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MAY 20 2014
King County Prosecutor
Appellate Unit

71333-7

NO. 71333-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH ADEE,

Appellant.

2014 MAY 20 PM 4:08
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

The trial court ordered Kenneth Harvey Adee to pay nearly \$13,000 in restitution for the medical expenses and wage losses Seattle Police Officer Chet Decker sustained after he broke his hand repeatedly punching Adee. However, it was impossible from the submitted medical and wage loss documentation to determine whether all the costs incurred related to Adee's crime. Therefore, the State failed to establish a causal connection between Officer Decker's injury and Adee's crime of resisting arrest. This court must accordingly vacate the restitution order.

Alternatively, despite Adee's request for a continuance in order to dispute the existence of a causal link between Officer Decker's injury and Adee's crime, the trial court misapprehended case law governing continuances of restitution hearings, misinterpreted the law regarding causation requirements for imposing criminal restitution, and failed to hold an evidentiary hearing. This manifest abuse of the trial court's discretion requires reversal of the restitution order and remand for a new restitution hearing.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing restitution.
2. The trial court erred in accepting the State's documentation of the injured officer's medical and wage loss expenditures even though the

documentation failed to establish a causal relationship between the officer's injury and Adee's crime.

3. The trial court erred in denying Adee's request for a continuance of the restitution hearing.

4. The trial court erred in concluding the timing of the officer's punches did not matter in determining whether a causal relationship existed between the officer's hand injury and Adee's crime of resisting arrest.

5. The trial court erred in failing to hold an evidentiary restitution hearing regarding the facts Adee disputed.

Issues Pertaining to Assignments of Error

1. Where the medical and wage loss documentation submitted by the State to establish restitution fails to provide the required causal connection between the injury sustained and the crime committed, must the order setting restitution be vacated?

2. Where the trial court misapprehends the good cause standard that applies to continuances of restitution hearings, does the trial court necessarily abuse its discretion and must the case be remanded for a new restitution hearing?

3. Where the trial court misapprehends the legal standard governing the causal relationship between the injury and the crime

charged, does the trial court necessarily abuse its discretion and must the case be remanded for a new restitution hearing?

4. Where the defendant disputes facts relevant to imposing restitution, must the trial court hold an evidentiary hearing to address the disputed facts?

C. STATEMENT OF THE CASE

On July 27, 2012, Adee's parents phoned police after Adee made various threats to harm his parents and their property, verbally and via text message, at the home in which they all resided. CP 4. When police arrived, Adee walked away from police. CP 4; RP 7. At some point, Officer Chet Decker forcibly took Adee to the ground. CP 4; RP 7. Prior to arrest, Officer Decker repeatedly punched Adee and, in doing so, broke his hand. CP 4; RP 7.

The King County Prosecutor charged Adee with felony cyberstalking, third degree malicious mischief, and third degree assault. CP 1-2. Pursuant to plea negotiations, the State amended the charges to one count of harassment and one count of resisting arrest. CP 7-8. Adee pleaded guilty to the amended charges. CP 9-17.

On May 31, 2013, the trial court imposed a deferred sentence of 12 months with credit for time served. CP 25. The trial court also imposed \$600 in legal financial obligations. CP 26.

On November 26, 2013, 179 days after sentencing, the parties convened at a restitution hearing. RP 1-20. Defense counsel requested a continuance of the restitution hearing because the State had submitted its restitution materials in late October and because defense counsel had not had an opportunity to review these materials due to a personal vacation during the first part of November. RP 4, 6-7; CP 84. The State's materials included a wage loss summary totaling \$9366.54 and medical expenses totaling \$3817.18, for a combined total of \$13,184.32. CP 70-71.

Defense counsel also requested a continuance to present additional evidence pertinent to whether Officer Decker's injury was causally related to Adee's crime. RP 4. This evidence included transcripts of Officer Decker's defense interview, transcripts of the in-car police video recording, the actual in-car video, and a declaration from Adee's father. RP 4, 7. At the restitution hearing, defense counsel asserted that this evidence was necessary "to hash out what happened that was resisting arrest, when the punch occurred, and how it was related to the resisting before we can even decide if there's a causal connection. And . . . I think that the Court needs to have all the information." RP 9-10. In addition, the defense challenged "medical records that don't even indicate a diagnosis" that the State submitted in support of restitution. RP 9; CP 70-83.

