

68571-6

68571-6

NO. 68571-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GUY ROOK,

Appellant.

APPELLATE DIVISION
NO. 68571-6-I
FILED
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STATE OF WASHINGTON


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

APPELLANT'S OPENING BRIEF

Elaine L. Winters
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. Mr. Rook did not receive effective assistance of counsel at his restitution hearing.

2. The sentencing court erred by ordering Mr. Rook to pay restitution of \$45,838.79 to Premera Blue Cross.

3. The sentencing court erred by ordering Mr. Rook to pay restitution of \$7,171.43 to Christopher Kalaluhi.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal defendant has the constitutional right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22. At Mr. Rook's restitution hearing, counsel stated he was there for a "limited purpose"; he had not consulted with his client about the State's restitution request; and he saw no problems with the request but marked "objection" on the court order.

a. Where defense counsel completely fails to subject the government's case to adversarial testing, the defendant's Sixth Amendment right to counsel is violated and prejudice is presumed. Must this Court reverse Mr. Rook's restitution order and remand for a new restitution hearing because his attorney did not function as counsel? (Assignment of Error 1)

b. The court's restitution order includes compensation for (1) items the State did not prove were causally connected to Mr. Rook's crime, (2) expenses not authorized by the restitution statute, (3) costs that were not supported by the evidence produced by the State, and (4) medical expenses that were counted twice. Did Mr. Rook's attorney's deficient performance by not objecting to these portions of the requested restitution prejudice Mr. Rook requiring a new restitution hearing? (Assignment of Error 1)

2. The superior court's authority to order a felony offender to pay restitution is governed by RCW 9.94A.753. The State produced a list of the victim's medical expenses for an over-two-year period that gave only the dates and a one or two word description of the service provided. The crime victim stated only that he continued to have pain. Did the State prove medical bills for services provided more than one year after the accident were causally connected to Mr. Rook's offense? (Assignments of Error 2, 3).

3. The sentencing court's restitution order included payment of \$18,387.09 to Premera Blue Cross for emergency room services from August 26 to August 28, 2009 based upon an Explanation of Services form dated September 26, and a second payment of \$18,944.75 to

Premiera Blue Cross for the same services during the same time period based upon an Explanation of Benefits form dated October 24, 2009. Where the two amounts were for identical services but reflected a change in one of the charges, should the restitution order to Premiera Blue Cross be reduced by \$18,387.09? (Assignment of Error 2)

4. The sentencing court's restitution order included payment of \$247.37 to Mr. Kalaluhi for emergency room services from August 26 to August 28, 2009. Where a later Explanation of Benefits form Mr. Kalaluhi's insurance provider showed that he was not responsible for any emergency room services, must the restitution order to Mr. Kalaluhi be reduced by \$247.37? (Assignment of Error 3)

5. The sentencing court's restitution order included payment of \$127.46 to Mr. Kalaluhi for an office visit on March 11, 2010, and payment of \$56.40 to the Crime Victims Compensation Program for the same office visit on March 11, 2010. Should the restitution order to Mr. Kalaluhi be reduced by \$56.40? (Assignment of Error 3)

6. The State has the burden of proving restitution, which must be based upon substantial credible evidence. The sentencing court's restitution award to Mr. Kalaluhi includes \$101.54 for pharmacy expenses, but the information provided only supports an award of

\$48.85. Should the restitution order to Mr. Kalaluhi be reduced by \$52.69? (Assignment of Error 3).

7. RCW 9.94A.753(3) permits the superior court to order restitution for “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.” The sentencing court’s restitution order included payment of \$32 to Mr. Kalaluhi for his family’s parking fees while he was in the hospital. Was the sentencing court statutorily authorized to order restitution for the victim’s family’s parking costs? (Assignment of Error 3)

C. STATEMENT OF THE CASE

Guy Rook was convicted by a jury of vehicular assault for an automobile accident in which Christopher Kalaluhi was injured. CP 8, 10. Based upon the court’s determination that Mr. Rook was a persistent offender, he was sentenced to life in prison without the possibility of parole.¹ CP 11, 13. The court indicated that restitution would be set at a later hearing, and Mr. Rook waived his personal presence at that hearing. CP 12.

