

COA NO. 72933-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ELYAS KEROW,

Appellant.

FILED
Jun 25, 2015
Court of Appeals
Division I
State of Washington

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

The Honorable Theresa B. Doyle, 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>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining To Assignments Of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	7
1. THE COURT LACKED AUTHORITY TO ENTER RESTITUTION AFTER THE STATUTORY DEADLINE PASSED WITHOUT FINDING GOOD CAUSE FOR THE CONTINUANCE.....	7
a. As a threshold matter, the State improperly cited an unpublished decision, and the trial court improperly relied upon it	8
b. Without good cause for the continuance, the restitution order entered beyond the 180-day deadline is void	9
c. The issue is preserved for appeal	14
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Colley v. Peacehealth,</u> 177 Wn. App. 717, 312 P.3d 989 (2013).....	9
<u>Johnson v. Allstate Ins. Co.,</u> 126 Wn. App. 510, 108 P.3d 1273 (2005).....	8
<u>State v. Dedonado,</u> 99 Wn. App. 251, 991 P.2d 1216 (2000).....	12
<u>State v. Grantham,</u> 174 Wn. App. 399, 299 P.3d 21, <u>review denied, 178 Wn.2d 1006, 308 P.3d 642 (2013)</u>	10, 11
<u>State v. Gray,</u> 174 Wn.2d 920, 280 P.3d 1110 (2012).....	10, 11
<u>State v. Hennings,</u> 129 Wn.2d 512, 919 P.2d 580 (1996).....	14
<u>State v. Johnson,</u> 96 Wn. App. 813, 981 P.2d 25 (1999).....	9, 12
<u>State v. Krall,</u> 125 Wn.2d 146, 881 P.2d 1040 (1994).....	10, 11
<u>State v. Moen,</u> 129 Wn.2d 535, 919 P.2d 69 (1996).....	14
<u>State v. Murray,</u> 118 Wn. App. 518, 77 P.3d 1188 (2003).....	9
<u>State v. Reed,</u> 103 Wn. App. 261, 12 P.3d 151 (2000).....	12

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Tetreault,
99 Wn. App. 435, 998 P.2d 330,
review denied, 141 Wn.2d 1015, 10 P.3d 1072 (2000) 12

RULES, STATUTES AND OTHER AUTHORITIES

RAP 10.4(h) 9

RCW 9.94A.753(1)..... 1, 9, 10

RCW 9.94A.753(7)..... 10

A. ASSIGNMENTS OF ERROR

1. The court erred in imposing restitution beyond the statutory 180-day time limit, in violation of RCW 9.94A.753(1). CP 28-29.
2. The court erred in denying appellant's motion to strike the State's restitution request as beyond the 180-day deadline. CP 67.
3. The court erred in relying on an unpublished Court of Appeals decision.

Issues Pertaining to Assignments of Error

1. Whether the trial court lacked statutory authority to enter the restitution order beyond the 180-day deadline under RCW 9.94A.753(1) in the absence of good cause?
2. Whether the court erred in allowing the State to cite an unpublished Court of Appeals decision as authority and in relying on that unpublished decision to uphold the restitution order?

B. STATEMENT OF THE CASE

Elyas Kerow pled guilty to one count of second degree vehicle prowling. CP 8-23. The factual basis for the plea was that he "unlawfully entered Brett Braaten's car intending to commit a crime against property

therein." CP 15. On May 16, 2014, the court imposed a deferred sentence. CP 24-26; 1RP¹ 4-8. Restitution was to be determined. CP 25.

The State later sought \$1000 in restitution for Braaten and \$3,641.71 for the insurance company, USAA. CP 34. The State filed documentation for the upcoming restitution hearing. CP 33-64. The documentation included a victim loss statement signed by Ms. Braaten, in which she represented that the total amount of loss or damage consisted of a repair for \$1428. CP 35. Braaten's loss statement further indicated the loss was submitted to her insurance company. CP 35. USAA insurance paid a total of \$4058. CP 35. There was a \$1000 deductible on the policy. CP 35.

The State's documentation from USAA named the policyholder as Austin Wolff and requested a check be made payable to USAA as subrogee of Wolff. CP 36. Wolff is named as the owner of the vehicle. CP 40, 46, 51. USAA paid \$4,065.48 on the property damage claim. CP 36. There were some additional costs for towing, storage, and auction. CP 36. USAA received \$1000 from the salvage of the totaled vehicle, leaving \$3,641.71 in costs. CP 36.

¹ The verbatim report of proceedings is referenced as follows: 1RP 5/16/14; 2RP - 10/29/14; 3RP - 11/18/14; 4RP - 12/3/14.

