigate such complex allegations of fraud, the Skagit County Prosecutor elected to retain Mr. Rekdal to investigate the allegations. 1/5/07 RP* 87; 1/30/06 RP* 94-95. Despite working on behalf of the prosecutor's office, Mr. Rekdal and his firm continued to act as Frontier Ford and Mr. Rennebohm's personal accountant. 1/26/06 27-30; 1/27/06 RP* 46. During the course of the investigation, Mr. Rekdal learned that over the course of years Mr. Rennebohm had underreported a substantial amount of corporate and personal income, between \$250,000 and \$1,000,000; had used corporate funds to pay off personal loans; and had failed to pay state or federal taxes on any of those funds. CP* 1262-75. Despite the fact that he was at that time retained by the Skagit County Prosecutor's office, Mr. Rekdal did not reveal the information to the parties in the present matter. CP* 1266.

The vast majority of questionable transactions in Frontier Ford's books were posted by Ms. Mullen personally, and the remainder were done by the bookkeeping staff whom she supervised. 1/27/06 RP* 77. Mr. Dean did not write a single check or make a single inappropriate transfer or posting in Frontier Ford's book. Unlike the hundreds of thousands of dollars of purchases traced directly to Ms. Mullen by receipts, checks, and even pictures, the State did not offer a single transaction traceable to Mr. Dean. See 1/8/06 RP* 180 (testimony regarding Ms. Mullen writing checks to herself and debiting amount to Mr. Dean's account receivable); 1/9/06 RP* 15-23 (detailing Ms. Mullen's purchase of more than \$33,000 in jewelry in 20 month period); 1/11/06 RP* 169-75 (detailing Ms. Mullen's purchases of Doncaster clothing totaling nearly \$32,000 in a seven month period); 1/11/06 RP* 181-84 (detailing Ms. Mullen's purchases of stuffed toy rabbits from Bunnies by the Bay totaling \$19,622); 1/13/06 RP* 140-50 (detailing Ms. Mullen's purchases at St John Boutique totaling nearly \$75,000 over four months), 1/17/06 RP* 34 (detailing single purchase of jewelry by Ms. Mullen totaling \$17,500).

Ms. Mullen testified the mispostings which were at the heart of the state's case were done with Mr. Rennebohm's knowledge

and approval. 1/31/06 RP* 120; 2/1/06 RP* 42. Ms. Mullen testified the postings were designed to "hide the profits" of Frontier Ford from Mr. Rennebohm's business partner, Ragnar Pettersson. 1/31/06 RP* 160. By reducing the reported profits, the postings decreased the salaries of managers (such as Mr. Dean) whose pay was in part determined as a percentage of profit. 1/31/06 RP* 161-62. In return for her involvement, Mr. Rennebohm provided her numerous and expensive gifts purchased by Frontier Ford. 1/31/06 RP* 163.

A large portion of Mr. Dean's salary was determined based upon the dealership's monthly sales, his salary fluctuated significantly from month to month depending on monthly sales. Because Mr. Dean was then going through a divorce and needed a predictable monthly pay from which to calculate child support, Ms. Mullen testified that at the direction of Mr. Rekdal and with Mr. Rennebohm's knowledge, she created an accrued salary account for Mr. Dean in which, after paying Mr. Dean a predetermined amount each month in salary, she deposited his surplus monthly income. 1/29/06 RP* 65-68; 1/31/06 RP 127-28. Ms. Mullen testified she ceased using the account for that purpose in 1999 at the direction of Mr. Rekdal because of potential tax liabilities arising

from the accrued salary structure. 2/1/06 RP* 43-45. Ms. Mullen testified that without Mr. Dean's knowledge, she continued to use that account, which still bore Mr. Dean's name, to launder money from her other activities. 2/1/06 RP* 44-45. Mr. Rekdal confirmed that numerous postings in this second account were for checks written to and endorsed by Ms. Rennebohm and for items purchased by Ms. Mullen. 1/27/06 RP* 82.

Numerous witnesses testified that Mr. Dean and Ms. Mullen had a romantic relationship at some point in time while both were employed at Frontier Ford. 1/6/06 RP* 151; 1/13/06 RP* 47.

