

NO. 64617-6-I

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

REC'D

MAY 14 2010

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA MCINTIRE,

Appellant.

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

The Honorable Monica Benton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court acted outside its sentencing authority in imposing the second restitution order for \$14,668.00, well beyond the 180-day statutory time limit.

Issue Pertaining to Assignment of Error

Whether the trial court acted outside its authority in imposing a second restitution order – over one year past sentencing – where no good cause for a continuance was shown, as the prosecutor knew of the damages at the time of the first restitution hearing, but failed to request restitution for such damages, due to a miscommunication?

B. STATEMENT OF THE CASE

Following a jury trial in King County Superior Court, appellant Joshua McIntire was convicted of taking a motor vehicle without permission on January 13, 2008. CP 5-6, 31. According to the certification for determination of probable cause, McIntire and co-defendant Hannah O'Reilly took a 1996 Honda Accord from a McDonald's parking lot on Holman Road in Seattle, after Ann Joyce and her husband parked it and went inside the restaurant. CP 3. McIntire was allegedly driving when the car when it was involved in an accident about 30 minutes later. McIntire and O'Reilly

purportedly fled but were later located in the area and identified by a witness. CP 3.

On August 15, 2008, the court sentenced McIntire to 16 months of incarceration and restitution to be determined at a later date. CP 33-40. On October 10, 2008, the court imposed restitution in the amount of \$6,725.66 to be paid to Allstate Insurance Company, joint and several liability with Hannah O'Reilly, should she be convicted and required to pay under a separate order. CP 41-42. This restitution order was for the Honda Accord. RP 10-11. The court's order also indicated, "Additional restitution may be requested and ordered in the future, beyond the 180 days, if directly related to this cause number." CP 41.

Four days later, on October 14, 2008, United Services Automobile Association (USAA) filed a letter written by its subrogation specialist to the deputy prosecuting attorney assigned at the time, Samantha Kanner, indicating the company's interest in "recovery through restitution" in subrogation of its policyholder, Tracee Lee Mayfield, stating the date of loss as January 13, 2008, the date of the accident mentioned in the statement of probable cause. Supp. CP ___ (sub. no. 42, Letter, 10/14/08). The letter itself was dated October 8, 2008. Id.

It was not until one year later, however, that the state noted an additional restitution hearing. Supp. CP __ (sub. no. 43, Notice of Restitution Hearing Scheduled, 10/26/09).

At the November 19, 2009 hearing, a different prosecutor explained the reason for the delay was a miscommunication and engaged in the following colloquy with the court:

CARLSTROM [prosecutor]: . . . It is a little bit unclear to me as to why we are this far beyond the original restitution date, but it appears that what happened is the driver of the victim vehicle who was run into was contacted by my office and indicated she did not wish to pursue restitution.¹ What does not appear to have been all that clear at the time was that she was not actually the registered owner of the car that was totaled by the Defendant, it was actually her partner.

Shortly after restitution was initially ordered –

JUDGE: Domestic partner, is that what you're suggesting?

CARLSTROM: I believe so.

JUDGE: Okay.

. . .

CARLSTROM: She was driving someone else's car.

¹ The prosecutor is referring to Ann Alfred. She was listed as a witness in the state's trial brief, testified at trial, and her injuries from "the accident" were the subject of a motion in limine, according to the Clerk's Minutes. Supp. CP __ (sub. no. 24A, Clerk's Minutes, 7/23/08); Supp. CP __ (sub. no. 24, State's Trial Brief, 7/17/08).

JUDGE: Alright.

CARLSTROM: Shortly after the original restitution order was entered there is in ECR a letter from the registered owner insurance company ---

JUDGE: Mmm hmm.

CARLSTROM: Indicating that they do wish to pursue restitution. That letter purports to be addressed to the King County Prosecutor's Office. It does not appear that we received that because our restitution investigator was not aware ---

JUDGE: Was it timely? When was it sent?

CARLSTROM: It was. I --- I think that if you look in ECR and I meant to double check the dates before I came up but the letter was sent --- or at least was filed in the court file --- I want to say the day after the restitution order --- The Court's original restitution order was entered.

The original restitution order did specify that additional restitution could be sought if it was directly related to this cause regardless of the 180 day period.

