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No. 69729-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN HARRIS, Jr.,

Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying John Harris's motion for a new attorney when he reported he could not communicate with his court-appointed counsel.

2. The trial court erred by ordering Mr. Harris to pay restitution of \$8,655.22 for the crime of driving with a suspended operator's license.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant's constitutional right to counsel is violated when he is forced to proceed with an attorney with whom he has an irreconcilable conflict, such as a breakdown in communication. U.S. Const. amends. VI, XIV; Const. art. I § 22. When the defendant asks to discharge his court-appointed attorney, the court must inquire into the nature and extent of the purported conflict. Mr. Harris asked to discharge his attorney before omnibus hearing due to his inability to communicate with the lawyer, who had represented him in a prior trial. The court, however, denied the motion without posing any questions of Mr. Harris's attorney about the nature and extent of the conflict and posing only two questions to Mr. Harris. Was Mr. Harris's

constitutional right to counsel violated when the court denied his motion?

2. After he was involved in an automobile accident that resulted in the death of another person, Mr. Harris was ordered to pay restitution for the accident victim's burial expenses as condition of his sentence for driving with a suspended operator's license and

a. Restitution may only be imposed as authorized by statute. Two statutes grant the superior court the discretion to order restitution as a condition of probation for a suspended sentence. RCW 9.92.060; RCW 9.95.210. Another permits the court to order restitution for lost or damaged property in lieu of a fine. RCW 9A.20.030. Did the trial court lack authority to order Mr. Harris pay to pay restitution when he was sentenced to the maximum term without probation?

b. Restitution may only be ordered for a victim's damages or losses that are causally connected to the crime for which the defendant is sentenced. Were the accident victim's burial expenses causally connected to the offense of driving with a suspended operator's license?

C. STATEMENT OF THE CASE

Clashana Grayson attempted to cross East Marginal Way on the evening of April 9, 2010, but she was not in a marked cross walk and was wearing dark clothing. 2RP 198, 200-01; 3RP 262; 4RP 581; 6/11/13 RP 6. East Marginal Way is in an industrial area at this point, several lanes wide, and cars drive fast, often over the speed limit. 2RP 223; 3RP 265-66. The area was dark. 2RP 224; 5RP 670.

John Harris Jr. was driving his 1996 Cadillac that evening when he suddenly hit something he had not seen in his headlights. 4RP 572, 575; 6RP 765. Mr. Harris applied his brakes, got out of his car, and saw he had hit Ms. Grayson. 2RP 210-11; 6RP 766-67. He called at a woman who had arrived to call 911, and someone passing in a silver car told Mr. Harris, "She's dead, man." 6RP 767-68. Mr. Harris then moved his car to the nearby Annex Tavern, intending to stop, but he panicked and drove home. 2RP 211; 6RP 769-70, 783-84. Mr. Harris's driver's license was revoked at that time. 5RP 691.

Ulonda Carpenter was in the Annex Tavern parking lot facing East Marginal Way when she observed the car hit Ms. Grayson and called 911. 2RP 198-99, 201, 209. David Sabedra also observed the accident from his tow truck at the entrance to the ABC towing yard

next door to the tavern. 5RP 647-49. They both observed Mr. Harris stop, get out of his car, and then return to his car and drive to the area north of the tavern. 5RP 651-53.

Ms. Carpenter and about four other people went to the street and tried to help Ms. Grayson and protect her from on-coming traffic. 2RP 203-04, 229; 3RP 275. They were unsuccessful in diverting a speeding silver-colored car that ran over Ms. Grayson. 2RP 203-04, 229; 3RP 258; 5RP 654, 660. The driver of the silver car did not stop. 2RP 234; 5RP 673. The make of the car was never identified, and the driver did not report the accident to the police. 3RP 349.

Ms. Grayson died later that evening at a local hospital . 2RP 259; 3RP 341-42; 4RP 455. The cause of death was blunt force injuries to her head, torso, and extremities, with the head injuries as the most damaging. 4RP 512. The medical forensic pathologist opined that the most serious injuries were consistent with those suffered when an upright pedestrian is hit by an automobile. 4RP 512, 528. However, he could not rule out the possibility that the second vehicle caused Ms. Grayson's fatal injuries. 4RP 522, 536.

