

73500-4

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October 9, 2015  
Court of Appeals  
Division I  
State of Washington

73500-4

NO. 73500-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

TANIS COLEMAN,

Appellant.

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

The Honorable Julie Spector, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in entering a restitution order more than 180 days after sentencing.

2. The court erred in finding good cause for delayed entry of the restitution order.

Issue Pertaining to Assignments of Error

Restitution must be determined within 180 days of sentencing unless good cause is shown. Here the restitution hearing began after 168 days. The court believed that sufficed to meet the timeliness requirement and believed there was good cause to extend the deadline, if necessary, because no briefs had yet been filed. The hearing continued on the 175<sup>th</sup> day, and the court heard all evidence and argument on that day. Without any further finding of good cause for delay, the court entered the restitution order on the 188<sup>th</sup> day. Must the restitution order be vacated as unauthorized by statute?

B. STATEMENT OF THE CASE

The King County prosecutor charged appellant Tanis Coleman with one count of first-degree theft and one count of first-degree identity theft. CP 9-10. The first-degree theft charge was alleged to have occurred between September 3, 2013 and March 24, 2014. CP 9. The identity theft was alleged to have occurred between January 21, 2014 and March 24, 2014.

CP 10. Regarding the second count, identity theft, the State also alleged the aggravating factor that the victim was particularly vulnerable. CP 10.

According to the certification for probable cause, Coleman's father Edward told police "his son Tanis Coleman took all the money from his accounts at Wells Fargo and Washington Federal Bank." CP 6. Edward told police he did not withdraw any of the money himself and was quite shocked to learn it was gone. CP 6. According to police, Edward also said Coleman "told him he withdrew the money to go drinking and gambling." CP 6.

The money was taken from the Wells Fargo account via a debit card that Edward did not know about or authorize. CP 5-6. But the money in the Washington Federal account was simply withdrawn because the account was a joint account with right of survivorship, with both Edward and Tanis Coleman as account signers. CP 30, 94.

Coleman pled guilty as charged and agreed to pay restitution for the amounts taken via debit card from the Wells Fargo account. CP 22, 30. However, he reserved the right to contest restitution as to the Washington Federal account on the grounds that, because it was a joint account, he was entitled to the funds therein. CP 30. He stipulated to the facts contained in the probable cause certification for purposes of sentencing. CP 30.

At sentencing, the court denied Coleman's request for a DOSA and imposed an exceptional sentence based on the aggravating factor. 1RP 13; CP 37-39. Edward told the court his son took every nickel he had, but did not discuss specific banks or accounts. 1RP<sup>1</sup> 4-6. Edward signed a Victim Loss Statement claiming \$71,000 in losses from his savings accounts. CP 93.

In between the sentencing in October and the restitution hearing the following April, Edward Coleman passed away. 2RP 8-9.

The restitution hearing began April 10, 2015. 2RP 1. The State's witness, Coleman's daughter and administrator of her grandfather's estate, was not available until the following week. 2RP 2. The court declared that beginning the restitution hearing that day automatically tolled the 180-day statute and, even if it did not, there was good cause to continue the hearing beyond 180 days because no briefing had yet been filed on the issues before the court. 2RP 11. The court entered a restitution order awarding the agreed restitution on the Wells Fargo account and reserving restitution on the Washington Federal account until testimony could be taken on April 17. CP 46. The court informed the parties that they may, but need not, present written briefing on the issue of whether Coleman was authorized to take the money in the joint account. 2RP 16-17.

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<sup>1</sup> There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Oct. 24, 2014; 2RP – Apr. 10, 2015; 3RP – Apr. 17, 2015.

On April 14, 2015, the State filed a Memorandum in support of its restitution request. Supp CP<sup>2</sup> \_\_\_\_ (sub no. 43, Memorandum in Support of State's Request for Restitution filed Apr. 14, 2015). The State attached a copy of Edward Coleman's will, in which he disinherited his son. Id.

On April 17, the court heard testimony from Tanisha Bailey, Coleman's daughter and administrator of her grandfather's estate. She testified she did not know when the Washington Federal account was created; it was an older account that had belonged to both her grandparents before her grandmother died. 3RP 10. She had no personal knowledge of any deposits made to that account. 3RP 11. She testified her grandfather never intended Coleman to take any of the money in that account. 3RP 7-8. She was not aware of Coleman having any income or any job. 3RP 8, 17. Coleman argued there was no evidence who deposited the money into the Washington Federal Account, and, therefore, the State had failed to prove that he was not entitled to the money. 3RP 19.

