IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHUA EULICE PETTIS, Appellant.	No. 45533-1-II UNPUBLISHED OPINION

SUTTON, J. — Joshua Eulice Pettis appeals from the trial court's restitution order following his plea of guilty to unlawful possession of a controlled substance (methamphetamine). He argues that (1) the trial court had no authority to impose restitution for the crime he was originally charged with because he pleaded guilty to a different charge and did not expressly agree to pay restitution related to the original charge, (2) his counsel provided ineffective assistance by failing to argue that the trial court lacked the authority to impose restitution, and (3) the amount of the restitution the trial court ordered was based on speculation and conjecture. We hold that the trial court had the authority to impose restitution related to the original charge because the record as a whole demonstrates that Pettis expressly agreed to allow the State to request such restitution as part of the plea deal. Accordingly, we also reject Pettis's ineffective assistance of counsel claim. But we further hold that the amount of the restitution was based on speculation, and we reverse the restitution order and remand for a new restitution hearing to determine the appropriate amount of restitution based on the existing evidence.

FACTS

I. CHARGES AND PLEA

The State originally charged Pettis with first degree theft after he and an accomplice were discovered removing portions of a temporary steel bridge owned by the United States Forest Service on or about June 9, 2012.[1] After his arrest, Pettis admitted to taking approximately five tons of steel on two separate occasions.

In late December 2012, Pettis and the State negotiated a plea that dismissed the first degree theft charge and amended the charge to possession of a controlled substance (methamphetamine), with the goal of allowing Pettis to seek a drug-treatment based sentence. The statement of defendant on plea of guilty (plea statement) did not mention the original charge, but it stated that the State would make a sentencing recommendation that included "$188,000 restitution to the U.S. Forest Service." Clerk's Papers (CP) at 10. The plea statement did not expressly state that Pettis had agreed that the State would request restitution related to the original charge as part of the plea agreement.

After finding that the plea was knowing and voluntary and that Pettis understood the consequences of the plea, the trial court accepted this plea. The trial court then proceeded to sentencing.

At that point, the State advised the court that it was seeking $188,000 in restitution to be paid to the United States Forest Service but that this amount required some "negotiation" because

[1] The bridge was being stored on U.S. Forest Service land and was not in use at the time of the theft.

Pettis had requested "a little better records." Report of Proceedings (RP) at 18-19. The trial court then asked Pettis if he understood that "as a part of this guilty plea [he had] apparently agreed and the State is going to be asking for restitution for the theft and so forth that [he was] originally charged with." RP at 19. Pettis stated that he understood this. The court then asked Pettis if he understood that although the parties might disagree about the amount of restitution, the State was requesting restitution and the court was authorized to order restitution. Pettis confirmed that he understood this. The trial court sentenced Pettis and continued the date for the restitution hearing.

II. RESTITUTION HEARING

At the restitution hearing,[2] Pettis argued that the State had provided a conclusory statement of the costs and asserted that he did not cause any of the damage to the bridge because the steel was already cut and that there was no evidence that he took any more steel than the two tons that the officers found in his truck when he was arrested. The State asserted that the documents it had showed that there were two 32-foot sections and one 60-foot section of steel missing from the site and that Pettis had admitted to a law enforcement officer that he had taken a total of five tons of steel. The trial court set the matter over for an evidentiary hearing.

At the evidentiary hearing,[3] the State presented evidence from: Douglas Eric Myers, a representative of the company that had manufactured the bridge; Deputy Derek Allen, the investigating officer; and Shannon Robert Henriquez, a forest service civil engineer. Pettis also testified.

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[2] The restitution hearing was held June 28, 2013.

[3] The evidentiary hearing was held August 2, 2013.

During its cross-examination of Pettis, the State asked him about the plea, including whether he had "stipulated to restitution for this incident as part of the plea." RP at 166. Pettis responded, "Yes." RP at 166. Defense counsel also responded, "The stipulation was the State could ask for restitution." RP at 166.

Myers estimated that the cost to repair the bridge, which comprised six modules, was $188,000, which included freight and the cost to replace all damaged or missing bridge components. This included the cost to completely replace a 32-foot module and a 52-foot module. But the estimate did not break down the prices by item or by module, and Myers refused to break down the prices further. Myers also testified that the total weight of all the materials required to repair the bridge was 85,000 pounds.