The accident occurred on a Friday night. That weekend Mr. Harris contacted attorney Paul Cullen, and on Monday Mr. Harris and

the attorney went to the police station. 3RP 346-47, 358-59; 6RP 772, 799. Two police officers interviewed Mr. Harris, and he then took them to his home and gave them his automobile. 3RP 347-48, 358-59; 6RP 773. Mr. Harris returned to the police station about ten days later and answered further questions. 3RP 359-60.

The King County Prosecutor charged Mr. Harris by amended information with leaving the scene of an accident resulting in injury or death (felony hit and run) and driving with a suspended driver's license. CP 8-9, 22-23. Prior to the omnibus hearing, Mr. Harris asked the court to appoint new counsel because he was unable to communicate with his public defender. 1RP 20-21. The Honorable Ron Kessler denied the motion without questioning Mr. Harris or his counsel any further about the conflict. CP 7; 1RP 20-21.

After a jury trial before the Honorable Christopher Washington, Mr. Harris was convicted as charged. CP 49-50. The jury answered "yes" to a special verdict form asking if the accident resulted in death. CP 51. Mr. Harris received a standard range sentence for hit and run driving consecutive to a 364-day sentence for driving with a suspended license. CP 52-62.

After sentencing, a restitution hearing was held before the Honorable Suzanne Parisien. 6/17/13 RP. The court ordered Mr. Harris to pay restitution to Ms. Grayson's family members for the expenses of her funeral, burial, and memorial. CP 91-105.

D. ARGUMENT

1. **Mr. Harris's constitutional right to counsel was violated when the trial court denied his motion to discharge his court-appointed attorney based upon a breakdown in communication.**

A criminal defendant has the right to counsel, which includes effective counsel with whom he can communicate. Prior to his omnibus hearing, Mr. Harris asked the superior court to discharge his court-appointed attorney because he was unable to communicate with him. Although Mr. Harris's reason for asking for new counsel was valid, the court made no inquiry of Mr. Harris or his counsel concerning the nature and extent of the breakdown in communication. Mr. Harris's convictions must be reversed because the denial of his motion violated his right to counsel.

a. Mr. Harris's constitutional right to the effective assistance of counsel included an attorney with whom he could not communicate.

The federal and state constitutions provide a criminal defendant with

the right to counsel and to due process.¹ U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22. Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Cronin, 488 U.S. at 655 (quoting Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)).

The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); State v. A.N.J., 168 Wn.2d 91, 96-98, 225 P.3d 956 (2010). The right to effective counsel is not fulfilled simply because an attorney is present in court; the attorney must actually assist the client and play a role in ensuring the

¹ The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The Fourteenth Amendment states in part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." The right to counsel found in the Sixth and Fourteenth Amendment applies to the States. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

Article I, Section 22 provides in part, "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

proceedings are adversarial and fair. Strickland, 466 U.S. at 685; A.N.J., 168 Wn.2d at 98.

When a defendant who is represented by court-appointed counsel is dissatisfied with his attorney, he must show good cause before the court will appoint new counsel. In re Personal Restraint of Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998); Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991). Good cause may include a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the defendant and his attorney. Stenson, 132 Wn.2d at 734; Smith, 923 F.2d at 1320.

Communication between a client and his attorney is an essential component of the right to counsel. See Riggins v. Nevada, 504 U.S. 127, 144, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992) (Kennedy, J., concurring) (“We have held that a defendant’s right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. The defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf.”); Geders v. United States, 425 U.S. 80, 91, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976) (holding that trial court’s order

preventing counsel from communicating with his client during overnight recess in the middle of trial violated the Sixth Amendment). The right to counsel is violated when a defendant is forced to proceed with an attorney with whom he has an irreconcilable conflict or with whom he cannot communicate. Daniels v. Woodford, 428 F.3d 1181, 1197 (9th Cir. 2005), cert. denied, 550 U.S. 968 (2007); Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970). When there is a breakdown in communication between counsel and client, even competent counsel may not provide an adequate defense. United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001). A breakdown in communication and loss of trust results in the constructive denial of counsel.

Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel. This is true even where the breakdown is the result of the defendant's refusal to speak to counsel, unless the defendant's refusal to cooperate demonstrates "unreasonable contumacy."

Daniels, 428 F.3d at 1198 (quoting Brown, 424 F.2d at 1169).

b. The trial court improperly denied Mr. Harris's request for new counsel. When a trial court learns of a conflict between a defendant and his counsel, the court must thoroughly inquire into the

factual basis of the defendant's dissatisfaction. Smith, 923 F.2d at 1320 (quoting United States v. Hart, 557 F.2d 162, 163 (8th Cir.) (per curiam), cert. denied, 434 U.S. 906 (1977)). In reviewing the denial of a defendant's motion for new counsel, the appellate court considers (1) the adequacy of the trial court's inquiry into the conflict; (2) the extent of the conflict between the accused and his attorney, and (3) the timeliness of the motion. Stenson, 142 Wn.2d at 724; Daniels, 428 F.3d at 1197-98. An evaluation of the three factors demonstrates that the trial court improperly denied Mr. Harris's motion for a new attorney.

First, the trial court failed to make any inquiry into Mr. Harris's dissatisfaction with his attorney except to learn that he could not communicate with his lawyer. 1RP 20-21. The Nguyen Court held that a trial court informed of a conflict between the defendant and his counsel should question the attorney or the defendant "privately and in depth" and "examine available witnesses" before ruling on the motion. Nguyen, 262 F.3d at 1004 (quoting United States v. Moore, 159 F.3d 1154, 1160 (9th Cir. 1998)). "[I]n most circumstances, a court can only ascertain the extent of the breakdown in communication by asking specific and targeted questions." United States v. Adelzo-Gonzalez,

268 F.3d 772, 777-78 (9th Cir. 2001). Such an inquiry is adequate if it “‘ease[s] the defendant’s dissatisfaction, distrust, and concern’ and ‘provide[s] a sufficient basis for reaching an informed decision.’” Daniels, 428 F.3d at 1198 (quoting Adelzo-Gonzalez, 268 F.3d at 777).

The trial court did not engage in the colloquy necessary to determine if Mr. Harris’s right to effective assistance of counsel was violated. The court asked Mr. Harris only two questions, did not question his attorney at all, and did not call any witnesses on the issue. 1RP 20-21. Mr. Harris had just lost a trial with attorney Miguel Duran. 1RP 21. Mr. Harris informed the court that he and Mr. Duran had some misunderstandings during that case, and he could not face the trial in this case without “having an understanding of this man.” Id. When asked what he meant, Mr. Harris explained to the court “Well, we’re not able to communicate, Your Honor.” Id. The court asked Mr. Harris if he had anything further to say, but Mr. Harris did not. Id.

Although Mr. Harris stated that he could not communicate with Mr. Duran, the court denied Mr. Harris’s motion without any further inquiry. Id.; CP 7. The court thus failed to fulfill its duty to inquire into the reasons for the conflict.

Second, the conflict between Mr. Harris and his counsel was serious, as Mr. Harris told the trial court that he did not want to go to trial without “having an understanding with this man” and explained that meant they were “not able to communicate.” 1RP 21. While an adequate colloquy from the court would have made the reasons for the conflict more clear, Mr. Harris’s statement that he and Mr. Duran were unable to communicate is sufficient to establish that Mr. Harris was constructively denied counsel. See Daniels, 428 F.3d at 1198; Nguyen, 262 F.3d at 1003.

Mr. Harris’s complaints about Mr. Duran were also presented to the judge who presided over his first trial during the same time period. Supp CP __ (sub. no. 134, State v. John Harris, Jr., King County No. 11-1-03052-7 SEA, 7/25/12).² Mr. Harris said that his attorney had not called witnesses at the first trial and had not requested missing discovery. Id. Mr. Harris even related that he felt his attorney was working for the prosecutor’s office. Id. Thus, Mr. Harris established that he had a serious communication breakdown with his court-appointed attorney.

