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Court of Appeals
Division III
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NO. 35581-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

JESSE CRISWELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court acted outside its authority in imposing restitution that was not causally related to the crimes of conviction.

2. Appellant received ineffective assistance of counsel when his attorney agreed to the amount of restitution requested by the state.

Issues Pertaining to Assignments of Error

The state initially charged appellant inter alia with four counts of forgery for purchasing goods at an Ephrata gas station with counterfeit \$50.00 bills. For count 1, the state alleged appellant purchased smoking devices, cigarettes and other miscellaneous items using \$350.00 worth of counterfeit \$50s. While the clerk was bagging the items, appellant picked out a couple of hats and paid for them with an additional counterfeit \$50. This purchase was count 2.

Count 3 involved an additional counterfeit \$50 located in the safe and included as part of the clerk's money drop for that night. Count 4 involved an additional counterfeit \$50 the store's manager discovered in the till two days later.

At the close of the state's case, the prosecutor moved to dismiss counts 3 and 4. The court granted the motion to dismiss

and appellant was convicted of counts 1 and 2, pursuant to which, appellant had acquired \$400.00 worth of goods and currency in change. Despite this, defense counsel agreed to the state's restitution request of \$500.00, which included restitution for the dismissed counts.

1. Did the court err in imposing restitution that was not causally related to appellant's crimes?

2. Did defense counsel provide ineffective assistance of counsel in agreeing to restitution which included damages for crimes the state was unable to prove?

B. STATEMENT OF THE CASE

By an amended information, the state charged appellant Jesse Crisswell with three counts of forgery committed on May 1, 2016, one count of forgery committed on May 2, 2016, and one count of third degree theft committed on May 1, 2016. CP 1-2, 11-13.

At trial, Manager Ida Cruz testified she came into Hawk Fuel on May 2, to check the till of clerk John Driesen, who worked the night shift from 11:00 p.m. on April 30 until 7:00 a.m. on May 1. RP 81, 138. Cruz found nine counterfeit \$50s in Driesen's safe drop

for the evening, which she turned over to officer Camden Eckhart, who packaged and logged them into evidence. RP 79, 82, 118.

Cruz reviewed the surveillance video of the entirety of Driesen's shift to see if she could determine when the bills were presented. RP 83, 86. She presented Eckhart with video of the only transaction she could find that appeared to involve the fake \$50s. RP 80, 87.

The video showed Criswell buying smoking devices and other miscellaneous items with seven \$50s. RP 118. The video further showed that while Driesen bagged the items, Criswell picked out some hats and paid for them with another \$50. RP 118, 219-225; Ex 2. Cruz acknowledged the video only showed Criswell with eight \$50s. RP 118.

Cruz also provided the police with the report of transactions involving \$50s that night. Again, only eight \$50s were reported. RP 87-89; Ex 3, 4.

Cruz testified it was possible Driesen worked a consecutive night shift beginning late in the evening on May 1 and ending early in the morning May 2. RP 114. However, she did not recall speaking with him when she came in on the morning of May 2 and found the nine fake \$50s. RP 116, 118.

Cruz claimed that she came in again on the morning of May 3 to count Driesen's till and found a tenth \$50. RP 118. She testified she reviewed the video from May 1, where Criswell is observed making one transaction with seven \$50s and a second transaction with an additional \$50, as captured on exhibit 2. RP 118. However, Cruz now claimed she also saw Criswell come in on a separate occasion that same night and get change for a \$50. RP 118. This \$50 was not included in Driesen's safe drop for May 1, however. Rather, Cruz found it in the till on May 3. RP 118-19. Cruz did not find any record of that tenth bill in the transaction report. RP 119.

Driesen testified he remembered Criswell coming into the store the morning of May 1. RP 137. He remembered Criswell making a larger purchase with \$50s. He could not recall if anyone else paid with \$50s, but was fairly certain there were other \$50s in the till that night. RP 137. Driesen could not recall if Criswell came in on another occasion and gave him another \$50. RP 139. Driesen was unaware he received counterfeit bills during his shift. RP 141.

