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Apr 25, 2016
Court of Appeals
Division I
State of Washington

NO. 74319-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

WILLIAM FREDERICK JENSEN,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JANET M. HELSON
THE HONORABLE KIMBERLEY D. PROCHNAU

REPLY BRIEF OF APPELLANT

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A. SUMMARY OF THE FACTS AND PROCEDURE

William Jensen was convicted of soliciting the murders of his family, including his daughter Jenny Jensen. The sentencing court (Judge Jones) entered an agreed restitution order in 2005 that plainly anticipated future counseling costs for Jensen's victims. Jensen's case was remanded after appellate review for resentencing on two rather than four counts of solicitation to commit murder. Restitution was never an issue on appeal and was not affected by the appellate remand. All parties at the resentencing on February 13, 2009 agreed that no other aspect of the sentence would change and the court (Judge Prochnau) agreed that she was only changing the defendant's term of confinement.

The prosecutor then broached the subject of supplemental restitution for counseling costs incurred between 2005 and 2009. The prosecutor erroneously told Judge Prochnau that a written restitution order had not previously been entered. It was agreed that consideration of supplemental restitution should be deferred to allow defense counsel to review the basis for that request, but a precise date was not selected at that time.

A hearing was ultimately held on September 30, 2009, more than 180 days after resentencing. The hearing had been rescheduled more than once without notice to the victims, so they were unable to attend. At the hearing, Jensen argued that a new restitution order would be untimely because additional restitution had to be determined within 180 days of resentencing. The trial court accepted this argument and refused to impose supplemental restitution. Defense counsel promised to present a written order but that was never done.

In 2014, the State asked the court (Judge Helson) to consider imposing restitution for counseling costs incurred by Jenny Jensen between 2009 and 2014. Judge Helson determined that she did not have the authority to impose any additional restitution in light of Judge Prochnau's 2009 ruling. Judge Helson reduced Judge Prochnau's oral ruling to a written order so that the State could appeal that ruling.

The State has argued on appeal that Judge Jones's 2005 restitution order authorized restitution for continuing counseling costs of Jenny Jensen and, thus, the timing of the request for modification was not affected by the usual 180-day rule.

Jensen has responded to the State's appeal by arguing that the State waived or conceded the issue below, and by arguing that the resentencing judge had an obligation to enter a formal order on supplemental restitution at the resentencing hearing, or to hold a hearing within 180 days of resentencing.

B. ARGUMENT IN REPLY

Jensen's arguments in response should be rejected. Neither the trial court nor this court are bound by an erroneous claim as to the court's sentencing authority.

Before and during Jensen's resentencing, his lawyer implored the court that its authority upon resentencing was limited to vacating two counts and imposing a new term of confinement. CP 285-86 ("Every condition of the original sentence should stay the same—only the vacated sentences should be subtracted."); CP 287 ("All other conditions of the sentence should remain unchanged."). Judge Prochnau's oral ruling seemed to follow Jensen's request.

The Court does impose that sentence. The Court will **reimpose all other conditions of the sentence** including no contact with the victims. **Restitution**, I believe Judge Jones waived certain costs and financial circumstances. **The Court is not going to make any other changes to Judge Jones' sentence.**

CP 134 (emphasis added). Likewise, page three of the written judgment plainly manifests an intent to impose restitution as previously ordered. See CP 147 (§4.1 Restitution and Victim Assessment: [X] Defendant shall pay restitution to the Clerk of the Court as set forth in attached (sic) in the previously filed Appendix E."). The words "in the previously filed" were a handwritten interlineation but the reference was flawed insofar as the previous restitution order was a stand-alone order rather than an Appendix E to the original judgment. Page 3 of the judgment at §4.3 also notes that the defendant will be required to pay "\$500 plus restitution." The prosecutor told the court that Judge Jones had originally ordered restitution but that no formal order had been entered. CP 138. The prosecutor was mistaken in this regard; Judge Jones had plainly entered an order that provided for future counseling costs. CP 114. Although there was confusion as to the form of Judge Jones's order, Judge Prochnau was correctly told that Judge

Jones had imposed restitution, and Judge Prochnau's oral and written comments plainly intended to preserve that ruling.

