IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 55536-7-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
LONNIE LILLARD,	)	
	)	
Appellant,	)	
	)	
and	)	
	)	
MELLISA ANNE SANDERS,	)	
	)	FILED: August 21, 2006
Defendant.	)	

PER CURIAM. Restitution that is ordered in conjunction with a conviction is also vacated when the conviction itself is vacated. Where a defendant succeeds in having a conviction overturned based upon the principles of double jeopardy, that sentence which is part of that conviction is also vacated. The restitution associated with the vacated conviction can not now be elevated to an uncharged crime, especially where, as here, the crime was charged in another jurisdiction.

Lonnie Lillard appeals the trial court's denial of his motion to withdraw his 1996 guilty plea and the resulting amended judgment and sentence. In 1996, Lillard pled guilty to eight counts of forgery. Counts III and VII were vacated by the Supreme Court because they violated the double jeopardy clauses of the United States and Washington Constitutions. The Supreme Court remanded the

matter to King County Superior Court directing the court to "grant . . . Lillard his choice of remedy of withdrawing his guilty plea to all eight forgery charges unless the court finds, after an evidentiary hearing, that there are compelling reasons not to allow that remedy."

An evidentiary hearing was held.[1] The State's investigator, Kelly Rosa, was the only witness. Rosa testified that the first victim for count I, Skipper's Seafood Restaurant, had changed ownership since the time of the crime and that any records connected with Lillard's fraud no longer existed. Rosa testified that she was not able to find the victim of count II because he was a transient. The only contact she had for him was his mother's telephone number which was disconnected. Rosa did find an address in Lynnwood for the bank teller to whom the forged check was presented. However, she was not able to discover a telephone number. The prosecution argued that it was highly unlikely that a teller could remember a transaction from nine years ago. No objections were made to this testimony.

There is no dispute that for counts I and II, the State presented evidence of missing witnesses and records. The trial court found the statute of limitations, missing witnesses and missing data were compelling reasons not to permit the

[1] This case was remanded to the superior court under RAP 16.12 for an evidentiary hearing. RAP 16.12 provides "[t]he Rules of Evidence apply at the hearing." Turning to the Rules of Evidence, we find somewhat of an anomaly. Rule 1101(c)(3) provides the rules of evidence need not be applied in "habeas corpus proceedings." It is interesting that the Rules of Evidence apply, but those very same rules provide that they need not apply. Because we reach our decision on other grounds, we need not address this apparent anomaly.

withdrawal of the plea for the remaining six counts. The State does not need to make a showing of a compelling reason on each count. It is sufficient such a showing is made on any one of the counts.[2] Where essential evidence or witnesses have been lost, withdrawal of the guilty plea may be unfair.[3] Since we need look no further than these two counts, the hearsay issues raised by Lillard with regard to counts IV through VI are irrelevant.

Lillard contends that the trial court erred in maintaining the order for restitution for the two vacated convictions. The original plea agreement provided restitution be made in full on "charged and uncharged counts outlined in the State's Certification for Determination of Probable Cause." The plea agreement provided the trial court consider as "real facts" information set forth in the Certification for Determination of Probable Cause. The facts that formed the basis of the convictions for counts III and VII were set forth. The State argues that the particulars set forth in the probable cause are sufficient to permit the trial court to maintain the restitution for those counts. We disagree.

"A sentencing court's authority to order restitution is purely statutory."[4] "Restitution shall be ordered . . . if the offender pleads guilty to . . . fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not

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[2] State v. Turley, 149 Wn.2d 395, 401, 69 P.3d 338 (2003).
[3] State v. Miller, 110 Wn.2d 528, 535, 756 P.2d 122 (1988) (citing United States v. Jerry, 487 F.2d 600 (3d Cir. 1973) ("loss of physical evidence and difficulty in relocating key witnesses")); Farnsworth v. Sanford, 115 F.2d 375 (5th Cir. 1940) ("52 witnesses dismissed after plea").
[4] State v. Dedonado, 99 Wn. App. 251, 255, 991 P.2d 1216 (2000).

prosecuted pursuant to a plea agreement."[5] Restitution may be ordered for an offender only if the offender enters a guilty plea with an express agreement to pay restitution for those crimes.[6] An appellate court will not reverse an order of restitution unless it is manifestly unreasonable or the sentencing court exercised its discretion on untenable grounds or for untenable reasons.[7] A trial court may impose restitution if the damage was a foreseeable consequence of the defendant's criminal acts.[8] "[R]estitution is punishment."[9] "'[U]nder the [S]entencing [R]eform [A]ct [of 1981], restitution is part of an offender's sentence.'"[10] Hence, a vacated conviction necessarily vacates the punishment and sentence connected to it.

The State argues that the plea agreement sets forth facts such that a vacated conviction now becomes an "uncharged" crime. Lillard's convictions for counts III and VII were vacated because double jeopardy attached. Vacating the conviction includes vacation of the sentence imposed thereon. Restitution was part of that sentence and thus must be vacated along with the conviction. Lillard's convictions were dismissed because he was tried for the same counts in Snohomish County. There is no authority to impose restitution for a sentence in another county. The vacated count cannot now become an "uncharged" count,

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[5] RCW 9.94A.753(5).
[6] State v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000).
[7] State v. Woods, 90 Wn. App. 904, 906, 953 P.2d 834 (1998) (citing State v. Hunotte, 69 Wn. App. 670, 674, 851 P.2d 694 (1993)).
[8] State v. Landrum, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992).
[9] State v. Kinneman, 155 Wn.2d 272, 281, 119 P.3d 350 (2005).
[10] 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)).

especially here, where the count was in fact “charged” in another jurisdiction.

In conclusion, we affirm the trial court’s decision to not permit Lillard to withdraw his guilty plea, but reverse the imposition of restitution for counts III and VII that were vacated.

FOR THE COURT:

Grosse, J

Appelwick, C.J.

Coleman, J