74319-8

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Court of Appeals
Division I
State of Washington

No. 74319-8-I

IN THE COURT OF APPPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Appellant,

v.

WILLIAM JENSEN,
Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

When Mr. Jensen was resentenced on two counts of solicitation to murder, no restitution was ordered. At that hearing, the prosecutor mistakenly told the sentencing judge that no restitution had ever been imposed. The prosecutor was incorrect. But, the prosecutor's error could have been easily cured because the resentencing court stated it would permit the State to set a restitution hearing. Jensen did not object. For unknown reasons the State set that restitution hearing beyond the 180-day time limit required by statute. At that hearing, the prosecutor conceded that the restitution order from the first sentencing was not adopted at the resentencing hearing and no longer had any force or effect:

> COURT: Okay. And what's the legal effect if, upon resentencing, the – you would agree that if, upon resentencing, the court never reissued the prior restitution order and never made reference to it, you would agree that then there would be no restitution order?
>
> MS. BRENNEMAN: Yes. And we –
>
> COURT: Doesn't automatically continue, in other words.
>
> MS. BRENNEMAN: I think that would probably be accurate.

CP 193. The State now takes the exact opposite position. This Court should affirm. The State waived its objection. The trial court's ruling was correct.

II. BRIEF RESTATEMENT OF FACTS

During the first appeal in this case, the Washington Supreme Court reversed and "remand[ed] for vacation of two convictions and for resentencing."

State v. Jensen, 164 Wash.2d 943, 959, 195 P.3d 512 (2008). The remand order did not impose any restrictions on resentencing.

At the new sentencing hearing, the prosecutor stated:

> MS. BRENNEMAN: I will just- raise the issue of restitution. Although it was originally ordered by Judge Jones, there was never any order actually entered. It was to be determined at a future date.
>
> Would it be possible for us to get that material together for the Court and now enter a restitution order consistent with this resentencing that encompasses the monies that they've had to spend out for counseling?
>
> COURT: Are you asking to enter a specific restitution order today, or are you just asking to set a hearing?
>
> MS. BRENNEMAN: Set a hearing....

CP 138-39. Not due to any fault of Jensen's, the State set the restitution hearing more than 180 days after sentencing. No victim objected. After the State conceded that the original restitution order had not been reimposed at the resentencing, the judge concluded:

> COURT: The court agrees with [defense counsel], much reluctantly, because this is certainly not equitable to the victims of Mr. Jensen. But I can't see a way from le-, reviewing that transcript, it appears clear that I was not aware, or made aware, that there was a previous restitution order. The prosecutor certainly represented that there had not been one. Mistakenly, of course. And so I did not enter a restitution order at the — and I did not enter a restitution order, of course, in February of 2009 as the prosecutor requested additional time to get the materials available, so I indicated that restitution would be determined at a future hearing, the date to be set…
>
> So unfortunately, the State waited too late to get this hearing set, and the court believes it does not have any authority under the case law and the statute to set restitution order, this not being the, Judge Jones' order having expired when it was not made a condition of the new sentence. So the court grants the defendant's motion to dismiss the motion for restitution.

CP 197-98. Later, that oral ruling was reduced to writing.

III. ARGUMENT

A. Introduction

The State asks this Court to overlook its mistakes; ignore its concession; and somehow conclude that the original restitution order remained in effect despite the fact that the resentencing judge expressly stated she did not order any restitution.

B. The State Conceded the Issue Below

This Court can dispose of the State's appeal by finding that it waived the issue. At resentencing, the State sought only a future hearing date to enter a restitution order. When the State failed to set a hearing within the time specified by statute, the State conceded that there was no restitution order entered at the resentencing.

Jensen certainly was not to blame for this mistake. The error was entirely of the State's creation.

A party must object to trial or sentencing errors at a time that gives the trial court an opportunity to correct any mistake. Failure to timely object bars appellate review. *In re Lee,* 95 Wn.2d 357, 363, 623 P.2d 687 (1980); *State v. Loehner***,** 42 Wn.App. 408, 410, 711 P.2d 377 (1985). Counsel may not remain silent before the trial court and later, if the verdict or sentence is adverse, urge objection for the first time in a post-trial motion or on appeal. *State v. Garibay,* 67 Wn.App. 773,

776-77, 841 P.2d 49 (1992) (failure to object to sentencing date under RCW 9.94A.110 time line of 40 days following conviction).

Having conceded to the trial court that no restitution order was entered at resentencing, the State should not be heard to argue the opposite position now.

