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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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
C. <u>ARGUMENT</u>	7
THE TRIAL COURT ERRED IN ORDERING RESTITUTION BECAUSE THE COURT DID NOT FOLLOW APPLICABLE LAW IN DETERMINING A RESTITUTION AMOUNT	7
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Cawyer

182 Wn. App. 610, 330 P.3d 219 (2014).....7

State v. McCarthy

178 Wn. App. 290, 313 P.3d 1247 (2013).....12

FEDERAL CASES

United States v. Giltner

889 F.2d 1004 (11th Cir. 1989).....11

United States v. Marshall

719 F.2d 887 (7th Cir. 1982).....12

RULES, STATUTES AND OTHER AUTHORITIES

Chapter 7.68 RCW.....3, 5, 9, 10, 11

RCW 7.68.120(1).....9

RCW 7.68.120(2)(a).....10, 11, 12

RCW 9.94A.753.....1, 3, 5, 6, 7, 10, 13

RCW 9.94A.753(3).....1, 7, 10

A. ASSIGNMENTS OF ERROR

1. The trial court erred in setting restitution in an amount greater than One-hundred U.S. dollars. RP 18-23 (August 31, 2017)¹.
2. The trial court erred in determining that \$12,062 is an appropriate amount of restitution in this matter. RP 21 (August 31, 2017).
3. The trial court erred in determining that \$12,062 of restitution was based on easily ascertainable damages for injury to or loss of property pursuant to RCW 9.94A.753(3). RP 21 (August 31, 2017).
4. The trial court erred in basing the restitution amount based on notices that were provided from the Crime Victims' Compensation Program. RP 21 (August 31, 2017).
5. The trial court erred in determining restitution by arriving to the restitution amount ordered (\$12,062) in a manner that improperly mixed and matched RCW 9.94A.753 and chapter 7.68 RCW. RP 21 (August 31, 2017).
6. The trial court erred in determining restitution in a manner that violates appellant's right to due process. RP 21 (August 31, 2017).

¹ The Verbatim Report of Proceedings has separate page numbers for each date of Proceedings. So, Appellant's attorney is citing the Report(s) by date as well.

Issues Pertaining to Assignments of Error

When a court orders restitution, restitution 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. Furthermore, 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.

Additionally, restitution can be ordered in all cases where the victim is entitled to benefits under the Crime Victims' Compensation Act. However, in Ordering restitution, the trial court must follow applicable law. In this matter, the trial court based the restitution amount on a declaration from an employee of the Crimes Victim Compensation Program and no other supporting documentation. The appellant was given no possible way to challenge the restitution amount as the trial court determined that the above-mentioned declaration alone allowed the trial court to hold that the above-mentioned declaration made the amount of restitution ordered easily ascertainable.

1. Did the trial court err in ordering restitution of \$12,026 based on a declaration from an employee of the Washington Department of Labor and Industries (Crime Victim's Compensation Program) when the appellant

was given no meaningful opportunity to challenge the basis of said employee's declaration?

2. Did the trial court err in determining that the restitution ordered was based on easily ascertainable damages for injury to or loss of property when the trial court's basis for finding that the amount was based on easily ascertainable damages was entirely based on the above-mentioned declaration?
3. Did the trial court err in determining restitution pursuant to RCW 9.94A.753(7) when the victim was not entitled to restitution pursuant to chapter 7.68 RCW, because the Department of Labor and Industries did not follow the procedures required in RCW 7.68.120?
4. Did the trial court violate appellant's constitutional right to due process by determining a restitution amount based on only a declaration with absolutely no supporting documentation and where the appellant had absolutely no meaningful way to challenge the declarant's findings?

B. STATEMENT OF THE CASE

On July 28, 2016, appellant Micah A. Herrera pled guilty to one count of Assault in the Third Degree-Domestic Violence in Skamania County Superior Court. CP 3-13. On that same date, the trial court entered a Judgment and Sentence for the matter which required appellant to pay \$100 in restitution to the named victim. CP 14-29. However, the Judgment and Sentence states that the \$100 amount is subject to modification. CP 20.

