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NO. 63768-1-1

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

REC'D
MAR 09 2010
King County prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

STEVEN BURNS,

Appellant.

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

The Honorable Dean S. Lum, Judge

BRIEF OF APPELLANT

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	8
1. BECAUSE A RESTITUTION HEARING WAS NOT HELD WITHIN THE 180-DAY STATUTORY TIME LIMIT, AND NO CONTINUANCE WAS REQUESTED OR GRANTED, BURNS IS ONLY LIABLE FOR THE AMOUNT OF RESTITUTION HE AGREED TO PAY IN THE PLEA AGREEMENT.	9
a. <u>The Disputed Amount Was Not "Determined" Within the 180-Day Limit</u>	16
b. <u>The Untimely Order Did Not "Modify" The Initial Restitution Amount</u>	18
2. EVEN IF THIS COURT CONCLUDES THE RESTITUTION HEARING WAS TIMELY, PORTIONS OF THE RESTITUTION AWARD WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.	21
D. <u>CONCLUSION</u>	23

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Davis v. Dep't of Licensing</u> 137 Wn.2d 957, 977 P.2d 554 (1999)	19
<u>State v. Barnett</u> 36 Wn. App. 560, 675 P.2d 626 (1984)	22
<u>State v. Davison</u> 116 Wn.2d 917, 809 P.2d 1374 (1991)	8
<u>State v. Dennis</u> 101 Wn. App. 223, 6 P.3d 1173 (2000)	20
<u>State v. Ewing</u> 102 Wn. App. 349, 7 P.3d 835 (2000)	21
<u>State v. Gonzalez</u> ___ Wn.2d. ___, ___ P.3d ___ (81525-9, Filed Feb. 18, 2010) ...	1, 9, 11, 12, 15, 16, 19, 20
<u>State v. Griffith</u> 164 Wn.2d 960, 195 P.3d 506 (2008)	20, 21, 22
<u>State v. Halsey</u> 140 Wn. App. 313, 165 P.3d 409 (2007)	10, 15, 16
<u>State v. Hunsicker</u> 129 Wn.2d 554, 919 P.2d 79 (1996)	17, 18
<u>State v. Johnson</u> 96 Wn. App. 813, 981 P.2d 25 (1999)	5, 10, 16
<u>State v. Kinneman</u> 122 Wn. App. 850, 95 P.3d 1277 (2004)	21

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Krall</u> 125 Wn.2d 146, 881 P.2d 1040 (1994)	5, 10
<u>State v. Murray</u> 118 Wn. App. 518, 77 P.3d 1188 (2003)	9
<u>State v. Pierson</u> 105 Wn. App. 160, 18 P.3d 1154 (2001)	10
<u>State v. Prado</u> 144 Wn. App. 227, 181 P.3d 901 (2008)	10
<u>State v. Reed</u> 103 Wn. App. 261, 12 P.3d 151 (2000)	11
<u>State v. Ryan</u> 78 Wn. App. 758, 899 P.2d 825 (1995)	10, 17, 18, 19
<u>State v. Studd</u> 137 Wn.2d 533, 973 P.2d 1049 (1999)	11
<u>State v. Tetreault</u> 99 Wn. App. 435, 998 P.2d 330 (2000)	10
<u>State v. Tobin</u> 161 Wn.2d 517, 166 P.3d 1167 (2007)	9
<u>State v. Tomal</u> 133 Wn.2d 985, 948 P.2d 833 (1997)	11
<u>Whatcom County v. City of Bellingham</u> 128 Wn.2d 537, 909 P.2d 1303 (1996)	19

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

North Carolina v. Alford

400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).....2

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A.7535, 7, 8, 10, 11, 13, 14, 20

A. ASSIGNMENTS OF ERROR

1. The sentencing court exceeded its statutory authority by ordering restitution after the 180-day statutory time limit, notwithstanding our Supreme Court's recent holding in State v. Gonzalez, __ Wn.2d. __, __ P.3d __ (Docket No. 81525-9, Slip Op. filed Feb. 18, 2010).¹

2. A portion of the restitution award was not supported by sufficient evidence.

Issues Pertaining to Assignments of Error

1. Whether the sentencing court exceeded its statutory authority by ordering restitution after the 180-day statutory time limit, where no continuance was requested or granted? (Assignment of Error 1).

2. Whether the \$20,000 portion of the restitution awarded to "Zurich Insurance Company" was not supported by sufficient evidence? (Assignment of Error 2).

¹ A copy of the slip opinion is attached as an appendix.

B. STATEMENT OF THE CASE

On May 19, 2008, pursuant to Alford² pleas entered in conjunction with a plea agreement, Steven Burns was sentenced for one count of first-degree theft, two counts of second-degree theft, and one count of forgery. CP 22-29 (Judgment and Sentence); CP 57-83 (Guilty Plea/Statement of Defendant on Plea of Guilty). The underlying allegations included acts of theft and forgery against All-Tech Collision (All-Tech) by Burns while an employee of All-Tech. See CP 8-12. In the plea agreement, Burns agreed to pay restitution in the specific amount of \$8,983.25, and further restitution with the “specific amount to be determined at a later hearing.” CP 82. This agreement is also reflected in the Statement of Defendant on Plea of Guilty, which states Burns agrees to the following restitution: “Restitution of \$8,983.25 (agreed) on charged counts and restitution on uncharged counts to be determined at later date.” CP 60-61.

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

Again at the sentencing hearing,³ the state acknowledged Burns only agreed to a portion of the restitution the state would seek:

And at this point, there is a partial restitution order that is agreed. And we have agreed also to essentially set a hearing on the rest of the restitution on the uncharged offenses.

