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STATE OF WASHINGTON
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NO. 86148-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COA NO. 66631-2-I

CITY OF SEATTLE,

Respondent,

v.

DONALD FULLER,

Petitioner.

PETITIONER'S RESPONSE TO AMICUS CURIAE BRIEF

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A. A court's authority to impose restitution is not a general or implied power, but must be expressly granted by the legislature.

Amicus curiae claims the Seattle Municipal Court's authority to impose restitution is a general power traditionally vested in all courts and, thus, the superior court's restitution power granted in Title 9 may be imputed to the municipal court via the general powers provision in RCW 35.20.010 and RCW 3.66.010 or the concurrent jurisdiction provisions in RCW 35.20.250 and RCW 3.66.060. In support of this claim, amicus curiae points to the inferior courts' flexible power and discretion to impose various conditions of probation without specific statutory authorization for each type of condition. Amicus Curiae Brief at 4-5, 7, 17, note 2. Courts of limited jurisdiction are authorized by statute to suspend or defer sentence and to set conditions of probation generally. *See e.g.*, RCW 35.20.255(1); RCW 3.66.067, .068, .069. The power to set conditions of probation is flexible, but not unlimited. Such conditions must be reasonably related to prevent the future commission of crimes. *See State v. Williams*, 97 Wn.App. 257, 983 P.2d 687 (1999) (Requiring 18-year-old to abstain "from alcohol and unlawful drugs was merely an extension of the more general probationary requirement to conduct himself in a lawful manner.")

But the authority to impose restitution is not found within a court's general power to set conditions of probation. Amicus curiae's arguments skirt around the well founded rule of law central to this case: the power to impose restitution is not an inherent power possessed by the court, but must be specifically granted by the Legislature. *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). The cases cited by amicus curiae which specifically address restitution are grounded on an express statutory grant of authority. Amicus Curiae Brief at 7, citing *State v. Barr*, 99 Wn.2d 75, 658 P.2d 1247 (1983) ("victim" as used in RCW 9.95.210 includes decedent's family in negligent homicide case in superior court) and *State v. Bedker*, 35 Wn.App. 490, 667 P.2d 1113 (1983) (Former RCW 9.95.210 authorized district court to impose restitution to victim of unregistered contracting).

The power to impose restitution stands in contrast to a court's inherent power to carry out its constitutional and statutory mandates. Amicus curiae cites *State v. Wicklund*, 96 Wn.2d 798, 638 P.2d 1241 (1982) as an example of courts of limited jurisdiction exercising the same power as superior courts. *Wicklund* involved the inferior court's constitutional mandate to determine whether a defendant was competent to stand trial and the statute at issue, RCW 10.77, was not by its terms limited to superior court. *Wicklund*, 96 Wn.2d at 801-804. In fact, prior

to the adoption of RCW 10.77 in 1973, “Washington courts relied exclusively on their inherent judicial powers to make determinations regarding competency.” *Wicklund*, 96 Wn.2d at 801. Thus, the court held that competency determinations were a “necessary power” conferred upon the district court in RCW 3.66.010. *Id.* at 803-04. But authority to impose restitution is not found within the inherent power of the court. *Davison*, 116 Wn.2d at 919.

B. The 1996 amendments to the suspended sentence and probation statutes, RCW 9.92.060 and 9.95.210, limited those laws to superior court. The plain language of the statutes control. Those statutes no longer provide restitution authority to inferior courts.

In an attempt to find a statutory grant of restitution authority for courts of limited jurisdiction, amicus curiae urges this court to ignore the clear, unambiguous language the Legislature inserted into the suspended sentence and probation statutes in 1996.¹ Amicus curiae argues that the tradition of restitution imposed by inferior courts and the specter of unintended future consequences prove that the Legislature did not intend to “divest district and municipal courts of their authority to order

¹Amicus curiae does not contest Fuller’s claim that RCW 9A.20.030 does not apply to crimes committed after July 1, 1984. Amicus curiae does not argue that this court can correct the legislative omission under the principles set forth in *State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982). Rather, amicus curiae focuses on convincing this court to extend the restitution authority in RCW 9.92.060 and RCW 9.95.210 to all courts.

restitution” when it amended RCW 9.92.060 and RCW 9.95.210 to refer only to superior court. Amicus Curiae Brief at 9-10.

As an introduction to this argument, amicus curiae attempts to portray our State’s court system as a harmonious whole, with all courts granted the same or similar powers to conduct their judicial business. In reality, superior courts, justice courts and the other inferior courts have their origins in different portions of the State constitution and, as a result, have a different relationship with the Legislature and executive branches of government. In addition, the various courts of limited jurisdiction are not cut of the same legislative cloth. Such courts have different enabling statutes with separately delineated powers and procedures. See Linda S. Portnoy. *Washington Criminal Practice in Courts of Limited Jurisdiction*, 3rd Ed § 1.02.²

More to the point, the sentencing authority of courts of limited jurisdiction has often been separate and distinct from that of the superior court. Some of the cases cited by amicus curiae illustrate this point. In *State ex rel Woodhouse v. Dore*, which reviewed the revocation of a deferred sentence, the court first questioned whether the justice of the peace had the authority to impose a deferred sentence in the first place.

