

NO. 36932-0-II

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

STATE OF WASHINGTON, Respondent

v.

MICHAEL TRAYLOR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN P. WULLE
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-02117-7

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

After extensive negotiations this matter was filed as a gross misdemeanor in the Clark County Superior Court as a Negligent Driving in the First Degree (Information, CP 1). The Information was filed on November 3, 2006, with the understanding that he would be pleading guilty on that date. The defendant did so. (Statement of Defendant on Plea of Guilty to Non-Sex Offense (CP 9)).

At the time of the change of plea and then later at the time of sentencing on November 29, 2006, there is always the understanding that the defendant would pay the full restitution for the serious physical injuries that he had caused the victim (which ultimately led to the victims death).

The question of restitution was set over for purposes of getting a final amount set. Crime victims compensation submitted some of their items, and those were reflected in an initial report of restitution but the full amounts were not realized until April 4, 2007 with the restitution report of that date (CP 31) indicating a restitution request of \$106,186.71. Citations setting this matter by the Prosecutor's Office for review of restitution were entered on February 1, 2007 (CP 90); April 17, 2007 (CP 92); June 5, 2007 (CP 94); June 6, 2007 (CP 95). As indicated in the transcript that

has been ordered by the appellant, there was never a dispute as to the amount of restitution or he was not contesting the amount of damage that was done. What the defendant was objecting to was a comparative negligence theory that he maintained should have been utilized.

This became obvious at the July 19, 2007, hearing. The deputy prosecutor set out his understanding of the agreement and the defense agreed with that.

(Deputy Prosecutor): My understanding is that the dollar amounts are not in dispute. That 110,634.81 is not an issue in dispute. That an additional legal issue, however, is being potentially raised by the defense relative to comparative fault and whether or not the matter can be reduced based on comparative negligence on the part of the parties.

Our position is, as we indicated in chambers are that there's a plea agreement that required him to pay restitution regardless of anything else that should trump that issue. And Ms. Clark had indicated a desire to continue a little bit of research, provide me some additional information so I could research the same issue and then we return in a couple of weeks to meet with the court and discuss whether or not this is a viable issue. Or at that time, if it's not viable, simply enter the judgment for 110,634.81.

Is that right, Ms. Clark?

(Defense Attorney) Ms. Clark: Yes, Your Honor, that's an accurate rendition.

-(July 19, 2007, RP 4, L. 2-21)

The reasons for the set over's are further clarified and explained as requests by everyone (including the defendant) for a determination as to

causation, but no one disputes the amounts and the fact that the defendant would pay whatever amounts were justified. This was clarified at the September 25, 2007, meeting with the Court where the following discussion took place:

The Court: This is the State of Washington vs. Michael Traylor, 06-1-02117-7.

Mr. David or Ms. Clark, who wishes to go first?

(Deputy Prosecutor) Mr. David: Well, the matter was set on this morning for review to determine - - (Defense Attorney) Ms. Clark: (Inaudible).

Mr. David: - - for Ms. Clark to basically look into the issue as to whether or not there's any grounds for a comparative-negligence-type of argument. She presented a motion which we've not seen before today. When we were last in court - - or presented a brief that we've not seen before today. When we were last in court you were going to see if - - set it over and have her write out whatever she's going to write and then a make determination as to how to proceed from there.

It's been our position and always been our position that the defendant agreed to pay restitution in this case. This shouldn't be before the court. That what should be before the court is the restitution order. We've already agreed upon the dollar amounts.

The Court: Agreed - - when you say "agreed on the dollar amounts," what do you mean by "agreed"?

Mr. David: We - -

Ms. Clark: We agreed that those were the expenses incurred. It's just - -

The Court: As a result of the accident?

Mr. David: Correct. It's 100 - -

Ms. Clark: It's how to apportion that.

Mr. David: It's 110,634.81. We agreed last time we were in court as to that dollar amount should you order restitution in this case.

The Court: So we have a scenario where the defendant has agreed to pay restitution, the two sides are agreeing that as a result of the accident the injuries that the person has resulted in this amount of dollars put out. But if I understand the defense's position, it's - - there's a contributory negligence issue - -

Ms. Clark: But for causation, yes. And that's what the case law refers to.