At the end of the hearing, Coleman's attorney expressed concern that the 180-day deadline would expire on the 22<sup>nd</sup>. 3RP 18. The court declared that it was tolled because the hearing was started, but Coleman reiterated his objection if the hearing was to be set over. 3RP 18. After considering upcoming dates, the court asked the parties to simply make their arguments

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<sup>2</sup> A Supplemental Designation of Clerk's Papers was filed on October 8, 2015.

that day. 3RP 19. After both parties made their oral arguments, the court declared, “I am going to issue a written ruling. I will have both sides submit bindings. [sic] You can do it when you get back. That will conclude this hearing.” 3RP 25.

On May 1, 2015, the court entered findings of fact, conclusions of law, and a restitution order awarding the full amount from the Washington Federal account. CP 48-52. The court found there was no evidence anyone but Edward made any deposits into the Washington Mutual<sup>3</sup> account. CP 51. The court found the funds belonged to Edward and were taken from him while he was alive. CP 52. Because Coleman was disinherited, the court found he was not entitled to any of the funds after Edward’s death. CP 52.

Coleman timely filed notice of appeal from the May 1, 2015 restitution order. CP 53-54, 96-98.

C. ARGUMENT

THE COURT EXCEEDED ITS AUTHORITY IN ORDERING RESTITUTION MORE THAN 180 DAYS AFTER SENTENCING.

The restitution order must be vacated because it was entered 188 days after the sentencing hearing. “Under RCW 9.94A.753(1), a court ordering restitution must issue its order within 180 days of sentencing.” State v. Gray, 174 Wn.2d 920, 925, 280 P.3d 1110 (2012). The court’s

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<sup>3</sup> The documentation and testimony refers to the bank as “Washington Federal.” It is unclear why the findings of fact refer to it as “Washington Mutual.”

authority to order restitution derives entirely from statute. Id. at 924 (citing State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010)). The 180-day time limit is akin to a statute of limitations, and is mandatory. State v. Grantham, 174 Wn. App. 399, 404, 299 P.3d 21 (2013). “Use of the word ‘shall’ creates a mandatory time limit, and a trial court may not enter an order determining restitution after the statutory period has expired.” State v. Chipman, 176 Wn. App. 615, 619, 309 P.3d 669 (2013) (citing State v. Krall, 125 Wn.2d 146, 147-49, 881 P.2d 1040 (1994)).

The statute provides for only two exceptions to the 180-day deadline. Chipman, 176 Wn. App. at 619 (discussing RCW 9.94A.753 and Gray, 174 Wn.2d at 926-28). First, the court may continue the restitution hearing for good cause shown. Gray, 174 Wn.2d at 925. Second, the court may modify an existing restitution order so long as the offender remains under the court’s jurisdiction. Id. In this case, neither exception applies, and the restitution order is void. See State v. Duback, 77 Wn. App. 330, 332, 891 P.2d 40(1995) (“The order imposing restitution is void if statutory provisions are not followed.”).

a. Delayed Entry of the Restitution Order Was Not Justified by Good Cause.

First, the record does not show good cause for extending the deadline for determining restitution. The restitution hearing in this case

began on April 10, 2015, well before the 180-day deadline. The court appears to have assumed that merely starting the hearing was sufficient to toll the deadline indefinitely. That is incorrect. The law provides that the court “shall determine” restitution within the 180 day window. RCW 9.94A.753. It does not require merely that the hearing begin. Restitution must actually be determined within that time period unless there is good cause. This mistake as to whether the deadline had been tolled is not good cause. See, e.g., State v. Reed, 103 Wn. App. 261, 265 n. 4, 12 P.3d 151, 152 (2000) (“Inadvertence or attorney oversight is not good cause.”) (citing State v. Tomal, 133 Wn.2d 985, 989, 948 P.2d 833 (1997)); State v. Johnson, 96 Wn. App. 813, 814, 981 P.2d 25, 25 (1999) (“[I]nadvertence or attorney oversight does not establish good cause”).

On April 10, the court declared there was good cause because the parties had not submitted any briefing. 2RP 11. However, later that same day, the court declared that briefing would be appreciated but was not necessary. 2RP 16. The state submitted a memorandum on April 14. Supp CP \_\_\_\_ (sub no. 43, Memorandum in Support of State’s Request for Restitution filed Apr. 14, 2015). It appears Coleman did not submit any written briefing. The court appeared, on April 10, to fault Coleman for not making clear the nature of his dispute about the restitution. 2RP 11. But the plea agreement makes clear that Coleman was disputing ownership of

the funds in the jointly held account. CP 30. The State was not at any disadvantage; it was well-aware of the nature of Coleman's challenge. Moreover, any confusion the court may have been laboring under was eliminated at the latest on April 10. The need for briefing was not good cause because the court declared the briefing to be optional. 2RP 16.

