

**NO. 43819-4-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**SAMUEL PATRICK FARLAND,**

Appellant.

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

The Honorable Rich Melnick, Judge

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in imposing restitution on a crime Mr. Farland neither pleaded guilty to nor explicitly agreed to pay restitution on as part of a plea bargain.

2. The trial court denied Mr. Farland his right to appeal under Article I, Section 22 of the Washington Constitution.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. An offender cannot be ordered to pay restitution on uncharged offenses unless there is express proof in the record that the offender agreed to pay such restitution as part of a plea agreement. Mr. Farland pleaded guilty to the only offense he was charged with and made no express agreement to pay restitution on uncharged offenses. Did the trial court err in ordering Mr. Farland to pay restitution on an uncharged offense?

2. Did the imposition of a restitution amount contingent on the outcome of this appeal deny Mr. Farland his right to appeal under Article I, Section 22 of the Washington Constitution?

**C. STATEMENT OF THE CASE**

On January 12, 2012, Samuel Farland pleaded guilty to the only crime he was charged with, Burglary in the Second Degree.<sup>1</sup> The information provided:

That they, SAMUEL PATRICK FARLAND and SAMUEL EVAN ELLIOTT, together and each of them, in the County of Clark, State of Washington, on about July 13, 2011, with intent to commit a crime against a person or property therein, entered or remained unlawfully in the building of Mary Jane's House of Glass, located at 8312 E. Mill Plain Boulevard, Vancouver, Washington; contrary to Revised Code of Washington 9A.52.030(1) and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

CP 1, 3-20; 1RP<sup>2</sup> 1-9.

The Statement on Plea of Guilty list the elements of the burglary:

In Clark County, Washington on or about July 13, 2011, Samuel Patick Farland, with intent to commit a crime against a person or property therein entered or remained unlawfully in a building of Mary Jane's House of Glass located at 212 NE 164<sup>th</sup> Vancouver, WA.<sup>3</sup>

CP 3.

The prosecutor's recommendation on the plea is at Section 6(g) of the Statement of Defendant on Plea of Guilty:

The prosecuting attorney will make the following recommendation to the judge:

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<sup>1</sup> RCW 9A52.030

<sup>2</sup> There are two volumes of verbatim, Volume 1 and Volume 2. They are cited in the record as "1RP" and "2RP", respectively.

<sup>3</sup> Mary Jane's House of Glass has two locations in the Vancouver area. The Information lists the wrong location. The correct location is on the guilty plea form. CP 3; 1RP 2.

1. Recommend 45 days in jail with credit for time served.
2. No contact with Mary Jane's House of Glass.
3. State agrees not to file any additional charges based on police report V11-12481.
4. The state is aware the defendant admits to going to Mary Jane's House of Glass only once and taking only one item of less than \$100.00 in value.
5. Payment of \$200 court costs, \$500 crime victim compensation fund fee, \$800 court appointed attorney fee, \$100 DNA fee, \$500 fine and restitution hearing to be set to determine defendant's restitution liability.

CP 7.

The plea form is signed by Mr. Farland, Mr. Farland's attorney James Sowder, and prosecutor Michael Vaughn.<sup>4</sup>

Attached to the plea form is the Clark County Prosecuting Attorney's Office Offer of Settlement. CP 17-19. Typed into the generic form is the prosecutor's agreement to recommend 45 days on a plea to Burglary in the Second Degree. CP 17. Also, as part of the form's boilerplate "Terms Applicable To All Recommendations," there is a sentence saying, "The defendant agrees to pay restitution to victims of uncharged crimes contained in the discovery and/or dismissed counts." CP 17. At another place in the Offer of Settlement, typed under "Other" is "State agrees not to file any additional charges based on police report V11-12481." CP 18.

No one signed the Offer of Settlement.. CP 19.

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<sup>4</sup> The preprinted prosecutor name on the Offer of Settlement is "Jeannie M. Bryant."

Mr. Sowder specifically did not sign the Offer of Settlement. He felt it gave away or waived “too much.” 1RP 65, 66.

Mr. Sowder did not recall attaching the Offer of Settlement to the plea form. 1RP 64-65. He told the court at times the prosecutor attached the Offer of Settlement to a plea form as it was being handed up to the judge. 1RP 65-66.

On February 17, 2012, the court sentenced Mr. Farland to 45 days and noted on the Judgment and Sentence a restitution hearing was to be set. 2RP 78-84; CP 25.

