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NO. 51006-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH BYRON WOODY, JR.,

Appellant.

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

The Honorable Daniel Stahnke, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court acted outside its authority in imposing restitution that was not causally related to the crime of conviction.

2. Appellant received ineffective assistance of counsel when his attorney agreed to the amount of restitution requested by the state.

3. The court erred by ordering appellant to pay a \$100 DNA fee without first inquiring whether his mental health condition impacted his ability to pay legal financial obligations (LFOs).

4. Appellant received ineffective assistance of counsel when his attorney failed to cite authority that would have allowed the court to waive the \$100 DNA fee, based on appellant's mental health condition.

5. The court imposed a sentencing condition in excess of its statutory authority.

6. The court erred in finding appellant used a motor vehicle during the commission of his offense, thereby triggering department of licensing notification.

Issues Pertaining to Assignments of Error

1. Appellant was initially charged inter alia with first degree robbery for allegedly displaying a weapon and forcibly taking prescription medication from Sz-Chi Liang and/or Walgreens on June 7, 2016. CP 3. Pursuant to a plea agreement, however, appellant pled guilty to second degree assault. CP 33-34, 44. He did not agree the court could consider the police reports as a basis for the plea. CP 44. Rather, he agreed in writing: “admit to assaulting Sz-Chi Lang [sic] on June 7, 2016, with a deadly weapon in Clark Co., WA.” CP 44. Appellant did not agree to pay restitution for uncharged or dismissed charges. CP 35-53.

The state sought restitution in the amount of \$15,376.36. CP 8-27. Most of this amount represented prescription medication taken during a robbery of the Mill Plain Pharmacy on August 22, 2016 – a different offense to which appellant also pled guilty. CP 44, 21-27. However, \$3,917.01 of this amount represented prescription medication and cash taken from Walgreens on June 7, 2016. CP 8-20. At sentencing, defense counsel stipulated to the entire amount. RP 45.¹

¹ “RP” refers to the transcripts for hearings held January 18, 2017, August 24, 2017, and September 25, 2017.

(i) Did the court err in imposing restitution that was not causally related to appellant's assault conviction?

(ii) Did defense counsel provide ineffective assistance of counsel in agreeing to restitution which included damages for a charge that was dismissed?

2. RCW 9.94A.777(1) requires that a trial court determine whether a defendant who suffers from a mental health condition has the ability to pay any LFOs, mandatory or discretionary. At sentencing, defense counsel presented evidence appellant suffers from attention deficit hyperactivity disorder. RP 33.

(i) Did the trial court err by ordering appellant to pay a \$100 DNA fee without first analyzing whether this mental health condition impacted his ability to pay the mandatory fee?

(ii) Did defense counsel provide ineffective assistance of counsel for failing to bring RCW 9.94A.777(1) to the trial court's attention?

3. Should this Court strike the condition that appellant undergo evaluation and treatment for chemical dependency where the court made no finding that appellant has a chemical dependency that contributed to his offenses?

4. Where appellant did not admit a motor vehicle was used during the commission of the Mill Plain Pharmacy robbery, and where appellant did not agree the court could consider the police reports as a basis for his plea, did the court err in finding a motor vehicle was used during the offense?

B. STATEMENT OF THE CASE

By an amended information, on October 26, 2016, the Clark county prosecutor charged appellant Keith Byron Woody with crimes stemming from two separate incidents: a robbery at Walgreen's on June 7, 2016; and a robbery at the Mill Plain Pharmacy on August 22, 2016. CP 3-7; RP 28-31.

For the Walgreens incident on June 7, the state charged Woody with (1) first degree robbery while armed with a firearm for allegedly displaying a weapon and forcibly taking prescription medication from Sz-Chi Liang and/or Walgreens. CP 3. The state also charged Woody with (2) first degree unlawful possession of a firearm; according to the state, Woody had a prior Oregon conviction for attempted first degree assault, which prohibited him from possessing a firearm. CP 4.

For the Mill Plain Pharmacy incident, the state charged Woody – and Keandre Deshawn Brown – with (3) first degree

robbery while armed with a firearm for displaying a weapon and forcibly taking prescription medication from Valenti Logunov and/or Mill Plain Pharmacy. CP 4. In counts (4) - (7) that state charged Woody and Brown with second degree assault while armed with a firearm for allegedly assaulting various pharmacy customers with a deadly weapon. CP 4-6; RP 30. Lastly, the state charged Woody and Brown with two counts each of first degree unlawful possession of a firearm. CP 6-7.

