73500-4

NO. 73500-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TANIS COLEMAN ,

Appellant.

FILED
Dec 28, 2015
Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIE SPECTOR

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

PHILIP SANCHEZ
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. ISSUES PRESENTED

1. Coleman stole $106,605 from his 95 year-old father's bank accounts. By expiration of the statutory time limit to determine restitution, the trial court had ordered part of the restitution requested and found good cause to continue the hearing to determine the remainder of the amount requested. Was the final order, entered 188 days after sentencing, statutorily authorized?

B. STATEMENT OF THE CASE

Tanis Coleman was charged with theft in the first degree and identity theft in the first degree, domestic violence, with aggravating factors.[1] Coleman and his wife lived with Coleman's 95 year-old father, Edward, to provide Edward Coleman in-home care and assistance. CP 1-2, 4.

Edward Coleman[2] had two bank accounts, one at Wells Fargo and the other at Washington Federal. Id. Between January 21 and March 24, 2014, without Edward's knowledge or permission, defendant Coleman made 48 ATM withdrawals totaling $31,825.50 from Edward's Wells Fargo account. CP 5. During the

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[1] RCW 9.94A.535(3)(b) (victim vulnerability), RCW 9.94A.535(3)(n) (position of trust), alleged on both counts.

[2] Because the victim and the defendant share the same last name, the victim will be referred to in the remainder of this brief by his first name only. No disrespect is intended.

investigation, Edward denied recognizing Tanis Coleman in the Wells Fargo ATM security photos and did not wish to prosecute or pursue the matter further. Id.

A month later, Edward discovered that his Washington Federal account, which once held $69,291.79, had been depleted to $29.97. CP 6. Investigators met with Edward again, and Edward reported that his son had admitted to taking Edward's money to use for drinking and gambling. Id. Edward then identified Tanis Coleman in the Wells Fargo ATM security photos. Id.

Coleman pled guilty to the amended charges of theft in the first degree and identity theft in the first degree, domestic violence, with aggravating factors.[3] CP 9-10. On October 24, 2014, Coleman was given a 20-month sentence and ordered to pay restitution. CP 36-42.

On April 10, 2015, 168 days after sentencing, the trial court held its first restitution hearing. 2RP 2-21. Because Wells Fargo had reimbursed Edward the money taken from his account, it sought restitution directly from Coleman; Washington Federal, however, had not reimbursed Edward for the money taken from that

[3] The amended information only alleged aggravating factors for count 2, identity theft in the first degree.

account, so his estate requested that portion of the restitution. 2RP 2-3. Coleman agreed to pay restitution to Wells Fargo in the amount of $37,342.48 for his withdrawals from that account. 2RP 3; CP 46. He contested restitution requested by Edward's estate for withdrawals from the Washington Federal account, in the amount of $69,262.52. 3RP 3-9. Coleman argued that because he had been a "named account holder," he was entitled to use the funds in the account. 3RP 5.

The State contended that Coleman's misappropriation of the Washington Federal account funds was within the charging period and included in the crimes to which Coleman pled. It also argued that pursuant to RCW 30.22.090, only the depositor of the account, Edward, was entitled to the account holdings. 3RP 6-7. The State then offered to present testimony of Tanisha Bailey, Edward's granddaughter and the executor of his estate, to show that Edward was the only depositor. Id.

After argument from both counsel, the trial court made a finding of good cause to toll the 180-day restitution requirement.

> Ms. Ulrey: Your Honor, we are on a fairly short timeline because of the – I don't know if the statute is considered tolled once we have begun the restitution hearing, but I know our deadline –

The Court: It is tolled and I can also extend it for good cause because this is a late argument, essentially. There has been no briefings submitted, nothing, other than the fact that he is on the account so therefore he can't be held liable for reimbursement by, now, the decedent – or the decedent's estate, I should say. So I wouldn't worry about the statute of limitations for two reasons. One is, we began the restitution hearing well within the statute of 180 days. Second, the Court can, and has discretion to extend it for good cause and I can make that finding here today.

2RP 11. Before concluding the hearing, the trial court also requested the parties to submit briefing if they chose.

