

09544-4

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NO. 69544-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
MICHAEL LANE SAYERS,
Appellant.

RECEIVED
SUPERIOR COURT
KING COUNTY
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE PATRICK H. OISHI

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A trial court must order restitution when a defendant agrees to pay that restitution. Here, Sayers pled guilty to lesser charges and agreed to pay for all losses to a stolen excavator. The trial court ordered restitution for the losses associated with this stolen excavator. Did the trial court properly exercise its discretion by ordering restitution pursuant to an agreement of the parties?

2. A trial court's calculation for restitution must be reasonable. Here, the calculation for restitution was for the actual loss to the victim-insured and to the victim-insurer, which for the former was the deductible it paid and for the latter was the fair market value of the excavator they paid in the claim to the victim-insured minus the amount they received through salvage. Did the trial court properly exercise its discretion by ordering restitution in the amount of actual loss to the victims?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Michael Sayers was originally charged with possession of a stolen vehicle and possession of stolen property in the first degree. CP 1-2. The original charge of possession of stolen property in the

first degree charge, count II, encompassed Sayers' possession of a stolen excavator. CP 1-2. Sayers pled guilty to one count, an amended charge of taking a motor vehicle without permission in the second degree. CP 9. In return for Sayers' plea to the reduced charge, the State agreed not to file additional property crimes against the defendant arising out of this incident. CP 26. Also, Sayers agreed to pay restitution for "all losses from and damages to the stolen truck, the stolen excavator, and their contents." CP 26. On April 17, 2012, judgment and sentence was entered. CP 31-36.

On October 3, 2012, a contested restitution hearing was held. RP 8-22.¹ At that hearing, the trial court ordered restitution in the amount of \$1000 to R.S. Construction and \$10,749.50 to Safeco Insurance. CP 41-42.

2. SUBSTANTIVE FACTS²

On June 18, 2010, King County Sheriff's Deputies responded to property in the City of Covington where Sayers lived.

¹ The Verbatim Report of Proceedings consists of one volume, which will be referred to herein as "RP."

² The facts of the crimes are taken from the certification for determination of probable cause and the prosecutor's summary, based on Sayers' stipulation to them as part of the felony plea agreement. CP 26.

CP 5. Deputies discovered a stolen mini-excavator in the driveway.

CP 5. Sayers stated that the excavator was not his. The access panel and ignition had damage.³ CP 5. Deputies spoke with the registered owner of the excavator who indicated that Sayers did not have permission to possess the excavator. CP 5. The registered owner told deputies that the owner of the excavator was now an insurance company who paid out an insurance claim to the registered owner for the excavator in the amount of \$19,197.00.

CP 6. During this contact, a modified stolen truck and stolen license plates were also located on Sayers' property. CP 6.

At the contested restitution hearing on October 3, 2012, the State presented documentation in support of its request for restitution.⁴ The victim-insured paid out a \$1000 deductible to its victim-insurer when the excavator had been stolen.⁵ RP 9. At the restitution hearing, Sayers did not dispute restitution being ordered for the \$1000 deductible. RP 14-15.

³ The company logo had also been painted over. RP 19.

⁴ See Appellant's Opening Brief Appendix. There is no dispute between the parties that this was the information considered by the trial court during the restitution hearing.

⁵ Hereinafter, the victim-insured shall be referenced to as insured and victim-insurer shall be referenced to as insurer.

The State additionally requested restitution to be ordered to the insurer in the amount of \$10,749.50. RP 9. This amount was the actual loss to the insurer. RP 10. When the insured made its claim to the insurer for the stolen excavator, the insurer paid the insured \$19,197.00 for the stolen excavator. RP 9. This amount was determined by subtracting the deductible from the fair market value; the fair market value was determined by doing a comprehensive analysis of other similar excavators. RP 10, 14. When the excavator was recovered from the defendant six months after that claim was paid, the insurer was able to salvage the excavator for \$8,447.50. RP 10. Thus, the amount calculated for restitution was what the insurer paid to the insured minus the salvage amount, for a total of \$10,749.50. RP 10, 22.

