

No. 67856-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARK HOUGHTON,

Appellant.

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

APPELLANT'S REPLY BRIEF
AND SUPPLEMENTAL ASSIGNMENT OF ERROR

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The court lacked authority to order that Mark Houghton pay restitution for expenses that were not reasonably incurred loss from the crimes of conviction and that were not established by at least a preponderance of the evidence, contrary to Houghton's right to due process of law.

B. ISSUE RELATING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

Restitution may be ordered as part of the penalty imposed in a criminal case only when the prosecution proves the damages sought were reasonably incurred due to the offenses of conviction. The court ordered Houghton to pay restitution for unexplained expenses to individuals without apparent connection to the case; to attorneys hired by a fire department regarding scheduling fire fighters to testify in court; and to an insurance claims specialist who offered no explanation about how the work she did was related to the offenses prosecuted in the criminal case. Did the court order restitution without considering the reasonableness of the claims and without requiring the prosecution to meet its due process obligation to offer evidence in support of its restitution request?

C. ARGUMENT.

1. **Restitution was impermissibly ordered for tangential or unconnected costs**

a. Restitution is authorized only for loss incurred by victims as a result of the offense of conviction

Restitution is a criminal sanction that it “strongly punitive” in its purpose. State v. Kinneman, 155 Wn.2d 272, 280, 119 P.3d 350 (2005).

It is part of the sentence that may not be imposed absent affording the accused the fundamental right to due process of law. State v. Hotrum, 125 Wn.App. 681, 683, 87 P.3d 766 (2004); State v. Dedonado, 99 Wn.App. 251, 254, 991 P.2d 1216 (2000).

Determining the accurate sentence to impose, including restitution, may not be based on mere assertions or unproved allegations. See State v. Hunley, _ Wn.2d __, 287 P.3d 584, 589 (2012).

Restitution is part of the “quantum of punishment” and the same due process rights attach as to other contested parts of punishment, including being proven to the degree required by law. State v. Schultz, 138 Wn.2d 638, 643-44, 980 P.2d 1265 (1999); State v. Serio, 97 Wn.App. 586, 987 P.2d 133 (1999).

The restitution statute provides, in pertinent part, that restitution:

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 due to mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling related to the offense.

RCW 9.94A.753(3).

Restitution is permitted only when based on actual compensation for loss caused by the offense of conviction, not upon speculative claims, general equity concerns, or intangible loss. State v. Ewing, 102 Wn.App. 349, 353-54, 7 P.3d 835 (2000); State v. Johnson, 69 Wn.App. 189, 191, 847 P.2d 960 (1993). It “cannot be imposed based on the defendant's ‘general scheme’ or acts ‘connected with’ the crime charged, when those acts are not part of the charge.” State v. Dauenhauer, 103 Wn.App. 373, 378, 12 P.3d 661 (2000). A defendant may not be required to pay restitution for conduct not included in the crime charged or for other uncharged offenses unless expressly agreed to by the offender in a plea agreement. State v. Woods, 90 Wn.App. 904, 907, 953 P.2d 835 (1998).

A court abuses its discretion when a restitution order is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. State v. Enstone, 137 Wn.2d 675, 679–80, 974 P.2d

828 (1999). “[A] challenge to a sentence that is contrary to law may be raised on appeal for the first time.” State v. Anderson, 58 Wn.App. 107, 110, 791 P.2d 547 (1990).

If the court find a portion of the damages are not causally related to the defendant's actions, the court must vacate that portion of the restitution order. State v. Dennis, 101 Wn.App. 223, 229, 6 P.3d 1173 (2000). The court acts beyond its sentencing authority when it imposes restitution that is not statutorily authorized. State v Moen, 129 Wn.2d 535, 545-46, 919 P.2d 69 (1996); accord, Kinneman, 155 Wn.2d at 283 (on appeal, court may review challenges to the “legal conclusions and determinations by which a [trial] court comes to apply a particular sentencing provision”).

