

FILED
Jun 10, 2016
Court of Appeals
Division I
State of Washington

NO. 74414-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES BEA,

Appellant.

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

The Honorable Monica Benton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing restitution relating to uncharged conduct that James Allen Bea did not expressly agree to as part of his plea agreement.

2. The trial court erred in refusing to hold an evidentiary restitution hearing on the facts Bea placed in dispute.

Issues Pertaining to Assignments of Error

1. Where the defendant neither agrees to pay restitution beyond the crimes charged nor agrees to pay restitution for other uncharged offenses, does the trial court lack authority to impose such restitution?

2. Where the defendant disputes facts relevant to imposing restitution, must the trial court hold an evidentiary hearing to address the disputed facts?

B. STATEMENT OF THE CASE

In May 2014, the State charged Bea with two counts of threats to bomb or injure the property of Jack Henry and Associates, a financial technology company that employed Bea. CP 1-2, 5. In April 2015, the State amended its information to add two counts of first degree identity theft, one count of second degree identity theft, and two counts of felony harassment. CP 14-16.

Bea pleaded guilty to the amended charges. CP 17-71. As part of the plea agreement, Bea agreed to pay restitution “to Jack Henry and Associates for all costs related to charged conduct including security measures and reimbursement for fraud losses to credit customers; for actual losses by Main State Credit Union credit card customers Lynn Hancock, Robert Schena, Paula Farren and Joyce Achramowicz.” CP 61 (boldface, italics, and underlining omitted).

The trial court followed the State’s sentencing recommendation and imposed concurrent sentences of 36 months each for the two bomb threat and two first degree identity theft counts, 22 months for the second degree identity theft, and 29 months each for the two felony harassment counts. CP 71, 94; IRP¹ 21.

In November 2015, the State submitted restitution materials requesting “restitution in the amount of \$40,924.31 for an occupational risk manager to address trauma caused by the defendant’s threats (\$2,971.21), auditing costs (\$9,714.15), credit monitoring for affected cardholders (\$6,637.42), and reimbursement of financial institution that sustained a loss (\$21,601.53).” CP 109. The State’s restitution submission exceeded the language of the plea agreement that limited restitution to Jack Henry and

¹ This brief refers to the verbatim reports of proceedings as follows: IRP—June 5, 2015; 2RP—June 8, 2015; 3RP—December 4, 2015.

Associates' losses related to charged conduct and for the losses of four named Maine State Credit Union customers. Compare CP 61 with CP 109.

Defense counsel objected, asserting that the State had not carried its burden of “establishing a nexus between the requested restitution and the facts that were ple[]d and proven . . . on the basis of the defendant’s conduct that he ple[]d guilty to I am not seeing a nexus at all with respect -- particularly to the financial institutions.” 3RP 2.

The State responded that Bea “agreed to pay restitution for conduct including security measures and reimbursement for fraud losses to credit card customers, for actual losses to Maine State Credit Union credit card customers, and then it lists several of the victims.” 3RP 4.

The trial court asked to see the plea agreement and, upon review, noted that Bea only agreed to pay Maine State Credit Union cardholders, which “is only one of the \$40,000 sum, not the full panoply of credit unions.” 3RP 4. Thus, the trial court intended “to limit it to the Maine State Community Bank and the Maine State Credit Union sums.”² 3RP 4.

The trial court stated it understood the defense nexus objection but was “satisfied that the outline from Jack Henry Associates to include the

² The trial court was referring to financial institutions listed in the Jack Henry and Associates victim loss summary as “Maine State Credit Union #6” and “Mainstreet Community Bank #8.” CP 110. However, the plea agreement limited restitution to four named “Main[e] State Credit Union” cardholders. CP 61. It did not mention Mainstreet Community Bank. CP 61. Nor did it authorize restitution to Maine State Credit Union directly. CP 61.

occupational risk manager expenses of \$2,971.21, the auditing costs of \$9,714.15, and credit monitoring for the affected cardholders of \$6,637.42 are directly related in this case.” 3RP 5. However, the trial court again stated, “I have limited -- of financial institution I have limited to the one that your client agreed to pay. And that is substantially less than what Jack Henry was seeking.” 3RP 5.