Mr. Dean was charged with one count each of first degree theft, conspiracy to commit first degree theft, and criminal profiteering. CP 42-52. At the close of the State's case, the trial court dismissed the profiteering count against Mr. Dean, but while noting the paucity of evidence on the remaining counts refused to dismiss them. 1/31/06 RP* 54. Following a trial in January and February 2006, a jury convicted Mr. Dean of both the remaining theft and conspiracy charges. CP* 1030-31. Ms. Mullen was convicted of an additional the count of criminal profiteering based upon several discrete predicate acts in which she alone used the funds she took from Frontier Ford and used to purchase items:

primarily the hundreds of thousands of dollars in purchases of the sort detailed above.

Following a trial in January and February 2006, a jury convicted Mr. Dean of both the remaining theft and conspiracy charges. CP* 1030-31.

Following trial, and after learning Mr. Rekdal had made substantial disclosures in a deposition during a civil suit brought against him and his firm by Mr. Rennebohm that substantially contradicted the State's evidence and argument at trial, Mr. Dean made a motion for new trial. CP* 1188. The newly discovered evidence revealed Mr. Rekdal had withheld information at trial regarding Mr. Rennebohm's illegal financial activities and Mr. Rekdal's knowledge of those acts. The court denied the motion but noted the evidence against Mr. Dean was far from overwhelming and, relative to that presented against Ms. Mullen, nearly nonexistent. CP* 1279-1280.

At sentencing the trial court, again recognizing Mr. Dean was substantially less culpable than Ms. Mullen and imposed a lesser sentence on Mr. Dean. 12/11/06 RP* 42.

The State sought restitution in the amount of \$1,200,000, the amount Mr. Rekdal had theorized was missing from Frontier Ford.

CP 72-82. The court however, imposed a substantially lower amount \$241,458, concluding the only easily ascertainable loss the State had proved, was the amounts resulting from Ms. Mullen's criminal profiteering conviction. CP 46. Despite the fact that Mr. Dean was not convicted of the profiteering charge and that it was not a part of the conspiracy charge he was convicted of, the court imposed the same amount of restitution on Mr. Dean. Id.

The court subsequently amended the order to included \$25,000 for investigation cost. Supp. CP __ In doing so, the court again made no effort to differentiate the cost of investigating Ms. Mullen's discrete acts from Mr. Dean's.

D. ARGUMENT

THE STATE DID NOT PROVE THE AMOUNT OF
LOSS WHICH RESULTED FROM MR. DEAN'S
CRIMINAL ACTS

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. 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 is permitted only for loss that is causally connected to the offense of conviction. State v. Kinneman, 155 Wn.2d 272, 286, 119 P.3d 350 (2005); State v. Woods, 90 Wn.App. 904, 907, 953 P.2d 835 (1998). Restitution may not be imposed for a “general scheme,’ or acts, ‘connected with’ the crime charged, or uncharged crimes unless the defendant enters into an express agreement.” Kinneman, 155 Wn.2d at 286 (quoting Woods, 90 Wn.App. at 907-08).

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. Because the court found there were no easily ascertainable damages for either of Mr. Dean’s convictions the Court lacked authority to impose restitution. RCW 9.94.A.753(3) limits restitution to “easily ascertainable damages.” The Court concluded:

the only easily ascertainable damages causally connected to the crimes for which the defendants were convicted are those proven to the jury under Count 3 against Ms. Mullen in the amount of \$241,458.

CP 146.

But Mr. Dean was not convicted of “Count 3 against Ms. Mullen.” Nor was “Count 3 against Ms. Mullen” a part of the conspiracy of which Mr. Dean was convicted. Mr. Dean was charged with one count each of first degree theft, conspiracy to commit first degree theft, and criminal profiteering. CP 42-52. At the close of the State’s case, the trial court dismissed the profiteering count against Mr. Dean. 1/31/06 RP* 54.² Ms. Mullen, however was convicted of criminal profiteering, i.e., “Count 3,” in addition to first degree theft and conspiracy. The acts underlying Ms. Mullen’s additional conviction were not a part of the conspiracy to commit theft, nor were they part of any crime allegedly committed by Mr. Dean.