The restitution hearing was held on August 2, 2012. 1RP 20-76. The prosecutor put on testimony from David Saberi, a partner in Mary Jane’s two Vancouver stores. Mr. Saberi testified Mary Jane’s was broken into on back-to-back days around July 12 and 13, 2011<sup>5</sup>. He estimated the total loss on the first break in was \$10,161.23, but that amount was reduced due to depreciation plus there was a \$1,000 deductible. 1RP 34-36. In the second instance, the estimate loss was \$16, 656.25 minus a small amount of depreciation plus another \$1,000 deductible.

Adrian Beech, a representative from Farmer’s Insurance testified that for the first break-in. Farmers paid out \$9,107.80 and for the second break-in \$15, 463.75. 1RP 52-53.

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<sup>5</sup> Mr. Farland pled guilty to the first burglary.

Mr. Farland testified at the restitution hearing. He admitted breaking the front door of Mary Jane's and entering to steal a bong. 1RP 55. During cross-examination, and over objection, Mr. Farland acknowledged that he had gone to Mary Jane's a second time. In that second instance, he drove friends to and from Mary Jane's knowing that their intent was to break in and steal things. 1RP 58. He remained in the car while his friends went into the store. 1RP 60-61.

Mr. Sowder maintained that Mr. Farland only pleaded guilty to the single offense he was actually charged with and that he never accepted the prosecutor's Offer of Settlement. 1RP 62-63. "[W]e spend some time crafting within the plea – change of plea form that [Mr. Farland] was only pleading to this one count and not agreeing to anything else." 1RP 66.

The court believed it had to reconcile the prosecutor's Offer of Settlement with the Statement of Defendant on Plea of Guilty form because it was attached to latter plea form. 1RP 63, 65. The court interpreted the documents as obliging Mr. Farland to having agreed to pay restitution on the uncharged burglary. 1RP 64, 67. The court imposed the full amount of restitution requested by the State. 1RP 67. In the alternative, the court imposed \$20,215.60, (double the amount of restitution requested for the first burglary of Mary Jane's), and made the payment of that amount contingent on Mr. Farland prevailing on appeal.

In other words, if Mr. Farland successfully prevailed on an appeal challenging the imposition of restitution on the offense he did not plead guilty to or agree to, Mr. Farland would still have to pay double the amount of the restitution for the first burglary. 1RP 67-68; CP 31-32.

Mr. Farland made a timely appeal of the Corrected Supplemental Order Setting Restitution. CP 33-35.

**D. ARGUMENT**

**1. MR. FARLAND'S RESTITUTION OBLIGATION IS LIMITED TO THE CRIME FOR WHICH HE PLEADED GUILTY.**

**a. Standard of Review**

For purposes of determining restitution, whether a loss is causally connected to the crime for which the defendant was convicted is a question of law reviewed de novo. *State v. Acevedo*, 159 Wn. App. 221, 229–30, 248 P.3d 526 (2010).

**b. Mr. Farland can only be ordered to pay restitution for the crime for which he pleaded guilty.**

A court's authority to impose restitution is statutory. *State v. Griffith*, 164 Wn.2d 960, 965-966, 195 P.3d 506 (2008). The statutory provision authorizing restitution provides, in relevant part,

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 in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution 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) (emphasis added).

Mr. Farland did not plead guilty to a lesser offense or fewer offenses. He pled guilty as charged to a single count of Burglary in the Second Degree which was the only charge the prosecutor filed against him. CP 1-2. Restitution is allowed only for losses that are causally connected to the crimes charged unless the defendant expressly agrees to pay restitution for crimes for which he was not convicted. *State v. Griffith*, at 965–66.

By his plea, Mr. Farland did not make an express agreement to pay restitution on anything other than the one crime he pleaded guilty to. The only document Mr. Farland signed with respect to the plea agreement was the guilty plea form. CP 13. See also CrR 4.2(g) (Superior Court Criminal Rules guilty plea form). In the guilty plea form, the prosecutor outlined the specifics of the recommendation on plea:

1. Recommend 45 days in jail with credit for time served.
2. No contact with Mary Jane's House of Glass.
3. State agrees not to file any additional charges based on police report V11-12481.

4. The state is aware the defendant admits to going to Mary Jane's House of Glass only once and taking only one item of less than \$100.00 in value.

5. Payment of \$200 court costs, \$500 crime victim compensation fund fee, \$800 court appointed attorney fee, \$100 DNA fee, \$500 fine and restitution hearing to be set to determine defendant's restitution liability.

CP 7. Nothing in the prosecutor's plea recommendation expressly required Mr. Farland to agree to restitution on an uncharged crime. Nothing in the record more clearly expresses this than when, at the restitution hearing, defense counsel objected to certain cross-examination of Mr. Farland about other crimes because "he is only entitled – required to pay restitution to the charge he pled to." IRP 57.