We now have information, which I believe the Court has a copy of the packet that we provided indicating that the registered owner's insurance company is seeking restitution in the amount of \$38,000.00 plus dollars for the vehicle that was totaled as a direct result of Mr. McIntire's actions.^[2]

So, that --- is the request from the State that is before the Court today.

RP 5-7.

² Although the "packet" referred to by the prosecutor was not filed at the time of the hearing, it is clear the court considered it when making its ruling. RP 14. It has since been filed and will be designated as soon as it is recorded. It indicates the registered owner of the Corolla and USAA policyholder was Tracee Lee Mayfield.

Regardless of the court's first restitution order – and seemingly indefinite extension of time it granted the state to request additional restitution – defense counsel objected the statute made no such allowance, except where the full extent of an individual's injuries remained unsettled at the time of the original restitution hearing:

Second, I think the timeliness is --- is critical because we are way outside the 180 days and this is not the same victim.

I think that when the Court made --- left it open that additional restitution may be sought. When there's restitution within the six month period, but all the injuries aren't known that the Court can leave a restitution order --- order open and if there's ongoing costs to the victim in that restitution order then those can be ordered --- those additional costs can be ordered by the Court outside the 180 days.

I don't think that applies to a completely different person who was never really named as a victim of this case.

RP 8-9.

Responding to the timeliness issue, the prosecutor asserted the court could "in effect modify the restitution amount," based on its earlier order by virtue of RCW 9.94A.753(4).³ RP 12-13. The

³ RCW 9.94A.753(4) provides in relevant part:

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

defense reiterated its position that the state was seeking an entirely new restitution order “to a different person,” rather than modification of the old one, and that RCW 9.94A.753(4) therefore did not apply. RP 13.

The court was not persuaded by the defense argument, although it was concerned about the amount requested: “\$36,000.00 for a 2006 Corolla.” RP 11; see also RP 14. Based on the packet provided by the prosecutor’s office containing materials from the insurance company (RP 7, 14),⁴ the court found “ascertainable” damages in the amount of \$14,668.00, which it imposed in an additional order setting restitution. CP 43. McIntire appeals from this order. Supp. CP __ (sub. no. 47, Notice of Appeal, 12/16/09).

C. ARGUMENT

THE SENTENCING COURT EXCEEDED ITS AUTHORITY
IN IMPOSING THE SECOND RESTITUTION ORDER WELL
BEYOND THE STATUTORY TIME LIMIT.

Regardless of the court’s first restitution order – and seemingly indefinite extension of time granted the state to seek

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 [. . .].

additional restitution, a sentencing court's power to impose restitution is derived solely by statute. State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010). By statute, restitution must be imposed 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 [. . .].

RCW 9.94A.753(1).

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, State v. Krall, 125 Wash.2d 146, 148-50, (1994) (trial court may not order restitution determined after expiration of statutory time limit).

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

⁴ See n.2.

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.

The trial court was without authority to grant the state an indefinite period of time in which to seek restitution. First, the court's initial restitution order indicating "additional restitution may be requested and ordered in the future, beyond 180 days, if directly related to this cause number" does not qualify as a "continuance" of the restitution hearing. The court did not continue the hearing to any particular date for any particular purpose. Rather, the court attempted to give the state an indefinite period of time in which to seek restitution. Such runs contrary to the statute's 180-day time limit.

Second, assuming the court's order constituted a "continuance," there was no good cause to support it. "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.

If the 180-day time limit cannot be extended but for “good cause,” it stands to reason it cannot be extended indefinitely. An indefinite extension encompasses all impediments – external and otherwise, including attorney neglect or oversight.

And as it turned out, there was no external impediment to establishing restitution for the Toyota Corolla at the time of the initial restitution hearing or shortly thereafter, within the 180-day period. The state knew of the accident at the time of trial. The insurance company requested restitution from the prosecutor’s office just after the first restitution hearing. Whatever the reason, the prosecutor’s office dropped the ball. There was no external impediment preventing the prosecutor’s office from complying with the statutory directive. Rather, there was a self-created hardship in what appears now to be a miscommunication. The court’s indefinite extension granted the state was unauthorized and cannot serve as a “continuance” for “good cause” after-the-fact under RCW 9.94A.753(1).

