

NO. 39518-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RYAN ALEXANDER MILTON,

Appellant.

FILED  
COURT APPEALS  
JUN 21 PM 3:22  
STATE OF WASHINGTON  
BY *M*

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

The Honorable Lisa Worswick

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REPLY BRIEF OF APPELLANT

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VALERIE MARUSHIGE  
Attorney for Appellant

23619 55<sup>th</sup> Place South  
Kent, Washington 98032  
(253) 520-2637

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A. ARGUMENT IN REPLY

THE TRIAL COURT ABUSED ITS DISCRETION BY ENTERING RESTITUTION ORDERS IN VIOLATION OF MILTON'S CONSTITUTIONAL RIGHT TO COUNSEL AT ALL CRITICAL STAGES OF A CRIMINAL PROCEEDING.

Mistakenly relying on State v. Fitzsimmons, 93 Wn.2d 436, 610 P.2d 893 (1980) and State v. Jackson, 66 Wn.2d 24, 400 P.2d 774 (1965), the State argues that “[b]ecause the sixth amendment right to counsel attaches only at a critical stage of a criminal prosecution which may result in a loss of liberty, it must be inferred that a restitution hearing is not a critical stage of a proceeding.” Brief of Respondent at 5-8. In Fitzsimmons, the State Supreme Court determined that when a defendant is charged with driving while under the influence he must be allowed access to legal counsel immediately after arrest and charging because that is when his case reaches a critical stage. 93 Wn.2d at 442-43. In Jackson, the State Supreme Court determined that the absence of counsel at a preliminary hearing did not deny defendant his right to counsel at a critical stage in the proceedings because the lack of counsel at the hearing did not prejudice the defendant or deprive him of a fair trial. 66 Wn.2d at 28-30.

Neither Fitzsimmons nor Jackson leads to the conclusion that a defendant is not entitled to counsel at a restitution hearing because it does not involve a loss of liberty and consequently is not a critical stage in the

proceedings. As the State Supreme Court emphasized in Garrison v. Rhay, 75 Wn.2d 98, 102, 449 P.2d 92 (1968), a stage is critical if it presents a possibility of prejudice to the defendant, and it is evident that a restitution hearing poses such a possibility. See, e.g., State v. Guadagni, 218 Ariz. 1, 7, 178 P.3d 473 (2008),(restitution order vacated for violation of right to counsel at restitution hearing); People v. Scarce, 87 P.3d 228, 235 (Colo. Ct. App. 2003)(defendant “entitled to the assistance of counsel at any hearing held to determine his restitution responsibilities”); E.C.M. v. State, 835 So.2d 1280, 1281 (Fla. App. 2003)(reversed because court imposed restitution without offering juvenile counsel or determining that he waived right to counsel); State v. Alspach, 554 N.W.2d 882, 883-84 (Iowa 1996)(recognizing an indigent defendant’s right to counsel at the restitution hearing, as part of the sentencing process); Hodas v. State, 603 So.2d 21, 22 (Fla. 4<sup>th</sup> DCA 1992)(holding that defendant has right to counsel at restitution hearing and reversing the restitution order where counsel was not present); Hill v. Bradford, 565 So.2d 208, 210 (Ala. 1990)(right to counsel attaches at restitution hearing because hearing is part of sentencing, which in turn is a critical stage); Williams v. State, 506 S.2d 368, 372 (Ala.Cr.App. 1986), cert. denied, 506 So.2d 372 (Ala. 1987)(trial court had no authority to order restitution in the absence of defendant and his attorney unless right to counsel was waived).

The State argues further that the trial court did not abuse its discretion because “the requests for restitution were properly substantiated in this case” and therefore the “court’s decision to enter the restitution orders in the absence of the defense attorney was a reasonable decision exercised on tenable grounds.” Brief of Respondent at 8-12. To the contrary, nothing in the record reflects that the trial court even considered the State’s restitution documents. When the State informed the court that defense counsel was not present and that defendant waived his own presence, the court entered the restitution orders forthwith and concluded the proceedings without any inquiry. 3RP 62.<sup>1</sup> There is no indication in the record that copies of the ex parte restitution orders were sent to Milton or defense counsel. According to the State, “[i]t is common for restitution orders to simply be entered if no one appears to contest the amount.” Importantly, the State fails to cite any authority for such a practice and fails to cite any authority for its assertion that defense counsel’s absence “can be interpreted as agreement with the amount of restitution requested.” Brief of Respondent at 11.

