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NO. 63768-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STEVEN BURNS,

Appellant.

2010 MAY 28 PM 1:44
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN LUM

BRIEF OF RESPONDENT

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A. ISSUES

A trial court is required to order restitution either at sentencing or within 180 days of sentencing. If the court orders restitution, it may modify the amount during any point that the defendant remains on court supervision. Here, the trial court ordered restitution at sentencing and later modified the amount of restitution while Burns remained on court supervision. Did the court exceed its statutory authority in modifying the earlier restitution amount?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

The State charged defendant Steven Burns by second amended information with one count of First Degree Theft, two counts of Second Degree Theft, and one count of Forgery, all committed against AllTech Collision. CP 13-14. The State alleged that routinely over two years, as an employee of AllTech, Burns made unauthorized payments and forged checks to himself. CP 70-72. Burns pleaded guilty to these reduced charges and agreed to a restitution amount of \$8,923.25 for the charged counts with an

understanding that the State would seek additional restitution on the uncharged counts at a later date. CP 57-83.

At sentencing, on May 16, 2008, the trial court ordered restitution in the amount of \$8,923.25 to AllTech Collision, but indicated in its order that "additional restitution will be requested for losses in this case, including for uncharged crimes." CP 25, 28. Burns indicated that he did not waive his presence at any future restitution hearings. CP 25.

Burns failed to appear for his report date to jail, discharged his attorney, and a warrant was issued for his arrest. CP 26, 56; Supp. CP __ (Sub 83); Supp. CP __ (Sub 84). On September 19, 2008, he was eventually arrested on the warrant, and served four months in jail. Supp. CP __ (Sub 85A).

On November 26, 2008, the State filed a notice of a restitution hearing for December 15, 2008, where it sought "to address the issue of additional restitution." CP 88 (emphasis in original). Burns, acting pro se, continued this restitution hearing multiple times in an attempt to find new counsel. 2RP¹ 8-9; CP 89-91. After these continuances, the court appointed counsel to

¹ The Verbatim Report of Proceedings will be referred to as follows: 1RP (Sentencing 05/16/08); 2RP (04/14/09); 3RP (05/07/09); 4RP (06/04/09).

represent Burns. Supp. CP __ (Sub 90). Defense counsel reset the hearing to April 14, 2009. Supp. CP __ (Sub 95); 2RP at 4. Burns failed to appear at this hearing, and the court issued a warrant. Supp. CP __ (Sub 95). On April 14, 2009, Burns' defense counsel filed an objection that the restitution hearing was untimely, since it was after November 12, 2008, the 180th day after sentencing. CP 84. The State informed the court that this was a hearing to modify the court's earlier restitution order. 2RP 8-9. The court indicated it would allow the hearing to proceed in order to consider modifying the restitution. 2RP 13-14.

On April 17, 2009, Burns' warrant was quashed, he waived his presence at future hearings, and the court rescheduled the hearing for May 7, 2009. Supp. CP __ (Sub 96). The hearing began on May 7 and ended on June 4, 2009, at which time the court ordered an extra \$73,237.40 to AllTech Collision and \$20,000 to Zurich Insurance through a ruling that "modifies the original Order Setting Restitution signed May 16, 2008 to reflect additional losses incurred by the victims . . . [pursuant to] RCW 9.94A.752(4)." CP 100. Burns now appeals his restitution. CP 87.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY MODIFIED THE AMOUNT OF RESTITUTION.

Burns argues that the trial court ordered additional restitution in this case without statutory authority. Because the clear language of the statute authorizes such a modification, Burns' claim fails.

A court's authority to order restitution as a condition of sentence for a criminal offense is purely statutory. State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). Restitution pursuant to a felony conviction is governed by the Sentencing Reform Act of 1981 (SRA) under RCW 9.94A.030(42) and RCW 9.94A.753.

Those statutes provide as follows:

“Restitution’ means a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specified period of time as payment of damages. The sum may include both public and private costs.” RCW 9.94A.030(42).

“[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.” RCW 9.94A.753(3).

The language of the restitution statute is intended to grant broad powers of restitution to the courts. State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991). Imposition of restitution is generally within the sound discretion of the trial court and is reviewed under an abuse of discretion standard. Id. at 919. Courts reject overly technical constructions that would allow an offender to avoid just punishment. Davison, 116 Wn.2d at 922.

However, despite the discretion granted to the trial court in determining restitution, there are statutory mandates and directives as to when restitution amounts may be ordered or amended. See RCW 9.94A.753(1),(4). "When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days. . ." RCW 9.94A.753(1) (emphasis added). "The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime." RCW 9.94A.753(4). The term "shall" is mandatory and the term "may" is directory of the trial court. State v. Knall, 125 Wn.2d 146, 148-49, 881 P.2d 1040 (1994).

The restitution statute "unambiguously allows the total amount of restitution to be modified 'during any period of time the offender remains under the court's jurisdiction.'" State v. Gonzalez, 168 Wn.2d 256, 266, 226 P.3d 131 (2010) (quoting RCW 9.94A.753(4)). The trial court's modification of the "amount" of restitution refers to the total restitution, not simply the monthly payment of restitution already ordered. Id. at 264. "[I]t is clear that the statute is intended to ensure that defendants fulfill their responsibility to compensate victims for losses resulting from their crimes." Id. at 265. "When the legislature enacted the restitution statute, it clearly stated its intent that victims be afforded legal protections at least as strong as those given criminal defendants." Id.

