

NO. 42611-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN GRANTHAM,

Appellant.

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

The Honorable George L. Wood, Judge
The Honorable Ken Williams, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. May Grantham now challenge the order granting a continuance to April 28, 2011, beyond the 180-day statutory restitution deadline?

2. Should this Court disregard the State's unsupported factual assertions, which it relies on to claim the continuance was based on good cause?

3. Should this Court reject the State's argument that Grantham waived his right to the setting of restitution within the deadline?

B. ARGUMENTS IN REPLY

1. AN UNTIMELY RESTITUTION ORDER MAY BE CHALLENGED FOR THE FIRST TIME ON APPEAL.

The State argues Grantham may not raise his argument for the first time on appeal. The State cites no pertinent authority for this proposition. It instead claims State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996) does not apply. Brief of Respondent (BOR) at 13-14, 16-18.

In pertinent part, Moen stands for the well accepted proposition that a sentence which exceeds statutory authority may be challenged for the first time on appeal. Id. at 546. The Moen Court also noted that its holding was consistent with the orderly administration of justice:

Where a restitution order is involved, the defendant's failure to object to a late order [does not implicate the same

concerns as] withholding an objection in order to take a chance on a favorable verdict. All that is involved is a court ruling the restitution order invalid because the timeliness requirement has not been met. *Whether the trial court or the appellate court makes that determination is a distinction with little difference, once the time period has passed.*

Id. at 547 (emphasis added).

Because the superior court continued Grantham's restitution hearing beyond the statutory time limit without good cause, the sentence was illegal. Grantham may therefore raise this issue for the first time on appeal.

2. THIS COURT SHOULD REJECT THE STATE'S ATTEMPT TO INJECT UNSUPPORTED FACTUAL ASSERTIONS INTO THIS APPEAL.

The State makes a number of unsupported factual assertions to argue there was good cause for the continuance. Without citing to the record, the State claims “the restitution hearing was continued because Mr. Grantham had asked to be present at the restitution hearing *and he was not available within 180 days.*” BOR at 14 (emphasis added). The State makes a similar assertion a page later, stating “He was not available within 180 days. Mr. Grantham asserted a constitutional right to be present but he was not available until after April 28th.” BOR at 15.

This is not so. While there may have been a basis for some continuance based on other circumstances, the State's misrepresentation,

not Grantham's assertion of his constitutional right, is the only reason the court granted a continuance beyond the 180-day limit. Brief of Appellant (BOA) at 6 (citing CP 73-74, 76). Thus, whether Grantham was unavailable for selected periods before or after the deadline is irrelevant to this Court's review.

Assuming such information were relevant, however, the State would still be unable to demonstrate that Grantham would have been unavailable for all the dates between March 2 and the statutory deadline, had the court recognized the correct deadline. Such information does not, and indeed could not, appear on the record, because the State misinformed Grantham and the court as to the deadline. In a similar manner – as argued in the opening brief -- the court's finding listing the reasons for the continuance is erroneous. BOA at 8 (challenging finding 3).

In either situation, the State cannot demonstrate the existence of good cause to grant the continuance. RCW 9.94A.753(1).

**3. GRANTHAM DID NOT WAIVE HIS RIGHT TO A
TIMELY RESTITUTION ORDER.**

The State appears to assert that Grantham was represented by counsel at the time the court granted the continuance beyond 180 days, and that counsel, "saw the facts of the situation the same as everyone else," that Mr. Grantham would "not be available any time within the

remaining 180 days.” BOR at 16. Somehow, this leads the State to conclude Grantham waived any objection to a setting outside the statutory time period. BOR at 15-16.

The State’s assertion about what defense counsel “knew” is pure speculation. The record shows only that at the time the continuance was granted, counsel had tentatively agreed to appear for Grantham. In any event, counsel was unfamiliar with Grantham’s case. CP 76.

Despite later statements by counsel the State now cites,¹ the State cannot show that either Grantham or then-prospective counsel were in a position on March 2 to knowingly waive Grantham’s right to the timely setting of restitution. See State v. Wilcox, 20 Wn. App. 617, 619, 581 P.2d 596 (1978) (waiver is an intentional relinquishment or abandonment of a known right or privilege and must be knowing, intelligent, and voluntary).

¹ BOR at 7. It is reasonable to assume that counsel – who knew nothing about the case – accepted the State’s mistaken claims that April 28 was within the deadline. Taking counsel’s quoted statement in context, moreover, it is clear he was referring to the continuance from June 2 to June 9, 2011 as being supported by good cause, not the continuance at issue in this appeal. RP 24-25.

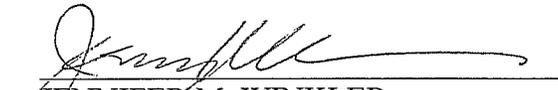
C. CONCLUSION

For the reasons stated above and previously argued, the restitution order should be stricken.

DATED this 30th day of April, 2012.

Respectfully submitted,

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vs.)	COA NO. 42611-1-II
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF APRIL, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JONATHAN GRANTHAM
DOC NO. 801853
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF APRIL, 2012.

x 

NIELSEN, BROMAN & KOCH, PLLC

April 23, 2012 - 2:31 PM

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