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NO. 68504-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN M. STRONG,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

N

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Should the sentencing court's restitution order be upheld when the court ordered the defendant to pay restitution for all damages as he expressly agreed to do in the plea agreement and when substantial credible evidence supported the award?

B. STATEMENT OF THE CASE

PROCEDURAL AND SUBSTANTIVE FACTS

The defendant was originally charged with Possession of Stolen Vehicle on August 18, 2011, regarding a motorcycle belonging to Michael Rice. CP 1-2. The defendant pled guilty as charged on December 1, 2011. CP 14-40; 12/1/2011RP. He acknowledged that he would be required to pay restitution (CP 18, 37, 40), and he agreed to pay restitution "in full to the victim(s) on charged counts and agrees to pay restitution in the specific amount TBD [to be determined] [and] agrees to pay restitution for all damage to stolen motorcycle." CP 37 (bracketed items added). Part of the consideration in the plea agreement was the State's foregoing bail jumping charges. CP 37.

Furthermore, the parties stipulated that the real and material facts for sentencing purposes included "the facts set forth in the certification(s) for determination of probable cause and prosecutor's summary." CP 37. These real facts included (1) a confidential informant's assertion to the Bellevue Police that the defendant admitted stealing the motorcycle and stated he planned to store it in his garage and ultimately remove the parts and place them on a wrecked frame (CP 29), (2) a detective's observations on December 28, 2010, about the recovered stolen motorcycle and its missing license plate and completely removed ignition (CP 30-31), (3) victim Rice's appearance at the scene of the recovery and his observation about new damage to the motorcycle's right front fairing (CP 32), and (4) the co-defendant's assertion that he assisted the defendant in scraping the front fairing of the stolen motorcycle (CP 34).

On December 23, 2011, the defendant was sentenced. CP 41-46; 12/23/2011RP. A restitution hearing was scheduled for March 14, 2012, and the defendant did not waive his presence. CP 43; 12/23/2011RP 8-9.

At the restitution hearing on March 14, 2012, the defendant was present. 3/14/2012RP 2. The sentencing court denied the

State's request to continue the hearing for additional briefing (3/14/2012RP 11), considered the issue of causation, and ordered the defendant to pay restitution in the full amount as requested by the State (CP 64; 3/14/2012RP 11-16). The defense provided a brief with multiple web pages attached that purported to show sale prices for a motorcycle comparable to the stolen motorcycle (CP 53-61), but these were not introduced as evidence, their comparability to the stolen motorcycle was not supported or fully explained, and the defendant did not testify, missing an opportunity to provide alternative evidence to the court in opposition to the State's evidence regarding the scope of damages he caused. 3/14/2012RP. The court entered its exhibits and findings regarding the documents it had considered in reaching its ruling, and these documents included the under-penalty-of-perjury two-page statement of victim Rice along with a two-page detailed estimate of the cost of repair to Rice's motorcycle. CP 65-69.

Included in the documents considered by the court were victim Rice's sworn assertion that "all cowling / fairings scratched from being laid down, paint chipped off of tank, foot pegs are losing the rubber from being put on its side, engine covers scratched up." CP 66. Rice continued by noting that "my bike was like new, ran

great no scratches Now there are panels hanging off, my tach / speed-ometers don't work, it runs rough." CP 67.

The defendant appealed the court's order. CP 70-71.

C. ARGUMENT

RCW 9.94A.753 authorizes the imposition of restitution as a part of sentencing. The restitution amount must be based on easily ascertainable damages that are supported by substantial credible evidence. The restitution amount need not be established with specific accuracy. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 906 (2008). The supporting evidence is sufficient if it affords a reasonable basis for estimation of loss and the trier of fact is not subjected to speculation or conjecture. If the amount is disputed, the State must prove the restitution amount by a preponderance of the evidence. Id.; State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

Restitution is only allowed for losses that are causally related to the charged crimes unless the defendant expressly agrees to pay restitution for crimes for which the defendant was not convicted. Griffith, 164 Wn.2d at 965-66. Losses are causally connected if the victim would not have incurred the loss but for the

crime. Courts do not look to the name of the crime for which the defendant was convicted but rather to the underlying facts of the charged offense. Id.

In determining the amount, the court can rely on a defendant's admission or acknowledgement of the amount, or may determine the restitution amount by a preponderance of the evidence. State v. Hunsicker, 129 Wn.2d 554, 558-59, 919 P.2d 79 (1996). Nothing prevents the parties from making an agreement regarding the amount. Id. at 559.

