FILED
Apr 09, 2015
Court of Appeals
Division III
State of Washington

32782-5-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ABEL PEREZ MORALES,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts the restitution order should be amended to impose only $871.83.

III. ISSUES

1. Did the Defendant receive notice of the restitution hearing where his attorney acknowledged on the record that she has received notice a month prior to the hearing?
2. Is the restitution order supported by sufficient evidence in the lengthy exhibit which the Defendant failed to designate for this Court's review?
3. Do the rules of evidence and the confrontation clause apply in a restitution hearing?
4. Is there a causal connection between the theft charge and every cost imposed at the restitution hearing?

IV. STATEMENT OF THE CASE

On November 25, 2013, the Defendant was charged with trafficking in property in the first degree and theft in the second degree. CP 34. The Defendant admitted to police that he had been stealing large tractor and semi truck batteries from several farm facilities and selling them at Core International. CP 38-39. He claimed he was working alone in stealing and re-selling the batteries. CP 39. Each battery had an early approximate value of $150-$200 apiece. CP 39. Police were only able to recover 14 batteries. CP 39. The initial police report indicated that besides the loss of property, there had also been damage to the vehicles from which the batteries were stolen. RP 39. The initial report does not provide an estimated value for the number of batteries stolen but not recovered. RP 38-40.

An attorney was appointed to represent the Defendant. CP 43-44.**

On March 11, 2014, the Defendant pled guilty to theft in the second degree and was sentenced. CP 6. The restitution hearing was reserved for a later date. CP 11. The Defendant was in deportation proceedings. RP 4. He waived his right to be present at the restitution hearing and was subsequently deported. CP 11; RP 8.

His counsel no longer knows how to reach her client. RP 11.

On August 7, 2014, the State gave the Defendant notice of the restitution hearing by service on his attorney. CP 33; RP 5. The hearing was held on September 2, 2014. RP 1. At the hearing, defense counsel objected to the notice, saying that she had withdrawn from the matter. RP 3. Despite the claim of withdrawal and the failure to file a new notice of appearance, counsel continued to represent the Defendant at the restitution hearing.

The State provided 40 pages of evidence in support of the proposed restitution order. Plaintiff's Exhibit (PE) 1. Defense counsel objected to the admission of the exhibit for the reason that she had received the exhibit "less than a month ago." RP 5. She also made evidentiary objections regarding foundation and hearsay. RP 6.

Defense counsel complained that the State only requested restitution of the Defendant and not other co-defendants who pled guilty to possessing stolen property. RP 6-8. The prosecutor contradicted the defense counsel's allegation, explaining that co-defendants "pled to unrelated charges like drug possession and forgery as opposed to theft," because there was no evidence of their complicity in the Defendant's crimes of theft and trafficking. RP 8.

The Defendant, on the other hand, confessed to the thefts after he was caught trafficking some of the stolen items at a recycling facility. CP 38-39; RP 8. Police also recovered the Defendant's fingerprints at the burglaries. RP 8.

The State requested restitution for four different victims and two insurance companies in the amount of $9488.10. PE 1. The judge reviewed the evidence and proposed order and struck out compensation to three parties, entering a final order in the amount of $4937.25 related to the claims of Bert Gledhill and Maynard Bailie. CP 2-3; RP 11-12. The judge explained that he was entering restitution for the victims in the theft of batteries, but not for victims of uncharged burglaries. RP 11-12.

The Defendant acknowledges Mr. Gledhill is a victim. RP 6. In fact, the Defendant explicitly pled guilty to theft of Mr. Gledhill's property and acknowledged that the loss to Mr. Gledhill was in excess of $750. CP 19, 26, 29-30. Mr. Gledhill provided various receipts totaling $871.83 for the repair or replacement of five batteries and cables. PE 1 at 33-40.

The Defendant objected to restitution related to Maynard Bailie, arguing that counsel "believed" those thefts occurred on a different

date than that included in the information. RP 13. Nationwide Insurance provided a letter to the prosecutor's office indicating that in 13-1-50543-5 for defendant Abel Perez-Morales, Nationwide lost $3065.42 and the insured party Maynard Bailie lost $1000 that was his deductible. PE 1 at 3. The letter attached detailed assessments and payments made to replace battery cables and three batteries and to repair the associated John Deere and New Holland tractors/trucks. PE 1 at 4-13.

V. ARGUMENT

On appeal, the Defendant challenges the restitution order. A reviewing court will only reverse a restitution order if it is manifestly unreasonable or if the sentencing court exercised its discretion on untenable grounds or for untenable reasons. *State v. Woods*, 90 Wn. App. 904, 906, 953 P.2d 834 (1998).

A. THE DEFENDANT RECEIVED PROPER NOTICE OF THE RESTITUTION HEARING.

The Defendant challenges the notice of the hearing.

The Defendant waived his presence for the hearing. The trial court explained that by waiving his presence and by his counsel

withdrawing, the defendant also waived notice. RP 3, 9-10.

