

NO. 62891-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ASHLEY ALEXANDER,

Appellant.

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

The Honorable Jeffrey Ramsdell

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Ashley Alexander pleaded guilty to an amended information charging the misdemeanor offense of disorderly conduct. Although it had the ability to do so, the State did not require Alexander to pay restitution for uncharged conduct as a condition of the plea agreement. The State now asserts that a restitution award was proper because the State originally charged Alexander with third-degree assault. But while a court may look to underlying conduct in ascertaining the propriety of a restitution claim, unless the defendant has agreed to pay restitution for uncharged conduct, restitution must be limited to the crime charged and proved. Here, the crime charged and proved did not authorize the restitution award.

1. RESTITUTION MUST BE CAUSALLY
CONNECTED TO THE CRIME CHARGED AND
PROVED.

a. Restitution is only authorized for the specific crime of which the defendant was charged and convicted. A restitution order must be based on the existence of a causal relationship between the precise crime charged and proven and the victim's damages. State v. Griffith, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008); State v Woods, 90 Wn. App. 904, 907, 953 P.2d 834, rev.

denied, 136 Wn.2d 1021 (1998). “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. Misczak, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993).

The import of these holdings is that the causal relationship may not flow from the defendant’s conduct where this conduct was not the basis for the crime of which the defendant was convicted. State v. Dauenhauer, 103 Wn. App. 373, 378-79, 12 P.3d 661 (2000).

In Dauenhauer, the defendant was convicted of three counts of second-degree burglary, but the trial court awarded restitution for acts that were not part of the burglary charge. 103 Wn. App. at 379. On appeal, the Court held that the restitution award was statutorily barred, as these acts were “merely connected,” but not causally linked, with the charged offense. Id. at 379-80. Here, likewise, the injuries for which the State sought restitution were not causally linked to Alexander’s conviction for disorderly conduct.

The State attempts to analogize this case to State v. S.T., 139 Wn. App. 915, 163 P.3d 796 (2007). Br. Resp. at 11-13. The analogy is inapt. In S.T., the juvenile appellant was convicted by

Alford¹ plea of attempted taking a motor vehicle without permission in the second degree. 139 Wn. App. at 917. The State filed a restitution claim for personal property that had disappeared from the car after it was stolen. Id. at 918. This Court looked to the elements of the charged offense in conjunction with the facts, and based on this examination, distinguished Misczak. Id. at 918-20. S.T. had been found sitting in the driver's seat of an idling stolen vehicle with an obvious punched ignition. Id. at 920. This Court concluded,

This is not a case where the restitution order was based on a defendant's general scheme or acts not part of the charge . . . In this case, restitution was based on the precise offense charged and the acts that were part of that charge.

Id.

In S.T., the record established sufficient facts to support the crime charged. State v. L.A., 82 Wn. App. 275, 918 P.2d 173 (1996) (a damaged ignition is corroborative evidence of taking a motor vehicle without permission). Here, by contrast, although the certification for determination of probable cause establishes a factual support for the crime of disorderly conduct, a causal nexus between this offense and the State's restitution claim has not been

¹ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

proven. And with respect to the originally charged offense, the certification does not establish Alexander intentionally assaulted Whalen. CP 2-4.

Further, an important facet of this Court's analysis in S.T. was the fact that taking a motor vehicle without permission was the crime charged. Id. at 921. This Court noted, "The unique features of taking a motor vehicle without permission have made it challenging to develop a predictable analytical framework for orders of restitution." Id.; cf., also, State v. Hiatt, 154 Wn.2d 560, 568, 115 P.3d 274 (2005) ("petitioners are guilty of taking, rather than merely subsequently possessing, the automobile. But for the taking of the vehicle, the personal property would not have gone missing.") (emphasis in original).

b. Barring restitution for uncharged conduct except pursuant to plea agreements does not hamper the State's ability to negotiate settlements. Limiting restitution awards to crimes charged and proven does not in any way restrict the State's freedom to act or prosecutorial discretion in charging decisions. The State always retains the authority to condition a plea bargain on the defendant's agreement to pay restitution for uncharged conduct. Miszak, 69 Wn. App. at 429; RCW 9.95.210(2). In fact,

apparently in acknowledgment of the fundamental precept, in addition to containing the language, “The defendant shall pay restitution in full to the victim(s) on the charged counts,” the King County Prosecuting Attorney’s standard plea agreement form contains checkboxes permitting the parties to enter an agreement as to a specific dollar amount or according to some other terms, such as for uncharged conduct. CP 17. But “[a] defendant may not be required to pay restitution beyond the crime charged or for other uncharged offenses absent a guilty plea with an express agreement as part of that process to pay restitution for crimes for which the defendant was not convicted.” Dauenhauer, 103 Wn. App. at 378.

