

NO. 67804-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

NOE FUENTES,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON

REPLY BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Appellant

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 APR 26 PM 4:17

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THE TRIAL JUDGE FOLLOWED HIS "PRACTICE" OF FORCING INSURERS TO SUE FOR RESTITUTION INSTEAD OF EXERCISING HIS DISCRETION TO WEIGH THE JUVENILE'S ABILITY TO PAY IN WHOLE OR IN PART	3
2. ASSUMING, ARGUENDO, THAT THE COURT EXERCISED DISCRETION, IT ABUSED ITS DISCRETION BY APPLYING THE WRONG LEGAL STANDARD AND BY REFUSING RESTITUTION WHERE THE JUVENILE DID NOT SHOW AN INABILTY TO PAY EVEN PART OF THE AMOUNT OWED TO THE INSURER.....	7
B. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Brady, 154 Wn. App. 189,
224 P.3d 842 (2010)..... 3

Salas v. Hi-Tech Erectors, 168 Wn.2d 664,
230 P.3d 583 (2010)..... 8

State v. Bennett, 63 Wn. App. 530,
821 P.2d 499 (1991)..... 2

State v. Gronnert, 122 Wn. App. 214,
93 P.3d 200 (2004)..... 7

Statutes

Washington State:

Laws of 2012, ch. 201, § 1 2

RCW 13.40.010..... 2

RCW 13.40.190..... 9

RCW 13.40.200..... 9

RCW 13.40.500..... 3

RCW 13.40.510..... 3

Other Authorities

Community Juvenile Accountability Act..... 2, 3
<http://www.lni.wa.gov/workplacerrights/wages/minimum/> 9
Juvenile Justice Act..... 2

A. ARGUMENT IN REPLY

As discussed in the State's opening brief, the restitution statute has fluctuated between allowing judges discretion to impose restitution for losses to insurers, then making such restitution mandatory, and then returning to judges some discretionary authority. Br. of Appellant at 6. These changes have occurred as the legislature has sought to balance the interests in restorative justice that emphasize holding juveniles accountable for restitution, with the obvious problem of digging a financial hole so deep a juvenile cannot escape. When the legislature returned some measure of discretion to disposition judges, it also lengthened the collection period to ensure that restitution could be imposed, but on a more reasonable schedule. It did not intend to create a loophole that allowed juveniles to wholly avoid restitution to insurers. Thus, the current statute balances the competing interests by mandating restitution, but it still allows judges to ameliorate harsh restitution obligations by setting reasonable payment plans or forgiving debt, whichever is appropriate, based on the juvenile's ability to pay over the extended 10-year period.

These changes were made within the existing policies toward juvenile restitution. The underlying purposes of the Juvenile Justice Act's restitution provisions are victim compensation and juvenile accountability. State v. Bennett, 63 Wn. App. 530, 533, 821 P.2d 499 (1991). In the juvenile justice model, restitution is a means to hold the offender responsible in a way that makes apparent his impact on the victim, and to provide restitution to his victim. RCW 13.40.010(c) and (h).

Restitution is also a central tenet of modern restorative justice programs. See, e.g., Laws of 2012, ch. 201, § 1 (26).¹ The Community Juvenile Accountability Act, for instance, was promulgated "to provide a continuum of community-based programs that emphasize the juvenile offender's accountability for his or her actions. . ." RCW 13.40.500. Under this Act, the legislature has directed funding to programs that "maximize the juvenile offender's opportunities to make full restitution to the victims and amends to the community." RCW 13.40.510(4)(g).

¹ "'Restorative Justice' means practices, policies and programs informed by and sensitive to the needs of crime victims that are designed to encourage offenders to accept responsibility for repairing the harm caused by the offense by providing safe and supportive opportunities for voluntary participation and communication between the victim, the offender, their families, and relevant community members."

The period to collect restitution has lengthened to facilitate payment. See In re Brady, 154 Wn. App. 189, 195, 224 P.3d 842 (2010) (tracing history of statutes). In sum, restitution is punitive, rehabilitative and restorative.

There are two main difficulties with the disposition court's ruling in this case: 1) the court substituted a general practice for an individual weighing of interests; and 2) even if the court did weigh interests, it applied the wrong legal standard and relied upon evidence that showed nothing about inability to pay in the future.

These errors are symptomatic of a general practice by some juvenile court judges that under-values restitution obligations as compared to the balance intended by the statutes. The State respectfully asks that the trial court should be directed to apply the statute using the correct legal standard and in a manner that actually weighs evidence relevant to ability to pay over ten years.

1. THE TRIAL JUDGE FOLLOWED HIS "PRACTICE" OF FORCING INSURERS TO SUE FOR RESTITUTION INSTEAD OF EXERCISING HIS DISCRETION TO WEIGH THE JUVENILE'S ABILITY TO PAY IN WHOLE OR IN PART.

