

No. 39114-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RONALD STEEN,

Appellant.

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STATE OF WASHINGTON  
SUPERIOR COURT  
PIERCE COUNTY

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

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The Honorable Linda C.J. Lee, Judge

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APPELLANT'S OPENING BRIEF  
Amended as to Supplemental Clerk's Papers citation

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A. ASSIGNMENTS OF ERROR

1. The restitution court erred in relying on facts contained in the Declaration for Certification of Probable Cause and in the prosecutor's verbal claims regarding the facts in imposing restitution because those facts were not proven by the state and were not admitted or acknowledged by the defendant, Ronald Steen.

2. In the alternative, the restitution court acted outside its statutory authority in ordering Mr. Steen to pay restitution for damages which were not caused by Steen's offense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A restitution court is only statutorily authorized to order a defendant to pay restitution for damages which are caused by the specific crime of conviction, rather than by crimes which are related to the crime of conviction or by acts in the "general scheme" of the crime.

1. The prosecution bears the burden of proving that the damages sought to be ordered paid in restitution were caused by the crime of conviction, and the restitution court may not rely on any facts which are not either so proved or admitted or acknowledged by the defendant.

Mr. Steen entered an Alford<sup>1</sup> plea, denying the facts the prosecution alleged had occurred. Although he agreed to allow the trial court to consider the Declaration for Determination of Probable Cause ("Declaration") in order to determine the factual basis for the plea, he did not agree to such consideration for the purposes of restitution. At the

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<sup>1</sup>North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

restitution hearing, the prosecution did not present any evidence, instead arguing what it said were the facts. The trial court then relied on those facts and the facts contained in the Declaration in ordering restitution.

Did the court err in relying on those facts when they were not proved, admitted or acknowledged? Further, is reversal and dismissal of the resulting restitution amounts required because there was insufficient evidence to support them?

2. Mr. Steen was convicted of possession stolen property for driving a car which had been reported stolen. The prosecution asked the court to order Steen to pay for damage to the ignition but presented no evidence that Steen had caused that damage or that the damage had occurred while Steen was in possession of the car, instead of having occurred prior to that time.

Even if the Court finds that the trial court could permissibly rely on the Declaration in ordering restitution, is reversal and dismissal of the amount ordered paid for ignition repairs required because the prosecution failed to prove that those damages were caused by Steen's crime?

3. According to the prosecutor, once Steen was arrested, the officer did not want to wait for the car's owner to show up and drive the car away, so the officer ordered the car impounded. The prosecution asked the restitution court to order Steen to pay the costs of that impoundment.

Even if it was proper for the restitution court to rely on the prosecutor's unsupported declarations as "evidence" to prove how the impound costs had occurred, did the court err in ordering Steen to pay those costs where they were not caused by Steen's crime?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Ronald Steen was charged with unlawful possession of a stolen vehicle. CP 1; RCW 9A.56.068; RCW 9A.56.140. On January 15, 2009, he entered an Alford plea to the charged offense. CP 3-11; 1RP 1-14.<sup>2</sup> After accepting the plea, the Honorable Linda C.J. Lee ordered Mr. Steen to serve 43 months in custody and to pay “[r]estitution by later court order,” with a restitution hearing to be held in the future. CP 15-27; 1RP 13.

On March 31, 2009, Judge Lee ordered Mr. Steen to pay \$537.49 in restitution. CP 38-39; 2RP 8-9. Mr. Steen appealed and this pleading follows. See CP 40.

2. Facts related to issues on appeal

In the Statement of Defendant on Plea of Guilty to Non-Sex Offense (“Statement”), Steen declared:

I maintain my innocence of this charge but am pleading guilty in order to take advantage of the State’s sentencing recommendation. I have reviewed the anticipated evidence with my attorney and I believe there is a substantial lik[e]lihood of being found guilty if I proceeded to trial. I fully understand that this type [of] plea has the same force and legal effect as a plea in which I admit guilt.

CP 10. The prosecutor’s recommendation, indicated in the plea, was 43 months in custody with credit for time served and, *inter alia*, “[r]estitution, if any[.]” CP 6.

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<sup>2</sup>The verbatim report of proceedings consists of two volumes, which will be referred to as follows:

January 15, 2009, as “1RP;”  
March 31, 2009, as “2RP.”

