

NO. 66355-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KIMBERLY LINDBERG,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY BRADSHAW

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

When the defendant agrees to restitution in the Plea Agreement and the parties forget to mention it at sentencing, can the Court correct the Judgment and Sentence and order the undisputed restitution at a later hearing when the defendant does not object?

B. STATEMENT OF FACTS

The defendant pleaded guilty on September 9, 2010 to the amended charges of driving under the influence (DUI) and reckless driving. CP 8-15; RP 3-23. The defendant admitted to driving recklessly and impaired and “[s]triking [an] unoccupied vehicle.” RP 9. The defendant also acknowledged in her Statement of Defendant that the Court could order restitution. CP 10. The State’s Non-felony Plea Agreement and Sentencing Recommendation form is agreed and indicates that both parties contemplated restitution to the victim. CP 23.

At the Sentencing hearing, no one addressed restitution and the judgment and sentence was silent on the matter. RP 24-50;

CP 25. The Judge did have a data sheet from the State indicating that the State was still waiting for documentation concerning the restitution amount. RP 70.

On April 15, 2011, the parties convened at a hearing to determine restitution. RP 65-77. It was realized that the judgment and sentence was silent as to the ordering of restitution. RP 70. The State moved to amend the judgment and sentence to include restitution. RP 72. The defendant did not object. RP 73. Based on the obvious agreement of the parties from the plea paperwork, the acknowledgement of defendant in her Plea Statement, the clear understanding that she had caused property damage, and all other circumstances, the Court permitted the amendment. RP 70-73. There was no argument as to the causality of the damage or the amount of restitution. The defendant admitted the amount was "related and reasonable under the nature of the damage." RP 73. The Court ordered \$1493 to the insurance company and \$1000 to the victim for his deductible.

C. ARGUMENT

THE COURT WAS WITHIN ITS DISCRETION IN AMENDING A JUDGMENT AND SENTENCE AFTER THE PARTIES REALIZED THEY HAD FORGOTTEN TO ADDRESS AGREED RESTITUTION AT THE SENTENCING HEARING.

The sole issue presented here is whether the court erred in amending the judgment and sentence to order restitution after it was discovered that agreed restitution was inadvertently not ordered during the sentencing hearing. The court has the authority under CrR 7.8 to correct a judgment and sentence "[o]n motion and upon such terms as are just, ... for [m]istakes, inadvertence, surprise, excusable neglect..." CrR 7.8 (b)(1). CrR 7.8(b) motion is reviewed for abuse of discretion. State v. Smith, 159 Wn. App. 694, 699-700, 247 P.3d 775 (2011) (citing In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 879-80, 123 P.3d 456 (2005)). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In the present case, the court inadvertently failed to order restitution at the time of the sentence. Four months later, after the amount of restitution had been determined, the court amended the judgment and sentence and ordered the restitution. The defendant

did not contest the amount or nexus of the damage and had agreed to restitution in the Plea Agreement. The defendant did not even object to the court amending the restitution. RP 73.

The trial court's power to impose restitution is derived solely from statutes. State v. Enstone, 89 Wn. App. 882, 884, 951 P.2d 309 (1998), aff'd, 137 Wn.2d 675, 974 P.2d 828 (1999); State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). An award of restitution for a misdemeanor offense is authorized under RCW 9.92.060(2) and RCW 9.95.210(2), both of which allow the court to require the defendant "to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question ...". State v. Marks, 95 Wn. App. 573, 543-54, 97 P.2d 606 (1999) (quoting State v. Soderholm, 68 Wn. App. 363, 377, 842 P.2d 1039 (1993)).

It is undisputed that the defendant caused the damages sought repaired in the restitution order. RP 73. It is undisputed that the defendant agreed to pay restitution as part of the Plea Agreement. CP 23; RP 72. Importantly, the court admitted that it knew the State was waiting for the full documentation from the victim at the time of the sentencing. RP 71. Clearly, it was inadvertent that the court did not order restitution at the time of the sentencing.

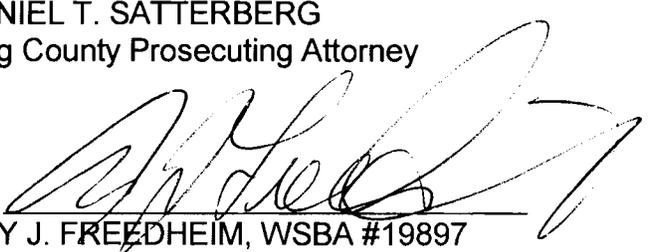
D. CONCLUSION

The defendant agreed to pay restitution for the damage she caused when she crashed into another vehicle while impaired. At the sentencing hearing, the Court was aware that the State was still waiting for complete documentation from the victim. Restitution was inadvertently not addressed at the sentencing hearing. Four months later when the documentation was apparently available, the Court amended the judgment and sentence and ordered the restitution as agreed. For all of the above reasons, the State respectfully requests the Court to affirm the trial court's decision.

DATED this 9 day of March, 2012.

Respectfully submitted,

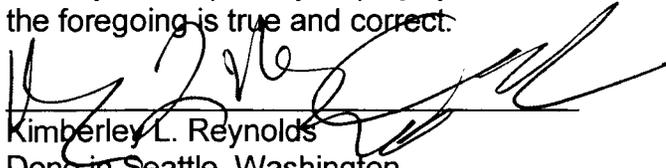
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. KIMBERLY LINDBERG, Cause No. 66355-1-I, 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.



Kimberley L. Reynolds
Done in Seattle, Washington

3/12/12
Date