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NO. 64617-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA McINTIRE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA BENTON

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**BRIEF OF RESPONDENT**

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A. ISSUES

A trial court is required to order restitution either at sentencing or within 180 days of sentencing. Once the court orders restitution, it may modify the amount while the defendant remains on court supervision. Here, the trial court ordered restitution within 180 days of sentencing and later modified the amount of restitution while McIntire remained on court supervision. Did the court properly exercise its statutory authority in modifying the earlier restitution amount?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

The State charged defendant Joshua McIntire by amended information with Taking a Motor Vehicle Without Permission in the Second Degree. CP 5. The State alleged that McIntire drove Ann Joyce's Honda Accord without permission. CP 5. Minutes after stealing the Accord, McIntire collided with a Toyota Corolla driven by Ann Alfred. CP 3, 44-49, 50-58; RP 11. A jury found McIntire guilty as charged. CP 31.

On August 15, 2008, McIntire was sentenced to a standard range sentence. CP 33-40. On October 10, 2008, 56 days after

sentencing, the trial court ordered restitution in the amount of \$6,725.66 to Allstate Insurance on behalf of Ann Joyce and the damage caused to her Accord. CP 41; RP 10-11. The prosecutor had spoken to Alfred, the driver of the Corolla, who indicated that she did not wish to pursue a restitution claim. CP 44-49, 50-58; RP 5-7. The trial court clarified in the order that "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, United Services Automobile Association (USAA) filed a letter requesting restitution on behalf of Tracee Mayfield, who owned the Toyota Corolla that was totaled in the collision. CP 59; RP 7. On October 26, 2009, the State noted a financial review hearing to address this claim for additional restitution. CP 60.

On November 19, 2009, the trial court ordered additional restitution to USAA in the amount of \$14,668.37 for the damage McIntire caused to the Corolla.<sup>1</sup> CP 43; RP 14. The trial court found that McIntire was aware at the initial restitution hearing that

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<sup>1</sup> McIntire does not challenge the amount of restitution ordered on appeal and therefore does not submit any Report of Proceedings from which to evaluate the trial facts regarding McIntire's criminal conduct in this case.

more restitution could be sought at a later date. RP 14. McIntire now appeals his restitution. CP 61.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY MODIFIED THE AMOUNT OF RESTITUTION.

McIntire argues that the trial court ordered additional restitution in this case without statutory authority. Because the clear language of the statute authorizes such a modification, McIntire's claim fails.

A court's authority to order restitution as a condition of sentence for a criminal offense is purely statutory. State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). Restitution pursuant to a felony conviction is governed by the Sentencing Reform Act of 1981 (SRA) under RCW 9.94A.030(42) and RCW 9.94A.753.

Those statutes provide as follows:

“Restitution’ means a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specified period of time as payment of damages. The sum may include both public and private costs.” RCW 9.94A.030(42).

“[R]estitution 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." RCW 9.94A.753(3).

The language of the restitution statute is intended to grant broad powers of restitution to the courts. State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991). Imposition of restitution is generally within the sound discretion of the trial court and is reviewed under an abuse of discretion standard. Id. at 919. Courts reject overly technical constructions that would allow an offender to avoid just punishment. Id. at 922.

Despite the discretion granted to the trial court in determining restitution, there are statutory directives as to when restitution may be ordered or amended. See RCW 9.94A.753(1), (4). "When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days. . ." RCW 9.94A.753(1) (emphasis added). "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." RCW 9.94A.753(4). The term "shall" is mandatory and the term "may" is directory of the trial court. State v. Krall, 125 Wn.2d 146, 148-49, 881 P.2d 1040 (1994).

The restitution statute "unambiguously allows the total amount of restitution to be modified 'during any period of time the offender remains under the court's jurisdiction.'" State v. Gonzalez, 168 Wn.2d 256, 266, 226 P.3d 131 (2010) (quoting RCW 9.94A.753(4)). In Gonzalez, our Supreme Court held that the trial court can increase a victim's restitution amount if there is still court jurisdiction. Id. The trial court's modification of the "amount" of restitution refers to the total restitution, not simply the monthly payment of restitution already ordered. Id. at 264. "[I]t is clear that the statute is intended to ensure that defendants fulfill their responsibility to compensate victims for losses resulting from their crimes." Id. at 265. "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." Id.

The trial court held a restitution hearing within 180 days of sentencing to determine the amount of restitution. CP 37, 41. Specifically, the court determined that Allstate Insurance was entitled to restitution in the amount of \$6,725.66. CP 41. There is no question that the trial court properly ordered the initial restitution amount.

The court later modified this initial amount of restitution by ordering an additional \$14,668.37 to be paid to the other victim in this case. CP 43. The court's decision to modify the restitution amount was within its discretion, since it still had jurisdiction over McIntire. 9.94A.753(4); State v. Gonzalez, 168 Wn.2d at 266. As such, the total restitution ordered by the trial court, including its modification, was statutorily authorized.

