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Division II
State of Washington
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No. 49750-6-II
Consol. with 49706-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CLAY HALTOM,

Appellant.

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

REPLY BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

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A. ARGUMENT IN REPLY

1. The restitution order is void because it was entered late; contrary to the State's claim, Mr. Haltom never agreed to the amount.

As explained in the opening brief, the restitution order is void because the court entered the order after the mandatory 180-day deadline had passed, without having found good cause to extend the deadline. Thus, under the statute and numerous decisions of this Court, the order should be reversed and remanded with instructions to vacate the restitution imposed under this cause number. Br. of Appellant at 8-12 (citing, *inter alia*, RCW 9.94A.753; *State v. Chipman*, 176 Wn. App. 615, 618, 309 P.3d 669 (2013); *State v. Burns*, 159 Wn. App. 74, 244 P.3d 988 (2011); *State v. Tetreault*, 99 Wn. App. 435, 437, 998 P.2d 330 (2000); *State v. Johnson*, 96 Wn. App. 813, 815, 981 P.2d 25 (1999)).

In its response brief, the State does not address *any* of the dispositive cases discussed in the opening brief. Instead, the State cites *State v. Hunsicker*, 129 Wn.2d 554, 919 P.2d 79 (1996). Br. of Respondent at 10-12. The State's reliance on *Hunsicker* is misplaced, because that case is inapposite.

In *Hunsicker*, the amount was determined within the allowable period (then 60 days) because the defendant "agreed to pay restitution in a specific amount" in the plea agreement. *Id.* at 555. Although the order was

technically entered after the deadline, “the order fixed the amount at \$1,800, the amount agreed to by the defendant in his plea agreement.” *Id.* at 562. The Court held:

We conclude that where the amount of restitution is determined by the agreement of the defendant in a plea agreement, signed contemporaneously with sentencing, the statute’s purpose, determination of the restitution amount within [180] days, is met.

Id.

This holding does not apply here, because Mr. Haltom did *not* agree to the amount of restitution in the plea agreement he signed. On the contrary, the plea agreement stated:

The Defendant agrees to pay restitution *in such sums as shall be negotiated between the parties* herein. The Prosecution understands, that as a practicable matter, restitution shall be very hard to determine, in any sort of manner which is fair and equitable to numerous victims of crime.

Ex. 2 at 5 (emphasis added); *see also* Br. of Respondent at 2 (admitting that plea agreement states the above). Nor did Mr. Haltom agree to waive the 180-day rule. Ex. 2. Thus, *Hunsicker* is not relevant, and the cases cited in the opening brief control.

Although it acknowledges that the plea agreement Mr. Haltom signed states the restitution amount “shall be negotiated,” the State claims

Mr. Haltom agreed to the amount at the sentencing hearing. Br. of Respondent at 11-12 (citing RP (6/28/17) 26-27). The State is wrong.

The following is the section of the transcript the State cites:

THE COURT: Okay. Mr. Jay, I will hear from you on sentencing then.

[PROSECUTOR]: I'm sorry –

THE COURT: I will hear from you.

[PROSECUTOR]: Well, Your Honor, why don't we start with 66-5, which is the easiest one. That's one count.

Mr. Haltom pled guilty to one count of possession of stolen property, first degree on March 22nd, 2007.

He's here before the Court on sentencing. There are other concurrent convictions listed which attribute to the his offender score, that being three counts under 07-1-20-7. He's pled guilty to three counts under that. That gives him a criminal history of 5 -- or offender score of 5 on this matter, seriousness level of 2, standard range on this cause is 14 to 18 months, max term is ten years.

Your Honor, on page 4 of the proposed judgment and sentence there's a restitution figure of monies owing to the Kendrick's, Danny and Lynnette. I would ask to have the authority of the Court to scratch out the figure and to put in TBD. I have not had a chance -- and I apologize to the Kendricks if they are attendance in the courtroom, I have not had a chance to review all of the paperwork behind that, and I'd just be loathed to recommend that as a figure to the Court today without having had personal knowledge of how it was generated.

I would indicate for the record, that it's something in excess of \$11,000, so Mr. Haltom can kind of expect that figure to come around again.

I would ask that \$500 victim assessment be imposed this morning. \$200 court costs. \$350 court appointed attorney. I think that comes to the sum of \$1050.

And finally, Your Honor, I went through – all through this plea form and I could not find a place where there's a place to mark that this should be served concurrently with 07-1-20-7, so I have written that in on page 9 of 12, kind of getting the cart before the horse here.

