

FILED

Feb 09, 2015

Court of Appeals
Division III
State of Washington

NO. 32782-5

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

ABEL PEREZ MORALES, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR FRANKLIN COUNTY

NO. 13-1-50543-5

BRIEF OF APPELLANT

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- State v. Schiffer, 51 Wash.App. 268, 273, 753 P.2d 549 (1988).
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STATEMENT OF THE CASE

Mr. Perez Morales is appealing the validity of the restitution order entered by the Honorable Cameron Mitchell on the 2nd day of September 2014. According to the Information, Mr. Perez Morales was charged with Theft in the Second Degree based on the Prosecutor's statement that, "said Abel Perez-Morales in the County of Franklin, State of Washington, on or about November 18, 2013, then and there, did wrongfully obtain, batteries, property of another belonging to Bert Gledhil of a value exceeding \$750, with intent to deprive Bert Gledhill of such property." (CP 29 - 30). On the 11th day of March, 2014, Mr. Perez Morales pled guilty to Theft in the Second Degree. (CP 19 - 28). In the Judgment and Sentence, Mr. Perez Morales -- knowing that he had an immigration hold and would be deported -- waived his right to be present at any restitution hearing so that a warrant would not be issued for his arrest if he failed to attend a subsequent restitution hearing. (CP 6 -18).

On the 28th of May, 2014, Mr. Perez Morales' attorney submitted a Notice of Intent to Withdraw upon the Court and the Prosecuting Attorney. (CP 5). On the 12th day of August, 2014, the Prosecuting Attorney submitted a request for a restitution hearing to the court and to Ms. Bennett and requested that the hearing be held seven days later on August 19, 2014 – five and a half months after Mr. Perez Morales was sentenced on this case. (CP 4).

Ms. Bennett was not attorney of record for Mr. Perez Morales at that time and the Prosecutor's Office made no attempt to provide notice to Mr. Perez Morales of this hearing. On the 2nd day of September, 2014, a restitution hearing was held in which the State made no attempt to produce any witness testimony, the State argued facts that were not properly admitted as evidence, and a request for a restitution order in excess of \$9,000.00 was made.

Based on the lack of notice provided to Mr. Perez Morales and on the lack of good evidence

supporting the order, Mr. Perez Morales respectfully requests that the order be vacated.

ISSUES

1. The State of Washington did not provide proper notice of the restitution hearing to the Appellant, a violation of his Due Process Rights, therefore the restitution order should be vacated.
2. The evidence presented at the restitution hearing was not properly admitted as evidence and was no causal connection to the crime proved sufficient to support the restitution order.

ARGUMENT

1. The State of Washington did not provide proper notice of the restitution hearing to the Appellant, a violation of his Due Process Rights, therefore the restitution order should be vacated.

The State of Washington made no attempt give any notice to Mr. Perez Morales of the restitution hearing they requested approximately five and a half months after he was sentenced on this case.¹ Instead, the Prosecutor provided notice to Ms. Bennett on August 12 of a hearing to be held on August 19; approximately three months after Ms. Bennett provided a Notice of

¹It is a common practice of the Franklin County Prosecutor's Office to send notice of a restitution hearing 5½ months after a defendant is sentenced (the deadline for entering a restitution order is 6 months).

Withdrawal to the Court and to the Prosecutor. (CP 5). At the restitution hearing, the Prosecuting Attorney subsequently objected to Ms. Bennett's standing to be heard at the restitution hearing based on the fact she submitted a Notice of Withdrawal three months prior. (RP page 4 lines 15 -16).

The original hearing date of August 12 was continued in open court two weeks to September 9th, which according to the Prosecuting Attorney, was "the 180-day deadline for this matter." (RP Pg. 3 line 6). When Ms. Bennett appeared at the hearing on September 2, 2014, the Prosecuting Attorney objected to Ms. Bennett's standing *for the first time* based on the Notice of Withdrawal which was filed three months prior. (RP page 4 lines 15 -16). (MR. CHOW: "I'll object to Ms. Bennett's presence just for the record.") The Prosecuting Attorney further stated at the restitution hearing, "It's my understanding [Mr. Perez Morales] was deported." (RP page 4 lines 3 - 4).

