

NO. 41354-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES OSLAKOVIC
Appellant.

FILED
MAY 16 11 09 AM '06
BY _____
DEPUTY

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

The Honorable Frederick Flemming, Judge

BRIEF OF APPELLANT

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pm 5/13/11

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A. ASSIGNMENTS OF ERROR

1. The trial court exceeded its jurisdiction by imposing restitution for a crime Mr. Oslakovic did not plead guilty to or agree to pay restitution.
2. The trial court abused its discretion for imposing restitution for injuries that were not caused by Mr. Oslakovic's driving.

Issues Presented on Appeal

1. Does a sentencing court have the authority to order restitution, without the defendant's agreement, for crimes that the defendant was not convicted of?
2. Did the trial court exceed its jurisdiction by imposing restitution for a crime Mr. Oslakovic did not plead to or agree to restitution?
3. Did the trial court abuse its discretion for imposing restitution for injuries that were not caused by Mr. Oslakovic's driving?

B. STATEMENT OF THE CASE

1. RELEVANT FACTS

Mr. Oslakovic was charged with vehicular assault and felony hit

and run. CP 1-2. Pursuant to a motion under State v. Knapstad, 107 Wash.2d 346, 729 P.2d 48 (1986), the trial court dismissed the charge of vehicular assault specifically finding that there was no evidence that Mr. Oslakovic's driving caused the Ms. Roznowski's injuries. Supp. CP (Plea Knapstad and plea hearing, pages 21, 24 VRP 11-5-9) (8-27-10). The orally ruled¹ that "there's no evidence he did anything except drive". Id.

[I]f you look at it, again, most favorably in favor of the state, this young lady opens the door and gets out as she's going down the freeway as a passenger, with the defendant driving, and stands on the running board, and then she falls off. But, the only thing he allegedly – the defendant could have done wrong was going between 70-80 miles an hour. And along there, the freeway, I think is 60 miles an hour, the speed limit.

RP 6 (November 5, 2009).

There is no evidence he is swerving. There's no evidence he did anything with his brakes. That he didn't even slow down is the argument the state can make. There's no evidence he did anything to try to throw her off, or swerving and making some sort of maneuver that would cause her to fall off. The only thing that there is is she opens the door and shuts the door, hangs on to the luggage rack and, in less than a mile, falls off and tragically, is injured.

RP 21 (November 5, 2009).

On the same day that the trial court dismissed the vehicular assault charges against Mr. Oslakovic, it also accepted an Alford plea to felony hit

¹ No were written findings and conclusions.

and run and misdemeanor driving under the influence. Supp. CP (Knapstad and plea hearing, pages 27-31 VRP 11-5-9) (8-27-10). Supp. CP (Statement of Defendant on Plea of Guilty 11-5-09).

In his statement of defendant on plea of guilty, Mr. Oslakovic acknowledged the elements of DUI as driving under the influence while maintaining his innocence. CP Supp. CP (Knapstad and plea hearing, pages 27-31 VRP 11-5-9) (8-27-10). During the plea hearing, the trial court did not advise Mr. Oslakovic that he would be required to pay restitution and Mr. Oslakovic did not at any time agree to pay restitution. Supp. CP (Knapstad and plea hearing, pages 27-31 VRP 11-5-9) (8-27-10).

During a later restitution hearing, the state argued that under State v. Thomas, 138 Wn. App. 78, 155 P.3d 998 (2007) the trial court could order restitution because the state believed that “but for” Mr. Oslakovic’s driving, the complainant would not have been injured. RP 5 (October 15, 2010). The defense disagreed and objected to the imposition of restitution. Id.

The court commented that it could review the statement of probable cause to support restitution. RP 6 (October 15, 2010); Supp CP (Affidavit of Probable Cause 1-22-09) (Attached hereto as Exhibit A).

Nothing in the affidavit of probable cause indicated any erratic driving or swerving. Mr. Oslakovic admitted to driving and said that Ms. Roznowski received a telephone call and became upset and opened the door of the car and climbed out and fell. Mr. Oslakovic said it happened very quickly and that he exited the freeway at the next possible exit so that he could return to Ms. Roznowski. Although not admitted to in any pleading or proven in any manner, the police affidavit speculate that based on witness reports that Mr. Oslakovic was driving 70-75 miles per hour. The affidavit listed Mr. Oslakovic's blood alcohol level at .09. Id.

