

**FILED**

MAY 25 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

30375-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THEODORE SAROFF, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Andrew J. Metts  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

**FILED**

MAY 25 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

30375-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THEODORE SAROFF, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Andrew J. Metts  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

**INDEX**

APPELLANT’S ASSIGNMENTS OF ERROR.....1  
ISSUE PRESENTED.....1  
STATEMENT OF THE CASE.....1  
ARGUMENT.....2  
CONCLUSION.....7

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

STATE V. CUNNINGHAM, 96 Wn.2d 31,  
633 P.2d 886 (1981)..... 6

STATE V. DAVISON, 116 Wn.2d 917,  
809 P.2d 1374 (1991)..... 6

STATE V. ENSTONE, 137 Wn.2d 675,  
974 P.2d 828 (1999)..... 6

STATE V. LOHR, 130 Wn. App. 904,  
125 P.3d 977 (2005)..... 5

VANDERCOOK V. REECE, 120 Wn. App. 647,  
86 P.3d 206 (2004)..... 4

**STATUTES**

RCW 9.94A.753(1)..... 5, 6

I.

APPELLANT'S ASSIGNMENTS OF ERROR

The length of the appellant's assignments of error make their reproduction here time consuming and wasteful of resources.

II.

ISSUE PRESENTED

- A. DID THE LOWER COURT ABUSE ITS DISCRETION IN REQUIRING MONTHLY PAYMENTS OF \$1,250.00?

III.

STATEMENT OF THE CASE

The defendant pled guilty on September 19, 2008, to charges involving defrauding multiple financing companies who supplied "flooring" funds for the defendant's automobile sales business. CP 2-16. The defendant was ordered to pay \$268,593.11 in restitution. The monthly repayment amount was set at \$50.00. CP 7.

The State filed a motion to raise the monthly payment amount. After testimony and records examination, the court set the monthly payment at \$1,250.00 on August 26, 2011. RP 23.

This appeal followed. CP 28-32.

#### IV.

#### ARGUMENT

The defendant's desired outcome for this appeal is not immediately apparent. The records indicate that the defendant owes various finance companies a total in excess of \$150,00.00. RP 4. The defendant acknowledges that he should pay back the stolen funds. RP 8. However, the defendant does not appear to *actually* wish to do his best to pay off his restitution. RP 7-10.

The defendant argues that the trial court erred when it increased the amount of his monthly restitution payments to \$1250.00. The defendant does not state what *he* thinks the amount at which restitution payments should be set.

The defendant cites several alleged errors made by the trial court. The trial court did not increase the amount of money owed by the defendant, the court only increased the monthly payments. This would only be prejudicial or harmful if the defendant could not meet the new payment amounts of \$1,250.00 per month. Testimony and reports from Ms. Cyndi Selley, court collection deputy, showed that the defendant had considerable monthly payments for items the judge deemed not necessary. RP 1-24. A couple of interesting points surfaced at the hearing. The defendant declared bankruptcy but put the wrong address on notice to one of the creditors with whom the defendant had been dealing for years. RP 11. This prevented that particular company from receiving any funds from the bankruptcy. RP 7.

It was also discovered that the defendant was living in the exact same house he had lived in for years. RP 7-9. It is now owned by the defendant's son and the defendant is paying \$1650.00 per month in rental. RP 9.

It appears from the record that the court deemed that the defendant was still "playing games". RP 21-24. An example is seen at RP 11 wherein one of the defendant's creditors was not properly notified of the defendant's bankruptcy due to an incorrect address being used for the bankruptcy. This incorrect address was in spite of the defendant dealing with the finance company for several years. RP 11.

The defendant argues several supposed mistakes, but at no point does the defendant claim he cannot make the payments set by the lower court. To be sure, if the defendant's financial representations to the court are accurate, he will certainly have to change his lifestyle. The trial judge noted several items, such as cable TV, internet, high monthly rental etc., which could be eliminated and that money turn over to the Spokane County Clerk. RP 21-24. There is no indication that the defendant cannot make the payments ordered by the court.

What the defendant appears to be arguing on appeal is that the lower court was unfair to him. The defendant may have to "tighten his belt" in order to meet his monthly payments, but the current arrangement is unfair to the creditors. A \$50 per month payment is ludicrous.