McIntire argues that any modification for additional restitution needed to be requested within 180 days of sentencing, otherwise he claims that the 180-day deadline is violated. He misapplies the statute by erroneously combining its two separate and distinct sections.

The court must determine an amount of restitution either at sentencing or within 180 days of sentencing. RCW 9.94A.753(1). The statute sets a deadline to order the amount of restitution at

180 days after sentencing *if* it was not ordered at the sentencing hearing. Id. In our case, the restitution amount of \$6,725.66 was determined within the 180-day deadline. CP 41. Because the restitution hearing was timely held, the 180-day deadline was satisfied.

A separate section of the restitution statute unambiguously authorizes the trial court to modify the initial restitution amount while the defendant remains under court supervision. RCW 9.94A.753(4); Gonzalez, 168 Wn.2d at 266. There is no 180-day deadline to modify the amount of restitution after the initial restitution amount is timely ordered. See id. The cases cited by McIntire involve initial restitution hearings that were untimely, contrary to RCW 9.94A.753(1). See State v. Prado, 144 Wn. App. 227, 249, 181 P.3d 901 (2008) (an initial order must be entered within 180 days); State v. Tetreault, 99 Wn. App. 435, 438, 998 P.2d 330 (2000) (an initial restitution hearing held after 180 days is invalid); Krall, 125 Wn.2d at 148-50 (an initial hearing must be held within 180<sup>2</sup> days); State v. Ryan, 78 Wn. App. 758, 762-63, 899 P.2d 825 (1995) (an agreed ex parte initial restitution order

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<sup>2</sup> The former RCW 9.94A.753(1) required that the initial restitution hearing be held within 60 days of sentencing. For consistency throughout this brief, this statutory period will be listed at 180 days.

must be determined accurately within 180 days if the defendant objects to specific portions of the order). These cases do not impose a time limit on modifying a valid initial restitution amount. As long as the trial court still has jurisdiction over the case, the court may modify the restitution amount that the court initially timely ordered.

McIntire argues that the trial court cannot modify the amount of restitution to include a different victim from the same case. McIntire argues that the trial court's decision to cover the damages of the second victim would improperly "grant the state an indefinite period of time in which to seek restitution." Appellant's Brief at 8 (quoting CP 41). He argues that ordering restitution for a second victim amounts to a separate restitution hearing, and as such, this additional restitution needed to be ordered within 180 days of sentencing.

But the statute does not limit the trial court's discretion to modify the amount of restitution. "Where the Legislature omits language from a statute, intentionally or inadvertently, the court will not read into the statute the language it believes was omitted."

State v. Moses, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002). There is no statutory basis to limit how the trial court may modify its earlier order. Indeed, the statute expressly states the opposite; modifications may be made at "any period of time."<sup>3</sup> RCW 9.94A.753(4). Here, the trial court increased the total amount of restitution McIntire owed due to his criminal conduct in this case.

Denying this second victim her share of the restitution would violate the entire purpose of the SRA, which clearly intends "to ensure that defendants fulfill their responsibility to compensate victims for losses resulting from their crimes." Gonzalez, 168 Wn.2d at 265. "When the particular type of restitution in question is authorized by statute, imposition of restitution is generally within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." Davison, 116 Wn.2d 917 (citing State v. Morse, 45 Wn. App. 197, 199, 723 P.2d 1209 (1986)).

Modification is within the discretion of the trial court and the court has discretion to deny additional requests. The trial court

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<sup>3</sup> Restitution determined at the sentencing hearing "may be modified as to amount, terms, and conditions *during any period of time* the offender remains under the court's jurisdiction. . ." RCW 9.94A.753(4) (emphasis added).

considers the credibility of all restitution claims. See State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008) (holding that the amount of restitution must be supported by substantial credible evidence). This evaluation of credibility would undoubtedly include when a victim's claim was submitted. Here, one of the first questions asked by the trial court was when did USAA submit its restitution request on behalf of the second victim. RP 6. After learning that the victim's restitution claim was filed with the court only days after the initial restitution hearing, the trial court reviewed other aspects of the claim, ultimately increasing the total restitution amount by \$14,668.37. RP 6-7, 14-15.

The Legislature has entrusted these credibility determinations to the trial court so the court can apply the statute to the unique facts of each case so that victims are made whole financially. The trial court here ordered additional restitution for the second victim within the statutory framework and properly held McIntire fully responsible for his criminal conduct.

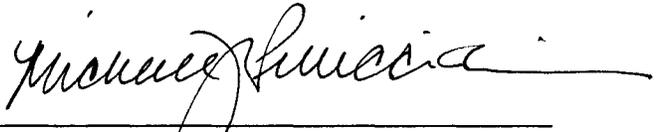
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the trial court's order of restitution in this case.

DATED this 3<sup>rd</sup> day of August, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Lind, the attorney for the appellant, at Nielsen, Broman & Koch, 1908 East Madison, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JOSHUA MCINTIRE, Cause No. 64617-6, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame  
Name  
Done in Seattle, Washington

8/3/10  
Date