72057-1

72057-1

NO. 72057-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BOYSEN,

Appellant.

REC'D
OCT 01 2014
King County Prosecutor
Appellate Unit

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

The Honorable Douglass North, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it ordered appellant to pay $6,387.43 in restitution for an automobile that has been recovered, is in law enforcement's possession, and will be released to the owner.[1]

Issue Pertaining to Assignment of Error

Appellant pled guilty to killing his grandparents. Following the crimes, he took and drove the victims' automobile, eventually leaving it in a parking lot before finding new transportation. The car was recovered and remains in police custody. Given that the car will be released, did the sentencing court err when it awarded the insurer the full value of the vehicle as restitution?

B. STATEMENT OF THE CASE

Michael Boysen was charged with two counts of Aggravated Murder in the First Degree for the deaths of his grandparents, Robert and Norma Taylor. CP 1-2. Boysen entered an Alford[2] plea because of the substantial likelihood he would be convicted at a trial, his remorse, and his desire to spare his family additional trauma and

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[1] The court's Order Setting Restitution is attached to this brief as an appendix.

[2] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

grief. CP 21.

Boysen agreed the court could consider the Certification for Determination of Probable Cause in establishing the factual basis for his pleas. CP 21. According to that document, Boysen was released from the Monroe Correctional Complex on March 8, 2013. His grandparents, Robert and Norma Taylor, picked him up and drove him to their Renton home, where several family members celebrated Boysen's homecoming with a dinner party. CP 4. At the conclusion of the party, all guests left, leaving Boysen to spend the night at his grandparents' home. CP 5.

The following afternoon, the bodies of Robert and Norma Taylor were found in a closet. They had been strangled. CP 5, 8. Norma's purse and cell phone, and Robert's wallet, were missing, as were silverware, jewelry, coins, and a substantial amount of cash. CP 6-7. Boysen left the home in the Taylors' red 2001 Chrysler 300. CP 5.

Police eventually located the Chrysler in a Wal-Mart parking lot in Salem, Oregon. Next door to the Wal-Mart is Valley Motors, where Boysen paid cash for a 2002 Ford Taurus. CP 7. On the morning of March 12, 2013, police learned that Boysen had checked in to a motel in Lincoln City, Oregon. His Ford Taurus was located in

the motel parking lot, and Boysen was taken into custody. CP 7. A search of the Ford revealed a firearm and evidence linking Boysen to the murders. CP 7.

On October 18, 2013, the Honorable Douglass North imposed consecutive life sentences. CP 112. Boysen did not appeal. The State sought restitution for the victims' estate, but the parties were unable to agree on the amount. To allow additional negotiations, and by agreement of the parties, on March 26, 2014, Judge North extended the 180-day deadline to May 15, 2014. CP 118.

The King County Prosecutor's Office Victim Assistance Unit (VAU) submitted documents in support of restitution. The VAU requested $6,387.43 – payable to the Taylors' insurer, The Hartford, for the value of the 2001 Chrysler plus expenses associated with the valuation – and $500.00 payable to the Taylor estate as reimbursement for the deductible on the automobile policy. CP 125-151.

On May 7, 2014, Judge North ordered Boysen to pay $500.00 to his grandparents' estate for the deductible. CP 220. The matter was continued, however, for further investigation regarding the requested payment to The Hartford. Supp. CP ___ (sub no. 221, Order to Continue Restitution Hearing). Judge North had questioned

whether Boysen should get some credit against his obligation because the Chrysler was recovered and sitting in police custody. RP 3.

The parties reconvened on June 11, 2014. RP 3. The State argued that, because Boysen's actions resulted in loss of the car to the estate, which the insurance company then reimbursed, Judge North had discretion to award full restitution to the insurer. RP 4. Patty Shelledy, legal counsel for the King County Sheriff's Office, explained that, for cases involving a death, their office holds evidence indefinitely. And because the Chrysler had potential evidentiary value, they would hold the car for the period in which Boysen could seek to withdraw his guilt pleas through a collateral attack. Shelledy indicated that could be a period of several years. RP 5-8.

Judge North pointed out that eventually the car will be released, it will have value, and it will be sold for an amount that will reduce Boysen's liability. RP 6. He also noted the car was of "very marginal evidentiary value." RP 8. The prosecutor responded that it was impossible to determine the car's evidentiary significance without a trial and argued that, when the car is released and sold, Boysen can request a reduction in his obligation. Until then,

however, the issue of any offset was not ripe. RP 8-10.

Defense counsel pointed out that Boysen no longer had a right to appeal (that right expired 30 days after his sentencing) and his right to bring a collateral attack would expire on October 18 (one year from sentencing). RP 12. Counsel argued there was no legal authority for the State to simply retain the car for evidentiary purposes and make Boysen foot the bill for that retention. RP 16-17.

Judge North granted the State's restitution request for the car, finding that any other action would be premature and must wait until the car is eventually released by law enforcement. RP 14. Judge North clarified that this was his ruling "at least until the point in which collateral attack expires." RP 17. Defense counsel suggested the matter be continued again until after October 18. RP 17. Judge North refused to do so, but added, "At the point where collateral attack expires, we can talk about whether there should be some sort of a credit or offset based upon what can be realized upon selling the car." RP 17.

Judge North entered a supplemental restitution order adding $6,387.43 payable to The Hartford. RP 19; CP 121-122. Defense counsel timely filed a Notice of Appeal. CP 152-154.