A defendant’s constitutional rights to counsel and due process should not be taken so lightly. As Division One of this Court concluded in State v. Pollard, 66 Wn. App. 779, 834 P.2d 51 (1992), evidence admitted

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<sup>1</sup> The verbatim report of proceedings is attached as an appendix.

at a restitution hearing must meet due process requirements, such as providing the defendant an opportunity to refute the evidence presented and requiring that the evidence be reliable. 66 Wn. App. at 784-85 (citing State v. Strauss, 119 Wn.2d 401, 418, 832 P.2d 78 (1992)). In light of the fact that Milton did not waive his right to counsel at the restitution hearing and defense counsel's unexplained absence, the trial court abused its discretion by summarily entering restitution orders without the presence of counsel and without determining whether the State provided sufficient proof of the restitution amount. Before ordering restitution, the court must find that the victim's injuries or loss to property were causally connected to the defendant's crime. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999).

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should vacate the trial court's restitution orders and remand for a new restitution hearing because the trial court entered the restitution orders in violation of Milton's constitutional right to counsel at all critical stages of a proceeding.

DATED this 20<sup>th</sup> day of July, 2010.

Respectfully submitted,

A handwritten signature in cursive script that reads "Valerie Marushige". The signature is written in black ink and is positioned above the printed name.

VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Ryan Alexander Milton

# **APPENDIX**

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF PIERCE

3  
4  
5 STATE OF WASHINGTON,

6 Plaintiff,

7 vs.

8 RYAN ALEXANDER MILTON,

9 Defendant.

)  
)  
) Superior Court  
) No. 08-1-04625-9  
) Court of Appeals  
) No. 39518-5-II  
)  
) **VOLUME 3**  
)  
)

10 **VERBATIM TRANSCRIPT OF PROCEEDINGS**

11  
12 August 28, 2009  
13 Pierce County Courthouse  
14 Tacoma, Washington  
15 Before the Honorable Lisa Worswick

16 **APPEARANCES**

17 For the State of  
18 Washington:

KAREN PLATT  
Pierce County Prosecutor's Office  
930 Tacoma Avenue South, Rm. 946  
Tacoma, Washington 98402-2171  
253.798.7400

19 For the Defendant:

20  
21 Suzanne L. Trimble, CCR, RPR  
22 Official Court Reporter  
23 Department 16 Superior Court  
24 (253) 798-6632  
25

**COPY**

T A B L E O F C O N T E N T S

PROCEEDINGS

PAGE

VOLUME 3  
August 28, 2009

TESTIMONY

(No witnesses heard.)

OTHER

Restitution Hearing..... 62

E X H I B I T

EXHIBIT

DESCRIPTION

MARKED/ADMITTED

PAGE

(No exhibits marked or admitted.)

1 BE IT REMEMBERED that on Friday, August 28, 2009,  
2 the above-captioned cause came on duly for hearing before the  
3 **HONORABLE LISA WORSWICK**, Judge of the Superior Court in and  
4 for the County of Pierce, State of Washington; the following  
5 proceedings were had, to wit:

6 <<<<<< >>>>>>

7  
8 MS. PLATT: Ryan Milton -- just so you know,  
9 Mr. Mosley is not here on these matters. So I don't know if  
10 you were inclined to go ahead with the restitution hearing or  
11 not. In both of these cases, the defendant has waived his  
12 presence.

13 THE COURT: I'm sorry. You were talking about one  
14 case, and I was looking at another.

15 MS. PLATT: This is Ryan Milton. There was two  
16 matters on this afternoon for restitution hearings. The  
17 defendant has waived his presence.

18 THE COURT: I'll sign the order.

19 MS. PLATT: Thank you, Your Honor. I'll hand them  
20 forward. On Cause No. 08-1-01775-5, the State is asking for  
21 \$2,869.12. On the other Cause No. 08-1-04625-9, I have a  
22 restitution order for \$60,434.58. I'll hand that forward, as  
23 well.

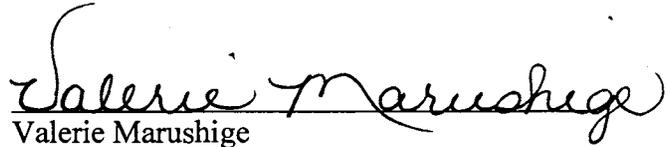
24  
25 (Proceedings concluded.)

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Karen Platt, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 20<sup>th</sup> day of July, 2010 in Kent, Washington.



Valerie Marushige  
Attorney at Law  
WSBA No. 25851

FILED  
COURT REPORTERS  
10 JUL 21 PM 12:22  
STATE OF WASHINGTON  
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