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Court of Appeals  
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State of Washington  
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NO. 51611-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MICAH AMIEL HERRERA,

Appellant.

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

HONORABLE JUDGE RANDALL C. KROG

SKAMANIA COUNTY SUPERIOR COURT CASE NO. 16-1-00034-5

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Does RCW 9.94A.753(7) provide statutory authorization for the restitution order of \$12,026, based upon a declaration and accounting ledger from a Claims Manager of the Crime Victims Compensation Program (CVCP) of the Department of Labor and Industries for the state of Washington? **Yes.**
2. Did the trial court appropriately find easily ascertainable damages and a causal connection to the offense using evidence contained in the CVCP declaration? **Yes.**
3. Did the trial court appropriately determine that the procedural requirements imposed upon the Department of Labor and Industries, established within RCW 7.68.120, were inapplicable given an existing order of restitution for the crime in this matter? **Yes.**
4. Did the trial court satisfy the appellant's constitutional due process rights when it modified restitution based upon the CVCP declaration? **Yes.**

**B. STATEMENT OF THE CASE**

**1. Procedural Facts**

On July 28, 2016, Appellant Micah A. Herrera was convicted of Assault in the Third Degree, Criminal Negligence – Domestic Violence. CP at 14. The Judgment and Sentence filed that same day ordered the appellant to pay \$100.00 in restitution to the victim, subject to later modification. CP at 21. On October 27, 2016, the trial court entered a stipulated order modifying restitution to \$7,939.70, to be paid to the Crime Victims Compensation Plan. CP

at 30. On August 31, 2017, the trial court granted the State's motion to modify total restitution to \$12,026.42, RP, Aug. 31, 2017, at 21, and entered its order to that effect on November 03, 2017. CP at 105.

## **2. Substantive Facts**

This appeal centers on the sufficiency of evidence the State presented in support of the modification of restitution ordered on August 31, 2017. The State's Supplemental Motion and Affidavit for Order of Restitution, filed August 02, 2017, included three declarations by Kim Vincent, Claims Manager for the Crime Victims Compensation Program (CVCP) of the Department of Labor and Industries for the state of Washington. CP at 81-91. In the most recent of those declarations, Ms. Vincent stated under oath in relevant part:

3. I have reviewed the claim file of [the victim] claim number VN59146.
4. The following amounts have been paid on this claim:
  - \$12026.42 for time-loss . . .
5. The total amount paid on this claim is \$12026.42.
6. The Crime Victims Compensation Program is seeking reimbursement for the total amount paid, which is \$12026.42. . . .

7. All payments were made for authorized services under chapter 7.68 [RCW]. All services authorized were related to the injuries inflicted as a result of the criminal act of May 15, 2016.

CP at 89. Attached to Ms. Vincent's declaration was a "CVCP Cost Ledger," identifying eight payments from CVCP to the victim. For each payment, the ledger recorded the "type" of payment (in each instance here, "time loss"), the relevant period of time underlying the payment, and the amount of the payment.

The trial court granted modification of restitution on August 31, 2017. RP at 21. In relevant part, the trial judge concluded:

The Court finds that there was a restitution order that was entered in this case, so the subsection – 7 – 7. -- .7537, 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 ordered that was entered.

Court finds that it does have the authority pursuant to 9.94A.7534 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 -- .7533 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 based upon the criminal activity that the defendant pled guilty to – guilty of, in this case 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, Aug. 31, 2017, at 20-21. On November 03, 2017, the Court entered its Amended Order of Restitution, modifying restitution from \$7,939.70 to \$12,026.00.

### **C. ARGUMENT**

Because the trial court in this case properly amended restitution according to damages set forth in the Crime Victims Compensation Program (CVCP) declaration and ledger, this Court should affirm the trial court's decision. First, and most important, RCW 9.94A.753(7) provides standalone statutory authority—

recognized in this Court's precedent<sup>1</sup>—for the order of restitution, given the victim's entitlement to CVCP benefits under chapter 7.68 RCW. On this basis alone, this Court should affirm the order of restitution.

Second, while the trial court did not apply subsection (7) in its decision, it appropriately ordered restitution using the standards contained in RCW 9.94A.753(1) through (6). The CVCP declaration provided a sufficient evidentiary basis for the trial court to find easily ascertainable damages and a causal connection to the offense for which the appellant was convicted. This Court should find no abuse of discretion in the trial court's decision.

Third, the trial court correctly refused to apply the statutory notice requirements found in RCW 7.68.120(2), given an existing court order of restitution.

