

682 37-7

68237-7

No. 68237-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALICEA DEEANN MARTINI,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

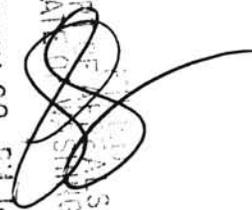
2019... 30
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE
APR 4 5 53


TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT..... 4

THE STATE DID NOT PROVE THE AMOUNT OF THE
STORES’ LOSSES, REQUIRING VACATION OF THE
RESTITUTION ORDER..... 4

1. The trial court abused its discretion by relying upon “hearsay
within hearsay” to establish the amount of restitution..... 4

2. The restitution order must be vacated 7

E. CONCLUSION..... 7

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. I, § 3 5

U.S. Const. amend. XIV 5

Cases

State v. Griffith, 164 Wn.2d 960, 195 P.3d 506 (2008) 7

State v. Lewis, 57 Wn. App. 921, 791 P.2d 250 (1990)..... 7

State v. Pollard, 66 Wn. App. 779, 834 P.2d 51 (1992)..... 5, 6

Statutes

RCW 9.94A.530(2) 4

RCW 9.94A.753(1) 7

RCW 9A.56.350(1)(a)(3) 2

A. ASSIGNMENTS OF ERROR

1. The court's finding that the amount of Hollister's loss was \$394.50 is not supported by substantial credible evidence.
2. The court's finding that the amount of Macy's loss was \$251.99 is not supported by substantial credible evidence.
3. The evidence relied upon by the State to establish the amount of restitution was unreliable in violation of the Due Process Clause.
4. The court erred in ordering restitution, where the State did not sufficiently prove the amount of the stores' losses.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

If the defendant disputes the amount of restitution in a criminal case, constitutional due process and the restitution statute preclude the State from relying upon "hearsay within hearsay" to establish the amount. Here, Alicea Martini admitted she stole several items from Hollister and Macy's and admitted the retail value of each item. But she argued the retail value of the items did not establish the amount of the stores' losses because the stores recovered all of the items stolen. In order to prove that the value of the items was equal to the amount of the stores' losses, the State presented the hearsay statement of a legal assistant, who claimed a loss prevention officer told her the stores were

required to dispose of all merchandise recovered in a theft. Did the State fail to present substantial credible evidence to prove the amount of the stores' losses by relying upon such "hearsay within hearsay"?

C. STATEMENT OF THE CASE

One day in May 2009, Andrew Crawford, a loss prevention officer at Macy's in Alderwood Mall in Lynnwood, observed Alicea Martini and Crystal Thomas selecting items of merchandise and placing them into Ms. Thomas's purse and a sweatshirt that Ms. Martini was carrying. CP 70-71. When the young women passed the registers without paying for the items and exited the store, another loss prevention officer detained them. Id. A search of the young women uncovered items belonging to both Macy's and Hollister, another store in the mall. Id. Ms. Martini and Ms. Thomas admitted they stole the merchandise. Id. A total of seven items of stolen merchandise were recovered. Id.

The retail value of the items taken from Hollister was \$394.50, and the value of the items taken from Macy's was \$251.99, for a total of \$646.49. Id.

Ms. Martini was charged with one count of second degree organized retail theft, RCW 9A.56.350(1)(a)(3). CP 73. She pled

guilty as charged. CP 16-21, 23-26. As part of the plea agreement, she agreed to “pay restitution in full,” although she did not agree to a particular amount. CP 26. She also agreed that, in determining the sentence, the court could consider the facts “as set forth in the affidavit(s) of probable cause.” CP 23.

The State requested restitution in an amount equal to the retail value of the all of the items stolen. CP 31-37. Ms. Martini objected, arguing the retail value of the items was not equivalent to the amount of the stores’ losses because the stores had recovered all of the items stolen. CP 40. A restitution hearing was held to resolve the dispute.

The State presented no live testimony at the hearing. RP 11. The State relied upon the facts set forth in the affidavit of probable cause, to which Ms. Martini had agreed. RP 13. But the affidavit of probable cause sets forth only the retail value of the items stolen. See CP 70-71. It does not establish that the retail value of the items is equivalent to the amount of the stores’ losses. Id.

In order to prove that the retail value of the items was equivalent to the amount of the stores’ losses, the State presented an affidavit from Diane Kinnebrew, a legal assistant in the Snohomish County Prosecutor’s Office. CP 10. Ms. Kinnebrew stated she spoke to the

manager of the security department at one of the stores, who told her that all stores are required to dispose of stolen merchandise. Id. Thus, stores cannot recover any of the value of items that are stolen, even if the merchandise is recovered. Id.