The trial courts oral ruling imposing restitution is as follows:

One part of the argument for the defendant is the proximate cause, and I don't think that that makes it incumbent upon the Court. It could be a proximate cause. I'm of the belief that there was a proximate cause connection between the DUI and his driving and, therefore, the injuries that occurred to the young lady. And I'm going to find that, therefore, restitution is applicable.²

RP 5-6 (October 15, 2010). This oral ruling contradicted the court's earlier oral ruling from the Knapstad hearing in which the court expressly held that "there's no evidence he did anything except drive". RP 6, 21, RP 21 (November 5, 2009); pages 21, 24 VRP 11-5-9) (8-27-10).

² There are no written findings or conclusions for the Knapstad hearing.

The trial court ordered restitution in the amount of \$94, 223.19. RP

5-6. Mr. Oslakovic appeals the order of restitution. CP 31-33.

C. ARGUMENT

1. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT ORDERED RESTITUION FOR INJURIES WHICH DID NOT RESULT FROM THE CHARGE OF DUI AND TO WHICH MR. OSLAKOVIC DID NOT AGREE TO PAY RESTITUTION.

The issues before this Court are whether the trial court was authorized to impose restitution without advising Mr. Oslakovic of the possibility of restitution before his plea hearing; and whether there was a causal connection between the DUI and the victim's injuries. In Mr. Oslakovic's case, the trial court erroneously believed that because the declaration of probable cause supported the DUI conviction that this somehow permitted the court to impose restitution. RP 5-6 (October 15-2010). This is incorrect.

The authority to impose restitution is not an inherent power of the court but is derived from statute. State v. Davison, 116 Wn .2d 917, 919, 809 P.2d 1374 (1991). An Appellate court must vacate a restitution order if the defendant did not make a specific agreement to pay when pleading guilty, or if the state failed to establish a causal connection between the

defendant's crime and the damages. State v. Osborne, 140 Wn.App. 38, 42, 163 P.3d 799 (2007); Accord, State v. Griffith, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008); State v. Thomas, 138 Wn. App. 78155 P.3d 998 (2007).

Generally, a causal connection exists when, 'but for' the offense the defendant is found to have committed, the victim's loss or damages would not have occurred. State v. Hahn, 100 Wn.App. 391, 399, 996 P.2d 1125, review granted, 141 Wn.2d 1025(dismissed Nov. 30, 2000) (2000). In determining whether a causal connection exists, the trial court must look "to the underlying facts of the charged offense, not the name of the crime to which the defendant entered a plea." State v. Landrum, 66 Wn.App. 791, 799, 832 P.2d 1359 (1992).

The restitution statute, RCW 9.94A.753 confers broad power on the trial court to order restitution. However restitution may not be ordered unless the defendant is advised before entering a plea of guilty, "of all the direct consequences of his plea, including the possibility of restitution". State v. Raleigh, 50 Wn.App. 248, 253, 748 P.2d 267, review denied, 110 Wn.2d 1017 (1988), or agree to pay restitution. RCW 9.92.060.

A trial court imposing restitution "may rely on no more information than is admitted by the plea agreement, or admitted,

acknowledged, or proved in a trial or at the time of sentencing.” Woods, 90 Wn.App. at 907, quoting former RCW 9.94A.370(2) (1996). Restitution is allowed only for losses that are causally connected to a crime, and may not be imposed for a general scheme, acts connected with the crime charged, or uncharged crimes unless the defendant enters into an express agreement to pay restitution in the case of uncharged crimes. State v. Kinneman 155 Wash.2d 272, 119 P.3d 350 (2005).

a. Standard of Review

The scope of a court's statutory authority to impose restitution is a legal question that the appellate court reviews de novo. State v. Kinneman, 155 Wn.2d at ___; State v. Johnson, 96 Wn.App. 813, 815-16, 981 P.2d 25 (1999).

First, the Court considers whether the sentencing court applied the proper law, including the requirement that there be a causal connection between the crime proven and the victims' damages. Second, the Court reviews whether the application of that law to the evidence before the trial court supports findings of fact necessary to support the causal connection and the amount of the victim's damages. Kinneman, 122 Wn.App. at 857. Third, and finally the Court must determine whether the trial court abused its discretion by requiring the defendant to pay restitution in the amount

and under terms contained in its order. Davidson, 116 Wn.2d at 919. Application of the wrong legal standard can constitute an abuse of discretion. State v. Tobin, 161 Wn.2d 517, 166 P.2d 1167 (2006)

b. Restitution A Direct Consequence of Plea.

