74416-0

FILED
Sept 16, 2016
Court of Appeals
Division I
State of Washington

NO. 74416-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DONALD GOSNEY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JULIE SPECTOR

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Did the trial court abuse its discretion in ordering the defendant to pay restitution for the injuries he caused in assaulting Des Moines Police Officer Scott Oak?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On September 9, 2014, the defendant was charged with Assault in the Third Degree and Attempting to Elude a Pursuing Police Vehicle. CP 1. On May 29, 2015, the defendant entered into a negotiated plea whereby he agreed to plead guilty to Assault in the Third Degree and the State agreed to dismiss the Attempting to Elude charge and to recommend a low-end standard range sentence. CP 10-36. With 18 prior felony convictions, the defendant's standard range was 51 to 60 months confinement. CP 32-36. The defendant received a sentence of 51 months. CP 37-45.

2. CSTANTIVE FACTS

At approximately 10:00 p.m., on the evening of August 5, 2014, the defendant went to the SCORE Jail in Des Moines to pick up a friend who was being released from custody. CP 26. In running his ID, jail personnel discovered that the defendant had two

outstanding felony warrants for his arrest and one outstanding misdemeanor warrant for his arrest. CP 26.

Des Moines Police Officer Scott Oak happened to be at the jail booking a suspect on another case. CP 26. After being provided copies of the arrest warrants, Officer Oak contacted the defendant. The defendant was sitting in the driver's seat of a Dodge Caravan with the driver's side window rolled down. CP 26. After confirming the defendant's identity, Officer Oak requested that the defendant step out of the vehicle while advising him that there were warrants out for his arrest. CP 26. The defendant had other ideas.

The defendant appeared angry and said something to the effect of "Oh, shit." CP 27. Officer Oak then opened the door of the minivan and told the defendant that he was under arrest. CP 27. Instead of getting out of the vehicle, the defendant rammed the gear shift into reverse and accelerated backwards. CP 27. Officer Oak was able to raise his left arm in an attempt block the blow of the door but he was unable to get out of the way. CP 27. Fearing that he was going to fall under the vehicle and get run over, Officer Oak grabbed the steering wheel. CP 27. The defendant then rammed the gear shift into drive and accelerated over a median

and up onto a sidewalk, driving down the sidewalk until he was able to exit the jail parking lot. CP 27. At some point during these maneuvers, Officer Oak was able to free himself from the vehicle. CP 27.

Officer Oak ran back to his patrol car and began a pursuit of the defendant. CP 27. However, because his shoulder was injured in the assault, Officer Oak had to end his pursuit and drive to the hospital. CP 27. After a lengthy chase involving multiple police agencies, the defendant's vehicle was clipped by an officer using a PIT or Pursuit Immobilization Technique, and finally stopped. CP 28.

At the time of the incident, it was known that Officer Oak suffered a contusion of the shoulder region, cervical strain, contusions of the face, scalp and neck, and a contusion of the leg. CP 28. According to the certification of probable cause, Officer Oak missed the next three days of work. CP 28.

As part of his guilty plea listed in section B 1 above, the defendant specifically agreed to "pay restitution in full" to the victim in the charged count. CP 31. The victim of the defendant's assault

was Des Moines Police Officer Scott Oak. CP 26. The defendant also pled to "real facts," thereby stipulating that the court could use as real and material the facts as set forth in the certification for determination of probable cause and the prosecutor's summary. CP 31.

At the time of sentencing, a restitution amount had not yet been determined. 2RP[1] 16; CP 98. At the request of the State, the court ordered that if not agreed to otherwise, restitution would be determined at a future restitution hearing with the date to be set. CP 39; 2RP 16. The defendant waived his presence for any future restitution hearing. CP 39; 2RP 17-18.

After sentencing, restitution documents were sent to defense counsel but counsel did not return a signed order agreeing to restitution. CP 107. A restitution hearing was then set for November 19, 2015. CP 107.