On October 29, 2014, the restitution hearing took place. 2RP 4-10. The court asked defense counsel if she had any argument. 2RP 5. Counsel noted Braaten was the victim and USAA provided a very complete packet of information for payments to Wolff. 2RP 5. But counsel also pointed out Wolff was not mentioned anywhere in the police report and was not a victim in this case. 2RP 5. There was no indication in the documentation that Braaten was "out of \$1000." 2RP 6. The USAA paperwork did not mention Braaten at all. 2RP 6. There was no showing of a connection between Wolff and Braaten.² 2RP 7.

The State interjected "I do have to ask how that's relevant when we have an order setting restitution[.]" 2RP 7. The court responded, "Well, I haven't signed it, though. That's the thing." 2RP 7.

The State argued the paperwork had the right claim number and the right date of loss involving the same vehicle.³ 2RP 7-8. The court said it was clear that the insurance company information was correct in that it paid \$3,641.71. 2RP 8. The court asked if counsel disputed this. 2RP 8. Counsel did not. 2RP 8. The question for the court was why

² Counsel further argued it was unclear where Braaten got the amount of \$1,428 in repair costs, as the car was totaled. 2RP 6.

³ Defense counsel pointed out the claim policy number on the victim loss statement has four additional digits compared to the number listed in the USAA paperwork. 2RP 7.

Braaten was entitled to the \$1000 deductible when "everything else shows Wolff" was the policyholder. 2RP 8.

The State suggested Braaten was likely insured under the policy. 2RP 8. Defense counsel represented that Braaten was the registered owner of the car according to police reports. 2RP 8. The court said it had not seen the police report. 2RP 8. The State reiterated its belief that Braaten was covered by the policy because the date of loss, the claim number, and the car were the same. 2RP 9.

The court wondered why money was going to Braaten if she did not own the car. 2RP 9.⁴ The State said Braaten paid the deductible. 2RP 9. The court countered that Wolff was the owner of the car. 2RP 9-10. The State said, "Well, I believe Ms. Braaten was the registered owner of the vehicle." 2RP 10. The court responded, "the State needs to present something showing a connection between Braaten and Wolff." 2RP 10. The court continued: "I'm reviewing everything pretty carefully. The bar is fairly low on this, but there's got to be something. Okay. So go ahead and set it over to a date that you both agree on. And that's that." 2RP 10. The restitution hearing was continued to a future date, unspecified on the record. CP 65. The court did not enter a written order of continuance. Id.

⁴ The transcript has the court referring to "him" and "he" at this point, but the context makes clear that the court was referring to Braaten.

The parties returned to court on November 18, 2014, at which time the State presented an email from Braaten explaining that Wolff is her father but that she was responsible for paying the deductible. 3RP 4-6; CP 75. The court noted Wolff is the policyholder. 3RP 6.

Defense counsel interjected, arguing the court lacked jurisdiction to set restitution because more than 180 days had passed since sentencing. 3RP 6. November 12 was the 180th day. 3RP 6, 10. There was no previous finding of good cause to continue the case past the 180-day deadline. 3RP 8-9. The court requested to see the order continuing the case, and then figured out there was none. 3RP 9, 11. The court continued the case again so that the State could research the issue of whether the court lost jurisdiction because the matter, while originally scheduled within the 180-day period, was "continued beyond the 180 days without a finding of good cause." 3RP 11.

At a December 3, 2014 hearing, the parties argued the issue. 4RP 4-20. The State, citing an unpublished case from the Court of Appeals, claimed that there was sufficient information to establish a causal connection between the insurance claim and the damaged car at the October 29 restitution hearing, and that the court continued the case simply to clarify the relationship between Braaten and Wolff. 4RP 8-12. According to the State, the unpublished case it relied on distinguished

between "clarification and needing additional evidence that the State didn't initially provide." 4RP 13. The State also argued defense counsel waived the issue by not objecting to the November 18 continuance date, accusing counsel of gamesmanship. 4RP 11, 13.

Defense counsel responded that he understood the State's frustration at picking a date beyond the 180-day period, but that its accusation of gamesmanship was inaccurate. 4RP 16. The court said it did not agree with the State's position on that point. 4RP 16.

Defense counsel distinguished the unpublished case cited by the State, arguing there was insufficient information to "tie Braaten to this car" so as to establish why she was entitled to restitution at the original hearing. 4RP 15-16. Additionally, there was good cause to continue in the unpublished case, whereas the court in Kerow's case never found good cause to continue. 4RP 14.

