

NO.
72043-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

TED GRIMES,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SEAN P. O'DONNELL

REPLY BRIEF

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A. ISSUES PRESENTED

Ted Grimes is challenging the trial court ordered monthly restitution payment of \$700 per month toward his outstanding restitution as the said amount substantially exceeds the statutory allowed amount.

Grimes also contends that the six month financial reports to the clerk's office exceeds the authority of the trial court. The trial court does require Grimes to report his daily whereabouts to the court every day for a year by using reverse logic and requiring Grimes to provide financial information far in excess of what the clerk needs in order to determine the proper restitution payment in violation of Grimes' Fourth and Fifth Amendment rights.

Grimes is not claiming he should not pay restitution, only that he pay the correct amount as prescribed by law.

B. APPELLANTS STATEMENT OF THE CASE

Ted Grimes was originally charged with “unauthorized control over the funds of another” for performing the services of an Intermediator for tax-deferred exchanges under Section 1031 of the Internal Revenue Code which the State Department of Financial Institutions (DFI) declared fell under the definition of escrow under RCW 18.44.010. RCW 18.44.010 was enacted in 1964, three years prior to the federal tax case of Starker v U.S. which first authorized tax-deferred exchanges and the escrow definition was never revisited until 1999. Grimes performed these services under the business name of Pacific Coast Data Services, Inc. a business not regulated by DFI. Grimes also owned Pacific Coast Escrow, Inc. which was fully licensed and under the direct supervision of DFI. Prior to Grimes’ trial the State Legislature, aware of Grimes’ situation through State industry lobbyists, amended the definition of escrow specifically excluding the Section 1031 tax-deferred exchanges from the definition of

escrow. RCW 18.44.011, Chapter 30 Laws of Washington, 1999. The State erroneously argued at trial that the change in definition was not retroactive and Grimes actions were in violation of then current law.

Grimes discovered, while in prison and after his sentence was final, that the change in the definition of escrow in 1999 was, indeed, fully retroactive and he violated no law when performing the Intermediary acts. “We [State Supreme Court] have previously found legislation to have retroactive, curative effect when ‘it clarifies or technically corrects an ambiguous statute.’” State v. Dunaway, 109 283, 291 (1972); In re F.D. Processing, Inc., 119 Wn2d 452, 461 (1992). Grimes should have been found not guilty on those charges.

In 2006, the clerk, without requesting any financial information from Grimes, raised his restitution payments to \$4,500 per month in violation of his Judgment and Sentence and without any court direction. At the 25% rate, Grimes would have had to earn \$18,000 per month to require that restitution payment. Grimes was only earning a fraction of that amount at the time.

Grimes' financial situation has been under intense scrutiny since DFI began their investigation of him in 1996. DFI, as regulator of the banking and financial industry used their impressive powers to scan the country to find where Grimes had hidden his so-called stolen funds. DFI even reported to the IRS that Grimes had hidden, untaxed resources. Both agencies searched and searched but could not find any hidden funds as there just were none. All the missing funds were in the form of promissory notes secured by deeds of trust which had been turned over to the Bankruptcy Court by Grimes.

Two independent certified public accountants hired by DFI to examine the books of Pacific Coast Escrow, Inc. placed the shortage in the escrow trust account at close to \$300,000. They did not look at Pacific Coast Data Services, Inc. in their review. The Bankruptcy Court collected \$740,000 cash from those promissory notes. Safeco Insurance added an additional \$500,000 from the fidelity bond insurance policy of Pacific Coast Escrow, Inc. Yet the Bankruptcy Court incredulously still came up over \$600,000 short to cover the escrow shortage.

Prudence Brownell, a King County Clerk, reported that Grimes continuously failed to pay restitution as required. She was addressing the \$4,500 per month that greatly exceeded Grimes' total monthly income.

In 2008 Grimes was issued a subpoena to provide all financial information including all bank statements from both personal and business accounts going back three years. Grimes provided the clerk with over 250 pages of data which was everything the clerk has asked for. In 2012 Grimes was issued another subpoena, again to provide all financial information including all bank statements from both personal and business accounts going back another three years. Another 250 plus pages of data was supplied to the clerk which, again, was everything the clerk had asked for. In both instances Grimes signed the authorization for the clerk to obtain the income tax records of Grimes. Yet the clerk continues to claim, without merit, that Grimes is hiding his financial data.

C. ARGUMENT

- 1. THE COURT ONLY HAS LIMITED AUTHORITY TO IMPOSE A PAYMENT SCHEDULE FOR RESTITUTION AND TO CHANGE THAT SCHEDULE AS NEEDED PER STATUTE.**

The issue before this Court is whether the trial court erred by abusing its discretion in ordering Grimes to make \$700 monthly restitution payments based upon the information it received at the violation hearing in 2014. Grimes does not challenge the courts' right to order restitution in this appeal, only the monthly amount to be paid as ordered by the trial court.