²The Legislature’s desire for uniformity in the lower court system has spawned at least two reforms of inferior courts, the Justice Court Act of 1961 (aimed at district courts) and the Court Improvement Act of 1984 (to standardize municipal courts). *Id.*

The court discussed the various sentencing authorities granted to each type of court by the legislature.

The power to defer imposition of sentence, as with the power to suspend, must come expressly from the legislature. *Power to defer imposition of sentence has been granted explicitly to the superior courts in RCW 9.95.200, 9.95.210, and power to suspend sentence vested in all courts in RCW 9.92.060, none of these being inherent in the courts but rather deriving from powers granted by the legislature.*

In deferring imposition of sentence for one year, the justice of the peace apparently acted under Laws of 1961, ch. 299, s 81, p. 2450 (RCW 3.50.320), *but we read that section as designed particularly for and applicable to only municipal courts.* Although the point was not raised on this appeal, we find nowhere that this section can be read to extend the power of deferring sentence to the district justice of the peace courts.

State ex rel Woodhouse v. Dore, 69 Wn.2d 64, 69, 416 P.2d 670 (1966) (emphasis added). *See also State v. Essary*, 60 Wn.2d 731, 732, 375 P.2d 486 (1962) (justice court's power to suspend jail sentence was then granted in RCW 9.92.060).³ Thus, the court recognized some basic sentencing powers in Title 9 were granted to all courts while others were given only to the superior court. At the time *Dore* was decided, RCW 9.92.060 applied to "all courts." In 1996, the Legislature expressly limited that statute to superior courts. Laws of 1996 ch. 249, sec. 28. 1996 was

³Contrary to amicus curiae's claim at Amicus Curiae Brief page 3, none of the cases cited therein address the power of courts of limited jurisdiction to impose restitution as a condition of probation. *See State ex rel Woodhouse v. Dore*, 69 Wn.2d 64, 69, 416 P.2d 670 (1966); *State v. Essary*, 60 Wn.2d 731, 732, 375 P.2d 486 (1962); *State v. Willey*, 168 Wash. 340, 12 P.2d 393 (1932); *Avlonitis v. Seattle Dist. Ct.*, 97 Wn.2d 131, 641 P.2d 169 (1982).

not the first time the Legislature changed the scope of the suspended sentence statute. The original 1905 statute authorized suspended sentences only in superior court; the statute was later amended to apply to other courts. *State ex rel Graham v. Willey*, 168 Wash. 340, 341-43, 12 P.2d 393 (1932). The *Willey* court held that the Legislature means what it says when specifically granting sentencing powers to the state's various courts. "[H]ad the Legislature not intended [to give the power of suspension to inferior courts] it would have been easy to say so or confined the giving of such power by specifically naming only the superior court as it did in the original act." *Id.* at 342 (justice court has power to suspend sentence in a criminal action within its jurisdiction).

Similarly, the 1996 change in the statutory language cannot be ignored and was not illogical in the context in which the amendment was made. In 1996, *State v. Shannahan* defined the scope of the restitution authority in RCW 9A.20.030. *State v. Shannahan*, 69 Wn.App. 512, 514 note 2, 849 P.2d 1239 (1993) (RCW 9A.20.030 "applies with equal force to fines imposed pursuant to RCW 9A.20.020 and to those imposed pursuant to RCW 9A.20.021"). A statute is presumed to have been enacted in the light of existing judicial decisions that have a direct bearing upon it. *Kelso v. City of Tacoma*, 63 Wash.2d 913, 917, 390 P.2d 2 (1964); *Duke v. Boyd*, 133 Wash.2d 80, 93, 942 P.2d 351 (1997). Relying

on *Shannahan*, the Legislature may very well believed that inferior courts' restitution power was provided by RCW 9A.20.030 and, thus, limited the scope of RCW 9.92.060 and 9.95.210 to superior courts. There is nothing illogical or absurd about this Legislative choice.

Yet, amicus curiae urges this court to read the word "superior" out of RCW 9.92.060 and RCW 9.95.210 as if the Legislature had not inserted the word in the first place. Amicus curiae argues that the plain language of the statute must be disregarded to avoid an absurd and unjust result, leaving inferior courts without authority to impose restitution. This argument violates the cardinal rule of statutory construction, courts "will not delete language from a clear statute even if the Legislature intended something else but failed to express it adequately. No part of a statute should be deemed inoperative unless the result of obvious mistake." *State v. Azpitarte*, 140 Wash.2d 138, 142, 995 P.2d 31 (2000). *See also State v. Leyda*, 157 Wash.2d 335, 348, 138 P.3d 610 (2006) *superceded by statute as recognized in In re Newlun*, 158 Wash.App. 28, 240 P.3d 795 (2010). Here, there is no obvious mistake. The Legislature could have not have been more clear. Inserting "superior" before each reference to court unambiguously limits the amended provisions to superior courts, particularly where other provisions expressly apply to other types of courts. *See* Petitioner's Brief at 14-15.