1RP 2. The sentencing court recognized the disputed amount would require a hearing, and noted there was a statutory time limit for the hearing:

I'll sign the agreed upon restitution. And this is understanding there will be an additional request and we obviously will take that up later.

So Counsel, are you going to schedule one within the statutory period?

1RP 12. The prosecutor replied, "Yes, Your Honor." 1RP 12.

In the judgment and sentence, the sentencing court set forth Burns' restitution obligation as \$8,983.25 owed to All-Tech Collision (All-Tech), and the total financial obligation as "\$10,483.25 (plus

³ The Reports of Proceedings (RP) referenced in this brief are as follows:

1RP = 5/16/2008;
2RP = 4/14/2009;
3RP = 5/7/2009;
4RP = 6/4/2009.

any additional restitution).” CP 25. The Judgment and Sentence also provided, “Restitution to be determined at a future restitution hearing” at a “date to be set.” CP 25. At the time of sentencing, Burns did not waive his right to be present at the restitution hearing, and did not expressly waive the requirement of a timely restitution hearing. CP 24. The sentencing court entered a restitution order in the amount of \$8,983.25 to All-Tech. CP 28.

The record reflects that the sentencing court sent Burns notice of a restitution hearing scheduled on December 15, 2008. Supp. CP __ (Sub. No. 88, Notice of Restitution Hearing Scheduled, 11/26/2008). The date for this proposed hearing was already 210 days after sentencing. The hearing was subsequently rescheduled for February 9, 2009, March 30, 2009, and April 7, 2009. Supp. CP __ (Sub. No. 89, Notice of Rescheduled Restitution Hearing Scheduled, 12/31/2008); Supp. CP __ (Sub. No. 91, Notice of Rescheduled Restitution Hearing, 3/2/2009); Supp. CP __ (Sub. No. 92, Notice of Rescheduled Restitution Hearing, 3/10/2009).

On April 14, 2009, 330 days after sentencing, Burns’ counsel filed a written objection and motion to strike the restitution hearing, arguing the state failed “to comply with the statutory

mandate to determine restitution within 180 days of the sentencing hearing.” Supp. CP ___ (Sub. No. 93, Jurisdictional Objection to Restitution Hearings, 4/14/2009). A hearing was held on that date. At the hearing, Burns’ counsel argued that the 180-day time limit imposed by RCW 9.94A.753 is mandatory unless a continuance is sought prior to the expiration of that limit, citing State v. Krall, 125 Wn.2d 146, 148-50, 881 P.2d 1040 (1994), and State v. Johnson, 96 Wn. App. 813, 816-17, 981 P.2d 25 (1999). 2RP 6-7.

The prosecutor argued that since a restitution order was signed at sentencing, the original order was timely, and the amount of additional restitution determined at the hearing would “modify” the original order. 2RP 8-9. The trial court initially challenged the prosecutor’s argument:

So, but you’re not – you’re seeking an additional amount, that in addition and above that which has already been entered, correct? You’re not seeking to modify it down [. . .].

2RP 9-10. The prosecutor contended that since Burns knew there would be an additional hearing, modification was appropriate. 2RP 10-11.

Burns’ counsel argued that the state was required to determine the restitution amount within the 180-day time limit:

The fact that it was contemplated by the parties that restitution was disputed, and that the Court had authority to entertain the dispute, is invariably all true from the pleadings. That's pretty clear. But that means authority to entertain it within the ambit of the statute, which sets the mandatory time frame shall be within 180 days.

2RP 13.

The trial court denied Burns' motion, concluding that even if the 180-day mandatory limit had passed, the court was entitled to "modify" the earlier restitution order to add additional amounts:

You know, it has always been everyone's practice around here to look at the 180 day rule as a hard and fast statutory -- almost a statute of limitations. The problem is that that's really not what the statute says. The statute says that there is a hard and fast 180 day period.

But if that were the case in all situations then you wouldn't have this exception here. And the exception is sufficiently broad, and it is not limited to modifications [. . .]. It just says modify. And so it is certainly within the ambit of a reasonable reading of this restitution statute. And, of course, the purpose of the restitution statute is to make the victim whole.

[. . .]

So I'm going to allow [. . .] this hearing to proceed, because if I were to quote the statute as [defense counsel] suggests, essentially I'd read subsection 4 out of the statute, and you can't do that.

2RP at 13-14 (referencing RCW 9.94A.753⁴).

The restitution hearing occurred on May 7 and June 4, 2009, 353 and 381 days after sentencing, respectively. At the hearings, the trial court heard testimony of Gary Bell, owner of All-Tech, and considered extensive documentary evidence. 3RP 4-38; 4RP 4-112; Tr. Ex. 1-34. Following the hearing, the trial court purported to

⁴ 9.94A.753 provides, in relevant part:

(1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days [. . .]. 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.

[. . .]

(4) [. . .] For an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime [. . .].

“modify” the earlier \$8,983.25 order to “reflect additional losses incurred by the victims,” and ordered Burns to pay \$73,237.40 to All-Tech, as well as \$20,000 to Zurich Insurance Company. CP 85-86.

Burns objected that “there’s been no proof or testimony before the Court to support an award to Zurich.” 4RP 126. The prosecutor claimed “I didn’t think there was any sort of contention with regard to the amount paid by the insurance company.” 4RP 126. The trial court awarded the \$20,000. 4RP at 127. Exhibit 34 appears to include an insurance claim filed by All-Tech to “Underwriters Insurance Company” based on loss as a result of dishonesty of Steven Burns and Robert Apley, Jr. Tr. Ex. 34 at 5. The claim indicates both the total loss and net loss are to be determined (“TBD”). Tr. Ex. 34 at 7. The exhibit does not show evidence of any payment made by any insurance company. Tr. Ex. 34.