The Prosecuting Attorney presented the State's Exhibit 1. Ms. Bennett objected to entry

of the exhibit for several reasons including the lack of any witness present to authenticate the document. However, the court did not make a ruling on any of her objections based on the Court's finding of fact that Ms. Bennett did not have standing as Mr. Perez Morales' attorney as a result of the Notice of Withdrawal. (RP. Page 9, lines 19 - 24). ("I guess I am concerned one, I don't know that Ms. Bennett has standing to object to the admission of the exhibit. The court is going to admit the exhibit.")

The Court and the Prosecuting Attorney both alluded to the fact that Mr. Perez Morales' choice to sign a waiver of his right to *be present* at the restitution hearing constituted a waiver of his right to have notice of the hearing, to object to the amount of the restitution being requested, to the entry of the restitution order, and to any and all of his other rights with regard to the restitution hearing.

Ms. Bennett: "I would have to make a motion to dismiss the hearing for lack of notice."

THE COURT: "He waived notice, though."

MS. BENNETT: "He waived his right to be present at the hearing."

(RP page 3 lines 20 - 25)

THE COURT: "The defendant had waived his presence here. Ms. Bennett withdrew some several months ago so I don't know the State was required to provide her with what they intended to present since she was no longer the attorney of record in this matter. So the court is going to admit the document."

(RP page 9 - 10, lines 22 - 2)

MS BENNETT: "If Your Honor is making a holding that I don't appear in court on his behalf, I would have to make a record that, in that case, it would go hand in hand that the State would have had the burden to notify Mr. Perez Morales of this hearing, because although he did waive his presence at the hearing... certainly he could have hired me again... he could have hired another attorney... He didn't waive his right to know that there would be a restitution hearing, and as such he should have legally been given notice of it."

(RP page 11, lines 5 - 15).

In reality, the only waiver that Mr. Perez Morales made with regard to the restitution hearing was a waiver of his right to be physically present for the hearing. That waiver was made for the **sole purpose** that he would not obtain a warrant for failing to appear at that hearing - if and when it was set by the Prosecutor. He made that choice because he knew he was to be deported after his sentence as was

the Prosecutor. (RP Page 4, lines 3 - 4).

The Prosecuting Attorney could have provided him notice of a date when he was sentenced but chose not to do so. The Prosecutor similarly could have entered a restitution order when he was sentenced but chose not to do so. Instead, knowing that he was going to be deported, the Prosecuting Attorney waited five and a half months to set a date for the restitution hearing and made no attempt to provide Mr. Perez Morales notice of that hearing date or the basis for the \$9,000.00 plus sum being requested, and only provided notice to his prior attorney a couple of weeks before the end of the 180 day deadline and subsequently objected to that attorney's ability to object to evidence *for the first time* at the September restitution hearing based on lack of standing due to the submission of the Notice of Withdrawal three months prior even though the Prosecutor *only* sent notice of the hearing to Ms. Bennett and not to Mr. Perez Morales.

To find a due process violation, the court must find that Mr. Perez Morales was prejudiced by the State's action and must consider the

reason the State took that action and if the State is able to justify the action the court must undertake a further balancing of the State's interest and the prejudice to the accused and determined whether the action violates those fundamental conceptions of justice which lie at the base of our civil and political institutions. State v. Calderon, 102 Wash.2d 348, 352 - 353, 684 P.2d 1293 (1984). Whether due process rights are violated is a question that is reviewed de novo. State v. Warner, 125.2d 876, 883, 889 P.2d 479 (1995)). As such, the Court of Appeals should examine the entire record to determine prejudice and to balance the delay against the prejudice. See Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 n. 31, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). Negligence on the part of the state may result in a Due Process violation. State v. Schifferl, 51 Wash.App. 268, 273, 753 P.2d 549 (1988).

In our case, the Prosecuting Attorney had no basis to not give notice to Mr. Perez Morales of the restitution hearing date. The Prosecutor routinely sets hearing dates 5 ½ months after the

sentencing date. That date could have been provided to him at his sentencing, therefore he would have been on notice that he either needed to appear in court on that date or make arrangements for an attorney to appear for him. Because Mr. Perez Morales never was informed of the restitution hearing date or given any explanation as to why the Prosecutor was seeking he be found accountable for over \$9,000.00 in restitution, he was prejudiced by not having an opportunity to defend himself, hire an attorney to defend himself or plan a defense to the allegations being made.

