

FILED  
Oct 06, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 75310-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BIENHOFF,

Appellant.

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

The Honorable Douglass A. North, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by ordering restitution. CP 37-38.

Issue Pertaining to Assignment of Error

Did the trial court err in ordering restitution for funeral expenses for the man Appellant was convicted of killing when that man was attempting to commit a felony offense when he was killed?

Potential Issue Presented<sup>1</sup>

In the event Appellant does not substantially prevail on appeal, should this Court exercise its discretion to deny a State's motion for costs?

B. STATEMENT OF THE CASE

In late 2015 a King County jury convicted Appellant Michael Bienhoff of first degree murder for killing Precious Reed in February 2012, and he was sentenced to life without the possibility of release. CP 9-16. A restitution hearing was held May 4, 2016, before the trial judge, the Honorable Douglass A. North. RP 3-24.<sup>2</sup> The State sought over \$40,000 in restitution for lost wages and funeral expenses paid by the

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<sup>1</sup> The second argument presented herein pertains to the potential for the assessment of the costs of the appeal under RCW 10.73.160 and RAP 14.4.

<sup>2</sup> There is one volume of verbatim report of proceedings referenced as "RP."

Department of Social and Health Services' (DSHS) Crime Victim Compensation program. CP 37-38; RP 10.

Bienhoff and his three codefendants all contested restitution, arguing that because Reed was attempting to commit a felony when he was killed, neither he nor his family were entitled to benefits under the Crime Victim Compensation Act (CVCA Chapter 7.68 RCW). CP 28-36; Supp CP \_\_\_ (sub no. 159, Memorandum Against Restitution, filed 9/2/16 in State v. Lyons, King Co No. 12-1-04403-8 SEA); Supp CP \_\_\_ (sub no. 137, Defense Objection to Restitution, filed 5/2/16 in State v. Pierce, King Co No. 12-1-04437-2 SEA). The defendants argued they were not liable to DSHS for erroneous payments it made to Reed's widow for lost wages or for the funeral expenses it covered on behalf of the family. Id.; RP 8-16. The State argued the court should grant its requested restitution because the State had paid out the money and should therefore be reimbursed by Bienhoff and his codefendants. RP 4-8, 16-19.

The trial court rejected the State's request for \$34,250 in lost wages it had paid Reed's widow, concluding the State had paid them in error because Reed was not employed prior to his death and therefore his death generated no lost wages. RP 19-20. The trial court did, however, grant \$6,129.89 in restitution for Reed's funeral costs, reasoning Reed's

assailants lured him into the situation that resulted in his death. CP 37-38; RP 20-21. Bienhoff appeals. CP 43.<sup>3</sup>

C. ARGUMENTS

1. BECAUSE REED WAS ATTEMPTING TO COMMIT A FELONY WHEN HE WAS KILLED, DSHS SHOULD NOT HAVE PAID FOR HIS FUNERAL UNDER THE CVCA, AND BIENHOFF SHOULD NOT BE HELD LIABLE FOR THAT ERRONEOUS PAYMENT.

The trial court erred by ordering Bienhoff to pay restitution to DSHS for Reed's funeral expenses because Reed was not a "victim" for purposes of the CVCA, and therefore neither he nor his estate were entitled to benefits under the CVCA. Ineligibility under the CVCA precludes ordering Bienhoff to pay restitution under the Sentencing Reform Act (SRA) for Reed's funeral expense. This Court should vacate the restitution order.

This Court reviews restitution orders for an abuse of discretion. State v. Kerow, 192 WN. App. 843, 846, 368 P.3d 260, 261 (2016), review denied, No. 93130-5, 2016 WL 4542155 (Wash. Aug. 31, 2016). A trial court's authority to impose restitution is statutory, and it is an abuse its discretion to order restitution not authorized by statute. Id. Failure to

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<sup>3</sup> Bienhoff is challenging the underlying conviction in an independent appellate proceeding. See State v. Bienhoff, No. 76519-1-I.

comply with statutory provisions authorizing restitution renders any resulting order void. Id.

For felonies committed after July 1, 1985, like Bienhoff's, the relevant statute is RCW 9.94A.753, which provides:

(5) Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. . . .

. . .

(7) Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. . . .

Emphasis added.

Under the CVCA;

If injury or death results to a victim from the deliberate intention of the victim himself or herself to produce such injury or death, or while the victim is engaged in the attempt to commit, or the commission of, a felony, neither the victim nor the widow, widower, child, or dependent of the victim shall receive any payment under this chapter.

RCW 7.68.061.

Reed was undeniably attempting to commit a felony at the time of his death; he was attempting to purchase and possess several pounds of marijuana, which was illegal in 2012, and remains so today. See RCW

69.50.4013 (Class C felony to possess over 40 grams of marijuana unless certain criteria are met that are not at issue here). As such, neither he nor his widow or any of his descendants were eligible for compensation under the CVCA in light of RCW 7.68.061. In other words, any payments made by DSHS under its CVCA program were made in error, like the lost wage payments. Bienhoff was not held liable for the lost wages, and should not have been held liable for the funeral expenses erroneously paid by DSHS.

Unfortunately, the trial court failed to follow the clear and unambiguous language of RCW 7.68.061, and instead crafted an exception out of thin air for the funeral expenses, reasoning "Reed was lured into this arrangement by Mr. Bienhoff." RP 20. This was clear error. There is no "luring" exception under RCW 7.68.061. If the person injured or killed was attempting to commit a felony at the time of the injury or death, neither they nor their estate is entitled to compensation under the CVCA, no exceptions.

Just like Bienhoff was not held liable for the nearly \$35,000 in erroneous "lost wage" payments DSHS made to Reed's widow, he should also have been relieved of liability for funeral expenses paid for erroneously by DSHS under the CVCA. The trial court abused its discretion in ordering Bienhoff to reimburse DSHS for the erroneous

payments it made for Reed's funeral under the CVCA. This Court should therefore vacate the restitution order.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Bienhoff indigent and therefore entitled to appointment of appellate counsel and production of an appellate record at public expense. CP 41-42. If Bienhoff does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id.* Accordingly, Bienhoff's ability to pay must be determined before discretionary costs are imposed. Without a basis to rebut the trial court's determination that Bienhoff is indigent, this Court should not assess

appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

For the reasons stated, this Court should vacate the restitution order entered against Bienhoff.

DATED this 5<sup>th</sup> day of October 2016

Respectfully submitted,

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