

NO. 64194-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

APRIL LOUISE DAVIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE ANDREA DARVAS

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

The defendant, April Davis, worked as an office manager in charge of billing for Doctor Pamela Butterfield's dental practice. During the time of her employment, the defendant began manipulating the books and misappropriating funds. When the defendant's elaborate scheme of doctoring the books was discovered, she was charged with a felony offense, ultimately pleading guilty to a reduced charge of attempting to make a fraudulent insurance claim. She was subsequently ordered to pay \$212,955.13 in restitution to Doctor Butterfield.

On appeal, the defendant contends that she should not have to pay restitution because (1) some of her "bookkeeping errors" were not related to her criminal activity, (2) Doctor Butterfield's patients might not have paid their bills anyways, and (3) she should not have to pay for Doctor Butterfield's cost of investigating the extent of her manipulation of the books. Should this Court reject the defendant's challenge to the restitution order?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On June 3, 2008, the defendant was charged with making a fraudulent insurance claim, a felony offense. CP 105; RCW 48.30.230. On December 23, 2008, the defendant entered into a negotiated plea to a reduced charge of attempted making of a fraudulent insurance claim, a gross misdemeanor. CP 11-29. The defendant agreed that she committed the crime over a period of time from June 24, 2002 through February 12, 2007. CP 16.

As part of the plea, the State agreed not to file any additional charges arising from the defendant's scheme. CP 13. The defendant agreed to "real facts," allowing the trial court to consider as real and material facts for sentencing purposes the facts as set forth in the certification for determination of probable cause. CP 29.<sup>1</sup> The defendant also agreed to pay restitution in full, the exact amount to be determined at a subsequent hearing. CP 29.

On January 16, 2009, Davis received a 12-month suspended sentence on condition she perform 480 hours of community service and pay restitution. CP 30-32. After a number of restitution

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<sup>1</sup> The certification for determination of probable cause was attached to the plea of guilty. See CP 20-26.

hearings were held, Judge Darvas entered an order requiring the defendant to make restitution to Doctor Butterfield in the amount of \$212,955.13.<sup>2</sup> CP 33.

## 2. SUBSTANTIVE FACTS

Doctor Butterfield owns and operates a dental practice.

1RP<sup>3</sup> 5. In May of 2002, the defendant began working for Doctor Butterfield as her office manager in charge of accounts, billing and insurance claims. 1RP 5-6.

On February 26, 2007, another employee was filling in for the defendant on her day off when it was discovered that the defendant had hidden a number of unsent patient billing statements. 1RP 6-7. An initial investigation revealed that this was just the "tip of the iceberg"; there were huge problems with the books. 1RP 7. Doctor Butterfield ultimately hired a lawyer and a forensic accounting firm to go through the books, patients' accounts and insurance information. 1RP 10. In summarizing and

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<sup>2</sup> The defendant was also ordered to make restitution to a multitude of insurance companies, although this part of the order of restitution is not being contested on appeal.

<sup>3</sup> The verbatim report of proceedings is cited as follows: 1RP--6/5/09; 2RP--8/14/09; 3RP--9/24/09.

describing the defendant's practices in manipulating the books, the accounting firm broke the defendant's activities into six categories listed as follows: (1) inaccurate insurance adjustments, (2) missing insurance adjustments, (3) inaccurate finance charges, (4) inaccurate posting errors, (5) inaccurate paid by insurance postings, and (6) deleted treatment. Exhibit 3; see also Exhibit 5.<sup>4</sup>

The category of "inaccurate insurance adjustments posted" pertains to contracts Doctor Butterfield had with certain insurance companies. A specific procedure may cost \$100, but the insurance company for the patient may have a provision that states they will pay only \$80 and require that this amount be the limit the doctor can charge the patient for the procedure. On the books then, once the insurance company paid the \$80, the \$100 initially listed in the books would be adjusted to \$80--with a refund possible for the patient's payment. See Exhibit 3 at 2; Exhibit 5 at 2-3; 1RP 20. The defendant repeatedly made insurance adjustments in the