² This document is also found at CP 67-70 in State v. John Harris Jr., Court of Appeals No. 69202-0-1.

Finally, Mr. Harris's motion was timely. In evaluating the timeliness of a motion for new counsel, the court balances the defendant's important constitutional right to counsel with the resulting inconvenience and delay. Daniels, 428 F.3d at 1200 (quoting Moore, 159 F.3d at 1161). "Even if the trial court becomes aware of a conflict on the eve of trial, a motion to substitute counsel is timely if the conflict is serious enough to justify the delay." Id. (citing Adelzo-Gonzalez, 268 F.3d at 780).

Mr. Harris asked the court for new counsel on June 19, 2012. The motion occurred prior to his omnibus hearing, and five months before the trial court began hearing pre-trial motions. 1RP 20-21, 24. Mr. Harris's motion was thus timely. See Smith, 923 F.3d at 596 (timeliness never found to be a bar when substitution claim is meritorious); Adelzo-Gonzalez, 268 F.3d at 780 (motion made approximately six weeks prior to trial was timely); Nguyen, 262 F.3d at 1003 (motion made on day trial set to start was timely).

The trial court thus violated Mr. Harris's constitutional right to counsel by denying his motion to discharge Mr. Duran and forcing Mr. Harris to proceed to trial with an attorney he could not communicate with and did not trust.

c. Mr. Harris's convictions must be reversed. The erroneous denial of a motion for new counsel is presumptively prejudicial. Daniels, 428 F.3d at 1199; Nguyen, 262 F.3d at 1005. Mr. Harris's convictions must be reversed and remanded for a new trial.

2. The trial court exceeded its statutory authority in ordering Mr. Harris to pay restitution for Ms. Grayson's burial expenses as part of his sentence for driving with a suspended driver's license.

Mr. Harris was required to pay restitution of \$8,655.22 to reimburse Ms. Grayson's family members for burial and memorial expenses as part of his sentence for driving with a suspended or revoked operator's license.³ CP 61-62, 91-105. The restitution order exceeded the court's statutory authority to impose restitution for a gross misdemeanor offense, however, because it was not part of a suspended sentence or a condition of probation. In addition, the restitution was not authorized because the burial expenses were not a loss caused by the commission of the crime of driving with a suspended license.

³ The State did not seek restitution for Mr. Harris's felony hit and run conviction, conceding the burial expenses were not causally connected to that offense. CP 78 (citing Hartwell, *infra*, 38 Wn. App. at 138-41).

a. The superior court could not impose restitution as a condition of Mr. Harris's sentence of driving with a suspended driver's license because it did not suspend any portion of the sentence or impose probation. Driving with a suspended driver's license is a gross misdemeanor, and the maximum sentence is 364 days in jail and/or a \$5,000 fine. RCW 9A.20.021(2); RCW 46.20.342(1)(b). The court sentenced Mr. Harris to the maximum term of 364 days in jail, consecutive with his sentence for felony hit and run driving. CP 60. The court did not suspend any portion of his sentence or order probation. CP 60-61.

The trial court's power to order restitution is statutory, not inherent. 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). Mr. Harris's challenge to his restitution order requires this Court to review whether the trial court exceeded its statutory authority in ordering restitution. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). In interpreting a statute, the appellate court tries to discern the legislature's intent, looking first at the statute's "plain language and its ordinary meaning." J.P., 149 Wn.2d at 450. The plain meaning may be found in the language of the statute itself as well as related statutes. Id.

The superior court's power to impose restitution for a gross misdemeanor is found at RCW 9.92.060 and RCW 9.95.210. State v. Soderholm, 68 Wn. App. 363, 377, 842 P.2d 1039 (1993). These two statutes, however, address suspended sentences and thus do not authorize restitution in this case. See State v. Eilts, 94 Wn.2d 489, 492, 617 P.2d 993 (1980) (RCW 9.95.210 authorized the court to order restitution when granting probation); State v. Marks, 95 Wn. App. 537, 539-40, 977 P.2d 606 (1999) (upholding restitution based upon the two statutes where defendant given suspended sentence and probation for misdemeanor).