After the evidence was presented, Pettis argued that the trial court should consider Pettis's ability to pay. He also argued that there was no evidence as to exactly what damage he had caused and that the damages were not easily ascertainable. Finally, he asked the trial court to reject the $188,000 request and set the restitution amount "based on the testimony and on the evidence that's before the Court, thinks is reasonable and appropriate under these circumstances." RP at 177.

Based on all of the evidence, the trial court concluded that the bridge comprised six modules and that two of these modules were "untouched," two were entirely gone, one was damaged beyond repair, and one was damaged but could be repaired. RP at 186-87. It further concluded that it was unlikely that Pettis was responsible for the two missing modules, so it would only impose restitution for the two damaged modules.

After acknowledging that the $188,000 repair costs had not been broken down, the trial court stated:

> So the best I could do would be. . . To replace these you'd have to replace two that were gone entirely and replace or fix two that were damaged, so I basically assigned twice the value to the two that were gone entirely. I did an algebraic equation here and I figured, okay, the two that are gone entirely are going to be worth double the amount of two that have to be repaired, and by doing that I figured that the cost of repairing the — a damaged module would be roughly $31,333.00, and so there was two of them that were damaged — whereas the two that were totally removed I would've put a value on each of those of more like 62 or $63,000.00, and so given that there was two that were damaged and needed to be repaired, I figured the value of those or the, the portion of [$]188,000 attributable to those I would put at $62,666.00. So, first of all, that's the best estimate, based on all the evidence, that I can make as to what this Defendant should be charged with, and the obligation should be joint and several.

RP at 188-89. After considering Pettis's income, disabilities, medical, and tax liabilities, the trial court lowered the restitution to $24,000.

The State moved for reconsideration, arguing the trial court improperly took Pettis's ability to pay into consideration when setting the amount of restitution. Pettis opposed this motion, arguing that the trial court had the authority to consider his ability to pay when setting restitution. The trial court granted the State's motion to reconsider and set the restitution at $62,666.

Pettis appeals the restitution order.

ANALYSIS

I. COURT'S AUTHORITY TO IMPOSE RESTITUTION

Pettis first argues that the trial court had no authority to impose restitution for an uncharged crime, the first degree theft, because he did not expressly agree to pay restitution for that offense. Based on the record as a whole, we disagree.

A trial court's authority to impose restitution is derived entirely from statute. *State v. Woods*, 90 Wn. App. 904, 906-07, 953 P.2d 834 (1998); *see also State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). A trial court may only award restitution for losses not related to the

crime for which the defendant is convicted if the defendant enters into an express agreement to make such restitution as part of a plea bargain process. RCW 9.94A.753(5);[4] *see also Woods*, 90 Wn. App. at 908; *State v. Miszak*, 69 Wn. App. 426, 429, 848 P.2d 1329 (1993).

Placing particular emphasis on the fact the trial court asked Pettis if he understood that "as a part of this guilty plea [he had] *apparently* agreed" to the State requesting restitution for the original charge, Pettis contends that the trial court merely assumed that there had been an express agreement. RP at 19 (emphasis added). Although Pettis is correct that the plea statement does not specifically state that Pettis had agreed to pay restitution based on the original first degree theft charge, the record as a whole is sufficient to establish an express agreement.

Pettis cites no authority stating that the express agreement must be contained within the written plea statement.[5] In fact, case law shows that the trial court can look beyond the plea statement to determine if there was an express agreement. For instance, in *State v. Fleming*, 75 Wn. App. 270, 277, 877 P.2d 243 (1994), despite less than clear language in the defendant's

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[4] RCW 9.94A.753(5) provides:

> Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. *In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or 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 prosecuted pursuant to a plea agreement.*

(Emphasis added.)

[5] We acknowledge that the best practice would be to clearly state this agreement in the plea documents.

plea statement, Division One of this court held that the defendant had agreed to the prosecutor's recommendation that he pay restitution related to a possibly uncharged crime by (1) admitting to the uncharged loss at the restitution hearing, (2) arguing to the trial court that only the disputed issue was the value of other items, and (3) failing to object to the State's request for the uncharged restitution until appeal. The record here provides even stronger support for the conclusion that Pettis expressly agreed to allow the State to seek restitution for the original charge.