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<sup>4</sup> Exhibit 5 is a report prepared by Doctor Butterfield's attorney. The accounting firm's forensic evaluation and report were completed and prepared on July 20, 2007, prior to the filing of charges against the defendant. CP 105; Exhibit 3. The report by Doctor Butterfield's attorney provided additional findings and updated amounts owed that were discovered during the continuing investigation. 1RP 21-22; Exhibit 5. The report was completed on June 1, 2009. Id.

books for patients who were not entitled to them. Thus, the amount owed or paid by a patient incorrectly appeared as zero. Id.

The category "missing insurance adjustments" is similar to the above category but instead of inaccurate insurance adjustments, the adjustment is never recorded. For example, if an insurance company were to make an overpayment, the company would ultimately be refunded the excess portion of the payment and the account adjusted. However, in many instances, the defendant never posted the refund payments to the patients' accounts. Thus, the patients would carry credits on their accounts they were not due, and when they came in again, the defendant would improperly apply this credit to the new amount owed, and/or would divert any new payment to other patients' accounts. Exhibit 3 at 2; 1RP 23-25.

The category of "inaccurate finance charges" pertains to interest and fees owed on past due accounts or interest due on accounts paid over time. Exhibit 3 at 2-3; Exhibit 5 at 3. The defendant repeatedly changed patients' balance due amounts to zero by indicating that there had been a finance charge adjustment when in fact the patients did not even owe a finance charge. Id.; 1RP 26.

The category of "inaccurate posting errors" pertains to changes in patients accounts for alleged bookkeeping errors. Exhibit 3 at 3; Exhibit 5 at 3; 1RP 27. Normally, if a patient were accidentally charged for a service they had not received, their account would be adjusted and the adjustment would be listed as a posting error. However, the defendant repeatedly listed patients' balances as satisfied by adjusting their balances downward and listing the adjustments as "posting errors" when no error had occurred. Id.

The category of "inaccurate paid by insurance postings" pertains to fraudulent insurance payments or overpayments. 1RP 28; Exhibit 3 at 3; Exhibit 5 at 3. This includes the defendant submitting insurance claims for services that had never been performed. Exhibit 3 at 3; Exhibit 5 at 3.

The category of "misallocated payment amounts" also pertains to the fraudulent insurance payments or overpayments. Exhibit 3 at 3. Sometimes the defendant allocated these improper insurance payments to different patient accounts. 1RP 28; Exhibit 3 at 3; Exhibit 5 at 3.

Subsequent to the forensic accounting report it was discovered that the defendant was also deleting from the books

services that were actually provided to the patients. 1RP 30; Exhibit 5 at 4. Referred to as "deleted treatment," the defendant would simply remove from the books some of the treatment actually provided to patients by Doctor Butterfield. For example, if Doctor Butterfield filled three cavities, the defendant would enter into the books that only two cavity fillings had been performed and thus the books would indicate a lower amount of money was owed, paid and received. 1RP 30.

In addition, at the time of the original forensic evaluation, the evaluator indicated that additional unexplained transactions were being investigated. Exhibit 3 at 3-4. Specifically, it appeared that funds from a number of insurance checks sent to Doctor Butterfield were never deposited into the company account. Id. At the restitution hearing, Doctor Butterfield testified that indeed the defendant had been intercepting the insurance checks, using her signature stamp, forging her signature, and depositing the checks into her own account. 1RP 10, 47-48.

Additional facts are included in the sections they pertain.

**C. ARGUMENT**

- 1. RESTITUTION IS APPROPRIATE BECAUSE "BUT FOR" THE DEFENDANT'S CRIMINAL ACTIONS, DOCTOR BUTTERFIELD WOULD NOT HAVE SUFFERED A LOSS OF OVER \$200,000.**

The defendant argues that she should not be required to pay restitution to her former employer, Doctor Butterfield, even though she cooked the books in an insurance scam that required an extensive accounting investigation and resulted in significant financial loss to Doctor Butterfield. This claim should be rejected. "But for" the defendant's criminal actions, none of the losses to Doctor Butterfield would have occurred; thus, the trial court did not abuse its discretion in ordering restitution.

