

FILED
Court of Appeals
Division III
State of Washington
4/2/2018 2:41 PM

NO. 35643-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID ROMISH,

Appellant.

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

The Honorable John O. Cooney

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by ordering David Romish to pay restitution of \$500.00 to N&N Excavation and \$9,325.88 to Cincinnati Insurance Co.¹

2. The trial court erred by relying upon the affidavit of probable cause over Mr. Romish's objection.

3. The trial court erred by finding a causal connection between the \$500 and \$9,325.88 expenses provided by the State and the possession of stolen property to which Mr. Romish pleaded guilty.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Restitution may only be ordered for actual expenses causally connected to the defendant's crime, and the State must prove the causal connection by a preponderance of the evidence. Mr. Romish pleaded guilty to first degree possession of stolen property. Did the trial court err by considering the affidavit of probable cause at the restitution hearing? In the absence of the affidavit of probable cause, did the State fail to prove a causal connection between the expenses alleged and Mr. Romish's

¹ The trial court's Order Setting Restitution (CP 126) is attached as an Appendix.

possession of stolen property? Should the \$500 and \$9,325.88 amounts be excluded from the ordered restitution? (Assignments of Error 1-3).

C. STATEMENT OF THE CASE

Pursuant to a plea agreement with the Spokane County Prosecutor's Office, David Romish pleaded guilty to one count of first degree possession of stolen property. RCW 9A.56.150; CP 72, 104-110. The parties agreed that Mr. Romish had an offender score of 1 and he faced a standard sentencing range of 2-6 months. CP 73, 105. In the Statement of Defendant on Plea of Guilty, Mr. Romish stated that on August 23, 2016, he had stolen property valuing over \$5000 in his possession that he reasonably should have known had been stolen and that he did not do anything to the property once it was in his possession. CP 110. As part of the plea agreement, Mr. Romish agreed to pay restitution. CP 106 at (h). The Honorable John O. Cooney sentenced Mr. Romish on July 13, 2017, to serve two months on electronic home monitoring. CP 116; RP 18, 20.

According to the affidavit of determination of probable cause, after a warrant was executed, several pieces of stolen property were recovered from Mr. Romish's property. CP 1-8. A

bobcat tractor was located in a shed on the property, which had its paint modified and some identification markings removed. CP 4.

A restitution hearing occurred on October 12, 2017. RP 25. At the restitution hearing, the State produced Frank Nekich, owner of N&N Excavation. RP 26-27. Mr. Nekich testified to the condition the bobcat was in when it was taken versus when it was recovered and the length of time involved. RP 27-32. The State submitted documents supporting Mr. Nekich's claim. CP 57-70 (see State's attachment B). Mr. Nekich's out of pocket costs for the bobcat was \$500.00 (deductible); his insurance company, Cincinnati Insurance Co., covered the remaining costs of \$9,325.88. RP 30-31, 40-41.

Defense counsel argued a lack of causal connection in this case because the State could not establish when the damage to the bobcat occurred or that it was Mr. Romish who damaged the property. CP 77-78; RP 42-43. Mr. Romish did not stipulate to the affidavit of probable cause as either a basis for conviction in this case or for restitution. RP 45.

Mr. Romish objected to the court's consideration of the affidavit of probable cause, but the objection was overruled. RP 45-47. The court found that, because the affidavit of probable cause was part of the court file, it could rely on that document to

some extent when deciding the restitution claim. RP 47. The court found a causal link between Mr. Romish and the damage that was done to the bobcat, finding by a preponderance of the evidence that the damage to the bobcat was caused when it was in Mr. Romish's possession. RP 47-48. The court therefore ordered the restitution amount requested by the State with the exception of the NPL (excavator) claim, for which the court found the State did not present enough evidence to establish that claim. CP 57-70 (see State's attachment A); RP 48. Mr. Romish was thus ordered to pay restitution of \$500.00 to N&N Excavation (Mr. Nekich) and \$9,325.88 to Cincinnati Insurance Co. CP 126; RP 48. Mr. Romish appeals. CP 133-35.

D. ARGUMENT

THE STATE DID NOT PROVE THE CLAIMED
AMOUNT OF RESTITUTION WAS CAUSED BY MR.
ROMISH'S CRIMINAL ACT.

