

No. 50337-9-II

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

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**State of Washington,**

Respondent,

v.

**Adonis Brown,**

Appellant

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OPENING BRIEF OF ADONIS BROWN

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Appeal from Pierce County Superior Court, 15-1-04860-2

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### **Assignments of error**

1. The trial court erred in ordering that Brown pay restitution pursuant to RCW 9.94A.753(7).

### **Issues Pertaining to Assignments of Error**

1. Brown was affirmatively misled by the Statement on Plea of Guilty and Judgment and Sentence, which both indicated that Brown would not be required to pay restitution pursuant to RCW 9.94A.753(7).
2. Any reasonable person would understand that the Statement on Plea of Guilty and Judgment and Sentence to mean that Brown would not be required to pay restitution pursuant to RCW 9.94A.753(7).
3. Brown should not be ordered to pay any costs on appeal.

### **Introduction**

Adonis Brown's case was resolved by a plea agreement. His Statement on Plea of Guilty referenced restitution, but did so in a way that misled Brown to believe that he would not be subject to a restitution order under subsection 7 of the Restitution Statute, RCW 9.94A.573. The

Statement used language that does not apply to subsection 7; stated that only a prosecutor would move for restitution; and stated that the amount of restitution would be determined by the judge rather than an administrative agency. The Judgment and Sentence similarly misled Brown. The Judgment told Brown that he would be subject only to an agreed restitution order. But none of these things were true. An administrative agency moved for restitution, not the prosecutor. The agency moved under subsection 7, told the court what the amount was, and Brown never agreed to the restitution. Because the Statement and Judgment affirmatively misled Brown about restitution, the restitution order must be reversed.

### **Statement of the Case**

Adonis Brown, a juvenile at the time of his alleged crimes, pled guilty as an adult in Pierce County Superior Court to one count of Second Degree Manslaughter, (9A.32.070(1), 9.94.010, 0.94A.530, 9.94A.533), and one count of Unlawful Possession of Firearm in the First Degree (9.41.010, 9.41.040(1)(a)). He was sentenced on February 26, 2016. He was ordered to serve 94 months in prison, flat time, with no credit for good time. He was also ordered to pay various mandatory fees, including the

\$500 Crime Victim Assessment, the \$100 DNA Database fee, and the \$200 criminal filing fee. CP 63-64.

In his Statement on Plea of Guilty, Brown acknowledged that the “amount of restitution may be up to double my gain or double the victim’s loss.” CP 47.

Later in the Statement, Brown acknowledged that the “prosecuting attorney” would recommend restitution, “if any [,] by later order or [sic] the court.” CP 49. Brown further acknowledged the “judge does not have to follow anyone’s recommendation as to sentence.” CP 49.

The Judgment and Sentence did not order restitution. Instead, it stated that an “agreed restitution order may be entered.” CP 64. It further stated that a restitution hearing “shall be set by the prosecutor.” CP 64.

On or about January 19, 2017, the prosecutor moved for restitution. CP 85-85. In an order dated January 19, 2017, the court denied the restitution. CP 86. The court denied the request for restitution for two reasons. CP 86. First, the request was made more than 180 days after the entry of judgment, making it untimely. RCW 9.94A.573(1) (requiring that restitution requests be made within 180 days). Second, it found that the prosecutor could not act on behalf of the Department of Labor and

Industries, so there was no exception to the 180-time limit available. CP 86.

Nearly one year after the judgment was entered, on February 10, 2017, the Washington Department of Labor and Industries, not the prosecutor, petitioned for restitution pursuant to RCW 9.94A.753(7). CP 89-98. That part of the restitution statute provides that “Regardless of the provisions of subsections (1) through (6) of this section,” a court “shall order restitution in all cases where the victim is entitled to benefits under the crime victims’ compensation act.” RCW9.94A.753(7). If, however, “the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims’ compensation act,” then “the department of labor and industries, as administrator of the crime victims’ compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order.” *Id.* If the Department petitions, “the court shall hold a restitution hearing and shall enter a restitution order.” *Id.*

In Brown’s case, the Department sought \$5,750.00 in restitution. CP 89. The amount was paid by the crime victim’s compensation fund for funeral expenses. CP 91.