By way of a negotiated plea, the defendant pled guilty to a reduced charge of attempting to make a fraudulent insurance claim. The date of the crime encompassed the entire time frame of the defendant's employment with Doctor Butterfield. Pursuant to RCW 9.92.060, the court had the full authority to order the defendant to make restitution "to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question."

The general rule is that restitution may be ordered for losses incurred as a result of the offense charged. State v. Woods, 90 Wn. App. 904, 907, 953 P.2d 834, rev. denied, 136 Wn.2d 1021 (1998). A sentencing court can order a defendant to pay restitution as long as there is a causal connection between the crime and the injuries for which compensation is sought. State v. Enstone, 137 Wn.2d 675, 682-83, 974 P.2d 828 (1999); State v. Wilson, 100 Wn. App. 44, 995 P.2d 1260 (2000).

Restitution is to be ordered broadly, it is not "limited by the definition of the crime." State v. Selland, 54 Wn. App. 122, 124, 772 P.2d 534, rev. denied, 113 Wn.2d 1011 (1989). In determining whether a causal connection exists, the court "look[s] to the underlying facts of the charged offense, not the name of the crime to which the defendant entered a plea." State v. Landrum, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992) (although Landrum pled guilty to simple assault, the facts showed his attack was sexually motivated and thus restitution for a medical sexual assault examination was warranted). Losses are causally connected if, "but for" the charged crime, the victim would not have incurred the loss. State v. Griffith, 164 Wn.2d 960, 966, 195 P.3d 506 (2008).

A challenge to the awarding of restitution is reviewed for an abuse of discretion. State v. Israel, 113 Wn. App. 243, 54 P.3d 1218 (2002), rev. denied, 149 Wn.2d 1015 (2003). While reasonable minds may differ as to a trial court's decision, that is not the standard used in reviewing a trial court decision to award restitution. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). To prevail on appeal, the defendant must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

**2. DOCTOR BUTTERFIELD'S LOSSES ARE CRIME RELATED--NOT JUST THE RESULT OF "BOOKKEEPING ERRORS."**

The defendant contends that restitution for losses incurred by Doctor Butterfield is inappropriate because most of the losses are the result of "non-criminal bookkeeping errors" unrelated to the defendant's criminal activity. Def. br. at 1. This is incorrect. In no uncertain terms, the defendant "cooked the books" causing substantial losses to Doctor Butterfield.

For the first few years of her employment, the defendant's bookkeeping was just fine. It was not until 2004 that the defendant began to make "creative adjustments" to the books. 1RP 22.

There is simply no evidence that the defendant's creative adjustments to the books were anything but intentional acts intended to cover for her illegal activities. The defendant can point to no evidence that suggests the doctoring of patients' accounts was the result of simple acts of negligence.

In addition, the defendant's attempt to analyze each category of financial manipulation separately is misguided. First, the categories listed by the accounting firm were simply a way to best explain the defendant's activities. They were not separate, distinct independent acts. In order to even discover that losses had occurred, Doctor Butterfield and her staff had to go through every medical chart, every account record, and every explanation of benefits, line by line, to see if they matched up. 1RP 8-9. Money paid or owed was diverted from one account to another, with the result being that the books appeared to be in order. 1RP 33.

In one instance, money from one account was diverted on the books into five separate accounts making all of the accounts appear to be correct with no balance due. 1RP 23. The defendant would use multiple means, all together, to make each account appear to have a correct balance. 1RP 33. This allowed the defendant to cover up her criminal behavior, prevented its

discovery, prevented Doctor Butterfield from obtaining moneys due to her for her services rendered, and thus "but for" the defendant cooking the books to create and cover her insurance fraud activity, Doctor Butterfield would not be out these losses.

