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COURT OF APPEALS
DIVISION II

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NO. 41354-0-II

STATE OF WASHINGTON

BY *[Signature]*
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHARLES OSLAKOVIC
Appellant.

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

The Honorable Frederick Flemming, Judge

REPLY BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court exceeded its jurisdiction by imposing restitution for a crime Mr. Oslakovic did not plead guilty to or agree to pay restitution.
2. The trial court abused its discretion for imposing restitution for injuries that were not caused by Mr. Oslakovic's driving.
3. The trial court erred by imposing restitution for injuries that were not caused by Mr. Oslakovic's driving and that were not agreed to in the plea bargain.

Issues Presented in Reply

1. Does a sentencing court have the authority to order restitution, without the defendant's agreement, for crimes that the defendant was not convicted of?
2. Did the trial court exceed its jurisdiction by imposing restitution for a crime Mr. Oslakovic did not plead to or agree to restitution?
3. Did the trial court err by imposing restitution for injuries that were not caused by Mr. Oslakovic's driving and that were not agreed to in the plea bargain?

B. STATEMENT OF THE CASE

1. RELEVANT FACTS

Mr. Oslakovic was charged with vehicular assault and felony hit and run. CP 1-2. Pursuant to a motion under State v. Knapstad, 107 Wash.2d 346, 729 P.2d 48 (1986), the trial court dismissed the charge of vehicular assault specifically finding that there was no evidence that Mr. Oslakovic's driving caused the Ms. Roznowski's injuries. Supp. CP (Plea Knapstad and plea hearing, pages 21, 24 VRP 11-5-9) (8-27-10). The court orally ruled "there's no evidence he did anything except drive". Id. 1

[I]f you look at it, again, most favorably in favor of the state, this young lady opens the door and gets out as she's going down the freeway as a passenger, with the defendant driving, and stands on the running board, and then she falls off. But, the only thing he allegedly – the defendant could have done wrong was going between 70-80 miles an hour. And along there, the freeway, I think is 60 miles an hour, the speed limit.

RP 6 (November 5, 2009).

There is no evidence he is swerving. There's no evidence he did anything with his brakes. That he didn't even slow down is the argument the state can make. There's no evidence he did anything to try to throw her off, or swerving and making some sort of maneuver that would cause her to fall off. The only thing that there is is she opens the door and shuts the door, hangs on to the luggage rack and, in less than a mile, falls off and tragically, is injured.

¹ No were written findings and conclusions.

RP 21 (November 5, 2009).

On the same day that the trial court dismissed the vehicular assault charges against Mr. Oslakovic, it also accepted an Alford plea to felony hit and run and misdemeanor driving under the influence. Supp. CP (Knapstad and plea hearing, pages 27-31 VRP 11-5-9) (8-27-10). Supp. CP (Statement of Defendant on Plea of Guilty 11-5-09).

In his statement of defendant on plea of guilty, while maintaining his innocence, Mr. Oslakovic acknowledged the elements of DUI as driving under the influence. CP Supp. CP (Knapstad and plea hearing, pages 27-31 VRP 11-5-9) (8-27-10). During the plea hearing, the trial court did not advise Mr. Oslakovic that he would be required to pay restitution and Mr. Oslakovic did not at any time agree to pay restitution. Supp. CP (Knapstad and plea hearing, pages 27-31 VRP 11-5-9) (8-27-10).

During a later restitution hearing, the state argued that under State v. Thomas, 138 Wn. App. 78, 155 P.3d 998 (2007) the trial court could order restitution because the state believed that “but for” Mr. Oslakovic’s driving, the complainant would not have been injured. RP 5 (October 15, 2010). The defense disagreed and objected to the imposition of restitution. Id.

The court commented that it could review the statement of probable cause to support restitution. RP 6 (October 15, 2010); Supp CP (Affidavit of Probable Cause 1-22-09) (Attached hereto as Exhibit A). Nothing in the affidavit of probable cause indicated any erratic driving or swerving. Mr. Oslakovic admitted to driving and said that Ms. Roznowski received a telephone call and became upset and opened the door of the car and climbed out and fell. Mr. Oslakovic said it happened very quickly and that he exited the freeway at the next possible exit so that he could return to Ms. Roznowski. Although not admitted to in any pleading or proven in any manner, the police affidavit speculated that based on witness reports that Mr. Oslakovic was driving 70-75 miles per hour. The affidavit listed Mr. Oslakovic's blood alcohol level at .09. Id.

