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Division II
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NO. 51611-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICAH A. HERRERA,

Appellant.

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

The Honorable Randall C. Krog, Judge

APPELLANT'S REPLY BRIEF

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LEGAL ANALYSIS AND ARGUMENT

A. RCW 9.94a.753(7) DOES NOT PROVIDE AUTHORITY FOR THE TRIAL COURT'S ORDER OF RESTITUTION AS ARGUED BY RESPONDENT.

The Respondent is correct that RCW 9.94A.753 does state, in relevant part, “[r]egardless 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”; however, RCW 9.94A.753(7) does not hold the ramifications to this matter that the Respondent suggests.

The Respondent relies heavily on *State v. McCarthy*, 178 Wn.App. 290 (Div. 2 2013) to support its argument that RCW 9.94A.753(7) justifies the amount of restitution set in this matter by the trial court; however, Respondent is incorrect for doing so. The Respondent is incorrect, because the named victim in this matter is not entitled to benefits under Chapter 7.68 RCW as the trial court’s restitution determination in this matter was made in a manner that prevented Appellant from challenging the amount of restitution.

The Washington Court of Appeals stated the following in

McCarthy:

The dissent raises concern about a criminal defendant being ordered to pay restitution based upon a department finding without the defendant having an opportunity to challenge the Department's determination. Nevertheless, RCW 7.68.120(2) affords one charged with a crime an opportunity to object to a determination made by the crime victims' fund.

178. Wn. App. 290, 302 (Div. 2 2013). In short, Appellant should have had an opportunity to challenge the crime victims' fund Department's determination pursuant to RCW 7.68.120(2). However, the appellant never had such an opportunity.

RCW 7.68.120(2)(a) states:

The Department may issue a notice of debt due and owing to the person found to have committed the criminal act, and shall serve the notice on the person in the manner prescribed for the service of a summons in a civil action or by certified mail. The department shall file the notice of debt due and owing along with proof of service with the superior court of the county where the criminal act took place. The person served the notice shall have thirty days from the date of service to respond to the notice by requesting a hearing in superior court.

The Department never filed a notice of debt due or proof of service with the Skamania County Superior Court pursuant to RCW 7.68.120(2). CPs.

As a result, the Appellant never had an opportunity to challenge the

Department's findings as he should have been able to just as the Washington Court of Appeals said in *McCarthy*.

Furthermore, one additional line from the *McCarthy* court needs to be considered when analyzing the Respondent's argument in this matter. Right before the *McCarthy* opinion discusses the mechanism(s) of RCW 7.68.120(2), the *McCarthy* court makes sure to state, "the Department concluded that McCarthy's crimes were a proximate cause of the death expenses. *McCarthy did not seek review of the Department's determination (emphasis added)*". *McCarthy* at 301. In short, the Court of Appeals has always recognized that someone convicted of a crime has a right to challenge the State's determination prior to the State depriving said person of property.

Simply put, because the Department did not follow the procedure(s) laid out in RCW 7.68.120(2), the Respondent cannot mix and match Chapter 7.68 RCW and RCW 9.94A.753(7) as authority to impose whatever amount of restitution the Department wants on Appellant. If the Respondent wants to use Chapter 7.68 RCW to determine restitution, then Chapter 7.68 RCW needs to be complied with by the department, but it was not. Otherwise, the Appellant does not have any way to challenge the amount of restitution ordered.

B. RESPONDENT’S ARGUMENT THAT NOTHING IN RCW 7.68.120(1) RESTRICTS THE VICTIM’S ENTITLEMENT TO CVCP BENEFITS OVER \$100.00 MISSES THE POINT OF APPELLANT’S ARGUMENT.

In the present case, the trial court made the initial order of restitution from July 28, 2016 subject to modification. CP at 28. However, the problem is that the Appellant had no way to challenge the amount of restitution ordered. The Respondent’s argument(s), in essence, say that the trial court gets to mix and match RCW 9.94A.753 and Chapter 7.68 RCW to make restitution whatever the Department decides to pay out regardless of whether or not RCW 7.68.120 is complied with.