Amicus curiae bears the burden of persuading this court to disregard the plain language of RCW 9.92.060 and 9.95.210.

One who questions the application of the plain meaning rule to a provision of an act must show either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act considered in *pari materia* with other acts, or with the legislative history of the subject matter, imports a different meaning. *If the language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject the court cannot give it a different meaning...* [T]here is authority for applying the plain meaning rule even though it produces a harsh or unjust result or a mistaken policy as long as the result is not absurd.... The words should be given their common and approved usage....

2A N. Singer, *Statutory Construction* § 46.01 (4th ed. 1984), *quoted in State v. McDougal*, 120 Wn.2d 334, 351, 841 P.2d 1231 (1992). Amicus curiae argues the Legislature's inadvertent elimination of the long standing and only remaining restitution authority for inferior courts is an absurd and unjust end because it may result in the vacation of restitution orders and renders superfluous the statutes providing for the collection of restitution obligations. Amicus Curiae Brief at 8, 10-15. But amicus curiae has failed to make the threshold showing that the statutory language in question is ambiguous or controlled by other portions of the statute. The statutory language is plain and the authority to impose restitution is not controlled by the procedure to collect restitution. The statutes and court rules providing for the collection of restitution are not superfluous or

meaningless if and when the Legislature adopts a statute enabling inferior courts to once again impose restitution as condition of probation.

Even if the language at issue was subject to judicial construction, the potential vacation of existing restitution orders does not justify the judicial deletion of words the Legislature purposefully inserted. Amicus curiae failed to cite a single case where courts deleted language from a statute by judicial fiat. But the caselaw is replete with cases where the courts were compelled to honor the plain language of the statute regardless of the consequences. *See e.g., State v. Taylor*, 97 Wn.2d 724, 649 P.2d 633 (1982) and *State v. Leyda, supra*. A particularly relevant example is *State v. J.P.*, 149 Wash.2d 444, 69 P.3d 318 (2003), where this court held the juvenile justice act provides restitution for counseling costs only in felony sex offenses.

We are mindful of the trial judge's observation that the victim of this misdemeanor assault with sexual motivation needed counseling. We regret, as did the trial judge, that the legislature's most recent, most specific definition of "restitution" in the JJA explicitly limits compensation for counseling to victims of felony sex offenses. Although we may wish that the legislature had not said what it did say, we cannot simply wish away the legislature's specific statement that restitution "shall be limited to ... costs of the victim's counseling reasonably related to the offense if the offense is a sex offense." RCW 13.40.020(22) (emphasis added). If restitution for counseling is to be available to victims of juvenile crimes that are not sex offenses, the legislature, not the courts, must delete this statutory language that says otherwise.

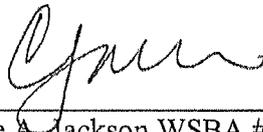
J.P., 149 Wn.2d at 457. In *J.P.*, this court had to resolve the tension created by three disparate provisions: the general definition of restitution (which limited restitution to physical injury to persons), the 1987 amendment (which permitted restitution for the “costs of counseling reasonably related to the offense,”) and the subsequent 1990 amendment (which added to the permissible categories of restitution counseling costs “if the offense is a sex offense.”) *J.P.*, 149 Wn.2d at 451-53. The ambiguity created by these provisions was identified in *State v. Landrum*, 66 Wn.App. 791, 832 P.2d 1359 (1992). Nonetheless, the Legislature did not clarify the statute. Thus, this court’s decision was dictated by the plain language of the statute and the applicable principle of statutory construction, the most recent and specific amendment controls. *J.P.*, 149 Wn.2d at 453-54. The result –elimination of counseling restitution previously granted for nonsex offenses-- was “not so absurd that this Court should write the words, ‘if the offense is a sex offense’ out of RCW 13.40.020(22).” *J.P.*, 149 Wn.2d at 456.

The same rules of statutory construction apply here. The most recent and specific amendment to RCW 9.92.060 and 9.95.210 limit those statutes to superior court. The result is not so absurd that this court may amend RCW 9.92.060 and 9.95.210 by judicial fiat. This case is similar to the situation the court faced in *State v. Taylor*, where the Legislature

effectively decriminalized felony flight by failing to include it in the list of exceptions to the statute which decriminalized traffic offenses. The court did not act for the Legislature then. The court cannot act for the Legislature now. There is no basis for this court to judicially amend RCW 9A.20.030 or either RCW 9.92.060 or RCW 9.95.210. A judicial amendment to the latter statutes may create additional unintended consequences.

While amicus curiae has correctly identified a problem—the lack of authority for courts of limited jurisdiction to impose restitution—it seeks the wrong solution. The lack of authority for inferior courts to impose restitution can only be addressed by the Legislature, which can devise a response that takes into account the various purposes of the statutes discussed here. This court is not empowered to fashion such an amendment to the law.

Respectfully submitted this 12th day of September, 2012,



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Yours,

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