

NO. 43308-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN McCARTHY,

Appellant.

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

The Honorable Richard Brosey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it imposed restitution beyond the scope of the crime.

2. The trial court erred by imposing restitution for uncharged crimes.

3. RCW 9.94A.753 does not mandate that the trial court impose restitution for crimes that are not causally related to the crimes to which the defendant pleads.

Issues Presented on Appeal

1. Did the trial court err when it imposed restitution beyond the scope of the crime?

2. Did the trial court err by imposing restitution for uncharged crimes?

3. Does RCW 9.94A.753 mandate that the trial court impose restitution for crimes that are not causally related to the crimes to which the defendant pleads?

B. STATEMENT OF THE CASE

1. RELEVANT FACTS

Ryan McCarthy pleaded guilty to first degree robbery, residential burglary and attempted extortion in exchange for

amending the charging document to no longer include murder. CP 65-76. McCarthy agreed to the prosecutor recommending “restitution” in general. Id. The court imposed restitution for funeral and burial costs for the two victims of the Booth shooting. RP 105, 108. The state argued that there existed a causal connection between the crimes of extortion, residential burglary and robbery and the killing of the two victims. Id.

McCarthy took and passed multiple polygraph tests indicating that he was not in the house when Booth committed the murders. RP 108. McCarthy did not plead guilty to attempted murder or murder and he did not agree to pay restitution in any specific amount or to all victims for all damages caused by Booth’s shootings. CP 65-76. The state argued that McCarthy’s plea to extortion, residential burglary and robbery led to the murders even though McCarthy left before the murders occurred. RP 105, 107, 108. The trial court imposed restitution for burial expenses under RCW 9.94A.753(7).

C. ARGUMENT

1. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT ORDERED RESTITUION FOR INJURIES THAT

WERE NOT CAUSALLY RELATED TO THE CRIMES TO WHICH APPELLANT PLEADED AND WHERE APPELLANT DID NOT AGREE TO PAY RESTITUTION FOR UNCHARGED CRIMES.

The trial court was not authorized to impose restitution for injuries resulting from the crime of murder where Mr. McCarthy did not plead guilty to that crime and none of the crimes pleaded to were causally connected to the victim's injuries and the resultant financial costs.

a. Standard of Review

The authority to impose restitution is not an inherent power of the court but is derived from statute. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 11167 (2007); State v. Oakley, 158 Wn. App. 544, 551-552, 242 P.3d 886 (2010), citing, State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). The Court of Appeals reviews a trial court's authority to order restitution under the statute de novo. State v. Kinneman, 155 Wn.2d 272, 286, 119 P.3d 350 (2005); Oakley, 158 Wn. App. at 552.

Restitution is allowed only for losses that are causally connected to a crime, and may not be imposed for a general scheme, acts connected with the crime charged, or uncharged

crimes unless the defendant enters into an express agreement to pay restitution in the case of uncharged crimes. Tobin, 161 Wn.2d at 524; Kinneman 155 Wn.2d at 282; State v. Woods, 90 Wn.App. 904, 907, 953 P.2d 834 (1998) RCW 9.94A.753(5).

First, the Court considers whether the sentencing court applied the proper law, including the requirement that there be a causal connection between the crime proven and the victims' damages. Second, the Court reviews whether the application of that law to the evidence before the trial court supports findings of fact necessary to support the causal connection and the amount of the victim's damages. Kinneman, 155 Wn.2d at 286. Third, and finally the Court must determine whether the trial court abused its discretion by requiring the defendant to pay restitution in the amount and under terms contained in its order. Davidson, 116 Wn.2d at 919. Application of the wrong legal standard can constitute an abuse of discretion. Tobin, 161 Wn.2d 522.