At the close of the state's case, the prosecutor moved to dismiss counts three and four. RP 148; see also RP 217-118

(state's closing argument count 1 is for smoking devices; count 2 is for ballcaps). The court granted the motion. CP 91-110. The jury convicted Criswell of the two forgery counts and theft. CP 78-80.

The state filed a "Restitution Report" prior to trial. Supp. CP ___ (sub. No. 14, Restitution Report, 6/2/16). It reported property damage or loss of \$500.00 payable to Hawk Fuel. Id.

At sentencing on September 18, 2017, the court found Criswell's forgery convictions constituted the same criminal conduct and imposed concurrent, standard-range sentences of 27 months. CP 119, 122. For the misdemeanor theft, the court imposed a concurrent sentence of 300 days with 270 days suspended on conditions. CP 127.

Regarding restitution, the court asked: "By the way, is the restitution of \$500 being agreed to? Or do I need to set a hearing?" RP 19. Defense counsel responded: "We agree to \$500 in restitution, your Honor." RP 19. The court therefore imposed that amount. CP 125. This appeal follows. CP 115-36.

C. ARGUMENT

1. THE COURT ACTED OUTSIDE ITS AUTHORITY IN IMPOSING RESTITUTION FOR DAMAGES NOT CAUSALLY CONNECTED TO THE CRIMES OF CONVICTION.

The decision to impose restitution and the amount thereof are within the trial court's discretion. State v. Bennett, 63 Wn. App. 530, 535, 821 P.2d 499 (1991). This Court will reverse such an order if it is manifestly unreasonable or the sentencing court exercised its discretion on untenable grounds or for untenable reasons. State v. Smith, 33 Wn. App. 791, 798-99, 658 P.2d 1250, review denied, 99 Wn.2d 1013 (1983).

However, "[R]estitution is authorized only by statute, and a trial court exceeds its statutory authority in ordering restitution where the loss suffered is not causally related to the offense committed by the defendant, or where the statutory provisions are not followed." State v. Vinyard, 50 Wn. App. 888, 891, 751 P.2d 339 (1988). "A restitution order must be based on the existence of a causal relationship between the crime charged and proven and the victim's damages." State v. Blair, 56 Wn. App. 209, 214-15, 783 P.2d (1989).

“The general rule is that restitution may be ordered only for losses incurred as a result of the precise offense charged. 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.2d 1329 (1993) (citations omitted).

In other words, the award of restitution must be based on a causal relationship between the offense charged and proved and the victim’s losses or damages. A defendant may not be required to pay restitution beyond the crime charged or for other uncharged offenses. An exception to this general rule exists where the defendant pleads guilty and expressly agrees to pay restitution for crimes for which the defendant was not convicted.

State v. Johnson, 69 Wn. App. 189, 191, 847 P.2d 960 (1993) (citations omitted).

Accordingly, restitution for loss beyond the scope of the crime charged is properly awardable only when the defendant enters into an ‘express agreement’ to make such restitution as part of the plea bargain process.” Miszak, 69 Wn. App. at 429.

Criswell was convicted of two counts of forgery for two transactions. In the first, he obtained \$350.00 worth of goods and currency as change. In the second, he obtained \$50.00 worth of goods and currency as change. That amounts to \$400.00 in

damages, not \$500.00. Clearly, the additional \$100.00 stems from counts three and four, that were dismissed. This is evidenced by the fact the state submitted its restitution request before trial and before it decided not to pursue counts three and four. Thus, the \$100.00 included in the restitution order is not causally related to Criswell's offenses. And because he did not agree to pay restitution for uncharged crimes as part of a plea agreement, the court was without authority to impose this additional \$100.00. This Court therefore should reverse the restitution order and remand for the trial court to strike \$100.00 of it. State v. Woods, 90 Wn. App. 904, 953 P.2d 834 (1998).

2. DEFENSE COUNSEL'S AGREEMENT TO \$500.00 WORTH OF RESTITUTION AS PART OF CRISWELL'S SENTENCE AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

As indicated above, \$100.00 worth of the restitution amount was not causally related to Criswell's crimes of conviction. Defense counsel's failure to object amounted to ineffective assistance of counsel. State v. Hassan, 184 Wn. App. 140, 336 P.3d 99 (2014).