The State manufactures a parade of horrors that it asserts would ensue if this Court follows Woods and Misczak. The State laments that limiting restitution to conduct that has been charged and proven “would force the State to conduct unnecessary trials, or file unnecessary charges, simply to preserve its right to establish a casual [sic] connection between the defendant’s crime and the resulting loss.” Br. Resp. at 12-13. As shown by the State’s own plea form, this is a meritless claim.

The State could have conditioned Alexander’s guilty plea on an agreement to pay restitution for uncharged conduct. Alexander

should not bear the brunt of the State's decision not to do so. See Dauenhauer, 103 Wn. App. at 379 (differentiating the circumstance of defense counsel's incorrect concession to liability – which would not confer statutory authority upon the trial court to order restitution for uncharged conduct – from “a guilty plea and agreement to pay for uncharged acts” – which would); cf., also, State v. Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006) (defendant may plead guilty to crime for which there is no factual basis).

The State also mischaracterizes Alexander's argument. The State portrays her line of reasoning as an effort to “interpret the statute . . . to limit restitution to an agreed amount whenever the State reduces a charge or agrees to a negotiated resolution[.]” Br. Resp. at 12 (emphasis added). Alexander has never sought to tie courts' hands in the manner the State misleadingly suggests. Alexander simply asks this Court to find that because the State did not require Alexander to agree to pay restitution for uncharged conduct as part of its plea bargain, Alexander should not be liable for restitution beyond the scope of her disorderly conduct conviction.

c. The State abandoned the charge of assault in the third degree when it filed an amended information. Alexander has

referred this Court to authority establishing that the State's decision to file an amended information constitutes an abandonment of the original charges.² Br. App. at 11 (citing State v. Navone, 180 Wash. 121, 123-24, 39 P.2d 834 (1934); State v. Oestreich, 83 Wn. App. 648, 651, 922 P.2d 1369 (1996); and State v. Kinard, 21 Wn. App. 587, 589-90, 585 P.2d 836 (1978)). The State's decision to amend the charge here – without obtaining Alexander's agreement to pay restitution connected to the original charge – bears directly upon whether the restitution award was improper.

There may be many reasons for the State's decision to amend criminal charges in a given case besides the service of plea negotiations. Frequently, the State amends to lesser charges because the State recognizes it could not prove the greater charge. Indeed, in this case, the prosecutor certified under penalty of perjury that the decision to file an amended information was based on "plea negotiations and evidentiary considerations." Supp. CP ____ (Sub No. 31) (emphasis added).

The State has not offered a substantive response to Alexander's argument on this point, instead noting in a footnote,

² The narrow exception to this rule is when the State amends the information pursuant to plea negotiations and the defendant refuses to plead guilty. Oestreich, 83 Wn. App. at 651.

“[T]his interpretation [that the State abandoned the third-degree assault charge] is contrary to the law . . . to the effect that the State’s decision to amend the charge does not preclude restitution on the original charge.” Br. Resp. at 16 n. 8. The State also notes that the cases cited by Alexander “do not involve or interpret a restitution statute.” Id.

The State’s claim that the originally-charged crime should dictate the extent to which the State should be entitled to seek restitution is based on the unstated premise that the State could have proven this crime. But it is not reasonable to presume, based on the record presented to the trial court, that the State could have proven Alexander intentionally assaulted Whalen. And the cases cited by the State implicitly recognize as much. See e.g. S.T., 139 Wn. App. at 920-21 (recognizing that the stipulated facts for purposes of the juvenile appellant’s Alford plea supported the original charge); and State v. Landrum, 66 Wn. App. 791, 832 P.2d 1359 (1992) (noting that defendant had entered an Alford plea to assault in the fourth degree, amended from original charge of child molestation in the first degree, and “It [was] undisputed that the police reports indicate that the assault was of a sexual nature.”) but see State v. J.P., 149 Wn.2d 444, 452-53, 69 P.3d 318 (2003)

(overruling Landrum to the extent that it found the juvenile restitution statute authorized restitution for counseling costs in non-sex offenses).

Moreover, the fact that the cases cited by Alexander do not involve the interpretation of a restitution statute is a non sequitur to the question whether the State's abandonment of the third-degree assault charge precludes its reliance upon this charge for purposes of its restitution claim.