The defendant must show prejudice in order to pursue his appeal. He not only has not shown prejudice, he cannot show prejudice. The total amount of money owed was not changed, only the amount of the monthly payments.

Turning to specific claims of error, the defendant argues that the trial judge here voiced his personal experiences as well as his knowledge of the local economy and real estate market. Brf. of App. 10 The defendant cites to *Vandercook v. Reece*, 120 Wn. App. 647, 86 P.3d 206 (2004) to support his arguments but the defendant does not mention that *Reece* has nothing to do with this case. In *Reece*, the issue was a judge using data from a prior hearing at which the same judge presided. *Id.* The judge in this case never presided over his prior restitution hearings.

The defendant may be confused as to exactly which judge handled the hearings. The Honorable Judge Clarke handled the original sentencing. The Honorable Judge Cozza handled the hearing at which the amount of monthly restitution payments would be increased to \$1,250.00. At various points in the defendant's brief, he names the wrong judge for certain events.

In any event, the defendant attacks the judge's ruling because of certain alleged comments that contained "judicially noticed" data. The court's ruling begins on page RP 20 with the observation that the defendant is 60 yrs. old and will never probably never pay off the outstanding restitution. The trial judge noted that "...we have to make some diligent efforts I think to get this under

control.” RP 21. So, despite the defendant’s claims to the contrary, the judge in this case did not use a payoff time frame in his decision on setting monthly payments.

The judge noted that he had reviewed the file in detail and the defendant’s information had been provided to the court in advance of the hearing. RP 21. The court ruled that based on information supplied by the clerk’s office and the DOC, the court found that the defendant has a significant amount of expenses in discretionary income. RP 21. The court went on to note certain expenses that, in the opinion of the court, were not necessary. These items were cable TV, cell phones, tithing and housing costs. RP 22.

The court has the power under RCW 9.94A.753(1) to set monthly payments. RCW 9.94A.753(1). In setting the minimum monthly payment, “[t]he court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.” *State v. Lohr*, 130 Wn. App. 904, 911, 125 P.3d 977 (2005) (citing RCW 9.94A.753(1)). This Court in *Lohr* stated: “Given that the court set the minimum monthly payment at an amount that would take over 400 years to pay off, it is evident the court considered Ms. Lohr's financial situation.” *State v. Lohr, supra* at 911. In this case, the judge noted that even at the higher \$1250.00 amount, he would not be surprised if the debt was never paid off.

RP 21. The facts before the judge met the statutory requirements, including total amount of restitution owed, the ability to pay, and the defendant's assets.

The court has discretion to determine the total amount of restitution owed and the minimum monthly payment under RCW 9.94A.753(1). A restitution award will not be disturbed on appeal absent an abuse of discretion. *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). In order to show that the court's order was an abuse of discretion, the defendant would have to show that the order was "...manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999) (quoting *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981)).

In an interesting twist, the defendant questions the court's use of information known to the judge regarding housing rental costs. While not conceding any error, the State wonders what the defendant expects to accomplish. As noted previously, the defendant has shown no prejudice. If the defendant prevails on this point and the housing amount was left at \$1,650.00, how is the defendant's situation made better? The absolute best the defendant can hope for is that this case is sent back for another "go" at setting a restitution monthly amount. There is nothing "magic" about the figures obtained by the various parties. If this case were to be heard again, the defendant will still owe in excess of \$250,000.00 and the next court would be required to pick a number for a

monthly payment that will not see the defendant's debt retired within his lifetime. So, as the State noted in the beginning of this brief, the goal of the defendant is not immediately obvious. It would appear that the defendant simply wants his monthly payments returned to the absurd amount of \$50.00 and that the accoutrements of the defendant's lifestyle left untouched.

As the court noted in setting the monthly payments at \$1,250.00, in the court's opinion the defendant can make such a monthly payment. RP 23.

V.

#### CONCLUSION

For the reasons stated, the restitution order requiring \$1,250.00 in monthly payments should be affirmed.

Dated this 25<sup>th</sup> day of May, 2012.

STEVEN J. TUCKER  
Prosecuting Attorney



Andrew J. Metts #19578  
Deputy Prosecuting Attorney  
Attorney for Respondent