As stated above, restitution is not limited by the definition of the crime. Selland, Wn. App. at 124. The court will look at the underlying facts of the offense and see if the losses are causally connected to the crime; i.e., "but for" the crime, would the victim have incurred the loss. Griffith, 164 Wn.2d at 966. They are here.

State v. Thomas,<sup>5</sup> is instructive. A jury found Thomas guilty of DUI. While Thomas' driving caused an accident that seriously injured her passenger, the jury did not find Thomas guilty of vehicular assault. Still, the trial court found that the passenger's injuries were causally related to the defendant's DUI and ordered restitution for the passenger's medical costs. In affirming, the Court of Appeals stated that the law allows the sentencing court to order the defendant to pay "the actual amount of loss caused by the crime to any person damaged; neither the name of the crime nor the named victims limit the award." Thomas, 138 Wn. App. at 83.

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<sup>5</sup> 138 Wn. App. 78, 155 P.3d 998 (2007).

Here, the defendant may not agree with the court's ruling, but that is not the standard. The defendant must show that the court abused its discretion, that no reasonable judge would have so ruled. Robtoy, 98 Wn.2d at 42. That standard, the defendant cannot meet here. It is reasonable to conclude that Doctor Butterfield's losses were causally related to the defendant's criminal acts.

**3. THERE IS NO LEGAL OR FACTUAL SUPPORT FOR THE DEFENDANT'S ARGUMENT THAT DOCTOR BUTTERFIELD MIGHT NEVER HAVE BEEN PAID FOR HER SERVICES SO SHE IS NOT ENTITLED TO RESTITUTION FOR HER LOSSES.**

In a separate assignment of error, supported by a single sentence of argument, the defendant claims that she does not have to pay restitution because there is no evidence Doctor Butterfield's patients would have paid their bills. This claim should be rejected. The defendant provides no legal support for this claim and it is contrary to the facts.

For this assignment of error, the defendant's sole argument that she should not be required to pay restitution consists of the following sentence: "Furthermore, there was no evidence to support that Dr. Butterfield's patients would have paid the full

amounts attributed to Ms. Davis's failure to bill them." Def. br. at 21. The defendant provides no legal authority or citation to support her assertion that Doctor Butterfield is not entitled to restitution for services she performed but has yet to be compensated.

"Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996), remanded on other grounds, 132 Wn.2d 193 (1997). Bare allegations unsupported by citation to authority, or persuasive reasoning cannot sustain the defendant's burden. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986), rev. denied, 110 Wn.2d 1002 (1988). Without appropriate citation to any legal authority or reason, this Court should decline to consider this claim.

Further, if the defendant's legal assertion were true, then no victim would be entitled to restitution when the crime committed involves the theft of services in which other parties were initially required to pay for the services. This is an absurd result and is contrary to the rule that the restitution statutes shall be interpreted broadly to carry out the legislature's intent. Israel, 113 Wn. App. 243.

Finally, the defendant's assertion is contrary to the facts. When a patient comes in for services at Doctor Butterfield's office, the patient pays for the services, minus anticipated insurance amounts, on the day of service. 1RP 42, 58-62. The office manager--the defendant--is in charge of verifying either prior to the date of the services being provided, or on the day services are provided, the amount insurance will pay for the services provided. Id. The patient pays the remaining costs on the day the service is provided. Id. In addition, each patient signs a contract wherein they agree they are legally responsible for the full amount of the bill if there is any denial of insurance coverage. 1RP 62.

In short, Doctor Butterfield provided services in which she charged a fee. The defendant prevented Doctor Butterfield from obtaining payment for her services. The trial court did not abuse its discretion in ordering restitution for the services provided that were never compensated but for the defendant's criminal actions.