C. ARGUMENT

THE COURT ERRED WHEN IT ORDERED RESTITUTION FOR THE FULL VALUE OF THE VICTIMS' CAR.

A trial court's authority to impose restitution is controlled by statute. State v. Hiett, 154 Wn.2d 560, 563, 115 P.3d 274 (2005). 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). Restitution orders are reviewed for an abuse of discretion. State v. Dauenhauer, 103 Wn. App. 373, 377, 12 P.3d 661 (2000), review denied, 143 Wn.2d 1011, 21 P.3d 291 (2001).

"If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence." State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). While certainty of damages need not be shown with specific accuracy, due process requires an opportunity to refute the evidence presented and requires that the evidence be reliable. State v. Pollard, 66 Wn. App. 779, 784-785, 834 P.2d 51, review denied, 120 Wn.2d 1015, 844 P.2d 436 (1992). The court must not engage in mere speculation or conjecture, and the amount of restitution must be supported by substantial credible evidence. Id.

at 785. "Notwithstanding the forgiving abuse of discretion standard, the record must permit a reviewing court to determine exactly what figure is established by the evidence." Id.

Judge North erred when he ordered restitution for the full value of the Chrysler. The car was not a total loss. It is not missing. There is not even evidence it was damaged. Rather, it is in the possession of law enforcement, intact, and worth more than $6,000.00. Everyone agrees that, eventually, law enforcement will release the car and that it will have value at that time. Yet, restitution has been set based on permanent loss of the full value of the car. No one believes this will prove to be an accurate determination. The proper course was to simply wait until law enforcement releases the car and then set restitution accordingly.

A restitution order must be issued within 180 days of sentencing unless, for demonstrated good cause, the period is extended prior to expiration of that deadline. RCW 9.94A.753(1); State v. Johnson, 96 Wn. App. 813, 816-817, 981 P.2d 25 (1999). And once restitution has timely been ordered in a case, the sentencing court has broad discretion to modify the terms and the amount thereafter so long as it retains jurisdiction. State v. Gray, 174 Wn.2d 920, 922-936, 280 P.3d 1110 (2012); State v. Gonzalez,

168 Wn.2d 256, 261-266, 226 P.3d 131, cert. denied, 131 S. Ct. 318, 178 L. Ed. 2d 207 (2010); RCW 9.94A.753(4) ("[t]he 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 . . . .").

Thus, the sentencing court can order *some* amount of restitution within 180 days (or beyond 180 days for good cause) and modify that amount thereafter. This is the proper approach for cases in which there is obviously restitution due, but the full amount cannot be known within 180 days of sentencing. See Gray, 174 Wn.2d at 935 (citing State v. Halsey, 140 Wn. App. 313, 326-327, 165 P.3d 409 (2007)); Gonzalez, 168 Wn.2d at 266.

In Boysen's case, after properly extending the 180-day deadline, Judge North initially ordered $500.00 in restitution to the Taylor estate for losses associated with the Chrysler. This timely order can be modified in the future, after release of the car, when the court and parties can finally and accurately assess the total amount of loss associated with the car.

Setting restitution for the full value of the car was an abuse of discretion. Moreover, because the total amount ordered is excessive, Boysen also will pay unwarranted interest. See RCW

10.82.090(1) (financial obligations bear interest from date of judgment); State v. Claypool, 111 Wn. App. 473, 474-476, 45 P.3d 609 (2002) (accrual of interest on restitution obligation may not be deferred), review denied, 148 Wn.2d 1004, 60 P.3d 1211 (2003).

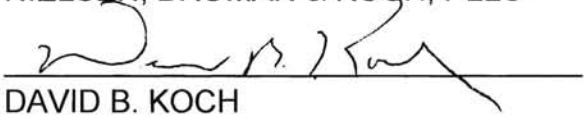
D. CONCLUSION

Judge North timely entered a restitution order. He is authorized to modify the amount once the car is released and the victims' true loss can be accurately established. This Court should vacate that portion of the supplemental restitution order requiring Boysen to pay $6,387.43 to The Hartford.

DATED this 30th day of September, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

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DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. MICHAEL CHADD BOYSEN, Defendant,	No. 13-1-02123-1 SEA SUPPLEMENTAL ORDER SETTING RESTITUTION

The court ordered payment of restitution as a condition of sentencing. The Court has determined that the following are entitled to restitution in the following amounts.

IT IS ORDERED that defendant make payments through the registry of the clerk of the court as follows:

~~The Estate of Robert Taylor~~
~~C/O Susan Campbell~~
~~C/O King County Clerk's Office~~
~~516 3rd Ave, 6th Floor~~
~~Seattle, WA 98104~~

$500 to the Estate of Robert Taylor has previously been ordered.
~~AMOUNT $500.00~~

The Hartford
PO Box 7247-7744
Philadelphia, PA 19170
RE: Account #SBB406019

AMOUNT $ 6,387.43

Please pay The Estate of Robert Taylor first.

DONE IN OPEN COURT this 11th day of ~~April~~ June, 2014.

Douglass A. North
JUDGE DOUGLASS A. NORTH

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Presented by:

Deputy Prosecuting Attorney

Copy received; Notice
Presentation waived: Objections noted for the record

James Conroy
Attorney for Defendant

Order Setting Restitution
CCN# 1816248 REF# 033420178

AM

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