

FILED
January 5, 2016
Court of Appeals
Division I
State of Washington

COA NO. 73149-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROSEMARY KAMB,

Appellant.

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

The Honorable Ira J. Uhrig, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issues Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. Plea.....	1
2. Restitution and sentencing hearing	2
C. <u>ARGUMENT</u>	7
1. THE RESTITUTION ORDER SHOULD BE REVERSED BECAUSE IT DISREGARDS KAMB'S LEGITIMATE COMPENSATION AS TRUSTEE.	7
a. Summary of restitution law.....	7
b. The amount of reasonable compensation for Kamb's legitimate work as a trustee cannot be included in the restitution amount	9
2. VARIOUS CHECKS MADE PAYABLE TO OTHERS SHOULD NOT HAVE BEEN INCLUDED AS RESTITUTION BECAUSE THE STATE FAILED TO PROVE THE PAYMENTS WERE ILLEGITIMATE.....	12
a. Checks to Skagit Valley Medical Center and Skagit Valley Hospital.....	13
b. Check to Health Care.....	14
c. Check to Josephine White.....	15
d. The court abused its discretion in awarding restitution for the check amounts.....	16
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Marriage of Littlefield,</u> 133 Wn.2d 39, 940 P.2d 1362 (1997).....	16
<u>State v. Acevedo,</u> 159 Wn. App. 221, 248 P.3d 526 (2010).....	9
<u>State v. Enstone,</u> 137 Wn.2d 675, 974 P.2d 828 (1999).....	16
<u>State v. Johnson,</u> 96 Wn. App. 813, 981 P.2d 25 (1999).....	8
<u>State v. Johnson,</u> 69 Wn. App. 189, 847 P.2d 960 (1993).....	8
<u>State v. Miszak,</u> 69 Wn. App. 426, 848 P.2d 1329 (1993).....	8, 12
<u>State v. Thomas,</u> 138 Wn. App. 78, 155 P.3d 998 (2007).....	8, 9, 11
<u>State v. Woods,</u> 90 Wn. App. 904, 953 P.2d 834 (1998).....	8, 9, 12

FEDERAL CASES

<u>North Carolina v. Alford,</u> 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).....	1
--	---

OTHER AUTHORITIES

RCW 9.94A.753	8
RCW 9.94A.753(3).....	8, 12, 13, 16

A. ASSIGNMENT OF ERROR

The court erred in setting the amount of restitution. CP 396.

Issues Pertaining to Assignment of Error

1. Whether the court erred in setting restitution by failing to subtract the amount of appellant's legitimate trustee compensation from the amount of restitution ordered?

2. Whether the court erred in treating various checks payable to others as instances of theft from the trust subject to restitution rather than instances of legitimate trust expenses?

B. STATEMENT OF THE CASE

1. Plea

Rosemary Kamb entered an Alford¹ plea to one count of first degree theft. CP 370-71, 372-81, 382-83; 1RP² 9-17; 2RP 4-10, 459-60. The charging period covered August 24, 2010 to April 2, 2011. CP 368, 372. As part of the plea, Kamb stipulated to the aggravating circumstance that she used her position of trust, confidence or fiduciary responsibility to facilitate commission of the offense. CP 375.

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

² The verbatim report of proceedings is referenced as follows: 1RP - 6/19/14; 2RP - four consecutively paginated volumes consisting of 1/12/15, 1/14/15, 1/20/15, 1/21/15, 1/29/15.

The factual basis for the plea resided in the police reports and statement of probable cause provided by the prosecutor. CP 380. According to the arrest warrant, Kamb served as trustee of the Paul Keating Trust. CP 362. On August 12, 2010, Mr. Keating died. CP 362. The following beneficiaries of the trust were to receive these amounts: \$50,000 to Margaret Smith; \$50,000 to Priscilla Keating; \$75,000 to Dorothy Knott; and the remainder to Woodland Park Zoo. CP 362.

In May 2011, Dorothy Knott contacted police and alleged Kamb may have taken money from the trust. CP 362. Police discovered a substantial amount of money had been removed from the trust. CP 362-64. Many withdrawals were unexplained or did not appear legitimately connected to trust business. CP 362-64.

2. Restitution and sentencing hearing

A combined restitution and sentencing hearing was held. 2RP 29. Knott testified that she attempted to contact Kamb without success after Keating died. 2RP 315-18. Knott hired a lawyer in an attempt to obtain her \$75,000 share of the trust money. 2RP 326-28. She paid this attorney a \$25,000 contingency fee. 2RP 327, 344-45. Knott ultimately received her \$75,000 bequest through another trustee.³ 2RP 327, 347-48.

