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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RYAN MILTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick

Nos. 08-1-04625-9 and 08-1-01775-5

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
KAREN D. PLATT
Deputy Prosecuting Attorney
WSB # 17290

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court's entry of restitution orders when defendant's attorney was not present violated his 6th amendment right to be represented by counsel at all critical stages of his criminal proceeding.
2. Whether the trial court abused its discretion by entering restitution orders when defense attorney did not appear at the restitution hearings.

B. STATEMENT OF THE CASE.

1. Procedure

On April 10, 2008, the Pierce County Prosecutor's office charged Ryan Milton, hereinafter "defendant", with one count of residential burglary on April 10, 2009, in cause number 08-1-01775-5. CP1. The State filed restitution information with the court on May 6, 2008. CP 212-218. These documents supported the victim's claim for restitution.

On October 3, 2008, the Pierce County Prosecutor's office charged defendant with burglary in the first degree with a deadly weapon sentencing enhancement, four counts of residential burglary, trafficking in stolen property in the first degree, four counts of theft in the first degree, three counts of theft of a firearm, and five counts unlawful possession of a firearm in the first degree, in cause number 08-1-04625-9. CP 34-41.

Defendant was re-arraigned on an amended information on March 26, 2009. During the re-arraignment, defendant told the court that he had a motion for malicious prosecution because he was induced to take the plea bargain. 2 RP 5-6. The judge declined to hear the defendant's argument as the motion was not noted and so was not properly before the court. 2 RP 6 – 7. Both cases were set for trial on June 15, 2009. 3 RP 10.

Defendant entered guilty pleas to both cases on the trial date. 3 RP 10. Defendant pleaded guilty as charged in 08-1-01775-5, and to the second amended information in cause number 08-1-04625-9. CP 2-10, 3 RP 10, CP 52-57, 58-70 2-10. During his colloquy with the court, defendant was concerned that he preserve for appellate purposes his right to a speedy trial. 3 RP 15. After some discussion with the judge, he understood that claim would not survive his guilty plea. 3 RP 15 – 16.

Attachment "D" of defendant's statement on plea of guilty sets forth the parties agreed sentencing recommendation, term of community custody, and legal financial obligations on both cases. CP 58-70, 2-10. During the plea colloquy, the court read aloud the agreed recommendation as set forth in attachment "D" of defendant's plea statement. 3 RP 20, CP 58-70, 2-10. The agreed recommendation included "restitution for all

victims by later order of the court.¹” 1 RP 18-19, CP 58-70, 2-10.

Defendant understood that recommendation. His sentencing date was set for June 23, 2009. 3 RP 33.

At sentencing, the court ordered 87 months in custody, with 120 months for the two enhancements, for a total of 207 months on cause number 08-1-04625-9. CP 92-106. Defendant was also ordered to complete 18 to 36 months of community custody, have no contact with the victims, and to pay standard legal financial obligations. CP 92-106. The judgments and sentences indicate that the legal financial obligations did not include restitution, which would be set by later order of the court. CP 92-106.

The court also ordered a sentence of 84 months on cause number 08-1-01775-5, to run concurrently with 08-1-04625-9. CP 13-24. The parties set restitution hearings on both cases for August 28, 2009. Defendant waived his presence at both restitution hearings. CP 71, 27. He did not indicate that he contested restitution.

On July 7, 2009, defendant filed a handwritten notice of appeal on both cause numbers with the trial court. CP 109-110, 28-29. He did not give a basis for the appeal, but alleged that both his assigned attorneys ineffectively represented him. CP 109-110, 28-29.

¹ The record does not indicate why the restitution hearing was set for a later date. 3 RP 49.

On August 4, 2009, defendant filed in the trial court a Motion and Declaration For Order Authorizing the Defendant To Seek Review at Public Expense and Providing For Appointment Of Attorney On Appeal in cause number 08-1-01775-5, and an Order Of Indigency Authorizing The Defendant To Seek Review At Public Expense And Providing For Appointment Of Attorney On Appeal on cause number 08-1-04625-9. CP 200-201, 202-207.

In anticipation of the restitution hearing on cause number 08-1-04625-9, the State filed 80 pages of information with the trial court on August 25, 2009. CP 119-199. The first page of this document is addressed to the defense attorney as well as the prosecutor. CP 119 - 199. The documents consists of restitution declarations, financial claim details, stolen property inventories provided to law enforcement and insurance companies, property repair invoices, and receipts. CP 119-199.

The defense attorney did not appear for the restitution hearing on August, 28, 2009. 3 RP 62. The State called defendant's two cases, informed the court that defendant had waived his presence, and that the defense attorney had not appeared. The court signed the restitution orders. 3 RP 62. The order on cause number 08-1-01775-5 was entered for \$2,869.12, and on 08-1-04625-9 for \$60,434.58. CP 30-31 and 111-112.

Defendant did not set a motion to reconsider the entry of the restitution orders in the trial court. By letter dated August 26, 2009, the Court of Appeals consolidated both cases into a single appeal. CP 210-211. Defendant filed no further notices of appeal.