RCW 9.92.060 gives the court the discretion to order an offender to pay restitution as "a condition to suspension of sentence." RCW 9.92.060(2). Similarly, RCW 9.95.210 allows the court to require an offender to pay restitution "in the order granting probation and as a condition thereof." RCW 9.95.210(2). They do not authorize restitution in this case.

RCW 9A.20.030 may also provide the court authority to order restitution in non-felony cases. See State v. Thomas, 138 Wn. App. 78, 81-82, 155 P.3d 998 (2007). The statute reads in relevant part:

If a person has gained money or property or caused a victim to lose money or property through the

commission of a crime, upon conviction thereof . . . the court, in lieu of imposing the fine authorized for the offense under RCW 9A.20.020, may order the defendant to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain or the victim's loss from the commission of the crime. . . . For purposes of this section, "gain" or "loss" refer to the amount of money or value of property or services gained or lost.

RCW 9A.20.030(1).⁴ RCW 9A.20.030 also does not provide the needed statutory authority for the restitution in Mr. Harris's case because it is limited to offenses involving losses or money or property.

The superior court thus did not have statutory authority to order Mr. Harris to pay restitution as part of his 364-day sentence for driving with a suspended driver's license.

b. The State did not prove that the restitution was for loss caused by the act of driving with a suspended driver's license. As argued above, the superior court's power to order restitution for a gross misdemeanor derives from RCW 9.92.060(2) and RCW 9.95.210(2). Marks, 95 Wn. App. at 539-40; Soderholm, 68 Wn. App. at 377. Even if this Court determines that these statutes or RCW 9A.20.030 permit restitution in Mr. Harris's case, the restitution order should still be stricken because the Ms. Grayson's funeral and burial expenses are not

⁴ RCW 9A.04.010 and RCW 9A.20 do not provide a definition of the term "victim."

causally connected to the crime of driving with a suspended operator's license.

RCW 9.92.060 and RCW 9.95.210 both permit the court to order restitution to those who have suffered loss or damage as a result of the defendant's offense. The court has discretion to order a 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 or when the 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 9.92.060(2)(b); RCW 9.95.210(2)(b) (emphasis added). Thus, unless the defendant enters an agreement to pay restitution for uncharged conduct, restitution may be ordered for loss or damage causally connected to the defendant's crime. State v. Hartwell, 38 Wn. App. 135, 138-41, 684 P.2d 778 (1984), overruled on other grounds, State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994)); see Griffith, 164 Wn.2d at 965-66 (interpreting RCW 9.94A.142). The State has the burden of proving the causal connection by a preponderance of the evidence. Thomas, 138 Wn. App. at 83.

The language of RCW 9.92.060 and RCW 9.95.210 limits restitution to loss resulting from the precise crimes for which the defendant was charged and convicted. Eilts, 94 Wn.2d at 493; State v. Berman, 50 Wn. App. 125, 132, 747 P.2d 492 (1987), rev. denied 110 Wn.2d 1019 (1988); State v. Mark, 36 Wn. App. 428, 675 P.2d 1250 (1984). Restitution cannot be imposed based upon a defendant's general scheme or acts simply connected with the crime charged. Mark, 36 Wn. App. at 430-33 (no restitution for losses occurring outside charging period); Berman, 50 Wn. App. at 131-32 (no restitution for uncharged thefts State alleged were part of the "same scheme").

Wearing dark clothing, Ms. Grayson jaywalked across a dark area of a busy street at night. Mr. Harris did not see Ms. Grayson before he struck her with his automobile, and she was run over by another car as she lay in the roadway. CP 88, 6/11/13 RP 6. The State never alleged that Mr. Harris's driving caused the accident, charging him with leaving the scene of the accident and driving with a suspended license, rather than vehicular homicide or reckless driving. CP 22-23; see RCW 46.61.520 (vehicular homicide occurs when defendant's driving is the proximate cause of injuries causing a death

and the defendant was driving recklessly, while under the influence of alcohol or drugs, or with disregard for the safety of others); RCW 46.61.500 (person guilty of reckless driving if he drives with willful and wanton disregard of safety of lives or property).