RCW 9.94A.753 requires the restitution amount to “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.” RCW 9.94A.753(3). Therefore, the trial court should base restitution off of easily ascertainable damages. However, the Respondent points to RCW 9.94A.753(7) to argue that subsections (1) through (6) of RCW 9.94A.753 do not apply if a victim is entitled to benefits under the crime victims’ compensation act. RB 9. As a result, the Respondent argues, the trial court can properly impose whatever

restitution the Department states it paid out to the victim on to the Appellant pursuant to Chapter 7.68 RCW. However, the Department did not comply with the RCW 7.68.120(2).

The lack of compliance with RCW 7.68.120(2) is vital to showing why the trial court erred in awarding the restitution in the amount it did, because “RCW 7.68.120(2) affords one charged with a crime an opportunity to object to a determination made by the crime victims’ fund.” *State v. McCarthy*, 178. Wn. App. 290, 302 (Div. 2 2013). So, while nothing in RCW 7.68.120(1) restricted restitution to the amount of \$100.00, the trial court still erred in determining restitution by not basing the amount in accordance with RCW 9.94A.753(3), and instead, basing the amount of restitution off of a declaration stating how much the Department paid out to the victim without complying with RCW 7.68.120(2).

**C. THE TRIAL COURT DID NOT PROPERLY FIND THE
CVCP DECLARATION SATISFIED THE EVIDENTIARY
REQUIREMENTS OF RCW 9.94A.753(1) THROUGH (6).**

Under RCW 9,94A.753, “the State must prove thee amount [of restitution] by a preponderance of the evidence.” *State v. Tobin*, 161 Wn.2d 517, 524 (2007). Furthermore, “[e]asily ascertainable damages’

are those tangible damages proven by sufficient evidence to exist.” *State v. Bush*, 34 Wn. App. 121, 123 (Div. 1 1983). The trial court based restitution in this matter on a CVCP declaration that states, in essence, the Department paid this money out. RP, Aug. 31, 2017, at 21. No evidence was presented as to how much “lost time” there was; where the victim worked prior to losing said time; what the victim’s rate of pay was; or if the victim was even employed to begin with. *See, generally*, RP, Aug. 31, 2017 and CP.

The Respondent correctly points out that “[t]he appellant presented no evidence at the hearing challenging the CVCP declaration.” RB at 15. However, that is one way the trial court erred in determining restitution. The Appellant was not allowed to cross examine the CVCP declarant. *See, generally*, RP, Aug. 31, 2017 and CP. The Appellant was unable to use discovery provisions to determine what to challenge from the CVCP declarant, because the Department did not comply with RCW 7.68.120(2). In short, the trial court erred by determining the State had proven the amount of restitution not based on easily ascertainable damages, but rather, the trial court determined that the State provided it with a declaration stating the Department paid money to the victim.

D. THE TRIAL COURT'S RESTITUTION DETERMINATION VIOLATED THE APPELLANT'S RIGHT TO DUE PROCESS.

To satisfy due process at a restitution hearing, the defendant must have an opportunity to refute the evidence presented, and the evidence must be reliable. *See State v. Pollard*, 66 Wn. App. 779, 784-85 (Div. 1 1992). The Appellant had no real opportunity to refute the evidence presented, because the Department did not comply with RCW 7.68.120(2). "RCW 7.68.120(2) affords one charged with a crime an opportunity to object to a determination made by the crime victims' fund." *State v. McCarthy*, 178 Wn. App. 290, 302 (Div. 2 2013). The Appellant was never afforded an opportunity to object to a determination made by the crime victims' fund. In order to do so, the Appellant would need to know how the Department made the determination as to the amounts it paid to the victim. If the Department had complied with RCW 7.68.120(2), then the Appellant could have done so, but the Department did not do so. Instead, the trial court made its determination by

mixing and matching Chapter 7.68 RCW and RCW 9.94A.753(7), and that robbed the Appellant of any opportunity to challenge the amount of restitution.

E. CONCLUSION

This Court should overturn the trial court's order of restitution, because RCW 7.68.120 was not complied with, and because the amount of restitution was not determined in accordance with RCW 9.94A.753(3).

RESPECTFULLY SUBMITTED,
This 28th day of January, 2018.

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