The payment of restitution is a direct consequence of entering a plea. State v. Cameron, 30 Wn.App. 229, 233, 633 P.2d 901, review denied, 96 Wn.2d 1023 (1981). Therefore, a sentencing court may not impose restitution upon a defendant who pleads guilty, without advising the defendant before he pleads guilty that restitution is a possibility. State v. Tracy, 73 Wn. App. 386, 387-388, 869 P.2d 425 (1994).

In Tracy, supra, the trial court did not inform the defendant of the possibility of restitution prior to accepting his Alford plea and Mr. Tracy did not agree to pay restitution. Tracy, 73 Wn. App. at 387-388. Following, the Court in Cameron, the Court in Tracy held that the failure to advise Tracy of the restitution required the Court to “strike the order of restitution.” Tracy, 73 Wn. App,at 387-388, citing, Cameron, 30 Wn.App. at 234, citing, In re Palodichuk, 22 Wn.App. 107, 589 P.2d 269 (1978).

In State v. Miszak, 69 Wn.App. 426, 848 P.2d 1329 (1993) the Court vacated an order of restitution because there was no evidence the defendant had agreed to pay restitution for the uncharged counts of theft-

which included amounts the defendant had not agreed to pay for. Miszak, 69 Wn.App. 429-430.

In Griffith, the defendant pleaded guilty to possessing \$250-\$1,500 worth of stolen jewelry: she did not plead guilty to burglary. Griffith, 164 Wn.2d at 966. “[C]ulpability for possession of stolen property does not necessarily include culpability for the stealing of the property. The actual thief is guilty of a different crime.”. Griffith, 164 Wn.2d at 966, (citations omitted). Because Griffith did not agree to pay for the victim’s loss from the burglary, she could only be held responsible for the value of the victim’s unrecovered property proven to be causally related to her crime. Griffith, 164 Wn.2d at 966-967.

C. Victim’s Injuries Must be Caused By Crime In Plea Agreement.

In Thomas, the defendant was convicted of DUI but acquitted of vehicular assault. The Court held Thomas liable for the passenger’s injuries because the trial court specifically found that the victim’s injuries were caused by the DUI. Thomas, 138 Wn. App. at 81, 83 .

Thomas, relied on by the state in Mr. Oslakovic’s case, is factually and legally inapposite on two separate grounds. First, Mr. Thomas, unlike Mr. Oslakovic, did not plead guilty to a lesser offense. Thus the issue of a proper advisement of the direct consequences of the plea issue was not

before the Court of Appeals in Thomas. Second, the instant case is factually distinguishable from Thomas on grounds that herein, the trial court specifically held that there was no evidence that Mr. Oslakovic's driving had anything to do with the complainant's injuries, whereas in Thomas, the court held that the injuries were caused by the DUI. Thomas, 138 Wn. App. at 81, 83.

In Osborne, the defendant did not agree to pay restitution for uncharged crimes but the restitution order required payment for conduct relating to the uncharged crimes of kidnapping and robbery. Osborne, 140 Wn. App. at 42. To uphold the restitution order, the trial court was required to find a causal relationship between Osborne's crime and the victim's damages. *Id.* Since the victim's injuries stemmed from conduct relating to the uncharged crimes of kidnapping and robbery, and Mr. Osborne did not agree to pay restitution for those uncharged offenses, the trial court erred in ordering restitution. And the Court of Appeals reversed the order of restitution. Osborne, 140 Wn. App. at 42.

These cases illustrate that when a defendant such as Mr. Oslakovic pleads guilty, he can only be held liable for restitution causally connected to that charge unless he specifically agrees to pay restitution for a greater uncharged crime. Griffith, 164 Wn.2d at 966-967; Osborne, 140 Wn. App.

at 42. Tracy, 73 Wn. App,at 387-388; Cameron, 30 Wn.App. at 234.

In Mr. Oslakovic's case, there was no causal connection between his driving under the influence and Ms. Roznowski's injuries from her decision to jump out of the moving car, and Mr. Oslakovic did not agree to pay restitution. "The appropriate remedy is to strike the order of restitution". Tracy, 73 Wn. App,at 387-388 (citations omitted).

D. CONCLUSION

Mr. Oslakovic respectfully requests this Court reverse the order of restitution and remand for dismissal with prejudice. .

