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Court of Appeals
Division II
State of Washington
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NO. 53674-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TAMI REEVES,

Appellant.

RESPONDENT'S BRIEF

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I. RESPONSE TO ASSIGNMENT OF ERROR

1. Defense counsel was not ineffective at sentencing because the trial court had the authority to impose restitution to be paid to the Task Force.

II. STATEMENT OF THE CASE

Tami Reeves was found guilty by a jury of one count of delivery of a controlled substance. CP 23. The delivery was the result of a controlled buy conducted with the Cowlitz-Wahkiakum Narcotics Task Force (CWNTF) and a confidential informant. CP 3, RP 5. Reeves sold the informant approximately 1.4 grams of methamphetamine for \$40. RP 4. The money for the controlled buy was provided by the CWNTF.

At sentencing, the State requested that Reeves be ordered to pay back the \$40 as restitution to the CWNTF. RP 4. Defense counsel agreed to that amount and the sentencing court imposed it as part of Reeves's sentence. RP 7. Reeves now timely appeals the imposition of the restitution order.

III. ARGUMENT

A. Ordering restitution to be paid to the CWNTF was appropriate because a law enforcement agency can be a "victim" for purposes of restitution.

A sentencing court's authority to order restitution is derived from statute. *State v. Cawyer*, 182 Wn. App. 610, 616, 330 P.3d 219 (2014). In

Washington, RCW 9.94A.753 governs restitution. That statute states that “[r]estitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property.” RCW 9.94A.753(5). The amount of restitution to be ordered must be based on easily ascertainable damages for injury to or loss of property. RCW 9.9A.753(3).

The legislative intent behind these statutory provisions is that they should be interpreted broadly so as to allow restitution. *State v. Davison*, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991), *citing State v. Barr*, 99 Wn.2d 75, 78, 658 P.2d 1247 (1983). Additionally, while one purpose of restitution is to compensate the victim, that is not its main purpose. Commentators and Courts have found that restitution increases a defendant’s self-awareness and sense of control over his own life and may reduce recidivism. *Barr*, 99 Wn.2d at 79. Restitution additionally furthers the SRA’s goals of providing just punishment, giving a defendant the chance to improve himself, and protecting the public by making crime unprofitable. RCW 9.94A.010.

Restitution may only be ordered if there is a causal connection between the defendant’s crime and the victim’s injuries. *Cawyer*, 182 Wn. App. at 616; *State v. Vinyard*, 50 Wn. App. 888, 893, 751 P.2d 339 (1988). The State must prove by a preponderance of the evidence that, but

for the offense, the loss of property would not have occurred. *Id.*, citing *State v. Tobin*, 161 Wn.2d 517, 519, 166 P.3d 1167 (2007). Additionally, restitution may only be awarded to victims. *State v. Kinneman*, 122 Wn. App. 850, 866, 95 P.3d 1277 (2004). Washington law defines a victim as “any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charges.” RCW 9.94A.030(55).

The State can be a “victim” for purposes of restitution, as can individual law enforcement agencies. For example, in *State v. Forbes*, an undercover police officer played in several “after hours” card games to establish that the proprietor of the games was engaged in illegal gambling. *State v. Forbes*, 43 Wn. App. 793, 794, 719 P.2d 941, (1986). The undercover officer incurred losses while playing and, post-conviction, the sentencing court ordered the defendants to pay restitution to cover the losses. *Id.* at 795. Division I of the Washington Court of Appeals upheld the restitution order, finding that the law enforcement agency suffered a loss as a result of the crime and was therefore entitled to restitution. *Id.* at 800. *See also Davison*, 116 Wn.2d 917 (upholding restitution payments to City of Seattle for wages paid while firefighter was on leave after being assaulted); *Tobin*, 161 Wn.2d at 519 (upholding restitution payment to State because the crimes directly victimized the State).

This case is similar to *Forbes*. Both there and here, law enforcement funds were used to engage in the criminal activity the State was investigating and prosecuting. Whether gambling funds or funds with which to buy controlled substances, both are clearly the property of the agency involved and in both cases, the property was lost because of the crimes committed by the defendants. As in *Forbes*, this Court should find that the CWNTF lost property due to Reeves' crime and can therefore be reimbursed with restitution. Upholding the restitution order in this case will also further the goals of the SRA and comport with case law of numerous other states including Alaska, Colorado, Oregon, Iowa, Nebraska, Nevada, New Mexico, North Dakota and Utah.

The Alaska Court of Appeals upheld a restitution order for money used in a controlled buy operation, finding that the trial court was authorized to order restitution to the victim or other person injured by the offense. *Haynes v. State*, 15 P.3d 1088 (Alaska Ct. App. 2001). The Oregon Court of Appeals also held that the police department that supplied the funds for a controlled buy was a victim and entitled to restitution, citing the statute that defined victim as "any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities." *State v. Pettit*, 73 Or. App. 510, 698 P.2d 1049 (1985). The Colorado Court of Appeals similarly held that a

governmental agency qualified as a victim and was entitled to restitution of the drug buy money. *People v. Cera*, 673 P.2d 807 (Colo. Ct. App. 1983). While these State Court rulings are not binding authority, it is persuasive that these states have similar restitution statutes and have concluded that restitution for controlled buy money is valid.

B. Trial counsel was not ineffective because an objection to the restitution order would not have been granted.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption of effectiveness that a defendant must overcome. *Strickland*, 466 U.S. at 689.

The Washington Court of Appeals has devised the following test to determine whether counsel was ineffective: "After considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302 (1978), citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Like the *Strickland* test, this test requires the defendant to prove that he was denied effective representation, given the entire record, and that he suffered prejudice as a result. *Id.* at 263. The

first prong of this two-part test requires the defendant to show that his lawyer “failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986 (1989). The second prong requires the defendant to show “there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *Id.* Therefore, even if a defendant can show that counsel was deficient, he also must show that the deficiency caused prejudice.

To establish ineffective assistance of counsel based on a failure to object, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998), citing *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996).

Here, Reeves cannot show that an objection to the restitution order would have been sustained. Though there appears to be no Washington case law on this issue, ordering restitution in this case is appropriate under the statute since the CWNTF lost money as a result of Reeves’ crime. Because the State or law enforcement can be a victim, and because

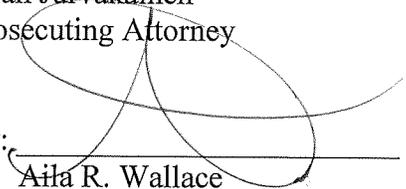
ordering restitution furthers the goals of the SRA, the restitution order was appropriate and any objection to its imposition would not have been granted.

IV. CONCLUSION

The restitution order in this case should be affirmed as the State is a “victim” for purposes of restitution and trial counsel was not ineffective in failing to object to the order.

Respectfully submitted this 17 day of January, 2020.

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By: 
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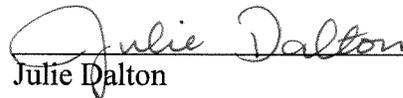
CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that opposing counsel was served RESPONDENT'S BRIEF electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January 17, 2020.


Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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