

NO. 37899-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY ALAN DEAN,

Appellant.

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FILED
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY [Signature]

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

The Honorable D. Gary Steiner, Judge

BRIEF OF APPELLANT

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P.M. 11-17-2008

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A. ASSIGNMENT OF ERROR

The court's amended order of restitution lacked statutory authority and violated constitutional due process protections.

Issue pertaining to assignment of error

Where the state made no attempt to determine the impact of the victim's preexisting injury on her recovery before awarding benefits under the crime victims' compensation act, does the order of restitution based on those benefits violate due process and exceed the court's statutory authority?

B. STATEMENT OF THE CASE

In January 2007, appellant Jeffrey Alan Dean pleaded guilty in Pierce County Superior Court to second degree robbery. CP 9; RCW 9A.56.210. Dean admitted that in October 2006, he and an accomplice knocked the victim down with a shopping cart and took her purse. CP 9. The victim, Tonya Bates, reported to police that she chased after the suspects, even though she had sprained and possibly fractured her ankle two to three weeks earlier. RP¹ 17-18, 25-26.

Following a restitution hearing in May 2007, the court ordered restitution to Bates in the amount of \$1,284.28, and restitution to the crime

¹ RP refers to the Verbatim Report of Proceedings from the restitution hearing on May 21, 2008.

victims' compensation fund (CVC) in the amount of \$252.99. The restitution order indicated that the amount to CVC was subject to change, as the victim was still treating. CP 30-31. CVC subsequently paid an additional \$10,277.72 in benefits to Bates for medical expenses and lost wages. RP 42.

The state sought restitution for amounts paid by CVC, and a restitution hearing was held before the Honorable D. Gary Steiner on May 21, 2008. Dean had waived his presence for restitution at the time of sentencing, and the court ruled that waiver still applied, despite Dean's recently filed motion to terminate his legal financial obligations. CP 40-45; RP 6². After rejecting defense counsel's argument that the hearing was outside the statutory time limit, the court heard evidence as to the amount of restitution requested. RP 13.

Bates testified that she had sprained her ankle two to three weeks before the robbery and she was still in a walking boot at the time of the incident. RP 17-18. She missed a couple of days of work after the incident. RP 19. She continued to work through June 2007, but her ankle slowly got worse, and a lump formed on one side. RP 20, 36. An MRI revealed torn ligaments and a cyst, which were not present before the robbery, and she underwent surgery to repair the ligaments and remove the

² Dean requested to be transported to court for a hearing on his motion. The court noted, however, that Dean's motion did not seek modification of restitution. RP 5-6.

cyst. RP 20-21. She missed four and a half months of work following the surgery. RP 21, 36.

The CVC claims manager who handled Bates's claim also testified. RP 40. As claims manager, she was responsible for obtaining documentation for the claim, including the police report, medical records, and verification of wages. RP 42. The claims manager admitted she did not obtain prior medical records and made no attempt to determine the extent to which Bates's previous injury contributed to her medical expenses and loss of income. RP 44-45. She testified that she does not closely scrutinize claims if a doctor indicates that the injuries are crime related. RP 43. She would only order an independent medical examination if the determination that the loss was crime related were contested, stating she did not apply the same criteria as in worker's compensation cases. RP 46. In this case, although the police report indicated Bates had recently sprained or fractured her ankle, the claims manager accepted the doctor's determination that the cyst and torn ligaments were crime related without clarifying whether the doctor was even aware of Bates's previous injury. RP 49.

Defense counsel argued that the court could not know, because the claims manager never asked, the impact of Bates's preexisting injury. Thus, the court could not determine that the amounts paid by CVC were

solely attributable to the crime. RP 51-52. Counsel suggested that the court recess the hearing to allow the state to obtain the necessary documentation to support its restitution request. RP 55.

The court declined counsel's suggestion. Instead, it ruled that it was sufficient to rely on the doctors' statements that the injuries were crime related. The court found "a continuous sequence, unbroken by any intervening cause, produces an exacerbation or injury without which the result would not have occurred." RP 55. The court ordered restitution in the full amount paid to Bates by CVC. RP 56; CP 54-55. Dean filed this timely appeal. CP 56.

