

71335-7

71333-7

NO. 71333-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH ADEE,

Appellant.

REC'D

SEP 05 2014

King County Prosecutor  
Appellate Unit

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DIVISION ONE  
COURT OF APPEALS  
STATE OF WASHINGTON

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

The Honorable Catherine Shaffer, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE'S DOCUMENTATION INSUFFICIENTLY CONNECTS OFFICER CHET DECKER'S INJURIES TO ADEE'S CRIME, REQUIRING VACATION OF THE RESTITUTION ORDER

The State relies on State v. Deskins, 180 Wn.2d 68, 322 P.3d 780 (2014), and State v. Dennis, 101 Wn. App. 223, 6 P.3d 1173 (2000), for its mistaken assertion that the medical and wage loss documentation adequately causally connected Officer Decker's injuries to Adee's crime. Br. of Resp't at 14-18. But in both cases, there was more detailed information before the trial court than existed here.

In Dennis, this court acknowledged that "the documents produced by the State do not indicate why medical services were provided to [officers]." 101 Wn. App. at 227-28; cf. Br. of Appellant at 8-9 (arguing State's wage loss and medical documentation does not link treatment or diagnoses to Officer Decker's hand injury). However, the Dennis court opined that the documentation sufficiently demonstrated causation because correspondence

from the King County Prosecuting Attorney's Office Victim Assistance Unit and the State's Certification of Probable Cause both state that [officers] were treated at Northwest Hospital for their injuries. Likewise, the letter from the City of Seattle Workers Compensation Unit claims specialist referenced [an officer]'s unpaid balance . . . for the amount it had paid to Northwest Hospital. The claims specialist also noted that [the officer]'s injury occurred on July 30, 1997, which is the same date the State contends that Dennis assaulted him.

Id. at 228. Unlike Dennis, neither the correspondence that accompanied the State's documentation nor the certification for determination of probable cause ties the listed medical expenses to where Officer Decker received treatment. CP 4-5, 85. And although the Victim Assistance Unit's memorandum references the date of the incident, this alone does not make it "possible to determine from [the] documentation whether all the costs incurred were related to the offender's crime." Dennis, 101 Wn. App. at 227.

In Deskins, the Washington Supreme Court accepted the State's documentation for the care of animals seized in connection with a charge for unlawful confinement of animals. 180 Wn.2d at 83-84. But the State provided detailed bills showing how much had been paid for the animals' care. Id. at 83. In addition, the Deskins court accepted the State's summary of expenditures based on former RCW 16.52.200(4) (2003)<sup>1</sup>, which, in the court's view, provided "the causal link between animal mistreatment and subsequent care by the State." Deskins, 180 Wn.2d at 84. Unlike Deskins, the State's documentation in this case was not detailed enough to provide a causal link between Adee's actions and the listed expenditures. Nor was

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<sup>1</sup> The subsections of former RCW 16.52.200 were partially renumbered in 2009 and 2011. LAWS OF 2011, ch. 172, § 4; LAWS OF 2009, ch. 287, § 3.

there a statute that permitted a summary or list of expenditures to suffice to demonstrate causation.

The documentation provided by the State in this case merely contained summaries and claim forms listing wage loss and medical expenditures without indicating why such expenditures were incurred or how they were calculated. See Br. of Appellant at 7-10. This is not sufficient to support the trial court's restitution order. Because the "State fail[ed] to establish a causal connection between a defendant's actions and the damages, this court must vacate the restitution order." Dennis, 101 Wn. App. at 229.

2. ADEE DISPUTED FACTS REGARDING THE ISSUE OF CAUSATION, ENTITLING HIM AT MINIMUM TO AN EVIDENTIARY HEARING

Adee disputed whether the act that constituted resisting arrest occurred before or after Officer Decker began punching Adee with a closed fist. RP 4, 7. The State misses this point in its attempts to distinguish State v. Acevedo, 159 Wn. App. 221, 248 P.3d 526 (2010), and State v. Woods, 90 Wn. App. 904, 953 P.2d 834 (1998), on the grounds that they involved damage that "occur[red] a month or days prior" to the crimes. Br. of Resp't at 11-13. The amount of time that elapses between the crime and the damage is not a controlling consideration. Both Acevedo and Woods stand for the proposition that there is no causation in fact when the loss or damage

occurs *before* the act constituting the crime, whether a minute before, a day before, or a month before. Acevedo, 159 Wn. App. at 230; Woods, 90 Wn. App. at 909. This is precisely the factual issue Adee disputes: did Officer Decker punch Adee, thereby breaking his hand, before Adee committed the act constituting the crime of resisting arrest?