Fuentes claims that the disposition judge did not follow a general "practice" of refusing to order restitution payments to insurers. Br. of Resp. at 6. Fuentes relies on characterizations of

the court's ruling rather than on quotes from the record. The record belies his assertions about the court's ruling.

Fuentes pleaded guilty and promised to pay restitution in full upon disposition. CP 9. Defense counsel began the disposition hearing by pointing out his client's alleged inability to pay restitution. RP 3. The court disregarded this argument and announced that Fuentes would be responsible for the total amount of restitution, \$2,139.00. RP 3. Defense counsel immediately followed up by saying

I put the financial affidavit there just *simply to point out that the majority of his amount is to American Family Insurance*. The \$500 is to [Nami] Hedland, which was the person that owned the vehicle.

RP 3 (italics added). Counsel also argued that the State should not be allowed to collect restitution in excess of \$250.00. RP 3. He concluded his argument by saying "based on his financial circumstances and based on the statute, I don't believe the court should order the \$1,600 to the insurance company, just the \$500.00 to [Nami Hedland]." RP 3-4.

The State started to rebut the statutory authority argument but the trial court abruptly cut him off, saying it was "not persuaded

by that argument." RP 4. However, the court then focused directly on the insurance issue:

I am reminded by counsel that *it is my practice* and I will in this case order the \$500 as being the amount of restitution, and I'll leave it to the insurance carrier, as capable as they are, if they wish to seek restitution, it wouldn't be very difficult for them to get an order in that amount. So the amount of restitution ordered in this matter by the court will be \$500, though the court does recognize there's additional insurance loss.

RP 4 (italics added). Thus, the court accepted counsel's argument solely on the basis that restitution should not be ordered because it was owed to an insurer.

When the prosecutor attempted to clarify the ruling, the court simply said, "I've made my decision and I'll rest on that." RP 4. In other words, the court was not making any finding about ability to pay. When the prosecutor pressed further as to Fuentes' ability to pay, the court replied:

I think he's going to have a hard time paying \$500. I mean, I'm not sure what you're asking me. If you want me to comment on what the likelihood is that this is going to be paid off at any time in the near future, I guess I could give you my opinion. It's probably not real likely.

RP 5. The court's follow-up comments revealed three things: 1) it did not realize that the statute required a finding regarding ability to

pay, 2) it had not factored ability to pay into its decision, and 3) it applied the wrong "ability to pay" standard.

As to the first two points, it is simply implausible to conclude from this record that the judge was not denying restitution as a matter of course, rather than through the exercise of discretion. The timing and content of the court's ruling shows that it initially ordered full restitution in spite of Fuentes' limited finances, but changed its ruling immediately upon being told the insurer would benefit, expressly saying that it would follow its "practice" of awarding restitution to direct victims but not insurers. RP 4. The stated rationale for this ruling was the court's belief that insurers should be required to sue to recover damages. RP 4. The court said nothing about the juvenile's ability to pay. The court's repeated rationale regarding the insurer's ability to collect by filing suit, had nothing to do with Fuentes' ability to pay over a ten-year period. RP 4, 7.² The comments reveal, instead, that the court was denying the motion simply because the recipient was an insurer.

This situation is different than the court's ruling in State v.

² Implicit in the court's rationale is, apparently, the belief that insurers should bear the costs of collecting losses from criminal behavior. RP 4, 7. The reality is that insurance companies pass along losses to law-abiding policy holders.

Gronnert, 122 Wn. App. 214, 93 P.3d 200 (2004). In that case, the sentencing judge made general disparaging remarks about the Drug Offender Sentencing Alternative but refused to apply the alternative because neither Gronnert nor society would benefit from the program. Gronnert, 122 Wn. App. at 226.

In this case, the court first expressly ordered restitution, then switched course and expressly stated that it was going to follow its general practice and refuse restitution to the insurer. Only when pressed by the prosecutor did the court address finances, and then the court simply made some abbreviated comments (addressed below) and then returned to its core rationale that insurers should be left to their own devices when it comes to collecting criminal restitution. RP 7. The court clearly did not attempt to tailor its ruling to the particulars of this case, as the court did in Gronnert. Reversal is warranted on this basis.

2. ASSUMING, ARGUENDO, THAT THE COURT EXERCISED DISCRETION, IT ABUSED ITS DISCRETION BY APPLYING THE WRONG LEGAL STANDARD AND BY REFUSING RESTITUTION WHERE THE JUVENILE DID NOT SHOW AN INABILTY TO PAY EVEN PART OF THE AMOUNT OWED TO THE INSURER.

The abuse of discretion standard is satisfied where the court applies the wrong legal standard to a discretionary decision.

A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. A trial court's decision is manifestly unreasonable if it adopts a view that no reasonable person would take. A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts.