A plea agreement is in the nature of a contract and is binding between the parties. Consideration in this contractual arrangement may be in the form of not filing additional charges. Id.

Finally, the ordering of restitution is within the sound discretion of the sentencing court and will not be disturbed on appeal unless that court has engaged in abuse of discretion. A court abuses its discretion only when the order is manifestly unreasonable or untenable. State v. Gray, 174 Wn.2d 920, 924, 280 P.3d 1110 (2012).

Here, the defendant agreed at the time of the plea to pay for all damage to the stolen motorcycle, and he also agreed to the real facts as found in the certification for the determination of probable

cause. CP 37. That document included facts recounted above in the “Substantive Facts” section of this brief and included damage omitted by the defendant in his Brief of Appellant.¹ Moreover, the sentencing court admitted as evidence the four-page document from victim Rice that detailed the damages as well as the repairs contemplated. CP 65-69. The sentencing court reviewed all the documentation, asked questions about the facts (3/14/2012RP 12-14), and then relied on that documentation in ordering the full amount requested by the State (3/14/2012RP 15-16).

The defendant relies on State v. Dedondo, 99 Wn.App. 251, 991 P.2d 1216 (2000), for the proposition that the list of repairs provided by victim Rice is insufficient to provide the substantial credible evidence required by the court. In Dedondo, the restitution award was flawed because one of the items claimed may not have been comparable “in value and function” to one of the damaged items. The defense asserted that the State had not articulated how

¹ In the Brief of Appellant at page 2, the defendant incorrectly claims that the only damage noted in the certification for determination of probable cause involved the ignition and a missing license plate. The defendant has omitted victim Rice’s coming to the scene on December 10, 2010, and his noting damage to the fairing (CP 32), a fact echoed in Rice’s later statement and in the repair estimate (CP 65-69) as well as in the co-defendant’s statement to the detective in the certification (CP 34).

the unit had been damaged or how the replacement unit was an appropriate match. Dedondo, 99 Wn.App. at 253-54. But here, victim Rice detailed a number of problems now found with his motorcycle as well as a list of proposed repairs that would return his motorcycle to its prior condition. CP 65-69. There are no mysterious items on the list nor has any challenge been raised as to the specifics provided by the victim. The holding of Dedondo is inapplicable here.

Similarly, the defendant relies on State v. Kisor, 68 Wn.App. 610, 844 P.2d 1038 (1993), and State v. Pollard, 66 Wn.App. 779, 834 P.2d 51 (1992), to bolster the claim that the victim's list did not meet the required level of proof. This reliance is misplaced. In Kisor, the reviewing court in Division II rejected the post-jury-trial restitution order because the list of damages submitted by the victim included items for which the basis of valuation was unclear. Specifically, the court noted that the affidavit was nothing more than a rough estimate for animal purchase and training, and the court commented that the advertisement attached did not provide a basis for the valuations put forward by the State. Kisor, 68 Wn.App. at 620. In Pollard, the clerk of the court of appeals requested the documents relied on by the restitution court in setting restitution but

did not receive them. Id. at 786. Because the record before the reviewing court was insufficient, the restitution order was vacated and the matter remanded to the restitution court. Id. at 786-87.

As can be seen, the documentation provided, or not, by the government in these two cases is strikingly different from that provided here by the State. Damages were noted both in the certification and in the evidence admitted by the court at the time of the restitution hearing, the repair estimate submitted by victim Rice was related to the motorcycle in question and was focused on damages to the bike, and all of the documentation has been submitted for review to the appellate court. Pollard does not apply because the reviewing court here can review exactly what the restitution court relied upon, and Kisor is inapplicable because the damages asserted and the costs of repair are both detailed and supported.

D. CONCLUSION

The defendant agreed to pay for all damage to the stolen motorcycle, and the State forewent bail jumping charges. At the restitution hearing, the State provided a detailed description of the repairs needed along with a statement from victim Rice regarding

some of the damages to the motorcycle. The certification for determination of probable cause provided real facts for the court and included observations by a co-defendant that the defendant had stolen the bike and had possessed it since the theft.

The sentencing court ordered the restitution amount relying on the defendant's agreement to pay for all damages and based on substantial credible evidence. This court should affirm that order.

DATED this 13th day of November, 2012.

RESPECTFULLY submitted,

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Appellant,)
)
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Today, I personally delivered a true and correct copy of the State's Brief of Respondent in the above-entitled cause to the offices of Marla Zink, Attorney for Appellant, Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, Washington 98101 .

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Signed by me in Kent, Washington, on November 13, 2012.



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Senior Deputy Prosecuting Attorney
Attorney for Respondent

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