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MAY 30, 2012

Court of Appeals
Division III
State of Washington

30240-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ERIC C. WILLIAMS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF OKANOGAN COUNTY

APPELLANT'S BRIEF

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INDEX

A. ASSIGNMENTS OF ERROR 1

B. ISSUES 1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT 5

1. THE TRIAL COURT ERRED IN ORDERING RESTITUTION FOR MR. WILLIAMS'S HIT AND RUN CONVICTION.....5

2. THE TRIAL COURT ERRED IN IMPOSING 18 MONTHS OF COMMUNITY CUSTODY FOR MR. WILLIAMS'S VEHICULAR ASSAULT CONVICTION.....8

E. CONCLUSION.....10

TABLE OF AUTHORITIES

WASHINGTON CASES

CITY OF WALLA WALLA V. ASHBY, 90 Wn. App. 560,
952 P.2d 201 (1998), *abrogated on other grounds by*
State v. Enstone, 137 Wn.2d 675,
974 P.2d 828 (1999)..... 6

STATE V. ARMENDARIZ, 160 Wn.2d 106,
156 P.3d 201 (2007)..... 8

STATE V. EDELMAN, 97 Wn. App. 161,
984 P.2d 421 (1999)..... 5

STATE V. FORD, 137 Wn.2d 472,
973 P.2d 452 (1999)..... 8

STATE V. GONZALEZ, 168 Wn.2d 256,
226 P.3d 131 (2010)..... 5

STATE V. GRIFFITH, 164 Wn.2d 960,
195 P.3d 506 (2008)..... 6, 7

STATE V. JOHNSON, 96 Wn. App. 813,
981 P.2d 25 (1999)..... 5

STATE V. KISOR, 82 Wn. App. 175,
916 P.2d 978 (1996), *overruled on other grounds by*
Enstone, 137 Wn.2d at 681-82..... 7

STATE V. MISZAK, 69 Wn. App. 426,
848 P.3d 1329 (1993)..... 6

STATE V. ROGGENKAMP, 115 Wn. App. 927,
64 P.3d 92 (2003), *aff'd*,
153 Wn.2d 614, 106 P.3d 196 (2005)..... 9

STATUTES

FORMER RCW 9.94A.030(49) 8

FORMER RCW 9.94A.030(50)(xiii) 10

RCW 9.94A.030(54)(xiii) 10

RCW 9.94A.345 9

RCW 9.94A.505(1) 9

RCW 9.94A.701(2) 9, 10

RCW 9.94A.753 5

RCW 9.94A.753(3) 7

RCW 9.94A.753(5) 6

RCW 46.52.020(1) 6

RCW 46.52.020(3) 6, 7

RCW 46.61.522(1) 9

RCW 46.61.522(1)(c) 2

A. ASSIGNMENTS OF ERROR

1. The trial court erred in ordering restitution for Mr. Williams's hit and run conviction.

2. The trial court erred in imposing 18 months of community custody for Mr. Williams's vehicular assault conviction.

B. ISSUES

1. Simone Williams lent her pick-up truck to Mr. Williams. The trial court awarded $580.00 in restitution to Ms. Williams for impound fees, towing, and having a key made for her truck, ruling that these expenses were caused by Mr. Williams's crime of hit and run. Did the trial court err in awarding restitution to Ms. Williams, as she was not a victim of the crime of hit and run, and there was no causal connection between Mr. Williams's crime of hit and run and the losses incurred by Ms. Williams?

2. Mr. Williams was convicted of vehicular assault, by operating or driving a vehicle with disregard for the safety of others and, by doing so, causing substantial bodily harm to another. The applicable statutes did not authorize 18 months of community custody for this crime. Did the trial

court err in imposing 18 months of community custody for Mr. Williams's vehicular assault conviction?

C. STATEMENT OF THE CASE

The State charged Eric C. Williams with one count of vehicular assault, one count of hit and run injury accident, and one count of driving while license suspended in the third degree. (CP 52-54). The alleged victim was named as John Danielson. (CP 52-53). The vehicular assault charge alleged that Mr. Williams "did operate or drive a vehicle with disregard for the safety of others and did cause substantial bodily harm to another," in violation of RCW 46.61.522(1)(c). (CP 52).

A witness, Vincent Soderberg, testified that on August 10, 2010, he saw a man get hit by a truck while the man was crossing the street. (RP[1] 67-70). He said the truck was there for a few seconds, and then drove away into a parking area. (RP 70, 96-97). Mr. Soderberg told the court the driver approached the man who had been hit, then walked away, without making verbal contact. (RP 72-73). He testified that the driver of the truck was Mr. Williams. (RP 71-72, 111). Mr. Soderberg told the

[1] Except where the date is noted, citations to the RP refer to the first four transcript volumes, which are consecutively paginated.

court he knew of Mr. Williams in high school, and that he identified Mr. Williams as the driver at the scene of the collision. (RP 66, 103, 111).