**c. Mr. Farland did not expressly agree to pay restitution on uncharged crimes.**

In imposing restitution against Mr. Farland on an uncharged burglary, the trial court failed to appreciate that no restitution could be imposed on the uncharged burglary without express proof of Mr. Farland agreeing to do so. Rather, the court felt it had authority to interpret the record - "inconsistencies that I have to reconcile"- and could impose restitution for an uncharged burglary merely if inconsistencies in the record could be interpreted against Mr. Farland. IRP 63.<sup>6</sup>

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<sup>6</sup> The court found a nexus between the restitution figure and Mr. Farland's culpability because Mr. Farland provided information at the restitution about being an accomplice to the second burglary of Mary Jane's. IRP 58-61, 65.

The inconsistency the court believed existed was in the prosecutor's Offer of Settlement attached as the last pages of the Statement of Defendant on Plea of Guilty. CP 17-20. The Offer of Settlement includes boilerplate language that "the defendant agrees to pay restitution to victims of uncharged crimes contained in the discovery, and/or dismissed counts." CP 17. Even though the Offer of Settlement was attached to the actual Statement of Defendant on Plea of Guilty, nothing in the record establishes that Mr. Farland explicitly agreed to it. The prosecutor's actual recommendation on the Statement of Defendant on Plea of Guilty did not require any agreement to pay restitution on uncharged crimes. CP 7. Mr. Sowder told the court he took caution in crafting Mr. Farland's admission statement in the plea form because Mr. Farland "was only pleading to the one count and not agreeing to anything else." IRP 66; CP 12.

There was no discussion during the guilty plea about Mr. Farland agreeing to pay restitution on uncharged offense. IRP 1-19.

Additionally, it was not clear how and when the Settlement Offer was even attached to the Statement of Defendant on Plea of Guilty. Mr. Sowder did not remember attaching it and doubted he would have done so. IRP 66. Mr. Sowder told the court that sometimes the prosecutor attached their Offer of Settlement to the plea form as it was literally being passed

up to the judge. 1RP 66. Deputy Prosecutor Bryant, who represented the State at the restitution hearing, did not dispute Mr. Sowder's claim. Neither did Ms. Bryant, as the crafter of the Offer on Settlement, avail herself of the opportunity to explain to the court her understanding of any plea negotiations and agreement on restitution. Instead, she was silent on this issue. 1RP 20-76.

Without proof of Mr. Farland's explicit agreement to pay restitution on uncharged offenses, the court erred as a matter of law in imposing restitution on Mr. Farland for the uncharged burglary to Mary Jane's House of Glass.

**2. IN SETTING A RESTITUTION AMOUNT CONTINGENT ON THE OUTCOME OF THIS APPEAL, THE SENTENCING COURT VIOLATED MR. FARLAND'S RIGHT TO APPEAL.**

Article I, Section 22 the Washington Constitution guarantees a criminal defendant the right to appeal.

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]

The sentencing court's Supplemental Order Setting Restitution violates Mr. Farland's constitutional right to appeal.

In its Supplemental Order Setting Restitution, the sentencing court ordered Mr. Farland to pay restitution in the amount of \$22,264.05. CP 34-35. Apparently concerned that Mr. Farland might prevail on appeal, the court imposed the following:

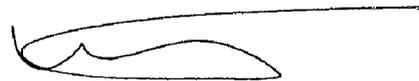
If Defendant appeals and prevails, the court finds that the state has proven damages from July 13, 2011 burglary at \$10,107.80 and the court per RCW 9.94A.750(3)<sup>7</sup> sets restitution at \$20,215.60.

Appeals from superior court, with limited exceptions not applicable here, can only be made on a final judgment. RAP 2.2(a)(1). The court's alternative order in the event of a successful appeal is not a final judgment and cannot be appealed even though it is part of a criminal action and would have a lasting impact on Mr. Farland. Because this contingent provision violated Mr. Farland's right to appeal, it should be stricken.

**E. CONCLUSION**

Both the actual and the contingent restitutions figures should be stricken and the case remanded for a restitution hearing before a different judge.

Respectfully submitted this 22nd day of April 2012.



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LISA E. TABBUT/WSBA #21344  
Attorney for Samuel Patrick Farland

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<sup>7</sup> The correct cite to the restitution doubling provision is RCW 9.94A.753.

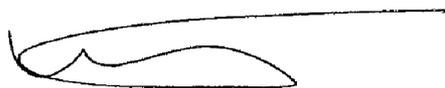
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Anne Mowry Crusser, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Samuel Patrick Farland, 9913 SE 6<sup>th</sup> St., Vancouver, WA 98664.

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

Signed April 22, 2013, in Longview, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Samuel Patrick Farland

# COWLITZ COUNTY ASSIGNED COUNSEL

**April 22, 2013 - 4:47 PM**

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