DATED this 12th day of May 2011.

Respectfully submitted,

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

BY _____
STATE OF _____
COUNTY _____
MAY 16 AM 9:05
CLERK OF COURT

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office Appeals Department, and Charles Oslakovic 502 S 34th St Tacoma, WA 98418 a true copy of the document to which this certificate is affixed, May 12, 2011. Service was made by depositing in the mails of the United States of America, properly stamped and addressed and electronically.

Signature

EXHIBIT A

January 22 2009 11:04 AM

KEVIN STOCK
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 09-1-00389-2

vs.

CHARLES PETER OSLAKOVIC,

DECLARATION FOR DETERMINATION OF
PROBABLE CAUSE

Defendant.

KEVIN S. BENTON, declares under penalty of perjury:

That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police report and/or investigation conducted by the WASHINGTON STATE PATROL, incident number 08003896;

That the police report and/or investigation provided me the following information;

That in Pierce County, Washington, on or about the 3rd day of April, 2008, the defendant, CHARLES PETER OSLAKOVIC, did commit the crimes of VEHICULAR ASSAULT AND FAIL TO REMAIN AT INJURY ACCIDENT. Police responded to a report of a person who had been holding on to the side of a vehicle on I-5 who then fell into the lane of travel. Investigation revealed that the defendant was driving his 1998 Lincoln Navigator southbound on I-5 at about 10:30 pm. The defendant was driving at Amy Roznowski was the defendant's passenger. The defendant had picked up Amy from the airport and they two decided to have dinner. The defendant consumed alcohol during dinner, and then purchased a bottle of wine to go from the restaurant. Witnesses who were also southbound I-5 observed the defendant's vehicle driving at a high rate of speed, between 70-75 mph. Witnesses were then shocked to observe that a person appeared to be standing on the running board on the side of the vehicle. The witnesses observed the defendant continue to drive at this high rate of speed for about ¼ to ½ mile, but did not know how long the person had been there before they first observed her on the side of the vehicle. The witnesses then the person fall off the side of the vehicle and come to rest in the lane of travel. Witnesses were able to stop and block the lane of travel so that the person was not struck by traffic. The victim was later identified as Amy Roznowski, who was transported to a local hospital to be treated for injuries received during this incident. Amy suffered numerous abrasions and contusions. The defendant suffered a complex scalp laceration, multiple rib fractures as well as a metacarpal fracture.

The witness reported that when Amy fell from the vehicle they were surprised that the driver of the vehicle, later identified as the defendant, continued to drive southbound on I-5. The defendant failed to stop and render aid. Local troopers were on the look out for the defendant's vehicle. Trooper Ames observed the vehicle on the off ramp to northbound Portland Avenue at a red light. Ames stopped the vehicle and contacted the defendant, who was the driver. The defendant admitted he was driving during incident and that he had continued driving. The defendant stated he was on his way back to see if Amy was ok. Ames noted the defendant's eyes

DECLARATION FOR DETERMINATION
OF PROBABLE CAUSE -1

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 940
Tacoma, WA 98402-2171
Main Office (253) 798-7400

1 were bloodshot and watery and there was an odor of intoxicants on the defendant's breath. The
2 defendant demonstrated six of six clues on the horizontal gaze nystagmus test. The defendant
3 admitted he had been drinking. The defendant stated he was giving Amy a ride home from the
4 airport and that they had stopped for dinner. The defendant stated Amy received a phone call
5 during the ride, then for some reason became upset at him. The defendant stated Amy then
6 opened the door and stepped onto the running board. The defendant continued driving, but said
7 it happened very quickly. The defendant stated he tried to pull over. The defendant also stated
8 he rolled down the window to see what Amy was doing. The defendant then stated that Amy
9 disappeared. When asked why he didn't stop, the defendant stated that all of a sudden he was
10 past the 38th Street exit. The defendant stated he took the 56th Street exit to go back and see what
11 happened. The defendant did not pull over as other witnesses did. The defendant stated he was
12 returning to the scene when stopped by police. Based on his observations Ames concluded the
13 defendant was under the influence of intoxicants. A sample of the defendant's blood was
14 obtained and analyzed, revealing .09 grams of alcohol per 100 mL of blood.

9 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
10 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

11 DATED: January 22, 2009
12 PLACE: TACOMA, WA

13 /s/ KEVIN S. BENTON
14 KEVIN S. BENTON, WSB# 16891