The Court: Don't worry about it. If you want to brief, it's great. If you don't want to brief it, that's fine too. I mean, in any event, for any appeal, the Court of Appeals is going to look very closely at what the Court considered, and whether or not there is a question if some of the monies were used appropriately, since he had, I assume, some leverage or authority to spend on behalf of the decedent. And to that extent, I don't know. So that's the other issue. So that's the only sticky wicket that I can see, legally, that may – there might be a partial offset if some of the money is used, say, that Mr. Tanis Coleman used to pay his utility bills, mortgage, groceries, gas – anything like that. That's the only – that was the argument I was expecting –

Ms. Ulrey: Yeah.

The Court: Was – because that's usually what I hear in these theft cases where somebody has – not necessarily a vulnerable person, but somebody misappropriated funds and embezzlement. So when I get these big, big embezzlement cases,

> they come in and they say well – and then usually it is negotiated off the record, and saying, you know what, we'll take, you know 75 cents on the dollar because some of the monies were used appropriately and the rest were not. And that's where I thought we were going with this –
>
> Ms. Ulrey: Instead of just an outright denial that the 69,000 – he was entitled to all of it merely because his name existed on the account as a signatory. You know, I don't think that's a persuasive argument. That is not the current state of law in the case, and that applies here.

2RP 17-18. The State submitted additional briefing for the trial court's consideration. CP 99-114.

A week later, on April 17, 2015, the State presented testimony from Tanisha Bailey regarding the Washington Federal account. 3RP 3-17. Following testimony, due to a time conflict, the trial court contemplated another continuance for oral argument. 3RP 17-18. Then, after further discussion of counsel's unavailability and recognizing that the time limit for ordering restitution had been tolled because the hearing was in progress, the court instructed counsel to present argument immediately. Id.

After hearing from counsel, the trial court indicated it would issue a written ruling and requested the parties to submit findings

"when you get back."[4] 3RP 25. On May 1, 2015, the trial court entered written findings and an order that Coleman must pay $69,262.52 to Edward's estate for his withdrawals from the Washington Federal account. CP 48-52.

C. ARGUMENT

1. THE TRIAL COURT ACTED WITHIN ITS STATUTORY AUTHORITY IN ORDERING RESTITUTION TO EDWARD COLEMAN'S ESTATE.

Coleman contends the trial court's order for restitution was improper. He argues that the trial court (1) erroneously determined that the statutory time limit for imposing restitution had been tolled for "good cause" and (2) did not enter its order until after the time limit had expired.[5] Both claims should fail. Where Coleman's restitution hearing was held *and* a finding of "good cause" was made within the statutory time limit, the trial court's order for restitution was within its statutory authority.

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[4] Ms. Ulrey was out of town beginning Saturday, April 18, 2015 through April 23, 2015. Ms. Sirkin was unavailable April 24, 2015 through April 27, 2015. The trial court was in judicial conferences the week of April 27. 3RP 17-18.

[5] RCW 9.94A.753(1) states: "When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause. The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have."

A trial court's restitution order is reviewed for abuse of discretion. State v. Johnson, 96 Wn. App. 813, 817, 981 P.2d 25 (1999). A sentencing court's authority to order restitution is statutory. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). The State is obligated to establish the amount of restitution by a preponderance of the evidence. State v. Dennis, 101 Wn. App. 223, 226, 6 P.3d 1173 (2000).

The statutory time limit to determine restitution is 180 days and that limit is mandatory, but a trial court may continue the restitution hearing beyond the time limit for "good cause." State v. Grantham, 174 Wn. App. 399, 403, 299 P.3d 21 (2013). "Good cause" requires a showing of some external impediment that did not result from self-created hardship that would prevent a party from complying with statutory requirements. State v. Johnson, 96 Wn. App. 813, 817, 981 P.2d 25 (1999). Attorney oversight or inadvertence is not "good cause." Id.

At the first restitution hearing, the trial court in the case at bar found "good cause" to toll the statutory time limit for determination of restitution, where it was necessary for witness testimony and briefing. 2RP 11. Further, at Coleman's subsequent restitution hearing, still within the statutory time limit, the court again

explicitly stated his restitution period was tolled. 3RP 18. After completing his hearing, only the trial court's determination of restitution remained:

> The Court: All right. I am going to issue a written ruling. I will have both sides submit [f]indings. You can do it when you get back. That will conclude this hearing.[6]
> Ms. Ulrey: Thank you very much, your Honor.
> The Court: Thank you, Counsel.