¹ Mr. Rook’s appeal of his conviction and the sentence entered on August 19, 2011, State v. Guy Rook, No. 67572-9-I, is linked with this appeal. Court Administrator/Clerk’s Notation Ruling dated May 2, 2012.

On January 26, 2012, the King County Prosecutor's Office sent a memorandum to Mr. Rook's counsel, George Sjursen, informing him a restitution hearing was set for February 14, 2012. CP 27. In bold-faced print, the letter asked the recipient to assure that counsel was assigned to represent Mr. Rook for purposes of determining restitution if Mr. Sjursen had withdrawn as counsel. CP 27.

At the February 14 hearing, Mr. Sjursen stated that he had withdrawn from representing Mr. Rook, but would appear "in this limited fashion." RP 2. Mr. Sjursen added that he had forwarded the restitution information provided by the State to Mr. Rook, but had not had an opportunity to talk to Mr. Rook about the information. RP 3. Stating he had no reason to oppose the requested restitution, defense counsel signed the restitution order, but noted an objection because he had not talked to his client. CP 21; RP 3.

The court therefore ordered Mr. Rook pay restitution totaling \$53,396.42, divided as follows:

\$ 7,171.43	Christopher Kalaluhi
\$ 45,838.79	Premera Blue Cross
\$ 386.20	WA Dental
\$ 56.40	Crime Victims Compensation

CP 20-21. This appeal follows. CP 22-24.

D. ARGUMENT

1. **Mr. Rook's constitutional right to effective assistance of counsel was violated when his attorney did not consult with him or present argument at his restitution hearing.**

Mr. Rook's attorney did not consult with him prior to the restitution hearing and did not contest any of the restitution requested by the State. Mr. Rook's right to effective assistance of counsel at sentencing was thus violated, and his attorney's complete failure to subject the State's position to meaningful review or adversarial testing requires vacation of the restitution order.

The federal and state constitutions provide a criminal defendant with the rights to representation of counsel and to due process of law. U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22. Restitution is part of an offender's sentence, and a restitution hearing is thus a critical stage of the proceeding where the defendant is entitled to counsel. CrR 3.1(b)(2); Mempa v. Rhay, 389 U.S. 128, 137, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967) (defendant has constitutional right to counsel at sentencing); State v. Hughes, 154 Wn.2d 118, 155, 110 P.3d 192 (2005) (restitution is part of offender's sentence), overruled on other grounds, Washington v. Recuenco, 548 U.S. 212 (2006). The right to counsel necessarily includes the right to effective assistance of counsel.

McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S. Ct. 759, 25 L. Ed. 2d 763 (1970); State v. A.N.J., 168 Wn.2d 91, 96-98, 225 P.3d 956 (2010). The right to effective counsel is not met simply because an attorney is present in court; the attorney must actually assist the client and play a role in ensuring the proceedings are adversarial and fair. Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); A.N.J., 168 Wn.2d at 98.

The traditional test for an appellate court is whether, after considering the entire record, the defendant can show he was denied effective representation of counsel and that counsel's deficient performance prejudiced the defendant, thus denying him a fair sentencing hearing. State v. Thiefault, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).² To prevail, the defendant must show there is a reasonable possibility that, but for counsel's unprofessional errors, the outcome would have been different. Id. at 417. Prejudice is presumed, however, when there is complete denial of counsel at a critical stage in the proceeding, including when counsel "entirely fails to subject the

² Thiefault utilized the Strickland standard in analyzing a claim of ineffective assistance of counsel at sentencing. Thiefault, 160 Wn.2d at 417; accord State v. Saunders, 120 Wn.App. 800, 819-25, 86 P.3d 232 (2004). The United States Supreme Court, however, has not applied Strickland in the context of a non-death penalty sentencing hearing.

prosecution's case to meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

An attorney's ethical obligations include the requirement that he consult with his client and keep the client informed of the progress of his case. RPC 1.4. The ability to consult with the attorney is part of the right to counsel guaranteed by the constitution. State v. Hartwig, 36 Wn.2d 598, 601, 219 P.2d 564 (1950) (Article I, § 22 right to counsel includes reasonable time for consultation and preparation); see A.N.J., 168 Wn.2d at 102, 105, 118-19 (permitting withdrawal of guilty plea due to ineffective assistance of counsel, noting limited time lawyer consulted with juvenile client and lack of private meeting).