The total amount to be withheld from the offender/employee's earnings each month, or from each earnings disbursement, shall not exceed twenty-five percent of the **disposable earnings** of the offender. (emphasis added) RCW 9.94A.7603. The total amount to be withheld from the defendant's earnings each month, or from each earnings disbursement, shall not exceed twenty-five percent of the **disposable earnings** of the defendant. If the amounts to be paid toward the arrearage . . . , or twenty-five percent of the **disposable earnings** of the defendant, whichever is less. (emphasis added) RCW 9.94A.7703.

The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amount required by law to be withheld. RCW 9.94A.7601.

Grimes' retirement disbursements in the form of Social Security, Military Retirement, ERISA and other federal controlled retirement funds are to be deducted from his gross earnings to arrive at the disposable income from which restitution is to be paid.

(See Argument 4 below for more detailed argument and citations.)

The State argues in its' Respondent Brief that in 2009 Grimes earned \$32,639.00 which, when divided by 12 months, equals \$2,719.61 per month. Of that figure, \$1,330 was from Grimes' Social Security payment and \$866.66 was from his military retirement leaving a nonexempt net of \$522.95, resulting in a restitution payment of \$52.30 instead of the \$407.98 as stated in the States' Response Brief. Similarly from the States' Response Brief Grimes income for the years below is:

2010 monthly income	\$3,290.25
Grimes social security	(1,350.00)
Grimes military pension	(866.66)
net monthly income	1,073.59
restitution amount due (15%)	161.04
States' incorrect amount	822.56

2011 monthly income	\$2,568.08
Grimes social security	(1,409.00)
Grimes military pension	(883.91)
net monthly income	275.17
restitution amount due (10%)	27.52
States' incorrect amount	385.21

2012 monthly income	\$3,100.08
Grimes social security	(1,360.00)

Grimes military pension	(931.38)
Grimes Boeing pension	(338.47)
net monthly income	470.23
restitution amount due (10%)	47.02
States' incorrect amount	775.02

Once a court has ordered restitution, it may modify its order “as to amount, terms, and conditions during any period of time the offender remains under the court’s jurisdiction.” RCW 9.94A.753(4). However, the total amount to be withheld from the offender/employee’s earnings each month, or from each earnings disbursement, shall not exceed twenty-five percent of the disposable earnings of the offender. RCW 9.94A.7603.

2. THE TRIAL COURT ERRED WHEN CONSIDERING GRIMES’ ENTIRE FINANCIAL SITUATION WHEN ORDERING HOW MUCH HE SHOULD PAY PER MONTH.

Grimes owes such a large amount of restitution (\$1.6 million) that it will never be paid in full in the twenty years after release from total confinement as specified in RCW 9.94a.753. Grimes will be ordered to pay the statutory maximum amount each remaining month toward that figure well into 2025 when the restitution time limit arrives.. Living expenses are immaterial in that calculation, only income. The living expenses portion of the financial requests only pertain to calculating a

restitution payment when the restitution will actually get paid off.

Grimes has already supplied the clerk with over 500 pages of financial data in response to two subpoena's for said information. Nothing significantly has changed in Grimes' financial situation. Requiring essentially the same data again in only two years when Grimes has been retired and not working for both of those years amounts to harassment on the part of the clerk. It is in retribution for Grimes asking the trial court to order the clerk to negotiate with Grimes for a partial release of judgment so Grimes could sell his home. Grimes had offered the clerk over \$100,000 from the proceeds of his quarter interest in the property toward his restitution payment. The clerk refused and the trial court determined it did not have the authority to compel the clerk to negotiate. RP 89,90.

Grimes' current monthly disposable earnings are \$75.16 after subtracting out his exempt retirement funds from his gross income. At the 10% rate, Grimes would pay \$7.52 in monthly restitution payments. Grimes currently also owes \$1,653,705 in restitution. Office of the County Clerk, Legal Financial Obligations statement. Grimes Judgment and Sentence was entered in 1999. Grimes was released from total confinement in August, 2005. Grimes' offenses were committed in 1996.

Grimes therefore is under the court's jurisdiction until September 2025.

RCW 9.94A.753. Basic math shows Grimes would have to pay well over \$165,370 per year or well over \$13,780 per month to pay off the restitution amount in full – not counting the annual interest at the 10% per annum figure. At 25% of his disposable income, Grimes would have to earn over \$55,000 per month from non-exempt sources to fully pay the amount owed for restitution.

The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have. RCW 9.94A.753(1).

Taking into consideration the total amount owed, it is apparent that it is highly unlikely that Grimes will ever pay off what is owed in full.

