

FILED
Court of Appeals
Division II
State of Washington
6/20/2018 8:00 AM
No. 51281-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

ORLENA DRATH, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 11-1-00116-4

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

TABLE OF CONTENTS

	Page
A. <u>STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u>	1
B. <u>FACTS AND STATEMENT OF CASE</u>	1
C. <u>ARGUMENT</u>	
1) The evidence was sufficient to establish a causal connection between payment made by the insurance company and Drath's offenses, because the total losses to the victim were sufficiently proved and were not contested, and the restitution awarded to the insurance company should represent the difference in the victim's total losses and the amount of restitution awarded to the victim. However, the case should be remanded to correct an apparent accounting error.....	1
2) The State concedes that the amount of restitution that the court ordered Drath to pay the victim erroneously includes a small sum for which the victim was separately compensated by insurance. Therefore, the State contends that this case should be remanded to the trial court for the trial court to recalculate the restitution amount and correct the restitution order.....	4
D. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

Table of Cases

	Page
<u>State Cases</u>	
<i>State v. Dedonado</i> , 99 Wn. App. 251, 991 P.2d 1216 (2000)	2
<i>State v. Griffith</i> , 164 Wn.2d 960, 195 P.3d 506 (2008).....	4, 5, 7
<i>State v. Kinneman</i> , 155 Wn.2d 272, 119 P.3d 350 (2005).....	3
<i>State v. Tobin</i> , 161 Wn.2d 517, 166 P.3d 1167 (2007).....	3
<u>Rules</u>	
RAP 10.3(b)	1

A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- 1) The evidence was sufficient to establish a causal connection between payment made by the insurance company and Drath's offenses, because the total losses to the victim were sufficiently proved and were not contested, and the restitution awarded to the insurance company should represent the difference in the victim's total losses and the amount of restitution awarded to the victim. However, the case should be remanded to correct an apparent accounting error..
- 2) The State concedes that the amount of restitution that the court ordered Drath to pay the victim erroneously includes a small sum for which the victim was separately compensated by insurance. Therefore, the State contends that this case should be remanded to the trial court for the trial court to recalculate the restitution amount and correct the restitution order.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Drath's statement of facts. RAP 10.3(b).

C. ARGUMENT

- 1) The evidence was sufficient to establish a causal connection between payment made by the insurance company and Drath's offenses, because the total losses to the victim were sufficiently proved and were not contested, and the restitution awarded to the insurance company should represent the difference in the victim's total losses and the amount of restitution awarded to the victim. However, the case should be remanded to correct an apparent accounting error.

State's Response Brief
Case No. 51281-5-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

At the restitution hearing held in this case, the trial court judge admitted Exhibit 1 into evidence. RP 34. Appended to Exhibit 1 there are two letters from the Progressive Home Advantage insurance company showing that the company made net payments totaling \$1,836.00 and \$6,176.14 to the victim of in the instant case. There is no explanation of what the payments were for or what loss they were intended to cover, other than generic references to “Contents Coverage” and adjustments for “replacement cost value[,]” “Recoverable Depreciation[,]” and “Deductible[.]” Other than the victim’s restitution request, no citation to the record was located where there was any testimony about these insurance letters or where the effect of insurance coverage was discussed or explained.

Aside from the insurance letters appended to Exhibit 1, the only other reference to insurance located in the record is the court’s Order of Restitution, which included an order for \$6,176.14 restitution to Progressive Home Advantage. CP 449. “A causal connection is not established simply because a victim or insurer submits proof of expenditures for replacing property stolen or damaged by the person convicted.” *State v. Dedonado*, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000). “Restitution is allowed only for losses that are ‘causally

State’s Response Brief
Case No. 51281-5-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

connected' to the crimes charged." *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (quoting *State v. Kinneman*, 155 Wn.2d 272, 286, 119 P.3d 350 (2005)).

However, the victim's restitution request and the evidence presented at trial show that the victim suffered \$92,218.00 in losses due to Drath's crimes of burglary and theft. Ex. 1. In his restitution request, the victim reported that he received \$8,012.00 of insurance coverage with a \$1,000.00 deductible. Ex. 1. In section two, below, the State concedes that the trial court's restitution order awarding the full amount of \$92,218 to the victim is probably erroneous because it appears that some part of the total loss to the victim was compensated to him by insurance. Therefore, the causal connection between the insurance payment and the victim's losses caused by Drath is shown, and Drath should not receive a windfall on these facts. The State contends that Drath should pay the total amount of the losses that she caused by her crimes; so, if the payment does not go to the insurance company, then it should go directly to the victim (who would then be obligated to reimburse the insurance company).

However, the total amount of insurance compensation that the victim received, which should be the total amount of restitution owed to the insurance company, is uncertain because the victim's statement and

State's Response Brief
Case No. 51281-5-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

the supporting correspondence from the insurance company to do not exactly match up but are instead off by a comparably small amount of about \$1,836.00, an amount which might also be affected by as much as \$2,876.45 for deductibles.