C. ARGUMENT

A sentencing court's power to impose restitution is statutory, not inherent. RCW 9.94A.753; State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Whether a trial court exceeded its statutory authority is an issue of law reviewed de novo. State v.

Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). Aside from statutory interpretation, an appellate court reviews a trial court's order of restitution for an abuse of discretion. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

1. BECAUSE A RESTITUTION HEARING WAS NOT HELD WITHIN THE 180-DAY STATUTORY TIME LIMIT, AND NO CONTINUANCE WAS REQUESTED OR GRANTED, BURNS IS ONLY LIABLE FOR THE AMOUNT OF RESTITUTION HE AGREED TO PAY IN THE PLEA AGREEMENT.

The trial court erred by conducting a restitution hearing after the mandatory 180-day statutory time limit expired, since no continuance was requested and there was no showing of "good cause." In State v. Gonzalez, our Supreme Court recently held that modification of the amount of restitution owed to a particular victim is permissible after expiration of the 180-day limit. Appendix at 6-9. However, its holding should be limited to cases where medical or other expenses accrue *after* the 180-day period expires. Otherwise, the 180-day limit is essentially read out of the statute. Here, all of the losses by All-Tech related to the charged and uncharged offenses, and were determinable within the 180-day limit. Even in light of Gonzalez, the trial court erred by allowing amendment of the restitution order after the 180-day limit expired.

Under RCW 9.94A.753(1), the sentencing court must determine the amount of restitution due within 180 days:

When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days [. . .]. The court may continue the hearing beyond the one hundred eighty days for good cause [. . .].

The 180-day time limit is mandatory, unless extended prior to its expiration. State v. Prado, 144 Wn. App. 227, 249, 181 P.3d 901 (2008); State v. Tetreault, 99 Wn. App. 435, 438, 998 P.2d 330 (2000) (restitution order untimely when entered more than 180 days after sentencing); see also, Krall, 125 Wn.2d at 148-50 (trial court may not order restitution determined after expiration of statutory time limit); State v. Ryan, 78 Wn. App. 758, 762-63, 899 P.2d 825 (1995).

A trial court may continue the restitution hearing beyond the 180-day limit for good cause only if a request to continue is timely made. State v. Pierson, 105 Wn. App. 160, 18 P.3d 1154 (2001); State v. Johnson, 96 Wn. App. 813, 816-17, 981 P.2d 25 (1999). To be timely, a motion for continuance must be made before the 180-day limit has expired. State v. Halsey, 140 Wn. App. 313, 326-27, 165 P.3d 409 (2007). A trial court lacks statutory authority to grant a continuance of a restitution hearing following expiration of

the 180-day limit. Johnson, 96 Wn. App. at 816-17. “Good cause,” for purposes of the restitution statute, requires a showing of an external impediment that did not result from a self-created hardship that would prevent a party from complying with statutory requirements. State v. Reed, 103 Wn. App. 261, 265 n. 4, 12 P.3d 151 (2000). Inadvertence or attorney oversight is not “good cause.” State v. Tomal, 133 Wn.2d 985, 989, 948 P.2d 833 (1997); Johnson, 96 Wn. App. at 817.

RCW 9.94A.753 provides that a sentencing court may modify the restitution order within certain parameters:

(4) [...] For an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime [. . .].

Significantly, Gonzalez did not expressly overrule any of this prior caselaw, indicating the Court did not intend to invalidate its other controlling cases. See e.g. State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). (“We will not overrule such binding

precedent *sub silentio*.”). And the Gonzalez Court’s holding can be harmonized with its earlier precedent if it is limited to facts where a victim’s expenses resulting from the offense accrued after the 180-day limit, such as ongoing medical expenses and lost wages.

Gonzalez struck a man in the face and robbed him of his truck. Appendix at 2. The trial court found Gonzalez guilty of first-degree assault and first-degree robbery. Appendix at 2. Gonzalez was sentenced on January 5, 2004, and was ordered to pay \$21,306.45 in restitution to the crime victims’ compensation program. Appendix at 2. On June 28, 2004, the restitution order was amended to correct a clerical error, and the amount was reduced to \$20,886.60. Appendix at 2.

After restitution was ordered, the victim continued to accrue medical bills which CVCP continued to pay. Appendix at 2. When medical treatment was complete, CVCP paid the victim \$22,624.99 for permanent partial disability due to his injuries, \$7,594.91 for time loss, and \$16,228.00 for medical expenses -- in total, \$46,447.90. Appendix at 2. On June 30, 2006, 907 days after sentencing, the state moved for an amended order of restitution to add \$25,561.30 -- the total would then match the \$46,447.90 that CVCP paid. Appendix at 2-3. The trial court granted the motion

and amended the restitution order. Appendix at 3. Gonzalez appealed, then moved to transfer his appeal to the Washington Supreme Court, which granted the motion to transfer. Appendix at 3.

Gonzalez argued the order amending the restitution amount on June 30, 2006, was untimely because it was entered beyond the 180 day period, the state did not seek a continuance for good cause, and the requirements of RCW 9.94A.753(7) were not met. Appendix at 5. The state argued that the amendment was proper under RCW 9.94A.753(4). Appendix at 5-6.