While the case was proceeding to trial, the state submitted two restitution reports. CP 8-20, 21-27. According to the first, Walgreens reported losses of \$3,917.01. CP 8. This included a reported cash loss of \$975.00 and \$2,942.01 worth of drugs. CP 12. According to the second, Pharmacist Mutual Insurance Company reported losses of \$10,459.35, which represented the amount it paid on Mill Plain's insurance claim. CP 23. Mill Plain also reported a loss of \$1,000.00, which constituted its deductible. CP 23. In combination, the total amount sought by the state was \$15,376.36. CP 21.

Due in large part to Woody's cooperation following arrest, the parties were able to reach a global agreement regarding his participation in the Walgreen's and Mill Plain Pharmacy incidents.

RP 31-32. Pursuant to an amended information, the state charged Woody with: (1) first degree robbery while armed with a firearm of Valentin Logunov and/or Mill Plain Pharmacy on August 22, 2016; (2) second degree assault of Sz-Chi Liang on June 7, 2016; and (3) first degree unlawful possession of a firearm on October 20, 2016. CP 33-34.

At the plea hearing on August 24, 2017, Woody pled guilty to the amended information. RP 21-26; CP 35-53. He also pled guilty under a separate cause number to possession of a weapon by a prisoner and fourth degree assault stemming from an incident that occurred while he was in jail on this matter. RP 13, 18-19.

On the Mill Plain robbery, the state calculated Woody's offender score as six points, which included: two points for the Oregon attempted first degree assault; two points for the other current offense of second degree assault; one point for the other current offense of possessing a firearm; and one point for the other current offense of a prisoner possessing a weapon. Based on an offender score of six points, the standard sentencing range was 77-102 months. CP 51.

Pursuant to the plea agreement, the state indicated it would recommend a sentence of 162 months, the top of the range

including the 60-month firearm enhancement. RP 16-17. But the defense was free to argue for a different sentence. RP 18.

At sentencing on September 25, 2018, the state recommended 162 months for the robbery, as anticipated, with concurrent sentencing on the other offenses. RP 28-27, 32. The state also sought restitution in the amount of \$15,376.36, which amounted to the value of the medication stolen from Walgreens and Mill Plain. RP 32.

In advance of sentencing, defense counsel provided the court with Woody's medical records. RP 33. According to defense counsel, the records documented that:

Mr. Woody has had – he's been dealing with issues all of his life. He has a, you know, he has a severe hyperactivity disorder, attention deficit, oppositional defiance disorder, rated severe.

Neglect from his home situation, neglected child. I mean, he – he was battling, you know, to overcome a number of obstacles.

RP 33.

Based on Woody's history, his cooperation, remorse and plan to use his time to better himself while incarcerated, defense counsel asked for the low end of the range. RP 33-37.

The court imposed the high end of the range plus the enhancement for 162 months. RP 44. After imposing the

sentence, the court asked if restitution was stipulated. The prosecutor indicated it was not. RP 45. The court asked:

THE COURT: On the restitution, Mr. Woody, they have got \$15,376.00 for restitution that you would owe. You are entitled to a hearing to set the amount of restitution. It would require you coming back. Stipulate?

MR. SCHILE [defense counsel]: We want to stipulate.

RP 45.

Before adjourning, the prosecutor asked if the court considered Woody's indigency when it imposed legal financial obligations (LFOs). The court responded, "I found him currently indigent and waived some costs and fees, all but the non-mandatory ones." RP 46. The court included the \$100 DNA fee.

CP 59.

Pre-printed on the Judgment and Sentence were the following amounts: \$500 for the victim penalty assessment; \$200 for the criminal filing fee; \$1,500 for the court appointed attorney; \$100 for the DNA collection fee; and \$15,376.36 for restitution. CP 58-59. It appears the court crossed out and initialed the \$200 criminal filing fee and the \$1,500 court appointed attorney fee. CP 58.

Also pre-printed on the judgment and sentence is an “x” in the box requiring Woody to undergo an evaluation and treatment for chemical dependency as a condition of community custody. CP 57. Nothing was said about this condition at sentencing.

A hand-written “x” is also located next to the box requiring Department of Licensing notice:

5.7 [] Department of Licensing Notice: The court finds that Count ___ is a felony in the commission of which a motor vehicle was used.

CP 61. As indicated, there is a handwritten “x” in the box. There is also written “01” in the blank space following “Count.” Nothing was said about this finding at sentencing.