On October 27, 2016, the trial court entered an amended order of restitution. CP 30. Then, on January 11, 2017, the trial court entered an amended order of restitution for \$7,939.70. CP 31. On June 29, 2017, appellant, through counsel, filed a motion, memorandum of law, and declaration with the trial court to set aside the trial court's order of restitution. CP 37-61. On August 02, 2017, Skamania County Assistant District Attorney, Daniel McGill, filed a Motion and Affidavit for Order to File Amended Order of Restitution. CP 62-66. Mr. McGill's motion was based on a declaration from the Crimes Victim Compensation Program stating that the Crimes Victim Compensation Program was entitled to be reimbursed for \$12,026.42 that had been paid by the program to the victim

in appellant's matter for "Time Loss". On August 24, 2017, appellant, through counsel, filed a supplemental memorandum of law in support of appellant's June 29, 2017 Motion to Set Aside the Order of Restitution. CP 70-75.

Appellant moved the trial court to set aside its order of restitution, because the Restitution Order(s) were not based on easily ascertainable damages for injury to the victim or loss of property to the victim; the trial court improperly made its determination based only on a declaration from the Department of Labor and Industries; appellant's right to due process was violated because defendant had no meaningful opportunity to challenge the basis of the restitution amount; and the trial court improperly combined RCW 9.94A.753 and chapter 7.68 RCW to reach the trial court's decision.

The trial court made the following ruling on August 31, 2017:

9.94A.753 subsection three, states that, Restitution shall be ordered – restitution order by Court pursuant to criminal case shall be based on easily ascertainable injuries or injury to or loss of property including lost wages from injury to a person, and lost wages resulting from the injury. Restitution shall not include the reimbursement for damages, for mental anguish, pain and suffering.

In this case, much of the argument relates to whether or not there was a restitution ordered in this case and entered in this case, and, or, whether or not the department of CRime Victims must go ahead and take additional steps when they are going to be coming – receiving the benefits from that. RCW 9.94A.753(7) states – seven states, The Court shall order restitution in all cases where the victim is entitled to benefits under the Crime Victims' Compensation Act. If the Court does not order restitution and the victim has been determined to be entitled to benefits under the

Crime Victims' Compensation Act, Department of Labor and Industry has a number of steps that they that may do, and petitioning the Court for an entry of an order of restitution.

In the present case, back on July 28, 2016 in the judgment, and sentence, there was a restitution order entered in this case. Restitution to Julianne Denton 9514 Gertz Circle, Portland, Oregon, in the amount of \$100.

The Court finds that there was a restitution order that was entered in this case, so the subsection – 7 –7. -- .753(7), talking about, if the Court does not order restitution, a number of steps that the department must undertake and undergo would not apply in this case, because there was a restitution order that was entered.

Court finds that it does have the authority pursuant to 9.94A.753(4) to go ahead and allow the amounts of restitution to be modified during a period of time the defendant remains under the Court's jurisdiction.

The Court does find that there is jurisdiction still over the defendant in this case to allow a modification. So the Court does find there was a restitution order that was entered in this case. The court does have the authority to modify that restitution order in this case.

Again, when we're doing it, we need to go back and look at those figures under 75 -- .753(3) that are easily ascertainable damages for the injury to loss.

The Court does find that the notices that were provided from the Crime Victims' Compensation Program do indicate that there was time lost for this case, and all services authorized were related to the injuries inflicted as a result of the criminal acts of May 15, 2016 in this case. So the time lost that was ordered in this case for lost wages in this case, relate to the crime acts that were accrued back on May 15, 2016.

So the Court would find that those are easily ascertainable used upon the criminal activity that the defendant pled guilty to – guilty of, in this case of the assault going back to May 15, 2016. So it does find that the restitution in the amount of the \$12,062 is appropriate to be entered in this case.

RP 18-21 (August 31, 2017). A written order was then entered ordering appellant to pay restitution in the amount of \$12,062. CP 83.