First, the plea statement clearly stated that the State was seeking restitution in the amount of $188,000 and that the recipient of the restitution was the United States Forest Service. Although the plea statement did not state that this restitution was related to the original first degree theft charge, it is apparent from the amount and the payee that it was related to the original charge, not the crime Pettis pleaded guilty to. Second, although the trial court stated that Pettis had "apparently" agreed that the State would recommend the restitution as part of the plea deal, Pettis expressly acknowledged during the plea colloquy/sentencing hearing that as part of the plea statement the State would request restitution related to the original charge. RP at 19. Third, during the restitution hearing, both Pettis and his counsel confirmed that he had stipulated that the State could ask for restitution for the theft as part of the plea. And, fourth, as in *Fleming*, at no point during the plea colloquy/sentencing hearing or restitution hearing did Pettis assert that the State

could not request restitution for the originally charged offense.[6] The only aspect of the restitution Pettis disputed was the amount of the restitution given the lack of evidence demonstrating that he had caused any specific damage. Accordingly, as in *Fleming*, we hold that the record as a whole demonstrates that Pettis expressly agreed to allow the State to request restitution related to the original first degree theft charge and, thus, the trial court had the authority to impose that restitution.

II. No Ineffective Assistance of Counsel

Pettis next argues that his trial counsel provided ineffective assistance of counsel by failing to challenge the trial court's authority to impose restitution based on the originally charged offense. This argument fails.

We review an ineffective assistance claim de novo, beginning with a strong presumption that trial counsel's performance was adequate and reasonable. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). To prevail on an ineffective assistance of counsel claim, Pettis must show both deficient performance and resulting prejudice; failure to show either prong defeats this claim. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

[6] Pettis cites to *State v. Dauenhauer*, 103 Wn. App. 373, 379-80, 12 P.3d 661 (2000), for the premise that his counsel's later agreement with the trial court's inquiry at sentencing was not sufficient to establish statutory authority for the imposition of restitution. *Dauenhauer* is not helpful here because it did not involve a plea agreement or examine whether there was an express agreement to allow the State to seek restitution based on a dismissed original charge.

To show prejudice here, Pettis must establish that there was a reasonable probability that the trial counsel could have established that the trial court did not have the authority to impose the restitution. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). As discussed above, based on this record, the trial court had the authority to impose the restitution. Accordingly, this argument fails.[7]

III. Amount of Restitution

Finally, Pettis argues that the amount of the restitution was not supported by the record because the trial court's calculation was based on conjecture and speculation. We agree.

A. Standard of Review

We review for abuse of discretion a trial court's decision to impose restitution and the amount of that restitution. *Woods*, 90 Wn. App. at 906. Abuse of discretion exists when the trial court's decision is manifestly unreasonable or the court exercised its discretion on untenable grounds or for untenable reasons. *Id.* at 906.

Establishing the appropriate amount of restitution need not be specifically accurate, but the loss claimed must be supported by substantial credible evidence. *Fleming*, 75 Wn. App. at 275. The trial court must have a reasonable basis for determining the estimated loss and its

[7] We note that if there is evidence outside the record demonstrating that there was in fact no express agreement, we cannot consider that evidence in this direct appeal. *McFarland*, 127 Wn.2d at 335 (personal restraint petition is the appropriate means of raising issues that require evidence or facts outside the trial record).

determination must not be based on mere speculation or conjecture. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008).

B. RESTITUTION FORMULA

The trial court determined the amount of restitution by applying a formula that assumed that the cost to repair the damaged bridge modules was half of what it would cost to replace the missing modules. But this assumption was not based on any evidence in the record and appears to be mere speculation and conjecture. Furthermore, assigning the same loss value to each of the two damaged modules also supports the conclusion that the amount was speculative and not based on the evidence because the evidence established that damages to each of the damaged modules were not identical. Accordingly, we agree with Pettis that the restitution amounts were speculative and not supported by the evidence and we reverse the restitution order and remand for a new restitution hearing.

Pettis argues that the State may not present any additional evidence on remand. The State does not respond to this argument. Because introducing new evidence on remand would conflict with the statutory requirement that restitution be set within 180 days after sentencing,[8] we agree with Pettis. *Griffith*, 164 Wn.2d at 968 n.6.

We hold that the trial court had the authority to impose the restitution and that Pettis does not establish ineffective assistance of counsel. But we reverse the determination of the restitution

[8] RCW 9.94A.753(1)

amount as speculative and remand for a new restitution hearing based on the existing evidence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Bjorgen, A.C.J.
BJORGEN, A.C.J.

Lee, J.
LEE, J.