As the parties appeared to recognize, the court's authority to impose additional restitution at such a late juncture depended upon the applicability of RCW 9.94A.753(4), which provides:

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 [. . .].

Emphasis added.

Contrary to the court's ruling, however, this subsection does not apply, because the state was not seeking to modify an existing order; rather, it was seeking a completely new order to the benefit of a completely new victim. Likewise, this subsection does not apply because it contemplates those situations where, as defense counsel argued, the full extent of an individual's damages cannot be known at the time of the restitution hearing. Any other interpretation reads the 180-day time limit out of the statute.

In response, the state may cite to the Supreme Court's recent decision in State v. Gonzalez,⁵ where the court held that

⁵ 168 Wn.2d 256, 226 P.3d 131 (2010).

modification of the amount of restitution *owed to a particular victim* is permissible after expiration of the 180-day limit. However, a close reading of *Gonzales* actually supports McIntire's interpretation.

Gonzalez struck a man in the face and took his truck. The blow crushed the right side of the man's face, requiring extensive reconstructive surgery. *Gonzalez*, 168 Wn.2d at 259. *Gonzalez* was sentenced on January 5, 2004, for assault and robbery, and ordered to pay \$21,306.45 in restitution to the crime victims' compensation program (CVCP). *Gonzalez*, 168 Wn.2d at 260. On June 28, 2004, the restitution order was amended to correct a clerical error, and the amount was reduced to \$20,886.60. *Gonzalez*, at 260.

After restitution was ordered, the victim continued to accrue medical bills, which CVCP continued to pay. 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, totaling \$46,447.90. *Gonzalez*, 168 Wn.2d at 260. On June 30, 2006, 907 days after sentencing, the state moved for an amended order of restitution to add \$25,561.30, to make up the difference between the initial

restitution order and what CVCP ultimately paid. The trial court granted the motion and amended the restitution order. Gonzalez appealed, then moved to transfer his appeal to the Washington Supreme Court, which granted the motion to transfer. Gonzalez, at 260.

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)⁶ were not met. Gonzalez, at 261-62. The state argued that the amendment was proper under RCW 9.94A.753(4).

The Court addressed the issue as one of statutory construction; specifically, the meaning of the word "amount" in RCW 9.94A.753(4). Gonzalez, 168 Wn.2d at 262. Gonzalez

⁶ That subsection provides:

(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 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.

argued that the term amount was ambiguous, because it could mean either the total amount of restitution or the amount of the monthly payment. He argued that the Court should construe amount to mean the monthly payment. Gonzalez, at 162. The state argued amount meant the total amount of restitution. Id. The Court concluded the dictionary definitions and the court's prior usage of the words "amount" and "terms," as well as other provisions of the statute, demonstrated that "amount" signified the total restitution. Gonzalez, at 263-265. Under this interpretation, it concluded, the trial court was permitted to amend the restitution order even after the expiration of the 180-day limit. Gonzalez, at 266.

In reaching its conclusion, the Court 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. Gonzalez, 168 Wn.2d at 265.

Yet, the Court's analysis also 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. Gonzalez, 168 Wn.2d at 266. 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. Gonzalez, at 266. This result, the Court found, would fundamentally undermine the purpose of the restitution statute where the victim is burdened with an ongoing serious injury. Id. Furthermore, Gonzalez did not expressly overrule any prior restitution case law, 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).

Accordingly, 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.

McIntire's 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 McIntire's actions were capable of accurate determination within the 180-day 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.

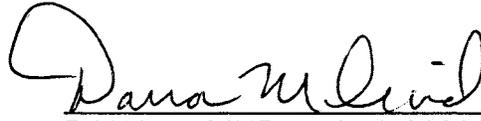
D. CONCLUSION

This Court should reverse the second order imposing additional restitution in the amount of \$14,668.00, as it was not authorized by statute.

Dated this 14th day of May, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "Dana M. Lind", written over a horizontal line.

DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

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

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|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 64617-6-I |
| |) | |
| JOSHUA MCINTIRE, |) | |
| |) | |
| 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 14TH DAY OF MAY, 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] JOSHUA MCINTIRE
DOC NO. 321937
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MAY, 2010.

x *Patrick Mayovsky*