³ Margaret Smith also received her bequest through another trustee. Ex. 39.

Julie DeHaan, a certified public accountant experienced in trust work and forensic accounting, testified on the State's behalf. 2RP 48-51. DeHaan performed a forensic examination of records in Kamb's case. 2RP 52. She described her job as to track where the funds were expended, for what purpose, and then "account for them in the end." 2RP 59. DeHaan's methodology was to count withdrawals from the account to Kamb's benefit if she could not conceive of a legitimate reason for the withdrawal related to the trust. 2RP 165, 212, 216-18.

The total value of the Keating estate at the time of his death on August 12, 2010 was approximately \$475,000. 2RP 77-78, 89, 242, 245-46; Ex. 19. Exhibit 19 is the spreadsheet DeHaan produced, covering various accounts. 2RP 52-55. DeHaan determined a total of \$12,398.60 was used for legitimate expenses of the estate. 2RP 60; Ex. 19 at 2. Priscilla Keating was the only beneficiary to receive her trust distribution from Kamb, in the amount of \$50,000. 2RP 60, 201-03; Ex. 19 at 2. DeHaan concluded a total of \$204,909 constituted payments for Kamb's benefit. 2RP 60, 77; Ex. 19 at 2.

DeHaan described the Keating trust as a very simple one to manage, requiring no more than 40 hours of work that could have been completed in four to six months. 2RP 57, 153-54, 238, 241. Kamb's bookkeeping showed she actually acted as a fiduciary to the trust for a

period shortly after Keating's death. 2RP 96, 124-25. Kamb mapped out what needed to be done. Ex. 1 at 74-80. Legitimate expenses associated with the estate were paid. 2RP 96-104, 212, 247.

As successor trustee, Kamb was entitled to reasonable compensation for performing trust services, as per the trust document. 2RP 68-69, 89, 101-02, 224; Ex. 2 at 12, 33.⁴ Hourly rates for trustee work range from \$95 to \$425 in a fiduciary setting. 2RP 228. The fee can be set up other than hourly; it can be a fixed fee plus a percentage of the assets. 2RP 237. The trust document states reasonable compensation "shall be commensurate with comparable charges for similar services made from time to time by corporate Trustees in the geographic area in which the Trust has its principal situs for administration." Ex. 2 at 33.

According to DeHaan, \$204,000 would be excessive compensation for administering the Keating trust. 2RP 90, 229. A recurring figure of \$2,495 showed up in the books as a trustee fee, with no accounting done to justify it. 2RP 67-68. DeHaan questioned the amount and frequency of the fee because it was unclear how the fee was calculated. 2RP 101, 104, 119, 121. The fees were unreasonable and excessive. 2RP 106, 121. There was no basis for a fee six months after Keating's death. 2RP 222.

⁴ The original trust document created in June 1998 named Paul Keating as the trustee; in December 1998 the trust document was amended to name Kamb as successor trustee. Ex. 2 at 33, 40.

Once the decedent's debts were paid, the memorial service was over, and belongings disposed of, there were no more reasonable expenses of the estate. 2RP 118.

Sheila Ridgway, an attorney who does estate, trust and guardianship work, also testified on behalf of the State. 2RP 256-57. She was asked to assess what reasonable compensation for Kamb would be in this case. 2RP 258. Ridgway was familiar with how trustees generally bill and receive compensation. 2RP 262. According to Ridgway, an individual acting as trustee should bill on an hourly basis. 2RP 263. A fixed fee plus a percentage of the assets is inappropriate for individuals acting as trustees; that method of compensation only applies to financial institutions. 2RP 274-75.

Attorneys acting as trustees are generally entitled to a higher rate of compensation than a non-attorney acting as trustee. 2RP 265. Factors taken into account include trustee location, time and labor required, the novelty and difficulty of questions involved, skills needed to properly perform the legal service, the amount involved and the result obtained. 2RP 266-67. Kamb was suspended from the bar at the time she served as trustee of the Keating estate. 2RP 262.

The records reviewed by Ridgway lacked transparency and detail. 2RP 308. Many expenditures were unexplained. 2RP 277-78, 308. The

recurring \$2,495 "trustee fee" was unreasonable. 2RP 267-68. There were 18 such withdrawals totaling \$44,910 from October 29, 2010 to April 27, 2011. 2RP 269-70. This was a simple trust that should have taken two to four months to administer. 2RP 270, 291-92, 305-06.