For the November 19, 2015 hearing, the State submitted a Labor and Industry (L & I) ledger detailing the expenses paid out to medical providers for services incurred as a result of the

[1] The verbatim report of proceedings is cited as follows: 1RP—May 29, 2015; 2RP—June 5, 2015; 3RP—November 19, 2015; and 4RP—December 17, 2015.

defendant's assault on Officer Oak, and lost wages. CP 63-92.[2] The L & I cover letter submitted with the ledger provided the date of injury, claim number, injured party, total amount L & I had paid out on the claim and that L & I was seeking restitution from the defendant under the claim of injury. CP 62. The ledger provided the dates, dollar amounts and medical service providers paid by L & I, and lost wages paid -- all under a single claim number pertaining to Officer Oak's injury. Id. The ledger listed the expenses from the date of injury through October 3, 2015, the "run date" of the ledger. CP 58-96. The list includes fees paid to Highline Emergency Center, Group Health Cooperative, Group Health Pharmacy, Chiropractic Therapy, one-on-one physical therapy, Capen & Associates -- an industrial rehabilitation service provider,[3] Serenity Holistic Health -- a holistic health service provider, and Cheryl Hart Psy.D. a clinical psychologist,[4] and for

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[2] There was a subsequent restitution hearing held on December 17, 2015. See 4RP. Additional restitution documents were submitted to the court for the December 17 hearing. For an unknown reason, when the documents submitted for each hearing were later filed with the Superior Court Clerk's Office, the documents for both hearings were submitted as one, designated to this court as CP 58-96. The transcript of each hearing identifies the particular documents that were submitted prior to each hearing.

[3] See http://www.capenindustrialrehab.com/index.html.

[4] See http://www.drcherylhart.com/. CP 61.

time Officer Oak missed work. Id. The total amount paid by L & I was $61,581.16. CP 59.

Previously submitted to the court was a letter written by Officer Oak that read as follows:

> Due to my injuries from being hit by the defendant vehicle, I was off work for 3 days. I have had multiple doctor appointments since then for back, neck and shoulder pain. I have an MRI scheduled next week for my shoulder and will likely need surgery to repair the damage caused by the defendant's actions. I have chronic back, neck and shoulder pain from being injured by the defendant.

CP 99.

At the November 19, 2015 hearing, the defense objected to the amount of restitution. 3RP 22. The defense claimed that there was an insufficient causal connection between the items listed and the crime. 3RP 22, 28. The State responded that the documents that were provided to the court indicated a sufficient causal connection between the assault and medical treatment, with the exception of approximately $7,000 paid to Therapist Cheryl Hart for psychiatric services. 3RP 24-25. The prosecutor stated that Officer Oak was in the process of signing a medical release form so that the therapist could provide a letter to the court indicating

whether or not the services provided and paid by L & I were related to Officer Oak's injuries. 3RP 24-25.

The judge, the Honorable Judge Julie Spector, indicated that she was "very familiar with L & I ledgers." 3RP 29. With the exception of the $7,000 paid to Therapist Cheryl Hart, Judge Spector found that the ledger and documents provided a sufficient nexus between the expenses paid by L & I and the defendant's assault of Officer Oak. 3RP 25-26, 29. The court signed an order setting restitution in the amount of $54,496.23. CP 46. The court also allowed for a subsequent restitution hearing to determine if L & I's payments to Therapist Cheryl Hart were causally connected to the defendant's assault of Officer Oak. 3RP 27.

The parties appeared on December 17, 2015, for a second restitution hearing. At this hearing, Judge Spector had additional documents before her. See 4RP 34. The documents included an email from Officer Oak that stated:

> In reference to King County Superior Court Case # 14-1-04849-9 and a request for restitution from the Washington State Department of Labor and industries:
>
> On 8/5/14 I was assaulted by Donald Gosney at the SCORE Jail parking lot in Des Moines. Directly due

> to this assault, I sought medical care from Dr. Cheryl Hart for psychological treatment and therapy.