The Court: Interesting.

-(September 25, 2007, PR 3, L. 3 – 4, L. 18)

This matter was, apparently, not pursued by the defense after this particular meeting with the Court because ultimately an order setting the restitution was entered on October 18, 2007(CP 79). The question of comparative negligence although broached with the Court at the meeting of September 25, 2007, was never further pursued by the defense.

II. RESPONSE TO ASSAIGNMENT OF ERROR NUMBER 1

The first assignment of error raised by the defendant is a claim that the restitution order is invalid because it was entered after the expiration of the 180 day time limit pursuant to RCW 9.94A.753(1).

A trial court's authority to order restitution is purely statutory; it does not arise from the Court's inherent power. State v. Davison, 116 Wn. 2d 917, 919, 809 P. 2d 1374 (1991). Accordingly, if the trial court exceeds its statutory authority under the restitution statute and fails to

follow the statutory provisions, the restitution order is void. State v. Johnson, 96 Wn. App. 813, 815, 981 P. 2d 25 (1995). However, in State v. Tetreault, 99 Wn. App. 435, 438, 998 P. 2d 330 (2000) the order extending the 180 day period was not invalid because there was no record of a timely written motion to extend the time period. Tetreault merely requires that a party “request” an extension prior to the expiration of the 180 day period; it does not require a timely written notice. 99 Wn. App. at 438. In our case, the trial court extended the 180 day periods before it expired and as indicated in the recitation of the Statement of Facts in this brief, it is obvious that the defense was requesting this so that it could explore a possible legal avenue to reduce the amount of restitution that the defendant was agreeing to. Further, the statutory time limit “operates as an ordinary statute of limitations” and is “subject to principals of waiver and collateral estoppel, including the doctrine of equitable tolling.” State v. Duvall, 86 Wn. App. 871, 874 – 875, 940 P. 2d 671 (1997). As Duvall indicates the purpose of the limitation, for imposing restitution is to avoid delay in resolving criminal charges. Accordingly, the court should consider whether the defendant had timely notice of the restitution claim, whether the delay hindered the gathering of evidence or otherwise prejudiced the defendant, and whether the prosecution acted with diligence and good faith. Duvall, 86 Wn. App. at 876. In Duvall, the tolling of the

statute of limitations for seven months did not frustrate the purpose of limitation period. The Defendant had notice that the original sentencing hearing that the court intended to enter a restitution order at a later date. The defendant made no showing of prejudice by the delay; at the hearing, he did not object to the substance of the order and acknowledged that he found the amount to be adequately documented. There was no evidence of bad faith or lack of diligence by the State, and the Court acted promptly once the defendant called the defect to its attention. “In short, the circumstances were in every way appropriate for equitable tolling.” Duvall, 86 Wn. App. at 876.

In our situation, there was no question but that the defendant understood that he was to make restitution payments in full for the damage he had done. This was negotiated from an arrest charge of vehicular homicide to a gross misdemeanor offense. The filing of the information and the change of plea were done on the same day which is indicative that the parties had negotiated and worked this out ahead of time. As indicated in the limited transcript provided by the appellant in this appeal, there was never any question of the amounts set forth in the restitution reports. The question that the defense wanted to raise was one of comparative negligence and possibly having this amount reduced in a comparative negligence setting. Thus, the set overs were done for the purposes of

assisting the defense in putting this information together. There is no indication of any lack of due diligence or good faith on the part of the State. The defendant was not prejudiced by the delay because it was a delay that he, through his attorney, was requesting. Further, there was no indication that there was any question about the fact that the defendant would pay the restitution, the defense was just wanting an opportunity to reduce that amount. The equitable tolling doctrine “permits a court to allow an action to proceed when justice requires it, even though a statutory time period had nominally elapsed.” In Re Carlstad, 150 Wn. 2d 583, 593, 80 P. 3d 587 (2003).