Imagine, for example, a hypothetical scenario in which the State initially charged a defendant with robbery in the first degree, but after further investigation determined that it could not prove the robbery charge and filed an amended information charging assault in the fourth degree. According to the State's theory, the State would be entitled to seek restitution for the robbery charge it could not prove notwithstanding its decision to abandon this charge. Such a result would be contrary to both public policy and related precedent.

In State v. Mora, 138 Wn.2d 43, 977 P.2d 564 (1999), the State filed charges of second-degree assault with a firearm against a juvenile, triggering the automatic jurisdiction of the Adult Division of Superior Court, but could not prove this charge. 138 Wn.2d at

47. Following a stipulated facts trial, the court convicted Mora of the lesser charges of possession of a stolen firearm and assault in the third degree. Id. Rejecting the contention that the Adult Division of Superior Court retained jurisdiction, the Supreme Court held the analysis turned on “the nature of the offenses upon which [Mora] stood trial, and not simply . . . the State’s charging decision.” Id. at 52. In so holding, the Court reasoned, “tying adult court jurisdiction to the prosecutor’s charging decision without regard to later amendment of the charges is neither consistent with the statute’s language nor does it carry out the Legislature’s intent.” Id. at 50.

Although the Legislature intends liberal construction of the restitution statutes, “it is reasonable to believe it did not intend to provide victims a blank check.” State v. Vinyard, 50 Wn. App. 888, 895, 751 P.2d 339 (1988). The plain language of RCW 9.95.210 permits “restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question.” RCW 9.95.210(2) (emphasis added). The State

asserts this Court should jettison this principle to issue the State a blank check.³ This Court should decline the State's invitation.

2. THE STATE DID NOT PROVE A CAUSAL CONNECTION BETWEEN ITS UNAUTHENTICATED DOCUMENTATION OF LOSSES AND THE AMOUNT OF RESTITUTION SOUGHT.

a. The State's documentation was not causally linked to the alleged damages. The State chose not to call any witnesses to authenticate the "time loss" and insurance claim forms it submitted at the restitution hearing. It did not call any medical provider or records custodian to verify that the figures on the insurance claim forms comported with (1) the amounts claimed on the forms or (2) Whalen's medical treatment. Nor did it call a witness to explain the "time loss" figures. Yet the State claims this case is "remarkably similar" to State v. Blanchfield, 126 Wn. App. 235, 108 P.3d 173 (2005), in which the Court upheld a restitution award for medical treatment. Br. Resp. at 28. The State is wrong.

In Blanchfield, the State specifically introduced medical bills which were then linked to the victim's medical treatment by her

³ The State asserts the basic principle enunciated in State v. Eilts, 94 Wn.2d 489, 495, 617 P.2d 993 (1980), that restitution must be limited to the crime of which the defendant was charged and convicted, has been overruled. Br. Resp. at 17-18. Appellate courts' adherence to this rule manifestly establishes its continued viability.

testimony regarding payments she made. 126 Wn. App. at 242. Here, the State only introduced insurance claim forms. As defense counsel argued below, “There’s no medical documents from a medical provider indicating that a provider actually made the findings that are now being testified to.” 3RP 7. Thus, unlike Blanchfield, there is a link missing in the foundation for the State’s proof of damages.

On appeal, the State points to Whalen’s testimony regarding the injury she suffered as establishing the requisite causal connection between the amounts claimed in these documents and the restitution request. Br. Resp. at 26-27. Alexander does not dispute that Whalen suffered injury or that “medical services were needed.” Br. Resp. at 28. The problem with the State’s evidence is that neither the documents from the insurance company nor the Worker’s Compensation forms show what medical treatment Whalen received or even that a doctor treated her. Nor do these documents meet preliminary foundational requirements for admission. Thus, assuming arguendo that it was permissible for the trial court to rely on hearsay to support the restitution order (a

premise which Alexander contests),⁴ the State's hearsay evidence was insufficient to link Whalen's injuries to the amount of restitution claimed.

b. The remedy is reversal and dismissal of the restitution order. Where the State has introduced insufficient evidence to support a restitution claim, it is barred from offering additional evidence on remand. Griffith, 164 Wn.2d at 968 (holding that introducing new evidence on remand would conflict with the statutory requirement that restitution be set within 180 days after sentencing). Here, absent sufficient evidence to tie the amounts sought by the State to the restitution claim, the restitution order must be reversed and dismissed.

⁴ See Br. App. at 16-19.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in the Brief of Appellant, the restitution order in this matter should be reversed and dismissed.

DATED this 29th day of October, 2009.

Respectfully submitted:



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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