

69761-7

69761-7

NO. 69761-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

NOE F.
(D.O.B. 11/8/1995),

Appellant.

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

APPELLANT'S OPENING BRIEF

2013 MAY 29 PM 4:54
COURT OF APPEALS
STATE OF WASHINGTON

NANCY P. COLLINS
Attorney for Appellant

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

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT..... 4

By ordering that a juvenile pay restitution to an insurance company when the court found he lacked the ability to pay, the court abused its discretion and misapplied the governing statute.. 4

1. The juvenile court has discretion to decline to order restitution to an insurance provider 4

2. The court ordered restitution without considering and weighing Noe’s documented inability to pay..... 7

3. The court’s unreasonable ruling imposing restitution notwithstanding uncontested evidence of Noe’s poverty requires reversal 12

E. CONCLUSION..... 13

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005)	10
<i>State v. Griffith</i> , 164 Wn.2d 960, 195 P.3d 506 (2008).....	4
<i>State v. Rice</i> , 98 Wn.2d 384, 655 P.2d 1145 (1982).....	5
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646 (2006);	4

Washington Court of Appeals Decisions

<i>State v. Goodrich</i> , 47 Wn.App. 114, 733 P.2d 1000 (1987).....	4
<i>State v. J.H.</i> , 96 Wn.App. 167, 978 P.2d 1121 (1999)	5
<i>State v. J.S.</i> , 70 Wn.App. 659, 855 P.2d 280 (1993)	4
<i>State v. Lamb</i> , 163 Wn.App. 614, 262 P.3d 89 (2011).....	9

Statutes

RCW 13.40.190	4, 5, 6, 10, 12
---------------------	-----------------

Other Authorities

Judgepedia.org, Christopher A. Washington, available at: http://judgepedia.org/index.php/Washington_judicial_elections,_2012	11
Voting for Judges, Chris Washington, Newspaper endorsements, available at: http://www.votingforjudges.org/12gen/rating/stranger.html#42	11

A. ASSIGNMENT OF ERROR.

The court unreasonably ordered Noe F. to pay restitution to an insurance company despite his poverty.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

A judge has unambiguous authority to waive restitution sought by an insurance company in a juvenile case if the juvenile reasonably shows he is unable to afford this restitution due to his poverty. Noe and his mother presented the juvenile court with detailed financial information and explained Noe's inability to find employment despite long-standing efforts to do so. The court summarily imposed restitution without acknowledging Noe's inability to pay. Did the court fail to meaningfully consider Noe's request to waive restitution sought by an insurance company based on his undisputed poverty?

C. STATEMENT OF THE CASE.

After Noe F. pled guilty to third degree malicious mischief for throwing a rock that damaged a car's window, Judge Chris Washington ordered him to reimburse the car's owner for her \$500 insurance

deductible. COA 67804-3-I, Slip op. at 1-2.¹ The judge decided against ordering Noe to pay further restitution to the insurance company. 9/16/11RP 4.² The judge explained that it was “my practice” not to order juvenile to pay non-mandatory restitution to insurance companies. *Id.* The judge also found that Noe was poor and unable to pay the restitution. *Id.* at 5.

The prosecution appealed the juvenile court’s order denying restitution sought by the insurance company. COA 67804-3-I, Slip op. at 4. This Court ordered a new restitution hearing because the trial court appeared to have a policy against imposing restitution for insurance companies, and the governing statute permitted the juvenile court to waive restitution only upon individualized findings of the juvenile’s inability to pay restitution within 10 years. COA 67804-3-I, Slip op. at 7-9.

On December 12, 2012, the same judge presided at a new hearing. Noe presented the court with declarations from himself and his mother explaining their poverty. CP 11-16. Noe also told the court that,

¹ This Court’s opinion from Noe’s prior appeal discusses the undisputed factual background. Although this opinion is unpublished, it is cited herein to provide factual context and to address any law of the case issues.

“I keep trying” to find employment but had not been able to obtain any work. CP 15. He stopped attending school after the seventh grade and has “a criminal history that makes it even harder to get a job.” CP 15. He has never “had a paying job and I have no experience in anything an employer might need.” CP 15. His mother explained that Noe has mental health problems. CP 11. Defense counsel also offered statistics documenting the severity of unemployment for teenagers and young adults in this state which, at 34.1%, is among the worst in the country for Noe’s age range. CP 7. This high rate of unemployment includes young people who, unlike Noe, have age-appropriate education and no criminal record. CP 7.

The trial court entered no additional findings and did not acknowledge any of the evidence Noe presented. 12/7/12RP 5. Instead, the court simply declared that it would impose restitution even though it did not believe Noe would be able to pay it. *Id.* at 5-7.

² A motion is pending to transfer the verbatim report of proceedings from September 16, 2011, prepared for COA 67804-3-I, to the instant appeal.