- b. The costs the county incurs when it unreasonably pays for a lawyer to communicate with the same county’s prosecution is not “property loss” for which restitution may be imposed.

Restitution is permitted only for loss that is causally connected to the precise offense of conviction. Kinneman, 155 Wn.2d at 286 (citing Woods, 90 Wn.App. at 907-08 and State v. Miszak, 69 Wn.App. 426, 428, 848 P.2d 1329 (1993)). “A causal connection is not established simply because a victim or insurer submits proof of expenditures for replacing

property stolen or damaged by the person convicted.” State v. Dedonado, 99 Wn.App. 251, 257, 991 P.2d 1216 (2000)

The loss must be “reasonably and rationally related” to the crime of conviction. State v. Wilson, 100 Wn.App. 44, 50, 995 P.2d 1260 (2000); see Kinneman, 155 Wn.2d at 286. For example, restitution may be based on legitimate investigative costs incurred due to the crime of conviction. Wilson, 100 Wn.App. at 50. Lost wages are recoverable when due to an injury suffered as a direct result of the crime. State v. Goodrich, 47 Wn.App. 114, 115, 733 P.2d 1000 (1987); RCW 9.94A.753(3). But wages are not recoverable for time spent in court or preparing for court. Goodrich, 47 Wn.App. at 115.

The court ordered Houghton to pay restitution for fees billed by two law firms who communicated with the prosecution regarding testimony by firefighters from the same county. The law firms billed the county as follows:

\$80 for a “conference with prosecutor regarding subpoenas”

\$200 for “communications regarding criminal court subpoenas”

\$575 for “conferences with firefighters and prosecutor regarding witness interviews,” to “participate in interview of Huffman,” and to “participate in interviews of Randy Tonkin and Brett K.”

\$200 for “conference with firefighters regarding testimony in criminal case; communication with prosecutor’s office regarding same,” and “conferences regarding Bruskotter interview with prosecutor”

CP 100-03.

The prosecution submitted no information explaining why the prosecution did not simply subpoena the witnesses directly or confer with them about their availability personally, as it would typically do. Id. There is no reason why the firefighters, employed by the city, would need an attorney to act as intermediary with King County prosecutors. The fire had essentially extinguished on its own shortly after it was set and the firefighters simply insured no one was in danger and investigated the cause of the fire. See 8/30/11RP 149-50. The firefighters’ role in this case was largely as investigators and thus the use of attorneys as intermediaries to schedule testimony is extraordinarily puzzling.

In Wilson, the court ordered the defendant to reimburse a company from which the defendant embezzled for the costs of investigation required to discover the extent of the crime. 100 Wn.App. at 46. The court ruled that these expenses were both reasonably incurred and caused by the crime of conviction. Id. at 50.

Unreasonable or needlessly incurred costs are not the proper subject of a restitution order. Inserting a lawyer as an intermediary between county prosecutors and city firefighters, both government employees with law enforcement functions, is illogical and unreasonable. Absent explanation, the use of lawyers to arrange the trial availability of public employees is not a loss reasonably incurred by the government and should not be subject to a restitution order.

c. The court lacked authority to issue a blanket restitution order to an insurance company without evidence that the claims were based on the charged offense.

In Hunley, the Court emphasized that mere allegations are insufficient at sentencing to serve as the basis for a person's sentence. 287 P.3d at 590-91. Due process of law requires the prosecution to offer evidence showing the basis for a sentence and may not merely submit a summary of the sentence it seeks. Id. at 591. "Facts relied upon at sentencing must have some basis in the record" and their sentencing consequences must be proved by at least a preponderance of evidence. Id. Furthermore, the right to trial by jury requires that facts used to increase punishment must be proven to the jury, thereby limiting the court's authority to impose restitution to facts necessarily proven by the crime of conviction. Southern Union Co. v. United

States, _ U.S. _, 132 S.Ct. 2344, 2356, 183 L.Ed.2d 318 (2012) (fine based on days crime occurred cannot be imposed without jury finding of each day); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amend. 6, 14; Const. art. I, § 3, 21, 22.

