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NO. 67626-1-1

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

REC'D
JAN 31 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JORGE CUEVAS-SANCHEZ,

Appellant.

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

The Honorable John P. Erlick, Judge

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN 31 PM 4:32

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it placed the burden on appellant to prove he did not owe restitution.

Issue Pertaining to Assignment of Error

Appellant pled guilty to vehicle prowling. After initially claiming no losses, the victim claimed an iPod was stolen from his car and requested restitution. The defense contested this claim. It is the State's burden to establish restitution. At the restitution hearing, however, the court indicated it was ordering restitution, but might have been persuaded not to do so had appellant stated he did not take the iPod. Did the court erroneously shift the burden of persuasion to appellant at the hearing?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Jorge Cuevas-Sanchez with Attempted Theft of a Motor Vehicle. CP 1-4.

According to the Certification for Determination of Probable Cause, on the evening of February 18, 2011, at a Southcenter Mall parking lot, a woman alerted security that she had seen a Hispanic male "pop the lock" of a Honda Civic. CP 3. A security officer found Cuevas-Sanchez in the car and asked if the vehicle belonged to him.

Cuevas-Sanchez said it belonged to a friend, he did not have a key, but the car had been unlocked. CP 3.

As a security supervisor arrived, Cuevas-Sanchez ran. With the assistance of a Tukwila Police Officer, Cuevas-Sanchez was stopped and arrested. He declined to speak. The owner of the Honda, Rafael Suarez-Serrantos, told police he did not know Cuevas-Sanchez and did not give him permission to be in the car. CP 3.

In exchange for Cuevas-Sanchez's guilty plea, the charge was amended to Vehicle Prowling in the Second Degree. CP 5-18. Cuevas-Sanchez agreed to pay restitution "for any damage or loss to the stolen vehicle or its contents." CP 18; RP 10. The Honorable John Erlick imposed a 12-month suspended sentence and ordered restitution to be determined at a subsequent hearing. CP 30-31; RP 18-19. Cuevas-Sanchez waived his presence at that hearing. RP 19.

Suarez-Serrantos filled out a "stolen vehicle worksheet," which he submitted to the King County Victim Assistance Unit. On the worksheet, he claimed that a "brake lock pedal" had been damaged and that his iPod Nano was missing from his car. Supp. CP ____ (sub no. 36, Stolen Vehicle Worksheet).

Defense counsel opposed the restitution request and supplemented the record with reports from Tukwila Police Officers and mall security. CP 34-49. Regarding the iPod, the reports indicate that after examining the vehicle, Suarez-Serrantos “confirmed that nothing appeared stolen.” CP 47. Moreover, a search of Cuevas-Sanchez did not reveal an iPod, only what looked to be shaved keys. CP 45, 47. None of the officers’ involved reported seeing Cuevas-Sanchez throw or otherwise dispose of any property while chasing him in the parking lot. CP 44-48. Counsel argued the State had failed to prove a causal connection between the offense and the missing iPod.¹ CP 40-41.

Defense counsel repeated this argument regarding the iPod at the restitution hearing. RP 25-28. In response, Judge Erlick asked, “We don’t have anything from the defendant saying he didn’t take the Nano, correct?” RP 28. Counsel confirmed there was not a denial, but noted he had not admitted taking the iPod, either. RP 28.

¹ Counsel also challenged restitution concerning the brake pedal lock. Counsel later conceded this argument was a “bit weaker” than that regarding the iPod. RP 27.

After finding restitution appropriate for the brake pedal lock,

Judge Erlick addressed the iPod:

On the Nano, it's – Nano is a pretty small item, and what we have here is a statement by a victim saying the Nano was taken. I'm not particularly surprised that he might not be aware at the time it was in the car. It's a very small, portable device, and I think like many of us, we lose our PDAs or iPhones all the time in terms of misplacement.

So I think that the defendant – I'm sorry, the victim, or the State in this case on behalf of the victim, carried the initial burden of proof and has carried that initial burden of proof, and it's not really directly controverted. I understand that the pursuing, I guess security officers, may well not have seen him slough off the Nano or any other items, but that doesn't mean he didn't do it.

If the defendant had come in by way of declaration or affidavit and said I didn't take anything from that car, it would be more difficult, but I've got a victim saying this was taken, and the defendant is not coming in and saying I didn't take it, and I will grant restitution for the amount of – the amount of \$249.

RP 29-30.