**4. A VICTIM IS ENTITLED TO THE COST OF INVESTIGATING THE EXTENT OF A DEFENDANT'S FINANCIAL CRIME.**

The defendant next contends that she should not have to pay restitution for Doctor Butterfield's cost of investigation and

attorney fees. There is no support for the defendant's claim. The Supreme Court has held that investigative costs and attorney fees causally related to the offense are properly included as part of restitution. State v. Kinneman, 155 Wn.2d 272, 286-89, 119 P.3d 350 (2005).

After discovering that the defendant had failed to send out a number of bills, Doctor Butterfield and another employee began looking at the books more closely. 1RP 7-8. They quickly discovered that the failure to send out the current bills was just the "tip of the iceberg." 1RP 7. Doctor Butterfield then decided that she needed to do an extensive investigation of all patient files. Id. This entailed pulling every patient's medical chart, pulling every patient's financial record, pulling every patient's insurance information and then going through the three records line by line to see if they matched up. 1RP 8-9. The period of time under investigation spanned the five years the defendant worked as Doctor Butterfield's office manager. 1RP 5-6, 8.

Doctor Butterfield also hired a lawyer because she did not know the extent of the defendant's scheme, how to deal with the

problem and how to deal with the insurance companies.<sup>6</sup> 1RP 34-35. As Doctor Butterfield put it, "Obviously, this wasn't my level of expertise, I fix teeth." 1RP 35.

Four employees conducted the initial review and investigation of the extensive records, with 1,466 plus hours spent compiling and reviewing the records. 1RP 12-13; Exhibit 1. Doctor Butterfield then turned over the records--with the suspected improper activities highlighted--to the accounting firm of Clark Newberg for a full forensic evaluation. 1RP 10-11. The firm completed their evaluation on September of 2007, a summary of the losses being submitted to the court at the first restitution hearing held on June 5, 2009. 1RP 21; Exhibit 1.

At the end of the first day of the restitution hearing, the matter was continued until August 14, 2009 because more testimony was needed. 1RP 65-69. However, on August 14, 2009, just before the hearing was set to resume, defense counsel informed the prosecutor (and subsequently the court) that no other witnesses needed to be called to testify, that the defense was not

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<sup>6</sup> At the restitution hearing, the prosecutor asked that Doctor Butterfield's lawyer, Joanna Harrison, be allowed to sit at counsel table to assist her (similar to having a detective sit at counsel table) because the lawyer possessed extensive knowledge of the case. 1RP 2.

contesting the amounts requested, only the legal propriety of imposing the costs. 2RP 2-4. The prosecutor also submitted an updated list of the costs incurred by Doctor Butterfield, amending the initial amounts contained in the Clark Newberg report that was completed two years before in September of 2007. 1RP 21; 2RP 4. The defendant was asked if he was raising any objection to the amended amounts, counsel responded, "No objection, your Honor." 2RP 5.

This is the exact type of case wherein reviewing courts have repeatedly said investigation costs are appropriately included in a restitution order. Kinneman, 155 Wn.2d at 277 ("[R]estitution may be ordered for investigative costs if they are reasonably and rationally related to the crime and consequential in the sense that but for the crime, the victim would not have incurred them."); Wilson, 100 Wn. App. at 50 (restitution is available for an employer's investigative costs to prove monetary loss related to embezzlement by an employee); State v. Smith, 119 Wn.2d 385, 831 P.2d 1082 (1992) (the costs of developing film from a surveillance camera needed to investigate a burglary was properly part of restitution).

In State v. Johnson, 69 Wn. App. 189, 847 P.2d 960 (1993), the defendant was employed as a bookkeeper and office manager for an auto repair shop. During the course of her employment, Johnson embezzled funds from the shop. After pleading guilty to theft, the court ordered restitution, including investigation costs for the cost of having the victim, his accountant, his parents, his fiancée, and a former girlfriend review the shop's business records.<sup>7</sup> On appeal, this Court affirmed the restitution order, stating, "the cost of investigating the business records was a reasonable consequence of Johnson's act of embezzlement." Johnson, at 193.