The proof submitted for restitution is insufficient when it does not explain when and why certain expenses were provided, as in Dennis, 101 Wn.App. at 227-28. A causal connection is not established by merely submitting a list of expenditures, without more. Dedonado, 99 Wn.App. at 257.

Here, the prosecution's restitution packet contained pages of records that merely showed certain sums of money had been paid to certain people. CP 105-53. These records did not explain why the money was paid or how the costs were incurred. Id. They did not explain who the payees were or how they were related to the case; and most of these people did not testify at trial. The prosecution's assertions that money was paid without evidence demonstrating how it reflects actual damages caused by Houghton's offenses of conviction fails to meet the due process requirements of restitution under RCW

9.94A.753. See Dedonado, 99 Wn.App. at 257; see also Hunley, 287 P.3d at 589.

The court ordered Houghton to pay \$41,464.81 in restitution to State Farm Insurance Company. The boat was worth \$15,000, and this sum paid to David Parker appears to be a legitimate object of restitution.¹ CP 105. But in addition to reimbursing the boat owners for the boat, the court ordered Houghton to pay another \$26,464.81 to State Farm for money it paid to a list of people. CP 105. The court engaged in no inquiry into what these people did that rendered their actions reimbursable as restitution ordered as part of Houghton's sentence.

State Farm submitted a request for reimbursement for \$12,505.81 in "expenses." CP 104. State Farm paid this sum to five individuals but the record does not explain what these individuals did in connection to the offenses for which Houghton was convicted. CP 105.

"A.M. Williams" received three checks totaling \$696. CP 105. Williams did not testify at trial. His or her relationship with the offense was never explained. The same is true for Mark Dynan, Tim Seppula,

¹ The \$15,000 cost of the boat was discussed at trial.

Copart Seller, and Case Forensics, whose “expenses” were included in Houghton’s restitution order. CP 105.

Of the people or entities receiving money for the purported \$12,505.81 in “expenses,” John Stone was the only person who testified at trial. According to his trial testimony, he was a Seattle firefighter and also worked for “case forensics.” 8/30/11RP 119-20. In that capacity, he did some minimal investigation into the fire, including speaking to Houghton on the telephone one time. But in addition to paying John Stone \$550.65, the prosecution also requested restitution for “Case Forensics” of \$757.52. CP 105. There was no explanation about what work they did and how it was related to the offenses of conviction or how it was separate from Stone’s work.

In addition to these expenses, Heidi Heilbaum asserted she did 275 hours of work and requested restitution of \$13,959.00 based on her hourly rate. CP 104. State Farm did not pay Houghton any claims for insurance related to the fire. 8/31/11RP 80. As to Heilbaum’s restitution claim, the prosecution offered no details of what these many hours of Heilbaum’s work entailed or whether it was solely related to the offenses of conviction, when the trial testimony indicated it was also investigating an uncharged insurance claim Houghton made before the

fire and wholly unrelated to the fire, for which Houghton was not charged. 8/30/11RP 45-46. The blanket assertion that an insurance investigator should be paid for a certain number of hours does not show that the work done was caused by the offenses of conviction, which is necessary for the court's authority to order the sum as criminal restitution. Dennis, 101 Wn.App. at 227-28; Dedonado, 99 Wn.App. at 257.

- d. The prosecution's failure to offer evidence showing that its restitution request was based on damages caused by the crime of conviction requires remand for a new restitution hearing.

Houghton did not affirmatively agree to pay the restitution sought by the prosecution. Absent his affirmative agreement to pay the requested amount, his failure to object to the restitution sought by the prosecution does not waive his right to due process of law, including the requirement that the prosecution meet its burden of proof. Hunley, 287 P.3d at 591-92.

The prosecution's request that Houghton pay restitution to people without evidence the expenses were based on the crimes of which Houghton was convicted does not constitute sufficient evidence to order restitution. The court abused its discretion by ordering

restitution for attorney bills relating to witness scheduling of county firefighters, “expenses” paid to people whose relationship to the case was never established, and a blanket sum of money to a State Farm claims specialist without any accounting whatsoever. Houghton did not waive his objection to this restitution because he did not agree to pay this restitution and the court cannot abdicate its authority to impose restitution without proof there is sufficient connection between the punishment imposed and the charged crime. This Court should remand the case for a full and fair restitution hearing.