Faced with the unpublished decision cited by the State, the court reframed the legal issue before it: "whether the Court had sufficient information in the record at the hearing that was within the 180 days to, um, find that there was a causal connection with [Braaten] and the – the crime that Mr. Kerow committed." 4RP 16-17. The court commented that Kerow's case sounded like the unpublished case "where it's clarification."

4RP 17. The court said it would bone up on the case law and then enter an order on the matter. 4RP 19.

On December 13, 2014, the court entered an order setting restitution in the amount of \$1000 for Braaten and \$3,641.71 for USAA. CP 28-29. On that that same date, the court entered the following order on Kerow's motion: "the court continued the hearing from 10/29/14, within 180 days of sentencing, to 11/18/14, for clarification of the relationship between Mr. Braaten, the victim in the case, and Mr. Wolff, the claimant under the policy covering the damaged vehicle. The court sought clarification of their relationship and continued the hearing for that reason. The State's evidence was sufficient at the 10/29/14 hearing." CP 67. Kerow appeals from the restitution order. CP 30-32.

C. **ARGUMENT**

1. **THE COURT LACKED AUTHORITY TO ENTER RESTITUTION AFTER THE STATUTORY DEADLINE PASSED WITHOUT FINDING GOOD CAUSE FOR THE CONTINUANCE.**

The trial court did not find good cause to continue the restitution hearing beyond the 180-day deadline mandated by statute. As a result of that failure, the court lacked statutory authority to determine restitution at a later date. The restitution order must be vacated. CP 28-29.

- a. **As a threshold matter, the State improperly cited an unpublished decision, and the trial court improperly relied upon it.**

It is improper for a party to cite an unpublished decision to the trial court and it is error for the trial court to rely on it. Johnson v. Allstate Ins. Co., 126 Wn. App. 510, 519, 108 P.3d 1273 (2005). The trial prosecutor engaged in sanctionable conduct when it cited an unpublished decision of the Court of Appeals in support of its argument that restitution was timely. 4RP 10, 13; Johnson, 126 Wn. App. at 519.

The trial court, instead of sanctioning the trial prosecutor, embraced the unpublished decision in ruling restitution was timely. We know the court did so because the court orally commented that Kerow's case sounded like the unpublished case and its written order tracks the language and reasoning of the unpublished case. 4RP 17; CP 67. In response to the unpublished decision, the trial court reframed the relevant legal question from whether restitution could be ordered without a finding of good cause to continue past the 180-day deadline to whether the continuance was for purposes of clarification. Compare 3RP 11 with 4RP 16-17.

The State's improper conduct and the trial court's error put Kerow in an awkward position. "If one party cites an unpublished opinion, then in fairness the other party must be allowed to explain why the opinion is

neither illustrative nor persuasive, creating a controversy that the appellate court will find difficult to resolve without citing the unpublished opinion." Colley v. Peacehealth, 177 Wn. App. 717, 723, 312 P.3d 989 (2013). Kerow's trial counsel understandably felt compelled to address and distinguish the unpublished decision in arguing to the trial court. 4RP 14-16. On appeal, Kerow will not cite the unpublished decision at issue here. RAP 10.4(h) forbids it. And to explain why the unpublished decision lacks persuasive value would only encourage the practice of citing unpublished decisions as authority.

b. Without good cause for the continuance, the restitution order entered beyond the 180-day deadline is void.

The trial court's authority to impose restitution is statutory. State v. Johnson, 96 Wn. App. 813, 815, 981 P.2d 25 (1999). The court cannot exceed the authority granted under the controlling statute. Johnson, 96 Wn. App. at 815. A restitution order is void when statutory provisions are not followed. Id. Whether a trial court exceeded its statutory authority is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

RCW 9.94A.753(1) provides in relevant part as follows:

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.⁵

"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 time limit is mandatory unless extended for good cause." Gray, 174 Wn.2d at 925 (citing State v. Krall, 125 Wn.2d 146, 148-49, 881 P.2d 1040 (1994)).

To render restitution timely, a trial court must make an express finding of good cause for continuing a restitution hearing beyond the 180th day before the 180th day has passed. State v. Grantham, 174 Wn. App. 399, 405-06, 299 P.3d 21 (2013) ("because the continuance of Grantham's restitution hearing on March 2 was not based on an express finding of good cause to hold it later than 180 days after sentencing, as RCW 9.94A.753(1) requires, the hearing was not timely and we must reverse and vacate the invalid restitution order."), review denied, 178 Wn.2d 1006, 308 P.3d 642 (2013).

At the October 29 restitution hearing, which took place before the 180-day deadline, the trial court did not make a finding of good cause to continue the restitution hearing. 2RP 10; CP 65. Under Grantham, the

⁵ Subsection (7) refers to mandatory restitution ordered after it has been determined the victim of a crime is entitled to benefits under the crime victims' compensation act. RCW 9.94A.753(7).

subsequent determination of restitution by order dated December 3 is invalid in the absence of that finding. CP 28-29; Grantham, 174 Wn. App. at 405-06.