C. The Restitution Order was not Reimposed at Resentencing

However, if this Court reaches the underlying issue, it is clear that the restitution order was not reimposed at resentencing. Because restitution was not ordered, the earlier order no longer had any force or effect.

The State's argument is almost entirely premised on the theory that the restitution order remained undisturbed despite the fact that the Washington Supreme Court reversed the original judgment and remanded for resentencing. The State either misunderstands or mischaracterizes the remand from the direct appeal as limited to correcting a portion of Jensen's original sentence. Instead, Jensen's case was remanded for a new sentencing hearing. *State v. Toney*, 149 Wash. App. 787, 792, 205 P.3d 944 (2009), *rev. denied*, 168 Wash.2d 1027 (2010) (drawing distinction between "remand for resentencing," which authorizes an entirely new sentencing proceeding, and a remand which authorizes "the trial court to enter only a ministerial correction of the original sentence"); *State v. Davenport*, 140 Wash. App. 925, 931-32, 167 P.3d 1221 (2007), *rev. denied*, 163 Wash.2d 1041 (2008) (distinguishing between a remand for resentencing and a remand to correct the judgment and sentence; "At the resentencing hearing, the

trial court had the discretion to consider issues Davenport did not raise at his initial sentencing or in his first appeal.").

Washington courts have long recognized this distinction, which the State appears to have overlooked. In *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003), the Washington Supreme Court held that when a case is "remanded for resentencing," it means that the "entire sentence was reversed, or vacated, since 'reverse' and 'vacate' have the same definition and effect in this context-the finality of the judgment is destroyed." *See also United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) (*per curiam*), *cert. denied*, 519 U.S. 1137 (1997) (under "holistic approach," a vacated criminal sentence "becomes void in its entirety," having been "wholly nullified and the slate wiped clean."). As a result, when a case is remanded for resentencing, the "court is free to reconstruct the sentence utilizing any of the sentence components." *Id.*

As a result, the State's argument is premised on cases that are completely inapposite. For example, the State relies on *In re Personal Restraint of Carle*, 93 Wn.2d 31, 32, 604 P.2d 1293 (1980), a case that involves a remand limited in scope to correct the unlawful portion of a sentence without disturbing the lawful portion. The same is true of *State v. Williams*, 51 Wn.2d 182, 185, 316 P.2d 913 (1957), and *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). An illegal portion of a sentence, if separable, "may be vacated without disturbing the lawful part." *State v. Sims*, 171 Wn.2d 436, 448-49, 256 P.3d 285 (2011).

This case did not involve the ministerial correction of a single or divisible sentencing error. Instead, two counts of conviction were reversed and the case remanded for new sentencing hearing. If the State believed that the remand should have been limited in scope it could have moved to reconsider the scope of the remand from the direct appeal. But, it did not do that either.

D. The State's Invocation of Victim's Rights Does Not Eliminate the Requirement of Setting a Timely Restitution Hearing

Finally, the State invokes the rights of the victims. The State does not explain why it has standing to invoke the rights of the victims.[1] More importantly, the State completely fails to explain why the restitution time limit becomes non-enforceable whenever the State chooses to incant the victim's rights amendment. Restitution always involves a victim. The State's argument reads the statutory time limit into irrelevance.

The State's errors do not void Mr. Jensen's statutory protection that a restitution order must be set within 180 days of sentencing. RCW 9.94A.753.[2]

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[1] If the State is acting as the personal representative of the victims, then the State should be subject to civil liability for its errors. If not, then the victims should be held to the same waiver standard as a party.

[2] Because the lower court concluded that the State's request for restitution was untimely, it did not reach the issue of whether the State could seek restitution for a victim who was named only in a vacated count and who was not the subject of the original restitution order. *State v. Chipman,* 176 Wash.App. 615, 622, 309 P.3d 669 (2013) ("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 [victim not included in original restitution order] after the 180–day period had expired."). *See also State v. Burns*, 159 Wash.App. 74, 78–80, 244 P.3d 988 (2010). This Court could also affirm on those grounds.

IV. CONCLUSION

Based on the above, this Court should affirm the lower court order.

DATED this 8th day of March, 2016.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on today's date I e-filed the attached *Response Brief* causing a copy to be sent to opposing counsel at paoappellateunitmail@kingcounty.gov; Jim.Whisman@kingcounty.gov

March 9, 2016//Portland, OR /s/Jeffrey Ellis