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668-69, 230 P.3d 583, 585 (2010) (citations and internal quotations omitted). Even if the trial court's comments in this case can be considered an exercise of discretion, that discretion was abused because the court applied the wrong legal standard and because the evidence submitted simply cannot establish the finding required by the statute.

The question is not, as the court seemed to believe, whether Fuentes was able to pay off restitution "in the near future." RP 5. Rather, under the statute, the court must order restitution unless a very specific finding is established. The court "shall require the respondent to make restitution to any persons who have suffered loss or damage . . ." RCW 13.40.190(1)(a). This obligation is relieved as to insurance carriers only if "the respondent reasonably satisfies the court that he or she does not have the means to make full or partial restitution over a ten-year period." RCW 13.40.190(g). The obligation can also be relieved under RCW 13.40.200(4).

Thus, the trial court applied the wrong standard by simply guessing that Fuentes could not pay now or "in the near future." RP 5. The proper inquiry was whether Fuentes could pay over the course of 10 years. The court's use of the wrong legal standard was an abuse of discretion.

Moreover, applying the correct legal standard, no reasonable person could conclude from the evidence presented that Fuentes was unable to pay at least partial restitution to the insurer in the next decade. At the age of 15, Fuentes could work a minimum wage job paying \$7.68 per hour.³ In less than two hours of work at this rate, he could meet the monthly restitution obligation. Once he is 16 years old, Fuentes would be eligible for a job at the minimum wage of \$9.04 per hour. *Id.* At this rate, he could meet his minimum restitution obligation by working for 1 ½ hour each month. It is simply not reasonable to conclude, based simply on an affidavit saying only that Fuentes is presently unable to pay, that he could not meet at least part of his obligation over the next decade.

Fuentes argues that the State sought to "impose chronic financial hardship on an impoverished youth." Br. of Resp. at 1.

³ <http://www.lni.wa.gov/workplacerrights/wages/minimum/> (last accessed 4/24/12).

Fuentes' rhetoric is unwarranted. A restitution obligation amounting to \$13 per month is hardly a "chronic financial hardship" when it would simply require him to work 1 ½ - 2 hours per month to pay for the damage that he maliciously and intentionally caused. If the scant affidavit relied upon by this court is sufficient to relieve Fuentes of his restitution obligation, then the "inability to pay" requirement is toothless.

Fuentes also argues that proof of inability to pay would be impossible, suggesting that he cannot obtain an affidavit from every business in Seattle swearing they would never hire Fuentes. Br. of Resp. at 4. Fuentes misstates and overstates (perhaps sarcastically) his burden. Proof of inability to pay even the small sum \$13 per month might readily be shown if Fuentes had a physical, cognitive, or behavioral difficulty that would prevent or limit his employment. No such evidence was presented. Instead, Fuentes relied on the assertion that he was unemployed and not in school. Many, many juvenile offenders will fit this profile. It hardly means they cannot pay a reasonable sum towards restitution in the coming decade.

Finally, Fuentes complains that the State improperly seeks a "meaningful inquiry" into his ability to pay; he argues that no such

requirement is present in the statute. Br. of Resp. at 1. But, surely Fuentes does not argue that the court can make a perfunctory, pro forma, or meaningless inquiry *unless* the statute expressly calls for a "meaningful inquiry." A meaningful inquiry is called for in every case as to any legal or factual determination. The point of the State's argument was that the trial court must seriously consider the statutory obligation to pay restitution over the full ten-year period, consider evidence that addresses that point, and relieve the juvenile only if there is evidence from which a reasonable fact-finder could conclude that the juvenile would not be able to pay in full or in part. Perhaps because he was influenced by his general practice, the trial court failed to make such an inquiry in this case.

B. CONCLUSION

The State does not insist that every dollar owing as restitution to every insurer must be ordered by the juvenile court. The State simply asks that the court be required to consider and apply the correct legal standard, and that the court relieve juveniles of restitution obligations only where there has been evidence presented that the juvenile cannot pay a reasonable amount over a ten-year period. If the court's ruling in this case -- applying of the wrong legal standard and making findings based on no showing of

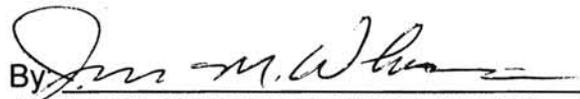
inability to pay \$13 per month over a ten-year period -- is sufficient to satisfy the statute, then the statutory requirement is essentially meaningless. Restitution is an important component of restorative justice; the restitution provisions should be faithfully interpreted and applied.

This Court should reverse and remand with instructions for the superior court to consider whether Fuentes has the financial ability to pay all or part of the \$1,600 obligation to the insurer within the next ten years.

DATED this 26th day of April, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By 

JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Appellant
Office WSBA #91002

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 Erin Calkins, the attorney for the respondent, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Reply Brief, in STATE V. NOE FUENTES, Cause No. 67804-3-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.

W Brame
Name
Done in Seattle, Washington

4/26/12
Date