2. The State’s brief contains factual errors that Houghton disputes and that merit clarification

In order to correct and clarify the record, appellant addresses some of the factual misrepresentations in the prosecution’s brief on which it uses as a platform to claim the legal errors in the case should be considered harmless. First, the fire did not cause serious damage. There were burned cushions and a sail, and personal items, but as the prosecution agrees, there was “virtually no damage to the boat.” Response Brief at 5. Although the prosecution alleges that Houghton lied about personal property that he had on the boat when he filed his insurance claim, that allegation was sharply contested by Houghton and

was not established by clear evidence. 9/7/11RP 94, 103, 153; see Exs. 1-3 (showing outside of boat); Exs. 5, 6, 8 (showing charred cushions and sail); Exs. 14-15 (showing inside of boat). The boat was full of Houghton's personal property, as evident by the photographs of a boat packed with belongings underneath benches and covered by other items, and the investigators did not search the boat to see what might have been missing from it. Exs. 14-16.

The prosecution alleges there was no sign of forced entry, but it purposefully omits mention of evidence that the hatch had a broken locking mechanism and it could be opened without needing to be forced. 8/30/11RP 16; 9/7/11RP 93.

As to the matter of Houghton's visitation with his children, he was upset that he could not visit with them on his boat, but the visits continued and were not cancelled or even removed from the boat before the incident. 9/7/11RP 99.

As to the testimony of the Leaheys', who first noticed the fire at the dock, signs at the dock offered a reward for arson being investigated. 8/25/11RP 22; Ex. 19. Although this motive was not explored in questioning of the Leaheys', signs were admitted into evidence that show a financial motive for exaggerating their testimony

and the jury could consider the potential for a reward as basis for questioning their testimony against Houghton. Additional discrepancies in the record are addressed below.

3. The officer's disregard for Houghton's clear expression of his interest in having counsel present for his police interview requires suppression of the statement elicited

The prosecution argues that Houghton should not have had the right to counsel when questioned by the state during its investigation of the suspicious and presumptively arson-caused fire on Houghton's boat. It predicates this argument on criticism of the court's findings of fact – findings that the prosecution drafted for the court's entry. The prosecution's attempt to overturn the court's findings and legal conclusions should be rejected when the prosecution also wrote them.

As reflected in findings the prosecution purposefully drafted, the court ruled that Miranda warnings applied to Houghton. His request for counsel during the interview should have been granted, or the interview halted, rather than dissuading Houghton from obtaining counsel by virtue of distracting him and pressing forward with the interview.

The prosecution describes the location of the questioning as Houghton's "own office." Response Brief at 16 n.4. In fact, this area

was a “little office space that’s in the restrooms.” 8/30/11RP 73. It is a small room the held cleaning supplies and a wash basin in addition to a desk. 9/7/11RP 29. Houghton had been repeatedly warned that he should not treat this space as if it were his. 8/30/11RP 74, 100; 9/7/11RP 37. The prosecution’s effort to paint this area as if it were Houghton’s “own” comforting office is contrary to the record.

The prosecution also tries to manipulate Houghton’s argument to the jury at the close of trial as if it contained implicit concessions on the legality of his interrogation. Response Brief at 16 n.5. Arguments made to the jury as to whether it should convict Houghton are simply irrelevant and serve a distinctly different purpose than the pretrial litigation of the legality of the statements obtained from the state.

When interviewed by arson investigator Pomeroy, Houghton was not free to leave by virtue of a contract with the state that obligated him to remain at the scene 24 hours a day including the day of the incident. 8/30/11RP 70. He was taken to a cramped government office/restroom of which he had been repeatedly admonished not to treat as his own. He asked the arson investigator about contacting his lawyer and the investigator told him none would be necessary if he were a victim. Ex. 18, p. 2. By trapping Houghton into waiving his

right to remain silent by a false presentation of his criminal liability, Houghton was denied his right to remain silent as well as his right to counsel. U.S. Const. amends. 5 & 6; Const. art. I, §§ 9, 22.