CP 60.

Also before the court was a letter from Doctor Cheryl Hart that stated in pertinent part:

> My treatment of Scott Oak from 2/26/2015 to 8/27/2015 is related to the LNI on the job injury associated to LNI Claim # AU54891.[[5]]

CP 61. The letter was signed by the doctor under penalty of perjury. Id.

And finally, there was an email from L & I Third Party Adjudicator Thocuc Le that stated in pertinent part that the psychiatric services paid by L & I were related to the defendant's assault on Officer Oak. CP 95.

At the December 17 hearing, the defense again objected to the amount of restitution requested, claiming that there was an insufficient nexus between the treatments provided by Doctor Hart and the assault. 4RP 35. Judge Spector asked defense counsel, "[w]hat else do you think is required." 4RP 35. Defense counsel responded, "[w]ell, there's nothing about a diagnosis. There's nothing about why the treatment is required." 4RP 35. The court

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[5] This is the claim number on the L & I ledger for costs paid by L & I for Officer Oak's injuries. See CP 66.

disagreed, finding that based on Officer Oak's statement that the treatment was related to being assaulted and Doctor Hart's statement that the treatment was related to the officer being assaulted, absent violating the patient-doctor privilege, this was sufficient evidence demonstrating the nexus between the treatment and the crime. 4RP 36. The court signed an order setting an additional restitution amount of $7,085.07. CP 54.

C. ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ORDERING RESTITUTION FOR COSTS INCURRED AS A RESULT OF THE DEFENDANT'S ASSAULT ON OFFICER SCOTT OAK

The defendant contends that the trial court abused its discretion when it ordered restitution for monies paid by L & I to medical service providers who treated Officer Oak after he was assaulted. This claim has no merit. The documentation provided to the court sufficiently evidenced that the monies paid by L & I were incurred as a direct consequence of the defendant's assault on Officer Oak.[6]

A court's authority to impose restitution is statutory. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). A judge must

[6] The defendant does not contest that a criminal defendant can be required to pay restitution to a third party payor such as an insurance company, or in this case, L & I. See State v. Ewing, 102 Wn. App. 349, 352, 7 P.3d 835 (2000).

order restitution whenever a defendant is convicted of an offense which results in an injury to any person. RCW 9.94A.753(5).

Restitution is appropriately ordered where the trial court finds a "causal connection" between the crime and the victim's injuries for which compensation is sought. State v. Enstone, 137 Wn.2d 675, 682-83, 974 P.2d 828 (1999); State v. Wilson, 100 Wn. App. 44, 995 P.2d 1260 (2000). Losses are "causally connected" if, "but for" the charged crime, the victim would not have incurred the loss. State v. Griffith, 164 Wn.2d 960, 966, 195 P.3d 506 (2008). Restitution may include a victim's counseling or therapy expenses that are related to the crime. RCW 9.94A.753(3); State v. Goodrich, 47 Wn. App. 114, 733 P.2d 1000 (1987). The restitution statute is to be interpreted broadly to carry out the legislature's intent to make whole victims of criminal behavior. State v. Israel, 113 Wn. App. 243, 54 P.3d 1218, rev. denied, 149 Wn.2d 1015 (2002).

The rules of evidence do not apply to restitution hearings. State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038, rev. denied, 121 Wn.2d 1023 (1993). Still, the evidence presented at a restitution hearing must meet certain minimal due process requirements. Kisor, at 620 (citing State v. Pollard, 66 Wn. App. 779, 784, 834 P.2d 51, rev. denied, 120 Wn.2d 1015 (1992)). Thus, the amount of restitution

must be established with "substantial credible evidence" which "does not subject the trier of fact to mere speculation or conjecture." Kisor, at 620. A defendant, of course, must be given the opportunity to refute the evidence presented if he so chooses. Id. The trial court applies a preponderance of the evidence standard. State v. Ryan, 78 Wn. App. 758, 761-62, 899 P.2d 825, rev. denied, 128 Wn.2d 1006 (1995).