Also on the Statement was boilerplate language and a “box” next to it, which had been checked and which declared, “[i]nstead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.” CP 10. There was, however, nothing in the Statement which indicated that Steen agreed to have the court consider the Declaration for the purposes of sentencing or restitution. CP 3-11.

At the restitution hearing, the prosecutor noted that the victim of the case, William Bergstrom, had asked for restitution in the amount of \$3,064.64, based upon all the damages resulting from his car being stolen, instead of just limiting his request to the damages attributable to Mr. Steen’s crime. 2RP 2. The prosecutor told the court that he had explained to Bergstrom that most of what he had requested “would have been appropriate if Mr. Steen had pled guilty to theft of a motor vehicle” but was not appropriate, given the actual charge and plea. 2RP 2.

Steen agreed to pay restitution for “detailing” and an “enzyme” treatment for the interior of the car, because he had his dog with him in the car when arrested. 2RP 2-7. He disputed, however, the requests for payment for a “trip permit” to get the car back to Bergstrom’s home, the cost of new license plates, repairing the transmission and impoundment of that car. 2RP 3-7.

The prosecutor conceded that the trip permit and license plate costs should not be ordered paid, but argued that the ignition repair and impound costs were proper. 2RP 3.

The prosecutor presented a “restitution information” packet which

contained a "Victim Impact Statement" from Bergstrom, Bergstrom's "Restitution Declaration," his written declaration of what he called "Costs Regarding Stolen Vehicle," a list of personal property he said was in the car when it was stolen, a vehicle report showing that he had reported his car stolen on August 28, 2008, a copy of a bill from Graham Towing showing Bergstrom's name and address, that the car had been stolen, that it had been ordered impounded on September 16 and picked up on the 17<sup>th</sup>, and that there was "[n]o Key - Any Key Works." See "Restitution Information", filed 10/23/08 (designated and sent to this Court as "attachments" to the clerk's papers). There were also other invoices for such things as gas. Id.

At the restitution hearing, instead of presenting testimony, the prosecutor simply declared his belief of the facts, which were that Steen was "driving around in a vehicle with a key that doesn't belong to the vehicle and that key caused damage." 2RP 5. The prosecutor claimed that there was two published cases in which it was held to be proper for a defendant found in a stolen vehicle to be ordered to pay for damage to the ignition in restitution, so Steen should be ordered to do so. 2RP 4-5.

The prosecutor also declared his belief that the impound costs had been incurred when the officer who had arrested Steen had not wanted to wait by the car for the car's owner to drive down from Seattle and so had ordered the car to be impounded. 2RP 3. The prosecutor stated that the car had been parked on private property and that it was a "reasonable expectation" that someone who was driving a stolen vehicle would have to pay for impound costs. 2RP 4.

Steen's counsel had prepared no briefing regarding restitution, instead simply filing a letter Steen wrote to counsel raising questions about why he was being asked to pay for, *inter alia*, the ignition repair and impound costs. See CP 44-66; 2RP 5. In Steen's letter, Steen pointed out that the state had no evidence that he had caused the ignition damage or that the damage had occurred while Steen had possession of the car, so that it was improper to order him to pay for that damage. Id. Counsel repeated these arguments at the hearing, noting that Steen had been charged only with possessing the stolen car, not with having stolen it in the first place. 2RP 5. Counsel stated that, without evidence Steen had possessed the car when the damage occurred, it was improper to order Steen to pay for that damage, because it could not be said to have been caused by Steen's crime. 2RP 6.

Counsel did not initially address the argument about the impound costs, but after the prosecutor noted that failure, counsel then pointed out Steen's argument "in his letter to me" that the police were under no objection to impound the vehicle as it was on private property. 2RP 6. In his letter, Steen had also said that the car's owner had not been notified of its recovery until after the impound had occurred, so that the owner had not been given the choice of driving down to get the car himself and thus not have to pay for the impound. CP 45. Counsel also argued that the decision to impound was that of the officer, who was under no duty to do so, and Steen should not have to pay for that choice. 2RP 6-7.

In ordering Steen to pay both for the impound costs and the costs of the ignition repair, the court first stated that, in entering his Alford plea,

Steen had agreed that the court could rely on the Declaration for Determination of Probable Cause “to find a factual basis” for the plea. 2RP 8. The court then recited facts it said were contained in that Declaration, including that Steen “was seen driving the vehicle with the engine running with a house key being used in the ignition.” 2RP 8. The court held there was a “reasonable causal connection” between the impound fee and ignition repair costs, without providing further explanation or analysis. 2RP 8.

