

FILED
March 29, 2016
Court of Appeals
Division I
State of Washington

NO. 73149-1-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

ROSEMARY KAMB,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR WHATCOM COUNTY

The Honorable Ira J. Uhrig, Judge

RESPONDENT'S BRIEF

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I. ISSUES

1. Where the defendant has failed to act as a fiduciary, should she be entitled to any trustee fees to offset the restitution order?
2. Where the evidence supports that a check was not a legitimate expenditure and where there is no documentation or explanation regarding another check, did the trial court properly exercise discretion in including those amounts in the restitution order?

II. STATEMENT OF THE CASE

The State accepts the appellant's statement of the case.

III. ARGUMENT

- 1. Where the defendant failed to act as a fiduciary she was not entitled to an offset of the restitution order for trustee fees.**

The defendant seeks to have this matter remanded to the trial court for a determination of what reasonable compensation to her would be and to have that amount offset the restitution order.

Restitution shall be based on easily ascertainable damages for, among other things, loss of property. RCW 9.94A.753(3). "Easily

ascertainable damages are tangible damages supported by sufficient evidence. But '[c]ertainty of damages need not be proven with specific accuracy.' Instead, Washington courts have held that "[o]nce the fact of damage is established, the precise amount need not be shown with mathematical certainty." *State v. Tobin*, 132 Wn. App. 161, 173, 130 P.3d 426 (2006) (citations omitted).

"Restitution is appropriate if the damages are foreseeable and there is a causal connection between the defendant's crime and the injuries for which compensation is sought." *State v. Kisor*, 82 Wn. App. 175, 180, 916 P.2d 978 (1996) (citations omitted).

Any interpretation of RCW 9.94A.753 should be consistent with the "legislative intent to grant broad powers of restitution." *Kisor*, 82 Wn. App. at 184 *citing State v. Davison*, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991).

"When the particular type of restitution in question is authorized by statute, imposition of restitution is generally within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Davison*, 116 Wn.2d at 919, *citing State v. Morse*, 45 Wn. App. 197, 199, 723 P.2d 1209 (1986). The appellate court will find an abuse of discretion "only if the decision is

“manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.”” *Tobin*, 132 Wn. App. at 173 (citations omitted).

In short, the restitution statute allows the trial court considerable discretion in determining restitution, “which ranges from none (in some extraordinary circumstances) up to double the offender’s gain or the victim’s loss.” *State v. Kinneman*, 155 Wn.2d 272, 282, 119 P.3d 350 (2005). Nor does the statute require that “the restitution ordered must be equivalent to the injury, damage or loss, either as a minimum or a maximum.” *Kinneman*, 155 Wn.2d at 282.

Tobin, 132 Wn. App. at 174.

Restitution may be based on estimated damages so long as the evidence is sufficient to provide a reasonable basis for that estimation. *Tobin*, 132 Wn. App. at 174.

In *Tobin*, the defendant was running an illegal operation and so did not keep complete or accurate records. The appellate court noted that “Tobin should not escape paying restitution simply because he failed to keep detailed and accurate records of his criminal activities.” *Tobin*, 132 Wn.App. at 175.

Here, expert witness Julia DeHaan, CPA, testified regarding her forensic review of all documents available concerning the defendant’s trust administration and her resultant conclusions. She testified about the money that went into and out of various accounts and how she made determinations about what funds were

legitimately expended for the benefit of the trust and what funds went to the defendant or to her benefit. 2RP 53-55, 57-62¹.

She testified that there was very little documentation on what the checks were written for and there was no contemporaneous accounting after a month or so after Mr. Keating died. She testified to the lack of receipts justifying the expenditures. 2RP 62. Regarding any records maintained by the defendant, the only thing DeHaan saw were some handwritten notes that appeared to indicate what various checks were written for in the first few weeks after Mr. Keating's death. But after that, there was nothing. 2RP 63.

DeHaan also testified as to what the responsibilities of a trustee are: to safeguard assets, to keep records, to provide an accounting to the beneficiaries. 2RP 85-86. The defendant² did none of these things.

In terms of trustee compensation, expert witness Sheila Ridgway, Esq., testified that she reviewed the trust document and that it provided for "reasonable compensation" for services but that "there was no duty to pay compensation or reimbursement to any trustee . . . unless and until the trustee submitted a request or billing

¹ Consistent with the appellant's briefing, 2RP refers to the VRP for 1/12/15, 1/14/15, 1/20/15, 1/21/15, and 1/29/15.

² In this brief, the State refers to the defendant as the trustee and to the subsequent trustee as the successor trustee.

for compensation and reimbursement.” She went on to testify that under the current circumstances where the trustor has died, a trustee would comply with this requirement by “keep[ing] a detailed log and to generate invoices on a monthly basis.” The defendant did not do this. 2RP 268-269.

