

FILED
February 10, 2016
Court of Appeals
Division I
State of Washington

NO. 74042-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS BAKER,

Appellant.

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

The Honorable Thomas J. Wynne, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court erred when it failed to make appellant's liability for restitution joint and several with his co-defendant.

Issue Pertaining to Assignment of Error

At sentencing, the judge indicated his intent to make appellant and his co-defendant jointly liable for any restitution owed the victim and her insurer. By the time the restitution order ultimately was entered, however, the court forgot to make appellant's co-defendant jointly liable. Should the restitution order be amended to reflect the court's intent?

B. STATEMENT OF THE CASE

The Snohomish County Prosecutor's Officer charged Nicolas Baker with Burglary in the Second Degree and Possession of a Controlled Substance. His co-defendant in the case is Cory Redford. CP 70-71.

Evidence at trial revealed that, during the early morning hours of December 1, 2014, an alarm was tripped at the Hilton Pharmacy in Marysville. 2RP¹ 13, 18-19. Police responded and found both

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – September 22, 2015; 2RP – September 23 and

Baker and Redford on the roof of businesses adjoining the pharmacy. 1RP 44, 47-50. A hole had been cut in the roof immediately above the pharmacy, providing access to shelves containing prescription medications. 1RP 51-52, 81-82; 2RP 20. Police also found three backpacks that contained, among other items, burglary tools and prescription drugs taken from the pharmacy. 1RP 49, 61, 79, 85-87, 104-108; 2RP 21-30.

Jurors convicted Baker as charged. 2RP 75-76; CP 43, 45. Co-defendant Redford was convicted in a separate proceeding. 2RP 84. At sentencing, the prosecutor indicated he would be seeking \$7,939.18 in restitution for replacement of the stolen prescription drugs and repairs to the pharmacy roof, but did not yet know the defense position on that amount and had not yet prepared a restitution order. 2RP 82. The defense did not contest restitution, but lamented the fact that, because Redford was going to be serving a longer sentence than Baker based on his criminal history, much of the restitution obligation would likely fall on Baker. 2RP 84.

The court imposed a total sentence of five months in jail. 2RP 85-86; CP 15. The court reserved on restitution, but indicated that any liability would be made joint and several with Redford. 2RP 86.

October 1, 2015.

Two weeks later, the court entered a restitution order requiring Baker to pay \$7,939.18 in restitution. CP 1. Baker had waived his presence for entry of this order. CP 2. The stock form indicates in apparently preprinted language, "Restitution shall be joint and several with:". CP 1. Unfortunately, Redford's name was not filled in. The space following this language was left blank. CP 1.

Baker timely filed his Notice of Appeal. CP 10-11.

C. ARGUMENT

THE RESTITUTION ORDER SHOULD BE AMENDED TO MAKE BAKER'S LIABILITY JOINT AND SEVERAL.

The sentencing judge intended to make Baker and Redford jointly and severally liable for the significant restitution owed in this case. 2RP 86. This is commonly done, under RCW 9.94A.753, in cases involving multiple defendants. See, e.g., State v. Cosgaya-Alvarez, 172 Wn. App. 785, 789 n.1, 291 P.3d 939, review denied, 177 Wn.2d 1017, 304 P.3d 114 (2013); State v. Raleigh, 50 Wn. App. 248, 250, 748 P.2d 267, review denied, 110 Wn.2d 1017 (1988).

Unfortunately, by the time the restitution order was entered two weeks later, the judge forgot to indicate on that order that liability was joint and several. This was a mere scrivener's error. A

"scrivener's error" is synonymous with a "clerical mistake." See In re Personal Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2003). "A clerical mistake is one that when amended would correctly convey the intention of the court based on other evidence." State v. Priest, 100 Wn. App. 451, 455, 997 P.2d 452 (2000) (citing Presidential Estates Apartment Assoc. v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). The remedy for such an error is remand for correction of the error. Mayer, 128 Wn. App. at 701-02.

Undersigned counsel recognizes the mistake on the restitution order could be rectified – by agreement of the parties – without the need for this Court's review and intervention, thereby rendering the appeal moot. However, Mr. Baker may wish to exercise his right to file a Statement of Additional Grounds for Review, thereby requiring review of additional issues concerning his convictions and sentence. Thus, whether this appeal will become moot is not yet clear.

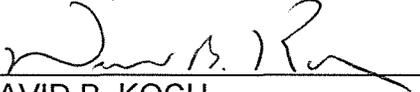
D. CONCLUSION

This case should be remanded to amend the restitution order to properly reflect the sentencing court's intention to make liability joint and several between both defendants.

DATED this 10th day of February 2016.

Respectfully submitted,

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