It is not clear if Mr. Rook's lawyer sought re-appointment to represent him at the restitution hearing. Counsel stated he mailed a copy of the documentation provided by the prosecutor to Mr. Rook, but did not consult with Mr. Rook. RP 3. Nor did he contest the State's request. RP 3. When, as here, defense counsel does not subject the government's position to any adversarial testing, the hearing is not fair and the conviction must be reversed due to denial of counsel. Cronin, 466 U.S. at 658-59.

The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused

is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecutor's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

Id. at 658. Mr. Sjursen failed to subject to the State's restitution request to any adversarial testing and thus failed to act as an advocate for Mr. Rook. The restitution order therefore must be reversed and remanded for a hearing.

In the alternative, counsel's failure to consult with his client or object to any of the requested restitution prejudiced Mr. Rook, as he was ordered to pay restitution that was not statutorily authorized or supported by evidence. As explained below, the State did not prove that medical bills incurred over a year after the victim's injuries were causally connected to Mr. Rook's offense; several portions of the restitution were not supported by the evidence or were duplicative; and the statute does not authorize restitution for the victim's family's parking costs. Yet Mr. Rook's attorney did not contest any ordered restitution. By failing to contest the State's restitution request or request a continuance in order to consult with Mr. Rook, Mr. Sjursen failed to provide the effective assistance of counsel mandated by the state and federal constitutions. Mr. Rook's restitution order should be

reversed and remanded for a new hearing. See Thieffault, 160 Wn.2d at 417 (remanding for new sentencing hearing due to counsel's failure to object to inclusion of out-of-state conviction in client's offender score).

2. The State did not produce evidence to support all of the restitution ordered by the court.

The sentencing court ordered the restitution amounts requested by the State. The documents supporting the restitution request, however, does not support the entire amount ordered. The award of \$45,838.79 to Premera Blue Cross should be reduced by \$19,428.87 because (1) the total included double payment for the same services and (2) the State did not prove medical expenses incurred over a year after the automobile accident was causally connected to it. The award of \$7,171.43 to Mr. Kalaluhi should be reduced by \$1,030.58 because (1) the figure includes reimbursement to Mr. Kalaluhi for a medical liability that was later covered by Premera and included in their award; (2) the figure includes a bill that was paid in part by the Crime Victim Compensation Program and is included in the restitution award to that program; (3) the State's documentation does not support the amount provided for pharmacy expenses; and (4) the restitution statute does not permit restitution for the victim's family's parking expenses.

a. Restitution may be ordered only as authorized by statute. The superior court's power to order restitution is statutory. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008); State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). When the defendant is convicted of a felony, the court's authority to impose restitution is derived from the Sentencing Reform Act (SRA). RCW 9.94A.505(1).

The SRA requires the superior court to order restitution when the defendant is convicted of an offense that resulted in injury, as did the vehicular assault here. RCW 9.94A.753(5). Restitution must be based upon "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." RCW 9.94A.753(3). In addition, restitution is limited to loss "'causally connected' to the crimes charged." Griffith, 164 Wn.2d at 965-66 (quoting State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007)). Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. Id. at 966; Tobin, 161 Wn.2d at 524.

b. The State did not prove a causal connection between the 2010 and 2011 medical bills and the charged offense. The court's restitution order must be based upon "substantial credible evidence." Griffith, 164 Wn.2d at 965. The burden is on the State to prove the victim's losses and the causal connection to the defendant's crime by a preponderance of the evidence. Id; State v. Dedonado, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000). This burden is not met merely because an insurer or victim submits a list of expenditures. Dedonado, 99 Wn. App. at 257. "[A] summary of medical treatment that 'does not indicate why medical services were provided[] fails to establish the required causal connection between the victim's medical expenses and the crime committed.'" State v. Dennis, 101 Wn. App. 223, 227, 6 P.3d 1173 (2000) (quoting State v. Bunner, 86 Wn. App. 158, 160, 936 P.2d 419 (1997)).