Woody appeals. CP 68.

C. ARGUMENT

1. THE AMOUNT OF RESTITUTION REPRESENTING CASH AND PRESCRIPTION MEDICATION TAKEN FROM WALGREENS MUST BE VACATED BECAUSE THERE WAS NO CAUSAL CONNECTION BETWEEN IT AND WOODY’S ASSAULT CONVICTION AND BECAUSE THERE WAS NO TACTICAL REASON FOR DEFENSE COUNSEL TO AGREE TO IT.

The decision to impose restitution and the amount thereof are within the trial court’s discretion. State v. Bennett, 63 Wn. App. 530, 535, 821 P.2d 499 (1991). This Court will reverse such an

order if it is manifestly unreasonable or the sentencing court exercised its discretion on untenable grounds or for untenable reasons. State v. Smith, 33 Wn. App. 791, 798-99, 658 P.2d 1250, review denied, 99 Wn.2d 1013 (1983).

However, “[R]estitution is authorized only by statute, and a trial court exceeds its statutory authority in ordering restitution where the loss suffered is not causally related to the offense committed by the defendant, or where the statutory provisions are not followed.” State v. Vinyard, 50 Wn. App. 888, 891, 751 P.2d 339 (1988). “A restitution order must be based on the existence of a causal relationship between the crime charged and proven and the victim’s damages.” State v. Blair, 56 Wn. App. 209, 214-15, 783 P.2d (1989).

“The general rule is that restitution may be ordered only for losses incurred as a result of the precise offense charged. Restitution cannot be imposed based on the defendant’s ‘general scheme’ or acts ‘connected with’ the crime charged, when those acts are not part of the charge.” State v. Miszak, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993) (citations omitted).

In other words, the award of restitution must be based on a causal relationship between the offense charged and proved and the victim’s losses or

damages. A defendant may not be required to pay restitution beyond the crime charged or for other uncharged offenses. An exception to this general rule exists where the defendant pleads guilty and expressly agrees to pay restitution for crimes for which the defendant was not convicted.

State v. Johnson, 69 Wn. App. 189, 191, 847 P.2d 960 (1993)
(citations omitted).

Accordingly, restitution for loss beyond the scope of the crime charged is properly awardable only when the defendant enters into an “express agreement to make such restitution as part of the plea bargain process. Miszak, 69 Wn. App. at 429.

The court here lacked authority to impose restitution for \$3,917.01 worth of cash and prescription medication stolen from Walgreens on June 7, 2016. Although Woody was initially charged with first degree robbery of Sz-Chi Liang and/or Walgreens for forcibly taking prescription medication, he pled guilty to second degree assault. His admission included nothing about taking prescription medication. CP 44. Rather, Woody agreed only: “admit to assaulting Sz-Chi Lang [sic] on June 7, 2016, with a deadly weapon in Clark Co. WA.” CP 44. Nor did Woody agree the court could review the police reports to establish a factual basis for the plea. Accordingly, there was no evidence before the court

establishing a causal connection between Woody's assault and Walgreen's loss of prescription medication. See State v. Woods, 90 Wn. App. 904, 907, 953 P.2d 834, rev. denied, 136 Wn.2d 1021 (1998) (In determining any sentence, including restitution, the sentencing court 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).

Moreover, Woody did not agree to pay restitution for uncharged or dismissed offenses as part of the plea agreement. CP 35-53. Indeed, the prosecutor acknowledged at sentencing there was no stipulation to restitution. RP 45. In the absence of Woody's express agreement, the court was without authority to impose that portion of restitution amounting to Walgreen's prescription losses.

To the extent defense counsel waived the issue by agreeing to the entire \$15,376.36 requested, Woody received ineffective assistance of counsel. The Sixth Amendment to the United States Constitution guarantees the assistance of counsel to criminal defendants. Its purpose is to ensure that the accused does not suffer an adverse judgment or lose the benefit of procedural protections because of the ignorance of the law. United States v.

Rad-O-Lite of Philadelphia, Inc., 612 F.2d 740 (3d Cir.1979). A defendant is guaranteed that he need not stand alone against the State at any “critical stage” of the proceedings. United States v. Wade, 388 U.S. 218, 224–27, 87 S. Ct. 1926, 1930–32, 18 L.Ed.2d 1149 (1967). It is also well-established that a defendant is entitled to counsel during the sentencing phase of his or her case. As stated by the Supreme Court in Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977):

Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel.