However, the State did provide notice – the only possible notice, namely upon the attorney. CP 4; RP 5. The State could not serve the Defendant. He had been deported, and his counsel denied knowing how to reach her client. Service upon his attorney is proper. CR 5(b)(1). *See also* CrR 8.4 (CR 5 shall govern service in criminal cases).

The Defendant claims that it was improper to serve his attorney, because she had filed a notice of withdrawal. Brief of Appellant at 3-4. This is incorrect. In a criminal case, a defendant's attorney may not withdraw without a "written" court order and a showing of good and sufficient cause. CrR 3.1(e). It is also true in a civil matter that an attorney's withdrawal, when the attorney is court appointed, requires the court's explicit order. CR 71(b). *See also State v. Gonzales*, 110 Wn.2d 738, 744, 757 P.2d 925 (1988) (civil rules can be instructive in criminal matters of procedure). An effective notice of intent to withdraw must show service on the client and must specify a date when the attorney intends to withdraw, which date shall be at least 10 days after service of the notice. CR 71(c)(1) and (2). *See also Kingdom v. Jackson*, 78 Wn. App. 154, 159, 896 P.2d 101

(1995) (client requires sufficient notice of the lawyer's intent to withdraw).

On appeal, the Defendant claims that *the prosecutor* needed to give the Defendant sufficient notice to find a new attorney. Brief of Appellant at 9. In fact, under the court rule and the rules of professional conduct, the onus is on *the Defendant's counsel* to give her client sufficient notice of her intent to withdraw. CR 71; RPC 1.16.

Ms. Bennett's notice of withdrawal includes no declaration of service to suggest that she provided her own client with notice of her intent to withdraw. Nor does it specify a date at least ten days after service when such notice would come into effect so that her client would have time to object. The court entered no order accepting the withdrawal. Accordingly, Ms. Bennett's notice of withdrawal was ineffective. By law, she continued to represent the Defendant.

The Defendant claims for the first time on appeal that his counsel only received one week's notice. Brief of Appellant at 3. In fact, counsel was served on August 7 with notice of a hearing that took place almost a full month later on September 2. Counsel admitted as much at the restitution hearing, informing the court that she had received the State's materials almost a month earlier. RP 5

("received that packet less than a month ago"). The Defendant cites no authority to suggest that notice of however many days is insufficient. *State v. Peerson,* 62 Wn.App. 755, 767, 816 P.2d 43 (1991), *review denied,* 118 Wn.2d 1012 (1992) (arguments not supported by citations to authority need not be considered by reviewing court).

Notice upon the Defendant's attorney was proper.

B. THE RESTITUTION ORDER SHOULD BE AMENDED.

The Defendant challenges the sufficiency of the evidence for the restitution order. Brief of Appellant at 9. The Defendant failed to designate the evidence, and for this reason, the Court may refuse to review the claim.

> An appellant seeking review of a trial court's decision must provide the necessary record. If he or she does not, or if the briefs on appeal do not properly cite to such record as may have been provided, the issues need not be reviewed. *State v. Blight,* 89 Wash.2d 38, 46, 569 P.2d 1129 (1977); *State v. Hensler,* 109 Wash.2d 357, 359, 745 P.2d 34 (1987).

State v. Lough, 70 Wn. App. 302, 335, 853 P.2d 920, 937 (1993) *aff'd*, 125 Wn.2d 847, 889 P.2d 487 (1995).

The State, however, has designated the exhibit which provided

the evidence at the restitution hearing. PE 1. It provides sufficient evidence for the order. The amount of restitution ordered need only be supported by evidence providing "a reasonable basis" for the award. *State v. Mead*, 67 Wn. App. 486, 491, 836 P.2d 257, 260 (1992); *State v. Mark,* 36 Wn. App. 428, 434, 675 P.2d 1250 (1984); *State v. Bush,* 34 Wn. App. 121, 123, 659 P.2d 1127, *review denied,* 99 Wn.2d 1017 (1983). The court may reasonably infer that the Defendant's theft of batteries resulted in cut battery cables and damage to vehicles in removing the batteries. *State v. Mead*, 67 Wn. App. at 491 (where defendant was convicted of possessing stolen display cases, it was proper to impose restitution for the lost coin collection within the cases, because this loss could be reasonably inferred by the defendant's possession).

The Defendant challenges the court's ruling admitting the exhibit under the rules of evidence and the confrontation clause. Brief of Appellant at 12-13, 15. His reliance on the rules is misplaced. They do not apply in sentencing proceedings, and a restitution hearing is a sentencing hearing. ER 1101(c)(3).