The trial court here ordered the amount of restitution at the sentencing hearing. CP 28. Specifically, the court determined that AllTech Collision was entitled to restitution in the amount of \$8,983.25. CP 28. The court executed this restitution order, at the sentencing hearing, as authorized by statute. RCW 9.94A.753(1). Thus, the trial court properly ordered the initial restitution amount.

The court later modified this initial restitution. CP 85. This modification increased the earlier restitution amount by \$73,237.40.

CP 85; 4RP 126. The court's decision to modify the restitution amount was within its discretion, since it still had jurisdiction over Burns. Id.; see 9.94A.753(4); State v. Gonzalez, 168 Wn.2d at 266. As such, the total restitution ordered by the trial court, including its modification, was statutorily authorized.

Burns argues that the restitution modification needed to be completed within 180 days of sentencing, otherwise he claims that the 180-day deadline is read out of the restitution statute. He misapplies the statute by erroneously combining its two separate and distinct sections.

The court must make an initial determination of restitution either at sentencing or within 180 days of sentencing. RCW 9.94A.753(1). The statute sets a deadline to order restitution at 180 days after sentencing, *if* it was not ordered at the sentencing hearing. Id. In our case, the restitution amount was determined at sentencing to be \$8,983.25. CP 45². Because restitution was ordered at sentencing, the 180-day deadline does not apply.

² The trial court's "Order Setting Restitution" is listed in the Clerk's Papers as a part of the Judgment and Sentence at CP 45 and separately in the Clerk's Papers at CP 53.

A separate section of the restitution statute unambiguously authorizes the trial court to modify the initial restitution amount while the defendant remains under court supervision. RCW 9.94A.753(4); Gonzalez, 168 Wn.2d at 266. There is no 180-day deadline to modify restitution. Id. The cases cited by Burns involve initial restitution hearings that were untimely, contrary to RCW 9.94A.753(1). See State v. Prado, 144 Wn. App. 227, 249, 181 P.3d 901 (2008) (an initial order must be entered within 180 days); State v. Tetreault, 99 Wn. App. 435, 438, 998 P.2d 330 (2000) (an initial restitution hearing held after 180 days after the State struck an otherwise timely hearing is invalid); Knall, Wn.2d at 148-50 (an initial hearing must be held within the 180³ days); State v. Ryan, 78 Wn. App. 758, 762-63, 899 P.2d 825 (1995) (an agreed ex parte initial restitution order must be determined accurately within 180 days if the defendant objects to specific portions of the order). These cases do not impose a time limit on modifying a valid initial restitution amount. As long as the trial court still has jurisdiction over the case, the court may modify the restitution it ordered at sentencing.

³ The former RCW 9.94A.753(1) required that the initial restitution hearing be held within 60 days of sentencing. For consistency throughout this brief, the expiration will be listed at 180 days.

Burns next contends that the trial court was prohibited from considering new evidence in his modification hearing. To support his argument, he cites cases that prevent the State from presenting new evidence in a restitution hearing after remand on appeal. State v. Griffith, 164 Wn.2d 960, 968, 195 P.3d 506 (2008); State v. Dennis, 101 Wn. App. 223, 229-30, 6 P.3d 1173 (2000). These cases are inapposite in that they do not hold that evidence must be excluded from modification hearings; they hold that when the State does not meet its evidentiary burden to prove the initial restitution amount, it cannot use new evidence upon remand to achieve this same purpose. Id. The idea behind modification hearings is to consider new evidence and amend the initial amount of restitution in an effort to make the victim whole. See Gonzalez, 168 Wn.2d at 266. A trial court may also consider new evidence at a modification hearing that would support reducing the restitution amount, as appropriate. Thus, the trial court properly considered the new evidence when it modified Burns' restitution amount.

Finally, Burns argues that a trial court should only modify restitution in "cases where medical or other expenses accrue after the 180-day period expires." Appellant's Brief at 9. He contends

that the restitution statute limits modifications to these circumstances. This statutory interpretation, he argues, keeps a 180-day deadline but is still consistent with the facts of Gonzalez. Through this proposed interpretation, Burns is essentially asking this court to read language into the statute so that a time limit can be placed on certain modifications.

"Where the Legislature omits language from a statute, intentionally or inadvertently, the court will not read into the statute the language it believes was omitted." State v. Moses, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002). There is no basis to interpret the statute as imposing a time limit on certain modifications. Indeed, the statute expressly states the opposite; modifications may be made at "any period of time."⁴ RCW 9.94A.753(4). The clear statutory language does not support Burns' claim. As such, the trial court properly modified its restitution order to AllTech Collision.⁵

⁴ Restitution determined at the sentencing hearing "may be modified as to amount, terms, and conditions *during any period of time* the offender remains under the court's jurisdiction. . ." RCW 9.94A.753(4) (emphasis added).

⁵ Since the State concedes that there is insufficient evidence to sustain the \$20,000 in restitution for Zurich Insurance, the only restitution at issue is the additional \$73,237.40 ordered to AllTech Collision. Infra § C.1.a.

- a. The State Concedes That There Is Insufficient Evidence To Support Restitution For Zurich Insurance.

As a part of the trial court's modified order of restitution, the court ordered that Burns pay Zurich Insurance \$20,000. The State concedes that there is insufficient evidence in the record to support this restitution to Zurich Insurance.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Burns' restitution owed to AllTech Collision and remand to invalidate the restitution owed to Zurich Insurance.

DATED this 27th day of May, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jonathan Palmer, the attorney for the appellant, at Nielsen, Broman, & Koch, 1908 E. Madison St., Seattle, WA 98122, containing a copy of the Respondent's Brief, in STATE V. STEVEN BURNS, Cause No. 63768-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

05/28/10

Date