A restitution hearing was held on February 17, 2017. CP 101-02.

The state was represented by the Department of Labor and Industries, not the prosecutor. RP 3. The court found that “the Department of Labor & Industries is the only one who has standing at this time for a restitution order.” RP 11-12.

The Department argued that, because its petition was brought within a year and the victim was entitled to benefits, the court had a mandatory duty to award restitution. RP 3.

Brown’s counsel made two arguments. First, he argued that the restitution action under section (7) should have been brought under a new cause number. RP 7. Counsel also argued that Brown lacked the ability to pay and is not likely to have the ability to pay. RP 10. Brown was 17 when the crime was committed, and he will leave prison when he is about 25, having lived his whole adult life in prison. RP 10. The court found that *State v. Blazina* does not apply to restitution, and stated that, if *Blazina* did apply to restitution, courts “would almost never order restitution.” RP 11.

The court allowed the full amount of restitution requested by the Department, \$5750.00. CP 99. It entered the restitution order “as a condition of sentencing.” CP 99.

## **Argument**

### **A. Standard of review**

A trial court's order of restitution, including the size of the restitution award, will not be disturbed on appeal absent abuse of discretion. Application of an incorrect legal analysis or other error of law constitutes abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

### **B. Brown was affirmatively misled about restitution by the language of his Statement on Plea of Guilty and his Judgment and Sentence.**

When Brown signed his Statement on Plea of Guilty, he was told that restitution would only be ordered under subsections (1)-(6) of RCW 9.94A.753. The agreement affirmatively misled Brown by referencing language from sections (1)-(6) and stating that the prosecutor, not the Department of Labor and Industries, would be the moving party seeking restitution. Nonetheless, the court ordered restitution under subsection (7). Brown was affirmatively misled into believing that he was not subject to restitution under subsection (7).

In the Statement on Plea of Guilty, which is identical to the form provided with Criminal Rule 4.2, Brown acknowledged that if the crime resulted in an injury to a person, "the judge will order me to make

restitution, unless extraordinary circumstances exist which make restitution inappropriate.” CP 47. The Statement also indicated that the “amount of restitution may be up to double my gain or double the victim’s loss.” CP 47.

The language regarding “extraordinary circumstances” and “doubling” a gain or loss is found in subsections 753(3) and (5). This led Brown to believe that restitution would be ordered under 753(3) and (5), not 753(7).

Other language in the statement reinforces this interpretation. The only change to the boilerplate language regarding restitution on the form was to add that the “prosecuting attorney” would recommend “Restitution if any by later order or the court.” CP 49. Since the prosecutor is only involved under subsections(1)-(6), this change to the boilerplate language led Brown to believe that restitution was only contemplated under (1)-(6).

Under subsection 7 , “the department of labor and industries, as administrator of the crime victims’ compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order.” RCW 9.94A.753(7). Since, in the Statement, only the prosecutor was designated to seek restitution, the Statement not only

did not give Brown any notice that he might be subject to a restitution claim by the Department, it led him to believe that restitution would not be sought under another section.

The language here told Brown that restitution would not be sought except under subsections (1)-(6). The prosecutor's added language only reinforced the exclusion of subsection (7). *See, e.g., State v. Garcia*, 194 Wn. App. 1038 (2016) (unpublished) (“We cannot discern how this boilerplate language in the judgment and sentence setting a restitution hearing evinces Garcia’s express agreement to pay restitution for damages stemming from his dismissed charge.”).