Sections 1 and 2 of RCW 9.94A.753 presume the restitution amount will be paid in full at some point and gives the court leeway in drafting a restitution plan to fit the financial situation of the offender while still accomplishing the payment in full of the restitution. The annual interest on Grimes' restitution at the statutory rate of 10% alone is over \$165,000 per year.

The court cannot dictate Grimes pay more than 25% of his disposable income toward restitution. RCW 9.94A.7603. With the huge amount owing, the court should only consider and verify Grimes' income. He will be paying the maximum amount allowable each month.

3. THE TRIAL COURT DID ATTACH PART OF GRIMES' INCOME.

The trial court did attach part of Grimes' income when it ordered a restitution payment of \$700.00 per month. 2014 Order on Failure to Pay Hearing – Setting Monthly Payment Schedule. The trial court considered Grimes exempt retirement income in its' calculations to arrive at the \$700 figure. RP 92-93. The trial court was very clear that it was looking at all the income amounts Grimes was receiving including the social security, pension, and military benefits. RP 93.

Black's Law Dictionary defines attachment as: "the act or process of taking, apprehending, or seizing persons or property, by virtue of a writ, summons, or other judicial order, and bringing the same into the custody of the law." The trial court, by virtue of a judicial order is taking Grimes' exempt income and bringing the same into the custody of the law.

4. RESPONDENT IGNORES THE LEGAL BASIS THAT A TRIAL COURT IS PROHIBITED BY FEDERAL STATUTE FROM CONSIDERING SOCIAL SECURITY OR FEDERAL PENSION BENEFITS WHEN IT DETERMINES MONTHLY RESTITUTION PAYMENTS.

Every person sentenced to imprisonment in any penal institution shall be under the protection of the law, and any unauthorized injury to his or her person shall be punished in the same manner as if he or she were not so convicted or sentenced. A conviction of crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein. RCW 9.92.110.

The right of any person to any future payment under this title [Social Security Act] shall not be transferable or assignable, at law or in equity, and **none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.** (emphasis added) Section 207 [42 U.S.C. 407] (a).

No other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section. Section 207 [42 U.S.C.

407](b).

Payments of benefits due or to become due under any law administered by the Secretary [of Defense] shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, **and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.** (emphasis added) 38 U.S.C. Sec. 5301(a)(1).

We consider whether the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U.S.C. Section 1001 *et seq.*, pre-empts a state law allowing a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits. Given the pervasive significance of pension plans in the national economy, the congressional mandate for their uniform and comprehensive regulation, and the fundamental importance of community property law in defining the marital partnership in a number of States, the question is of undoubted importance. We hold that ERISA pre-empts the state law. Boggs v Boggs, 520 U.S. 833 (1997).

ERISA Section 514(a) pre-empts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by the statute. 29 U.S.C. Sec. 1144(a).

ERISA’s anti-alienation provision reflects a policy choice on the part of Congress “to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them.” Patterson v Shumate, 504 U.S. 753, 765, 112 S.Ct. 2242. The court looked to the United States Supreme Court, which has explained that ‘it is not appropriate for a court to approve any generalized equitable exception to an antigarnishment provision even for criminal misconduct, despite a ‘natural distaste for the result.’” Anthis v Copland, 173 Wn.2d 752 (2112) To that end, the anti-alienation provision requires that every pension plan include a prohibition on assigning or alienating benefits provided under the plan. The Treasury Regulations, [1056(d)(1)] under the plan, which interpret this provision and are entitled to deference under Chevron U.S.A., Inc. v Natural Resources Defense Council, [467 U.S. 837, 104 S.Ct 2778] define the terms “assignment” and “alienation” as including any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a

right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

Unless otherwise provided by federal law, any money received by any citizen of the state of Washington as a pension from the government of the United States, whether the same be in the actual possession of such person or be deposited or loaned, shall be exempt from execution, attachment, garnishment, or seizure by or under any legal process whatever, . . . RCW 6.15.020(2).

The right of a person to a pension, annuity, or retirement allowance or disability allowance, or death benefits, or any optional benefit, or any other right accrued or accruing to any citizen of the state of Washington under any employee benefit plan, and any fund created by such a plan or arrangement, shall be exempt from execution, attachment, garnishment, or seizure by or under any legal process whatever. . . . RCW 6.15.020(3).

For the purposes of this section, the term “employee benefit plan” means any plan or arrangement that is described in RCW 49.64.020, including . . . or an individual retirement account or an individual retirement annuity . . . RCW 6.15.020(4)

5. STATE LAW DOES NOT PREEMPT FEDERAL LAW IN THIS INSTANCE.

The preemption doctrine is based on the Supremacy Clause of the United States Constitution. “Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.” State law is preempted if Congress passes a statute that expressly preempts it, Congress occupies an entire field of regulation, state law conflicts with federal law, making compliance with both an impossibility, or state law presents an obstacle to accomplishing the federal purpose. State v Grimes, COA No. 45289-4-1 (consolidated with 46534-1-1). Congress occupies the entire field of regulation for the Social Security Act. Congress occupies the entire field of regulation for the U.S. Military. ERISA pre-empts “any and all state laws.” 29 U.S.C. Sec. 1144(a).