Ultimately, the trial court imposed \$27,613.34 in restitution. CP 101.

This consisted of the following amounts:

- \$2,971.21 for a risk manager’s travel expenses, CP 111-13; 3RP 3;
- \$9,714.15 in auditing costs, CP 115; 3RP 5;
- \$6,637.42 for credit monitoring for the affected cardholders, CP 117-18; 3RP 5;
- \$7,717.00 for financial institution Maine State Credit Union, CP 125-26; and
- \$573.56 for financial institution Mainstreet Community Bank, CP 129-30.

Bea filed a timely appeal of the restitution order. CP 104. The trial court advised Bea he “ha[d] the right, if [he could not] afford it, to have counsel appointed and to have portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal.” CP 100. The trial court specifically found that Bea was “unable by reason of

poverty to pay for any of the expenses of appellate review” and that he could not “contribute anything toward the costs of appellate review.” CP 102.

C. ARGUMENT

1. THE RESTITUTION ORDER MUST BE VACATED BECAUSE IT CONFLICTS WITH THE PLEA AGREEMENT REACHED BY THE PARTIES

Bea does not dispute that he owes restitution. But the plea agreement he entered into with the State expressly limits the restitution that may be imposed. Pursuant to the plea agreement, Bea “agree[d] to pay restitution to Jack Henry and Associates for all costs related to charged conduct including security measures and reimbursement for fraud losses to credit customers; for actual losses by Main State Credit Union credit card customers Lynn Hancock, Robert Schena, Paula Farren and Joyce Achramowicz.” CP 61 (boldface, italics, and underlining omitted). The restitution ordered by the trial court exceeds this agreement and does not otherwise relate to any charged conduct. The restitution order must therefore be vacated.

“[R]estitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor’s recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.” RCW 9.94A.753(5). “A defendant may not be required to pay restitution beyond the crime charged or for other

uncharged offenses absent a guilty plea with an express agreement as part of that process to pay restitution for crimes for which the defendant was not convicted.” State v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000) (citing State v. Woods, 90 Wn. App. 904, 608, 953 P.2d 800 (1983); State v. Miszak, 69 Wn. App. 426, 848 P.2d 1329 (1993)). “In other words, restitution cannot be imposed based on a defendant’s ‘general scheme’ or acts ‘connected with’ the crime charged, when those acts are not part of the charge.” Id. (quoting Woods, 90 Wn. App. at 907-08). The reviewing court must vacate the restitution order if the defendant did not make a specific agreement to pay as part of a guilty plea or if there is no connection between the charged crimes and the restitution ordered. State v. Osborne, 140 Wn. App. 38, 41, 163 P.3d 799 (2007).

Under Osborne and Dauenhauer, the trial court had authority to order restitution only for Bea’s charged conduct and what was specified in the plea agreement. The trial court exceeded this authority.

As for restitution related to Bea’s convictions, Bea pleaded guilty to two counts of threats to bomb or injure the property of Jack Henry and Associates. CP 14-15. Restitution for injuries and losses resulting from the bomb threats would thus be appropriate. Bea was also convicted of identity theft against Joyce Achramowicz, Paula Farren, and Sheila Gaillard. CP 15; see also CP 31 (statement listing these persons in Bea’s own statement on

plea of guilty). Losses related to these identity theft charges would therefore be recoverable in restitution. Finally, Bea was convicted of felony harassment against David Johnstone and Tom Morton. CP 15-16. If Morton or Johnstone had losses stemming from felony harassment, Bea concedes restitution would be appropriate assuming the State could prove the requisite causal connections.