We also know that the parties intended that only the prosecutor seek restitution here by the actions of the parties. *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996) (holding that “subsequent acts and conduct of the parties to the contract” is relevant to interpretation of contract). The prosecutor later did set a hearing for restitution, in January 2017. CP 84-86. The court, however, denied the prosecutor’s request for restitution. CP 86. The parties acted here according to the language of their agreement: the “prosecuting attorney” sought restitution, which is just what the Statement told Brown would happen. CP 49. It was only after following the procedures laid out in

the Statement that the Department of Labor and Industries became involved. CP 84-85 (Department not involved in initial hearing on restitution set by prosecutor). The Department was brought in because the prosecuting attorney missed the deadline for seeking restitution. CP 86.

The Judgment and Sentence also reinforced the misleading information. The Judgment did not order restitution. Instead, it stated that an “agreed restitution order may be entered.” CP 64. No agreed restitution order was entered. Since Brown opposed restitution, this language does not authorize the restitution ordered.

The Judgment and Sentence further stated that a restitution hearing “shall be set by the prosecutor.” CP 64. This is what happened initially. CP 84-86. But the prosecutor missed the 180-day deadline for setting a restitution hearing. CP 86. The Department of Labor and Industries then came in and set a restitution hearing, and the prosecutor did not even appear at the hearing. RP 3, 11-12. The prosecutor sets hearings under subsections (1)-(6), and the prosecutor in fact sought to set a hearing in Brown’s case, but missed the deadline. CP 86. Brown was misled.

A defendant is entitled to relief where the government provides affirmatively misleading information. *State v. Minor*, 162 Wn.2d 796, 802,

174 P.3d 1162 (2008). In *Minor*, our Supreme Court held that a defendant was misled by failure to check a box on the judgment and sentence, in that case, regarding firearm rights. *Id.* at 803. The failure to check the box was not merely a failure to give notice, but led the defendant to assume that there was a reason that the box was not checked.

The situation here is indistinguishable from the failure to check a box. Both the Statement and the Judgment use language that involves only sections (1)-(6) of the restitution statute. Brown is not arguing that he was ignorant of the law. Instead, the government and court misled him about how the law applied to him. In referencing language and procedures that only apply to sections (1)-(6), the Statement and Judgment misled Brown just as surely as if a box had not been checked.

### C. **Rules of interpretation favor Brown.**

In the Statement, the prosecutor could have, **but did not**, clarify that restitution might be brought by “motion of prosecutor **or** Department of Labor and Industries.” CP 49. Instead, the prosecutor wrote the inscrutable “Restitution if any by later order or the court.” CP 49 (Statement part (i)). Assuming this means restitution could be ordered “by later order **of** the court,” a natural understanding that refers to the possible restitution in part (g), which reads that “the judge will order me

to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss." CP 47 (section (g)). This language is taken from subsections (3) and (5) of the Restitution Statute, RCW 753. Any reasonable interpretation of the Statement would lead to the conclusion that restitution under subsection (7) was not contemplated.

The Department stated that it was seeking this restitution under subsection (7) "under the same cause number" as the criminal case. RP at 9. This was part of the same criminal proceeding governed by the Statement. CP 99 (ordering the restitution as part of Brown's sentencing). The language in the Statement controls and favors Brown.

The language favors Brown even without the aid of two interpretive rules that favor Brown. *First*, since Brown was a juvenile, the constitution requires that any ambiguity be construed in his favor. *In re Gault*, 387 U.S. 1, 39 n.65 (1967) ("The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot.").

*Second*, the Statement is governed by the parol evidence rule, which "provides that all prior negotiations, conversations and parol

agreements merge into a final, unambiguous, integrated writing, and extrinsic evidence is inadmissible to add to, subtract from, vary or contradict the terms of the instrument.” *In re Murillo*, 134 Wn. App. 521, 535, 142 P.3d 615 (2006). The exact language of the Statement rules, and that language never references subsection (7)—instead, it references other parts of the restitution statute. By specifying part of the restitution statute, the Statement excludes other parts not specifically mentioned. Under the maxim *eiusdem generis*, “a general term used in conjunction with specific terms will be deemed to include only those things that are in the same class or nature as the specific ones.” *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 716, 334 P.3d 116 (2014). Since the specific sections of the Restitution statute are called out in the Statement, only those sections can apply to Brown.