Kamb had experience doing trust and estate work. 2RP 281. Ridgway agreed with DeHaan that the administration and closing out of the trust would take no more than 40 hours and an appropriate fee for an attorney in Skagit County would be \$250-\$275 an hour. 2RP 281-82. An appropriate fee for a non-attorney trustee ranged from \$50 to \$150 an hour depending on the individual's skills. 2RP 282. Ridgway did not calculate with specificity what an appropriate fee for Kamb would be, saying, "I don't know what Ms. Kamb actually did." 2RP 290. She thought an appropriate fee in this case would be \$7,500 to \$12,000. 2RP 291.

Kamb stipulated to \$48,000 in restitution and disputed the rest. 2RP 653; CP 375. Various witnesses testified that Kamb suffered from mental problems for a number of years, resulting in disordered thinking and deterioration of her mental functioning up through the charging period. 2RP 355, 359-60, 363-64, 378-82, 395-99, 404, 408-13, 420, 496, 527-29, 544-45, 549-52, 560-62, 572-77, 622-24. For example, in January 2011 Kamb had cashier's checks written out to her dentist (Dr. Otterhalt) and doctor (Dr. Wade) when she did not actually owe them anything, and

neither the dentist nor the doctor received the check. 2RP 79-80, 372-75, 601-02; Ex. 6 at 16; Ex. 43, Ex. 57. In connection with disciplinary proceedings, a Washington State Bar Association evaluator diagnosed Kamb with several mental conditions and opined her mental impairment prevented her from practicing law. 2RP 423-24, 433, 445-46; Ex. 46.

The trial court did not find Kamb's criminal conduct was the result of confusion. 2RP 730-31. It awarded a total of \$229,909.25 in restitution. CP 396. Of that total, \$25,000 went to Dorothy Knott for her attorney fees and the rest (\$204,909.25) went to Woodland Park Zoo. CP 396. The court imposed an exceptional sentence upward of 30 months confinement. CP 384-85, 389. Kamb appeals. CP 399-412.

C. **ARGUMENT**

1. THE RESTITUTION ORDER SHOULD BE REVERSED BECAUSE IT DISREGARDS KAMB'S LEGITIMATE COMPENSATION AS TRUSTEE.

Kamb pled guilty to theft from the trust over a period of time. But she performed some legitimate trust activities during that period. Kamb was entitled to reasonable compensation for services performed on behalf of the trust. The court erred in failing to subtract the amount of reasonable compensation from the restitution amount because compensation for legitimate services rendered does not constitute loss of property as a result

of the crime. For this reason, the restitution order should be reversed and the case remanded.

a. Summary of restitution law.

A court may impose only a sentence that is authorized by statute. State v. Woods, 90 Wn. App. 904, 907, 953 P.2d 834 (1998). The court's authority to impose restitution is statutory and so the court cannot exceed the authority granted under the controlling statute. State v. Johnson, 96 Wn. App. 813, 815, 981 P.2d 25 (1999). RCW 9.94A.753 authorizes the court to impose restitution against a criminal defendant. RCW 9.94A.753(3) places limits on this authority, stating in relevant part: "restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury."

Restitution may be ordered only for losses incurred as a result of the precise offense charged. State v. Miszak, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993). That is, a restitution award must be based on a causal relationship between the offense charged and proved and the victim's losses or damages. State v. Johnson, 69 Wn. App. 189, 191, 847 P.2d 960 (1993). The State must prove by a preponderance of the evidence that, but for the criminal act, the victim would not have suffered the loss. State v.

Thomas, 138 Wn. App. 78, 82, 155 P.3d 998 (2007). The court, however, cannot impose restitution based on a defendant's "general scheme" or acts "connected with" the crime charged, when those acts are not part of the charge. Woods, 90 Wn. App. at 907-08 (quoting Miszak, 69 Wn. App. at 428). Whether a loss is causally connected to the crime for which the defendant was convicted is a question of law reviewed de novo. State v. Acevedo, 159 Wn. App. 221, 229-30, 248 P.3d 526 (2010).

b. The amount of reasonable compensation for Kamb's legitimate work as trustee cannot be included in the restitution amount.

DeHaan, the State's forensic accountant, testified Kamb's bookkeeping showed she acted as a fiduciary to the trust shortly after Keating's death. 2RP 96, 124-25. Kamb paid out \$12,398.60 in legitimate expenses associated with the trust. 2RP 60, 96-104, 212, 247; Ex. 19 at 2. As trustee, Kamb was entitled to reasonable compensation for performing trust services. 2RP 68-69, 89, 101-02, 224; Ex. 2 at 12, 33.