The trial courts oral ruling imposing restitution is as follows:

One part of the argument for the defendant is the proximate cause, and I don't think that that makes it incumbent upon the Court. It could be a proximate cause. I'm of the belief that there was a proximate cause connection between the DUI and his driving and, therefore, the injuries that occurred to the young lady. And I'm going to find that, therefore, restitution is applicable.²

RP 5-6 (October 15, 2010). This oral ruling contradicted the court's earlier oral ruling from the hearing in which the court expressly held that "there's

² There are no written findings or conclusions for the Knapstad hearing.

no evidence he did anything except drive". RP 6, 21, RP 21 (November 5, 2009); pages 21, 24 VRP 11-5-9) (8-27-10).

The trial court ordered restitution in the amount of \$94, 223.19. RP 5-6. Mr. Oslakovic appeals the order of restitution. CP 31-33.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT ORDERED RESTITUION FOR INJURIES WHICH DID NOT RESULT FROM THE CHARGE OF DUI AND TO WHICH MR. OSLAKOVIC DID NOT AGREE TO.

Whether a sentencing court has the authority to order restitution, without the defendant's agreement, for crimes that the defendant was not convicted of and did not plead guilty to, is a question of law, reviewed de novo. State v. Osborne, 130 Wn. App. 38, 41 163 P.3d 799 (2007) State v. Johnson, 96 Wn.App. 813, 815-16, 981 P.2d 25 (1999).

The state relies on State v. Thomas, 138 Wn.App. 78, 155 P.3d 998 (2007) to support the imposition of restitution in Mr. Oslakovic's case. In Thomas, the trial court ordered Thomas to pay medical expenses when she caused an accident that seriously injured a passenger in her car. As a result of the accident, Thomas was charged with vehicular assault. Thomas, 138 Wn.App. at 80-81.

A jury found Thomas not guilty of vehicular assault but guilty of

driving under the influence, a lesser included offense. Thomas, 138 Wn.App. at 80. At the restitution hearing, the trial court found that Thomas's driving under the influence was one cause of the passenger's injuries. Thomas, 138 Wn.App. at 81. This court affirmed the order of restitution, because there was sufficient evidence in the record to support by a preponderance of evidence, a conclusion that Thomas's driving under the influence caused the passenger's injuries. Thomas, 138 Wn.App. at 83.

Thomas, does not provide controlling authority for the instant case. First, a jury made the finding of guilt in Thomas, whereas herein, Mr. Oslakovic pleaded guilty. The law relevant to restitution in a plea case differs from that in a jury trial on grounds, that in a plea, the trial court is limited in its ability to impose restitution based on the facts agreed to in the defendant's statement on plea of guilty. State v. Osborne, 140 Wn. App. at 42; State v. Miszak, 69 Wn.App. 426, 848 P.2d 1329 (1993).

Unlike in Mr. Oslakovic's case, in Thomas, the trial court was able to rely on all of the evidence produced at trial to find a causal relationship between the injuries and the crime charged under the lesser burden of proof by a preponderance of evidence. Thomas, 138 Wn.App. at 83. For example, in Thomas, a blood test revealed that Thomas had a blood alcohol level of .20, and the passenger's testimony, expert testimony and

Thomas's own admissions supported the conclusion that Thomas' driving under the influence was causally related to the passengers injuries. Thomas, 138 Wn.App. at 83.

In Mr. Oslakovic's case, the only evidence before the court was Mr. Oslakovic's alleged driving 70-75 miles an hour on the freeway. There was no evidence of driving in an erratic manner and the trial court so stated. In stark contrast to Thomas, there were no witnesses indicating that Mr. Oslakovic's driving caused the injuries. In Mr. Oslakovic's case, the passenger self-inflicted her injuries by jumping out of a car that was traveling on the freeway. Mr. Oslakovic did not encourage, assist or cause the injuries.