The setting of restitution is an integral part of sentencing. State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). Woody therefore had the right to effective assistance of counsel in setting restitution. State v. Hassan, 184 Wn. App. 140, 152, 336 P.3d 99 (2014).

To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel’s representation was deficient, and (2) the deficient performance prejudiced the defendant. Hassan, 184 Wn. App. at 152. Representation is deficient if, after considering all the

circumstances, it falls below an objective standard of reasonableness. Id. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have been different. Id.

The Court's decision in State v. Hassan is instructive here. Hassan was convicted inter alia of unlawful issuance of a bank check. The charge arose after Hassan told his friend Tiffany Gilpin that he would loan her \$1,000.00 to help her repair her car. Thereafter, Hassan gave Gilpin a \$2,400.00 check written on a closed account. He asked Gilpin to deposit the check in her account and then immediately withdraw \$1,400.00 to give to him because it was an easier way for him to get cash than at his bank. As Hassan requested, Gilpin deposited the check in her account, withdrew \$1,400.00 and gave it to Hassan. Hassan's check did not clear. Hassan, at 144-45.

At the restitution hearing, Hassan's counsel objected to the state's request for \$2,400.00 in restitution to Gilpin, claiming only that Hassan had repaid \$400.00 to her. The court imposed the full amount. Id. at 145.

On appeal, Hassan claimed his attorney was ineffective because he failed to object to the \$1,000.00 of the restitution order that represented Hassan's loan to Gilpin. Division Two agreed:

Unless a defendant agrees to the restitution amount, the State must prove the losses by a preponderance of the evidence. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). Here, the state proved that Gilpin suffered a loss of \$1,400. But there is nothing in the record supporting the trial court's conclusion that Gilpin suffered a loss relating to the \$1,000 she deposited in her account and did not pay to Hassan in cash. Gilpin admitted that this amount was a loan, not money that Hassan owed to her. And there is no evidence that Gilpin suffered any loss due to the \$1,000 loan she thought she was receiving not materializing. Therefore, the state failed to prove by a preponderance of the evidence that Gilpin incurred more than a \$1,000 loss.

Because there was no evidence to support a \$2,400 restitution award, counsel should have objected to that award. And there was no conceivable tactical reason not to object. Accordingly, defense counsel was deficient in this respect. Further, defense counsel's failure to object prejudiced Hassan because if counsel had pointed out the State's failure to sustain its burden of proving an additional \$1,000 loss, the trial court would have declined to include that amount in the restitution award. Accordingly, we hold that defense counsel's representation was ineffective regarding the restitution award.

Hassan, 184 Wn. App. at 152.

Defense counsel was similarly ineffective here. Woody's plea to first degree robbery of Mill Plain included language

admitting he took prescription medication. CP 44. His admission to second degree assault contained no admission regarding taking prescription medication. Moreover, Walgreens isn't even mentioned in the Statement of Defendant. Woody admitted solely to assaulting Sz-Chi Liang. CP 44. There was therefore no evidence before the court establishing a causal connection between Woody's conviction and the \$3,917.01 in losses the state sought on behalf of Walgreen's. There was no conceivable tactical reason not to object to this additional amount.

In response, the state may claim defense counsel agreed to the amount because Woody indicated, perhaps by facial expression, he did not want to return for a restitution hearing. However, defense counsel could have informed Woody he had the right to waive his presence, but still demand a hearing. Accordingly, this reason does not qualify as "legitimate."

Counsel's failure to object prejudiced Woody because the trial court would have declined to include the unproven amount in the restitution award. Defense counsel's representation was deficient regarding the restitution award. This Court therefore should reverse it.

2. THE TRIAL COURT ERRED BY ORDERING WOODY TO PAY A \$100 DNA FEE WITHOUT FIRST INQUIRING INTO WHETHER HIS MENTAL HEALTH CONDITION IMPACTED HIS ABILITY TO PAY.

According to the medical records provided by defense counsel to the court, Woods suffers from severe ADHD. RP 33. The trial court found Woody indigent, and imposed only mandatory LFOs, including a \$100 DNA fee and \$500 victim assessment fee. CP 58; RP 46. The trial court erred however, in imposing the \$100 DNA fee without first inquiring into whether Woody's mental health condition impacted his ability to pay the fee. To the extent defense counsel contributed to the error, Woody received ineffective assistance of counsel.