Nor does the confrontation clause have any application in restitution hearings. *State v. Abd–Rahmaan,* 154 Wn.2d 280, 288,

111 P.3d 1157 (2005) (confrontation clause of Sixth Amendment, applies to criminal prosecutions and not to post-conviction proceedings); *see also United States v. Loreng,* 956 F.Supp.2d 213, 222 n. 4 (D.C.Dist.2013) (confrontation clause protections do not extend to restitution proceedings); *United States v. Faxon,* 689 F.Supp.2d 1344, 1356 (S.D.Fla.2010) (confrontation clause does not prohibit offer of hearsay at restitution hearing). Restitution involves no potential loss of liberty, and due process is "substantially relaxed" at a restitution hearing. *State v. Fambrough,* 66 Wn.App. 223, 226–27, 831 P.2d 789 (1992). To satisfy due process during a restitution hearing, the defendant must have an opportunity to refute the evidence presented, and the evidence must be reliable and sufficient. *State v. Kisor,* 68 Wn.App. 610, 620, 844 P.2d 1038, *review denied,* 121 Wn.2d 1023 (1993); *State v. Pollard,* 66 Wn.App. 779, 784–85, 838 P.2d 51, *review denied,* 120 Wn.2d 1015 (1992).

The Defendant challenges the causal connection of the crime to the damage. Brief of Appellant at 16. The State concedes this point as to the victim Maynard Bailie.

The power to impose restitution derives entirely from the statute. *State v. McCarthy*, 178 Wn. App. 290, 294, 313 P.3d 1247

(2013); *State v. Woods*, 90 Wn. App. 904, 906, 953 P.2d 834 (1998). Restitution shall be based on easily ascertainable damages for losses. RCW 9.94A.753(3). "In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or 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." RCW 9.94A.753(5).

Restitution may only be imposed for losses that are causally related to the precise offense charged. *State v. Woods*, 90 Wn. App. at 907-08. Restitution for loss beyond the scope of the crime charged is properly awarded only when the defendant enters into an express agreement to make such restitution as part of the plea bargain process. *State v. Woods*, 90 Wn. App. at 908.

In *State v. Woods*, the defendant was charged with and pled guilty to possessing stolen property. *Id.* The losses incurred were the result of the theft of the vehicle, not the possession of it. *Id.* And while there was evidence to show the defendant committed the theft, she was not charged with theft and the plea agreement did not include the defendant's agreement to pay. *Id.* The court could not

impose restitution based on a "general scheme" or for acts "connected with" the crime charged. *Id.* "Restitution for loss beyond the scope of the crime charged is properly awardable only when the defendant enters into an express agreement, as part of the plea bargain process, to make such restitution." *State v. Woods*, 90 Wn. App. 904, 909, 953 P.2d 834, 837 (1998).

Under this causality requirement, defendants have not been required to pay for damage to property (fences, garages, and other vehicles) caused in their flight after committing assaults, drive-by shootings, and burglaries for which they were convicted. *State v. Oakley*, 158 Wn. App. 544, 553, 242 P.3d 886 (2010); *State v. Dauenhauer*, 103 Wn. App. 373, 12 P.3d 661 (2000).

Here the Defendant was charged with trafficking and theft. The trafficking charge regarded the property of various victims. However, as part the plea negotiations, the State agreed to drop the first count in exchange for a guilty plea to the second count. The second count, theft, explicitly limits the charge to the crime against Mr. Gledhill. CP 29-30. The State did not charge the Defendant with theft from Mr. Bailie. And the State did not acquire the Defendant's agreement to pay restitution on the dropped charge of trafficking. Therefore, the

restitution related to Mr. Bailie's losses must be vacated.

The facts of our case are similar to those in *State v. Osborne*, 140 Wn. App. 38, 163 P.3d 799 (2007). There the defendant was charged with eight felony counts, but pled guilty to only two assaults. *State v. Osborne*, 140 Wn. App. at 39. In his plea, the defendant did not agree to any restitution. *State v. Osborne*, 140 Wn. App. at 42. The superior court ordered the defendant to pay restitution on the dropped counts. *State v. Osborne*, 140 Wn. App. at 39. Insofar as the restitution was related to the dropped charges of kidnapping and robbery, and not the assaults, that portion of the order was reversed. *State v. Osborne*, 140 Wn. App. at 42.

There is an exception to the requirement for a causal connection.

> *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.

RCW 9.94A.753(7) (emphasis added).

In *State v. McCarthy*, 178 Wn. App. 290, 313 P.3d 1247 (2013), the court upheld the restitution imposed for burial and funeral costs where the defendant pled guilty to robbery, burglary, and extortion, but not murder. The state provided receipts of these costs which had been covered by the crime victims' compensation fund. The court reasoned that under section (7), the legislature has specifically directed courts to disregard causation requirements for victims entitled to benefits under the Crime Victims Compensation Act. *State v. McCarthy*, 178 Wn. App. at 299-302.

Here, no such evidence exists of CVC payments. The exception does not apply to our facts.

Accordingly, the restitution order should be amended, imposing $871.83 only.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and remand the matter for adjustment of the restitution order.

DATED: April 9, 2015.

Respectfully submitted:

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Christine Bennett and Abel Perez Morales christinebennettlaw@gmail.com	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 9, 2015, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**