Fourth, the trial court did not violate the appellant's constitutional due process rights, because the Sixth Amendment right to confrontation does not extend to restitution hearings.

“[R]estitution is both punitive and compensatory.” *State v. Kinneman*, 155 Wn.2d 272, 279 (2005). The restitution statute requires the defendant “to face the consequences of his or her

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<sup>1</sup> See *State v. McCarthy*, 178 Wn. App. 290 (Div. 2 2013).

criminal conduct.” *State v. Tobin*, 161 Wn.2d 517, 524 (2007). The “language of the restitution statute[] indicates legislative intent to grant broad powers of restitution” to trial courts. *State v. Davison*, 116 Wn.2d 917, 920 (1991). The legislature intended to make restitution widely available to victims of crimes. See *State v. Hiatt*, 154 Wn.2d 560, 564 (2005). In carrying out that intent, courts should “not engage in overly technical construction that would permit the defendant to escape from just punishment.” *Tobin*, 161 Wn.2d at 524.

**1. RCW 9.94A.753(7) Provides Independent Authority For The Trial Court’s Order Of Restitution, Because The Victim Was Entitled To Benefits Under Chapter 7.68 RCW.**

The trial court properly ordered restitution according to invoices from the CVCP for costs CVCP paid to the victim of the criminal offense underlying the appellant’s conviction. Revised Code of Washington 9.94A.753(7) explicitly mandates these orders: “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.” This Court solidified this rule in *State v. McCarthy*, explaining that RCW 9.94A.753(7) “does not expressly

identify what losses the court may impose on the accused, but the language urges that any benefits paid by the compensation fund be imposed upon the defendant.” 178. Wn. App. 290, 301 (Div. 2 2013).

In *McCarthy*, the Court rejected the defendant’s contention that a causal connection under RCW 9.94A.753(5) must be proven to link the offense to the injury. “The language of RCW 9.94A.753(7) does not support McCarthy’s argument that the same causation requirement imposed for purposes of subsection (5) must be imposed when the crime victims’ fund pays expenses.” *Id.* at 300. From a policy perspective, the Court found, “[t]he defendant’s reimbursement of the crime victim’s fund, under a loose rather than strict standard of causation, furthers the goal of the defendant facing the consequences of his conduct [and] promotes the worthy objective of protecting the public purse.” *Id.* at 301. Subsequent appellate cases have favorably applied *McCarthy*’s understanding of RCW 9.94A.753(7). See *State v. Ugalde*, No. 74324-4-I, 2018 Wash. App. LEXIS 75, at \*4-5 (Div. 1 Jan. 16, 2018) (unpublished); *State v. Bienhoff*, No. 75310-0-I, 2017 Wash. App. LEXIS 2531, at \*6 (Div. 1 Nov. 06, 2017) (unpublished).

*McCarthy* closely resembles the present case. Here, we have the victim of a violent crime, who applied for and received benefits through the CVCP. We have a declaration and invoice provided by the CVCP, establishing the specific amounts paid to the victim for lost wages, and identifying the appellant as the offender and the date of the criminal offense. CP at 89-91. At the restitution hearing on August 31, 2017, the State presented this evidence to the trial court. RP, Aug. 31, 2017. While the trial court in this case did not apply subsection (7), this evidence of payment of CVCP benefits to the victim is sufficient to trigger subsection (7), authorizing the restitution as ordered.

The appellant ignores the evidence of entitlement to CVCP benefits along with subsection (7)'s clear direction to disregard subsections (1) through (6). Instead, the appellant argues that a causal connection and "easily ascertainable damages" must be proven using subsection (3). See Br. of Appellant at 7. As *McCarthy* aptly noted, however, applying those standards would erase the statutory exception and more relaxed "loose causation" subsection (7) creates. See *McCarthy*, 178 Wn. App. at 301.

Because the CVCP declaration documented CVCP payments to the victim for lost wages in this case, and because

RCW 9.94A.753(7) demands restitution when victims are entitled to CVCP benefits, this Court should uphold the order of restitution.

**2. Nothing In RCW 7.68.120(1) Restricted The Victim's Entitlement To CVCP Benefits Or Restitution Over The Initial \$100.00 Restitution Order.**

Contrary to the appellant's argument on appeal, nothing in RCW 7.68.120(1) limited CVCP benefits payable to the victim or prevented the trial court from amending restitution to an amount greater than \$100.00. In relevant part, RCW 7.68.120(1) states:

Any payment of benefits to or on behalf of a victim under this chapter creates a debt due and owing to the department by any person found to have committed the criminal act in either a civil or criminal court proceeding in which he or she is a party. If there has been a superior or district court order . . . the debt shall be limited to the amount provided for in the order. A court order shall prevail over any other order.

