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BY C. J. HERRITT

**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS JOHN MARTIN TOBIN,

Appellant.

*[Handwritten initials and a circular stamp]*

**AMICUS CURIAE WASHINGTON STATE DEPARTMENT OF  
NATURAL RESOURCES' MEMORANDUM OPPOSING REVIEW**

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ORIGINAL

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## I. INTEREST OF AMICUS CURIAE

The Washington State Department of Natural Resources (DNR) is the agency responsible for managing most state-owned aquatic lands. See RCW Chapters 79.100 – 79.145. Tobin plead guilty to crab poaching and to the theft of geoduck clams from those aquatic lands. DNR is one of the victims and one of the recipients named in the restitution order. CP at 77-78.<sup>1</sup> Tobin’s Petition for Review challenges the amount of restitution awarded by the trial court, a matter of obvious concern to a named recipient.

## II. ISSUE

Tobin’s Petition for Review does not satisfy RAP 13.4(b)(1) because the Court of Appeals’ opinion does not conflict with a decision of the Supreme Court. The Petition does not satisfy RAP 13.4(b)(4) because a challenge to the sufficiency and admissibility of the evidence used by the trial court to set a restitution award is not a matter of substantial public interest.<sup>2</sup>

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<sup>1</sup> The record contains two separate sets of Clerk’s Papers associated with Tobin’s separate convictions. All “CP” citations in this pleading refer to the Clerk’s Papers associated with Superior Court cause number 02-1-05810-0.

<sup>2</sup> Some issues raised in the Petition for Review are not addressed in this opposing memorandum because DNR feels those issues fail on their face and are not worthy of response. DNR focuses on those issues where Tobin’s Petition mischaracterizes facts from the record below, which mischaracterizations warrant correction.

### III. ARGUMENT WHY THE PETITION FOR REVIEW SHOULD BE DENIED

#### A. The Decision Below Does Not Conflict With a Decision of the Supreme Court Because No Portion of the Restitution Award was Based on Conjecture or Speculation.

During the restitution hearing, the trial court indicated its reliance upon the calculations submitted by the State's forensic accountant, Mr. William Omaitis, in determining the amount of restitution. RP at 34.<sup>3</sup> The Petition for Review falsely mischaracterizes Mr. Omaitis' valuation as conjecture and speculation. Tobin then relies upon this mischaracterization to create a perceived conflict between the Court of Appeals' decision and In re Marriage of Muhammad, 153 Wn.2d 795, 108 P.3d 779 (2005).

As explained in Mr. Omaitis' affidavit, Tobin did not keep thorough records documenting the full extent of his illegal geoduck and crab poaching operation. CP 92. Mr. Omaitis found many copies of sales invoices from Tobin's company, Toulok. Mr. Omaitis, however, found numerous other "secondary" documents evidencing additional geoduck sales transactions for which he could not locate any Toulok invoices. Id. One category of secondary documentation consisted of sales invoices where purchasers of Tobin's poached geoduck resold the product to

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<sup>3</sup> All citations to "RP" refer to the Verbatim Report of Proceedings of the Restitution Hearing which took place April 9, 2004.

third parties. Id. Another category of secondary documentation consisted of Airway Freight Bills evidencing shipments of geoduck by Tobin that could not be matched to any of the sales invoices. Id. Mr. Omaitis attested that 75 percent of the total pounds of stolen geoducks was derived directly from Toulok sales invoices, and the remaining 25 percent of pounds was calculated from air bills and third-party sales invoices. Id. at 93. Mr. Omaitis similarly relied upon secondary documentation to determine 21 percent of the total volume of poached crab. Id. at 93-94. No portion of Mr. Omaitis' calculations relied upon conjecture or speculation. Any individual could review the documents relied upon by Mr. Omaitis and repeat Mr. Omaitis' calculations to arrive at the same numbers.

No conflict exists with In re Marriage of Muhammad, 153 Wn.2d 795, 108 P.3d 779 (2005). In Muhammad, the trial court allowed the husband in a marriage dissolution to keep the full value of his pension, worth \$38,400. Id. at 799. The trial court refused to divide any value of the husband's pension that had accumulated during the marriage, and the trial court further refused to divide \$8,200 of the value that had accumulated during a 20-month meretricious relationship that preceded their marriage. Id. The trial court had characterized the \$8,200 amount as "minimal." Id. at 800. The Supreme Court strongly disagreed that a party to the divorce would characterize half of \$8,200 as "minimal." Id. at 804.

Muhammad was not a restitution case, however, and its analysis has no application to Tobin's case, as correctly determined by the Court of Appeals. State v. Tobin, 132 Wn. App. 161, 176, 130 P.3d 426 (2006).

**B. The Alleged Error Regarding Investigative Costs Does Not Exist Because the Trial Court Did Not Award Investigative Costs.**

At page 16 of the Petition for Review, Tobin quotes portions of an affidavit by Detective Ed Volz regarding time spent by law enforcement officers investigating the Tobin case, and Tobin then argues the claimed investigative costs were not related to his crimes. The affidavit submitted by Detective Volz had claimed \$317,600 for staff time spent on the investigation. CP 126. Contrary to Tobin's assertion, and as demonstrated by the Verbatim Report of Proceedings of the restitution hearing, the State waived the investigative costs for the time spent by law enforcement investigating the case, and the trial court's restitution award did not include them.

The deputy prosecutor conceded early in the restitution hearing that the State "probably wouldn't get [its] investigative costs." RP at 6. The State did request, however, "extraordinary costs" consisting of \$15,000 to hire an extra secretary half time to manage the evidence; \$47,000 for the forensic accountant; \$70,000 to conduct new biological surveys of the geoduck tracts illegally harvested; and \$42,000 for the cost

of vessels and crews to find all the illegal crab pots Tobin had deployed in the Nisqually area of Puget Sound. RP at 6-7. It is only those extraordinary costs that the trial court awarded, not the \$317,600 in investigative costs, *see* RP at 35-36, so Tobin wages a battle against a chimera when he attacks an imagined award of investigative costs.

**C. A Defendant’s Challenge to the Sufficiency of the Evidence Supporting His Restitution Order Does Not Present an Issue of Substantial Public Interest.**

Having demonstrated that the Court of Appeals’ decision did not conflict with a Supreme Court opinion, and that the claimed issue regarding investigative costs does not exist, the remaining fragments of Tobin’s challenges are reduced to attacks against the sufficiency of the evidence supporting the restitution order. Tobin has failed to demonstrate that the trial court abused its discretion in setting the restitution order, and the issue is not one of substantial public interest that would warrant review under RAP 13.4(b)(4). Compare In re Marriage of Ortiz, 108 Wn.2d 643, 646, 740 P.2d 843 (1987) (determining whether prior case involving child support decrees applied retroactively involved a matter of substantial public interest), and State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (issue of ex parte communications between prosecutor and judges potentially impacted every criminal sentencing after November 2001 and presented “prime example” of substantial public interest).

#### IV. CONCLUSION

The trial court's restitution order did not rely upon any speculative or conjectural value estimates, so the Court of Appeals' upholding the restitution order does not conflict with any Supreme Court decision and RAP 13.4(b)(1) is not satisfied. The claim that investigative costs were not sufficiently connected to the crime overlooks the fact that investigative costs were not awarded. Finally, a challenge to the sufficiency of evidence relied upon to determine the amount of restitution does not present an issue of substantial public interest warranting review under RAP 13.4(b)(4). DNR urges the Court to reject Tobin's Petition for Review.

RESPECTFULLY SUBMITTED this 19th day of June, 2006.

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