The Court concluded the issue was one of statutory interpretation – specifically, the meaning of the word "amount." Appendix at 5-6. Gonzalez argued that the term "amount" was ambiguous, because it could mean either the total amount of restitution or the amount of the monthly payment. Appendix at 6. He argued that the Court should construe "amount" to mean the monthly payment amount. Appendix at 6. The state argued "amount" meant the total amount of restitution. Appendix at 6. The Court concluded the dictionary definitions and the courts' prior usage of the words "amount" and "terms" demonstrated that "amount" signified the total restitution. Appendix at 6-7. Under this

interpretation, it concluded, the trial court was permitted to amend the restitution order even after the expiration of the 180-day limit. Appendix at 11.

In reaching its conclusion, the Court considered the surrounding statutory provisions. Appendix at 7-9. It observed that RCW 9.94A.753(1) instructs the court to "determine the amount of restitution due" and to "set a minimum monthly payment." Appendix at 8. Accordingly, the court reasoned, the Legislature did not intend the term "amount" to mean the amount of the "monthly payment," because RCW 9.94A.753(1) separately orders the trial court to determine both, and because RCW 9.94A.753(2) provides a specific mechanism for adjusting the monthly payment schedule. Appendix at 8-9. The Court also found significant the legislative findings that victims should be made whole after suffering losses caused by offenders, and that restitution should be used to increase offender accountability. Appendix at 9-10.

However, the Court's analysis suggests its holding regarding the applicability of the modification provision was limited. Significantly, the Court noted RCW 9.94A.753(3) provides restitution must "be based on . . . actual expenses incurred" for treatment or lost wages resulting from injury, and that as a result,

the state is not permitted to seek restitution for likely future medical costs or lost wages. Appendix at 10. The Court observed that if no modification could be made after 180 days, the victim would be limited to restitution for only the first six months of treatment after sentence. Appendix at 10. This result, the Court found, “would fundamentally undermine the purpose of the restitution statute where the victim is burdened with an ongoing serious injury.” Appendix at 10.

Burns’ case is distinguishable from those where a particular type of expense, such as the cost of ongoing medical treatment or counseling sessions, was not knowable at the time of the original restitution hearing. See, e.g., Gonzalez, State v. Halsey, 140 Wn. App. 313, 165 P.3d 409 (2007). In such instances, a modification outside of the 180-day time frame is the *only* method for recouping expenses incurred after expiration of the time period. In such a case, the delay is attributable to the nature and extent of a victim’s injury, and is not simply unjustified or unexplained delay by the prosecutor.

In this case, by contrast, the alleged losses caused by Burns’ actions were capable of accurate determination within the 180-day limit, but were not determined within that limit. To the

extent that the prosecutor's inadvertence led to the unexplained delay, it would not have justified a continuance, had one been sought. Johnson, 96 Wn. App. at 817. Nor should it excuse the state's failure to have the trial court determine the restitution amount within the mandatory time limit. This case is, thus, distinguishable from Gonzalez and Halsey. In contrast to those cases, the delay in this case was unjustified, and was not was not attributable to an ongoing loss.

As stated previously, the Gonzalez Court did not expressly overrule any of its prior case law regarding the mandatory nature of the 180-day time limit, suggesting those cases still control where there is no ongoing injury or loss, and where the restitution amount is capable of determination at a timely hearing. Following those cases, the order in this case was untimely and should be reversed.

a. The Disputed Amount Was Not "Determined" Within the 180-Day Limit.

Burns acknowledges he is required to pay the portion of restitution he agreed to in his plea agreement, \$8,983.25. However, the restitution order imposing the additional disputed amounts, determined following the untimely restitution hearing, is void and must be reversed.

When a defendant agrees to pay specified restitution in his plea agreement but contests further payment, and the state fails to have the trial court determine the additional amount within 180 days, any restitution beyond the agreed amount is void. State v. Ryan, 78 Wn. App. 758, 763, 899 P.2d 825 (1995); see State v. Hunsicker, 129 Wn.2d 554, 558-59, 919 P.2d 79 (1996).

In Ryan, defendant Ryan objected to a portion of the \$10,130 attorney fees included in the ex parte restitution order, but did not object to the remainder of the restitution ordered. 78 Wn. App. at 761. Thereafter, a restitution hearing was not held within the statutory time limit. The Ryan court held that the disputed amounts were not determined within the statutory time frame, because restitution is not “determined” within the meaning of the statute until an objecting defendant receives a restitution hearing. 78 Wn. App. at 763. Accordingly, the Ryan court vacated the disputed portions of the restitution award. 78 Wn. App. at 763.

However, the Ryan court did not vacate the order as to those amounts Ryan agreed to pay: “Because Ryan acknowledged part of the restitution set in connection with his crimes, we vacate only the portion of restitution to which he objected.” 78 Wn. App. at 760. Similarly, in State v. Hunsicker, our Supreme Court held a forgery

defendant's restitution amount was timely determined, even though the restitution order was not entered until one and one-half years after the sentencing hearing, only because the plea agreement specified the restitution amount. 129 Wn.2d 559-60.

As in Ryan and Hunsicker, Burns acknowledged a portion of the restitution in his plea agreement. As in Ryan, Burns expressly disputed other alleged losses. Following these cases, Burns is required to pay the portion of restitution he agreed to in his plea agreement. However, the portion of the restitution order concerning the additional disputed amounts, determined following the untimely restitution hearing, is void.

b. The Untimely Order Did Not “Modify” The Initial Restitution Amount.

Although acknowledging it was beyond the statutory 180-day limit and no continuance was timely requested, the trial court claimed the later restitution order was within its statutory power as a “modification” of the earlier order. 2RP 13-14; CP 85-86.