In Sayers' brief in opposition to the State's request for restitution, Sayers agreed that the actual loss to the insured was the \$1000 deductible, but challenged the calculation of the amount requested for the insurer. CP 38-40. Sayers argued the insurer either overpaid or failed to get an adequate market value before paying its claim out to the insured. CP 40. At the contested restitution hearing, Sayers again agreed with the \$1000 deductible being ordered to the insured, but disputed the valuation of loss to

the insurer and indicated that because of the miscalculation there was no damage or loss to the insurer. RP 13-17.

The trial court found that the State had met its burden of proof by preponderance of the evidence for the actual losses incurred. RP 21-22. The trial court found that there was causation between the crime and the loss. RP 21-22. Consequently, the trial court ordered restitution to R.S. Construction in the amount of \$1000 and restitution to Safeco Insurance in the amount of \$10,749.50. CP 41-42.

C. ARGUMENT

Sayers argues that the trial court erred by ordering restitution in the amount requested by the State as the amount claimed is not supported by the restitution statute, as there is no causal connection between the crime and the loss, and as the State did not meet its burden of proof for preponderance of the evidence. Sayers cannot show that the trial court abused its discretion by ordering restitution because Sayers agreed, pursuant to a plea agreement, to pay all losses for the excavator and because the valuation of the loss was sufficiently proven and reasonable.

The Legislature has granted trial courts broad power to order restitution. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). The restitution statute affords victims “legal protections at least as strong as those given criminal defendants.” State v. Gonzalez, 168 Wn.2d 256, 265, 226 P.3d 131 (2010). The plain language of the statute, providing for awards up to double the offender’s gain or the victim’s loss, affirms the Legislature’s intent that trial courts have wide discretion to order restitution. State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991).

A trial court’s authority to impose restitution is solely statutory. Id. at 919. Unless the court exceeds that authority, its decision will be upheld on appeal unless it is an abuse of discretion. Id. A court abuses its discretion only when the court’s decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999) (citations omitted).

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION AS SAYERS AGREED TO PAY FOR ALL LOSSES FROM THE STOLEN EXCAVATOR.

Whenever a defendant is convicted of a crime that results in personal injury or property loss, the court must order restitution.

RCW 9.94A.753(5). Losses are determined to have a causal connection 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 causal connection between the loss and the crime is not required when a defendant has entered into an express agreement and as a part of the agreement, agrees to pay restitution. State v. Woods, 90 Wn. App. 904, 908, 953 P.2d 834 (1998). Prescribed by statute, a defendant shall pay restitution if an offender "pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement." RCW 9.94A.753(5).⁶

A plea agreement is considered to be a contractual agreement between the State and defendant once the trial court accepts the plea. State v. Hunsicker, 129 Wn.2d 554, 559, 919 P.2d 79 (1996) (citing State v. Miller, 110 Wn.2d 528, 536, 756

⁶ If the issue is causal connection for ordering restitution, then the Court may engage in an analysis of whether the victims' injuries were reasonably foreseeable. See State v. Hiatt, 154 Wn.2d 560, 563-65, 115 P.3d 274 (2005). Since Sayers agreed to pay for restitution for the excavator, no causal connection analysis and no foreseeability discussion is necessary.

P.2d 122 (1988)). Thus the plea agreement is binding on both parties.

In the present case, Sayers pled guilty to an amended charge of taking a motor vehicle without permission second degree, a Class C felony. CP 18. Sayers had originally been charged with multiple felony counts, including a Class B felony, possession of a stolen vehicle. CP 1. The State additionally agreed to “not file additional property crime charges against the defendant arising out of KCSO case 10-141874 and agrees not to file Bail Jumping charges.”⁷ In return for the State’s agreement not to file additional charges and for offering a plea to a reduced charge with a reduced sentence recommendation, Sayers agreed to “pay restitution for all losses from and damages to...the stolen excavator...” CP 26. The State upheld its end of the bargain by not refiling the original charges and not filing additional charges out of this incident.