C. ARGUMENT.

THE TRIAL COURT DID NOT PROPERLY ADHERE TO RCW 9.94A.753 WHEN IT ORDERED APPELLANT TO PAY \$12,062.00 IN RESTITUTION.

Under RCW 9.94A.753,

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.

RCW 9.94A.753(3). Furthermore, “[r]estitution is appropriate only if a causal connection exists between the defendant’s offense and the victim’s injuries for which restitution is sought.” State v. Cawyer, 182 Wn.App. 610, 616-617, 330 P.3d 219 (2014) (citing State v. Vinyard, 50 Wn.App. 888, 893, 751 P.2d 339 (1988)). “A causal connection exists if “but for” the offense, the loss or damages to a victim’s property would not have occurred.” State v. Cawyer, 182 Wn.App. 610, 617, 330 P.3d 219 (2014) (citing State v. Tobin, 161 Wn.2d 517, 519, 524-525, 166 P.3d 1167 (2007)). “The State must prove this causal connection between the expenses and the offense by a preponderance of the evidence.” State v. Cawyer, 182 Wn.App. 610, 617, 330 P.3d 219 (2014) (citing State v. Kinneman, 122 Wn.App. 850, 860, 95 P.3d 1277 (2004), *aff’d*, 155 Wn.2d 272, 119 P.3d 350 (2005)).

Here, the trial court made two distinct errors in interpreting RCW 9.94A.753(3). First, the trial court did not base its restitution order(s) in an amount that was based on easily ascertainable damages. Second, the

State did not prove any causal connection between the expenses and the offense by a preponderance of the evidence.

The restitution order(s) are not based on easily ascertainable damages, because the State did not provide any evidence of what the victim's damages were except for a declaration made by an employee of the Department of Labor and Industries. CP 1-100. Other than the declaration that was not supported by any documentation, the State provided no evidence that the victim lost any wages, had any medical expenses, or lost any property as the result of the appellant's criminal behavior. More specifically, the State provided no medical bills, no evidence of damaged property, no proof of income prior to the alleged injury, and no proof that the victim lost any wages as a result of the appellant's criminal behavior. Rather, the State simply provided the Court a declaration from the Department of Labor and Industries stating that the Department had paid out money to the victim in an amount of \$12,026.

For all the trial court knows, the victim in this matter may not have had any medical expenses; may not have lost any wages; and may not have suffered any property loss whatsoever. Certainly, the trial court had no information as to what, if any, injuries the victim suffered; how much medical costs were accrued by the victim; how much in wages, if any, the victim lost; or if the victim even lost any wages whatsoever. Frankly, if

the trial court would have been told by the declarant that the victim was given the maximum award allowed by statute, then that is what the trial court would have set for restitution regardless of any corroborating evidence. Simply put, the trial court's order(s) of restitution are not based on easily ascertainable damages, so the order(s) should be set aside.

THE VICTIM IN THIS MATTER IS NOT ENTITLED TO BENEFITS UNDER THE CRIME VICTIMS' COMPENSATION ACT, CHAPTER 7.68 RCW.

The victim in this matter is not entitled to benefits under the Crime Victims' Compensation Act, because the procedures and mandates of Chapter 7.68 RCW were not followed. RCW 7.68.120(1) states in relevant part that "If there has been a superior or district court order, or an order of the indeterminate sentence review board or the department of social and health services, as provided in subsection (4) of this section, the debt shall be limited to the amount provided for in the order. A court order shall prevail over any other order." RCW 7.68.120(1). In this matter, the trial court ordered the appellant to pay \$100 in restitution (subject to modification). Therefore, under RCW 7.68.120(1), the amount of restitution should be limited to \$100.

