

FILED
September 12, 2016
Court of Appeals
Division I
State of Washington

NO. 74963-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH SHARP,

Appellant.

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

The Honorable James Cayce, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in ordering restitution for alleged transfers of money the state failed to prove.

2. The court erred in failing to offset the restitution amount by payments appellant made towards the victim's bills during the time period of the alleged thefts.

Issues Pertaining to Assignments of Error

Appellant pled guilty to multiple counts of theft and agreed to pay restitution on charged and uncharged offenses. The state's theory was that appellant made multiple transfers of money from his mother's bank account into his own while he was acting as her Power of Attorney (POA) and had authority to pay his mother's bills out of her account.

1. Did the trial court err by ordering appellant to pay \$16,500.00 in restitution where that amount was based on three transfers of money the state failed to prove occurred?

2. Did the court err by failing to offset the restitution amount by \$26,168.38 – the sum of two balloon payments appellant made to Foundation House, his mother's assisted living facility at the time of the alleged thefts?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On August 15, 2013, the state charged appellant Kenneth Sharp with 7 counts of first degree theft, reportedly occurring between August 19, 2010 and August 25, 2011. CP 1-3. The state alleged that on 7 occasions, Sharp unlawfully transferred money from Helen Sharp's bank account into his own in amounts of: (1) \$200,000.00; (2) \$40,000.00; (3) \$7,500.00; (4) \$15,000.00; (5) \$10,000.00; (6) \$13,000.00; and (7) \$12,000.00. CP 5.

As an aggravating factor, the state alleged that Sharp knew or should have known Helen² was a particularly vulnerable victim. CP 1-4.

The state was subsequently allowed to amend the information to include one count of mortgage fraud, allegedly occurring between June 28, 2010, and August 19, 2010. CP 16-20.

On June 3, 2014, Sharp pled guilty to the charges in the amended information, but not the aggravator. CP 21-52. In the Felony Plea Agreement attached to the Statement of Defendant on

¹ The verbatim report of proceedings for October 3, 2014, January 22, 2015 and July 16, 2015 is contained in one bound volume, consecutively paginated and referred to as "RP."

Plea of Guilty, signed by Sharp, there is a box that is checked and next to it written: “agrees to pay restitution in full on charged and uncharged counts – exact amount to be determined.” CP 35.

At sentencing on January 22, 2015, the court imposed concurrent sentences of 29 months on the thefts and 43 months on the mortgage fraud. CP 59. Kenneth waived his right to be present at the restitution hearing. RP 21.

The state scheduled a restitution hearing for July 16, 2015. Supp. CP __ (sub. no. 49, Notice of Restitution Hearing Scheduled, 6/30/15). At the hearing, Kenneth’s attorney Greg Girard indicated he had not had time to look at the state’s documentation and that Kenneth was dissatisfied with Girard’s representation.³ RP 24. Girard therefore asked for a continuance and indicated he may move to withdraw as well. RP 25.

Girard noted one issue regarding restitution, specifically that Kenneth paid for some of the fees for Helen’s housing, out the money that was taken from her account. RP 26. Accordingly, the restitution amount should be offset by the amount of those payments. RP 27. The court indicated defense counsel needed to

² To avoid confusion, persons sharing the same last name of either Sharp or Grothe will be referenced by their first names. No disrespect is intended.

provide a declaration to that effect. RP 27. The court granted defense counsel's motion to continue and set a new date of September 15, 2015. RP 26; Supp. CP __ (sub. no. 51, Order on Criminal Motion, 7/16/15).

Girard indicated Kenneth would like to participate in the restitution hearing via Skype, if possible. RP 30. The court responded Kenneth could participate by telephone. RP 30. Girard indicated he'd let the court know definitively when the hearing was closer. RP 30.

On September 15, Girard presented – and the court granted – a motion to have counsel appointed to represent Kenneth, due to Kenneth's indigence and dissatisfaction with Girard. Supp. CP __ (sub. no. 52, Motion and Order Appointing Counsel, 9/15/15).