Beyond the charged conduct, Bea expressly agreed as part of his guilty plea to pay Jack Henry and Associates “for all costs related to the charged conduct including security measures and reimbursement for fraud losses to credit customers[.]” CP 61 (boldface, italics, and underlining omitted). This agreement appears to be broad enough to cover items like Jack Henry and Associates’ auditing, credit monitoring, and occupational risk manager expenses.³

In the plea agreement, Bea also agreed to pay restitution “for actual losses by Main State Credit Union credit card customers Lynn Hancock, Robert Schena, Paula Farren and Joyce Achramowicz.” CP 61 (boldface, italics, and underlining omitted). Both Achramowicz and Farren are also listed in the information containing the charges and in Bea’s guilty plea. CP

³ Bea does not dispute the trial court’s authority to order this type restitution because it is of the type he agreed to pay as part of the guilty plea. However, as discussed below, Bea placed facts relevant to the determination of this restitution in dispute, which entitled him to evidentiary hearing to resolve the disputed facts. See Part C.2 infra.

15, 31. Thus, the plea agreement expands the scope of “restitution for crimes for which the defendant was not convicted” to include additional responsibility for the losses sustained by credit card customers Lynn Hancock and Robert Schena. Cf. Dauenhauer, 103 Wn. App. at 378.

In summary, based on the conduct Bea was convicted of and Bea’s express agreement, restitution was authorized for (1) Jack Henry and Associates’ losses, if any, related to charged conduct, (2) Jack Henry and Associates’ losses related to security measures and reimbursement for fraud losses to credit customers, (3) losses sustained by Joyce Achramowicz, Paula Farren, Sheila Gaillard as pertains to identity theft, (4) losses sustained by Maine State Credit Union credit card customers Lynn Hancock, Robert Schena, Paula Farren and Joyce Achramowicz, and (5) losses, if any, related to the convictions for felony harassment of David Johnstone and Tom Morton.

The trial court exceeded what was authorized.

First, the trial court erred in including restitution in the amount of \$573.56 for Mainstreet Community Bank. The trial court believed it was limiting restitution to the one financial institution listed in Bea’s plea agreement, stating, “I have limited -- of financial institution I have limited to the one that your client agreed to pay.” 3RP 5 (emphasis added). The plea agreement stated Bea agreed to pay restitution only for “actual losses by

Main State Credit Union credit card customers”⁴ CP 61. While Maine State Credit Union and Mainstreet Community Bank might have similar sounding names, the restitution materials made clear they were separate financial institutions. See CP 125-26 (materials pertaining to Maine State Credit Union); CP 129-30 (materials pertaining to Mainstreet Community Bank). Bea never agreed to pay any amount in restitution to Mainstreet Community Bank; nor was he convicted of any conduct pertaining to Mainstreet Community Bank. The trial court’s imposition of \$573.56 in restitution to Mainstreet Community Bank was accordingly error that requires vacation of the restitution order. Osborne, 140 Wn. App. at 41-42; Dauenhauer, 103 Wn. App. at 378.

Second, Bea’s agreement pertaining to Maine State Credit Union was limited: he agreed to pay “for actual losses by Main[e] State Credit Union credit card customers Lynn Hancock, Robert Schena, Paula Farren, and Joyce Achramowicz.”⁵ CP 61. But, the restitution materials submitted

⁴ The plea agreement refers to “Main State Credit Union” rather than “Maine State Credit Union.” Compare CP 61 (“Main State Credit Union” (emphasis added)) with CP 110, 125 (“Maine State Credit Union” (emphasis added)). Although the plea agreement contains this typographical error, it is reasonable to conclude, based on the restitution materials the State submitted, Bea agreed to pay losses to Maine State Credit Union credit card customers only.

⁵ Bea was also convicted of second degree identity theft with respect to Sheila Gaillard and thus could have been ordered to pay restitution for Ms. Gaillard’s losses. CP 15. The State submitted no materials seeking restitution for Ms. Gaillard’s losses, however.

by the State relating to Maine State Credit Union were not limited to these four credit card customers. Maine State Credit Union's invoice page in the restitution materials shows it paid for 82 cards, pins, activations, postage expenses, blocking fees, notifications, alerts, and the like. CP 125. Unless each of the four named credit card customers had 20 Maine State Credit Union credit cards apiece, the imposition of this restitution exceeded Bea's plea agreement.