The State contends that the correct remedy is for this Court to remand this case to the trial court for determination of the correct amount of restitution to the insurance company. *State v. Griffith*, 164 Wn.2d 960, 968, 195 P.3d 506 (2008) (holding that correct remedy is remand for determination of correct amount of restitution but further holding, at n. 6, that “[i]ntroducing new evidence on remand would conflict with the statutory requirement that restitution be set within 180 days after sentencing”).

- 2) The State concedes that the amount of restitution that the court ordered Drath to pay the victim erroneously includes a small sum for which the victim was separately compensated by insurance. Therefore, the State contends that this case should be remanded to the trial court for the trial court to recalculate the restitution amount and correct the restitution order.

The victim’s restitution request contains several attached documents. Ex. 1. The first of these is the Sheriff’s Property Report, which lists items of stolen property other than firearms. *Id.* Some items listed on the property report were later recovered and returned to the

State’s Response Brief
Case No. 51281-5-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

victim. RP 17-36. The next attached document is a list of stolen firearms. *Id.* Several stolen firearms were recovered and returned to the victim, but none of the recovered firearms were included in the restitution request. RP 17-18, 25-26; Ex. 1. A third attachment lists a number of stolen knives, some of which were recovered. RP 35. None of the stolen firearms were listed among the 54 items that appear on the property report. Ex. 1.

Among these 54 items, some were recovered before the restitution hearing. RP 20-26. The victim testified about the value of the recovered items. RP 30-39. The recovered items included: \$500 worth of model cars as listed in item 7 (RP 31); \$500 worth of model cars as listed in item 8 (RP 31); \$100 worth of model cars as listed in item 9 (RP 32); \$900 worth of pool cues as listed in item 12 (RP 34-35); \$600 worth of wood pictures as listed in item 11 (RP 37); \$940 Imperial Katana as listed in item 24 (RP 37); \$550 Warrior Katana as listed in item 26 (RP 38); \$250 reindeer hide as listed in item 35 (RP 38); and, \$150 worth of ammunition as listed in item 50 (RP 38, 41). The total value of these recovered items is \$4,490.00.

In addition to the property already discussed, there was also a separate itemization of "Cold Steel Tanto" knives. Ex. 1. Six of these

knives were recovered. RP 35-36. Therefore, the deducted values of \$500, \$160, \$320, \$300, \$400, and \$400, for a total of \$2,080 for these six knives. RP 44. And the court deducted the \$4,490 outlined in the paragraph above (RP 44), for a total reduction of \$6,570 from the victim's restitution request to account for the recovered items.

The victim's original restitution request was for \$98,788.00. Ex. 1. An itemization of these costs as found on Exhibit 1 shows losses of \$39,790.00 as shown on the Sheriff's property report, \$38,880.00 of stolen guns, and \$9,835.00 for stolen knives. Additionally, on page two of the restitution request the victim reported damages to his house in the amount of \$5,403.00 and "recoverable depreciation" of \$4,880.00. The combined total is \$98,788.00, which is also the total amount requested by the victim. Ex. 1.

After deducting \$6,570.00 for the recovered property, the total amount of loss to the victim is \$92,218.00, which is also the amount of restitution to the victim ordered by the court. CP 449. However, in his restitution request, the victim also reported \$8,012.00 of insurance coverage with a \$1,000.00 deductible. Ex. 1, para. 2(B). The insurance payment and deductible do not match the numbers reported on the insurance documents attached to the restitution request or the amount of

State's Response Brief
Case No. 51281-5-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

restitution ordered to the insurance company by the court. CP 449; Ex. 1 (attachments).

But in any event, it appears that the amount of restitution ordered to the victim by the court includes an amount for which the victim had received separate compensation from insurance. Therefore, the State concedes that this case should be remanded to the trial court for the correct calculation of the restitution award to the victim net of insurance. *State v. Griffith*, 164 Wn.2d 960, 968, 195 P.3d 506 (2008)

D. CONCLUSION

This case should be remanded to the trial court to correct calculation errors, but the trial court's restitution order should otherwise be sustained.

DATED: June 19, 2018.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

State's Response Brief
Case No. 51281-5-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

MASON CO PROS ATY OFFICE

June 19, 2018 - 6:46 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51281-5
Appellate Court Case Title: State of Washington, Respondent v. Orlena R. Drath, Appellant
Superior Court Case Number: 11-1-00116-4

The following documents have been uploaded:

- 512815_Briefs_20180619184553D2555905_0938.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 51281-5-II --- State v. Drath --- Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- glinskilaw@wavecable.com

Comments:

Sender Name: Timothy Higgs - Email: timh@co.mason.wa.us
Address:
PO BOX 639
SHELTON, WA, 98584-0639
Phone: 360-427-9670 - Extension 417

Note: The Filing Id is 20180619184553D2555905