Thereafter, on February 25, 2016, a restitution order was entered, signed by both parties, setting forth restitution as follows:

Carol Grothe	\$231,578.90
Carrie Sharp	\$231, 578.90
State of Oregon, Estate Admin.	\$10, 808.82

CP 64-65.

³ The state's restitution documents were 375 pages. CP 66-441.

The order reflected that: "The defense has no specific objection to raise; however, the defense does not join in the state's request for restitution." CP 65. This appeal follows. CP 449-450.

2. Allegations in State's Certification for Determination of Probable Cause

At the time of the alleged thefts, Helen was 93 years old and living in Foundation House, an assisted living facility in Federal Way. CP 7. She had three children: Kenneth Sharp, Carrie Sharp and Carol Grothe. CP 7. Kenneth became Power of Attorney (POA) for Helen's financial decisions with the family's approval in 1995. CP 7.

Carol told police Helen owned her Tacoma home outright when she moved into Foundation House. Additionally, Helen had liquid assets in the amount of \$220,000.00. CP 7. Her living expenses were approximately \$5,000.00 per month. As POA, Kenneth paid for Helen's living expenses directly from her KeyBank account. CP 7.

On August 4, 2010, Kenneth visited Helen at Foundation house and presented her with documents to obtain a reverse mortgage on her home. Reportedly, he also presented a second

POA granting him power to mortgage Helen's interest in her home.
CP 7.

Carol told police that at the time, Kenneth and his wife Sara were living in the home. Regarding the loan, Helen reportedly told Carol that Kenneth said its purpose was to enable him to fix up the house to sell. According to Carol, Helen never mentioned a reverse mortgage. CP 7.

After speaking with her other daughter, Carrie – who advised against the loan – Helen reportedly called Kenneth to advise him not to take out the loan, or alternatively, to cancel it if he had. CP 7.

Nevertheless, the probable cause certification alleged that Kenneth took out a reverse mortgage on Helen's home, with a maximum cash amount set at \$448,500. CP 7. The loan documents were signed by Kenneth as POA for Helen. CP 7. One of the documents listed as a caveat that the borrower must live in the residence. CP 8. The proceeds of the mortgage were transferred into Helen's bank account. CP 7-8.

On October 9, 2011, Helen, Kenneth, and Carol met with attorney Bart Adams to discuss setting up a trust with Helen's assets. Adams recommended Helen sell her house instead. CP 8.

According to Carol, in December 2011, Kenneth asked her and Carrie to help clean out the house in preparation to sell it. While cleaning the house in February 2012, Carrie, Carol and Carol's husband James found a monthly reverse mortgage statement that had been mailed to Helen's residence. CP 8. In March, Carol called attorney Adams to discuss the reverse mortgage statement. Adams investigated and discovered the reverse mortgage on Helen's house. CP 8.

Carol and James subsequently provided to the police a notarized, signed statement by Helen stating she gave Kenneth POA so he could pay her bills. She did not want a reverse mortgage on her house and did not give Kenneth any money for his business or any other purpose. CP 8.

On October 26, 2012, Champion Mortgage sent a notice of default to Helen at her Tacoma residence notifying her that her reverse mortgage of \$472,474.97 was in default, due to the fact she was not living at the mortgaged property. CP 8.

Detective Annette Scholl reviewed a number of emails and social media postings provided by Carol and James. CP 8. In one email, Kenneth's wife Sara wrote to James that Kenneth's business

was failing. CP 8. Kenneth's step-daughter Amy Gann also wrote James that Kenneth's business was failing. CP 8.

Gann wrote James another email indicating that Sara was working to "make this right." CP 8. In an email to James on August 22, 2012, Sara wrote that Kenneth had informed her there was a reverse mortgage on Helen's home in an approximate amount of \$400,000.00-\$475,000.00. CP 8-9. Sara recommended Kenneth step down as Helen's POA; Sara also discussed her contributions of \$17,340.28 of her own money in an effort to rectify the situation. CP 9.