The State provided the restitution court with the testimony of Mr. Nekich (owner of N&N Excavation), documents reflecting repairs and servicing to the bobcat, and documents showing the related insurance claim. In addition, the court relied upon the affidavit of probable cause without Mr. Romish's agreement that it could be considered for purposes of determining restitution. The

State thus failed to prove all of the expenses included in the restitution ordered by the court were for damages caused by Mr. Romish's crime. Because the court only has statutory authority to require an offender to pay restitution for loss caused by his offenses, the restitution order must be vacated.

1. Restitution may only be imposed for loss or injury caused by the crime in question. The SRA requires the trial court to order restitution when the defendant is convicted of an offense that resulted in loss or injury. RCW 9.94A.753(5). Restitution must be based upon "easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." RCW 9.94A.753(3); *State v. Enstone*, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). Thus, restitution is limited to loss "'causally connected' to the crimes charged." *State v. Griffith*, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008) (quoting *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007)). Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. *Id.* at 966; *Tobin*, 161 Wn.2d at 524.

2. The State did not prove a causal connection between the expenses in the restitution order and the charged offense. The burden is on the State to prove the victim's losses and the causal connection to the defendant's crime by a preponderance of the evidence. *Griffith*, 164 Wn.3d at 965; *State v. Dedonado*, 99 Wn. App. 251, 991 P.2d 1216 (2000). This burden is not met merely because an insurer or victim submits a list of expenditures. *Id.* Summaries of treatment that do not indicate why services were provided fail to establish the required causal connection between the victim's expenses and the crime committed. *State v. Dennis*, 101 Wn.App. 223, 227, 6 P.3d 1173 (2000) (citing *State v. Bunner*, 86 Wn.App. 158, 160, 936 P.2d 419 (1997)).

In determining any sentence, including restitution, the sentencing court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. *State v. Woods*, 90 Wn. App. 904, 907, 953 P.2d 834, *review denied*, 136 Wn.2d 1021 (1998). Where a defendant disputes material facts for purposes of restitution, the sentencing court must either not consider those facts or grant an evidentiary hearing where the State must prove

the restitution amount by a preponderance of the evidence.

Woods, 90 Wn. App. at 907.

Thus, a summary report of expenses was not sufficient to prove the expenses were causally connected to a crime. *State v. Hahn*, 100 Wn.App. 391, 399-400, 996 P.2d 1125 (2000) (documents showed only name of service provider, service date, date paid, billed amount and amount paid); *Bunner*, 86 Wn.App. at 159-60 (list of medical services charged and amount DSHS paid). In contrast, restitution was properly awarded where the victim testified at the restitution hearing that her expenses for an emergency room visit and follow-ups for injuries were caused by the defendant's assault. *State v. Blanchfield*, 126 Wn.App. 235, 108 P.3d 173, *rev.denied*, 155 Wn.2d 1020 (2005).

The State provided the court with insurance claim summaries that showed the amounts paid by Cincinnati Insurance Co. and the deductible paid by Mr. Nekich. CP 57-70 (State's Attachment B). These documents show that Mr. Nekich incurred expenses for a \$500 deductible and that Cincinnati Insurance Companies paid the remaining costs for repairs, servicing and a rental, which amounted to \$9,325.88. *Id.*

The court should not have ordered Mr. Romish to pay restitution for Mr. Nekich's claims. The only documentation for these expenses states that after Mr. Nekich had the bobcat in his possession once again, he had a full servicing done and some repairs made, including paint repairs. CP 57-70 (State's Attachment B). The documents provided by the State do not prove the required causal connection to Mr. Romish's crime of possession of stolen property, and thus they should not have been considered as evidence of loss. There was some testimony regarding damaged paint and a damaged taillight, but this damage was not connected specifically to Mr. Romish and appeared to be connected by Mr. Nekich to the theft. RP 28-32. There was testimony and a cost summary for the servicing of the bobcat as a protective measure, but no testimony connecting that to any act of Mr. Romish, or any explanation as to why a full servicing was required. *Id.* As result, the restitution owed to Mr. Nekich and to Cincinnati Insurance Co. should be vacated.

3. Mr. Romish did not agree that the trial court could consider the affidavit of probable cause for purposes of establishing restitution. Mr. Romish objected to the restitution court considering the affidavit of probable cause at the restitution

hearing. RP 45-47. The court, however, assumed the affidavit of determination of probable cause could be used to establish some of the facts of Mr. Romish's crime. RP 47-48. The trial court was incorrect.