D. ARGUMENT.

By ordering that a juvenile pay restitution to an insurance company when the court found he lacked the ability to pay, the court abused its discretion and misapplied the governing statute

1. *The juvenile court has discretion to decline to order restitution to an insurance provider.*

A court's authority to order restitution derives entirely from statute. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008); *State v. Goodrich*, 47 Wn.App. 114, 116, 733 P.2d 1000 (1987) (“[w]hatever power the courts have to order restitution emanates from the Legislature.”).

In a juvenile case, the Legislature “unambiguously authorizes a court to relieve a juvenile’s obligation to pay restitution to an insurance provider” upon a showing of the juvenile’s inability to pay. COA 67804-3-I, Slip op. at 9 n.7; RCW 13.40.190(1)(g). The governing statute gives the court “discretion not to order restitution to an insurance provider based on the juvenile’s inability to pay over a 10-year period.” COA 67804-3-I, Slip op. at 5; RCW 13.40.190(1)(g).

A primary goal of a juvenile adjudication is rehabilitation. *See State v. Weber*, 159 Wn.2d 252, 264, 149 P.3d 646 (2006); *State v. J.S.*, 70 Wn.App. 659, 664, 855 P.2d 280 (1993) (“because the juvenile

system focuses on twin goals of punishment and rehabilitation of juvenile offenders, it differs materially from the adult sentencing system in which punishment is the primary purpose”) (quoting *State v. Rice*, 98 Wn.2d 384, 392-93, 655 P.2d 1145 (1982)).

Unlike the adult sentencing scheme, the juvenile court “retains discretion to tailor the disposition to meet the needs of the juvenile and the rehabilitative and accountability goals of the juvenile code. *State v. J.H.*, 96 Wn.App. 167, 181, 978 P.2d 1121 (1999). The juvenile court has authority to take the individual’s life circumstances and future needs into account to fashion a sentence that serves as appropriate punishment but is also directed at aiding the child to improve his chances for success in the future. *Id.*

Under the controlling statute, “the court may determine that the respondent is not required to pay, or may relieve the respondent of the requirement to pay, full or partial restitution to any insurance provider” if the juvenile lacks the ability to pay. RCW 13.40.190(1)(g). The court may decline to impose restitution to an insurance company

if the respondent reasonably satisfies the court that he or she does not have the means to make full or partial restitution to the insurance provider and could not reasonably acquire the means to pay the insurance provider the restitution over a ten-year period.

RCW 13.40.190(1)(g).

At Noe F.'s original sentencing hearing, the prosecutor informed Judge Washington that the statute required a finding of the respondent's inability to pay in order to waive restitution sought by an insurance company. 9/16/11RP 5. Judge Washington said "I appreciate that and I think I would make that finding." *Id.*

At the time Judge Washington made this finding, he received Noe's financial declaration stating that he had no assets and no employment. 9/16/11RP 7; Supp. CP __, sub. no. 33 (Financial Declaration). Defense counsel proffered that the juvenile probation officer would corroborate Noe's lack of employment and inability to work legally. 9/16/11RP 5.

This Court reversed the trial court 2011's ruling excusing Noe from paying restitution to the insurance company because the trial court had premised its ruling on its general "practice" of declining restitution for insurance companies as a blanket policy. COA 67804-3-I, Slip op. at 7. A general practice of denying restitution to insurance companies constitutes a failure to exercise the discretion required by RCW 13.40.190. This Court ordered another restitution hearing. *Id.* at 9.

After this Court's remand, the juvenile court set a new hearing. Noe offered more detailed information about his present and future financial circumstances. CP 7, 11-15. However, Judge Washington summarily ruled that he would grant the prosecution's "motion" ordering restitution to the insurance company and refused to further explain this ruling.³ 12/7/12RP 5.

2. *The court ordered restitution without considering and weighing Noe's documented inability to pay.*

After Noe's first sentencing hearing, the Court of Appeals criticized Judge Washington for relying on a general practice of refusing to order restitution for insurance companies. COA 67804-3-I, Slip op. at 7. The Court of Appeals agreed that the juvenile court has discretion to deny restitution to insurance companies, so long as the court finds the juvenile does not reasonably have the ability to pay the restitution within ten years. *See Id.* at 5 & 9 n.7. This Court remanded the case so Judge Washington could exercise his discretion based on Noe's present and future ability to pay restitution. *Id.* at 9.

At the resentencing hearing, Noe presented the court with

³ The prosecution had not filed any motion requesting restitution for the insurance company.

declarations from his mother and himself. CP 11-16. These declarations explained that the family had very little financial resources. Noe lived with his mother and she earned barely enough money to pay the rent and buy food for the two of them. CP 12. They have no savings, no assets, and spend the entirety of his mother's income on basic necessities of rent, electricity, and food. CP 12. Noe has been unable to find employment despite trying to do so for a long period of time. CP 11, 15. His job prospects are extremely limited because he has only a seventh grade education, a criminal history, and no job skills. CP 15. In addition, unemployment rates among people in Noe's age group are extremely high, thus substantiating how difficult it is for a person of Noe's age to find a job, not to mention his limited education and criminal history. CP 7.