An Appellate court must vacate a restitution order if the defendant did not make a specific agreement to pay when pleading guilty, or if the state failed to establish a causal connection between the defendant's crime and the damages. Oakley, 158 Wn. App. at

552; State v. Osborne, 140 Wn.App. 38, 42, 163 P.3d 799 (2007);
Accord, State v. Griffith, 164 Wn.2d 960, 965-66, 195 P.3d 506
(2008); State v. Thomas, 138 Wn. App. 78155 P.3d 998 (2007).

b. Court Misapplied the Law

The trial court herein misunderstood the import RCW 9.94A.753(7) when it imposed restitution under this subsection. RCW 9.94A.753(7) creates an exception from subsections one through six where a victim is entitled to benefits under the Crime Victim Compensation Act (CVCA). RCW 9.94A.753(7) provides as follows:

(7) Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

Id. (Emphasis added). RCW 7.68.020(15) defines "victim" as follows:

(15) “Victim” means a person who suffers bodily injury or death as **a proximate result of a criminal act of another person**, the victim's own good faith and reasonable effort to prevent a criminal act, or his or her good faith effort to apprehend a person reasonably suspected of engaging in a criminal act. For the purposes of receiving benefits pursuant to this chapter, “victim” is interchangeable with “employee” or “worker” as defined in chapter 51.08 RCW as now or hereafter amended.

(Emphasis added). Under these statutory provisions, a person is not a victim entitled to compensation under the Crime Victim’s Compensation Act (CVCA) unless the defendant’s criminal acts caused the injuries. *Id.* Thomas, 138 Wn.App. 78, 155 P.3d 998 (2007).

Where the trial court fails to follow the provisions of the governing statute, its restitution order is void. Tribble, 96 Wn.App. at 664. The meaning of a statute is a question of law reviewed de novo, with the fundamental objective to ascertain and carry out legislative intent. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720, *aff’d*, 144 Wn.2d 472, 28 P.3d 720 (2001). Where the statute's meaning is plain, the reviewing Court gives effect to that meaning

and does not engage in judicial construction. J.M., 144 Wn.2d at 480.

The meaning of RCW 9.94A.753(7) is plain and must be given effect. Under this provision to order restitution there must be a “victim” entitled to benefits under RCW 7.68. Under RCW 7.68(15), to be a “victim” entitled to restitution, the defendant must have caused the victim’s injuries. *Id.* Thus to give effect to these provisions, the court may not impose restitution for crimes not caused by the defendant. Thomas, 138 Wn.App. at 86.

In Thomas the issue was the trial court’s ability to impose restitution for injuries resulting from a DUI. Thomas, 138 Wn.App at 85. This Court explained that under RCW 9.92.060(2) a restitution award must be based strictly on the “crime in question”, the one for which the defendant was convicted, not other crimes. Thomas, 138 Wn.App. at 82-83, quoting and citing, RCW 9.92.060(2), *e.g.*, State v. Woods, 90 Wn.App. 904, 907–09, 953 P.2d 834 (1998). This provision authorizes and limits the trial court’s ability to impose restitution for “loss caused by the crime”. Thomas, 138 Wn.App. at 82-83.

Judge Quinn–Brintnall in her concurrence in Thomas,

addressed the role of RCW 9.94A.753(7) in relation to RCW 9.92.060(2). She held that that the trial court may only impose restitution under the mandatory provision of RCW 9.94A.753(7) where the defendant's criminal behavior caused the injuries or damage. Thomas, 138 Wn.App. at 86.

RCW 9.94A.753(7) requires a court to order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. **One is entitled to crime victim's compensation if she is injured as a result of a "criminal act,"** as defined by statute. RCW 7.68.070. The term "criminal act" includes an injury or death caused by a driver in violation of RCW 46.61.502, driving under the influence. RCW 7.68.020(2)(i)(D).

Thomas, 138 Wn.App. at 85-86 (Emphasis added)

The mandate to impose restitution under RCW 9.94A.743(7) does not mean that the trial court can impose any amount of restitution without first finding a causal connection between the crime and the victim's injuries. Thomas, 138 Wn.App. at 85-86. RCW 9.94A.753(7) is not a blanket vehicle for awards of restitution for injuries unrelated to the defendants crimes. *Id.* (Emphasis added). Tobin, 161 Wn.2d.at 524; Kinneman, 155 Wn.2d at 282; Oakley 158 Wn. App. at 552-553. RCW 9.94A.753(7); Thomas, 138 Wn.App. at 85-86.

