

NO. 66355-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KIMBERLY LINDBERGH,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Kimberly Lindbergh pled guilty to driving while under the influence and reckless driving after she hit a parked car. The State did not recommend the court impose restitution as part of her sentence. The judgment and sentence did not impose restitution, set an amount for restitution, or indicate that a restitution award will be determined at a later date. Five months later, at the request of the State and without relying on any authority, the court amended the judgment and sentence and imposed restitution. The trial court erred when it amended the judgment and sentence to include restitution not previously ordered or requested by the State.

B. ASSIGNMENT OF ERROR

The trial court erred in amending the judgment and sentence to include restitution.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court lack authority to amend the judgment and sentence five months after entry to impose restitution where the court cited no authority and none is provided by statute?

D. STATEMENT OF THE CASE

Ms. Lindbergh pled guilty to one count driving while under the influence, RCW 46.61.502 and .504, and one count reckless

driving, RCW 46.61.500, after she hit a parked car. CP 8-15; see CP 4.

In the statement on guilty plea, Ms. Lindbergh recognized the State would make certain sentencing recommendations. CP 9. However, Ms. Lindbergh did not acknowledge any recommendation by the State as to restitution. See CP 9-10. Her statement contains only boilerplate language that the ‘judge may also order me to make restitution to any victims who lost money or property as a result of crimes [she] committed.’ CP 10. While the restitution box is checked on the “Non-felony Plea Agreement and State’s Recommendation” form, no amount, victim or procedure is specified. CP 23.

At the sentencing hearing, the State did not request any restitution be imposed. RP 24-27. The court did not impose restitution. RP 44-49. The judgment and sentence accordingly does not include an order of restitution. CP 25. Nor does it provide for a restitution hearing at a future date. CP 25.

Five months after entry of the judgment and sentence, the State sought restitution. See RP 65. At the hearing, the court noted that the judgment and sentence did not order restitution. RP 70. The court indicated that, in order to impose restitution, there

would need to be a motion to amend the judgment and sentence. RP 71-72. The State orally moved to amend. RP 72. The court granted the motion, amended the judgment and sentence and ordered restitution to the victim and his insurance company for damage to his parked car. RP 73; CP ___ (Sub # 61 (Order Setting Restitution)).¹

E. ARGUMENT

The court lacked authority to amend the final judgment and sentence to include restitution.

A sentencing court has discretion in sentencing only where authorized by statute. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). An award of restitution for a misdemeanor offense is authorized under RCW 9.92.060(2), RCW 9.95.210(2), and RCW 9A.20.030. Because sentences are based on factors that can be known at the time of sentencing, generally there is no need to grant the power to modify the sentence at a later date. *State v. Shove*, 113 Wn.2d 83, 86, 776 P.2d 132 (1989) (quoting D. Boerner, *Sentencing in Washington* § 4.1, at 4-1 (1985)).

¹ A supplemental designation of clerk's papers has been filed requesting the trial court transmit the Order Setting Restitution to the Court.

RCW 9A.20.030 places the burden on the prosecutor “to investigate . . . restitution, and to recommend it to the court, when the prosecuting attorney believes that restitution is appropriate and feasible.” RCW 9A.20.030(1). Nonetheless, the State did not recommend restitution as part of Ms. Lindbergh’s plea. RP 5-6 (reciting State’s sentencing recommendation). The State also did not recommend restitution at the sentencing hearing. RP 24-27 (no request for restitution). The State did not seek restitution even though, by the time of sentencing, the State had before it all the facts necessary to seek an order of restitution at the time of sentencing, RP 68-69 (recognizing that documents at time of plea noted damage to other vehicle); see RP 19 (at entry of plea, State seeks time to advise victim prior to sentencing).

Likewise, the court did not include restitution in its sentence. RP 44-47. The Judgment and Sentence is silent as to any requirement for restitution. CP 25; see RP 60 (noting sentence carefully considered when entered).

When the State sought restitution months later, the court relied on no specific authority to amend the judgment and impose restitution for the first time. See 69-73. Because the trial court had no authority under the restitution statutes to modify the sentence

and impose a new restitution order, the modification was erroneous.

This Court should vacate the order of restitution and reverse the trial court's order amending the judgment and sentence to include restitution.

F. CONCLUSION

Because the trial court lacked authority to amend the judgment and sentence to include restitution, that provision of the judgment and sentence should be stricken, the order amending the judgment and sentence reversed and the order of restitution vacated.

DATED this 12th day of January, 2012.

Respectfully submitted,



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Respondent,)	
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] KIMBERLY LINDBERGH 2608 2 ND AVE. APT 138 SEATTLE, WA 98121	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF JANUARY, 2012.

X _____ *[Signature]*

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