Scholl reviewed Helen's KeyBank statements (ending in #0127) and noted a wire deposit of \$263,596.08 on August 19, 2010, just one week after the reverse mortgage application was completed. On September 10, 2010, another deposit of \$59,000.00 was transferred into Helen's account. Carol and James confirmed with KeyBank the \$59,000 deposit came from a reverse mortgage loan from Genworth Financial in Helen's name. CP 9. Scholl confirmed with a KeyBank investigator that the wire deposit of \$263,598.08 came from "Washington L Tab Residential Escrow" and was categorized as "proceeds." CP 9.

Scholl obtained a search warrant for Kenneth's KeyBank accounts for the period between January 1, 2008 and 2013 (ending in #3232).⁴ CP 9. On August 19, 2010 (the same day the \$263,596.08 was deposited into Helen's account), \$200,000.00 was transferred from Helen's account into Kenneth's KeyBank account. In examining the records, Scholl noted a number of other transfers from Helen's account into Kenneth's. CP 9. According to Scholl's calculations, a total of \$492,417.58 was transferred from Helen's bank account into Kenneth's personal account on or between November 3, 2008 and August 25, 2011. CP 9.

On June 13, 2013, Scholl received the payment account history for Helen Sharp from Foundation House. It showed a number of late fees were assessed to the account between August 2010 and October 2012. CP 10. But it also showed the following balloon payments were made:

⁴ Kenneth also had a business acct. for Minute Man Press (ending in # 5223) and another account ending in #3342. CP 9. But Scholl certified she was able to trace each transfer from Helen's account (#0127) into Kenneth's personal account (#3232). CP 9.

<u>Date</u>	<u>Amount</u>
8/24/10	\$11,010.00
11/08/11	\$15,168.38
08/2012	\$6,000.00
	\$11,380.28

CP 10.

Regarding the last two payments in 2012, Scholl wrote: "At that time Ken Sharp was still listed as the responsible party on the account history report." CP 10. Emails indicated Sara made the last two payments with her "personal money." CP 10. This was also confirmed by Heike Wolfe of Foundation House. CP 11. The account was subsequently transferred to reflect Helen c/o Carol as the responsible party. CP 10.

3. Restitution Documents

At the time of the restitution hearing, Helen was deceased. CP 79. The restitution hearing was not recorded. It appears the order was presented and signed off the record.⁵

As part of its restitution paperwork, the state submitted the bank records of Helen Sharp and Kenneth Sharp. CP 73-78, 80-

⁵ There are no court minutes for the date the restitution order was signed and entered. While not part of the record, the bailiff confirmed to our office staff the order was presented and signed off the record.

104, 160-164 (Kenneth's account ending in #3342);⁶ CP 105-159 (Helen's account ending in #0127); CP 165-299 (Kenneth's account ending in 5223);⁷ and CP 300-441 (Kenneth's account ending in #3232).⁸

The state also submitted an affidavit and summary prepared by Carol's husband, James Grothe. CP 68-69. He certified he went through the bank records and compiled a Summary of "Money recorded to have been taken out of Helen's KeyBank account and transferred into Ken Sharp's account." CP 70. His summary alleged that between 11/3/08 and 8/25/11, Kenneth made 38 transfers from Helen's KeyBank account (ending in #0127) into Kenneth's personal account (ending in #3232) totaling \$479,417.58.⁹ CP 68-70.

A record of all but three of the purported transfers are evidenced in the account of either Helen or Kenneth or both. See CP 105-159, 300-441. However, there is no evidence of the following transfers in any of the accounts:

⁶ This is a business account for "Fine Print Company INC." CP 160.

⁷ This is a business account for "Fine Print Company INC., DBA Minuteman Press." CP 165.

⁸ This is Kenneth's personal account. CP 9, 300.

