

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

NO. 39518-5-II

BY 

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN ALEXANDER MILTON,

Appellant.

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

The Honorable Lisa Worswick

BRIEF OF APPELLANT

VALERIE MARUSHIGE
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A. ASSIGNMENT OF ERROR

The trial court erred in entering restitution orders where appellant did not agree to the restitution amount and defense counsel was not present at the restitution hearing.

Issue Pertaining to Assignment of Error

Did the trial court err in entering restitution orders where appellant did not agree to the restitution amount and defense counsel was not present at the restitution hearing depriving appellant of his constitutional right to counsel at all critical stages of a criminal proceeding?

B. STATEMENT OF THE CASE¹

On April 10, 2008, the State charged appellant, Ryan Alexander Milton, with one count of residential burglary under Pierce County Cause No. 08-1-01775-5. CP 1. On June 15, 2009, by a second amended information filed under Pierce County Cause No. 08-1-04625-9, the State charged Milton with three counts of residential burglary, five counts of theft in the first degree, two counts of burglary in the first degree, two counts of unlawful possession of a firearm, one count of trafficking in stolen property in the first degree, and one count of theft of a motor vehicle. CP 52-57.

¹ There are three volumes of verbatim report of proceedings: 1RP - 04/10/08; 2RP - 03/26/09; 3RP - 10/07/08, 06/15/09, 06/23/09, 08/28/09.

On June 15, 2009, Milton pled guilty to residential burglary and theft in the first degree as charged in counts one and two under Cause No. 08-1-04625-9 and entered an Alford plea to all other counts under Cause No. 08-1-04625-9 and one count of residential burglary under Cause No. 08-1-01775-5. On June 23, 2009, the court sentenced Milton to 207 months in confinement and 18 to 36 months of community custody. CP 18-19, 99-100. The judgment and sentences indicate that Milton waived his right to be present at any restitution hearing. CP 21, 102. The court set a restitution hearing for August 28, 2009. Supp CP ____ (Cause No. 08-1-01775-5, Order for Hearing, 06/23/09; Cause No. 08-1-04625-9, Order for Hearing, 06/23/09).

On August 28, 2009, the State informed the court that Milton waived his presence and that defense counsel was not present. The prosecutor stated, "So I don't know if you were inclined to go ahead with the restitution hearing or not." 3RP 62. The court replied, "I'll sign the order." 3RP 62. Thereafter, the court entered an order setting restitution in the sum of \$2869.12 under Cause No. 08-1-01775-5 and an order setting restitution in the sum of \$60,434.58 under Cause No. 08-1-04625-9. CP 30-31, 111-12.

Milton filed timely notices of appeal. CP 28-29, 109-110.

C. ARGUMENT

THE TRIAL COURT ERRED IN ENTERING RESTITUTION ORDERS WHEN MILTON DID NOT AGREE TO THE RESTITUTION AMOUNT AND DEFENSE COUNSEL WAS NOT PRESENT AT THE RESTITUTION HEARING DEPRIVING MILTON OF HIS CONSTITUTIONAL RIGHT TO COUNSEL AT ALL CRITICAL STAGES OF A CRIMINAL PROCEEDING.

The trial court's restitution orders must be vacated and a new restitution hearing must be held because Milton did not agree to the restitution amounts and defense counsel was not present at the restitution hearing depriving Milton of this Sixth Amendment right to counsel at all critical stages of a criminal proceeding.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI. The purpose of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant. State v. Price, 126 Wn. App. 617, 631, 109 P.3d 27 (2005). The right to counsel attaches when formal judicial proceedings are initiated against an individual by way of indictment, information, arraignment, or preliminary hearing. This right extends to every critical stage of the prosecution once adversarial judicial proceedings begin. State v. Franklin, 48 Wn. App. 61, 63, 737 P.2d 1047

(1987)(citations omitted); CrR 3.1 A criminal defendant is guaranteed the right to counsel “at all critical stages of a criminal proceeding, including sentencing.” State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). Restitution is an “integral part” of the sentencing proceeding. State v. Pollard, 66 Wn. App. 779, 784, 834 P.2d 51 (1992). “The [United States Supreme] Court has uniformly found constitutional error without any showing of prejudice when counsel is either totally absent, or prevented from assisting the accused during a critical stage of the [criminal] proceeding.” United State v. Cronic, 466 U.S. 648, 659 n. 25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

Unless the defendant agrees to the amount of restitution, the State has the burden of proving the amount by a preponderance of the evidence. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). Before ordering restitution, the court must find that the victim’s injuries or loss to property were causally connected to the defendant’s crime. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999). A causal connection exists when, but for the offense committed, the loss or damages would not have occurred. State v. Hunotte, 69 Wn. App. 670, 676, 851 P.2d 694 (1993).

Here, the judgment and sentences indicate that Milton waived his presence at any restitution hearing. CP 21, 102. The trial court entered a

scheduling order setting a restitution hearing for August 28, 2009, signed by Milton and defense counsel. Supp. CP ____ (Cause No. 08-1-01775-5, Order for Hearing, 06/23/09; Cause No. 08-1-04625-9, Order for Hearing, 06/23/09). At the restitution hearing, the State informed the court that defense counsel was not present:

MS. PLATT: Ryan Milton -- just so you know, Mr. Moseley is not here on these matters. So I don't know if you were inclined to go ahead with the restitution hearing or not. In both of these cases, the defendant has waived his presence.

THE COURT: I'm sorry. You were talking about one case, and I was looking at another.

MS. PLATT: This is Ryan Milton. There was two matters on this afternoon for restitution hearings. The defendant has waived his presence.

THE COURT: I'll sign the order.

MS. PLATT: Thank you, Your Honor. I'll hand them forward. On Cause No. 08-1-01775-5, the State is asking for \$2,869.12. On the other Cause No. 08-1-04625-9, I have a restitution order for \$60,434.58. I'll hand that forward as well.

(Proceedings concluded.)

3RP 62.

The restitution orders presented by the prosecutor and signed by the court contain a paragraph which states the following:

I, RYAN ALEXANDER MILTON, [Cause No. 08-1-01775-5 and Cause No. 08-1-04625-9] being fully advised

I have a right to be brought before the Court for a full Restitution Hearing, and to have an attorney present to represent me, and that the Court will appoint an attorney if I cannot afford one, hereby waive these rights and agree to entry of this order.

The signature line for defendant is unsigned and the signature line for attorney for defendant indicates "Did not appear."

CP 31, 112.

The record substantiates that the trial court erred in entering the ex parte restitution orders because Milton did not agree to the restitution amount and the absence of defense counsel deprived Milton of his Sixth Amendment right to counsel at the restitution hearing. Furthermore, the trial court neglected to determine whether the State provided sufficient proof of the restitution amount relieving the State of its burden of proving the amount by a preponderance of the evidence.

Particularly in light of the large amount of restitution that was ordered, the restitution orders must be vacated and a new restitution hearing must be held where Milton's interests are properly represented by defense counsel and the State is held to its burden of proving the restitution amount by a preponderance of the evidence. Cronic, 466 U.S. at 659 n. 25; Robinson, 153 Wn.2d at 694; Tobin, 161 Wn.2d at 524.

D. CONCLUSION

For the reasons stated, this Court should vacate the trial court's restitution orders and remand for a new restitution hearing.

DATED this 29th day of March, 2010.

Respectfully submitted,


VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Ryan Alexander Milton

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Ryan Alexander Milton, DOC # 331999, Washington State Penitentiary, 1313 N 13th Avenue, Walla Walla, Washington 99362.

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

DATED this 29th day of March, 2010 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

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BY _____
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