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Court of Appeals
Division I
State of Washington

NO. 74414-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES BEA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA J. BENTON

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

When a defendant agrees to pay restitution as part of the plea agreement, and the trial court abuses its discretion by not enforcing the plea agreement, should the case be remanded for an evidentiary hearing?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State initially charged James Bea in King County Superior Court with two counts of Threats to Bomb or Injure Property. CP 1-2. At a later date, the State filed an amended information charging Bea with five additional counts: two counts of Identity Theft in the First Degree, one count of Identity Theft in the Second Degree, and two counts of Felony Harassment. CP 14-16. Bea pled guilty as charged to all seven counts. CP 17-31.

Prior to the plea, Bea, his attorney, and the State signed a document titled "Felony Plea Agreement." CP 61-62. The Felony Plea Agreement is the contract between the parties and it states in relevant part:

"Pursuant to RCW 9.94A.753, the defendant shall pay restitution in full to the victim(s) on charged counts and agrees to pay restitution to *Jack Henry and Associates* for all costs related to charged conduct including security measures and reimbursement for fraud losses to credit customers; for actual losses by *Main State Credit Union* credit card customers *Lynn Hancock, Robert Schena, Paula Farren, and Joyce Achramowicz.*"

CP 61.

Bea was sentenced on June 5, 2015. At the time of the sentencing, the State asked the court to follow the agreed recommendation of the parties when imposing the sentence.

1RP 4.¹ That agreed recommendation included "restitution to Jack Henry & Associates, as well as other named victims." 1RP 4. The State explained the reasons for the agreed recommendation and pointed out that Bea had also been investigated by federal authorities. 1RP 4-5. Upon inquiry by the court as to whether Bea's plea was "a global resolution of the federal case?" the State said that it was. 1RP 5. Bea's attorney also noted that Bea accepted the State's offer because he would have been facing greater jeopardy otherwise. 1RP 16. Bea's attorney recognized that "the impact that this will have on him through the rest of his life

¹ The verbatim report of proceedings is referred to as follows: 1RP (June 5, 2015 – sentencing hearing, part one); 2RP (June 8, 2015 – sentencing hearing, part two); and 3RP (December 4, 2015 – restitution hearing).

– he is going to owe – in the very initial restitution estimates that I received from the State – they already identified \$70,000 in restitution, and I strongly suspect that the restitution count will be much greater than that.” 1RP 16 (emphasis added). The court followed the agreed sentence recommendation and ordered restitution with the amount to be determined at a later date.

1RP 20.

The restitution hearing was held on December 4, 2015. The State sought restitution in the amount of \$40,944.31, which was significantly below the restitution amount anticipated by defense counsel at the sentencing hearing. CP 109; 1RP 6. The State provided documentation from Jack Henry and Associates (JHA) that included the security measure costs and reimbursement for fraud losses that JHA paid to thirteen financial institutions.

CP 110-51. Bea objected to the restitution amount claiming that he was “having difficulty” seeing the nexus between Bea’s conduct and the amount requested. 3RP 2-3. Without explanation, the trial court limited the restitution to two financial institutions, Main State Credit Union (MSCU) and Maine State Community Bank, and did not order restitution to the eleven other financial institutions that

JHA reimbursed.² The trial court imposed restitution in the amount of \$27,613.34. CP 105. This amount included the security measure losses to JHA, and reimbursement to only two of the financial institutions who suffered a loss as a result of the fraud: MSCU and Mainstreet Community Bank. 3RP 4-6.

2. SUBSTANTIVE FACTS³

The Certification for Determination of Probable Cause, which Bea stipulated to for purposes of real and material facts, was signed on May 14, 2014 under penalty of perjury by Seattle Police Department Detective John Lewitt. CP 5-11. According to Detective Lewitt, in April 2014, JHA employees began to receive bomb threats on their personal phones, which were listed in the JHA directory. CP 5-6. On May 7, 2014, MSCU notified JHA of potential fraudulent activity originating from Washington State. CP 10. MSCU noticed numerous fraudulent purchases related to Visa cards associated with Bea's address. CP 10. MSCU determined that there were four specific accounts that were targets

² The restitution order did not include an amount for Maine State Community Bank. The trial court must have intended to say Mainstreet Community Bank.

³ All facts in this section are taken from the Certification for Determination of Probable Cause, and the Supplemental Prosecuting Attorney Case Summary signed under penalty of perjury. CP 5-11, 46-48.

of the fraud. CP 10. Those accounts belonged to Joyce Achramowicz, Robert Schena, Paula Farren, and Patricia Finnimore, all residents of Maine. CP 10. The Seattle Police Department and the Federal Bureau of Investigations (FBI) interviewed several JHA employees. CP 10. During the interview, it was determined from the JHA Daily Online Activity Tracking Journal Report that Bea, a JHA employee, had accessed all four of the aforementioned account holders' MSCU customer information. CP 5, 10.