C. ARGUMENT

BY ORDERING RESTITUTION FOR BENEFITS TO WHICH BATES WAS NOT ENTITLED, THE COURT ACTED WITHOUT STATUTORY AUTHORITY AND VIOLATED DEAN'S RIGHT TO DUE PROCESS.

The court's authority to order restitution is limited by statute. State v. Halsey, 140 Wn. App. 313, 326, 165 P.3d 409 (2007); RCW 9.94A.753. Moreover, principles of due process apply at a restitution hearing. State v. Strauss, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992) (due process applies to sentencing hearing); see Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972). Due process requires notice and an opportunity to be heard. Matthews v. Eldridge, 424 U.S. 319, 333, 96 S.

Ct. 893, 47 L.Ed.2d 18 (1976). When a defendant “disputes facts relevant to determining restitution, the State must prove the damages at an evidentiary hearing by a preponderance of the evidence.” State v. Kinneman, 155 Wn.2d 272, 285, 119 P.2d 350 (2005).

Under the pertinent provision of the restitution statute, the court must order restitution in all cases where the victim is entitled to benefits under the crime victims’ compensation act, chapter 7.68 RCW. RCW 9.94A.753(7). The right to benefits from CVC is in turn governed by chapter 51.32 RCW. RCW 7.68.070. Specifically, the provision relating to payment of benefits in RCW 51.32.100 is applicable to the payment of benefits under the crime victims’ compensation act. RCW 7.68.070(10).

That statute provides as follows:

If it is determined that an injured worker had, at the time of his or her injury, a preexisting disease and that such disease delays or prevents complete recovery from such injury, it shall be ascertained, as nearly as possible, the period over which the injury would have caused disability were it not for the diseased condition and the extent of permanent partial disability which the injury would have caused were it not for the disease, and compensation shall be awarded only therefor.

RCW 51.32.100.

In this case, there was undisputed evidence that Bates had seriously sprained her ankle prior to the robbery and her injury had not resolved at the time of the crime. Nonetheless, the claims manager paid

Bates's entire claim without determining what impact that preexisting condition had on Bates's need for surgery and the time she was unable to work. By statute, the department was required to make such a determination and adjust benefits accordingly. See McArthur v. Dep't of Labor & Indus., 168 Wash. 405, 409, 12 P.2d 418 (1932) (department must deduct for effect of preexisting condition on injury).

If Bates's sprained ankle delayed her recovery and return to work, she was not entitled to recover the full amount of her damages under the crime victims' compensation act. See Stafford v. Dept. Labor & Indus., 33 Wn. App. 231, 235-36, 653 P.2d 1250 (1982) ("strict proof of entitlement" required for benefits under crime victim's compensation act), review denied, 99 Wn.2d 1020 (1983). The court is required to order restitution only if the victim is entitled to CVC benefits. RCW 9.94A.753(7). Since CVC failed to consider the impact of Bates's previous injury, and the state presented no independent medical evidence to support the payment of benefits, the state did not prove Bates was entitled to the full amount of CVC benefits she received. The court's order of restitution based on insufficient proof deprived Dean of due process and exceeded its statutory authority. The restitution order must therefore be vacated.

Generally, when the state fails to meet its burden of proof at a sentencing hearing, the prosecution does not receive an additional opportunity to present evidence or argument on remand. State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002). In this case, the defense suggested that the court recess the restitution hearing to allow the state to obtain the missing medical records and determine whether it could prove Bates was entitled to the full amount of CVC benefits she received. The state did not respond to this suggestion, and the court proceeded to impose restitution. RP 55. As defense counsel acknowledged, the sentencing court cannot make the necessary determination on the current record, and remand for an evidentiary hearing is appropriate.

D. CONCLUSION

Because the state failed to prove Bates was entitled to the benefits she received under the crime victims' compensation act, the order of restitution for the full amount of those benefits violated due process and exceeded the court's statutory authority. The amended order of restitution must be vacated.

DATED this 17th day of November, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Catherine E. Glinski', written in a cursive style.

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Jeffrey Alan Dean*, Cause No. 37899-0-II, directed to:

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


Catherine E. Glinski
Done in Port Orchard, WA
November 17, 2008

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