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Court of Appeals
Division III
State of Washington

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

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| STATE OF WASHINGTON, |) | NO. 30440-0-III |
| Plaintiff/Respondent, |) | |
| |) | |
| vs. |) | |
| |) | |
| JUAN APARICIO MARTINEZ, |) | |
| Defendant/Appellant. |) | |

RESPONDENT'S BRIEF

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INTRODUCTION

Respondent, State of Washington, asks this court to let stand the order of restitution arising from defendant's guilty plea to residential burglary, theft in the first degree, and theft of a firearm.

QUESTIONS PRESENTED

- I. Whether prior to accepting a guilty plea the court must verbally advise defendant of the possibility of restitution in addition to the written advisement contained in the statement on plea of guilty?**

Answer: No. Knowledge of the direct consequences of a guilty plea can be satisfied either by the plea documents or by clear and convincing extrinsic evidence. See In re Stoudmire, 145 Wash. 2d 258, 266-67, 36 P.3d 1005, 1009-10 (2001).

- II. Whether the finding that defendant has the current or future ability to pay legal financial obligations including restitution must be stricken from the judgment and sentence because such finding is not supported by the record?**

Answer: Yes. The state concedes that no record of the defendant's current or future ability was addressed by the court prior to ordering the defendant to begin immediate payment towards his legal financial obligations. The payment requirement should be stricken until such time as the court makes such a determination. See State v. Bertand, 165 Wash.App. 393, 403, 267 P.3d 511 (2011).

STATEMENT OF THE CASE

On February 10, 2011, the Herrejon family returned home from an out of town trip to find their Bridgeport home had been entered and trashed, and that rifles, jewelry, computers, televisions and other

valuable items had been stolen. RP 39 – 41. An investigation revealed that defendant and several other young men were responsible for the burglary and theft.

On February 14, 2011, defendant was charged by Information with burglary in the first degree, theft in the first degree, and three counts of theft of a firearm. CP 1-3. An amended Information was filed on July 18, 2011, correcting the commission dates of the original offenses and adding one count of trafficking in stolen property first degree. CP 4-8.

On September 22, 2011, this matter proceeded to jury trial, but mid-trial, after hearing the testimony of the victims, which included the value of the stolen items and the extent of the damage to the home, defendant entered a guilty plea to the amended charge of residential burglary, theft in the first degree, and one count of theft of a firearm. RP 107-08; CP 11-13. The trafficking charge and two counts of theft of a firearm were dismissed as part of the plea bargain. RP 104.

Prior to accepting the guilty plea the court did not verbally advise the defendant of the possibility of restitution. However, in paragraph 6(e) of the “Statement of Defendant on Plea of Guilty” the defendant acknowledged he understood that the court will order restitution if the crime resulted in damage to or loss of property:

In Considering the Consequences of my Guilty Plea, I Understand That:

...

(e). In addition to sentencing me to confinement, the judge will order me to pay \$500.00 as a victim's compensation fund assessment. *If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate.* The amount of restitution may be up to double my gain or double the victim's loss. The judge may also order that I pay a fine, court costs, attorney fees and the costs of incarceration.

CP, Paragraph 6(e).

Defendant was sentenced on October 24, 2011, to 22 months in custody along with the imposition of fines and fees. RP 138. The issue of restitution was raised at the sentencing hearing but the issue was tabled to a later date so defendant's counsel could review the court's ruling from a co-defendant's restitution hearing. RP 135, ll. 13 - 16. Defendant verbally waived his presence at the restitution hearing. RP 139, l. 16.

A restitution hearing was previously held in a co-defendant's case on October 10, 2011. RP 111. The parties in that case agreed to the numbers being requested by the Herrejons, but the co-defendant objected to restitution for the physical damages caused by the burglary because he claimed that he had not been provided those specific figures prior to pleading guilty. RP 128. The court took the matter under advisement and issued a written ruling in favor of the state. RP 131 l. 19. Although

the court's Decision on Restitution dated 10/12/11 in the co-defendant's case was designated in the defendant's statement of arrangements, that document was not made part of the designation of record in this case. The court's ruling in favor of the state is, however, mentioned by defendant's attorney in the restitution order presentment hearing at RP 141 ll.9-10. At the sentencing hearing in this case, the court reflected on his ruling in the co-defendant's case and clarified that "[t]he issue on restitution was whether or not the malicious mischief was included in the crime of burglary." RP 136, ll. 5-7.