Under the "real facts doctrine," a sentencing court may only consider information admitted by the plea agreement or admitted, acknowledged, or proved at trial or sentencing. RCW 9.94A.530(2). When a defendant disputes material facts, the court must either not consider them or hold an evidentiary hearing. *Id.* This doctrine applies at a restitution hearing, where, absent agreement, the State must prove the restitution amount by a preponderance of the evidence. *Griffith*, 164 Wn.2d at 965.

Mr. Romish never stipulated that the facts in the affidavit of determination of probable cause were to be used for either purposes of sentencing or for a later restitution hearing. He objected to the court's consideration of the affidavit of probable cause for purposes of determining restitution. RP 45-47. Here, form language in the plea agreement said that Mr. Romish agreed to pay restitution. CP 106 at (h). Nothing in the plea agreement shows that Mr. Romish agreed that the affidavit could be used for purposes of determining the amount of restitution. Mr. Romish did

not stipulate the probable cause affidavit could be utilized for purposes of determining restitution.

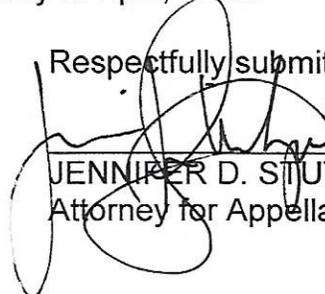
In his plea statement, Mr. Romish specified that on August 23, 2016, he had stolen property in his possession but that he did not do anything to the property once it was in his possession. CP 110. Thus, the plea agreement does not provide a factual basis to order Mr. Romish to pay restitution for Mr. Nekich's or Cincinnati Insurance Co.'s expenses. The testimony of Mr. Nekich and the supporting documentation from the State also do not provide the necessary factual basis to establish a causal connection to Mr. Romish's crime. Further, without the affidavit of probable cause, the State could not show that the losses claimed were causally connected to the possession of stolen property. Thus, the restitution to N&N Excavation (Mr. Nekich) and Cincinnati Insurance Co. should be vacated.

E. CONCLUSION

The order requiring Mr. Romish to pay restitution of \$500.00 to N&N Excavation and \$9,325.88 to Cincinnati Insurance Co. must be vacated because of a lack of proof of a causal connection to Mr. Romish's crime.

DATED this 2nd day of April, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jennifer D. Stutzer', written over a horizontal line.

JENNIFER D. STUTZER (38894)
Attorney for Appellant

APPENDIX

CN: 201601033408

SN: 46.1

PC: 1

FILED

OCT 18 2017

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON

Plaintiff,

v.

DAVID MICHAEL ROMISH
WM 07/10/74

Defendant(s).

No. 16-1-03340-8

PA# 16-9-62445-0

RPT# CT I: 003-16-0950649

SCHEDULE OF RESTITUTION - APPENDIX 4.3
(ORSR)

N&N Excavation
P.O. Box 1176
Mead, WA
99021

\$500.00

Cincinnati Insurance Co.
P.O. Box 5196
Twin Falls, ID
83303

\$9,325.88
(claim # 2729480)

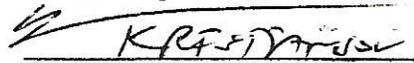
TOTAL:

\$9,825.88

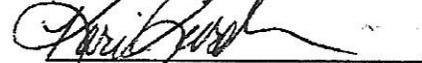
DATED this 18TH day of October, 2017.


HONORABLE JUDGE JOHN O. COONEY

Presented by:


GEOFF KRISTIANSON
Deputy Prosecuting Attorney
WSBA# 44169

As to form only:


KARI REARDON
Attorney for Defendant
WSBA # 26142

SCHEDULE OF RESTITUTION - APPENDIX 4.3

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

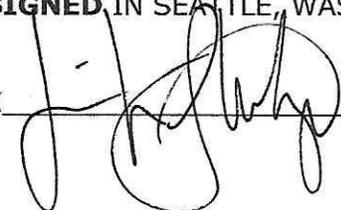
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35643-4-III
)	
DAVID ROMISH,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JENNIFER STUTZER, STATE THAT ON THE 2ND DAY OF APRIL, 2018, I CAUSED THE ORIGINAL **APPELLANT'S OPENING BRIEF** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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E-DELIVERED TO
OPPOSING COUNSEL
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| <p>[X] DAVID ROMISH
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() HAND DELIVERY
() EMAIL</p> |

SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF APRIL, 2018.

X  _____

STUTZER LAW PLLC

April 02, 2018 - 2:41 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. David Michael Romish
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