Judge Washington did not dispute or even question the accuracy of Noe's dire financial situation. He made no finding that Noe's declaration was inadequate or insufficient. Instead, he summarily stated he was "going to grant the State's motion." 12/7/12RP 5. Defense counsel asked for an explanation given this cursory ruling, saying, "Is the court applying the statute at this time?" *Id.* Defense counsel

reminded the court that the Court of Appeals agreed it had discretion to waive this restitution and said,

there's a very strong case that my client will not be able to pay within a ten-year period. So I'm not sure if the court is looking at the opinion as a guideline or whether the court is applying the statute at this time.

Id.

The court answered, "I've reviewed the law, I've reviewed the case and I have had a chance to read your brief and I was aware of the law, and that's going to be my decision, to award the restitution." *Id.* The court made no findings and gave no further explanation, other than agreeing to defense counsel's request that the monthly rate of restitution be set at \$5 per month based on Noe's inability to pay. *Id.* at 5-6.

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds; "this standard is also violated when a trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law." *State v. Lamb*, 163 Wn.App. 614, 625, 262 P.3d 89 (2011). The trial court claimed to have "reviewed the law" but never explained what that meant. 12/7/12RP 5. It said it reviewed the defense brief but never acknowledged or questioned the evidence showing Noe's inability to

pay. It never reconciled its December 2012 ruling with its 2011 finding that Noe could not afford to pay restitution. 9/16/11RP 5. It did not acknowledge Noe's inability to find employment despite his efforts to do so and did not mention the incredibly high unemployment rates for someone in Noe's age range. CP 7, 11, 15. In fact, the court seemed to assume that Noe would not be able to pay the restitution but was resigned to impose the restitution notwithstanding its authority under RCW 13.40.190(1)(g). 12/7/12RP 6.

Every defendant is entitled to ask the trial court for meaningful consideration of a sentencing request. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). The court must "exercise the discretion vested by statute" by seriously considering the appropriateness of a request for sentencing relief. *Id.* at 338.

Here, the court's refusal to explain the basis of his decision was unreasonable in light of the factual information Noe presented and based on its prior acknowledgment of Noe's entrenched poverty. Noe and his mother gave the court detailed information about their present lack of resources. Noe further explained his inability to find a job. Defense counsel offered documentary evidence of exceedingly high

youth unemployment in Washington, which is one of the worst in the United States at 34.1%. CP 7.

After this Court reversed Judge Washington's initial ruling waiving restitution because the judge indicated it was his "practice" not to impose restitution for insurance companies, Judge Washington appears to have adopted the opposite blanket policy of imposing restitution notwithstanding his statutory authority to waive it when provided with reasonable evidence of a juvenile's present and future inability to pay.

Judge Washington's December 7, 2012 ruling may have been driven by events outside the courtroom. He was the only incumbent superior court judge to lose in the November 6, 2012, general election. *See* Judgepedia.org, Christopher A. Washington, available at: http://judgepedia.org/index.php/Washington_judicial_elections,_2012 (last viewed May 28, 2013). Prosecutors in juvenile cases had given him negative reviews in the King County bar association's judicial survey due to their perception of his leniency. *See* Voting for Judges, Chris Washington, Newspaper endorsements, available at: <http://www.votingforjudges.org/12gen/rating/stranger.html#42>

(“prosecutors . . . sandbagged [Judge] Washington (apparently due to him extending lighter sentences to juvenile offenders).” (last viewed May 28, 2013)).

Whether Judge Washington’s refusal to meaningfully consider Noe’s financial indigency after the Court of Appeals ruling was based on politics, a misunderstanding of his discretion, or a desire to over-correct after the Court of Appeals ruled he had an improperly blanket policy of declining restitution for insurance companies, his reversal of course was not based on a reasonable view of the evidence presented.

Given Noe’s uncontested, documented inability to afford restitution, his lack of education and criminal history that had made finding a job impossible, and the “unambiguous” statutory discretion given to a court to waive restitution owed to an insurance company when appropriate, the court abused its discretion by imposing restitution without regard to Noe’s entrenched poverty. COA 67804-3-I, Slip op. at 9 n.7.

3. The court’s unreasonable ruling imposing restitution notwithstanding uncontested evidence of Noe’s poverty requires reversal.

The trial court disregarded its authority under RCW 13.40.190(1)(g) when it denied Noe’s request to waive restitution

sought by an insurance company based on the juvenile's inability to pay. A new hearing is required.

E. CONCLUSION.

For the reasons stated above, Noe F. respectfully asks this Court to reverse the court's restitution order and remand the case for a new hearing. Noe also asks that no costs be awarded in the event that he does not substantially prevail on appeal.

DATED this 29th day of May 2013.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 69761-7-I
v.)	
)	
NOE F.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF MAY, 2013, 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:

2013 MAY 29 9:54 AM
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

- | | | |
|---|-------------------|-------------------------------------|
| [X] KING COUNTY PROSECUTOR'S OFFICE
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] NOE F.
32127 20 TH LN SW #81
FEDERAL WAY, WA 98023 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF MAY, 2013.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711