Third, nothing in the Maine State Credit Union's invoice page has anything to do with the "actual losses" sustained by the four named credit card customers. CP 125. Rather, the invoice page appears to list the losses or expenses of Maine State Credit Union, not any of its customers. CP 125. Bea did not agree to pay the losses or expenses of Maine State Credit Union; nor was Bea convicted of criminal conduct against Maine State Credit Union. CP 14-16, 31, 61. Thus, the trial court lacked authority to impose restitution for Maine State Credit Union's losses. Osborne, 140 Wn. App. at 41-42; Dauenhauer, 103 Wn. App. at 378. The restitution order must be vacated.

2. BEA IS ENTITLED TO AN EVIDENTIARY HEARING TO ADDRESS HIS CHALLENGE TO THE CAUSAL NEXUS BETWEEN THE RESTITUTION REQUESTED AND HIS CONDUCT

“Where a defendant disputes facts relevant to the determination of restitution, the State must prove the amount by a preponderance of the evidence at an ‘evidentiary hearing.’” State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005), abrogated in part on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); see also State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005) (“If the defendant disputes facts relevant to determining restitution, the State must prove the damages at an evidentiary hearing by a preponderance of the evidence.”). Although “[c]ase law does not define ‘evidentiary hearing’ in the restitution context,” it means “[a] hearing at which evidence is presented, as opposed to a hearing at which only legal argument is presented.” Hughes, 154 Wn.2d at 154 (second alteration in original) (quoting BLACK’S LAW DICTIONARY 738 (8th ed. 2004)).

Bea disputed the State’s restitution evidence, arguing that it did not “establish a nexus between Mr. Bea’s conduct and these expenses.” 3RP 4; see also 3RP 2-3 (defense counsel disputing nexus between restitution requested and Bea’s conduct). Defense counsel clarified, “The defense’s

objection is that the materials submitted don't show nexus between the amount requested and Mr. Bea's conduct." 3RP 5.

Despite Bea's clear disputation of the facts relevant to the determination of restitution, the trial court held no evidentiary hearing to address Bea's factual disputes. 3RP 5. Instead, the trial court indicated it was "satisfied that the outline from Jack Henry to include the occupational risk manager expenses of \$2,971.21, the auditing costs of \$9,714.15, and credit monitoring for the affected cardholders of \$6,637.42 are directly related in this case." 3RP 5. However, the court gave no indication regarding why or how it was satisfied in light of Bea's concerns. The trial court was required to hold an evidentiary hearing.

The trial court also told defense counsel it was limiting the reimbursement "to the [financial institution] that your client agreed to pay. And that is substantially less than what Jack Henry was seeking." 3RP 5. But, as discussed above, the trial court failed to limit restitution to four named cardholders of Maine State Credit Union, which were the only financial institution payees Bea agreed to in the plea deal. CP 61; 3RP 4. Thus, although the trial court believed it was limiting the restitution to the parties' plea agreement, its belief was mistaken. The trial court's failure to ascertain even what it was ordering illustrates the need for evidentiary hearings when a defendant places the pertinent facts in dispute.

This court should reverse the restitution order and remand with instructions to hold the required evidentiary hearing.

3. APPELLATE COSTS SHOULD BE DENIED

In the event Bea does not prevail in this appeal, this court should deny any request by the State for appellate costs.

This court indisputably has discretion to deny appellate costs. RCW 10.73.160(1) (“The court of appeals . . . may require an adult offender convicted of an offense to pay appellate costs.” (emphasis added)); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016) (holding RCW 10.73.160 “vests the appellate court with discretion to deny or approve a request for an award of costs”).

