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JUN 03 2009

King County Prosecutor
Appellate Unit

NO. 62434-2-I

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

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN -3 PM 3:58

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW OYER,

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

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A. ARGUMENT IN REPLY

1. COUNSEL WAS INEFFECTIVE IN FAILING TO MEANINGFULLY CONTEST DAMAGE TO THE CAR BECAUSE OYER DID NOT STIPULATE ANY CARS WERE ACTUALLY DAMAGED.

The State argues Oyer's attorney made a tactical choice not to contest the fact of damage to the car because to do so would have violated Oyer's plea agreement. This argument overstates the import of the plea agreement. Oyer pleaded guilty to *attempting* to cause damage to a window and a motor vehicle. CP 8. He also agreed to pay restitution for "any vehicles damaged by broken window." CP 14. It is at best an exaggerated reading of the plea agreement to say that Oyer agreed the car was damaged. Ambiguities in plea agreements are strictly construed against the State as the drafter. State v. Bisson, 156 Wn.2d 507, 522, 130 P.3d 820 (2006). Thus, there was no risk to Oyer's plea deal by challenging the fact of damage to the car. There was no strategic reason to abandon this challenge. 1RP 3.

2. THE COURT ABUSED ITS DISCRETION BY RELYING ON THE DOUBLING PROVISION.

While the court did not apply the SRA's doubling provision to double the amount of restitution awarded, the court did reason that it need not "flyspeck" the amount of restitution on that basis. 2RP 16. But the doubling provision does not "serve as a safety margin to preserve an

otherwise erroneous restitution order.” State v. Fleming, 75 Wn. App. 270, 276, 877 P.2d 243 (1994). “Any increase or doubling of restitution pursuant to the statute should be a consciously exercised choice by the court, utilized to further the purposes of the restitution statute.” Id. The doubling provisions in the SRA and other restitution statutes do not substitute for substantial credible evidence affording a reasonable basis for estimating loss. Id.; State v. Soderholm, 68 Wn. App. 363, 378, 42 P.2d 1039 (1993).

The State also argues double restitution would have been appropriate in this case under RCW 9A.20.030. Brief of Respondent at 36. This is incorrect. RCW 9A.20.030 does not apply to Oyer’s case. That statute provides that the court may order restitution up to twice the victim’s damages, “in lieu of imposing the fine authorized for the offense under RCW 9A.20.020.” RCW 9A.20.030. Thus, that statute only authorizes restitution in cases where a fine could be imposed under RCW 9A.20.020. In turn, RCW 9A.20.020 provides that it applies only to crimes committed prior to July 1, 1984. RCW 9A.20.020. Since Oyer’s crime was not committed before July 1, 1984, no fine could be imposed and RCW 9A.20.030 does not authorize restitution in his case. The only statutes authorizing restitution in Oyer’s case are RCW 9.92.060 and RCW 9.95.210, neither of which permits doubling of the damages.

3. THE COURT IMPROPERLY DELEGATED ITS DUTY TO SET THE TERMS OF RESTITUTION.

This Court has discretion to consider even claims not preserved by objection. RAP 2.5; State v. Alexander, 64 Wn. App. 147, 150, 822 P.2d 1250 (1992). Restitution is entirely a creature of statute. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). Nothing in the statute permits the court to delegate its authority to set the terms of restitution. RCW 9.95.210. Nor does any statute require the Department of Corrections to assume that duty. Contrary to the State's brief, the Department's duty to determine whether restitution has been made as required does not include determining a payment schedule. RCW 9.95.210(5). Thus, Oyer respectfully requests this court exercise its discretion to review this issue and hold that the court is required to set a schedule for payment of restitution as part of the terms and conditions of restitution.

B. CONCLUSION

For the foregoing reasons and the reasons contained in the opening Brief of Appellant, Oyer respectfully requests this court reverse the restitution order or remand for the court to set a payment schedule.

DATED this 3d day of June, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script that reads "Jennifer J. Sweigert". The signature is written in black ink and is positioned above the printed name.

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Appellant.

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF JUNE, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MATTHEW OYER
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SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF JUNE, 2009.

x *Patrick Mayovsky*