This portion of the statute authorizes the Department of Labor and Industries to recoup from offenders CVCP benefits paid out to victims. If a court has ordered restitution in the matter, the Department may not recoup more than the amount of restitution ordered. This statute subrogates the Department of Labor and Industries to receive the restitution award, to the extent of benefits it paid to the victim.

In the present case, the trial court made the initial order of restitution from July 28, 2016 subject to modification. CP at 28. Because the restitution order was modifiable, and because the amended restitution was based upon victim benefits paid under chapter 7.68 RCW, the creation of debt authorized by RCW 7.68.120(1) kept pace with the amended restitution amount.

The appellant misreads RCW 7.68.120(1). By erroneously conflating the term “benefits” with “debt,” the appellant flips the logic of the statute to suggest the victim’s entitlement to CVCP benefits should be limited to the amount of restitution ordered. However, nothing in this part of the statute limits the amount of benefits the CVCP may pay out to victims. The victim was entitled to benefits greater than \$100.00, and the trial court properly amended restitution to reflect the entire amount of CVCP benefits paid to the victim.

**3. The Trial Court Properly Found The CVCP Declaration Satisfied The Evidentiary Requirements Of RCW 9.94A.753(1) Through (6).**

Even under the more stringent standards found in RCW 9.94A.753(1) through (6), the CVCP declaration and attached ledger provide sufficient basis for finding easily ascertainable

damages and a causal link to the offense. “A trial court’s order of restitution will not be disturbed on appeal absent abuse of discretion.” *State v. Tobin*, 161 Wn.2d 517, 523 (2007). “[T]he State must prove the amount [of restitution] by a preponderance of the evidence.” *Id.* at 524. Because the trial court did not abuse its discretion in finding the CVCP declaration satisfied the statutory requirements of RCW 9.94A.753, its decision should be preserved.

- i. ***The CVCP declaration and ledger constitute easily ascertainable damages and evidenced a causal connection to the offense for which the appellant was convicted.***

The trial court correctly found the victim’s lost wages were easily ascertainable and causally related to the appellant’s offense. “[R]estitution 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). The statute authorizes courts to order restitution up to “double the amount of the offender’s gain or the victim’s loss from the commission of the crime.” *Id.* “Easily ascertainable damages’ are those tangible damages proven by sufficient evidence to exist.” *State v. Bush*, 34 Wn. App. 121, 123 (Div. 1 1983). “Restitution is

allowed only for losses that are ‘causally connected’ to the crimes charged. Yet . . . foreseeability is not required.” *Tobin*, 161 Wn.2d at 524 (internal quotations omitted).

At the August 31 restitution hearing, the trial court considered the sworn declaration of the CVCP case manager attesting to the amount of benefits paid to the victim for lost wages. RP, Aug. 31, 2017, at 21. An invoice ledger was included with the declaration, providing specific accountings of lost wages for particular periods of time. In addition, the CVCP declaration stated, “[a]ll payments were made for authorized services under chapter 7.68 [RCW]. All services authorized were related to the injuries inflicted as a result of the criminal act of May 15, 2016.” CP at 89. The appellant presented no evidence at the hearing challenging the CVCP declaration. *See, generally*, RP, Aug. 31, 2017. Having considered the State’s evidence, the trial court concluded,

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 . . . relate[s] to the crim[inal] acts that were accrued back on May 15, 2016.

So the Court would find that those are easily ascertainable based upon the criminal activity that the defendant pled guilty to . . . the assault going back to

May 15, 2016. So it does find that the restitution in the amount of the \$12,062 [sic] is appropriate to be entered in this case.

RP, Aug. 31, 2017, at 21.

Here, after considering the evidence before the court, the trial judge correctly found the lost wages constituted easily ascertainable damages and were causally connected to the offense underlying the appellant's conviction. No abuse of discretion occurred.

- ii. ***Because RCW 9.94A.753(7) independently authorizes the trial court's order of restitution, any evidentiary insufficiency under RCW 9.94A.753(3) should be disregarded.***

Even if the CVCP case manager's declaration and ledger were insufficient to establish easily ascertainable damages or a causal connection, the trial court's decision should be affirmed. As a statutory exception, RCW 9.94A.753(7) authorizes the order of restitution the trial court entered, independent of subsections (1) through (6). In that scenario, the trial court's decision to order restitution of \$12,026.00 according to subsection (3) would not violate Washington statute, since subsection (7) expressly authorizes the ordered restitution.