Finally, the lack of notice about subsection also matters because the request for restitution under (7) occurred more than six months after the entry of judgment. Only subsection seven allows for restitution requests after sixth months, so the request was not timely under the terms of the plea and judgment. That is why the prosecutor’s request for restitution was denied. CP 86. Having told Brown that the prosecutor would set the hearing, the parties’ actions conformed to that writing: the prosecutor set

the hearing. CP 86. When the prosecutor missed the deadline, however, the state tried to avoid the words of the agreement by bringing in a new entity, the Department, to seek restitution. But having someone other than the prosecutor seek restitution violates the terms the state bound itself to in the Statement. Just because the state missed the statute of limitations for seeking restitution does not allow the state to avoid the agreement it made.

Because a reasonable person would not have understood his agreement in the Statement to encompass subsection (7), the restitution order must be stricken.

**D. There should be no costs assessed against Brown.**

The trial court found Brown indigent. CP 111-12. He is therefore presumed indigent throughout the appeal. RAP 14.2; RAP 15.2. When he is released, he will have spent his entire adult life in prison. He requests that the Court not assess costs against him.

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**CONCLUSION**

This Court should reverse the imposition of restitution against  
Brown.

RESPECTFULLY SUBMITTED September 11, 2017.

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## DECLARATION OF SERVICE

I declare that on September 11, 2017, I filed Appellant's open brief with the Court of Appeals for Division II via Electronic Filing for the Court of Appeals (Division II), which served for Pierce County at PCoatecf@co.pierce.wa.us and by U.S. mail to the Attorney General at

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I further declare that on September 11, 2017, I served by U.S. mail a copy of the brief on Adonis Brown at:

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

Dated September 11, 2017, in Seattle, Washington

s/ Harry Williams IV

Harry Williams IV, WSBA # 41020

**APPENDIX A**  
**RCW 9.94A.753**

**Restitution—Application dates.**

This section applies to offenses committed after July 1, 1985.

(1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause. The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(2) During the period of supervision, the community corrections officer may examine the offender to determine if there has been a change in circumstances that warrants an amendment of the monthly payment schedule. The community corrections officer may recommend a change to the schedule of payment and shall inform the court of the recommended change and the reasons for the change. The sentencing court may then reset the monthly minimum payments based on the report from the community corrections officer of the change in circumstances.

(3) Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

(4) For the purposes of this section, for an offense committed prior to July 1, 2000, the offender shall remain under the court's jurisdiction for a term of ten years following the offender's release from total confinement or ten years subsequent to the entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend jurisdiction under the criminal judgment an additional ten years for payment of restitution. For an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The offender's compliance with the restitution shall be supervised by the department only during any period which the department is authorized to supervise the offender in the community under RCW 9.94A.728, 9.94A.501, or in which the offender is in confinement in a state correctional institution or a correctional facility pursuant to a transfer agreement with the department, and the department shall supervise the offender's compliance during any such period. The department is responsible for supervision of the offender only during confinement and authorized supervision and not during any subsequent period in which the offender remains under the court's jurisdiction. The county clerk is authorized to collect unpaid restitution at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations.

(5) 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 or as provided in subsection (6) of this section 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.