Mr. Danielson testified that on August 10, 2010, he was struck by a blue pick-up truck while he was crossing the street. (RP 173-175). He told the court he sustained a fractured vertebra as a result of the collision. (RP 176-177).

Omak Police Officer Christopher Busching testified that a blue pick-up truck, registered to Simone Williams, was identified by witnesses as being involved in the collision. (RP 54-55, 59). Witnesses said the truck involved in the collision was parked in a Wells Fargo parking lot, away from the scene of the collision. (RP 55, 116, 141-142).

Simone Williams testified that she owned a blue Ford pick-up truck, and she had lent the truck to her cousin, Mr. Williams, in August 2010. (RP 193). She told the court she had not received her truck back on August 10, 2010. (RP 194-195). Ms. Williams said she was contacted around August 11, 2010 by an Omak police officer about her truck, and that she learned where her truck was from the police. (RP 194, 197).

The trial court instructed the jury that, in order to find Mr. Williams guilty of vehicular assault, it had to find:

> (1) That on or about August 10, 2010 the defendant operated or drove a vehicle;
> (2) That the defendant's vehicle operation or driving proximately caused substantial bodily harm to another person;
> (3) That at the time the defendant operated or drove the vehicle with a disregard for the safety of others; and
> (4) That this act occurred in the State of Washington.

(CP 37).

The jury found Mr. Williams guilty as charged. (CP 10-21, 23; RP 371).

The trial court imposed 18 months' community custody on the vehicular assault charge. (CP 15-16; RP (Sept. 12, 2011) 9, 18-19).

The State requested $580.00 in restitution to Ms. Williams, "which included impound fees, towing of her vehicle because she didn't have the key back, and a key being made for her vehicle[.]" (RP (Sept. 12, 2011) 9-10). The State told the court:

> [Mr. Williams] left the vehicle, apparently took - - obviously took the keys with him or with someone else (sic), the vehicle was left, it had to be - - or, not had to be, it was impounded by law enforcement, so Ms. Williams incurred an impound fee, she incurred a fee to tow it out of there so she didn't keep incurring those fees, and then she had to have a key made because she didn't receive the key back for quite a bit longer after that.

(RP (Sept. 12, 2011) 13).

Mr. Williams objected, not to the amount, but to the legal basis for restitution. (RP (Sept. 12, 2011) 11-12, 18). The trial court imposed the requested $580.00 restitution to Ms. Williams, ruling that Ms. Williams's injuries were caused by Mr. Williams's crime of hit and run. (CP 13; RP (Sept. 12, 2011) 18).

Mr. Williams appealed. (CP 6-7).

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ORDERING RESTITUTION FOR MR. WILLIAMS'S HIT AND RUN CONVICTION.

"A court's authority to order restitution is derived solely from statute." *State v. Gonzalez*, 168 Wn.2d 256, 261, 226 P.3d 131 (2010); *see also* RCW 9.94A.753 (authorizing restitution for felony offenses). Issues involving interpretation of the restitution statutes are reviewed *de novo*. *State v. Edelman*, 97 Wn. App. 161, 165, 984 P.2d 421 (1999); *see also State v. Johnson*, 96 Wn. App. 813, 816, 981 P.2d 25 (1999) (proper application of a statute is a question of law).

A trial court shall order restitution "whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property . . . unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets

forth such circumstances in the record." RCW 9.94A.753(5). A trial court's statutory authority to order restitution is limited to those losses causally connected to the crimes charged. *State v. Griffith*, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008). "Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss." *Id*. at 966.

"Restitution cannot be imposed based on the defendant's 'general scheme' or acts 'connected with' the crime charged, when those acts are not part of the charge." *State v. Miszak*, 69 Wn. App. 426, 428, 848 P.3d 1329 (1993).

In cases of hit and run, restitution may not be awarded for injuries arising from the accident. *City of Walla Walla v. Ashby*, 90 Wn. App. 560, 564, 952 P.2d 201 (1998), *abrogated on other grounds by State v. Enstone*, 137 Wn.2d 675, 681-82, 974 P.2d 828 (1999). The crime is leaving the accident scene, not the accident itself. *Id*. at 564-65. The crime of hit and run, as charged here, occurs when a driver involved in an injury accident fails to return to and remain at the scene of the accident until responsibilities, as set forth by statute, are completed. *See* RCW 46.52.020(1), (3).