The trial court claimed the restitution statute allowed the court to “modify” the restitution order to add the amounts determined at the untimely hearing. Limiting Gonzalez to its facts, the appellate courts have rejected the trial court’s approach:

Although the restitution statute allows restitution to be modified as to its amount, terms, and conditions [. . .], the trial court's ability to modify an order of restitution does not impact its initial obligation to accurately determine the amount within [the statutory limit].

Ryan, 78 Wn. App. at 763. Here, the initial determination did not occur within the statutory time limit.

In addition, even if this court disagrees with Burns' interpretation of Gonzalez and determines the order was properly modified as to the amount owed to All-Tech, the original order contained no award to Zurich Insurance. The award to Zurich was not simply a "modification" of the "amount" of the earlier order. It was a new award to a party not included in the original order. Such an award finds no basis in the statute allowing modification, and must be reversed.

The trial court's approach in this case rendered the 180-day time limit meaningless, a result that is contrary to binding precedent. Appellate courts should interpret and construe statutes to give effect to all the language used, with no portion rendered meaningless or superfluous. Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)).

Cases prohibiting trial courts from considering new evidence in remanded restitution cases also demonstrated the error of the trial court's approach. Our Supreme Court has held that introducing new evidence on remand conflicts with the statutory requirement that restitution be set within 180 days after sentencing. RCW 9.94A.753(1); State v. Griffith, 164 Wn.2d 960, 195 P.3d 506 (2008); see also, State v. Dennis, 101 Wn. App. 223, 229-30, 6 P.3d 1173 (2000). If the trial court could simply "modify" the restitution amount after considering new evidence, such orders from appellate courts would likewise be meaningless.

Because a restitution hearing was not held within the 180-day statutory time limit, the only amount of restitution "determined" before the expiration of that deadline was the amount Burns agreed to pay. This result is not contrary to Gonzalez, which is limited to cases where the additional sums added through modification were not capable of determination within the 180-day limit. The amended restitution order must be vacated, except as to the agreed \$8,983.25.

2. EVEN IF THIS COURT CONCLUDES THE RESTITUTION HEARING WAS TIMELY, PORTIONS OF THE RESTITUTION AWARD WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Even if this Court determines the restitution hearing was timely, and that modification was permissible, the trial court nevertheless erred by ordering Burns to pay \$20,000 to Zurich, because no evidence supported the award.

When requesting a restitution order, the state must prove by a preponderance of the evidence that but for the defendant's crime, the loss would not have occurred. State v. Kinneman, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004). While the claimed loss need not be established with specific accuracy, it must be supported by substantial credible evidence. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008).

When an insurance company that pays benefits to a crime victim suffers a loss as a direct result of the crime, a sentencing court may order the offender to pay restitution to the insurance company. State v. Ewing, 102 Wn. App. 349, 353, 7 P.3d 835 (2000) (in arson prosecution, restitution may be ordered to be paid to insurance company that covered loss for destruction of property

and contents); State v. Barnett, 36 Wn. App. 560, 562, 675 P.2d 626 (1984) (restitution to victim's insurance company).

However, in this case, there was no testimony or evidence that Zurich Insurance Company paid \$20,000 as a result of Burns' actions. Although the trial court admitted Exhibit 34, which appears to be a claim submitted By All-Tech to "Universal Underwriters Insurance Co.," the amount of the claim is "TBD," meaning "to be determined." The document does not indicate the exact extent of coverage the policy offered, nor does it reveal that any payment was made. In short, it does not demonstrate that Zurich Insurance Company suffered a loss related to Burns' alleged crimes. The evidence is insufficient to support the restitution order as to Zurich. Griffith, 164 Wn.2d at 965.

D. CONCLUSION

This Court should reverse and vacate Burns' restitution order and remand for instructions to re-instate the initial agreed restitution amount of \$8,983.25 only.

Dated this 9th day of March, 2010.

Respectfully submitted

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Opinion In PDF Format

Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 81525-9
Title of Case: State v. Bustmante Gonzalez
File Date: 02/18/2010
Oral Argument Date: 03/24/2009

SOURCE OF APPEAL

Appeal from Grant County Superior Court
03-1-00617-6
Honorable Evan E Sperline

JUSTICES

Barbara A. Madsen Signed Majority
Charles W. Johnson Signed Majority
Gerry L. Alexander Signed Majority
Richard B. Sanders Dissent Author
Tom Chambers Signed Dissent
Susan Owens Signed Majority
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 81525-9
)	
v.)	
)	EN BANC
ROBERT BUSTMANTE GONZALEZ,)	
)	
Appellant.)	Filed February 18, 2010
)	

FAIRHURST, J. -- Robert Bustmante Gonzalez seeks to reverse an order modifying the total amount of his restitution. He argues that the State violated RCW 9.94A.753, the restitution statute, when it sought to modify his restitution order more than two years after the order was originally entered. He also argues that imposing additional restitution constituted a second punishment in violation of double jeopardy. We reject both of Gonzalez's arguments and affirm the order of the trial court.

State v. Gonzalez (Robert Bustmante), No. 81525-9

I. FACTUAL AND PROCEDURAL HISTORY

On March 23, 2003, Gonzalez struck Denny Thoren in the face and robbed him of his truck. The blow crushed the right side of Thoren's face. Thoren was airlifted to Harborview Medical Center and underwent extensive reconstructive surgery. Even after surgery, Thoren lost most of the vision in his right eye.