The trial court denied defense counsel's request for a continuance.

RP 16. The court stated,

I would be [willing to allow for a continuance at the Defendant's request] if defendants could extend the [180-day postsentencing] period, but they can't. The only thing that the Court can extend the statutory period for is good cause, which means an external impediment that did not result from a self-created hardship that would prevent a party from complying with statutory requirements. I don't see anything that the State did here that would prevent it from meeting its duty to produce evidence by the 180-day deadline.

RP 15.

With regard to Adee's proposed evidence that might demonstrate a lack of causal relationship between Adee's crime and Officer Decker's injury, the trial court also opined that it did not matter if Officer Decker punched Adee before Adee physically resisted arrest, refusing to "segregate the event moment by moment in that sort of kaleidoscopic way." RP 13-14.

Instead, the court concluded,

whether the Officer broke his hand right off the bat by punching or whether he broke his hand because of Mr. Adee flailing about when they were trying to cuff him doesn't matter. It's all part of the arrest, and it's all part of the resisting, and there's a big causal connection there.

RP 14.

As for the documentation that the State submitted in support of the wage loss and medical expenditures incurred as a result of Officer Decker's injury, the trial court accepted nearly all of the documentation. RP 19.

However, the trial court did strike the November 20, 2012 entry in the amount of \$332.62 for wage loss, noting, “I don’t see anything that indicates what went on in November. It’s a long time . . . out from the last date requested, which is September.” RP 18-19.

In sum, the trial court imposed an order setting restitution requiring Adee to pay \$12,861.70 for Officer Decker’s medical expenses and wage losses. CP 30. Adee timely appeals this order. CP 38-40.

D. ARGUMENT

1. THE RESTITUTION ORDER MUST BE VACATED BECAUSE THE STATE’S DOCUMENTATION DOES NOT ESTABLISH THE REQUIRED CAUSAL CONNECTION

The State’s presentence statement included several documents summarizing Officer Decker’s absence from work and various medical expenditures. CP 70-83. However, it is not possible from this documentation to determine whether all the costs incurred were related to Adee’s crime of resisting arrest. Thus, the State’s presentence statement fails to provide the required causal relationship between the expenses and the crime committed. Accordingly, this court must vacate the restitution order.

To order restitution, the trial court must “find that a victim’s injuries were causally connected to a defendant’s crime.” State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999). “A causal connection is not

established simply because a victim or insurer submits proof of expenditures[.]” State v. Dennis, 101 Wn. App. 223, 227, 6 P.3d 1173 (2000) (alteration in original) (quoting State v. Dedonado, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000) (per curiam)). “This is because it is often not possible to determine from such documentation whether all the costs incurred were related to the offender’s crime.” Dennis, 101 Wn. App. at 227. Thus, “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.’” Id. (alteration in original) (quoting State v. Bunner, 86 Wn. App. 158, 160, 936 P.2d 419 (1997)). Evidence of expenditures must provide a reasonable basis for establishing losses and cannot require speculation or conjecture. State v. Hahn, 100 Wn. App. 391, 399, 996 P.2d 1125 (2000).

“When the defendant challenges the legal basis for an award of restitution, [courts] do not defer to the trial court.” State v. McCarthy, 178 Wn. App. 290, 296, 313 P.3d 1247 (2013). Rather, when the trial court’s authority to order restitution is at issue, “the reviewing court addresses the issue de novo.” Id.

In this case, the State merely presented a summary listing monies paid for wage losses. CP 70. Similarly, the State presented a summary of

medical expenditures and attached various health insurance claim forms and invoices. CP 71-83. This documentation does not link the listed expenditures to Officer Decker's wage losses or medical symptoms or treatment for injuries sustained as a result of Adee's crime. The State's documentation therefore fails to provide the causal connection necessary to sustain an order of restitution.

Turning first to the summary of wage loss transactions, the State's document lists various amounts of money paid to Officer Decker with a handwritten notation on the bottom that reads "wage loss." CP 70. This document does not link any wage loss to Officer Decker's specific injuries.¹ There is nothing in the document to link the wage losses to Officer Decker's broken hand. Thus, it is "not possible to determine from such documentation whether all the costs incurred were related to [Adee's] crime." Dennis, 101 Wn. App. at 227. Because the State's wage loss document is just the type of summary that the Washington courts have rejected as insufficient, the State failed to demonstrate the required causal connection between these expenditures and the crime committed.