The Order Setting Restitution and Disbursement ordered Steen to pay Bergstrom \$537.49, broken down as “\$90.75 for car detailing and enzyme treatment; \$227.39 for impound costs; and \$119.35 for ignition repair.” CP 38.

D. ARGUMENT

THE RESTITUTION COURT ERRED IN RELYING ON IMPROPER EVIDENCE AND IMPOSING RESTITUTION FOR AMOUNTS WHICH THE PROSECUTION FAILED TO SHOW WERE CAUSED BY STEEN’S CRIME OF POSSESSION OF THE STOLEN CAR

The authority to impose restitution is not an inherent power of the trial court but instead is wholly statutory. State v. Davidson, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). As a result, a trial court may not impose restitution unless it does so based upon the relevant statute. Id. Under RCW 9.94A.753(5), the sentencing court may order restitution “whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property.” To be statutorily authorized under this provision, there must be a causal link between the restitution ordered paid and the defendant’s crime, so that restitution can only be

ordered for losses caused by the particular offense charged. State v. Woods, 90 Wn. App. 904, 907-908, 953 P.2d 834, review denied, 136 Wn.2d 1021 (1998). Put another way, restitution cannot be imposed for damages which occurred as part of the “general scheme” of the charged crime or even acts “connected with” that crime, if those acts “are not part of the charge.” State v. Miszak, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993). The only exception is if the defendant agrees, as part of a plea deal, to make restitution for uncharged crimes. See RCW 9.94A.753(3); State v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000), review denied, 143 Wn.2d 1011 (2001).

Here, Mr. Steen did not agree to pay restitution for uncharged offenses in entering his Alford plea. CP 3-11. Thus, the restitution court was limited in its authority to impose restitution and was required to order Steen to pay only for damages proven to have been caused by the crime of conviction - possession of stolen property.

The court acted here outside its authority in ordering Steen to pay for the ignition repair costs and the costs of the impound.

a. The court violated the real facts doctrine

As a threshold matter, the court erred in relying on the prosecution’s declarations and the Declaration for Determination of Probable Cause in imposing restitution. Under RCW 9.94A.530(2) and RCW 9.94A.537, the “real facts” doctrine, a court may not rely on information which is not admitted in the plea agreement or admitted, acknowledged or proved at the time of sentencing. See State v. Young, 51 Wn. App. 517, 522, 754 P.2d 147 (1988). This requirement applies to

restitution hearings. See State v. Tindal, 50 Wn. App. 401, 403, 748 P.2d 695 (1988).

Where, as here, a defendant enters an Alford plea, he has “clearly manifested” his intention not to admit the allegations of the state about the crime. Young, 51 Wn. App. at 522. It is therefore improper for a court to rely on the facts alleged by the state in the certification of probable cause at sentencing or a restitution hearing unless the state proves them or the defendant admits or acknowledges them. See Young, 51 Wn. App. at 522. If, in the plea agreement, the defendant does not agree to have the court consider the allegations in the Declaration as true, those allegations cannot be considered. 51 Wn. App. at 522.

Here, Steen did not agree to have the court consider the Declaration in sentencing. See CP 3-11. He specifically only agreed “that the court may review the police reports and/or a statement of probable cause supplied by the prosecution **to establish a factual basis for the plea.**” CP 9-10 (emphasis added). The court was thus precluded from considering that document - and any of the facts contained in it - in ordering restitution. See Young, 51 Wn. App. at 522.

Further, to the extent the court relied on the prosecutor’s declarations of the facts, that reliance was also in error. The prosecutor’s claims that the key in the ignition when Steen was arrested had caused damage and about the need for the officer to impound the car were not supported by any evidence whatsoever. See 2RP 2-7. Indeed, the impound “facts” were not even contained in the Declaration, which

referred only to the stop and the damage to the ignition but said nothing about who made the decision to impound, why that decision was made and whether the key Steen was apparently using in the ignition had somehow itself caused damage. CP 2.