The State submits that the defendant cannot object to the extension because he invited or waived any error when he agreed to the extensions. And as the record clearly demonstrates he was agreeing, through his attorney, to these extensions and set overs specifically for the purpose of assisting him (the defendant) in reducing an amount of restitution that he would pay.

In State v. Hunsicker, 129 Wn. 2d 554, 919 P. 2d 79 (1996), Hunsicker entered into a plea agreement in which he agreed to pay restitution for eight forged checks. Hunsicker, 129 Wn. 2d at 555. The restitution hearing occurred well beyond the sixty day limit. Hunsicker challenged the restitution order. The Supreme Court affirmed the

restitution order on the ground Hunsicker had entered into an agreement to pay restitution as part of his plea agreement. Plea agreements are contracts. Hunsicker, 129 Wn. 2d at 559. Because Hunsicker had agreed to pay a specified amount at the time of his sentencing, the Supreme Court held that Hunsicker's restitution was determined within the statutory time requirement. Hunsicker, 129 Wn. 2d at 560. Thus, the statutory imperative to determine the amount of restitution within sixty days was honored. Entry of the order of restitution was a ministerial formality under such circumstances.

The State submits that the trial court in our case properly entered an order of restitution. The defendant had agreed to pay for the restitution and had requested the set overs beyond the statutory limits for his own purposes in an attempt to ameliorate his situation. He should not be now heard to complain about this.

III. RESPONSE TO ASSAIGNMENT OF ERROR NUMBER 2

The second assignment of error raised by the defendant is a claim that the trial court should have held an evidentiary hearing to determine the amount of restitution.

It is difficult to determine from the defendant's brief exactly what type of evidentiary hearing he is talking about. No one was disputing or contesting the facts. No one gave any indication that additional information could be gleaned to determine additional elements of causation. No examples have been provided by the defense in the appellate brief. In fact, the reason that the defense was requesting set over and review of this was to look at a question of law: that is, whether or not comparative negligence could be utilized in reducing the amount of restitution that he had already agreed to. If that is accurate, then the State submits that the discussion in State v. Lohr, 130 Wn. App. 904, 125 P. 3d 977 (2005) and in State v. Tobin, 161 Wn. 2d 517, 166 P. 3d 1167 (2007) appear to be correct. The trial court has discretion in arriving at a restitution figure. When a particular type of restitution in question is authorized by statute, imposition of restitution is generally within the discretion of the trial court and the appellate courts will not reverse it absent an abuse of discretion. State v. Davison, 116 Wn. 2d 917, 919, 809 P. 2d 1374 (1991). Evidence supporting restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture. State v. Pollard, 66 Wn. App. 779, 785, 834 P. 2d 51 (1992). To determine the amount of restitution, the trial court can either rely on a defendant's acknowledgement or it can

determine an amount by a preponderance of the evidence. Hunsicker, 129 Wn. 2d at 558 – 559; State v. Ryan, 78 Wn. App. 758, 761, 899 P. 2d 825 (1995). The State submits that, it appears from the limited record provided on appeal in our case, that the trial court rejected the comparative negligence theory offered by the defense and entered the full amount that the parties had previously agreed to. There is no explanation provided by the defendant on appeal as to what additional information would be necessary at a “evidentiary hearing”. There were no disputed facts that were relevant to the determination of restitution. All of the information was easily detailed for the trial court and the trial court acknowledged that there didn’t appear to be any factual issues that were really in dispute. Rather, the issue was a legal argument being made by the defense which was rejected by the trial court.

Where a defendant disputes facts relevant to determination of restitution (this was not the situation in our case), the State must prove the amount by a preponderance of the evidence at a “evidentiary hearing”. State v. Dedonado, 99 Wn. App. 251, 256, 991 P. 2d 1216 (2000). Case law does not define “evidentiary hearing” in the restitution context. However, Black’s Law Dictionary defines the term as “a hearing at which evidence is presented, as opposed to a hearing at which only legal

argument is presented.” BLACK’S LAW DICTIONARY 738 (8TH Ed. 2004).

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 3 day of June, 2008.

Respectfully submitted:

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