The remedy for improperly interfering with a suspect's decision about whether to seek the advice of counsel is suppression of the illegally obtained evidence and any evidence obtained as a fruit of that illegality. State v. Ladson, 138 Wn.2d 343, 359, 979 P.3d 833 (1999); State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005).

Houghton's statements to Pomeroy must be suppressed as well as all evidence obtained as a result of the illegally-elicited statement.

4. The prosecution cannot insulate itself from the effect of its own elicitation of admittedly improper testimony by blaming the defense for not asking for other remedies

The prosecution tries to shirk blame for eliciting testimony negatively commenting on Houghton's exercise of his constitutional right to be present during trial proceedings and to remain silent rather than testify. Houghton did not ask the prosecution to violate his right to remain silent, yet on appeal the prosecution contends that he should be blamed. This shifting of responsibility should not be countenanced.

The court did not erase the error by telling the jury not to “discuss” the testimony about Houghton’s failure to testify at his pretrial hearing on the admissibility of his statements to investigators. 9/8/11RP 106. There is an important distinction between not discussing something and not considering it for any purpose; the court gave only the former instruction and not the latter. Houghton’s attorney agreed that the court should tell the jury to “disregard” this testimony, but the court said something else to the jury – it said do not “discuss” that testimony because it has been stricken. 9/8/11RP 97, 106. The court did not tell the jury that it must disregard the evidence or that it may not use it for any purpose. 9/8/11RP 106.²

In his closing argument, the prosecution reminded the jury of Houghton’s failure to testify in earlier proceedings. He eluded to the stricken testimony by arguing to the jury that Houghton “did not say a

² The court told the jury:

There was some testimony about - - during the cross-examination, questions asked by Mr. Hamilton to Mr. Houghton about a pretrial hearing that was held in this case about the admissibility of the statement given to Inspector Pomeroy by Mr. Houghton. That testimony is stricken. So you may not discuss during your deliberations that pretrial hearing, the fact of the pretrial hearing and what choice, if any, Mr. Houghton made during the pretrial hearing to testify or not to testify.

9/8/11RP 106.

word for 22 months,” until he testified at trial. 9/8/11RP 153. This was part and parcel of what the court had stricken and the prosecution had conceded was improper during the testimony: the prosecutor asked Houghton while testifying, “you remain[ed] silent for 22 months” and did not give the details he gave until he testified at trial. 9/8/11RP 55. This question followed the line of questioning from the prosecutor involving Houghton’s failure to testify at the pretrial hearing. 9/8/11RP 41-43. Houghton’s timely objections were overruled and it was only later that the judge told the jury not to discuss it. The prosecutor reminded the jury in closing that “suddenly” Houghton “testifies at trial,” after remaining silent on these matters for 22 months and he “benefits from the delay” in testifying. 9/8/11RP 153. These arguments drew upon the testimony the court had stricken and the prosecution thereby encouraged the jury to consider testimony that it improperly elicited.

The prosecution essentially concedes that the remaining improper arguments by the prosecution that Houghton raised in his opening brief were probably wrong-headed but tries to insulate them by claiming were insufficiently prejudicial to warrant reversal. However, taking these very basic errors together, they mislead the jury about the

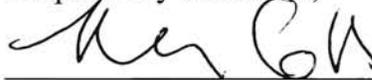
critical facts of the case and likely affected their deliberations. They should not be disregarded.

D. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Houghton respectfully requests this Court remand his case for further proceedings.

DATED this 3rd day of December 2012.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67856-6-I
v.)	
)	
MARK HOUGHTON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> MARK HOUGHTON 353698 MCC-WASHINGTON STATE REFORMATORY PO BOX 777 MONROE, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF DECEMBER, 2012.

X _____ *gmk*

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