The hearing continued on April 17, which was still within 180 days of the October 24 sentencing. The court received all the evidence and heard argument from both parties. But it did not make a determination of restitution. 3RP 25. The court asked the parties to submit findings "when you get back," apparently referring to an omnibus hearing the attorneys needed to attend. The court had already instructed them to "go do your omnibus and come back" "when you are done with your omnibus." 3RP 17. Thus, the record shows the plan was for findings to be submitted that same day. Five days remained on the 180-day deadline.

But the restitution order was not entered within that five-day period. Instead, nothing happened on the record for nearly two weeks. Without any showing or finding of good cause for additional delay, the restitution order and findings of fact were entered on May 1, 2015, 188 days after sentencing. CP 48.

The court's finding of good cause entered on April 10 does not apply to the additional delay after the second hearing on April 17. If it is

construed as applying to the additional delay, it is an abuse of discretion because it is manifestly unreasonable and untenable in light of the facts on the record. The record shows no reason for delaying entry of the restitution order for a full week after the deadline and nearly two weeks after the hearing. Moreover, the court gave no sign of considering the factors that go into good cause, 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.” State v. Tetreault, 99 Wn. App. 435, 438, 998 P.2d 330, 332 (2000). The Court did not consider the length of delay by setting a new deadline. Nor did the court mention any reason for additional delay. The record is silent as to any consideration of Coleman’s rights to speedy sentencing or ways he might be prejudiced by additional delay. The delay was not justified by good cause.

b. The New Restitution Order Was a Separate Restitution Order That Did Not Modify the Earlier Order.

Because the court delayed entry of the restitution order beyond 180 days after sentencing, in violation of the statute, the restitution order is void unless it is merely a modification of an earlier order. But the addition of nearly \$70,000 in restitution for the Washington Federal account is not a

mere modification of the earlier restitution award. See Chipman, 176 Wn. App. at 622.

In Chipman, the court awarded restitution before the deadline to one of the victims in the case, and then, after the 180-day deadline had expired, awarded additional restitution to a different victim. Id. at 617-18. The State argued the second restitution amount was authorized by statute because it was merely a modification of the earlier restitution order. Id. at 619-21. This Court rejected that argument, holding, “the restitution ordered at the second hearing for Cooper, the victim of count I, was not merely a modification of the restitution amount that the trial court previously had ordered for Kitchings, the victim of count II.” Id. at 622.

As in Chipman, the two restitution orders in this case involve two different victims – Wells Fargo Bank for the earlier order and the estate of Edward Coleman for the order appealed from here. CP 46-48. The Chipman court also reasoned that the new order was the result of an entirely separate hearing, as was also the case here, where the first order was agreed and required no hearing at all. Chipman, 176 Wn. App. at 622; CP 30. The Chipman court declared:

We hold that (1) a trial court must comply with the 180-day time limit in RCW 9.94A.753(1) for each victim’s restitution, regardless of whether the court previously has ordered restitution to one of the victims within the required period and (2) the trial court here lacked authority to enter

the restitution order for Cooper after the 180-day period had expired.

Chipman, 176 Wn. App. at 622. Under Chipman, the entry of a new restitution order for the estate of Edward Coleman was a separate restitution order for a separate victim after a separate hearing. It was not a modification of the earlier order, which remains unchanged.

The restitution order was not entered within 180 days of sentencing, and the record does not show good cause for extending the deadline. Therefore, the restitution order is in excess of statutory authority and should be vacated as void. Id.; Duback, 77 Wn. App. at 332.

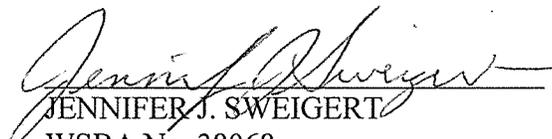
D. CONCLUSION

For the foregoing reasons, Coleman requests this Court vacate the restitution order.

DATED this 9<sup>th</sup> day of October, 2015.

Respectfully submitted,

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73500-4-1
	)	
TANIS COLEMAN,	)	
	)	
Appellant.	)	

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**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 9<sup>TH</sup> DAY OF OCTOBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TANIS COLEMAN  
1110 18<sup>TH</sup> AVENUE EAST  
APARTMENT 3  
SEATTLE, WA 98112

**SIGNED** IN SEATTLE WASHINGTON, THIS 9<sup>TH</sup> DAY OF OCTOBER 2015.

X *Patrick Mayovsky*