Ridgway also opined on the duties of a trustee. The trustee’s primary duty is one of loyalty. As part of that duty, a trustee has an obligation to present an understandable record. The defendant did not comply with this duty. 2RP 273. Another duty is to preserve the estate and protect it on behalf of the beneficiaries. 2RP 275. One of the ways that the defendant breached this duty was by moving funds from the original D.A. Davidson account and putting them in a non-growth account. 2RP 285.

The defendant wants this matter to be remanded to the trial court for a fact-finding hearing on what fee is appropriate and to have this fee offset the total restitution amount. The defendant argues that because the State has the burden of proving the restitution amount, the State therefore has the burden of proving an appropriate fee to the defendant.

It is the State’s position that because the defendant utterly failed to act as a fiduciary in this case, the trial court did not abuse its

discretion in determining that she was not entitled to any trustee fees. The defendant failed to document and keep records, failed to perform an accounting, failed to safeguard the assets and protect the estate on behalf of the beneficiaries, and failed to comply with her duty of loyalty.

After finding that the defendant intentionally used the funds from the trust for her own benefit and that her acts “constituted a clear breach of fiduciary duty,” the trial court found that the defendant was not entitled to any payment because of her clear mismanagement and misdirection of funds. 2RP 731. Because of her criminal actions, the defendant “is not entitled to anything.” 2P 731-732.

Even if the defendant did take action which under other circumstances may be considered to benefit the trust, there was sufficient evidence here to establish that the defendant took every action, including potentially paying legitimate expenses, for purposes of maintaining control of the trust so that she could loot it. To the extent that the defendant did any “legitimate” work on trust, it was for overall purpose of redirecting the funds to herself or her own benefit.

The trial court acted within its discretion in determining that the defendant was not entitled to any offset for trustee fees in light of her looting of the trust.

Furthermore, the defendant is not entitled to compensation under the terms of the trust itself as she did not keep a detailed log and did not generate invoices on a monthly basis.

Even if this court were to hold that the defendant were entitled to an offset of trustee fees, a remand for purposes of fact-finding would serve no purpose. The defendant was solely in charge of the trust and was responsible for keeping records. She did not keep records. There is no other information to present to the trial court other than what was already presented at the hearing. The defendant argues that the State has the burden of proving restitution owed, which is true enough. However, the defendant is not correct that the State bears the burden of establishing what legitimate trustee fees would be here. That would be an impossibility. The defendant left no records to establish what, if any, legitimate activity she did do. As the trial judge put it, “Ms. Kamb was undeniably in a position of responsibility for the funds that were in this trust. The money was there and it seems to have disappeared without actually being accounted for in any legitimate or rational fashion. The money just seems to be gone, and a lot of it.” 2RP 730. A fact finding hearing would not accomplish anything. To paraphrase the court in *Tobin*, the

defendant should not benefit from a trustee fee offset simply because she failed to keep detailed and accurate records.

The defendant notes the testimony of DeHaan and Ridgway that the time to administer this trust might be about 40 hours, in total. The State would note, however, that the defendant did not complete administration of the trust. So 40 hours of activity should not be imputed to her. In fact, the most that can be attributed to the defendant is the paying of some bills within the period after Keating's death and the paying of one beneficiary. Ridgway testified that she could not calculate any fee that might be appropriate here because there was no way to tell what the defendant actually did on behalf of the trust. 2RP 290. After the defendant was removed from the trust, a successor trustee was appointed to administer the trust.

Consistent with the intent of the legislature to grant broad powers of restitution, the trial court acted within its discretion in declining to offset the restitution amount with any trustee fees.

2. The trial court properly exercised its discretion in awarding restitution.

A. Checks to Skagit Valley Medical Center and Skagit Valley Hospital.

The State concedes that these checks appear to have been a legitimate expense to be paid from the trust.

B. “Health Care” check

The defendant argues that \$166.50 should be taken off the restitution figure. The defendant fails for note that on re-direct, DeHaan explained further about the “health care” check. She explained that there were actually two such checks. One check written payable to the health care entity for \$166.50, and a different check written to “cash,” notated to be for health care, and endorsed by the defendant. DeHaan treated one check as legitimate and the other as going to the benefit of Kamb. 2RP 247.

The trial judge did not abuse his discretion in declining to treat this check as a legitimate expenditure.

C. Check to Josephine White.

The precise amount of restitution need not be shown with mathematical certainty. *State v. Tobin*, 132 Wn. App. at 173.

DeHaan in her review of the records did not find any support for the check to Josephine White being a legitimate expense of the trust. The defense did not rebut this evidence.

The trial judge did not abuse his discretion in finding that the Josephine White check was not a legitimate expenditure.

IV. CONCLUSION

For the reasons stated above, this Court should affirm the restitution order.

DATED this 29th day of March, 2016.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:
I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Casey Grannis, addressed as Nielsen, Broman & Koch, 1908 East Madison, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 29th day of March, 2016.


KAREN R. WALLACE, DECLARANT