C. ARGUMENT.

1. THE TRIAL COURT'S ENTRY OF RESTITUTION ORDERS WHEN DEFENDANT'S ATTORNEY WAS NOT PRESENT DID NOT VIOLATE HIS 6TH AMENDMENT RIGHT TO COUNSEL AT A CRITICAL STAGE OF A CRIMINAL PROCEEDING.

A criminal defendant's right to counsel attaches when a critical stage in a criminal prosecution *resulting in a loss of liberty* is reached. *State v. Fitzsimmons* 93. Wn.2d 436, 442, 610 P. 2d. 893 (1980) citing *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L.Ed.2d 411 (1972), *State v. Jackson*, 66 Wn.2d, 24, 400 P.2d. 774 (1965). However, defendant is not entitled to counsel "at every stage." Rather the "critical point" is to be determined both from the nature of the proceeding and from that which actually occurs in each case. *Jackson, Id.* at 27.

Most cases which discuss a critical stage of a criminal prosecution involve arrests, preliminary hearings, arraignments, and trial. A restitution hearing occurs after defendant's guilt or innocence has been established. The Washington Supreme Court stated in *Jackson*,

“[t]he name of the stage of the criminal proceeding is not controlling. The court must look at substance and not merely form.” If there is no possibility that a defendant is or would be prejudiced in the defense of his case, this court will be reluctant to overturn the result of a fair trial where no denial of appellant’s constitutional rights is shown. We therefore hold that the right to counsel extends only to those stages in the judicial process that may be characterized as critical.”

Id. at 28.

As *Fitzsimmons* points out, a defendant is entitled to counsel during a critical stage which involves a loss of liberty. A restitution hearing concerns only civil financial payments, not fines, fees, or costs. It does not involve a loss of liberty.

Defendant argues that a restitution hearing is a critical stage of his case at which he has a sixth amendment right to have his counsel present. While a defendant may be entitled to counsel during sentencing, and a restitution hearing may be an integral part of sentencing, it does not follow that defendant is entitled to counsel at a restitution hearing. The issue before this Court is whether a restitution hearing is a critical stage.

To support his argument that a restitution hearing is a critical stage of proceedings, defendant cites *State v. Pollard*, 66 Wn. App. 779, 834 P.2d 51 (1992). This Court should take note that Pollard argued that his attorney’s performance at his restitution hearing was deficient, and appealed on the issue of ineffective assistance of counsel, not the sixth amendment right to counsel. In *Pollard*, defendant pleaded guilty

pursuant to a plea bargain, and agreed to pay restitution on all counts, even though some counts were dismissed. *Id.* at 781.

At his sentencing, Pollard contested restitution on all counts. *Id.* Pollard was present at the restitution hearing and again contested the amount of restitution sought by the State. His defense attorney agreed to some but not all of the restitution request. *Id.* at 781 - 782. They discussed the restitution issue and then the court ordered restitution in an amount based on the documentation the State had filed. *Id.* at 782.

Pollard appealed the restitution ordered on the basis that his counsel had been ineffective when he did not require that a victim advocate be placed under oath before presenting restitution evidence, and when he did not ask that the documents be admitted as exhibits. *Id.* at 783. The Court of Appeals, Division 1 interpreted Pollard's argument that his counsel was ineffective as questioning whether: (1) the sentencing rules in RCW 9.94A.530 (formerly RCW 9.94A.379) apply at a restitution hearing, (2) the Rules of Evidence apply at the restitution hearing, and (3) his counsel was ineffective. The Court of Appeals decided that Pollard had contested the amount of restitution, and that the State had not presented "substantial credible evidence" to support the restitution requested. It did not reach the issue of whether his counsel had been ineffective.

Pollard does not support defendant's argument that he has a sixth amendment right to counsel at a restitution hearing. Nor has defendant

presented case law that a restitution hearing is a critical stage. Because the sixth amendment right to counsel attaches only at a critical stage of a criminal prosecution which may result in a loss of liberty, it must be inferred that a restitution hearing is not a critical stage of a proceeding.

Defendant's motion to remand based on the violation of his sixth amendment right has no merit and should be denied.

2. BECAUSE THERE WAS NO ABUSE OF DISCRETION BY THE TRIAL COURT, DEFENDANT IS BOUND BY HIS ATTORNEY'S DECISION NOT TO CONTEST THE AMOUNT OF RESTITUTION.

The award of restitution to victims in criminal cases derives from RCW 9.94A.753. The statutory principles regarding the imposition of restitution are set forth in RCW 9.94A.753 (a) and (b). The restitution statute as amended in 1982 indicates that the Legislature's intent is that the statute be interpreted broadly to allow restitution. *State v. Barr*, 99 Wn.2d 75, 78-79, 658 P.2d 1247 (1983). The very language of the restitution statutes indicates legislative intent to grant broad powers of restitution.

For example, restitution may include both public and private costs, RCW 9.94A.753(9), and restitution may be up to double the offender's gain or the victim's loss. RCW 9.94A.753(3). Restitution may "have a strong punitive flavor." D. Boerner, *Sentencing in Washington* § 4.8, at 4-14 (1985). The award of restitution to victims of crimes is a statutory

obligation, imposed as a part of an offender's sentence for rehabilitative purposes. *State v. Duvall*, 84 Wn. App 439, 461, 928 P.2d 459 (1996.) In short, statutes authorizing restitution must be interpreted to carry out the expressed intent of the Legislature.

