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No. 63473-9-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

2010 APR 26 AM 4:12
COURT OF APPEALS
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN DEAN,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

THE STATE DID NOT PROVE THE AMOUNT OF
LOSS WHICH RESULTED FROM MR. DEAN'S
CRIMINAL ACTS

In the absence of sufficient proof to establish either an actual loss by the victim or a causal connection between such loss and Kevin Dean's crimes, the trial court erred in entering the restitution order in this case.

RCW 9.94A.753(3) provides, in pertinent part, restitution:

shall be based on 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.

Restitution is permitted only for loss that is causally connected to the offense of conviction. State v. Kinneman, 155 Wn.2d 272, 286, 119 P.3d 350 (2005); State v. Woods, 90 Wn.App. 904, 907, 953 P.2d 835 (1998). Restitution may not be imposed for a "general scheme,' or acts, 'connected with' the crime charged, or uncharged crimes unless the defendant enters into an express agreement." Kinneman, 155 Wn.2d at 286 (quoting Woods, 90 Wn.App. at 907-08).

Rather than base its decision upon the loss connected to Mr. Dean's crimes of conviction, the trial court based its restitution award entirely upon the losses attributable to the crimes of Mr.

Dean's codefendant, Lisa Mullen, a crime which was not a part of the conspiracy charge and of which Mr. Dean was not convicted.

CP 146. The Court concluded:

the only easily ascertainable damages causally connected to the crimes for which the defendants were convicted are those proven to the jury under Count 3 against Ms. Mullen in the amount of \$241,458.

CP 146.

The State's response, acknowledges that restitution was based entirely upon the conduct of Ms. Mullen, rather than Mr. Dean. Brief of Respondent at 13. Nonetheless the State argues restitution was "based upon the activity done by Lisa Mullen and Kevin Dean." Brief of Respondent at 17. Aside from the obois contradictions, the State's argument has nothing to do with the actual facts of the case. Mr. Dean was never charged as an accomplice or conspirator to the criminal profiteering charge against Ms. Mullen. It is proof of that charge which yielded the restitution award imposed by the court.

By concluding the only easily ascertainable damages were proven with respect to charges against Ms. Mullen's alone, the court necessarily found there were no easily ascertainable

damages for either of Mr. Dean's convictions. As such, the court could not impose restitution on Mr. Dean.

Further, the conclusion that a coconspirator may be liable for restitution resulting from crimes for which he cannot be criminally liable is contrary to the restitution statute and decisions of the Washington Supreme Court. The causal connection requirement exists between the crime of conviction and restitution imposed. Kinneman, 155 Wn.2d at 286; Woods, 90 Wn.App. at 907-08. Thus, if a defendant cannot be convicted of a charge he cannot otherwise be held liable for the offense.

Mr. Dean was not and could not be convicted as conspirator to Ms. Mullen's criminal profiteering count as the State did not offer an evidence that he had specific knowledge that he was assisting in that offense. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001). Stein concluded no criminal liability could arise absent such specific knowledge thus rejecting the Pinkerton doctrine that a conspirator is liable for all foreseeable acts committed by a coconspirator in furtherance of the conspiracy. Stein, 144 Wn2d. at 246 (citing Pinkerton v. United States, 328 US. 640, 66 S.Ct. 1180, 90 L.Ed.2d 1489 (1946)).

Despite Stein's limitation of criminal liability in conspiracy cases, and Kinneman's general limitation of restitution to the criminal of conviction alone, the State argues the restitution is causally connected to the conspiracy. Brief of Respondent at 13. First, the State's argument again ignores the actual facts of the case, specifically that the court relied entirely upon Ms. Mullen's separate conviction of criminal profiteering to determine the amount of restitution. CP 146. Second, the State fails to appreciate that absent proof of knowledge as required by Stein there is no causal connection between those amounts and the conspiracy, because the crimes that generated those losses are not a part of the conspiracy. In the end, the State seems to contend that while Stein rejected the Pinkerton doctrine as a basis for conviction of conspiracy, that doctrine somehow still applies to the sentence imposed following a conviction of conspiracy. That argument is not legally sound.

B. CONCLUSION

For the reasons above this Court must reverse the restitution order entered in this case.

Respectfully submitted this 26th day of April 2010.

A handwritten signature in black ink, appearing to read 'Gregory C. Link', is written over a horizontal line.

GREGORY C. LINK – 25228
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Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)
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 Respondent,)
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 v.)
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 KEVIN DEAN,)
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 Appellant.)

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF APRIL, 2010, 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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SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF APRIL, 2010.

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