There was not a causal connection between Mr. Williams's leaving the scene of the collision and the expenses incurred by Ms. Williams to retrieve her pick-up truck and obtain a new key. It cannot be said that if Mr. Williams had waited at the scene of the collision, and completed the responsibilities set forth by statute, he would have returned Ms. Williams's truck and its keys, instead of abandoning it in the Wells Fargo parking lot. *See Griffith*, 164 Wn.2d at 966 (defining when losses are casually connected to a charged crime); RCW 46.52.020(3) (setting forth the responsibilities of the driver involved in a hit and run injury-accident). Ms. Williams lent her truck to Mr. Williams, and whether she received it back, with a key, was not related to Mr. Williams's failure to stay at the collision scene, provide information, and render assistance. (RP 193). Mr. Williams's abandoning and failing to return Ms. Williams's truck to her, with a key, is not connected to his crime of hit and run.

In order to receive restitution, a person must be a victim of the charged crime. *State v. Kisor*, 82 Wn. App. 175, 183, 916 P.2d 978 (1996), *overruled on other grounds by Enstone*, 137 Wn.2d at 681-82; *see also* RCW 9.94A.753(3) (stating that "[t]he amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime."). A "victim" is defined as "any person who has sustained emotional, psychological, physical, or financial injury to

person or property *as a direct result* of the crime charged." Former RCW 9.94A.030(49) (2010) (emphasis added). Ms. Williams was not a victim of the charged crime of hit and run. She has not suffered any injury to her person or her property as a direct result of the crime of hit and run.

Because there was no causal connection between Mr. Williams's crime of hit and run and the losses incurred by Ms. Williams, and the fact that Ms. Williams was not a victim of the crime, the trial court lacked statutory authority to order restitution to Ms. Williams. The order of restitution should be reversed.

2. THE TRIAL COURT ERRED IN IMPOSING 18 MONTHS OF COMMUNITY CUSTODY FOR MR. WILLIAMS'S VEHICULAR ASSAULT CONVICTION.

"In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Whether the trial court imposed the correct term of community custody is a question of statutory interpretation, subject to *de novo* review. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

When a person is convicted of a felony, the trial court must impose a sentence as provided by the Sentencing Reform Act (SRA), RCW chapter 9.94A. RCW 9.94A.505(1). A sentence imposed under the SRA "shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345.

There are three ways to commit vehicular assault. *State v. Roggenkamp*, 115 Wn. App. 927, 935, 64 P.3d 92 (2003), *aff'd*, 153 Wn.2d 614, 106 P.3d 196 (2005); *see also* RCW 46.61.522(1) (setting forth the three ways). A person commits vehicular assault by operating or driving a vehicle (1) "[i]n a reckless manner and causes substantial bodily harm to another;" (2) [w]hile under the influence of intoxicating liquor or any drug . . . and causes substantial bodily harm to another;" or (3) "[w]ith disregard for the safety of others and causes substantial bodily harm to another." RCW 46.61.522(1). Mr. Williams was convicted of vehicular assault under the third alternative. (CP 10-21, 37, 52; RP 371).

Under the SRA, the trial court must sentence an offender to 18 months of community custody "when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense." RCW 9.94A.701(2). Under the law in effect at

the time Mr. Williams's crime was committed[2], vehicular assault was only classified as a "violent offense" when committed in the following two ways: "[1] by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug [2] or by the operation or driving of a vehicle in a reckless manner." Former RCW 9.94A.030(50)(xiii) (2010). It did not include vehicular assault under the third alternative: by operating or driving a vehicle with disregard for the safety of others, and by doing so, causing substantial bodily harm to another. Former RCW 9.94A.030(50)(xiii) (2010). Because Mr. Williams was convicted under this third alternative, he was not sentenced for a violent offense. Therefore, the statutory provision authorizing 18 months of community custody did not apply to Mr. Williams. *See* RCW 9.94A.701(2). The case should be remanded for resentencing.

E. CONCLUSION

The trial court lacked statutory authority to order restitution to Ms. Williams. Accordingly, this court should reverse the award of restitution to Ms. Williams.

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[2] The current law is the same, but because of other changes to the statute, the subsection has been renumbered. *See* RCW 9.94A.030(54)(xiii).

This court should also remand this case for resentencing, because of the incorrect community custody term.

Dated this 30th day of May, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 30240-7-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
ERIC C. WILLIAMS,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on May 30, 2012, I mailed copies of Appellant's Brief in this matter to:

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