The State answers this question by stating, as the trial court did, that “Adee’s crime of resisting arrest included the entire struggle by officers to secure Adee.” Br. of Resp’t at 13; RP 14 (trial court stating, “It’s all part of the arrest, and it’s all part of the resisting, and there’s a big causal connection there”). The State also argues that no evidentiary hearing is necessary because the trial court considered Adee’s offer of proof as true. Br. of Resp’t at 18-19. To the contrary, the State’s and the trial court’s conclusion is based on the assumption that Officer Decker could not possibly have punched Adee before Adee committed the crime of resisting arrest. This assumption unacceptably sidesteps the very factual issue Adee places in dispute. Adee is entitled to present evidence that Officer Decker punched Adee and injured himself before Adee resisted arrest.<sup>2</sup> Because Adee has “dispute[d] facts relevant to determining restitution, the State must prove the damages at an

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<sup>2</sup> Adee also disputed the sufficiency of the State’s medical and wage loss documentation at the restitution hearing. RP 9. If this court disagrees that the restitution order should be vacated due to the insufficiency of the State’s documentation, see discussion supra Part 1, on remand Adee should nonetheless be entitled to challenge whether the State’s documentation adequately demonstrates that the costs incurred were related to the crime of resisting arrest.

evidentiary hearing by a preponderance of the evidence.” State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

3. THE TRIAL COURT’S DENIAL OF ADEE’S CONTINUANCE REQUEST WAS BASED ON AN ERRONEOUS UNDERSTANDING OF THE LAW AND WAS THUS AN ABUSE OF DISCRETION

As the State deftly points out, there was no 180-day limitation on imposing restitution because Adee was convicted of misdemeanors, not felonies. Br. of Resp’t at 5-6, 21 (discussing application of RCW 9.95.210 in misdemeanor cases rather than RCW 9.94A.753). Given that the trial court erroneously believed it had to order restitution within 180 days of sentencing under RCW 9.94A.753(1), there was no statutory reason to deny Adee’s continuance request. Because the trial court denied a continuance by applying an incorrect statute’s time limitation, the trial court abused its discretion. See State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (it is an abuse of discretion if the trial court bases its decision ““on an incorrect standard””) (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

In any event, there was good cause to continue the hearing to allow Adee’s counsel to prepare materials on the issue of restitution. The State unnecessarily delayed in submitting its restitution materials to Adee, defense counsel had just returned from a preplanned vacation before the hearing, and

there was no prejudice to Adee or the State by postponing the restitution hearing. CP 84-86; RP 4, 9-10; Br. of Appellant at 11-15.

The State fails to engage in any factual analysis regarding whether there was good cause to continue the restitution hearing and instead asserts that only an “external impediment not resulting from a self-created hardship” can establish good cause and that “[s]imple inadvertence or attorney oversight is insufficient.” Br. of Resp’t at 20 (citing State v. Reed, 103 Wn. App. 261, 265 n.4, 12 P.3d 151 (2000)). But, as Adee discussed in his opening brief, Reed’s external impediment language has been applied only to untimely continuance requests *after* the 180-day period has expired. Br. of Appellant at 12-14; Reed, 103 Wn. App. at 264-65 (post-expiration request for continuance); State v. Johnson, 96 Wn. App. 813, 816-17, 981 P.2d 25 (1999) (same). This court should reject the State’s parroting of the trial court’s erroneous understanding of Reed and Johnson and hold that there was good cause to grant Adee’s timely and appropriate request for a continuance of the restitution hearing.

B. CONCLUSION

This court must vacate the trial court's restitution order because the wage loss and medical documentation does not provide sufficient evidence of causation between the treatment of Officer Decker's injuries and Adee's crime. In the alternative, this court must reverse the restitution order and remand with instructions to conduct an evidentiary hearing on the issue of restitution given Adee's multiple factual disputes relevant to determining restitution.

DATED this 5<sup>th</sup> day of September, 2014.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Kelland" or similar, written over a horizontal line.

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COA NO. 71333-7-1

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5<sup>TH</sup> DAY OF SEPTEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KENNETH ADEE  
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SIGNED IN SEATTLE WASHINGTON, THIS 5<sup>TH</sup> DAY OF SEPTEMBER, 2014.

X Patrick Mayovsky

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