In a thoughtful opinion addressing conflicts between divisions of their lower appellate courts, the Florida Supreme Court addressed restitution for the crime of driving with a suspended operator's license in Schuette v. State, 822 So.2d 1275 (Fla. 2002). While driving with a suspended license, Schuette was involved in an accident during which another person was injured.⁵ *Id.* at 1278. The State asked the court to order her to pay the victim's medical bills and lost wages, arguing that the victim's injuries would not have occurred "but for" Schuette's driving. *Id.* at 1283.

In Florida, restitution may be awarded for losses that are "causally connected" to the offense and "bear a significant relationship" to the crime of conviction. Schuette, 822 So.2d at 1279 (quoting State v. Glaubius, 688 So.2d 913, 915 (Fla. 1997)). In making this determination, Florida courts examine whether the losses would

⁵ Schuette was also convicted of leaving the scene of the accident. Like Washington, Florida has held that restitution for a victim's injuries are causally connected to the crime of hit and run driving and thus not recoverable as restitution. State v. Williams, 520 A.2d 276 (Fla. 1988).

have been incurred “but for” the defendant’s crime. Id. at 1280, 1282-83; Glaubius, 688 So.2d at 915. The State must prove the causal connection by a preponderance of the evidence. Glaubius, at 915.

The Schuette Court refused to adopt a blanket rule that restitution for an accident victim’s medical treatment or losses could be imposed upon a defendant convicted of driving with a suspended license as a matter of law. Schuette, 82 So.2d at 1282. Finding that the State had not proved a causal connection between Schuette’s driving without a license and the victim’s injuries, the court upheld the trial court’s decision not to impose restitution. Id. at 1282, 1284.

We disagree with a blanket rule of law requiring restitution whenever an accident occurs while a motorist is driving with a suspended license. We conclude that in this case there has been an insufficient relationship between the act of driving with a suspended license and damages or loss resulting from the accident to allow for restitution. What is missing in this case is a causal relationship between the act of driving without a license and the accident that resulted in damages. The suspension of the license was an existing circumstance, rather than a cause of the accident. Although it is undisputed that Schuette was driving illegally by driving with a suspended license, the State failed to present any evidence of a relationship – much less prove by a preponderance of the evidence – to establish that the accident and resulting damages were caused by, or related to, Schuette’s act of driving without a license.

Id. at 1282. As in Schuette, the State did not prove a causal connection between Mr. Harris's lack of a driver's license and Ms. Grayson's death.

The State did not assert or prove that Mr. Harris's recklessness or negligence caused the accident. At trial a witness from the Department Licensing testified that Mr. Harris's license was suspended for an administrative action due to a citation received. 5RP 691. At the restitution hearing, the deputy prosecuting attorney asserted that Mr. Harris's suspension was for refusal to take a breath test, but the State provided no proof for this assertion. 6/11/13 RP 8. In any event, there was no proof that the suspension was related to reckless or negligent driving, just as there was no proof that Mr. Harris's poor driving caused the accident.

Of course, if Mr. Harris's car had not been on East Marginal Way at the exact time Ms. Grayson crossed the dark street outside of the crosswalk, he would not have struck her. But there is no evidence that Mr. Harris's lack of a driver's license caused the accident. Her death would have resulted whether or not Mr. Harris had a driver's license at the time. And, there were other fast-moving cars on the road that evening, including one that ran over her in the street. 2RP 203-04,

228-29,3RP 258; 5RP 654-55. There is no way to know if Ms.

Grayson would have made it safely to the other side even if Mr. Harris had not been driving.

The State relied upon Division Two's Thomas opinion to support their argument that Mr. Harris's driving with a suspended license caused Ms. Grayson's death. CP 79-80, 81-87. The Thomas opinion, however, is distinguishable because of the proof of causation.