Granted, the trial court's restitution order did say that amount was subject to modification; however, the "subject to modification" language cannot mean that trial court can then modify the order to whatever an

employee declares was paid out to the victim. Otherwise, all trial courts could, in every criminal case where the defendant pleads guilty, simply order one dollar of restitution, subject to modification, then simply wait for the Department of Labor and Industries to state how much money the defendant owes in restitution and so order that amount of restitution. This would make RCW 9.94A.753(3) completely superfluous. Furthermore, if that was truly the way RCW 9.94A.753 and Chapter 7.68 RCW worked, then RCW 9.94A.753 should read something close to “if a court receives any information that the department has paid money to a victim of a criminal offense on behalf of a defendant, then the court shall modify the order of restitution in the amount stated by the department, regardless of the basis used by the department to determine the amounts paid.”

If the trial court wants the department to determine restitution, then the procedures outlined in RCW 7.68.120(2)(a) should be followed. RCW 7.68.120(2)(a) states, “[t]he 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.” RCW 7.68.120(2)(a). In this matter, the department did not file notice of debt due, nor did the department serve any such notice on the appellant. This lack of notice made it impossible for the appellant to request a hearing to challenge the department’s findings. In short, the victim in this matter is not entitled to benefits under chapter 7.68 RCW because the department either did not comply with the requirements of RCW 7.68.120(2)(a) or restitution was limited to \$100 under RCW 7.68.120(1).

THE TRIAL COURT VIOLATED THE APPELLANT’S
CONSTITUTIONAL RIGHT TO DUE PROCESS WHEN IT FAILED
TO PROVIDE THE APPELLANT WITH ANY MEANINGFUL WAY
TO CHALLENGE THE AMOUNT OF RESTITUTION.

The due process clause requires that a defendant in a sentencing hearing be given an opportunity to refute the evidence presented and that the evidence be reliable. *United States v. Giltner*, 889 F.2d 1004, 1007 (11th Cir.1989); *United States v. Marshall*, 719 F.2d 887, 891 (7th Cir.1982). Unfortunately, the trial court provided the appellant with no opportunity to refute the “evidence” presented, nor did the trial court require the evidence it relied on to issue the restitution order be reliable. RP 1-28. The trial court simply modified the restitution order based on a declaration from the department that it paid the victim \$12,026. The appellant had no meaningful way to challenge the department’s findings, because the trial court provided no avenue for the appellant to challenge

the department's findings. This is at odds with the appellate court's holding in State v. McCarthy, 178 Wn.App. 290, 313 P.3d 1247 (2013).

In McCarthy, the appellate court determined that the trial court's restitution was properly entered even though the trial court did not find a causal relationship between the restitution costs and the conviction independent of the Department of Labor and Industries making such a finding. 178 Wn.App. 292-294. However, in McCarthy, "[t]he dissent rais(ed) 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." 178 Wn.App. 302. However, the McCarthy appellate court dismissed the dissent's concern by stating, "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. 302. Unfortunately, the appellant in this matter did not get an opportunity to object to the determination made by the crime victims' fund precisely because the department did not follow RCW 7.68.120(2). The department did not issue a notice of debt due and owing to the appellant; did not serve the notice on the appellant in a manner prescribed for the service of a summons in a civil action or by certified mail; and the department did not file the notice of debt due and owing along with proof of service with the Skamania County Superior

Court. CP. In short, the trial court and the department mixed and matched chapter 7.68 RCW and RCW 9.94A.753 in such a way as to eliminate any meaningful opportunity to challenge the amount of restitution in violation of the appellant's due process rights.

D. CONCLUSION

For the foregoing reasons, this Court should set aside the trial court's order of restitution and the appellant should be ordered to pay restitution in the amount of \$100.

DATED this 30th day of September, 2018.

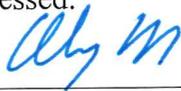
Respectfully submitted,

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I, Alyosha C. McClain, a person over the age of 18 years of age, served the Skamania County Prosecutor's Office kick@co.skamania.wa.us and Micah Herrera, 711 Medford Center, #48, Medford, OR 97504 a true copy of the document to which this certificate is affixed on October 01, 2018. Service was made electronically to the prosecutor and to Micah Herrera by depositing in the mail of the United States of America, properly stamped and addressed.



Signature

W. TODD PASCOE, PLLC

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