The Sixth Amendment to the United States Constitution guarantees the assistance of counsel to criminal defendants. Its purpose is to ensure that the accused does not suffer an adverse

judgment or lose the benefit of procedural protections because of the ignorance of the law. United States v. Rad-O-Lite of Philadelphia, Inc., 612 F.2d 740 (3d Cir.1979). A defendant is guaranteed that he need not stand alone against the State at any “critical stage” of the proceedings. United States v. Wade, 388 U.S. 218, 224–27, 87 S. Ct. 1926, 1930–32, 18 L.Ed.2d 1149 (1967). It is also well-established that a defendant is entitled to counsel during the sentencing phase of his or her case. As stated by the Supreme Court in Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977):

Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel.

The setting of restitution is an integral part of sentencing. State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). Criswell therefore had the right to effective assistance of counsel in setting restitution. Hassan, 184 Wn. App. at 152.

To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel’s representation was deficient, and (2) the deficient performance prejudiced the defendant. Hassan, 184 Wn. App. at 152.

Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. Id. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have been different. Id.

The Court's decision in State v. Hassan is directly on point. Hassan was convicted inter alia of unlawful issuance of a bank check. The charge arose after Hassan told his friend Tiffany Gilpin that he would loan her \$1,000.00 to help her repair her car. Thereafter, Hassan gave Gilpin a \$2,400.00 check written on a closed account. He asked Gilpin to deposit the check in her account and then immediately withdraw \$1,400.00 to give to him because it was an easier way for him to get cash than at his bank. As Hassan requested, Gilpin deposited the check in her account, withdrew \$1,400.00 and gave it to Hassan. Hassan's check did not clear. Hassan, 144-45.

At the restitution hearing, Hassan's counsel objected to the state's request for \$2,400.00 in restitution to Gilpin, claiming only that Hassan had repaid \$400.00 to her. The court imposed the full amount. Id. at 145.

On appeal, Hassan claimed his attorney was ineffective because he failed to object to the \$1,000.00 of the restitution order that represented Hassan's loan to Gilpin. Division Two agreed:

Unless a defendant agrees to the restitution amount, the State must prove the losses by a preponderance of the evidence. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). Here, the state proved that Gilpin suffered a loss of \$1,400. But there is nothing in the record supporting the trial court's conclusion that Gilpin suffered a loss relating to the \$1,000 she deposited in her account and did not pay to Hassan in cash. Gilpin admitted that this amount was a loan, not money that Hassan owed to her. And there is no evidence that Gilpin suffered any loss due to the \$1,000 loan she thought she was receiving not materializing. Therefore, the state failed to prove by a preponderance of the evidence that Gilpin incurred more than a \$1,000 loss.

Because there was no evidence to support a \$2,400 restitution award, counsel should have objected to that award. And there was no conceivable tactical reason not to object. Accordingly, defense counsel was deficient in this respect. Further, defense counsel's failure to object prejudiced Hassan because if counsel had pointed out the State's failure to sustain its burden of proving an additional \$1,000 loss, the trial court would have declined to include that amount in the restitution award. Accordingly, we hold that defense counsel's representation was ineffective regarding the restitution award.

Hassan, 184 Wn. App. at 152.

Defense counsel was similarly ineffective here. The state proved that Hawk Fuel suffered a loss of \$400 as a result of

Criswell's two convictions for forgery. But there was no basis for the court to order \$100 in restitution for losses resulting from additional forgery counts that were dismissed for want of proof. There was no conceivable tactical reason not to object to this additional amount. Defense counsel's failure to object prejudiced Criswell because the trial court would have declined to include that amount in the restitution award. Defense counsel's representation was deficient regarding the restitution award.

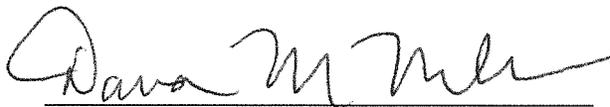
D. CONCLUSION

The court was without authority to impose restitution relating to dismissed counts. Defense counsel was ineffective in failing to object to that portion of the restitution amount. This Court should therefore reverse the restitution order.

Dated this 27th day of February, 2018

Respectfully submitted

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