"RCW 9.94A.777 (1) requires that a trial court determine whether a defendant who suffers from a mental health condition has the ability to pay any LFOs, mandatory or discretionary." State v. Tedder, 194 Wn. App. 753, 756, 378 P.2d 246 (2016). The statute provides:

Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.

RCW 9.94A.777(1).²

This language stands in contrast to that of other statutes permitting the imposition of LFOs upon anyone who has the present ability to pay or will be able to pay in the future. See e.g. RCW 10.01.160(3) (“The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.”)

In cases involving a defendant with mental health conditions however, the court must determine whether he has the ability to pay any LFOs at the time of sentencing. RCW 9.94A.777 (1). The requirement that a judge “must first determine” that the offender has the ability to pay also imposes a more concrete duty than RCW 10.01.160(3), which only requires the court to consider whether the person can pay. RCW 9.94A.777(1).

² For the purposes of the statute, “mental health condition” is defined as: “a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant’s enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.” RCW 9.94A.777 (2).

State v. Tedder, 194 Wn. App. 753, 378 P.3d 246 (2016), is instructive. Tedder challenged the trial court's imposition of mandatory and discretionary LFOs against him for the first time on appeal. Tedder, 194 Wn. App. at 756. He argued that because the trial court knew he suffered from significant mental health conditions, it erred in imposing LFOs against him without first determining whether he had the ability to pay as required by RCW 9.94A.777 (1) and State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). Tedder, 194 Wn. App. at 757.

This Court agreed. The Court noted that it was obvious from the evidence before the trial court that Tedder suffered from a mental health condition. Tedder, 194 Wn. App. at 756-57. Based on that evidence, the Court concluded the trial court should have inquired into whether Tedder's mental health history potentially prevented him from holding future employment before imposing LFOs. Tedder, 194 Wn. App. at 754, 757-58.

The same outcome is appropriate here. Like Tedder, Woody suffers from a serious mental health conditions, ADHD. Neither the trial court nor the prosecutor disputed this. Based on the medical reports submitted by the defense, the trial court should have

inquired into whether Woody's mental health condition prevented him from paying the \$100 DNA fee.

Woody anticipates the State will, nonetheless, speculate that he could potentially hold future employment. This does not change the analysis. See Tedder, 194 Wn. App. 757 (recognizing that "while he [Tedder] self-reported past employment, there was no independent verification that he was actually employed or employable in those positions.").

Alternatively, if necessary to raise this issue, this Court should find defense counsel ineffective for failing to ensure the trial court fulfilled its statutory obligation under RCW 9.94A.777. Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. at 358. The standard of review for an ineffective assistance claim involves a two-prong test. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To satisfy the first prong, the defendant must show counsel's performance fell below an objective standard of reasonableness. To satisfy the second prong, the defendant must show prejudice, meaning a reasonable probability that but for

counsel's performance, the result would have been different. State v. Townsend, 142 Wn.2d 838, 843-44, 847, 15 P.3d 145 (2001).

“Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691). Counsel's failure to find and apply statutes relevant to a client's case, without any legitimate tactical purpose, is constitutionally deficient performance. In re Yung-Cheng Tsai, 183 Wn.2d 91, 102-103, 351 P.3d 138 (2015).

Defense counsel provided the court with Woody's medical records, recognizing his mental health condition and history might favor mitigation. There was therefore no legitimate reason not to inform the court of its duty to also consider Woody's mental health history under RCW 9.94A.777 as it pertains to LFOs. Counsel's failure to do so constituted deficient performance. Moreover, Woody suffered prejudice. Given Woody's mental health issues and indigency – particularly considering the trial court's waiving of non-mandatory LFOs – there is a reasonable probability the trial court would have stricken the \$100 DNA collection fee. Thus, ineffective assistance of counsel provides another basis on which to hear the claim and remand the matter to the trial court.

The trial court erred in imposing the \$100 DNA fee without first inquiring into whether Woody's mental health condition impacted his ability to pay the fee as required under RCW 9.94A.777 (1).

3. THE COURT WAS WITHOUT AUTHORITY TO REQUIRE CHEMICAL DEPENDENCY TREATMENT IN THE ABSENCE OF REQUIRED FINDINGS.

The trial court lacks authority to impose a community custody condition unless authorized by the legislature. State v. Kolesnik, 146 Wash.App. 790, 806, 192 P.3d 937 (2008). RCW 9.94A.505(9) provides, "As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." And under RCW 9.94A.703(3)(c)–(d), as a condition of community custody, the court is authorized to require an offender to "[p]articipate in crime-related treatment or counseling services" and in "rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community."