Thus, in Bunner and Hahn, a summary report of medical expenses was not sufficient to prove the expenses were causally connected to an assault. State v. Hahn, 100 Wn. App. 391, 399-400, 996 P.2d 1125 (2000) (documents showed only name of service provider, service date, date paid, billed amount and amount paid); Bunner, 86 Wn. App. at 159-60 (list of medical services charged and

amount DSHS paid). In contrast, restitution was properly awarded where the victim testified at the restitution hearing that her medical expenses for an emergency room visit and orthopedic follow-ups for injuries were caused by the defendant's assault. State v. Blanchfield, 126 Wn. App. 235, 108 P.3d 173, rev. denied, 155 Wn.2d 1020 (2005).

The State provided the court with "Explanation of Benefits" forms addressing Mr. Kalaluhi's medical expenses from August 26, 2009, to September 11, 2011. CP 39-66. The forms detailed the amount of money paid by the insurance carrier and Mr. Kalaluhi's financial responsibility to various medical bills, providing only one- and two-word descriptions of what the bill covered. CP 39-66. The automobile accident occurred on August 25, 2009. CP 10. The court, however, assumed that all of the listed medical expenses, including those occurring in 2010 and 2011, were causally connected to this case.

Mr. Kalaluhi's written statement shows that he continued to suffer pain months after the accident and may experience lifelong nerve pain. CP 32. At trial, Mr. Kalaluhi's emergency room physician explained that his transverse process fracture indicated that Mr. Kalaluhi probably had a torn muscle that would be very painful and

slow to heal. 6/28/11RP 40-41.³ Mr. Kalaluhi was incorrect, however, in stating that he had a broken hip; the emergency room physician testified at trial he ruled out a suspected hip fracture. 6/28/11RP 21-22, 31-33, 42.

Mr. Kalaluhi did not explain why his medical expenses over a year after the automobile accident were caused by the accident. CP 31-32. The State thus did not produce evidence to support awarding restitution for medical expenses occurring over a year after the August 2009 accident. As result, the restitution owed to Mr. Kalaluhi should be reduced by \$607.46, and the restitution to his insurance company should be reduced by \$1,041.78. CP 39-42, 65-66.

c. The restitution award reimburses Premera Blue Cross twice for the same emergency room expenses. The documents provided by the State include two Premera Blue Cross Explanation of Benefit forms for Mr. Kalaluhi's hospitalization from August 26 to August 28, 2009. CP 45-46. One form is dated September 26, 2009, and lists the total insurance company benefit as \$18,387.09. CP 45. The other is dated October 24, 2009, and lists the total insurance company benefit as

³ Found in State v. Guy Rook, No. 67572-9-I, linked with this appeal.

\$18,944.75. CP 46. The first form states Mr. Kalaluhi was responsible for \$247.37, and the second says his responsibility of \$0.00. CP 45-46.

The two forms show the insurance coverage was for the same services during the same time period. The only differences are that the inpatient room and board charge on the later bill is higher and Mr. Kalaluhi was no longer responsible for any of that expense. CP 45-46. The October 24 form did not cover any services not included in the September 26 form, it simply restated the correct amount. Nonetheless, both the \$18,387.09 figure and the \$18,944.75 figure were used to calculate Premera's restitution total. As this was in error, the award to Premera should be reduced by the lower figure.