4/13/09	\$3,000.00
6/24/09	\$3,500.00
7/24/09	\$10,000.00

CP 72-78, 80-441.

The state also submitted a letter from the Oregon Department of Human Services to Carol, presenting a claim to the Estate of Helen Sharp in the amount of \$11,929.32 “for assistance in the above-referenced estate pursuant to Oregon Revised Statutes, Chapter 411 and/or Chapter 416,¹⁰ and Oregon Administrative Rules 461-135-0835 and 461-135-0838.” CP 79. There is a handwritten notation on the letter stating: “restitution for \$ paid back to Medicaid is \$1,120.50.” CP 79. There is a second handwritten notation indicating: “Helen’s estate could only pay \$1,120.50. CP 79.

The state’s restitution paperwork also indicates the state reduced the amount owed to Carol and Carrie by the \$17,380.29 Sara Sharp paid to Foundation House. CP 67. The state did not reduce the amount by the other two balloon payments that were

⁹ Like Scholl, James affirmed the transfers were made into Kenneth’s personal account. CP 68. James’ calculation was somewhat less than Scholl’s, however. CP 9, 68-70.

made on August 24, 2010 and November 8, 2011 for \$11,000.00 and \$15,000.00, respectively. CP 10, 70.

Thus, in determining the restitution award for Oregon, it appears the state subtracted the \$1,120.50 paid by the estate to the Oregon Estate Administration's claim of \$11,929.32 for an amount of \$10,808.82. CP 67.

For the award to Carol and Carrie, it appears the state added the \$1,120.50 paid by the estate to Oregon to the amount James calculated was transferred from Helen's account into Kenneth's account (\$479,417.58) and subtracted from it the amount paid by Sara (\$17,380.29), which it then divided by two, for \$231,579 each. CP 67-70, 79.

C. ARGUMENT

1. THE COURT ERRED IN ENTERING THE RESTITUTION ORDER BECAUSE IT WAS NOT SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE.

The state failed to prove three of the transfers – totaling \$16,500.00 – that were included in James Grothe's summary. The bank records submitted by the state contain no evidence of these

¹⁰ ORS 411 concerns "general assistance" for needy person, including medical and remedial care. ORS 416 is repealed but concerned recovery of aid and support.

alleged transfers.¹¹ Moreover, although the state correctly offset the amount of restitution by the amounts Sara Sharp paid to Foundation House in 2012, it failed to offset the other balloon payments in 2010 and 2011 – totaling \$26,168.38 – that were made to Foundation House while Kenneth was still paying Helen’s bills and “still listed as the responsible party on the account history report.” CP 10. Accordingly, \$42,668.38 of the restitution order is not supported by substantial credible evidence. This Court should reverse.

Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, restitution is “part of an offender’s sentence.” State v. Hughes, 154 Wn.2d 118, 155, 110 P.3d 192 (2005) (quoting State v. Edelman, 97 Wn. App. 161, 166, 984 P.2d 421 (1999)). A defendant waives the right to challenge an alleged sentencing error for the first time on appeal if the error involves agreement to facts, or the exercise of discretion. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). But a defendant can challenge a legal error in a sentence for the first time on appeal. Goodwin, 146 Wn.2d at 873-74. See also State v. Bahl, 164 Wn.2d

¹¹ Undersigned counsel is not an accountant, but went through all of the bank records twice and found no record of these transactions. If counsel somehow missed them, it was an inadvertent mistake.

739, 750, 193 P.3d 678 (2008) (defendant always has standing to challenge illegality of sentence).

Accordingly, Kenneth may challenge the court's authority to impose restitution for alleged losses the state did not prove – and the defense did not agree to – for the first time on appeal.¹² State v. Cosgaya-Alvarez, 172 Wn. App. 785, 291 P.3d 939 (2013) (holding defendant could challenge court's authority to impose restitution for court-ordered child support for the first time on appeal).