The trial court summarized the evidence as follows:

[I]f you look at it, again, most favorably in favor of the state, this young lady opens the door and gets out as she's going down the freeway as a passenger, with the defendant driving, and stands on the running board, and then she falls off. But, the only thing he allegedly – the defendant could have done wrong was going between 70-80 miles an hour. And along there, the freeway, I think is 60 miles an hour, the speed limit.

RP 6 (November 5, 2009).

There is no evidence he is swerving. There's no evidence he did anything with his brakes. That he didn't even slow down is the argument the state can make. There's no evidence he did anything to try to throw her off, or swerving and making some sort of maneuver that would

cause her to fall off. The only thing that there is is she opens the door and shuts the door, hangs on to the luggage rack and, in less than a mile, falls off and tragically, is injured.

RP 21 (November 5, 2009). This accurate and unchallenged summary of evidence does not support by a preponderance of evidence that Mr. Oslakovic caused the passenger's injuries.

The state in its response brief ignores the evidence in favor of the judge's statement during the restitution hearing which is not evidence:

One part of the argument for the defendant is the proximate cause, and I don't think that that makes it incumbent upon the Court. It could be a proximate cause. I'm of the belief that there was a proximate cause connection between the DUI and his driving and, therefore, the injuries that occurred to the young lady. And I'm going to find that, therefore, restitution is applicable.³

RP 5-6 (October 15, 2010). This oral ruling is not evidence and is not based on any evidence; it is merely a statement which contradicted the court's earlier oral ruling in which he dismissed the vehicular assault charges.

Even though the standard of proof is lower for restitution, the trial court found earlier that "there's no evidence he did anything except drive".

RP 6, 21, RP 21 (November 5, 2009); pages 21, 24 VRP 11-5-9) (8-27-

³ There are no written findings or conclusions for the Knapstad hearing.

10). The “driving”, did not cause the passenger’s injuries; rather the passenger decided to jump and was injured as a result.

In Osborne, a controlling case on point, the defendant pleaded guilty to assault. He did not plead guilty to robbery or attempted kidnapping and he did not agree to pay restitution for uncharged crimes. The trial court nonetheless ordered Osborne to pay for conduct relating to the uncharged crimes of kidnapping and robbery. Osborne, 140 Wn. App. at 42.

In Mr. Oslakovic’s case, as in Osborne, Mr. Oslakovic did not agree to pay restitution for an uncharged crime; here, vehicular assault. Mr. Oslacovik pleaded guilty to DUI and the facts in support of that crime do not provide a causal connection to the passenger’s injuries (nor do any of the facts set forth in the statement of probable cause provide a causal connection between Mr. Oslakovic’s driving and the passenger’s injuries). As in Osborne, herein, the trial court erred by imposing restitution for the passenger’s injuries where there was neither a causal connection between the crime and the injuries, nor an agreement to pay restitution for uncharged crimes. For these reasons, the order of restitution was made in error and must be stricken.

State v. Griffith, 164 Wn.2d 960, 966-967, 195 P.3d 506 (2008) is

another case which provides authority for striking the order of restitution.

In Griffith, the defendant pleaded guilty to possessing stolen property. The victim testified to her losses and a third party testified that he bought some jewelry from Griffith and looked at a ring and saw that that Griffith had a “mixture of stuff” that he did not examine. Griffith, 164 Wn.2d at 966. The Supreme Court held that the evidence was insufficient to establish that Griffith possessed all of the property that was stolen. The Supreme Court reversed the order of restitution holding that restitution may only be imposed for the property in Griffith’s possession, rather than based on the victim’s losses. *Id.*

In Mr. Oslakovic’s case, the trial court like the sentencing court in Griffith imposed restitution for the victim’s losses when Mr. Oslakovic like Griffith pleaded guilty to crimes that did not provide a factual basis to establish by a preponderance of evidence that Mr. Oslakovic caused the injuries. The passenger in this case was injured but those injuries were self-inflicted. Without an agreement at the plea hearing and lacking a causal connection between the DUI and the injuries, this Court must strike the order of restitution. State v. Tracy, 73 Wn. App. 386, 387-388, 869 P.2d 425 (1994) (citations omitted).

D. CONCLUSION