A court found Gonzalez guilty of first degree assault and first degree robbery. On January 5, 2004, Gonzalez was sentenced to 288 months in prison and was ordered to pay \$21,306.45 in restitution to the crime victims' compensation program (CVCP). On June 28, 2004, the restitution order was amended to correct a clerical error, and the amount was reduced to \$20,886.60. Gonzalez appealed his conviction, and the Court of Appeals affirmed.

After restitution was ordered, Thoren continued to accrue medical bills which CVCP continued to pay. When Thoren's medical treatment was complete, CVCP paid Thoren \$22,624.99 for permanent partial disability due to his injuries. In addition to the payment for permanent partial disability, CVCP paid Thoren \$7,594.91 for time loss and \$16,228.00 for medical expenses. In total, CVCP paid Thoren \$46,447.90 for the injuries sustained on March 23, 2003.

On June 30, 2006, 907 days after sentencing, the State moved for an amended

2

State v. Gonzalez (Robert Bustmante), No. 81525-9

order of restitution to add \$25,561.30 to the order of restitution. The total would then match the \$46,447.90 that CVCP had paid because of Thoren's injuries. Gonzalez challenged the motion, arguing that it could not be brought more than 180 days after sentencing and that it violated double jeopardy. The trial court granted the motion and amended the restitution order. Gonzalez appealed to the Court of Appeals, Division Three, and then moved to transfer his appeal to this court. We granted Gonzalez's motion to transfer.

II. ISSUES

- A. Did the amended restitution order violate RCW 9.94A.753 when it was entered more than 180 days after Gonzalez was sentenced?
- B. Did the amended restitution order violate double jeopardy?

III. ANALYSIS

- A. The amended restitution order did not violate RCW 9.94A.753 when it was entered more than 180 days after Gonzalez was sentenced

A court's authority to order restitution is derived solely from statute. State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). The amended restitution order in this case is governed by RCW 9.94A.753.1

1RCW 9.94A.753 states:

(1) 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

3

State v. Gonzalez (Robert Bustmante), No. 81525-9

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.

(2) During the period of supervision, the community corrections officer may examine the offender to determine if there has been a change in circumstances that warrants an amendment of the monthly payment schedule. The community corrections officer may recommend a change to the schedule of payment and shall inform the court of the recommended change and the reasons for the change. The sentencing court may then reset the monthly minimum payments based on the report from the community corrections officer of the change in circumstances.

(3) Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction 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 for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

(4) . . . For an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime. The court may not reduce the total amount of restitution ordered because the offender

may lack the ability to pay the total amount. The offender's compliance with the restitution shall be supervised by the department only during any period which the department is authorized to supervise the offender in the community under RCW 9.94A.728, 9.94A.501, or in which the offender is in confinement in a state correctional institution or a correctional facility pursuant to a transfer agreement with the department, and the department shall supervise the offender's compliance during any such period. The department is responsible for supervision of the offender only during confinement and authorized supervision and not during any subsequent period in which the offender remains under the court's jurisdiction. The county clerk is authorized to collect unpaid restitution at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations.

(7) Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court

4

State v. Gonzalez (Robert Bustmante), No. 81525-9

Gonzalez argues that the amended restitution order was untimely because it was entered more than 180 days after entry of the judgment and sentence. RCW 9.94A.753(1) provides that the amount of restitution shall be set at the sentencing hearing or within 180 days unless the court continues the restitution hearing beyond the 180 days for good cause. RCW 9.94A.753(1) provides for an exception to this requirement that is found in RCW 9.94A.753(7). Under RCW 9.94A.753(7), if no restitution order has been entered and the victim is entitled to benefits through the CVCP, the Department of Labor and Industries has one year from sentencing to petition for entry of a restitution order. Gonzalez argues that the order amending the restitution amount on June 30, 2006, was untimely because it was entered beyond the 180 day period, the State did not seek a continuance for good cause, and the requirements of RCW 9.94A.753(7) were not met.

The State asserts that the amendment was proper under RCW 9.94A.753(4). RCW 9.94A.753(4) provides that "restitution may be modified as to amount, terms, and conditions." Whether the amended order was appropriate in this case turns on

does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

5

State v. Gonzalez (Robert Bustmante), No. 81525-9

the meaning of the word "amount." Gonzalez argues that the term "amount" is ambiguous because it may mean either the total amount of restitution or the amount of the monthly payment. He argues that we should construe "amount" to mean the monthly payment amount. The State argues that "amount" means the total amount of restitution.

We review questions of statutory interpretation de novo. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). When we interpret a statute, our goal is to

carry out the legislature's intent. *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). The first step in interpreting a statute is to examine its plain language. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Plain

meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end. *Armendariz*, 160 Wn.2d at 110. A statute is ambiguous when it is "'susceptible to two or more reasonable interpretations,' but 'a statute is not ambiguous merely because different interpretations are conceivable.'" *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489,

6

State v. Gonzalez (Robert Bustmante), No. 81525-9 498, 210 P.3d 308 (2009) (quoting *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)).

When a statutory term is undefined, the words of a statute are given their ordinary meaning, and the court may look to a dictionary for such meaning. *Id.* The noun "amount" means "the total number or quantity : aggregate," "the sum of individuals," and "a principal sum and the interest on it." *Webster's Third New International Dictionary* 72 (2002). These definitions indicate that "amount" generally signifies a total or aggregate quantity. This court's prior use of the word "amount" within the meaning of the restitution statute supports its use as a synonym for total restitution owed. See, e.g., *State v. Hunsicker*, 129 Wn.2d 554, 919 P.2d 79 (1996) (employing the word "amount" in former RCW 9.94A.142, recodified as RCW 9.94A.753 (2001), to describe the principal amount of a restitution order).