The defendant's primary argument to the contrary seems to be her claim that the police or prosecutor's office could have done the investigation. Even if this speculative claim were true--that a business person can suspect their books are cooked and the police and/or prosecutor will obtain their records and do a complete forensic evaluation--the fact that someone else could have done the investigation does not change the fact that Doctor Butterfield

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<sup>7</sup> Similar to what Doctor Butterfield did here, the shop owner in Johnson used nonprofessionals in an attempt to curtail costs. Johnson, 69 Wn. App. at 193.

did the investigation, and that "but for" the defendant's criminal activity, she would not have.

In regards to the attorney fees, as part of the cost of dealing with, and investigating, criminal activity, attorney fees incurred can properly be included as part of any restitution order. Kinneman, 155 Wn.2d at 288-89. All that is required is the meeting of the same causal connection test for other types of restitution. Id. Attorney fees can even include the cost of attorney fees associated with a separate civil suit instituted as a result of a defendant's criminal activity. Id.

The defendant seems to acknowledge that it was appropriate to order attorney fees in this case.<sup>8</sup> The defendant appears to only object to the amount, specifically, the updated amount submitted on August 14, 2009. However, the defendant is barred from contesting this amount, and in any event, the amount is perfectly reasonable.

A judge must either determine the amount of restitution by a preponderance of the evidence or accept a defendant's admission or acknowledgement of the amount of restitution owed. State v.

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<sup>8</sup> See Def. br. at 22, stating "It is reasonable to conclude that Dr. Butterfield properly needed to consult counsel as to her responsibilities to the insurance companies caused by the inaccurate claims Ms. Davis filed."

Ryan, 78 Wn. App. 758, 761-62, 899 P.2d 825, rev denied, 128 Wn.2d 1006 (1995). The mere failure to object may be considered an acknowledgement. Id.

Here, at the second restitution hearing, defense counsel specifically informed the court that he was not contesting the amount of restitution, including attorney fees, but instead he was limiting his arguments to the issue of whether the restitution was causally connected to the crime. 2RP 2-4. When the prosecutor submitted an updated list of the costs, the court specifically asked defense counsel if he was raising an objection to the amounts and counsel responded that he was not. 2RP 5. Thus, the defendant is barred from challenging the amount of the attorney fees on appeal.

In any event, the fees are reasonable. Doctor Butterfield testified that she hired counsel to help her with the investigation of the case and the process. The investigation continued well after the initial forensic evaluation was complete. The process continued up until the defendant agreed at the last hearing to the amount of restitution owed. While the defendant claims there was "no need" for counsel to attend the restitution hearing, both the prosecutor and Doctor Butterfield indicated he possessed vast knowledge

about the case--with discovery involving three bankers boxes of documents. 1RP 34.

“The size of [a restitution] award is within the court's discretion and will not be disturbed on appeal absent a showing of abuse.” State v. Mead, 67 Wn. App. 486, 490, 836 P.2d 257 (1992). Even without the defendant's concession below as to the amount of restitution, the defendant cannot show the trial court abused its discretion, that no reasonable person would have so ruled.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the restitution order entered below.

DATED this 14 day of June, 2010.

Respectfully submitted,

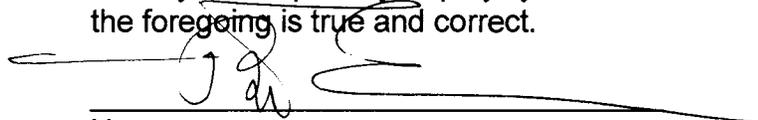
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lenell Nussbaum, the attorney for the appellant, at 2003 Western Ave, Suite 330, Seattle, WA, 98121, containing a copy of the Brief of Respondent, in STATE V. DAVIS, Cause No. 64194-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

A handwritten signature in black ink, appearing to be "J. A.", written over a horizontal line.

Name  
Done in Seattle, Washington

06/14/10  
Date