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No. 65367-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ADAM GRAY,

Appellant.

2018 DEC 10 11:44:52
COURT OF APPEALS
DIVISION ONE

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

THE TRIAL COURT ABUSED ITS DISCRETION IN MODIFYING THE RESTITUTION AWARD TO COVER EXPENSES INCURRED PRIOR TO THE INITIAL AWARD THAT THE STATE COULD HAVE PROVED AT THAT TIME

In the opening brief, Mr. Gray argued the restitution statute requires the trial court to determine the total amount of restitution due within 180 days of sentencing. Although RCW 9.94A.753(4) permits a court to modify the amount of a restitution award for as long as the court retains jurisdiction over the offender, Mr. Gray argued that provision does not cover expenses the State could have proved at the time of the initial restitution award. Instead, the Legislature intended to permit courts to modify restitution awards to cover expenses the State could not have proved at the time of the initial award, such as treatment expenses for an ongoing injury resulting from a crime.

The State contends RCW 9.94A.753(4) grants trial courts broad discretion to modify the amount of a restitution award, notwithstanding the 180-day time limit imposed by RCW 9.94A.753(1). The State contends that, as long as a court enters a restitution award within 180 days, the court may modify the amount of the award at any time until the entire award is satisfied,

regardless of when the additional expenses were incurred.

According to the State, RCW 9.94A.753(4) contains no timeliness requirement, because such a requirement is not explicitly set forth in that provision.

To the contrary, RCW 9.94A.753(4) must be read in conjunction with RCW 9.94A.753(1) in order to give effect to the Legislature's intent. In addition, both provisions must be understood in light of the underlying policy favoring finality of judgments, as well as the defendant's right to speedy sentencing. In this case, the modified award covered expenses the State could have proved, but simply failed to prove, at the time of the initial award. The modified award was therefore untimely and must be vacated.

As stated in the opening brief, it is well established that RCW 9.94A.753(4) must be interpreted in light of the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. See Christensen v. Ellsworth, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007) (citing Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002)). The Court's ultimate

objective is to give effect to the Legislature's intent. Christensen, 162 Wn.2d at 372-73 (citing Campbell & Gwinn, 146 Wn.2d at 9).

When RCW 9.94A.753(4) is read in conjunction with RCW 9.94A.753(1) and in light of the policies underlying the statutory scheme as a whole, it is apparent that the modification provision contains a timeliness requirement.

The restitution statute unambiguously requires the trial court to "determine the amount of restitution due at the sentencing hearing or within one hundred eighty days." RCW 9.94A.753(1). This is a mandatory deadline that may be continued beyond the 180 days only for "good cause." Id.; State v. Krall, 125 Wn.2d 146, 149, 881 P.2d 1040 (1994). In addition, any motion to continue the deadline must be brought within the 180-day period. State v. Johnson, 96 Wn. App. 813, 816-17, 981 P.2d 25 (1999); State v. Tetreault, 99 Wn. App. 435, 438, 998 P.2d 330 (2000).

Courts recognize that the purpose of the mandatory 180-day deadline is to secure finality of the judgment. State v. Moen, 129 Wn.2d 535, 542-43, 919 P.2d 69 (1996); Johnson, 96 Wn. App. at 817; see also State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989) (courts do not have inherent authority to modify sentences due to "the importance of finality in rendered judgments"). As this

Court explained, "it is in the best interest of all concerned that criminal matters be tried while they are fresh." State v. Duvall, 86 Wn. App. 871, 876, 940 P.2d 671 (1997) (citation omitted). In addition, permitting courts to impose restitution at any time would infringe upon a defendant's rights to speedy sentencing. Tetreault, 99 Wn. App. at 438. These policies and principles are no less important when a court modifies a restitution award than when it imposes an initial award. It is unreasonable to conclude the Legislature did not intend to impose a timeliness requirement on a prosecutor's request to modify the amount of a restitution award.

Instead, courts recognize the purpose of the modification provision is to permit courts to modify the amount of a restitution award to cover expenses that the State *could not* have proved at the time of the initial award, such as ongoing medical expenses. In State v. Gonzalez, 168 Wn.2d 256, 266, 226 P.3d 131 (2010), the Supreme Court upheld the trial court's decision to increase the total amount of restitution owed based on the victim's ongoing medical bills, even though the amended order was entered more than 180 days after sentencing. The court explained that trial courts must be able to modify restitution awards to cover expenses not yet incurred at the time of the initial award, because the statute requires that

restitution "be based on . . . *actual expenses incurred* for treatment or lost wages resulting from injury." Id. (quoting RCW 9.94A.753(3)) (emphasis added). Thus, "[i]f no amendment were available after 180 days, the victim would be limited to restitution for only the first six months of treatment after sentence. Disallowing amendments after 180 days would fundamentally undermine the purpose of the restitution statute where the victim is burdened with an ongoing serious injury." Id. at 266.