In addition, the later form shows that Mr. Kalaluhi was not responsible for the \$247.37 listed on the earlier form. The \$247.37, however, was included in calculating the amount of restitution owed Mr. Kalaluhi. The award to Mr. Kalaluhi should also be reduced by \$247.37.

d. The restitution order requires Mr. Rook to reimburse Mr. Kalaluhi twice for his March 11, 2010, medical bills. Premera Blue Cross did not pay for Mr. Kalaluhi's office visit on March 11, 2010, and the Explanation of Benefits form shows that he owed the medical

provider \$127.46. CP 64. The Crime Victims Compensation Program paid the doctor \$56.40 for that visit. CP 73. The trial court, however, ordered Mr. Rook to pay for all of the medical expenses outlined in the Premera forms. CP 20, 27; RP 3. The court thus ordered Mr. Rook to pay for the March 11, 2010 office visit twice: (1) \$127.46 noted as Mr. Kalaluhi's medical expense in the Premera documents and (2) \$56.40 to the Crime Victim's Program. CP 20-21. Mr. Kalaluhi's restitution amount should thus be reduced by \$71.06 (\$127.46 minus \$56.40) so that he is not required to pay twice for this office visit.

e. The State did not provide evidence to support the award of \$101.54 restitution to Mr. Kalaluhi for pharmacy expenses. Mr. Kalaluhi requested restitution of \$101.54 for his pharmacy expenses, but the request is not fully supported by the record. CP 29. Mr. Kalaluhi attached receipts for medication at two pharmacies, but the total of those receipts is less than \$101.54. CP 37. The information provided showed that Mr. Kalaluhi and his family members paid \$58.82 for prescriptions and other pharmacy needs. CP 37. In addition, two of the receipts appear to be for the same prescription, "OXCOD/APAP 5 – 325 MG TAB MAL" on the same day, September 1, 2009. CP 37. The restitution amount for pharmacy expenses thus

should be no more than \$48.85, and the total award to Mr. Kalaluhi should be reduced by \$52.69.

f. The trial court erred by requiring Mr. Rook to pay for Mr. Kalaluhi's mother's parking. Mr. Kalaluhi's restitution request included the cost of parking at Harborview Medical Center on August 26-28, 2009. CP 38. One of the parking receipts is marked "mom[']s, and Mr. Kalaluhi's car was destroyed in the accident, so the parking fees were for his family members. CP 32, 35, 38.

RCW 9.94A.753 only authorizes the court to order the offender to pay for "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." RCW 9.94A.753(3). In interpreting the restitution statute, this Court must try to discern the legislature's intent, looking first at the statute's "plain language and its ordinary meaning." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The plain meaning is found in the language of the statute itself as well as related statutes. Id. The restitution statute makes it clear that restitution is not a substitute for a civil judgment, and the award of restitution does not limit a survivor's civil remedies. RCW

9.94A.753(9); Dennis, 101 Wn. App. at 229 (SRA restitution is primarily punitive rather than compensatory).

Mr. Kalaluhi's family's parking expenses do not fall within the restitution statute, and his restitution award must therefore be reduced by the \$32.00 ordered for parking. CP 38.

g. The case should be remanded to reduce Mr. Rook's restitution. The award of restitution to Premera Blue Cross and Mr. Kalaluhi should not have included (1) medical expenses over one year after the accident in the absence of proof they were causally connected to the accident, (2) double payment for emergency room expenses, (3) the costs of a medical bill paid in part by the Crime Victims Compensation Program, (4) undocumented pharmacy expenses, and (5) Mr. Kalaluhi's family's parking costs. The award of \$45,838.79 to Premera Blue Cross must therefore be reduced by \$19,428.87, and the \$7,171.43 award to Mr. Kalaluhi must be reduced by \$1,030.58. This Court should reversed the restitution order and remand for the superior court to make these corrections.

E. CONCLUSION

Mr. Rook's restitution order must be vacated and the case remanded for a new restitution hearing because his attorney did not provide the effective assistance of counsel guaranteed by the federal and state constitutions. In the alternative, the restitution award to Premera Blue Cross must be reduced by \$19,428.87 and the award to Mr. Kalaluhi reduced by \$1,030.58.

DATED this 27th day of September 2012.

Respectfully submitted,



Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68571-6-I
v.)	
)	
GUY ROOK,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **OPENING 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> GUY ROOK 193154 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF SEPTEMBER, 2012.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710