2. The evidence presented at the restitution hearing was not properly admitted as evidence and there was no causal connection to the crime proved sufficient to support the restitution order.

At the September 2nd restitution hearing, the Prosecuting Attorney, moved to admit an Exhibit without having any witness testify to its contents or authenticate the documents. (RP page 3, lines 7 - 12). The Prosecutor then requested a restitution order be entered in the amount of \$9,448.10 and presented argument unsupported by

evidence as to why the order should be entered, and requested that Mr. Perez Morales be ordered to pay restitution for crimes having no causal connection to the crime proved by his plea. (RP page 4 - 5, lines 17 - 24).

The Court indicated some reluctance to enter the order based on a lack of a causal connection between the charge plead to and the requested damages being requested:

THE COURT: "I guess I do have some difficulty in determining whether or not how these charges are related to Mr. Perez Morales' actions based on the plea and the judgment and sentence."

(RP page 10, lines 5 - 9)

Upon this issue being raised by the court, the Prosecuting Attorney proceeded to make allegations against Mr. Perez Morales which were completely unsubstantiated including that he: "went on a burglary spree in the north part of the county," "burglarized a number of homes," possessed Mr. Needles' firearm, and was "the ring leader to all of the thefts.(RP Page 10, lines Page 8 line 9).

In response to those allegations, Ms.

Bennett responded:

MS BENNETT: I would just object to all of that. That has not been proven. That was not pled guilty to. And I strongly disagree with the fact that the State even had probable cause to charge any of that.

(RP 10 -11, lines 25 - 4).

At the same time that that Prosecuting Attorney argued that Mr. Perez Morales "was the *ring leader* to *all of these thefts*," he also justified not requesting restitution from any of the co-defendants based on his argument that none of the other co-defendants had *any connection* to the thefts. (RP page 8 lines 13- 12). Mr. Chow stated that the co-defendants "pled to unrelated charges like drug possession and forgery" and "they might have been present when the search warrant was served, however Mr. Perez Morales, we had evidence that he was trafficking in stolen property at the metal recycling facilities."²

In this case, the Prosecuting Attorney made no attempt call any witnesses to produce evidence

² One of the co-defendant's, the defendant's brother, was charged with Trafficking in Stolen Property as well as Possession of Stolen Property 2. Also, according to the police reports associated with this case, Mr. Perez Morales, along with two codefendants, his brother and Bolivar Ambriz, were identified as being present when batteries were sold at the recycling center.

at the restitution hearing. Instead, the Prosecuting Attorney essentially testified himself with regard to the sole Exhibit and underlying facts which were contested. The Prosecuting Attorney was not a witness to this crime, therefore he had no qualification to be a witness. Evidence Rule (ER) 104(a)&(b) ("Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court.... Subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the conditions.") and ER 602 ("at witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.") The Exhibit produced at the hearing was not authenticated and therefore should not have been admitted as evidence. Evidence Rule 901 states that, "the requirement of authentication as a precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its

proponent claims." (ER 901(a)). Furthermore, the Exhibit should not have been admitted as it is inadmissible Hearsay. ER 802.

Additionally, the Exhibit should not have been admitted based on a violation of Mr. Perez Morales' Due Process rights as Mr. Perez Morales was not given the opportunity to review the exhibit prior to its admission as he was never provided with it by the State. To find a due process violation, the court must find that Mr. Perez Morales was prejudiced by the State's action and must consider the reason the State took that action and if the State is able to justify the action the court must undertake a further balancing of the State's interest and the prejudice to the accused and determined whether the action violates those fundamental conceptions of justice which lie at the base of our civil and political institutions. State v. Calderon, 102 Wash.2d 348, 352 - 353, 684 P.2d 1293 (1984). Whether due process rights are violated is a question that is reviewed de novo. State v. Warner, 125.2d 876, 883, 889 P.2d 479 (1995)).

As such, the Court of Appeals should examine the entire record to determine prejudice and to balance the action against the prejudice. See Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 n. 31, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). Negligence on the part of the state may result in a Due Process violation. State v. Schiffer, 51 Wash.App. 268, 753 P.2d 549 (1988).