By concluding the only easily ascertainable damages were proven only with respect to Ms. Mullen’s charge, the court necessarily found there were no easily ascertainable damages for either of Mr. Dean’s convictions. That conclusion is consistent with

² The court also noted the relative lack of evidence of Mr. Dean’s alleged crimes at sentencing and again in denying Mr. Dean’s motion for a new trial.

the trial court's repeated recognition that little or no evidence existed to prove Mr. Dean ever took money from Frontier Ford. If the losses resulting from Mr. Dean's criminal acts are not easily ascertainable, the court could not impose any restitution.

As such, the court could not impose restitution on Mr. Dean.

3. Losses caused by acts of a coconspirator of which the defendant lacks knowledge and for which he could not be prosecuted cannot be causally related to the defendant's crime. As is clear from the caselaw set forth above, the causal connection requirement exists between the crime of conviction and restitution imposed. Kinneman, 155 Wn.2d at 286; Woods, 90 Wn.App. at 907-08. Thus, a defendant cannot be made to pay restitution arising from uncharged crimes or for crimes dismissed as a part of a plea bargain, unless the defendant specifically agrees.

In Washington a defendant cannot be convicted for crimes of a coconspirator of which the defendant lacks specific knowledge. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001). In reaching that result, the Court rejected the Pinkerton doctrine that a conspirator is liable for all foreseeable acts committed by a coconspirator in furtherance of the conspiracy. Stein, 144 Wn2d. at 246 (citing Pinkerton v. United States, 328 US. 640, 66 S.Ct. 1180,

90 L.Ed.2d 1489 (1946)). Thus, absent proof that Mr. Dean had either agreed to a conspiracy to commit criminal profiteering or had specific knowledge of Ms. Mullen's crime, Mr. Dean could not criminally liable to for those acts.

Despite Stein's rejection of the Pinkerton doctrine, this Court in State v. Israel concluded a defendant could be required to be restitution for acts of a coconspirator of which he was not convicted and of which he could not be convicted due to his lack of knowledge. 113 Wn.App. 243, 300, 54 P.3d.1218 (2002), review denied, 149 Wn.2d 1013 (2002). Israel stated "one convicted of conspiracy should be ordered to pay restitution for any injuries caused by the conspiracy, regardless of the defendant's knowledge or complicity." Id. That conclusion misses the fundamental point of Stein, if the defendant lacks complicity or knowledge of the acts they are by definition not a part of the conspiracy and the resulting injuries cannot be deemed to have been "caused by the conspiracy."

Further, Israel erroneously equates "criminal liability" with conviction alone, ignoring the fact that one of the principal aspects of criminal liability is the sentence or punishment which flows from it. Restitution is a part of that sentence. It is a basic component of

due process that if a person is not criminally liable for an act, he cannot be sentenced for the act.

Finally, Israel concluded the restitution was casually connected even while allowing that the defendant was not charged with the crimes that resulted in loss, and even acknowledging the State could not prove the defendant guilty of those crimes. To conclude the injuries are nonetheless causally connected conclusion begs the question causally connected to what? Certainly not the crime of conviction, as the court noted Mr. Israel could not have been convicted of those crimes. The Court's conclusion ignores the repeated holding that a causal connection is more than just a general scheme or connected act. Kinneman, 155 Wn.2d at 286 (quoting Woods, 90 Wn.App. at 907-08). If acts do not and cannot support a conviction, they are by definition not causally connected to the crime of conviction. It is no different than those instances in which a defendant pleads guilty to some, but not all crimes, without agreeing to pay restitution for the crimes which do not result in a conviction. Absent an agreement by the defendant, restitution is only available for criminal acts which result in a conviction.

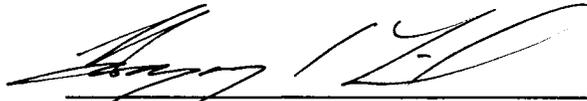
The conspiracy exception this Court created in Israel is wholly at odds with the limitation that restitution must be causally related to the crime of conviction.

Mr. Dean was not and could not be convicted of the crime committed by Ms. Mullen for which the court imposed restitution. Thus, the restitution is not causally related to his convictions.

E. CONCLUSION

For the reasons above this Court must reverse the restitution order entered in this case.

Respectfully submitted this 14th day of December 2009.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63473-9-I
v.)	
)	
KEVIN DEAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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COURT OF APPEALS

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF DECEMBER, 2009.

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