As for the medical expenditures, the State provided a similar summary that contained the amount paid, the date of services, and the

¹ Indeed, aside from "wage loss" being handwritten on the document, it would be impossible to determine from the document the purpose of the payments to Officer Decker.

medical providers. CP 71. Along with this summary, the State included various health insurance claim forms. CP 72-74, 76-78, 80-83. The claim forms and the summary do nothing more than list various medical expenditures without indicating why medical services were provided. The claim forms also list various diagnoses and procedures only by reference to a numerical code. Since Officer Decker's treatment and diagnoses are not provided in English, it is impossible to discern that they are related to his hand injury. The State's claim forms and a medical summary therefore do not suffice to causally connect the crime in question to Officer Decker's injuries.

The State also provided a pharmacy invoice for ibuprofen and Oxycodone. CP 75. While this invoice provides more information than the health insurance claim forms, it still fails to link the medications prescribed to a hand injury. Thus, like the claim forms, the invoice is not sufficient to establish the required connection between Officer Decker's injury and Adee's crime.

The State's inclusion of an invoice for what appears to be hand and wrist radiographs and splints comes closer to meeting the causation-in-fact requirement. CP 79. Indeed, this is the only record among those provided by the State that relates treatment to Officer Decker's injury. However, this invoice contains various monetary charges that are unexplained, a percentage

calculation of some sort, as well as other notations whose meaning is unclear. CP 79. In addition, the amount listed and apparently paid for these services is \$500.75. CP 71, 79. But nowhere on the document is there indication of how the amount of \$500.75 was reached or for which services the \$500.75 relates. Therefore, the evidence of damages—even if adequately tied to Officer Decker’s injury—is not “sufficient to afford a reasonable basis for estimating the loss” and thus “subject[s] the trier of fact to mere speculation or conjecture.” State v. Tobin, 132 Wn. App. 161, 174, 130 P.3d 426 (2006) (emphasis omitted) (quoting State v. Awawdeh, 72 Wn. App. 373, 379, 864 P.2d 965 (1994)). The invoice for splints and radiographs accordingly fails to provide sufficient accuracy to establish the loss and cannot support the restitution order.

“[I]f the State fails 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. “The reason for this rule is that the State must not be given a further opportunity to carry its burden of proof after it fails to do so following a specific objection.” Id. The State should not be given another chance to prove entitlement to restitution when its first attempt to do so failed. Because the State’s medical and wage loss documentation does not show the requisite causal connection between

Officer Decker's treatment and absence from work and Adee's crime, this court must vacate the restitution order.

2. ADEE IS AT LEAST ENTITLED TO AN EVIDENTIARY HEARING TO ADDRESS THE SUFFICIENCY OF THE STATE'S RESTITUTION EVIDENCE AND PRESENT HIS OWN EVIDENCE

Even if this court were to accept the State's documentation, there are several other factual disputes in this case between the State and Adee. "Where a defendant disputes facts relevant to the determination of restitution, the State must prove the amount by a preponderance of the evidence at an '*evidentiary hearing*.'" State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005) (emphasis added), abrogated in part on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Despite Adee's clear disputation of the facts, there was no evidentiary hearing in this case in which Adee was provided an opportunity to challenge the State's evidence or present his own. Thus, short of vacating the restitution order, this court must reverse the restitution order and remand with instructions for the trial court to hold an evidentiary hearing.

- a. The trial court abused its discretion by denying Adee's request to continue the restitution hearing so that the defense could present evidence

The trial court "shall determine the amount of restitution due at the sentencing hearing or within [180] days" RCW 9.94A.753(1). "The court may continue the hearing beyond the [180] days for good cause." Id.

In this case, the trial court misapprehended the legal standard allowing it to continue the restitution hearing for good cause. This was an abuse of its discretion. See State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (court abuses discretion when it applies incorrect legal standard).

The trial court acknowledged that it could “extend the statutory period for . . . good cause,” but stated that the good cause standard required “an external impediment that did not result from a self-created hardship that would prevent a party from complying with statutory requirements.” RP 15. Rather than ascertaining the correct legal standard, the trial court appeared more concerned “that the restitution order wouldn’t stand up” on appeal. RP 17.