The State also called Ridgway as an expert witness to testify about what reasonable compensation for Kamb would be in this case. 2RP 258. When defense counsel objected that the issue of the reasonableness of the fee was not a proper subject of litigation, the prosecutor responded "In order to determine what restitution is due to the victims in this case, we

need to determine what, if any, of that amount is an appropriate trustee fee that obviously should not be part of the restitution." 2RP 262-63.⁵

Ridgway agreed with DeHaan that the administration and closing out of the trust would take no more than 40 hours. RP 281. An appropriate fee for a non-attorney trustee working in Skagit County ranged from \$50 to \$150 an hour depending on the individual's skills. 2RP 282. Ridgway did not calculate with specificity what an appropriate fee for Kamb would be, but opined an appropriate fee in this case would be \$7,500 to \$12,000. 2RP 290-91.

The court, however, refused to subtract the amount of Kamb's reasonable compensation from the restitution amount: "I don't believe that Ms. Kamb has made any showing that she was entitled to any payment, whatsoever, for her services in managing this trust because it was clear mismanagement and misdirection of funds. If she believes that she is entitled to any reimbursement for her services, then she can maintain an

⁵ The court overruled the defense objection. 2RP 263. In closing argument, the State took the position that Kamb was not entitled to any trustee fees because she looted the account. 2RP 637-38. In response to the defense argument that fee reasonableness was a civil rather than a criminal matter and that the State had failed to meet its burden of proof, the State contended "[t]he problem is in order to determine what the appropriate amount of restitution is, you have to determine whether or not there are trustee fees that are reasonable and that, obviously, would come out of the restitution pot. So that is a figure that the court, I believe, needs to come up with and it's entirely appropriate to do so." 2RP 689.

action against the trust. But I don't believe she has showed any demonstration that she is entitled to anything." 2RP 731-32.

The court was wrong. Kamb did not need to show anything. She did not have the burden of proof. The State bore the burden of establishing the amount of restitution owed. And the State's own witnesses established Kamb was entitled to reasonable compensation. DeHaan testified Kamb did legitimate work on behalf of the trust. Ridgway estimated the reasonable fee amount in this case would be \$7,500 to \$12,000.

Not all of the \$2,495 "service" fees are legitimate. But some portion of the total is based on Kamb's legitimate trustee work. A fee for the legitimate work accomplished by Kamb as trustee of the Keating estate cannot be deemed a loss to the trust (and by extension, to the trust's beneficiaries) under the restitution statute. There is no causal connection between Kamb's legitimate trustee services and the losses suffered. The State must prove that, but for the criminal act, the victim would not have suffered the loss. Thomas, 138 Wn. App. at 82. Kamb's legitimate trustee work was not a criminal act. Her legitimate trustee services did not cause the trust to lose money as a result of criminal act. But for the criminal acts that did occur (the theft), the trust still owed reasonable compensation to the trustee for legitimate services rendered. The amount of compensation

for legitimate services accomplished on behalf of the trust does not constitute loss of property as a result of the crime under RCW 9.94A.753(3).

The court painted with too wide a brush in refusing to distinguish between Kamb's criminal acts perpetrated under the guise of being a trustee and the legitimate, non-criminal fiduciary work she accomplished as trustee. The two kinds of conduct may be associated, but the court cannot impose restitution based on a defendant's "general scheme" or acts "connected with" the crime charged, when those acts are not part of the charge. Woods, 90 Wn. App. at 907-08 (quoting Miszak, 69 Wn. App. at 428). The total restitution amount should be reduced by the amount of reasonable compensation owed to Kamb as trustee of the estate.

The restitution order should therefore be reversed. As the trial court never ascertained the appropriate amount of reasonable compensation, remand for additional fact-finding is necessary.

2. VARIOUS CHECKS MADE PAYABLE TO OTHERS SHOULD NOT HAVE BEEN INCLUDED AS RESTITUTION BECAUSE THE STATE FAILED TO PROVE THE PAYMENTS WERE ILLEGITIMATE.

In ordering restitution, the trial court used the total amount of funds going to Kamb's benefit as calculated by DeHaan, the State's forensic accountant. CP 396; Ex. 19 at 2. In calculating the amount of

loss to the trust, DeHaan treated several checks payable to others as going to the benefit of Kamb: a \$38.10 check payable to Skagit Valley Medical Center, a \$93.57 check payable to Skagit Valley Hospital, a \$166.50 check to Health Care, and a \$3,970 check payable to Josephine White. These amounts should have been omitted from restitution. The State failed to prove they were not legitimate trust expenses. The State must prove easily ascertainable damages by a preponderance of the evidence. Thomas, 138 Wn. App. at 82; RCW 9.94A.753(3). As set forth below, the State did not meet its burden.

a. Checks to Skagit Valley Medical Center and Skagit Valley Hospital

In calculating the amount of restitution owed on the spreadsheet, DeHaan treated the following as going to the benefit of Kamb: a \$38.10 check payable to Skagit Valley Medical Center and a \$93.57 check payable to Skagit Valley Hospital. 2RP 209-10; Ex. 1 at 111-114; Ex. 19 at 9. DeHaan believed these bills were covered by Medicare or supplemental insurance and maintained there was no hospital billing invoice in the accounting records. 2RP 210-11.