Although the Court of Appeal need not find that the State's conduct was intentional, Mr. Perez Morales asserts that Court can find the State's conduct was intentional based on (1) the Prosecutor's knowledge that the defendant was being deported after serving his sentence (MR. CHOW: "The plea agreement was for credit for time served, so Mr. Perez Morales took that. He was subsequently deported."), (2) the Prosecutor's failure to make any attempt to provide notice directly to Mr. Perez Morales, the Prosecutor's objection to Ms. Bennett's standing to argue on his behalf at the restitution hearing, and the Prosecutor's routine procedure of waiting until only merely weeks before the 180 day deadline to enter restitution orders thus minimizing the

amount of time the defendant has to adequately prepare for the hearing *if* they become aware of the hearing.

His inability to confront his accuser at the restitution hearing, since there were no witnesses called, is also a violation of the confrontation clause which is also a Due Process violation. The prejudice that resulted from this decision by the prosecutor (to not call any witnesses in its case) prejudiced Mr. Perez Morales' Due Process rights under the aforementioned test and the State has no justification for its decision to do so and the prejudice is that the defendant did not have the opportunity to cross examine the witness and thereby obtain clarification with regard to what information the Exhibit contained; such as a description of the items listed in the Exhibit, an explanation as to when those items went missing, if any, and any other lack of connection between the items for which reimbursement is being sought and the crime for which Mr. Perez Morales pled guilty.

In our case, the State has no adequate

justification for failing to provide the evidence (Exhibit 1) to Mr. Perez Morales prior to the restitution hearing or for failing to call any witnesses at the restitution hearing.³ Mr. Perez Morales was prejudiced by this State action because he had no opportunity to prepare a defense to the accusations or attack the credibility or basis of that information.

Even if the Court finds that the Exhibit and "evidence" produced at the restitution hearing was properly admitted and/or considered by the trial court, the Court of Appeals should nonetheless vacate the restitution order based on the lack of a sufficient causal connection between the crime proven by the prosecutor via the defendant's plea of guilty and the damages requested in the restitution order.

A court has statutory authority to impose restitution whenever a defendant is convicted of an offense that results in loss of property. RCW 9.94A.753(5); State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Restitution is allowed

³ The exhibit was provided to Ms. Bennett no sooner than 8/12/14, however the trial court found that she was not the attorney of record and the Prosecuting Attorney also argued she did not have standing as Mr. Perez Morales' attorney for the purpose of the restitution hearing.

solely for losses "'causally connected'" to the crimes charged. Griffith, 164 Wn.2d at 965 (internal quotation marks omitted) (quoting State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007)). The question is "whether, 'but for' the crime, the damages would have occurred." Tobin, 161 Wn.2d at 526. We review the court's restitution order for an abuse of discretion. State v. Dedonado, 99 Wn. App. 251, 255, 991 P.2d 1216 (2000). A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999).

If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 282, 285 119 P.3d 350 (2005).

In State v. Griffith, the Supreme Court of Washington reversed and vacated a restitution order after the court did not find a causal connection between the items listed in the order

that were that were undoubtedly stolen and Griffith's plea to possession of stolen property after she was found with *some* of the property that had been stolen. Since Ms. Griffith did not plead guilty to the theft of all of the items and only was found to be in possession of some of the items that were taken, the court could not order her to pay for everything taken during the theft. Our case is almost identical to that case in that the Prosecutor is arguing that Mr. Perez Morales should be ordered to pay restitution for uncharged crimes that have not been proven to have a causal connection to him.

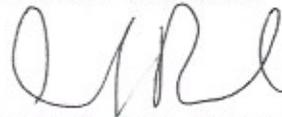
CONCLUSION

The record shows that Mr. Perez Morales was not given proper notice by the State of Washington of the Restitution Hearing in this case, therefore the State of Washington did not have the legal right to enter this order. Furthermore, the record does not support the

findings necessary to support the order due to the lack of evidence presented by the state at the restitution hearing. Therefore, Mr. Perez Morales is requesting that the restitution order be vacated, that he be reimbursed by the Prosecutor's Office for any amount paid under direction of that order and that he be reimbursed reasonable attorney's fees for this appeal.

RESPECTFULLY SUBMITTED this 8 day of
February, 2015.

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