In Kinneman, in the context of determining that under Blakely, the defendant was not entitled to a jury determination of an order of restitution the Court explained that:

[w]hile the restitution statute directs that restitution “shall” be ordered, it does not say that the restitution ordered must be equivalent to the injury, damage or loss, either as a minimum or a maximum, nor does it contain a set maximum that applies to restitution.

Kinneman, 155 Wn.2d at 282.

Here the trial court erred by imposing restitution for injuries and damages that were not caused by McCarthy’s crimes. For this reason, the order of restitution must be vacated.

c. No Causal Connection Between Crimes and Restitution.

“[R]estitution is authorized only by statute, and a trial court exceeds its statutory authority in ordering restitution where the loss suffered is not causally related to the offense committed by the defendant, or where the statutory provisions are not followed.” Woods, 90 Wn.App.at 907, quoting, State v. Vinyard, 50 Wn.App. 888, 891, 751 P.2d 339 (1988).

Generally, a causal connection exists when, ‘but for’ the offense the defendant is found to have committed, the victim's loss

or damages would not have occurred. Oakley, 158 Wn. App. at 552. The court here ordered restitution believing that it was statutorily required to do so in this case and believing that somehow, the created charges for the purpose of the plea led to the murders that were later committed by a different person. RP 105, 107.

The state argued that the crimes pleaded to were the cause of the deaths, but McCarthy left the residence before the shooting occurred and the charges for the plea were fabricated to facilitate the plea and were not actually committed by McCarthy. RP 112. The law prohibits restitution for a defendant's "general scheme" or acts "connected with" the crime charged, when those acts are not part of the charge. Oakley at 158 Wn. App. at 552; Woods, 90 Wn. App. at 907–08, quoting, State v. Miszak, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993). Contrary to this law, the trial court imposed restitution based on some loose sense of general scheme, not based on the actual crimes to which McCarthy pleaded.

In Oakley, this Court reversed an order of restitution for damage caused by uncharged crimes. Oakley, 158 Wn. App. at 525. In Oakley there was no causal connection between the

charged crimes of assault and the attempted drive-by shooting and the damages to a vehicle and garage door several blocks from the shooting. Oakley inflicted these damages while he fled the scene of the assaults and attempted drive-by, crimes that he had committed in a different area of the neighborhood.

Although Oakley's flight, like the defendant in State v. Dauenhauer, 103 Wn.App. 373, 379–80, 12 P.3d 661 (2000) was “connected with” his underlying crimes because he was trying to avoid apprehension when he caused the damages, Oakley did not crash into the vehicle and garage door as a result of his assaults and attempted drive-by shooting. Under these facts, this Court reversed the order of restitution because there was an insufficient causal connection between the charged crimes and the damages. Oakley, 158 Wn. App.at 553.

In Woods, this Court reversed a restitution order against Wood who was only convicted of possessing a stolen truck, but was charged with restitution for the belongings that had been in the truck when it was stolen. Woods, 90 Wn.App. at 909-10, This Court held, “it cannot be said that ‘but for’ Woods's possession of the stolen vehicle in September, the owner would not have lost the

personal property located in the vehicle when it was stolen in August.” Woods, 90 Wn.App. at 909-10.

In Blanchfield, the trial court imposed restitution for a hotel visit and moving expenses that were planned before the assault. This Court reversed the order of restitution holding that “[w]ithout the required causal connection, the trial court lacked the statutory authority to award restitution for those expenses and losses.” State v. Blanchfield, 126 Wn.App. 235, 242, 108 P.3d 173 (2005)

Here McCarthy pleaded guilty to attempted extortion, residential burglary and robbery. The residential burglary was committed by the attempted extortion and the robbery never occurred. None of these charges caused the death of the victims in the Booth case and do not meet the level of general scheme. RP 112. As in Woods and Blanchfield the charges McCarthy pleaded to did not cause the injuries nor were they related to the injuries. In short, there was no causal connection between the fabricated charges for the plea and the injuries and damages from the shooting.