A challenge to the awarding of restitution is reviewed only for an abuse of discretion. Israel, 113 Wn. App. 243. While reasonable minds may differ as to a trial court's decision, that is not the standard used under an abuse of discretion standard. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). To prevail on appeal, the defendant must prove that no reasonable person would have taken the position adopted by the trial court. Id.

The defendant does not contest that Officer Oak suffered injuries from his assault upon the officer. Rather, he asserts that the trial court did not have sufficiently reliable evidence to show a causal connection between his assault on Officer Oak and the medical and therapeutic services provided to Officer Oak after the assault. This is incorrect.

The defendant suggests that all that was provided to the court were conclusory statements by the prosecutor's restitution investigator, the L & I adjudicator, and a long list of payments to various treatment providers. He states that the "entries are not categorized" and suggests the medical services may have been provided for other reasons. This ignores a great deal of specific information contained in the documents.

The letter from L & I's third party adjudicator clearly states that the expenses paid – documented in the ledger, are related to a single claim number (AU54891) for injuries suffered by Scott Oak on August 6, 2014, and that the party L & I is seeking restitution from is the defendant under his superior court cause number for his assault on Officer Oak. CP 62. The documented billing dates begin with a bill from Highline Community Hospital, dated August 6, 2014, when Officer Oak would have been at the hospital after the assault. CP 26, 66. All of the remaining documented billings are from medical providers, all after the date of the assault, and all under the same claim number, i.e., they directly relate to the basis of the claim – the injury suffered by Officer Oak. This is far from pure speculation as the defendant claims. Judge Spector, who

stated she was "very familiar" with this type of documentation (3RP 29), found the documents provided a sufficient causal connection.

The defendant's argument pertaining to lost wages is equally flawed. He asserts that Officer Oak missed only three days of work but that L & I paid $29,000 in lost wages for "the year" L & I claimed he missed work. Def. br. at 11-12. It is quite clear that when Officer Oak said he missed three days from work he was referring to the three days following the assault. See CP 99. Further, the defendant does not cite to the record to support his claim that L & I believes Officer Oak missed a year of work. Rather, the payments from L & I would include time missed from work to attend the multitude of medical appointments Officer Oak was subjected to following the assault. There is no inconsistency.

Finally, the defendant asserts that he had no ability to refute the information provided by the State. The record belies this claim. The record shows that at the November 19th restitution hearing there was a question as to the causal connection between Officer Oak receiving treatment from Doctor Cheryl Hart and the assault. 3RP 27. Thus, Judge Spector did not sign a restitution order for

those expenses. Instead, a second restitution hearing was held a month later. At this hearing, Judge Spector was provided with a statement from Officer Oak, a statement from Doctor Hart, and an email from L & I's adjudicator, all stating that Doctor Hart's treating of Officer Oak was related to the assault.

Clearly the defendant had the opportunity and could have attacked in a variety of ways all of the claimed expenses if he chose to do so. Instead, he relied on arguing that the evidence was insufficient. Judge Spector found otherwise. While the defendant may have wanted more specific information -- a medical diagnosis from each treatment provider, a witness from each treatment provider testifying in court, or individualized statements for each medical appointment Officer Oak attended, this level of specificity is not required. Rather, the defendant must show that no reasonable person would have found the causal connection requirement met based on the evidence presented that was sufficiently reliable to prove this point.

D. CONCLUSION

For the reasons cited above, this Court should affirm the trial court's awarding of restitution for costs incurred as a result of the defendant's assault upon Officer Scott Oak.

DATED this 16 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, Jan Trasen at Washington Appellate Project, containing a copy of the Brief of Respondent, in STATE V. GOSNEY, Cause No. 74416-0-I, 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.

Name
Done in Seattle, Washington

09-16-16
Date