Once law enforcement connected Bea to the fraud, Detective Lewitt made the arrest. CP 10. Bea was read his *Miranda* warnings and provided a statement. CP 10. Bea admitted to the crimes and explained that while he was at work, he used his cellular phone to take pictures of the work screen that contained the victims' account information. CP 10. Bea further stated that he altered the data to enable purchases to be made by himself and other individuals. CP 10.

After Bea's arrest, the FBI accessed Bea's computers and cellular phones pursuant to search warrants. CP 46. The agents discovered that Bea was in possession of hundreds of credit card numbers and the accompanying sensitive financial information of the card holders. CP 46. Bea possessed photographs of his computer screen at JHA, and from a previous financial company where he had worked. CP 46. Each photograph showed a different screen readout showing card holders' credit card numbers and information such as Social Security numbers and the "CCV" numbers that are printed on the backs of credit cards as an extra security measure. CP 46.

C. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ENFORCING THE PLEA AGREEMENT.

The authority to impose restitution is derived from statute.

State v. Hiatt, 154 Wn.2d 560, 563, 115 P.3d 274 (2005).

"Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person ... unless extraordinary circumstances exist which make restitution

inappropriate in the court's judgment and the court sets forth such circumstances in the record." RCW 9.94A.753(5).

The restitution statute is to be interpreted broadly to carry out the Legislature's intention. State v. Hennings, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). Restitution against a criminal defendant is proper when a causal connection exists between the crime and the injuries for which compensation is sought; in deciding whether a restitution order is within a trial court's statutory authority, courts use a "but for" factual test to evaluate the causal link between the criminal acts and a victim's damages. State v. Tobin, 161 Wn.2d 517, 527, 166 P.3d 1167, 1172 (2007). For instance, funds expended by a victim as a direct result of the crime committed by the defendant can be a loss of property on which restitution is based. State v. Kinneman, 155 Wn.2d 272, 287, 119 P.3d 350 (2004); State v. Smith, 119 Wn.2d 385, 388-90, 831 P.2d 1082, 1083 (1992) (holding the expenditures by a bank for labor and supplies needed to unload, load and reset surveillance cameras following a burglary constitute an "injury to or loss of property" within the meaning of the restitution statute). Thus, "the trial court need only find that a victim's injuries were causally connected to a defendant's crime before ordering a defendant to pay restitution for

the expenses which resulted." State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999).

The trial court has discretion to determine the amount of restitution. State v. Dedonado, 99 Wn. App. 251, 255, 991 P.2d 1216 (2000). A reviewing court should reverse when it finds that a trial court's decision was an abuse of discretion and was "manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." Dedonado, 99 Wn. App. at 256. Because restitution is an integral part of sentencing, the courts have stated that in determining any sentence, including restitution, the sentencing court may rely on no more information than is admitted by the plea agreement. Id. Where the plea agreement stipulates that the facts in the certificate of probable cause are real facts for purposes of sentencing, they become facts for purposes of restitution. State v. Tindal, 50 Wn. App. 401, 402-03, 748 P.2d 695 (1988).

Furthermore, the restitution statute permits restitution for uncharged crimes when "the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted *pursuant to a plea agreement.*" RCW 9.94A.753(5) (emphasis added). Simply stated, an offender

may be ordered to pay restitution for uncharged crimes if the offender enters a guilty plea with an express agreement to pay restitution for those crimes. State v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000).

In this case, Bea stipulated in the plea agreement to pay restitution not only to the four named MSCU credit card customers who were subject to counts three through five of the amended information, but he also agreed to pay restitution to JHA for all costs related to charged conduct including security measures and *reimbursement for fraud losses to credit customers*. CP 61 (emphasis added). As Bea's defense attorney admitted, Bea accepted the State's offer because he would have been facing greater jeopardy, including federal charges, otherwise. 1RP 16. An important part of the agreement was to pay restitution for fraud losses to credit customers. The trial court, without explanation, limited the restitution to only two of the thirteen institutions that JHA had to reimburse for fraud losses. Thus, the State is in agreement that the case should be remanded to the trial court in order to have another restitution hearing to determine the proper amount of restitution consistent with the plea agreement.

D. CONCLUSION

The State joins the appellant in his request to remand the case to the trial court for a restitution hearing.

DATED this 4th day of August, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Kevin A. March, containing a copy of the Brief of Respondent, in STATE V. JAMES BEA, Cause No. 74414-3-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Done in Seattle, Washington

08-04-16
Date