“The authority to impose restitution is statutory.” *State v. Martin*, 137 Wn.2d 149, 155 (1999). “A sentencing court may not exceed its statutory authority in imposing restitution.” *Id.* Here, the trial court did not exceed statutory authority for ordering restitution based upon the evidence of CVCP victim payments. While the court applied RCW 9.94A.753(3) in its analysis, subsection (7) provides even greater support for its decision on the basis of the same facts. The trial court’s decision to grant amended restitution should be upheld.

**4. The Trial Court Properly Refused To Apply The Procedural Notice Requirements Of RCW 7.68.120(2), Because A Court Order Of Restitution For The Offense Of Conviction Had Been Entered.**

The trial court properly disregarded the notice requirements of RCW 7.68.120(2), because those provisions do not apply when a court order of restitution already exists. Under RCW 9.94A.753(7), 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 may petition the court for entry of an order of restitution. Section 7.68.120 RCW authorizes Department to enforce debts created by

benefits it pays to victims, and establishes procedures for doing so.

However, RCW 7.68.120(1) expressly states:

[a] court order shall prevail over any other order. If, in a criminal proceeding, a person has been found to have committed the criminal act that results in the payment of benefits to a victim **and the court in the criminal proceeding does not enter a restitution order**, the department shall, within one year of imposition of the sentence, petition the court for entry of a restitution order.

(Emphasis added.) Accordingly, the existence of a court order of restitution in a case where CVCP benefits were paid to the victim precludes the Department's authorization to enforce a debt independently, using the procedures of RCW 7.68.120(2). In the present case, because the trial court ordered restitution on July 28, 2016, RCW 7.68.120(1) imposed upon the Department no obligation to follow the procedural requirements of RCW 7.68.120(2).

**5. No Constitutional Due Process Violation Occurred, Because The Sixth Amendment Right To Confrontation Does Not Extend To Restitution Hearings.**

The appellant's alleged violation of Constitutional due process fails, because the Sixth Amendment right to confrontation does not extend to restitution hearings. In *State v. Abd-Rahmaan*, the Washington Supreme Court found the confrontation clause of

the Sixth Amendment applies to criminal prosecutions and not to postconviction proceedings. See 154 Wn.2d 280, 288 (2005). *Abd-Rahmaan* acknowledged a limited due process right in parole revocation hearings, due to the potential deprivation of a conditional liberty. See *id.* at 288-289. “However, restitution involves no potential loss of liberty, and due process is ‘substantially relaxed’ at a restitution hearing.” *State v. Newcomb*, No. 43578-1-II, 2014 Wash. App. LEXIS 1381, at \*9-10 (Div. 2 2014) (unpublished) (citing *State v. Fambrough*, 66 Wn. App. 223, 226-27, (Div. 1 1992)). 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). However, “the Rules of Evidence do not strictly apply at such hearings . . . .” *State v. Strauss*, 119 Wn.2d 401, 418 (1992).

In the present case, the appellant’s diminished due process rights were satisfied, because he had ample opportunity to refute the CVCP declaration. The State submitted that declaration to the appellant as part of the State’s motion to amend restitution, filed on August 02, 2017. CP at 76. At the August 31 hearing, the appellant presented no evidence in opposition to restitution being set

according to the CVCP declaration and ledger. See RP, Aug. 31, 2017. The trial court's oral ruling reflected its determination that the declaration and ledger were reliable. See RP, Aug. 31, 2017, at 21. See, *supra*, at 15.

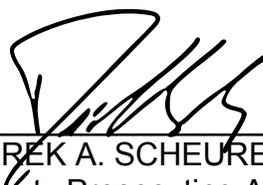
Because the appellant had abundant opportunity to present evidence refuting the CVCP declaration, and because the trial court deemed the CVCP documents reliable at the restitution hearing, the appellant's due process rights were satisfied.

**D. CONCLUSION**

This Court should uphold the trial court's order of restitution, because the trial court satisfied the requirements of RCW 9.94A.753 and 7.68.120 and upheld the appellant's limited due process rights when basing restitution upon the CVCP declaration.

RESPECTFULLY SUBMITTED,  
this 26th day of December, 2018.

By:



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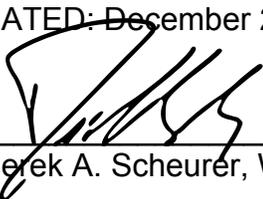
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**E. CERTIFICATE OF SERVICE**

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