Because Sayers agreed to pay for “all losses from and damages to the...stolen excavator,” there need not be a causal connection between the crime charged and the restitution. The express agreement by Sayers is that he would pay restitution for **all losses** from the stolen excavator. The restitution requested and

⁷ KCSO case #10-141874 references the investigation into this case. CP 22.

ordered in this case is for all losses the insured and insurer incurred from the stolen excavator. Therefore, Sayers expressly agreed to pay for those losses and he should be bound by the agreement.

The courts have upheld these contractual agreements when the agreements are clear. For example, in Hunsicker, 129 Wn.2d at 559-60, the Washington Supreme Court upheld a restitution order encompassing restitution for uncharged felonies reflected in the Certification for Determining probable cause, as the defendant's plea agreement provided that the defendant agreed to pay full restitution for those felonies in exchange for the State agreeing to either not to file and or to dismiss those additional charges.⁸

In contrast to Hunsicker, in State v. Johnson, 69 Wn. App. 189, 191-92, 847 P.2d 960 (1993), the Court of Appeals found there was no agreement for the defendant to pay for the loss of tools and photos, since the agreement was not clear these items were included. Although the defendant agreed to pay for "other items belonging to" the victim in the plea form, the Court of Appeals found this language was not sufficiently descriptive and no

⁸ It is worth noting that the primary issue on appeal in Hunsicker was whether the entry of the restitution order 60 days after sentencing meant that the order was not timely entered. 129 Wn.2d at 557. The Washington Supreme Court held that because the amount was determined within the 60 day period as the amount was reflected in the Certification, the restitution order was timely entered and was upheld. Id. at 562.

assumption could be made that this statement included the missing tools and photographs. Id. at 192. Therefore, the Court of Appeals held that the trial court abused its discretion by ordering the defendant to pay restitution for unspecified stolen tools and photographs. Id. at 195. Unlike in Johnson, the plea agreement in this case is clear and sufficiently describes that Sayers agreed to pay for the actual losses from the stolen excavator. Sayers agreed to pay for “all losses from and damages to the...stolen excavator.” CP 26. No assumptions need to be made as to what Sayers agreed to pay, in this case, because he clearly agreed to pay for the losses from the excavator, which includes the losses incurred by both the insured and insurer.

The facts in State v. Dedonado, 99 Wn. App. 251, 991 P.2d 1216 (2000), are not applicable in this case. In Dedonado, the defendant pled guilty to taking a motor vehicle without permission second degree. Id. at 253. No agreement was entered into by way of the plea that the defendant would pay restitution for all the losses incurred for the crime and thus the issue in Dedonado was whether there was a causal connection between the crime and the losses. Id. at 253, 256. Unlike in Dedonado, in the present case Sayers did agree to pay for all losses from and damages to the stolen

excavator. Therefore, no causal connection analysis is required in this case.

It is worth noting that Sayers additionally stipulated to real facts, as outlined in the Certification for Determination of Probable Cause. CP 26. That Certification states that the insurer paid out an insurance claim to the insured in the amount of \$19,197.00. CP 5-6, 22-23. Thus, Sayers was aware of, prior to entering the plea, the potential that the restitution claim could be around \$19,197.00.⁹

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION AS THE AMOUNT OF RESTITUTION ORDERED WAS REASONABLE AND WAS PROVED BY A PREPONDERANCE OF THE EVIDENCE.