In contrast, the word "terms" is defined as "propositions, limitations, or provisions stated or offered for the acceptance of another and determining . . . the nature and scope of the agreement." *Webster's, supra*, at 2358. The monthly payment schedule is better described as a proposition, limitation, or provision that affects the nature and scope of the agreement than as a total quantity. The dictionary definitions and prior usage in case law of the words "amount" and

7

State v. Gonzalez (Robert Bustmante), No. 81525-9 "terms" demonstrate that "amount" signifies total restitution.

When we look to the other provisions, it becomes even more clear that "amount" cannot mean "monthly payment." "[W]hen similar words are used in different parts of a statute, 'the meaning is presumed to be the same throughout.'" *Welch v. Southland Corp.*, 134 Wn.2d 629, 636, 952 P.2d 162 (1998) (internal

quotation marks omitted) (quoting *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 722, 748 P.2d 597 (1988)). RCW 9.94A.753(1) instructs the court to "determine the amount of restitution due." (Emphasis added.) Later in the same section, the court is instructed to "set a minimum monthly payment that the offender is required to make towards the restitution that is ordered." *Id.* (emphasis added). Here, the legislature clearly did not contemplate "amount" to mean the amount of the "monthly payment" because it separately orders the trial court to determine both.

In addition, RCW 9.94A.753(2) provides a specific mechanism for adjusting the monthly payment schedule. Under that provision, a community corrections officer may determine whether there has been a change in circumstance that merits an amendment of the monthly payment schedule. *Id.* If the officer recommends a change, the court may reset the monthly minimum payment schedule. *Id.* When read in combination with RCW 9.94A.753(2), the word "amount" in RCW

8

State v. Gonzalez (Robert Bustmante), No. 81525-9
9.94A.753(4) cannot reasonably be interpreted as encompassing a monthly payment schedule.

Even if we were to find that the word "amount" is ambiguous, legislative intent is best effectuated by interpreting "amount" to mean total quantity. When the legislature enacted the restitution statute, it clearly stated its intent that victims be afforded legal protections at least as strong as those given criminal defendants. That is, victims of crime were to be "honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants." *Laws of 1981, ch. 145, § 1.*

Legislative changes can also be considered when determining legislative intent. *State v. Mendoza*, 165 Wn.2d 913, 921, 205 P.3d 113 (2009). The legislature's amendments to the restitution statute demonstrate that the legislature has consistently sought to ensure that victims of crimes are made whole after suffering losses caused by offenders and to increase offender accountability. It established the monthly minimum payment system, for example, as part of its effort to "hold[] offenders accountable to victims . . . for the assessed costs associated with their crimes" and provide "remedies for an individual or other entities to recoup or at least defray a portion of the loss associated with the costs of felonious

9

State v. Gonzalez (Robert Bustmante), No. 81525-9
behavior." *Laws of 1989, ch. 252, § 1.*

Thus, according to the statute's plain language and legislative history, it is

clear the statute is intended to ensure that defendants fulfill their responsibility to compensate victims for losses resulting from their crimes. The plain meaning of the modification provision of RCW 9.94A.753(4) advances this intent by allowing an amendment to restitution in order to compensate a victim for losses resulting from a defendant's assault.

In contrast, not allowing an amendment would severely undermine the legislature's intent. Restitution must "be based on . . . actual expenses incurred" for treatment or lost wages resulting from injury. RCW 9.94A.753(3). In other words, the State is not permitted to seek restitution for likely future medical costs or lost wages. If no amendment were available after 180 days, the victim would be limited to restitution for only the first six months of treatment after sentence. Disallowing amendments after 180 days would fundamentally undermine the purpose of the restitution statute where the victim is burdened with an ongoing serious injury.

Because of the plain language, legislative history, and legislative purpose of the restitution statute, we hold that RCW 9.94A.753(4) unambiguously allows the total amount of restitution to be modified "during any period of time the offender

10

State v. Gonzalez (Robert Bustmante), No. 81525-9

remains under the court's jurisdiction." Gonzalez was under the court's jurisdiction at the time the amended order was entered. See RCW 9.94A.753(4). Accordingly, we hold that the trial court did not violate RCW 9.94A.753 when it entered the amended order of restitution on June 30, 2006.

B. The amended restitution order did not violate double jeopardy

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."² Similarly, the Washington State Constitution provides that "[n]o person shall be . . . twice put in jeopardy for the same offense." Wash. Const. art. I, § 9. Washington's double jeopardy clause "is given the same interpretation the Supreme Court gives to the Fifth Amendment." State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). The double jeopardy clause of the Fifth Amendment has been held to provide three protections: first, it protects against a second prosecution for the same offense after an acquittal; second, it protects against a second prosecution for the same offense after a conviction; and third, it "protect[s] against 'multiple punishments for the same offense' imposed in a single proceeding." Jones v.

²Here, the State asserts that restitution is civil in nature and, therefore, does not implicate double jeopardy. While we have not yet determined whether restitution is civil or criminal, we do not reach that issue today. Even if restitution were criminal, the amended order in this case does not violate double jeopardy.

11

State v. Gonzalez (Robert Bustmante), No. 81525-9

Thomas, 491 U.S. 376, 381, 109 S. Ct. 2522, 105 L. Ed. 2d 322 (1989) (quoting North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)). Gonzalez argues that the amended order of restitution constitutes multiple punishments in violation of the third protection against double jeopardy.