A letter from Skagit Valley Hospital states that Medicare may not cover all costs. Ex. 21 at 38. Both of these checks were endorsed and

cashied by the payee, presumably because the amounts were actually owed.
Ex. 7 at 4, 13.

Contrary to DeHaan's belief, there is a Skagit Valley Hospital bill dated October 19, 2010 showing \$93.57 was due after Medicare and AARP Health Care paid the bulk of expenses. Ex. 1 at 34-35; Ex. 21 at 54-55. There is also a Skagit Valley Medical Center bill dated September 30, 2010, showing \$38.10 was due following the insurance adjustment. Ex. 1 at 48-49. Both were legitimate trust expenses that should not have counted toward restitution.

A police report submitted into evidence contains the hearsay statement of someone from Skagit Valley Hospital that Medicare Insurance and supplemental insurance paid the account and so no patient balance was due. Ex. 18; 2RP 34-35. That hearsay statement cannot overcome the Skagit Valley Hospital billing statement showing a \$93.57 balance was due after Keating's death. Ex. 1 at 34-35; Ex. 21 at 54-55.

b. Check to Health Care

In her spreadsheet, DeHaan treated a \$166.50 check payable to cash but noted for "Health Care Options" as going to the benefit of Kamb. Ex. 19 at 4. There is a notation that the expense was presumed legitimate. Ex. 19 at 4. The check was endorsed by Kamb. 2RP 247; Ex. 14 at 17. But on cross-examination, DeHaan agreed this expense was legitimate and

should not be counted as going to Kamb's benefit. 2RP 110-11. So it should not have counted toward restitution.

c. Check to Josephine White

DeHaan treated a check payable to Josephine White for \$3,970 as going to the benefit of Kamb. Ex. 19 at 10. The check, dated March 17, 2011, is noted for "caregiving" and endorsed by White. Ex. 7 at 27. DeHaan did not know who White was. 2RP 239-40. There is no evidence she tried to find out.

DeHaan, did however, treat another check for "health care services" as a legitimate expense. Ex. 19 at 4. This check, posted on September 15, 2010, is payable to Marisela Tellez for \$75. Ex. 14 at 15-16. DeHaan did not testify she knew who Tellez was either, but she considered this caregiver payment as appropriate.

DeHaan did not explain why she treated the two checks differently. The State has the burden of proving by a preponderance of the evidence that the check payable to White was illegitimate. The State failed to sustain its burden. The check was noted for "caregiving." Nothing in the record shows White did not prove care services to Keating. The \$3,970 should therefore not be included as restitution.

d. The court abused its discretion in awarding restitution for the check amounts.

When restitution is authorized by statute, imposition of restitution is generally reviewed for abuse of discretion. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). A court's decision is based on untenable reasons if the facts do not meet the requirements of the correct standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The court abused its discretion in including the challenged amounts as restitution. As argued, the facts in the record do not meet the requirements of the standard for awarding restitution. Because the State did not prove these amounts went to the benefit of Kamb as opposed to the trust, they cannot be considered an illegitimate loss to the trust. Restitution must be based on easily ascertainable damages for property lost as a result of the crime. RCW 9.94A.753(3). The monies designated in those checks were legitimate payments to trust creditors. The State did not prove otherwise. The total amount of these checks — \$4,268.17 — cannot be lawfully included in the restitution amount.

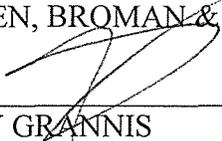
D. CONCLUSION

For the reasons set forth, Kamb requests reversal of restitution order and remand to determine the lawful amount of restitution.

DATED this 5th day of January 2016

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 72406-1-1
)	
ROSEMARY KAMB,)	
)	
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 5TH DAY OF JANUARY, 2015, 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 BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROSEMARY KAMB
DOC NO. 381951
WASHINGTON CORRECTIONS CENTER FOR WOMEN
9601 BUJACICH ROAD NW
GIG HARBOR, WA 98332

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF JANUARY, 2015.

X *Patrick Mayovsky*