3RP 25.

Thus, the trial court found "good cause" to toll the statutory time limit in order to determine whether Coleman was entitled to the funds in Edward's Washington Federal account. That restitution was requested at the time the hearing began, and when the court entered its original order awarding restitution to Wells Fargo, it delayed ruling as to the remainder requested. There was no prejudice to Coleman as a result of the trial court's brief delay in entering its order as to the remainder of the request. The *amount* of restitution requested was not in dispute, and any delay of his hearing or determination was not a result of attorney oversight or inadvertence.

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[6] Coleman asserts the trial court's request that the parties submit findings "when you get back" was in reference to their Omnibus hearing. 3RP 17. That Omnibus reference, made earlier in the proceedings, was with regard to availability for oral argument the day of the second hearing. 3RP 17-18.

Coleman relies on Johnson, supra, State v. Reed, 103 Wn. App. 261, 12 P.3d 151 (2000), and State v. Tetreault, 99 Wn. App. 435, 438, 998 P.2d 330 (2000), in arguing the trial court lacked "good cause" to toll the statutory time limit. His reliance is misplaced. In Reed, the issue before the court was not whether "good cause" existed, but whether the Department of Labor and Industries under an exception could seek reimbursement for the crime victim's compensation fund after 180 days.[7] Id. at 266. In Johnson, the appellate court held that the trial court lacked statutory authority where it retroactively found "good cause" for its prior continuances and ordered restitution 235 days after sentencing.[8] Id. at 815. In Tetreault, the State struck a hearing set within the 180-day period and did not request an extension of time until after the statutory time limit for determining restitution had expired. Coleman's circumstances are distinguishable as the trial court found "good cause" within the statutory limit.

Coleman also argues the trial court's order cannot be construed as a "modification" of a previous restitution order

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[7] RCW 9.94A.142(4).

[8] "Good cause" was based on a finding that it was beyond the prosecutor's control to obtain the defendant, who was in custody under the Department of Corrections, at an earlier date. Id. at 815.

pursuant to State v. Chipman, 176 Wn. App. 615, 309 P.3d 669 (2013). Here, the trial court entered a timely order as to part of the amount requested as restitution and reserved ruling on the remainder until testimony and further briefing could occur. The findings entered on May 1 were a modification of the earlier order as they were the result of the same proceeding. State v. Gray, 174 Wn.2d 920, 280 P.3d 1110 (2012). Unlike Chipman, where there were two separate victims under two separate counts and separate hearings held for each victim, Edward was the victim as to both charges to which Coleman pled and the restitution order was the result of a single proceeding that occurred on multiple days.[9] CP 9-10. The payees differed only because Wells Fargo already had reimbursed Edward for the theft of funds from that account.

The purpose of the restitution statute is not finality but rehabilitation. State v. Barr, 99 Wn.2d 75, 79, 658 P.2d 1247 (1983). When interpreting the State's restitution statutes, the Supreme Court has recognized that they there were intended to require the defendant to face the consequences of his or her criminal conduct. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). Statutes authorizing restitution should not be given

[9] In Chipman, the State requested tolling of the 180-day time limit after it had already expired.

"an overly technical construction which would permit the defendant to escape from just punishment." Id. Because Coleman cannot show the trial court erred in finding good cause to toll the statutory time limit to determine restitution, and because the order for restitution to the estate was a modification of the original order for restitution to Wells Fargo, the trial court was within its statutory authority when it ordered Coleman to pay the restitution to Edward's estate.

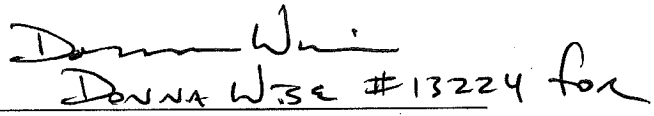
D. CONCLUSION

For the reasons cited above, this Court should affirm the trial court's May 1, 2014, order for restitution to Edward Coleman's estate.

DATED this 28TH day of December, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: DONNA WISE #13224 for
PHILIP SANCHEZ, WSBA #41242
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Sweigert, the attorney for the appellant, at Sweigertj@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Tanis Anthony Coleman, Cause No. 73500-4, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 28th day of December, 2015.

Name:
Done in Seattle, Washington