We're also recommending that this matter be served by way of a DOSA sentence, the mid point of the range, half of that is 23.75 months. We're asking that he be committed to the custody -- total confinement in the DOC for that period, 23.75 months. Credit for time served in the jail here. And that he, upon Completion of his DOSA and his time in prison, that he have 23.75 months in community custody. John, does that comport with your understanding of—

[DEFENSE COUNSEL]: It does.

[PROSECUTOR]: I will go ahead and hand this to you to for your review.

RP (6/28/07) 25-27.

As is evident from the transcript, defense counsel's statement "It does" indicated agreement with the prosecutor's explanation of how the DOSA (Drug Offender Sentencing Alternative) would work; the exchange cannot be fairly read to be an agreement to a specific restitution amount. And Mr. Haltom himself does not say anything in this portion of the transcript, unlike the defendant in *Hunsicker*, who signed an agreement to a specific amount of restitution.

When it was the defense's turn to speak at sentencing, counsel and Mr. Haltom discussed only Mr. Haltom's drug addiction and the propriety of a DOSA. RP (6/28/07) 30-31. There was no discussion of restitution. *Id.*

The court then imposed the DOSA. RP (6/28/07) 31. As to restitution, the judge stated, "We'll set a restitution hearing -- why don't we set that for October 5th -- Friday, October 5th 1:30 p.m., which should be enough time to get the restitution figures." RP (6/28/07) 31.

As noted in the opening brief, the State did not "get the restitution figures" for this cause number by October 5 – or by any date before the 180-day deadline. It also failed to ask the court to extend the deadline for good cause. Accordingly, the restitution order is void, and this Court should reverse and remand for vacation of the order. Br. of Appellant at 8-14; *Burns*, 159, Wn. App. at 82; *Chipman*, 176 Wn. App. at 618; *Johnson*, 96 Wn. App. at 816-17; *Tetreault*, 99 Wn. App. at 436-37.

- 2. Mr. Haltom's appeal is timely because he was never notified of his right to appeal and did not knowingly waive the right; as the Commissioner noted, the State's arguments to the contrary go to the merits of the appeal, not the right to appeal.**

In its response brief, the State attempts to relitigate the question of whether Mr. Haltom's appeal is timely. Br. of Respondent at 13-20. A commissioner of this Court and the trial court already found that Mr.

Haltom was never advised of his right to appeal. Accordingly, the State did not meet its burden to prove Mr. Haltom knowingly waived the right to appeal, and this appeal is timely. Commissioner's Ruling (filed July 26, 2017) at 1-2; CP 9-11 (trial court findings and conclusions June 21, 2017).

As it argued before the Commissioner, the State again claims that the appeal is untimely "because [Mr.] Haltom waived his right to appeal by entering into a plea agreement to pay restitution and failing to object to the amount of restitution." Commissioner's Ruling at 1; Br. of Respondent at 13. The Commissioner already rejected this argument because it conflates the right to appeal with the merits of an appeal. Commissioner's Ruling at 1-2.

Mr. Haltom has a right to appeal the restitution order. *State v. Kinneman*, 155 Wn. 2d 272, 283-84, 119 P.3d 350 (2005). In a criminal case, it is not the appellant's burden to prove an extraordinary circumstance justifies a late notice of appeal; it is the *State's* burden to prove the defendant knowingly waived the right to appeal. *City of Seattle v. Klein*, 161 Wn.2d 554, 561, 166 P.3d 1149 (2007); *State v. Kells*, 134 Wn.2d 309, 313, 949 P.2d 818 (1998); *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). As the Commissioner and trial court properly ruled, the State did not meet its burden to prove Mr. Haltom knowingly waived

his right to appeal, and therefore this appeal is timely. Commissioner's Ruling (July 26, 2017) at 1-2; CP 9-11.

On the merits, as already discussed, Mr. Haltom did not agree to late entry of a restitution order and did not agree to an amount before the 180 days had run. *See* exs. 1, 2; RP (1/18/08) 4-5; RP (5/17/17) 26. The restitution order is void because it was entered more than 180 days after sentencing and the court had not found good cause to extend the deadline before the 180 days expired. Accordingly, this Court should reverse and remand with instructions to vacate the order of restitution.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Haltom asks this Court to vacate the restitution order.

Respectfully submitted this 7th day of November, 2017.

/s Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project
1511 Third Ave, Suite 701
Seattle, WA 98101
Telephone: (206) 587-2711
E-mail: lila@washapp.org;
wapofficemail@washapp.org

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v.)	NO. 49706-9-II
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CLAY HALTOM,)	
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I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF NOVEMBER, 2017, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] CLAY HALTOM 724 WEST UNCAS RD PORT TOWNSEND, WA 98368	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF NOVEMBER, 2017.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711

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