On November 21, 2011, at the hearing for presentment of the restitution order, defendant's counsel acknowledged the court's ruling in the co-defendant's restitution hearing and agreed to entry of the restitution order while preserving the right to appeal. RP 141. At no time during the sentencing hearing or at the hearing to enter the order of restitution did the defendant or his attorney raise an objection to restitution being imposed as being outside the scope of the plea bargain.

ARGUMENT

I. Restitution was properly imposed.

Defendant is not now contending that the victims' damages are not the result of the crimes for which he was convicted. Instead, relying on State v. Tracy, 73 Wn.App. 386, 388, 869 P.3d 425 (1994), defendant

contends he should not have to pay restitution because he was not “advised” by the court prior to entering his guilty plea that restitution was a possibility.

The authority to impose restitution is statutory. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). “Under the SRA, the sentencing court is required to order restitution “whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property”.” State v. Miszak, 69 Wash. App. 426, 428, 848 P.2d 1329, 1330 (1993). In interpreting the restitution statutes, we must “recognize that they were intended to require the defendant to face the consequences of his or her criminal conduct.” State v. Tobin, 161 Wn.2d 517, 524, 166 P.2d 1167 (2007).

“The payment of restitution is a direct consequence of entering a plea.” State v. Tracy, 73 Wash. App. 386, 388, 869 P.2d 425, 426 (1994). “Therefore, a ‘sentencing court may not impose restitution upon a defendant who pleads guilty, unless defendant is advised of that possibility prior to entering his plea.”” Id., citing State v. Cameron, 30 Wash.App. 229, 233, 633 P.2d 901, review denied, 96 Wash.2d 1023 (1981).

“Knowledge of the direct consequences of a guilty plea can be satisfied either by the plea documents or by clear and convincing

extrinsic evidence.” In re Stoudmire, 145 Wash. 2d 258, 266, 36 P.3d 1005, 1009-10 (2001)

The statutory authority for restitution for this case under the SRA at RCW 9.94A.753(5) provides:

Restitution 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 or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

In *Tracy* the defendant’s sentencing for his misdemeanor level offense conviction was governed by RCW 9.92.060(2)(b), which provides in relevant part:

In addition, the superior court may require the convicted person to make such monetary payments, on such terms as the superior court deems appropriate under the circumstances, as are necessary: ... (b) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question or when the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement... .

Similarly in State v. Cameron, *supra*, the issue of restitution in that case was governed by RCW 9A.20.030 which provides, in part:

If a person has gained money or property or caused a victim to lose money or property through the commission of a crime, upon conviction thereof or when the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement, the court, in lieu of imposing the fine authorized for the offense under RCW 9A.20.020, may order the defendant to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain or victim's loss from the commission of a crime. Such amount may be used to provide restitution to the victim at the order of the court.

In *Cameron* the defendant plead guilty to first degree theft, but, as the court noted, the defendant was not advised of the possibility of restitution in either his statement on plea of guilty or by the court on the plea hearing record. State v. Cameron, 30 Wash.App at 232-33. It appeared that it was the complete absence of any advisement of restitution that concerned the *Cameron* court.

Tracy deemed the standard advisement in the statement on plea of guilty alone insufficient under the circumstances to show that defendant had been "advised" of the possibility of restitution. *Tracy* is distinguishable from *Cameron* in that *Tracy* involved the charge being amended to something other than the original charge, and, as the court noted, there was no record of an agreement by the defendant to pay restitution. The *Tracy* ruling cited with its own emphasis that portion of RCW 9.92.060 dealing with the offender pleading "guilty to a lesser

offense or fewer offenses *and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.*" State v. Tracy, 73 Wash.App. at 388. Since *Terry* involved an amendment of the charge to one where there was no victim, the statute required that there must also be an agreement by the defendant before restitution could be imposed. So, without a specific agreement by the defendant to restitution evidenced either in writing or on the plea hearing record, the standard advisement in the statement on plea of guilty was not sufficient evidence of such an agreement – especially given that the defendant expressly objected to the imposition of restitution and the prosecutor admitted that restitution was not part of the agreement.