180 days from sentencing was November 12. Under Gray and Krall, the restitution order must be entered before 180 days passes in the absence of good cause shown. Gray, 174 Wn.2d at 925; Krall, 125 Wn.2d at 148-49. Here, the trial court entered the restitution order well past the 180-day deadline. CP 28-29. The court's later explanation that it continued the hearing for "clarification" past the 180-day deadline does not change that fact. CP 67.

In ultimately ordering restitution, the trial court retroactively reasoned that it continued the hearing from October 29 to November 18 "for clarification of the relationship between Mr. [sic] Braaten, the victim in the case, and Mr. Wolff, the claimant under the policy covering the damaged vehicle." CP 67. The court's belated reasoning does not change the fact that it did not find good cause for the continuance from October 29 to November 18. It did not make an express finding of good cause to continue on October 29, before the 180-day deadline passed. Under Grantham, that failure by itself renders the restitution order untimely. Grantham, 174 Wn. App. at 405-06. Furthermore, the court did not even

make a retroactive finding of good cause in its December 3rd order explaining why it continued the case. CP 67.

Even if the court's December 3rd order could somehow be read as finding good cause for the earlier continuance, there is in fact no good cause shown. "Good cause requires a showing of some external impediment that did not result from a self-created hardship that would prevent a party from complying with statutory requirements." State v. Reed, 103 Wn. App. 261, 265 n.4, 12 P.3d 151 (2000). Inadvertence or attorney oversight does not establish good cause to extend the deadline. Johnson, 96 Wn. App. at 814, 817. The failure to obtain documentation in support of a restitution claim does not establish good cause for extension past the mandatory deadline. State v. Tetreault, 99 Wn. App. 435, 436-37, 998 P.2d 330, review denied, 141 Wn.2d 1015, 10 P.3d 1072 (2000). Further, the restitution statute "does not require that a defendant notify the State that he or she is challenging written documentation so that the State can have the opportunity to summon a witness or to get additional documentation to address his or her concerns." State v. Dedonado, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000).

The trial court explained it continued the case for "clarification" of the relationship between Braaten and Wolff. CP 67. That is another way of saying the State did not provide evidence it needed to satisfy the court's

concerns about whether the \$1000 insurance deductible request for Braaten was justified at the October 29 hearing. According to the documentation that the court had before it on October 29, Wolff was the owner of the vehicle; he was the policyholder and the one who was insured, not Braaten. CP 36, 40, 46, 51.

The trial court in its December 3rd order noted that it continued the October 29 restitution hearing on its own motion. CP 67. That does not matter. Good cause must exist to continue the restitution hearing past the 180-day deadline, regardless of whether it is the court or the State that is responsible for the continuance. There is nothing in the statute, or the case law interpreting the statute, that ascribes any significance to the distinction.

In its December 3 restitution order, the trial court stated, "The State's evidence was sufficient at the 10/29/14 hearing." CP 67. Kerow challenges the trial court's broad conclusion that the evidence was sufficient at the October 29 hearing. Evidence to support the claim that Braaten should receive \$1000 for an insurance deductible was insufficient because there was no evidence that she paid the deductible. The insurance documentation showed Wolff was the owner of the car and the policyholder. CP 36, 40, 46, 51. The State's later presentation of the email in November 2014 establishes that Braaten paid the deductible. CP

75. That documentation should have been presented before the 180-day deadline passed.

c. The issue is preserved for appeal.

Below, the State argued defense counsel waived the 180-day issue by not objecting to the November 18 continuance date. 4RP 11, 13. Defense counsel did not waive the issue for appeal. A challenge to the timeliness of the restitution determination may be raised for the first time on appeal. State v. Moen, 129 Wn.2d 535, 547-48, 919 P.2d 69 (1996); State v. Hennings, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). It follows that defense counsel was under no obligation to object at any time to preserve the issue for appeal. Counsel could have stayed completely silent on the issue and Kerow would be able to raise the issue on appeal. The fact that counsel chose to raise the 180-day issue at the hearing that took place past the 180-day deadline is immaterial on the matter of issue preservation.

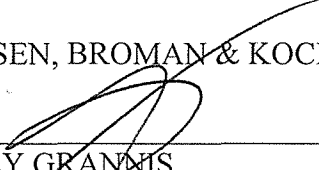
D. CONCLUSION

For the reasons set forth, Kerow requests the restitution order be vacated.

DATED this 25th day of June 2015

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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