6. EVEN THOUGH GRIMES IS UNDER THE JURISDICTION OF THE TRIAL COURT FOR PURPOSES OF RESTITUTION, GRIMES DOES NOT FORFEIT HIS CONSTITUTIONAL RIGHTS UNDER THE FOURTH OR FIFTH AMENDMENTS OF THE U.S. CONSTITUTION.

The State contends that “nowhere does the trial court order Grimes to

report his daily whereabouts.” State v. Grimes, Brief of Respondent, p.15.

Paragraph 3 of the trial court ordered “Monthly Financial Report of Ted Grimes” reads: “Below are all dates when I was away from the above address [my home] for more than 24 hours during the period covered by this report, including where I was (address, city, and state) during each absence. By reverse engineering, Grimes whereabouts is known daily to the State. He is either at home or at an address reported away from home.

The Fourth Amendment to the U.S. Constitution reads: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” “. . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and

suffering which have resulted in their embodiment in the fundamental law of the land. Elkins v United States, 364 U.S. 206, 80 S.Ct. 1437.

The protections of article I, section 7 are triggered only when a person's private affairs are disturbed or the person's home invaded. City of Seattle v McCready, 123 Wn.2d 260 .An unlawful search occurs when the State has unreasonably intruded into a person's private affairs. State v Young, 123 Wn.2d at 181. The uselessness of the State search for non-income financial affairs of Grimes has been discussed in Argument #2 above.

The fifth amendment to the United States Constitution states in part that “[no person] shall be compelled in any criminal case to be a witness against himself ...” This right has been incorporated into the due process clause of the Fourteenth Amendment and therefore binds the state. Malloy v Hogan, 378 U.S. 1 (1964). Further, the state constitution contains a similar provision, which states in part that “[n]o person shall be compelled in any criminal case to give evidence against himself ...” Const. art. 1, sec. 9. This court has held that the two provisions should be given the same interpretation. State v Mecca Twin Theater & Film Exch., Inc. 82 Wn.2d 87 (1964); State v Moore, 79 Wn.2d 51 (1971). The term

“compelled” has been held to connote that the accused was forced to testify against his will, and that testimony was exacted under compulsion and over his objection. State v Van Auken, 77 Wn.2d 136 (1969)

“The right against self-incrimination is liberally construed It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt. State v Easter, 130 Wn.2d 228, 236 (1996).

The trial court has every intention of using the inquisitorial method of investigation in their MONTHLY FINANCIAL REPORT OF TED GRIMES, as evidenced by paragraph 12 in that report which reads: “I understand that this report is intended to be used in any future court proceedings dealing with my probation and the conditions on that probation and may be filed in the court file.”

D. CONCLUSION

The U.S. Congress has set the priority that retirement income is favored and protected over victim’s restitution.

The trial court erred in including Grimes’ exempt social security income, his exempt military retirement income and his exempt ERISA

income in calculating his new monthly restitution payment of \$700 per month. Further, the restitution amount was calculated on gross income and not disposable income as required by statute.

The trial court erred in attaching the exempt portion of Grimes' income as delineated above. There is substantial legal basis for exempting that income from Grimes restitution payments.

State law does not preempt federal law in this instance.

The inquisitorial methods in the trial courts' MONTHLY FINANCIAL REPORT OF TED GRIMES violates his Fourth and Fifth Amendment rights under both the U.S. and Washington State Constitution. It does require Grimes, who has fully completed the incarceration portion of his sentence and is under no community custody order, to report his daily whereabouts to the court. It also requires Grimes to report detailed household bills and debts where it is no business of the court where he spends the remainder of his income after paying restitution in violation of his right of privacy. Grimes is not challenging the courts' right to his detailed income situation, only his private spending habits which also include the spending habits of his wife, an innocent party and subject also to the constitutional protections.

A handwritten signature in black ink, appearing to read 'Ted Grimes', written over a horizontal line.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TED J. GRIMES,)	
)	
Appellant,)	No. 72043-1
v.)	CERTIFICATE OF
)	SERVICE
)	
STATE OF WASHINGTON,)	
Respondent,)	

I hereby certify that on June 22, 2015, I filed the Appellant Brief for the Court of Appeals, Division I in the above reference Cause. I certify that I deposited in the U.S. Mail, postage prepaid, the document to the following participants:

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Ted Grimes
Defendant, pro se