Defense counsel argued that by pleading guilty to a crime that only involved an intent to commit theft, Cuevas-Sanchez had denied the theft.² Judge Erlick was not persuaded. RP 30. He ordered

² The information to which Cuevas-Sanchez pled guilty alleged that he "did unlawfully enter or remain in a vehicle, a Honda

Cuevas-Sanchez to pay \$34.99 to replace the brake pedal lock and \$249.95 to replace the iPod for a total of \$284.94. RP 31; CP 51. Cuevas-Sanchez appealed. CP 53-54.

C. ARGUMENT

THE SENTENCING COURT ERRED WHEN IT PLACED THE BURDEN ON CUEVAS-SANCHEZ TO PROVE THE VICTIM WAS NOT ENTITLED TO RESTITUTION FOR THE MISSING IPOD.

Restitution is authorized “whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property” RCW 9.94A.753(5). There must be a causal relationship between the proved offense and the victim's losses, and trial courts are not authorized to order restitution for acts merely connected to a charged crime. State v. Tettters, 81 Wn. App. 478, 480, 914 P.2d 784 (1996); State v. Tindal, 50 Wn. App. 401, 403, 748 P.2d 695 (1988). “A causal connection is not established simply because a victim or insurer submits proof of expenditures for replacing property stolen or damaged” State v. Dedonado, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000).

Civic belonging to Rafael Suarez-Serrantos, with intent to commit the crime of theft therein.” CP 5.

Notably, it is the State's burden to establish the amount of restitution owed, including the necessary causal connection, by a preponderance of the evidence. State v. Kinneman, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004), aff'd 155 Wn.2d 272, 119 P.3d 350 (2005); State v. Dennis, 101 Wn. App. 223, 226, 6 P.3d 1173 (2000); Dedonado, 99 Wn. App. at 257.

The trial court's order of restitution is reviewed for an abuse of discretion. This Court will find an abuse of discretion where the trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51, review denied, 120 Wn.2d 1015, 844 P.2d 436 (1992). The trial court abused its discretion here.

Although established case law makes clear it is the State's burden to prove the victim's entitlement to restitution and the amount, Judge Erlick improperly placed the burden on Cuevas-Sanchez to disprove the victim's entitlement. He noted there was nothing in the record demonstrating Cuevas-Sanchez had denied taking the iPod. RP 28. He then repeatedly relied on the fact Cuevas-Sanchez had not directly denied taking the iPod. RP 29

("it's not really directly controverted"); RP 30 ("If the defendant had come in by way of declaration or affidavit and said I didn't take anything from the car, it would be more difficult . . . and the defendant is not coming in and saying I didn't take it, then I don't know if it's directly controverted").

These comments reveal that the court improperly penalized Cuevas-Sanchez for not affirmatively denying that he took the iPod. The court improperly shifted the burden of disproving the restitution request to him. It was the State's, and only the State's, burden to prove restitution was authorized and warranted. Whether the State met that burden – in light of Suarez-Serrantos' conflicting claims regarding any losses – should not have turned on whether Cuevas-Sanchez provided a statement concerning the iPod.

In Dedonado, the sentencing court also improperly placed a burden on the defense regarding restitution. The court held that the State had established restitution, without having to prove a causal connection between the crime and the victim's losses, because the defense had failed to notify the State prior to the restitution hearing that it intended to challenge the victim's documentation of asserted

losses. Dedonado, 99 Wn. App. at 252-255. Noting that the State bore the burden to prove disputed restitution, this Court held that the defense had no obligation to object to the restitution documents beforehand. The court had abused its discretion in imposing an unwarranted burden on the defense, and the restitution order was reversed. Id. at 257-258.

That is the remedy here. Because Judge Erlick improperly imposed a burden on Cuevas-Sanchez to affirmatively indicate he did not take the iPod, he abused his discretion. The restitution order must be reversed.

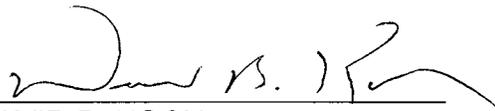
D. CONCLUSION

This Court should vacate the restitution order.

DATED this 31st day of January, 2012.

Respectfully submitted,

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DIVISION ONE

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)	
Respondent,)	
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v.)	COA NO. 67626-1-I
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JORGE CUEVAS-SANCHEZ,)	
)	
Appellant.)	

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 31ST DAY OF JANUARY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JORGE CUEVAS-SANCHEZ
1050 SW 151ST STREET #300
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SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JANUARY 2012.

x Patrick Mayovsky

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2012 JAN 31 PM 4:32