To be sure, the external impediment language relied on by the trial court is present in case law definitions of the good cause standard in restitution cases. See, e.g., State v. Reed, 103 Wn. App. 261, 265 n.4, 12 P.3d 151 (2000); State v. Johnson, 96 Wn. App. 813, 817, 981 P.2d 25 (1999). But, contrary to the trial court’s understanding, these cases specifically involved requests for good cause continuances *after* the restitution statute’s 180-day period had expired. Reed, 103 Wn. App. at 264-65; Johnson, 96 Wn. App. at 816-17. Also, both the Reed and Johnson courts leveled the “external impediment” and “self-created hardship” language against the State for failing to submit restitution materials within

the statutory timeframe. Reed, 103 Wn. App. at 265 n.4; Johnson, 96 Wn. App. at 817. Given the very different posture of this case, Johnson and Reed should not control.

State v. Tetreault, 99 Wn. App. 435, 998 P.2d 330 (2000), is closer to the mark. In Tetreault, as in Johnson and Reed, the State had “difficulty getting the necessary information in time, so it simply struck the [restitution] hearing date,” allowed the 180-day period to expire, and then made a request to extend the period. Tetreault, 99 Wn. App. at 438. After rejecting the State’s untimely request, the Tetreault court emphasized the utility of making a continuance request before the expiration of the 180-day period:

The timely submission of a request for extending the 180-day period would allow the court to consider the State’s diligence in procuring the necessary evidence as well as other factors that the State has conceded are applicable to a request for a continuance of sentencing such as (1) the length of the delay, (2) the reason for delay, (3) the defendant’s assertion of his or her right to speedy sentencing, and (4) the extent of prejudice to the defendant.

Id. Thus, Tetreault suggested a more nuanced and fact-intensive approach for determining whether a party requesting a timely extension could show good cause.

In this case, Adee was sentenced on May 31, 2013. CP 25-28. Pursuant to RCW 9.94A.753(1), the trial court was required to impose restitution by November 27, 2013, 180 days later. Defense counsel clearly

made her request to continue the restitution hearing on November 26, 2013, before the expiration of the 180-day period. RP 4, 6-10. Because the defense's continuance request was timely, the trial court should not have relied on Reed and Johnson, but instead should have focused on the equity of the case by considering factors such as those identified in Tetreault.

Applying those factors, there was good cause for the requested continuance. The State did not transmit its restitution materials until October 28, 2013. CP 85. The trial court initially set the restitution hearing on November 19, 2013, but, because of defense counsel's planned vacation throughout much of November 2013, defense counsel requested that the hearing be rescheduled. CP 84; RP 4. Thus, the reasons for the delay are twofold. First, the State provided the materials to defense counsel toward the end of the 180-day period—despite the fact that the State appears to have had the materials in May 2013 before sentencing. See CP 86 (facsimile from City of Seattle to prosecutor dated May 29, 2013 attaching medical and wage documentation). Second, because of her planned vacation, defense counsel lacked the time necessary to gather the evidence she wished to present at the restitution hearing. RP 4, 9-10. These facts demonstrate that there was good cause to delay the imposition of restitution.

As for the final two Tetreault factors, Adee's assertion of his speedy sentencing right and the extent of prejudice caused to Adee by the delay are

nonissues in this case. The defense made the request for the extension of the 180-day period in order to gather evidence necessary to contest the causal relationship between Adee's crime and Officer Decker's injuries. RP 4, 9-10. The denial of the defense's request precluded this evidence from being presented to and considered by the trial court. Thus, it was not the delay that prejudiced Adee but the denial of Adee's continuance request. Given the facts of this case, the trial court should have granted a continuance.

Because the trial court misinterpreted the relevant case law and applied an inappropriately harsh legal standard when it denied Adee's request to continue the restitution hearing, it abused its discretion. This abuse of discretion should result in reversal of the trial court's restitution order and remand for a restitution hearing at which Adee has an opportunity to present evidence in his favor.

b. The trial court misunderstood the legal standards governing causation-in-fact in restitution cases

During argument on the issue of restitution, Adee disputed "whether or not [Officer Decker's] actions were causally connected to anything [Adee] did at the time that [Officer Decker] started punching [Adee] with a closed fist." RP 4. Adee also made an offer of proof that Adee was walking away from Officer Decker when "Officer Decker came up behind him and forcibly took him to the ground at the same time as punching him." RP 7. In

addition, Adee asserted that in-car videos would “detail the timing” of what occurred and would resolve the question of whether Adee “took a fighting stance that . . . predated when . . . the punching occurred.” RP 7. Thus, Adee clearly disputed whether he had resisted arrest before Officer Decker punched Adee—thereby breaking his hand—which, in turn, called into question the causal relationship between resisting arrest and Officer Decker’s broken hand.

