

FILED
Apr 14, 2016
Court of Appeals
Division I
State of Washington

NO. 74042-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS L. BAKER,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUE

The restitution order contained provisions that were different from the court's oral decision. Does this discrepancy establish an error that can be raised for the first time on appeal?

II. STATEMENT OF THE CASE

The defendant, Nicholas Baker, burglarized the Hilton Pharmacy in Marysville. He committed this crime together with Cory Redford. A jury found him guilty of second degree burglary and possession of a controlled substance. CP 23, 25.

The defendant was sentenced on October 1, 2015. The prosecutor said that the total amount of restitution was going to be \$7,939.18. He did not, however, know the defense position with regard to this amount. RP 82. The court imposed a total of five months' confinement. It said that restitution would be joint and several with Mr. Redford. RP 86.

The judgment and sentence said that restitution would be set by later order of the court. The defendant waived his right to be present at any restitution hearing. CP 17.

On October 11, the court entered a restitution order. This order was presented by the prosecutor and "approved for entry" by defense counsel. It set restitution in the amount stated by the

prosecutor at sentencing. It did not, however, provide any joint and several responsibility for restitution. CP 1-9.

III. ARGUMENT

A. AN ALLEGED SCRIVENER'S ERROR CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

The defendant claims that the restitution order contains a scrivener's error. No objection to the order was raised in the trial court. The issue should not be considered for the first time on appeal.

In general, a party who fails to object at trial waives the right to appeal. "Although this rule insulates some errors from review, it encourages parties to make timely objections, gives the trial judge an opportunity to address an issue before it becomes an error on appeal, and promotes the important policies of economy and finality." State v. Kalebaugh, 183 Wn.2d 578, 583 ¶ 8, 355 P.3d 253 (2015). Obviously, there are a number of exceptions to this rule. The defendant has not, however, identified any exception that might be applicable.

The interests of judicial economy strongly support application of the rule in this case. If the restitution order contains a scrivener's error, that error could have been quickly corrected if anyone had pointed it out. As discussed below, the error could be

corrected now if anyone asked the trial court to do so. Full appellate review is an ineffective way to correct a scrivener's error. This court should leave the defendant to his remedy in the trial court.

B. AN INCONSISTENCY BETWEEN AN ORAL OPINION AND WRITTEN ORDER DOES NOT ESTABLISH ANY ERROR THAT CAN BE REVIEWED ON APPEAL.

If this court nonetheless considers the issue, it should conclude that the record does not establish any error. All the defendant has shown is a discrepancy between the court's oral opinion and its written order. This is not enough to establish that the order is erroneous.

A trial court's oral ... opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.

State v. Collins, 112 Wn.2d 303, 306, 771 P.2d 350 (1989). "Error cannot be predicated on the oral decision of the trial court." State v. Reynolds, 80 Wn. App. 851, 860 n. 1, 912 P.2d 494 (1996). This is no way for this court to know whether the written order represents a scrivener's error or a change in the trial court's decision.

If there has been an error, the remedy lies in the trial court under CrR 7.8(a). That rule allows the court to correct "clerical mistakes." "A clerical mistake is one that, when amended, would

correctly convey the intention of the court based on other evidence.” State v. Davis, 160 Wn. App. 471, 478 ¶ 9, 248 P.3d 121 (2011). A motion under CrR 7.8(a) can be heard and decided while an appeal is pending, subject to this court’s permission prior to formal entry. RAP 7.2(e).

The trial court presumably knows whether the restitution order accurately reflects its intention. This court does not know that. Consequently, the sole remedy is in the trial court. There is no error that can be corrected on appeal.

IV. CONCLUSION

The restitution order should be affirmed. Since the defendant has not challenged his conviction or other aspects of his sentence, those should be affirmed in any event.

Respectfully submitted on April 14, 2016.

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DECLARATION OF DOCUMENT
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AFFIDAVIT BY CERTIFICATION:

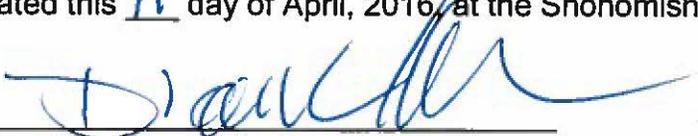
The undersigned certifies that on the 14th day of April, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and David Koch, Nielsen, Broman & Koch, kochd@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of April, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office