There are several reasons this court should exercise discretion and deny appellate costs.

a. Bea is presumed indigent throughout review

The trial court determined Bea was “unable by reason of poverty to pay for any of the expenses of appellate review” and that he could not “contribute anything toward the costs of appellate review.” CP 102. The trial court’s advisement of appeal rights, which Bea signed, stated, “I have the right, if I cannot afford it, to have counsel appointed and to have portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal” CP 100. Based on the trial court’s

determination of indigency, Bea is presumed indigent throughout this review. RAP 15.2(f); Sinclair, 192 Wn. App. at 393 (“We have before us not trial court order finding that Sinclair’s financial condition has improved or is likely to improve We therefore presume Sinclair remains indigent.”).

- b. Attempting to fund the Office of Public Defense on the backs of indigent persons when their public defenders lose their cases undermines the attorney-client relationship and creates a perverse conflict of interest

Moreover, any reasonable person reading the order of indigency issued by the trial court would believe that Bea was entitled to an attorney to represent him on appeal at public expense and that Bea would pay nothing due to his indigency, win or lose. Under the current appellate cost scheme, however, this reasonable belief is incorrect and trial court indigency orders are falsehoods.

Because the courts do not do so, appellate defenders must explain to their indigent clients that if their arguments do not win the day, they will be assessed, at minimum, thousands of dollars in appellate costs. Unlike other lawyers whose clients pay them, the client’s ability to pay does not factor into an appellate defendant’s representation of his or her client. Yet appellate defenders must still play the role of financial planner, hedging the strength of their arguments against the vast sums of money their clients will

owe, and attempt to advise their clients accordingly. This undermines the attorney's fundamental role in advancing all issues of arguable merit on their clients' behalf and thereby undermines the relationship between attorney and client.

Not only do appellate defenders have to explain to clients they will face substantial appellate costs if their arguments are unsuccessful, they also have to explain that the Office of Public Defense gets most of the money. Many clients immediately see the perverse incentive this creates: The Office of Public Defense, through which all appellate defenders represent their clients, collects money only when the appellate defender is unsuccessful. This is readily apparent as a conflict of interest and undermines any appearance that the appellate cost scheme is fair. See RPC 1.7(a)(2) (a conflict exists where "there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer"); Wood v. Georgia, 450 U.S. 261, 268-70, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981) (acknowledging conflict when interest of third part paying lawyer is at odds with client's interest); Winkler v. Keane, 7 F.3d 304, 308 (2d Cir. 1993) (contingent fee in criminal case creates actual conflict of interest); United States v. Horton, 845 F.2d 1414, 1419 (7th Cir. 1988) (conflict of interest arises when defense attorney must "make a choice advancing his own interest to the detriment of his client's interests").

The current appellate cost system works as a contingent fee arrangement in reverse: rather than pay their attorneys upon winning their cases, indigent clients must pay the organization that funds their attorneys when they lose. Franz Kafka himself would strain to imagine such a design. The appellate cost scheme creates a perverse conflict of interest implicating the constitutional right to conflict-free counsel. This provides good reason to exercise discretion and deny costs.

- c. The trial court waived all discretionary legal financial obligations and imposed a significant amount of restitution

The trial court waived all discretionary legal financial obligations, including court costs and fees for court-appointed counsel. CP 93; 1RP 21. The trial court also imposed \$27,613.34 in restitution. CP 101; 3RP 5-6. To impose thousands of dollars in appellate costs now would be incongruous with the trial court's waiver of discretionary legal financial obligations. It would also undermine Bea's ability to pay restitution. This court recently recognized that carrying an obligation to pay thousands of dollars in appellate costs plus accumulated interest "can be quite a millstone around the neck of an indigent offender." Sinclair, 191 Wn. App. at 391. There is no basis in the record to place this millstone around Bea's neck. Any request by the State for appellate costs should be denied.

D. CONCLUSION

This court should vacate the restitution order and remand for an evidentiary hearing on the restitution facts Bea placed in dispute.

DATED this 10th day of June, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 74414-3-1
)	
JAMES BEA,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF JUNE 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES NEA
DOC NO. 383373
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF JUNE 2016.

x *Patrick Mayovsky*