The State must prove the amount of restitution by a preponderance of the evidence. State v. Tobin, 161 Wn.2d at 524. Although the amount must be based on “easily ascertainable damages,” the claimed loss “need not be established with specific accuracy.” RCW 9.94A.753(3); State v. Griffith, 164 Wn.2d at 965. Evidence is sufficient if it “affords a reasonable basis for estimating

⁹ The restitution amount ordered is actually less than \$19,197.00, as the insurer was able to salvage the excavator and the salvage amount reduced the \$19,197.00 amount.

loss and does not subject the trier of fact to mere speculation or conjecture.” Griffith, 164 Wn.2d at 965. Insurance companies are victims for the purpose of ordering restitution when they have suffered a loss or damage. State v. A.M.R., 147 Wn.2d 91, 97, 51 P.3d 790 (2002); State v. Barnett, 36 Wn. App. 560, 562-63, 675 P.2d 626 (1984). Damage is given its ordinary meaning and an insurance company is considered damaged when they pay out claims to an insured victim. Barnett, 36 Wn. App. at 562. As it relates to victim insurance companies:

‘[A] defendant should not profit simply because the victim had the foresight to contract with a third party for full or partial protection for any loss or damage caused by criminal behavior.’ We would add to that observation that we see no reason that the costs of crime should be borne by the large pool of law-abiding policy holders whose premiums will be the source of payments to victims.

State v. Ewing, 102 Wn. App. 349, 356-57, 7 P.3d 835 (2000)
(citing in part, Barnett, 36 Wn. App. at 562).

Trial courts have wide latitude for valuing restitution. For example, in State v. Fleming, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994), the Court of Appeals found that it was not an abuse of discretion for the trial court to consider the fluctuating market value of the stolen property, as opposed to just valuing the stolen item at

the time it was stolen. The Court of Appeals held it is within a trial court's "sound discretion" to "take fluctuations in market value into consideration for purposes of setting restitution." Id. at 275. In State v. Smith, 42 Wn. App. 399, 403, 711 P.2d 372 (1985), the Court of Appeals held that the trial court did not abuse its discretion by not ordering the fair market value of stolen items. The trial court ordered restitution to an insurer for the actual loss the insurer incurred; this loss calculation included taking into account the amount the insurance company paid to the insured for replacement costs of the items stolen and recovered, and subsequently sold by the insurance company. Id. at 400, 403. The Court of Appeals reasoned that because one of the purposes of the restitution statute is to provide reparation to victims and the insurance company is a victim who suffered damages by having to pay out the insured's claim, the insurance company was damaged in the actual amount of loss it incurred. Id. at 402-03.

Similar to the trial court in Smith, the trial court in this case ordered restitution for the actual losses that both the insured and insurer incurred. The trial court ordered the \$1000 deductible that the insured paid out to its insurer. The trial court ordered \$10,749.50 to Safeco Insurance. The amount to Safeco was

determined by taking what the insurer paid out in a claim to the insured (\$19,197.00) and subtracting what the insurer was able to salvage the excavator for (\$8,447.50). The original amount paid to the insured was determined by figuring out, in a comparative analysis, what the fair market value of the excavator was, \$20,197.00, and subtracting the insured's deductible (\$1000). A total of \$10,749.50 was the actual loss to the insurer.

The amount of loss was not manifestly unreasonable. Instead, the insurer did a comprehensive comparative analysis for their initial claim they paid out to their insured.¹⁰ The amount the insurer was able to salvage was the *actual* amount that the insurer was able to salvage the excavator for.¹¹ As the trial court mentioned at the contested restitution hearing, "insurance companies are running a business...They very much have an interest in not overpaying their insureds." RP 16. In this case, the trial court properly exercised its discretion in ordering the amount of restitution.

¹⁰ The trial court noted that the comparative analysis done by the insurer was "a lot more comprehensive than in most cases we see." RP 14.

¹¹ It is worth noting that a six-month period lapsed from when the excavator was originally stolen and when the excavator was salvaged.

D. **CONCLUSION**

For the reasons cited above, the restitution order should be affirmed.

DATED this 9 day of August, 2013.

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 Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MICHAEL LANE SAYERS, Cause No. 69544-4-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.

Janice Schwarz

Name

Done in Kent, Washington

8/9/13

Date

Janice Schwarz

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