The SRA specifically authorizes the court to order an offender to obtain a chemical dependency evaluation and to comply with recommended treatment only if it finds that the offender has a chemical dependency that contributed to his or her offense:

Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

RCW 9.94A.607(1). If the court fails to make the required finding, it lacks statutory authority to impose the condition. State v. Warnock, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013).

Here, the court did not make the required finding and appeared to believe the condition was mandatory. In fact, it appears the "x" next to the condition was already on the judgment and sentence in anticipation of sentencing. CP 57. This is evidenced by the fact the court crossed out certain LFOs that were pre-printed on the judgment. CP 58. This Court should therefore strike the condition.

4. THE COURT ERRED IN FINDING A MOTOR VEHICLE WAS USED DURING THE MILL PLAIN PHARMACY ROBBERY.

Because Woody did not use a car to commit the Mill Plain robbery, this Court should vacate the department of licensing notification. State v. Alcantar-Maldonado, 184 Wn. App. 215, 219, 340 P.3d 859 (2014).

In Washington, a court may instruct the Department of Licensing to revoke a defendant's license upon conviction of one of many crimes, including "[a]ny felony in the commission of which a motor vehicle is used." RCW 46.20.285(4). RCW 46.20.285(4) does not define "use." In order for RCW 46.20.285(4) to apply, the vehicle must contribute in some way to the accomplishment of the crime. State v. Batten, 140 Wn.2d 362, 365, 997 P.2d 350 (2000). There must be some relationship between the vehicle and the commission or accomplishment of the crime. Batten, 140 Wn.2d at 365. "Used" in the statute means "'employed in accomplishing something.'" State v. Hearn, 131 Wn. App. 601, 609-10, 128 P.3d 139 (2006) (internal quotation marks omitted) (quoting State v. Batten, 95 Wn. App. 127, 129, 974 P.2d 879 (1999), aff'd, 140 Wn.2d 362, 997 P.2d 350). RCW 46.20.285(4) does not apply

when the vehicle was incidental to the commission of the crime. State v. Wayne, 134 Wn. App. 873, 875-76, 142 P.3d 1125 (2006).

Here, there was no evidence before the court upon which it could find a vehicle was employed in accomplishing the robbery. As indicated in the restitution section, in determining any sentence, the sentencing court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged or proved at the time of trial or at the sentencing. State v. Woods, 90 Wn. App. at 907. Woody's admission regarding count 1 of the amended information was this:

I Keith Byron Woody Jr. in Clark Co. WA on 8-22-2016 with intent to commit theft did unlawfully take personal property to wit prescription medication from the person or in the presence of another to wit: Valenti Logunov and/or Mill Plain Pharmacy in which property Valenti Logunov and/or Mill Plain Pharmacy had a possessory, ownership or representative interest, by the use or threatened use of immediate force, violence or fear of injury to said person or their property or to the person or property of another and in the commission of said crime or in immediate flight therefrom the defendant was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon to wit a handgun and was an accomplice to said crime. Furthermore, I Keith Woody Jr. did commit the foregoing offense while armed with a firearm as that term is employed and defined in RCW 9.94A825 and RCW 9.94A.533(3) a handgun.

CP 44.

Woody's admission says nothing about using a motor vehicle during the offense. Nor did Woody agree the court could review the police reports as a basis for his plea. Accordingly, "use" of a vehicle was neither admitted nor acknowledged. Nor was it proved by the state at sentencing. This Court therefore should vacate the trial court's direction to the Department of Licensing to revoke Woody's license. Alcantar-Maldonado, 184 Wn. App. at 229-30 (using a car to transport oneself to scene of crime not sufficient evidence to establish "use" for purposes of statute).

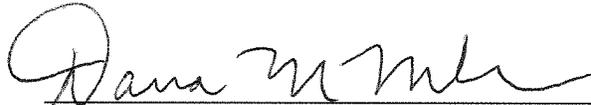
D. CONCLUSION

This Court should vacate the restitution order and remand to the trial court to impose restitution only for those losses that are causally related to Woody's crimes of conviction. This Court should also remand so the court may consider whether Woody's mental health condition (ADHD) impacts his ability to pay the \$100 DNA fee. This Court should also remand with directions to the trial court to strike the chemical dependency treatment condition and DOL notification.

Dated this 9th day of March, 2018

Respectfully submitted

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