The Supreme Court addressed multiple punishments in United States v. DiFrancesco, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980). In DiFrancesco, a defendant was found to be a "dangerous special offender" under a federal statute and sentenced to two concurrent 10-year sentences. Id. at 124. However, due to a preexisting 9-year sentence, the 10-year sentence would have only added one year to the defendant's time in federal prison. Id. at 125. A federal statute permitted the government to appeal the sentence to the Second Circuit Court of Appeals where the appellate court had the discretion to increase the sentence. Id. at 121 n.2. The government appealed and sought to increase the sentence. Id. at 125. On appeal, the Second Circuit concluded that the statute violated the prohibition on multiple punishments under the double jeopardy clause. Id. at 126. The Supreme Court reversed. Id. at 143.

12

State v. Gonzalez (Robert Bustmante), No. 81525-9

The Court determined that sentencing decisions did not enjoy the same level of finality as an acquittal. Id. at 132. The Supreme Court described double jeopardy in general when it stated:

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Id. at 127-28 (alteration in original) (quoting Green v. United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)). The Court recognized that while these considerations are sensible with regard to retrials on guilt, they "have no significant application to the . . . review [of] a sentence." Id. at 136. The appeal at issue did not "approximate the ordeal of a trial on the basic issue of guilt or innocence." Id. Furthermore, the Court concluded that because federal law provided for appeal to the circuit court, and people are deemed to know the law, the defendant had no legitimate expectation of finality in his sentence. Id. "The Double Jeopardy Clause does not provide the defendant with the right to know at any

specific moment in time what the exact limit of his punishment will turn out to be."

13

State v. Gonzalez (Robert Bustmante), No. 81525-9

Id. at 137. The Court remanded the case for further determination. Id. at 143.

In later cases, the Court has clarified what double jeopardy requires with regard to multiple punishments. The Court has recognized that "in the multiple punishments context" the interest the double jeopardy clause seeks to protect is "'limited to ensuring that the total punishment did not exceed that authorized by the legislature.'" Thomas, 491 U.S. at 381 (quoting United States v. Halper, 490 U.S. 435, 450, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), abrogated on other grounds by Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488, 149 L. Ed. 2d 450 (1997)). However, even if the sentence is within the range authorized by the legislature, double jeopardy may still pose a bar if the defendant has a legitimate expectation of finality in his or her sentence. See Pennsylvania v. Goldhammer, 474 U.S. 28, 30-31, 106 S. Ct. 353, 88 L. Ed. 2d 183 (1985); accord State v. Hardesty, 129 Wn.2d 303, 311, 915 P.2d 1080 (1996).

We recognized the legitimate expectation of finality standard in Hardesty. Hardesty was accused of fraud for failing to accurately relate his criminal history as part of a plea agreement. Hardesty, 129 Wn.2d at 305. After Hardesty had fully served his sentence, the prosecutor determined that Hardesty had a more extensive criminal history and moved to increase his sentence. Id. at 307. The trial court

14

State v. Gonzalez (Robert Bustmante), No. 81525-9

granted the motion and extended Hardesty's sentence. Id. at 308. The Court of Appeals reversed on double jeopardy grounds. Id. at 309. On review, we determined that those who commit fraud on the court may be subject to a resentencing because they have no expectation of finality in their sentences. Id. at 315. We stated that a legitimate expectation of finality "may be influenced by many factors such as the completion of the sentence, the passage of time, the pendency of an appeal or review of the sentencing determination, or the defendant's misconduct in obtaining the sentence." Id. at 311.

Here, Gonzalez was on notice that his sentence could be modified. As explained above, the restitution statute allows for the total amount to be amended. RCW 9.94A.753(4). Because everyone is charged with knowing what the law is, Gonzalez is deemed to know that his restitution order was amendable. While it is conceivable that the passage of time alone could be sufficient to give rise to a legitimate expectation of finality, sufficient time has not passed in this case. At trial, Gonzalez was made aware of the nature and extent of Thoren's injuries. He knew

that Thoren's injuries were severe and would take substantial treatment time. Therefore, Gonzalez could not have had a legitimate belief that the restitution order was final at the time the amended restitution order was entered.

15

State v. Gonzalez (Robert Bustmante), No. 81525-9

Because Gonzalez did not have a legitimate expectation of finality in the restitution portion of his sentence, and because the restitution amount is consistent with RCW 9.94A.753(3), double jeopardy was not violated when the trial court entered the amended order of restitution.

16

State v. Gonzalez (Robert Bustmante), No. 81525-9

IV. CONCLUSION

When an order of restitution is entered, the amount of restitution may be later modified by the court. RCW 9.94A.753(4). A modification that increases the amount of restitution does not violate double jeopardy unless the offender had a legitimate expectation in the finality of the restitution order. Here, restitution was properly amended under RCW 9.94A.753(4). The amendment did not constitute a violation of double jeopardy because the statute put Gonzalez on notice that restitution could be amended. Also, due to the nature and extent of Thoren's injuries, Gonzalez should have been aware that his restitution could have been modified even two and a half years after sentencing. The amended order of restitution is affirmed.

17

State v. Gonzalez (Robert Bustmante), No. 81525-9

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Chief Justice Barbara A. Madsen

Justice Susan Owens

Justice Charles W. Johnson

Justice Gerry L. Alexander

Justice James M. Johnson

Justice Debra L. Stephens

18

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63768-1-I
)	
STEVEN BURNS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STEVEN BURNS
1239 ALOISE AVENUE
SATA ROSA, CA 95407

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF MARCH, 2010.

x *Patrick Mayovsky*