The restitution court thus erred in relying on the Declaration and the unsupported, unproven declarations of the prosecutor in ordering restitution for the ignition damage and impound amounts, and that document and those declarations cannot be used to sustain that order on appeal.

- b. The court exceeded its statutory authority in ordering Steen to pay for the cost of the ignition repair and impoundment

Although imposition of restitution is usually within the discretion of the trial court, the abuse of discretion standard applies only when the ordered restitution is statutorily authorized. See Davidson, 116 Wn.2d at 920, 922. If the question on appeal is whether there is sufficient evidence to prove that the amounts ordered paid were for damages actually resulting from the offense, this Court applies de novo - not deferential - review. See id. This is because a restitution order is void if entered without statutory authority i.e., without sufficient proof of the required causal connection. See State v. Duback, 77 Wn. App. 330, 332, 891 P.2d 40 (1995).

On de novo review, this Court should reverse the ordered restitution for the ignition repair and impoundment costs, because those damages were not proven to have been caused by Steen's possession of the stolen car.

First, the court erred and acted outside its statutory authority in

ordering the amount for the ignition repair without any evidence that Steen had caused that damage or even been in possession of the car when that damage had occurred. A defendant who is convicted of possessing a stolen car cannot be required to pay restitution for items or damages caused by the theft of the car, which by definition occurred before his crime. See State v. Tettters, 81 Wn. App. 478, 481, 914 P.2d 784 (1996). The only exception is if the defendant *admits* that he had caused the damages by his conduct. See, e.g., State v. Harrington, 56 Wn. App. 176, 782 P.2d 1101 (1989).

Here, Steen made no admissions to having caused the damage to the ignition. Instead, he specifically disputed causing it. And the prosecution presented absolutely no evidence to prove the contrary, instead simply relying on its own unsworn, unproven declaration and two cases it said supported it.

Neither of those cases, however, provided such support. One of the cases, Kiegan C., involved consolidated cases, one of which went up to the Supreme Court and one of which was decided by the Court of Appeals. See, State v. Keigan C., 120 Wn. App. 605, 86 P.3d 798 (2004), affirmed sub nom State v. Hiett, 154 Wn.2d 560, 115 P.3d 274 (2005); 2RP 2-4. In both cases, the defendants were juveniles, and the question was whether the juvenile courts had properly ordered all of the defendants to be jointly and severally liable with other defendants for damage caused to stolen cars, when the defendants who had appealed were not the drivers of those cars. Hiett, 154 Wn.2d at 562; Keigan C., 120 Wn. App. at 606-607. In this case decided at the Court of Appeals and apparently not taken up on

review, the juvenile was picked up by the driver of the stolen car after the car had already sustained damage to the ignition, door locks and steering column, and the car then sustained further damage later. Keigan C., 120 Wn. App. at 606-608. In the case decided at the Supreme Court, the driver of the stolen car picked up the juvenile defendants, then attempted to elude police, causing damage in the process. Hiett, 154 Wn.2d at 562.

On appeal, the Court of Appeals and Supreme Court both noted that, although the juvenile defendants said their only conduct was riding in the car, they were convicted of the crime of “taking a motor vehicle without permission,” which is defined in such a way as to make “a knowing passenger as culpable as the person who took the car unlawfully and drove it away.” Keigan C., 120 Wn. App. at 607; see Hiett, 154 Wn.2d at 565. Further, because the defendants were juveniles, the juvenile restitution statute applied, and that statute specifically requires a juvenile who “participated in the crime with another person or other persons” to be “jointly and severally responsible for the payment of restitution.” Keigan C., 120 Wn. App. at 607; Hiett, 154 Wn.2d at 561. “But for” the taking of the motor vehicle without permission, the Courts concluded, none of the damage to the cars would have occurred, and, under the relevant statutes, the juveniles were properly ordered to pay restitution for the damages resulting from their crime of conviction. Keigan C., 120 Wn. App. at 607; see Hiett, 154 Wn.2d at 505.

Thus, unlike here, in Keigan C. and Hiett, the defendants were juveniles, charged with and convicted of a crime which was deemed the same as the taking of the car. And the relevant restitution statute

specifically treated them as such. Neither Keigan C. nor Hiett involved the situation where, as here, the crime was the later possession of a stolen vehicle in which the ignition was damaged at some unspecified time.