- d. McCarthy Did Not Agree To Restitution For Uncharged Crimes.

A trial court imposing restitution “may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” Woods, 90 Wn.App. at 907, quoting former RCW 9.94A.370(2) (1996). “Absent agreement from the defendant as to the amount of restitution, the State must prove the amount by a preponderance of the evidence.” Tobin, 161 Wn.2d at 524.

RCW 9.94A.142(2) provides in part:

Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property.... In addition, restitution shall be ordered ... *if the offender pleads guilty to ... fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.*

(Emphasis added.) Here McCarthy did not agree to pay restitution for uncharged crimes or in a specific amount. Rather McCarthy agreed that the prosecutor would recommend restitution. CP 65-76.

There are a number of cases on point holding that a general agreement to pay restitution does not commit the defendant to paying restitution for uncharged crimes. State v. Osborne, 140 Wn. App. 38, 42, 168 P.3d 799 (2007); Dauenhauer, 103 Wn.App. at

379–80; Woods, 90 Wn.App. at 907.

In Osborne, Mr. Osborne refused to agree to any restitution so the state was required to prove a causal relationship between his crime and the victim's damages. Osborne, 140 Wn. App. at 42; Dauenhauer, 103 Wn.App. at 378. In Osborne the restitution order required payment for conduct relating to the uncharged crimes of kidnapping and robbery, for which Osborne did not agree to pay restitution. *Id.* The Court reversed the order of restitution because the state failed to prove a causal connection and Osborne never agreed to pay the restitution for the uncharged crimes.

In Dauenhauer, the defendant was charged only with burglary, but his restitution included damages incurred in a car accident that occurred during his attempted escape. The Court held that the damages to the car were not causally related to the charged crimes. Dauenhauer, 103 Wn.App. at 379–80.

In Woods, the defendant pleaded guilty to possession of stolen property in the second degree but the owner incurred losses due to theft of his truck, not from the later charge of possession of stolen property. The Court reversed the order of restitution because Woods neither agreed to pay the restitution for the uncharged

crime, nor was there a causal connection between the losses and the possession of the truck. Woods, 90 Wn.App.at 907, 911.

Here the restitution order required McCarthy to pay restitution for conduct relating to the uncharged crimes of murder in the first degree and felony murder for which McCarthy did not agree to pay restitution. CP 65-76. The state could not prove a causal connection between the funeral expenses and the charged crimes of robbery first degree; residential burglary; attempted first degree extortion because there were no facts to support these crimes.

The trial court acknowledged that the crimes pleaded were pursuant to an Alford¹ and In re Barr,² agreement. Under an Alford plea, a defendant may take advantage of a plea agreement without acknowledging guilt. Alford, 400 U.S. 25; Newton, 87 Wn.2d 363, 552 P.2d 682 (1976). Under In re Barr, the Supreme Court of Washington held that a plea can be voluntary and intelligent absent a factual basis for the ultimate charges, so long as the plea is based on informed review of all the alternatives and the defendant understands the nature of the consequences of the plea. Thus

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

² In In re Barr, 102 Wn.2d 265, 684 P.2d 712 (1984).

when the:

record establishes a factual basis for the two crimes originally charged and reveals defendant's understanding of his complicity in those crimes, the failure to state a basis for all the elements of the offense substituted for the first two charges after plea bargaining will not preclude a finding that the plea to the substituted charge is voluntary and intelligent.

In re Barr, 102 Wn.2d at 271. Here as in Osborne, this Court must reverse the order of restitution because the state failed to prove a causal connection between the charges pleaded and the funeral expenses and because McCarthy never agreed to pay restitution for the uncharged crimes.

D. CONCLUSION

Ryan McCarthy respectfully requests this Court reverse the order of restitution.

DATED this 26th day of August 2012.

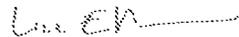
Respectfully submitted,



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Attorney for Appellant

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