The case at hand, unlike in *Tracy*, is not an instance where the defendant was ordered to pay restitution to victims of “offenses which are not prosecuted pursuant to a plea agreement.” Although it may be said that defendant plead guilty to the “lesser offense” of residential burglary instead of burglary first degree, the lesser charge is still about the burglary of the Herrejon home minus the additional element of being armed with a firearm during the burglary. And when we speak of burglary, “[t]he legislature has divided a single offense, burglary, into

three degrees: first, residential, and second.” State v. McDonald, 123 Wash.App. 85, 89, 96 P.3d 468 (2004).

And while it can also be said that defendant plead guilty to “fewer offenses” because three charges were dismissed – two counts of theft of a firearm and one count of trafficking, defendant still plead guilty to the original charge of theft first degree involving the Herrejons’ property, and one count of theft of a firearm, again involving the Herrejons’ firearm.

When properly construing the plain and unambiguous language of a statute, the full sentence must be observed. State v. J.P., 149 Wash.3d 444, 450, 69 P.3d 318 (2003). The portion of RCW 9.94A.753(5) that speaks to a “lesser offense and fewer offenses” is a continuous and uninterrupted part of the sentence about a “victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.” See In re Smith, 139 Wash. 2d 199, 204, 986 P.2d 131, 133 (1999)(The “last antecedent” rule of statutory construction “provides that, unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent.”).

The above quoted portion of RCW 9.94A.753(5) by its plain and unambiguous language does not apply to the facts at hand, and so the standard advisement in the pleading documents should suffice as

adequate notice. And, because “[k]nowledge of the direct consequences of a guilty plea can be satisfied either by the plea documents or by clear and convincing extrinsic evidence,” this court can look also to the other evidence on the record to find that defendant was advised of the state’s intent to seek restitution. The first piece of extrinsic evidence is the restitution report filed with the court and supplied to defendant’s attorney on August 11, 2011. CP 8-10.

The second piece of extrinsic evidence is supplied at the sentencing hearing where when the issue of restitution is raised the comments of both the prosecutor and defense counsel clearly reflect that restitution was an integral and ongoing discussion between the parties. RP 134-35. See also RP 139 where defense counsel states to his client, “There’s going to be a restitution hearing on November 9th. You will be gone, but I can handle it, if you’ll permit me to do that.” The client then consents to his attorney handling the restitution hearing in his absence. At no time, unlike in *Tracy*, did the defendant or his attorney question the imposition of restitution as being outside the scope of the plea agreement, nor did the prosecutor tell the court that restitution was not part of the agreement.

To accept the interpretation of RCW 9.94A.573(5) as suggested by defendant’s overly broad construction of *Tracy* where the defendant

was essentially convicted as charged to burglary and theft would result in an unjustified windfall to defendant - an injustice not only to the Herrejon family, but also to the co-defendants who share in the restitution obligation.

II. The finding that defendant has the current and future ability to pay legal financial obligations must be stricken because it is not supported by the record.

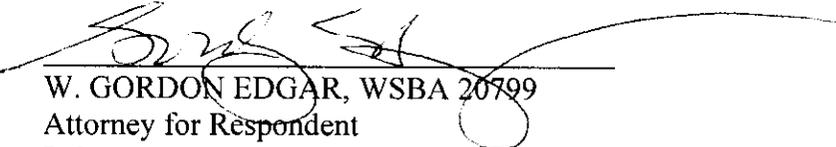
The state agrees the finding in paragraph 2.5 of the judgment and sentence that defendant has the current and future ability to pay legal financial obligations was not addressed by the court or the parties. The state concedes to defendant's contention that this finding must be stricken until such time as the court makes a determination of his ability to pay. See State v. Bertrand, 165 Wash.App. 393, 267 P.3d 511 (2011); and RCW 9.94A.760; RCW 9.94A.753; RCW 10.01.160; and RCW 70.48.130.

CONCLUSION

The order of restitution should be upheld because the pleading documents and other extrinsic evidence show that prior to pleading guilty the defendant was advised that restitution would be sought by the state and, if appropriate, ordered by the court.

The judgment and sentence should be amended, however, to preclude collection of legal financial obligations until such time as the court makes a determination of the defendant's current and future ability to pay.

Respectfully submitted this 17th day of August, 2012.



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