Defense counsel objected to this evidence, arguing it was “hearsay within hearsay” and therefore insufficient to prove the amount of the stores’ losses. RP 14-17. The court disagreed. RP 18. The court ordered Ms. Martini to pay restitution in the amount of \$646.49, the total retail value of the items stolen. RP 18-20; CP 5.

D. ARGUMENT

THE STATE DID NOT PROVE THE AMOUNT OF THE STORES’ LOSSES, REQUIRING VACATION OF THE RESTITUTION ORDER

1. The trial court abused its discretion by relying upon “hearsay within hearsay” to establish the amount of restitution.

A court's authority to order restitution is derived solely from statute. State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010).

In determining the amount of a restitution award, “the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530(2). “Where the defendant

disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence” Id.

If the defendant disputes the amount of restitution, the State must prove the amount by “substantial credible evidence.” State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51 (1992). Although the State need not prove the amount with specific accuracy, the evidence must “afford[] a reasonable basis for estimating loss.” Id. Also, evidence admitted at a restitution hearing must meet due process requirements, which include the requirement that the evidence be reliable. Id. at 784-85; U.S. Const. amend. XIV; Const. art. I, § 3. A trial court abuses its discretion in ordering restitution if the amount is not established by substantial credible evidence. Pollard, 66 Wn. App. at 785.

The State may not rely upon “hearsay within hearsay” to establish the amount of a disputed restitution award. Id. at 786. In Pollard, the defendant agreed to pay restitution for six counts of unlawfully issuing checks or drafts. Id. at 780-81. To prove the amount of restitution, the State presented a police report compiled after interviews with bank personnel at the respective institutions, setting forth the amounts of the checks Mr. Pollard had cashed at the banks.

Id. at 781. The Court of Appeals concluded “this report, standing alone, which is double hearsay, [was] an insufficient basis upon which to base the sum of restitution ordered.” Id. at 786. That is because the mere fact Mr. Pollard withdrew funds from his accounts in those amounts did not in itself establish the losses suffered by the banks. Id. For example, the banks that had issued the checks might have covered portions of the amounts Mr. Pollard withdrew with overdraft funds. Id. Thus, the State did not present substantial credible evidence to establish the amount of restitution. Id. at 786-87.

Pollard is indistinguishable from Ms. Martini’s case. Here, as in Pollard, the State relied upon “hearsay within hearsay” to establish the amount of restitution. Although Ms. Martini agreed to the retail value of the stolen merchandise, she did not agree that the retail value was equivalent to the stores’ losses because the stores recovered all of the items stolen. CP 23, 70-71. In order to prove that the stores lost the entire retail value of the items, the State presented the affidavit of Ms. Kinnebrew. CP 10. Ms. Kinnebrew asserted she had spoken to the manager of the security department at one of the stores, who told her the stores were required to dispose of all stolen items and could not recover any value from them. Id. In other words, the State relied upon

“hearsay within hearsay” to establish the amount of the stores’ losses. Such evidence did not amount to “substantial credible evidence” and was insufficient to prove the amount of the restitution award. Pollard, 66 Wn. App. at 786-87.

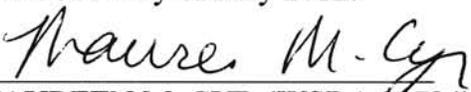
2. The restitution order must be vacated.

A restitution order is void if statutory provisions are not followed. State v. Lewis, 57 Wn. App. 921, 924, 791 P.2d 250 (1990). If a restitution award is reversed on appeal on the basis that substantial evidence does not support the amount, the State may not present additional evidence on remand because that would conflict with the statutory requirement that restitution be set within 180 days after sentencing. State v. Griffith, 164 Wn.2d 960, 968 & n.6, 195 P.3d 506 (2008); RCW 9.94A.753(1). Thus, the restitution award must be vacated and the State may not present additional evidence on remand.

E. CONCLUSION

The State did not prove the amount of restitution by substantial credible evidence. Therefore, the restitution order must be vacated.

Respectfully submitted this 30th day of May 2012.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68237-7-I
)	
ALICEA MARTINI,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MAY, 2012, I CAUSED THE ORIGINAL **OPENING 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:

- | | | |
|---|-------------------|-------------------------------------|
| [X] SETH FINE, DPA
SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] ALICEA MARTINI
322787
WCC FOR WOMEN
9601 BUJACICH RD NW
GIG HARBOR, WA 98332 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAY 30 PM 4:53

SIGNED IN SEATTLE, WASHINGTON, THIS 30TH DAY OF MAY, 2012.

X _____ *gr*