Similarly, in State v. Goodrich, 47 Wn. App. 114, 117, 733 P.2d 1000 (1987), this Court stated the modification provision

states an intent by the Legislature to allow a court to increase a defendant's obligation to make restitution when a victim incurs further costs. While this imposes a burden on the victim and the court to hold an additional hearing, it also enables the court to order restitution for the "actual medical expenses incurred."

Instead of acknowledging the basis for the court's holding in

Gonzalez, the State focuses on the following passage:

Because of the plain language, legislative history, and legislative purpose of the restitution statute, we hold that RCW 9.94A.753(4) unambiguously allows the total amount of restitution to be modified "during any period of time the offender remains under the court's jurisdiction." Gonzalez was under the court's jurisdiction at the time the amended order was entered.

Id. Although the language in this passage is stated broadly, Gonzalez should not be read to eliminate any requirement that a request to modify a restitution award be timely. Again, in Gonzalez, the modified restitution award covered the victim's ongoing medical expenses—expenses the State *could not* have proved at the time of the initial award. Id. Gonzalez holds that, under those circumstances, the 180-day time limit does not apply, because the additional expenses were incurred after the 180 days had passed.

In Gonzalez, the court was not presented with the situation presented here—a request to modify a restitution award to cover expenses the State *could have* proved at the time of the initial award. Therefore, the passage in Gonzalez relied upon by the State is *obiter dictum* to the extent it appears to permit the modification of restitution awards at any time regardless of when the additional expenses were incurred. "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute *obiter dictum*, and need not be followed." State v. Potter, 68 Wn. App. 134, 149 n.7, 842 P.2d (1992) (citation omitted). Dicta is not controlling precedent. Noble Manor v. Pierce County, 133 Wn.2d 269, 289, 943 P.2d 1378 (1997) (concurring opinion).

Instead, the restitution statute requires the total amount of restitution be determined within 180 days of sentencing unless "good cause" is shown. RCW 9.94A.753(1). The 180-day time limit operates like an ordinary statute of limitations. Duvall, 86 Wn. App. at 875. It may be tolled under appropriate circumstances, including bad faith, deception, or false assurances by the defendant and the exercise of diligence by the State. Id. But courts may extend the 180-day deadline only sparingly and not for a "garden variety claim of excusable neglect." Id. (citation omitted).

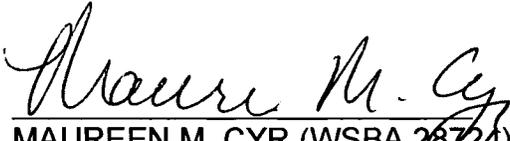
In this case, the State has not shown a sufficient basis to extend the 180-day deadline. Mr. Gray is not at fault in any way for the untimely modification request. In addition, the reason for the delay is no more than a "garden variety claim of excusable neglect" on the part of the State and the victim's family. The initial restitution award, set within the 180-day time period, was for \$6,730.82, payable to the Crime Victim's Compensation Fund for amounts distributed by the fund to the victim's family for funeral expenses. CP 37, 42. About eight months later, the victim's family contacted the prosecutor requesting reimbursement for additional funeral expenses—expenses that were incurred at the same time as the initial funeral expenses. CP 42. Although members of the victim's

family were present at sentencing, the prosecutor did not make sure at that time to establish whether the family would be seeking restitution for funeral expenses. 6/05/09RP 2, 4-6; CP 39. The funeral expenses were incurred long before the sentencing hearing. The State *could have* proved those expenses at the time of the initial restitution award. The State does not offer a sufficient basis for the untimely request other than "excusable neglect." Therefore, the modified restitution award must be vacated.

B. CONCLUSION

For the reasons set forth above and in the opening brief, the trial court abused its discretion in amending the restitution award to cover expenses the State could have proved at the time of the initial restitution award. Therefore, the order amending the award must be reversed and vacated.

Respectfully submitted this 20th day of December 2010.


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DIVISION ONE**

STATE OF WASHINGTON,)
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 v.)
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WILLIAM GRAY,)
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 Appellant.)

NO. 65367-9-I

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF DECEMBER, 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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