(6) Restitution for the crime of rape of a child in the first, second, or third degree, in which the victim becomes pregnant, shall include: (a) All of the victim's medical expenses that are associated with the rape and resulting pregnancy; and (b) child support for any child born as a result of the rape if child support is ordered pursuant to a civil superior court or administrative order for support for that child. The clerk must forward any restitution payments made on behalf of the victim's child to the Washington state child support registry under chapter 26.23 RCW. Identifying information about the victim and child shall not be included in the order. The offender shall receive a credit against any obligation owing under the administrative or superior court order for support of the victim's child. For the purposes of this subsection, the offender shall remain under the court's jurisdiction until the offender has satisfied support obligations under the superior court or administrative order for the period provided in RCW 4.16.020 or a maximum term of twenty-five years following the offender's release from total confinement or twenty-five years subsequent to the entry of the judgment and sentence, whichever period is longer. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The department shall supervise the offender's compliance with the restitution ordered under this subsection.

(7) Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

(8) In addition to any sentence that may be imposed, an offender who has been found guilty of an offense involving fraud or other deceptive practice or an organization which has been found guilty of any such offense may be ordered by the sentencing court to give notice of the conviction to the class of persons or to the sector of the public affected by the conviction or financially interested in the subject matter of the offense by mail, by advertising in designated areas or through designated media, or by other appropriate means.

(9) This section does not limit civil remedies or defenses available to the victim, survivors of the victim, or offender including support enforcement remedies for support ordered under subsection (6) of this section for a child born as a result of a rape of a child victim. The court shall identify in the judgment and sentence the victim or victims entitled to restitution and what amount is due each victim. The state or victim may enforce the court-ordered restitution in the same manner as a judgment in a civil action. Restitution collected through civil enforcement must be paid through the registry of the court and must be distributed proportionately according to each victim's loss when there is more than one victim.

(10) If a person has caused a victim to lose money or property through the filing of a vehicle report of sale in which the designated buyer had no knowledge of the vehicle transfer or the fraudulent filing of the report of sale, upon conviction or when the offender pleads guilty and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim, the court may order the defendant to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain or victim's loss from the filing of the vehicle report of sale in which the designated buyer had no knowledge of the vehicle transfer or the fraudulent filing of the report of sale. Such an amount may be used to provide restitution to the victim at the order of the court. It is the duty of the prosecuting attorney to investigate the alternative of restitution, and to recommend it to the court, when the prosecuting attorney believes that restitution is appropriate and feasible. If the court orders restitution, the court must make a finding as to the amount of the victim's loss due to the filing of the report of sale in which the designated buyer had no knowledge of the vehicle transfer or the fraudulent filing of the report of sale, and if the record does not contain sufficient evidence to support such finding, the court may conduct a hearing upon the issue. For purposes of this section, "loss" refers to the amount of money or the value of property or services lost.

[ 2016 c 86 § 5; 2003 c 379 § 16. Prior: 2000 c 226 § 3; 2000 c 28 § 33; prior: 1997 c 121 § 4; 1997 c 52 § 2; prior: 1995 c 231 § 2; 1995 c 33 § 4; 1994 c 271 § 602; 1989 c 252 § 6; 1987 c 281 § 4; 1985 c 443 § 10. Formerly RCW 9.94A.142.]

**NOTES:**

**Severability—Effective dates—2003 c 379:** See notes following RCW 9.94A.728.

**Intent—Purpose—2003 c 379 §§ 13-27:** See note following RCW 9.94A.760.

**Finding—Intent—Severability—2000 c 226:** See notes following RCW 9.94A.505.

**Technical correction bill—2000 c 28:** See note following RCW 9.94A.015.

**Retroactive application—1995 c 231 §§ 1 and 2:** See note following RCW 9.94A.750.

**Purpose—Severability—1994 c 271:** See notes following RCW 9A.28.020.

**Purpose—Prospective application—Effective dates—Severability—1989 c 252:** See notes following RCW 9.94A.030.

**Effective date—1987 c 281:** See note following RCW 7.68.020.

**Severability—Effective date—1985 c 443:** See notes following RCW 7.69.010.

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**September 11, 2017 - 11:21 AM**

**Transmittal Information**

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