However, seven months later, at the September 30, 2009 hearing to determine supplemental restitution, Jensen objected that the request was untimely, and Judge Prochnau asked the prosecutor whether she "would agree that if, upon resentencing, the court never reissued the prior restitution order and never made reference to it, you would agree that then there would be no restitution order ... [and that it d]oesn't automatically continue?" CP 193. The prosecutor answered, "I think that would probably be accurate." Id. The prosecutor's incorrect answer is not binding on this Court for several reasons.

First, the question and answer were immaterial because Judge Jones had ordered restitution, including for supplemental counseling costs, and Judge Prochnau had ruled on February 13, 2009, that no aspect of Judge Jones's sentence was altered except the number of counts and the duration of sentence.

Second, the judge's question and the prosecutor's answer were immaterial because the timing statute applies to sentencing hearings where restitution has never been determined, not resentencing hearings where the court has already determined that

future counseling costs may be imposed. RCW 9.94A.753(1) provides: "When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days." There is no question that Judge Jones timely determined restitution following the original sentencing hearing and that he expressly provided for future counseling costs of the victims.

However, restitution sought for *future* costs is not subject to this time limit. A court may modify a previous restitution order as to amount beyond the 180 day limit. State v. Gonzalez, 168 Wn.2d 256, 226 P.3d 131 (2010); State v. Gray, 174 Wn.2d 920, 923, 280 P.3d 1110 (2012). Thus, the resentencing court did not have to comply with the 180-day rule at all, so the prosecutor's comment at the September, 2009 restitution hearing was plainly incorrect, and is not binding.

The Washington Supreme Court has repeatedly held that a party's concession or failure to object on a purely legal question cannot alter a sentencing court's authority. In re Goodwin, 146 Wn.2d 861, 873-78, 50 P.3d 618 (2002). See also Matter of Johnson, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). A trial court's sentencing authority, including its authority to impose

restitution, is wholly statutory. In Goodwin, the court held that a miscalculated offender score could be challenged for the first time in a personal restraint petition because the offender score was wrong as a matter of law. 146 Wn.2d at 878. This rule is in keeping with the general rule that courts are not bound by erroneous concessions on legal matters. State v. Knighten, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988). A concession as to underlying factual matters and the exercise of discretion will, by contrast, be binding. State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980); State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, review denied, 141 Wn.2d 1030, 11 P.3d 827 (2000).

This case is like Goodwin. The sentencing issue before Judge Prochnau concerned the court's sentencing authority. It was a purely legal question. And, as with the offender score determination in Goodwin, it is of paramount importance that the sentencing court properly exercise its authority, lest legislative intent be defeated. Goodwin, at 877. Legislative policy plainly favors restitution. "Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property [...] unless extraordinary circumstances exist which make restitution inappropriate..." RCW

9.94A.753(5). The Washington Supreme Court has recognized that the restitution statutes are “intended to require the defendant to face the consequences of his or her criminal conduct[, so] Courts are not to engage in overly technical construction that would permit the defendant to escape just punishment.” State v. Tobin 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). Thus, the prosecutor’s erroneous comment on a purely legal issue as to a sentencing court’s authority is not binding; to treat it as such would frustrate the clear legislative purpose to impose restitution for victims.

Finally, the prosecutor’s erroneous statement is not binding on this court because the issue presented is one of “manifest error affecting a constitutional right.” RAP 2.5(a). Victims are guaranteed the right to be notified of and to participate in sentencing determinations. CONST. art. I, § 35. As noted above, sentencing includes the right to a proper determination of restitution. Judge Prochnau’s decision manifestly cuts off Jenny Jensen’s right to additional restitution, thus affecting her constitutional right to meaningful participation in the sentencing process.¹

¹ Jensen argues that the State may not represent the interests of the victim to restitution. This argument is unsupported by any authority. The State routinely defends victims’ right to restitution under statute promulgated by the legislature.

C. CONCLUSION

For these reasons, this Court should reverse Judge Prochnau's order, as memorialized in Judge Helson's written order.

DATED this 25th day of April, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jeffrey Ellis, the attorney for the respondent, at jeffreyerwinellis@gmail.com, containing a copy of the Reply Brief of Appellant, in State v. William Frederick Jensen, Cause No. 74319-8, 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.

Dated this 25th day of April, 2016.

U Brame
Name:
Done in Seattle, Washington