Thomas was prosecuted for vehicular assault based upon a single car accident where her passenger was injured. Thomas, 138 Wn. App. at 80. The jury was unable to reach a verdict on vehicular assault and instead convicted her of driving while under the influence of alcohol. Id. at 81. Thomas was angry and speeding at the time of the accident, and three and a half hours later she had a blood alcohol reading of 0.20, more than twice the legal limit. Id. at 80. Finding that Thomas's use of alcohol was one of the causes of the accident, the sentencing court ordered her to pay restitution for her passenger's medical expenses. Id. at 81.

The Thomas majority upheld the sentencing court, determining that there was substantial evidence to support a finding by a preponderance of the evidence that the passenger would not have been

injured but for Thomas's driving while under the influence of alcohol.⁶ Id. at 83. Here, however, there is no proof that Mr. Harris's driving with a suspended license caused the accident.

More analogous to Mr. Harris's case is this Court's opinion in Hartwell, supra. Hartwell was ordered to pay restitution when he left the scene of a serious automobile accident where three people were injured. Hartwell, 38 Wn. App. at 136. The State argued that the restitution was causally connected to the crime of felony hit and run because Hartwell had a blood alcohol level of 0.15, did not deny causing the accident, and left the scene. Id. at 139. This Court reversed the restitution order due to the lack of a causal connection between the victim's injuries and the crime of conviction. Id. at 140-41.

The injuries occurred in the accident that happened before Harwell committed the offense for which he was charged: leaving the scene of the accident. Had Hartwell stayed at the scene, thereby not committing the offense, the injuries presumably would have been the same. The statute specifically states that restitution may be ordered for "persons who may have suffered loss or damage by reason of the crime in question ..." RCW 9.95.210. The losses here were not suffered "by reason of the crime in question."

⁶ The concurring justice would have upheld the restitution award on the grounds that the victim was entitled to benefits under the Crime Victim's Compensation Act, citing RCW 9.94A.753(7). Thomas, 138 Wn. App. at 85-86 (Quinn-Brintnall, J., concurring in the result).

Id. at 140 (emphasis in original).

As in Hartwell and Schuette, Ms. Grayson did not die because Mr. Harris was driving with a suspended driver's license. The State thus failed to prove her family members suffered damages "by reason of the crime in question" as required by statute.

c. The restitution order must be vacated. Mr. Harris was ordered to pay restitution as a condition of his 364-day sentence for driving with a suspended driver's license. The trial court lacked statutory authority to order Mr. Harris to pay restitution for a gross misdemeanor when he was not given a suspended sentence or placed on probation. In addition, the family's burial expenses were not causally connected to Mr. Harris's driving with a suspended license. The restitution order must therefore be vacated. Hartwell, 38 Wn. App. at 141.

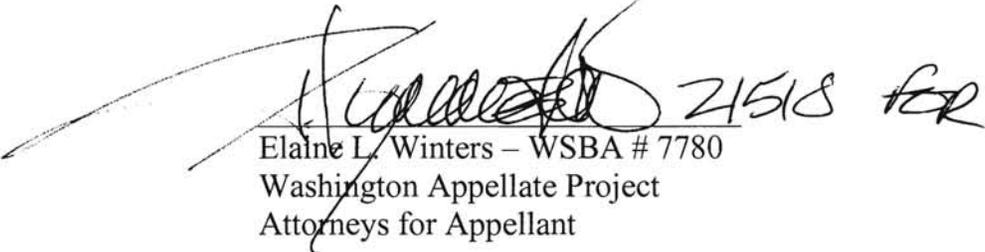
E. CONCLUSION

Mr. Harris was unable to communicate with his lawyer and made a timely motion for the appointment of new counsel. Mr. Harris's constitutional right to counsel was violated when the court denied his motion without inquiring into the nature and extent of the conflict.

In the alternative, the order requiring Mr. Harris to pay restitution as a condition of his 364-day sentence for driving with a suspended driver's license must be vacated because lacked statutory authority to order restitution when (1) Mr. Harris did not receive a suspended sentence or probation and (2) the damages were not causally connected to Mr. Harris's crime.

DATED this 7th day of October 2013.

Respectfully submitted,


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Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 69729-3-I
v.)	
)	
JOHN HARRIS, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF OCTOBER, 2013, 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:

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