The size of a restitution award is within the court's discretion but will be reversed upon a showing of abuse. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). This Court reviews a trial court's factual findings for substantial evidence. Griffith, 164 Wn.2d at 965.

A court's authority to impose restitution is statutory. State v. Davison, 116 Wn.2d 917, 919-20, 809 P.2d 1374 (1991). A judge must order restitution whenever a defendant is convicted of an offense which results in loss of property. RCW 9.94A.753(3). The amount of restitution must be based on "easily ascertainable damages." RCW 9.94A.753(3). While the claimed loss "need not

be established with specific accuracy, it must be supported by substantial credible evidence.” State v. Fleming, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994). “Evidence supporting restitution ‘is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.’” State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005) (internal quotation marks omitted) (quoting Fleming, 75 Wn. App. at 274-75), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

Because Kenneth did not agree to the state’s request for restitution, the state was required to prove the damages by a preponderance of the evidence. The state failed to do so with respect to \$42,668.38 of the order.

¹² While Kenneth did not make specific objections, he did not join in the state’s request for restitution. CP 65.

As noted, the state's restitution was based on transfers Kenneth allegedly made from Helen's account into his personal account. As proof, the state submitted the bank records for Helen's sole account and the bank records for Kenneth's three accounts. In none of them was there evidence Kenneth transferred: \$3,000.00 on 4/13/09; \$3,500.00 on 6/24/09; or \$10,000.00 on 7/24/09. Substantial credible evidence therefore does not support this portion of the order.

Nor did the state prove an additional \$26,168.38 of the order. This is the sum of balloon payments made to Foundation House while Kenneth was still Helen's POA and paying her bills. As Scholl noted, he was "still listed as the responsible party on the account history report" of Foundation House at this time. CP 10. The balloon payments to Foundation House had to come from somewhere. They did not come from Sara, Carrie or Carol or anybody else the police investigated or it would have been in the certification. Although Kenneth was making unauthorized withdrawals from Helen's account, a preponderance of the evidence shows he used at least some of it – \$26,168.38 worth – to pay Helen's Foundation House bills. Helen therefore did not suffer

this loss. The state correctly offset the amount Sara paid. There is no logical reason not to offset the other payments.

In short, it was the state's burden to prove the amount of restitution based on substantial credible evidence. Because it failed to do so, this Court should remand for a new restitution hearing – at which no new evidence may be admitted. Griffith, 164 Wn.2d at 967-68.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Kenneth was represented at the restitution hearing by appointed counsel. Supp. CP ___ (sub. no. 52, Motion and Order Appointing Counsel for Defendant). The trial court found him indigent for purposes of this appeal. CP 446-48. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

At sentencing, the court waived all discretionary fees, including interest (except on restitution), because the court preferred that Kenneth pay restitution instead of LFOs. CP 58; RP

22. The court imposed only the \$500 VPA and \$100 DNA fee. CP 58. The restitution award totals \$473,808.82. CP 66.

Under RCW 10.73.160(1), appellate courts “*may* require an adult offender convicted of an offense to pay appellate costs.” (Emphasis added). The commissioner or clerk “*will*” award costs to the State if the State is the substantially prevailing party on review, “*unless the appellate court directs otherwise in its decision terminating review.*” RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. Sinclair, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. Id. at 392-94. Based on Kenneth’s indigence, as well as the huge amount of restitution he owes – which the trial court preferred he paid over court fines and fees – this Court should exercise its discretion and

deny any requests for costs in the event the state is the substantially prevailing party.

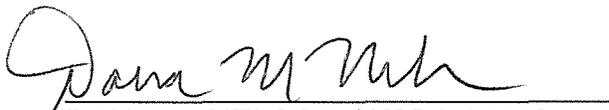
D. CONCLUSION

This Court should reverse and remand for a new restitution hearing. Alternatively, this Court should exercise its discretion and deny any request for appellate costs.

Dated this 12th day of September, 2016

Respectfully submitted

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