Similarly, State v. Donahoe, 105 Wn. App. 97, 18 P.3d 618 (2001), also cited by the state at the restitution hearing, does not support ordering restitution for the ignition damage here. See 2RP 2-4. In Donahoe, the defendant was also a juvenile, subject to the juvenile restitution statute. 105 Wn. App. at 99. He admitted he had “forced a screwdriver into the ignition and started the engine of a car stolen by others,” before driving the car himself. 105 Wn. App. at 99. He was found guilty of first-degree possession of stolen property and was ordered to make restitution for the damage to a fence and garage which were hit when the defendant’s 9-year-old brother took the wheel. Id. On appeal, the defendant argued that, because he was charged only with possessing the stolen property, the damage to the fence and the garage should not have been ordered paid and the trial court erroneously did so based upon the “general criminal scheme,” not a causal link. 105 Wn. App. at 100.

On review, the Court noted that the defendant had admitted that he was responsible for the crash of the car into the garage and fence, because he had started the car and driven with his younger brother in the first place. 105 Wn. App. at 101-102. The Court concluded that, under the facts, because the damage had occurred right after the defendant’s offense rather than before he had driven the stolen car, and because he had admitted responsibility, he was properly ordered to pay for that damage. Id.

Notably, in Donahoe, the issue on appeal was *not* whether it was

proper to order the juvenile to pay for the damage to the ignition - that issue was apparently never raised. See id. Instead, the issue was whether he should be ordered to pay for damage he admitted was his responsibility and which occurred directly after his crime, not at some unspecified time, as here. Dohahoe did not hold, as the prosecution here seemed to suggest, that it is proper to order payment for ignition damage whenever someone is convicted of having later possessed the stolen vehicle.

Steen is not disputing that there was ignition damage to the car. But the state presented absolutely no evidence that Steen caused that damage, or that it occurred while he was in possession of the car, rather than before, when someone else stole it, for example. The restitution court erred and exceeded its statutory authority in ordering Steen to pay for the cost of ignition repair, because that damage was not proven to have been caused by Steen's possession of the stolen vehicle.

The court also erred in ordering Steen to pay the costs of the impound without sufficient evidence that the cost was caused by Steen's crime. The prosecutor's version of events was that the officer decided to order impoundment because he did not want to wait for the owner of the car to arrive. 2RP 2-7. The evidence submitted as part of the restitution documentation did not indicate who ordered the impoundment but just that it was done for Bergstrom, ordered on September 16. See "Restitution Information", filed 10/23/08 (designated and sent to this Court as "attachments" to the clerk's papers). Either way, however, the prosecution presented no evidence that the impoundment was caused by Steen's possession of the car. While in some limited circumstances, an officer is

required to impound a car, those were not the circumstances here. RCW 46.55.113(2)(d) provides that, when the driver of a vehicle is arrested, the officer “*may* take custody of a vehicle, at his or her discretion,” but is not required to do so. RCW 46.55.113(2)(d) (emphasis added). As a result, the impoundment was a discretionary choice of the officer, not a mandatory act. See RCW 46.55.113(2)(d).

Further, the state presented no evidence that impoundment was necessary. The evidence indicated that the car was driveable. It was not on a public street or blocking traffic. There was no evidence -save for the prosecutor’s speculation - that the private property owner was unhappy or concerned about having the car parked on their property. There is no evidence indicating whether that person was home, on vacation or even cared. And there was no evidence showing how long it would have taken for Bergstrom to come pick up and drive away the car, to justify ordering an impound and the resulting cost.

Steen is not disputing that he was driving a stolen car. But the impound costs were not the result of that crime. They were the result of an officer’s impatience and his choice to incur costs rather than wait. Or they were the result of Bergstrom’s decision not to drive the driveable car. Further, they were costs which were arguably caused by the theft of the car, because even if Steen had not later driven it, an officer finding it after it was stolen could still have chosen to impound.

Because it cannot be said that Steen’s crime caused the impound costs, the restitution court should not have ordered Steen to pay for those costs. This Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should strike the order of restitution for the ignition repair and impound costs.

DATED this 23rd day of October, 2009.

Respectfully submitted,



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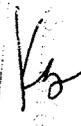
CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached document to opposing counsel and appellant by placing it in the United States Mail first-class postage prepaid to the following addresses:

- TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S,  
Tacoma, WA. 98402;
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