“There is not causal connection if the loss or damage occurred *before* the act constituting the crime.” State v. Acevedo, 159 Wn. App. 221, 230, 248 P.3d 526 (2010) (emphasis added); see also State v. Woods, 90 Wn. App. 904, 909, 953 P.2d 834 (1998) (“In examining the causal relationship between the crime and the loss, it is clear that if the loss or damage occurs before the act constituting the crime, there is not causal connection between the two.”) (quoting State v. Hunotte, 69 Wn. App. 670, 675, 851 P.2d 694 (1993), abrogated in part on other grounds by State v. A.M.R., 147 Wn.2d 91, 96, 51 P.3d 790 (2002))). Injuries must be the result of the precise offense charged and cannot be imposed based on a defendant’s general scheme or acts merely connected with the crime charged. McCarthy, 178 Wn. App. at 297.

Adee planned to submit evidence tending to show that Officer Decker punched Adee prior to Adee’s acts that constituted the crime of

resisting arrest. RP 7. If Adee's representations of the evidence were accurate, there would be no basis for imposing restitution in this case because there would be no causal relationship between Officer Decker's injuries and Adee's crime.

Unfortunately, however, the trial court failed to apply the settled law regarding causation in restitution cases. Even accepting Adee's offer of proof, the trial court stated it "[could not] parse . . . an event by looking to every moment of the effort to arrest" Adee. RP 12. In addition, the trial court would not "segregate the event moment by moment in that sort of kaleidoscopic way." RP 13-14. Thus, concluded the trial court, "whether the Officer broke his hand right off the bat by punching or whether he broke his hand because of Mr. Adee flailing about when they were trying to cuff him doesn't matter." RP 14.

The trial court's ruling clearly ignores the legal standard for establishing a causal relationship between an injury and the crime charged in restitution cases. Indeed, in the trial court's view, it did not matter whether Officer Decker began punching Adee before Adee physically resisted arrest. Thus, even if the evidence did show that Adee was punched before the acts constituting resisting arrest occurred, the trial court apparently would have come to the same erroneous conclusion. This is contrary to settled case law that rejects a causal connection when the injury occurs *before* the act

constituting the crime. By applying the incorrect legal standard, the trial court abused its discretion. The restitution order must accordingly be reversed.

c. There must be an evidentiary hearing to settle Adee's factual disputes

The law is settled that “[i]f the defendant disputes facts relevant to determining restitution, the State must prove the damages at an evidentiary hearing by a preponderance of the evidence.” State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005); see also Hughes, 154 Wn.2d at 154; Dedonado, 99 Wn. App. at 256. Although “[c]ase law does not define ‘evidentiary hearing’ in the restitution context,” the term means “[a] hearing at which evidence is presented, as opposed to a hearing at which only legal argument is presented.” Hughes, 154 Wn.2d at 154 (second alternation in original) (quoting BLACK’S LAW DICTIONARY 738 (8th ed. 2004)).

Adee clearly disputed the facts relevant to the imposition of restitution in this case. RP 4, 6-10; CP 35-37. Yet the trial court held no evidentiary hearing to address Adee’s factual disputes and instead just heard argument. RP 1-20. This court must accordingly reverse the restitution order and remand this matter with instructions to conduct an evidentiary hearing so Adee may have the opportunity to challenge the State’s evidence

and present his own evidence regarding the imposition of restitution. See Kinneman, 155 Wn.2d at 285-86.

D. CONCLUSION

The medical and wage loss documentation the State submitted fails to provide the required causal link between Officer Decker's injuries and treatment and Adee's crime. This court must vacate the restitution order in this case. Alternatively, because the trial court abused its discretion by denying Adee's request for a continuance and by misapplying the legal standard governing causation in restitution cases, this court must reverse the restitution order and remand with instructions to conduct a full evidentiary hearing on the issue of restitution.

DATED this 20th day of May, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 71333-7-I
)	
KENNETH ADEE,)	
)	
Appellant.)	

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 20TH DAY OF MAY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **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
14100 LINDEN AVENUE N.
APT. #454
SEATTLE, WA 98133

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF MAY, 2014.

x *Patrick Mayovsky*