When the particular type of restitution in question is authorized by statute, imposition of restitution is generally within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Morse*, 45 Wn. App. 197, 199, 723 P.2d 1209 (1986). The trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or imposed for untenable reasons. *State v. Hahn*, 100 Wn. App. 391, 398, 996 P.2d 1120 (2000).

The courts have long made a distinction between a constitutional right and a statutory right. For example, the speedy trial provisions of the superior court, juvenile court, district and municipal courts are procedural rules providing defendants with a right which is separate from the constitutional right to a speedy trial. See *Heaney v. Seattle Mun. Ct.*, 35 Wn.App. 150, 155, 665 P.2d 918 (1983), *rev. denied*, 101 Wn.2d 1004 (1984); *State v. Mack*, 89 Wn.2d 788, 793, 576 P.2d 44 (1978) "the rules are designed to protect but not guarantee the right; *accord, State v. White*, 94 Wn.2d 498, 501, 617 P.2d 998 (1980), "while founded upon the constitutional right to a speedy trial, the 60-day trial rule for a defendant in custody prescribed by CrR 3.3 is not of constitutional magnitude."

While recognizing the inability of counsel to waive certain fundamental guarantees, courts have explained that “[b]eing of statutory origin, a defendant's rights ... are ‘merely supplementary to and a construction of the Constitution....’ They do not carry the force or weight of constitutionally mandated imperatives.” *State v. George*, 39 Wn. App. 149, 155, 692 P.2d 219 (quoting *Townsend v. Superior Court*, 15 Cal.3d 774, 781-82, 126 Cal.Rptr. 251, 543 P.2d 619 (1975)).

As a general rule in criminal proceedings, an attorney is authorized to act for his or her client and to determine for the client all procedural matters, as well as trial strategy and tactics. For example, the Washington State Supreme Court has held that a defendant's right to trial within 60 days is a procedural right which can be waived by defense counsel over defendant's objection, to ensure effective representation and a fair trial. *State v. Luvene*, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995); *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); *see also State v. George*, 39 Wn. App. 145, 692 P.2d 219 (1984); *State v. Fanger*, 34 Wn. App. 635, 663 P.2d 120 (1983); *State v. Cunningham*, 18 Wn. App. 517, 569 P.2d 1211 (1977); *State v. Franulovich*, 18 Wn. App. 290, 567 P.2d 264 (1977).

Assuming arguendo that defendant has a right to counsel at a restitution hearing, this is a statutory hearing at which counsel has the right to decide on strategic and tactical issues, and to bind the defendant

who does not oppose. *New York v. Hill*, 528 U.S. 110, 120 S. Ct. 659, 145 L.Ed.2d 560, (2000), *U.S. v. Cravero*, 530 F.2d 666 (1976). In this case, defendant waived his presence at the restitution hearings. He has not challenged that waiver as unknowing or involuntary, it is presumed to be valid. More importantly, defendant never objected to restitution being ordered in this case.

Defendant implies that his attorney abandoned his case when he did not appear for the restitution hearing, leaving him unrepresented. This does not follow. He had notice of the date of the hearings. It is common for restitution orders to simply be entered if no one appears to contest the amount. The State had filed the restitution documents with the court. The fact that defense counsel did not attend the hearing may simply indicate that he did not find the amount of restitution requested unreasonable.

Defendant was initially charged with burglary to five houses, four counts of theft, one count of theft of a vehicle and four counts of theft of a firearm. He was eventually convicted on 17 felony level property crimes. The defense attorney could well have reviewed the restitution documents filed by the State and believed that a restitution order of \$60,000 was entirely reasonable. His absence can be interpreted as agreement with the amount of restitution requested.

In this case, the trial court ordered restitution based on documents filed by the victims with their insurance companies, the police department and other sources. CP 119-199, 212-218. The losses are all related to the

cases in which defendant entered pleas. Defendant agreed he would pay restitution to all victims as part of his plea bargain. CP 58-70, 2-10. The requests for restitution were properly substantiated in this case. The court's decision to enter the restitution orders in absence of the defense attorney was a reasonable decision exercised on tenable grounds. The restitution orders should remain in place.

Defendant never contested the amount of restitution requested in this case. He waived his presence at the hearing, leaving the matter in his attorney's hands. Defendant has not argued any error in the amount of restitution ordered. His only argument is that he has a constitutional right to have an attorney there and his attorney was not present. He does not argue that the restitution amount is wrong or that a lower amount of restitution would have been ordered had his attorney been present. Defendant's objection to the entry of the restitution orders when his attorney was not present is without merit. The trial court did not abuse its discretion in ordering restitution in these cases, and the court's orders should remain intact.

D. CONCLUSION.

Defendant has not established that he has a sixth amendment right to counsel at a restitution hearing. Even if he does, defendant has not shown that he ever contested the amount of restitution ordered or that

