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No. 26070-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON

Respondent,

vs.

ROBERT BUSTAMANTE GONZALEZ.

Appellant.

REPLY BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

A. Whether Modification of the Defendant's Restitution Order to Add Reimbursement For the Victim For Medical Bills Violated the Defendant's Right to be Free From Multiple Punishments; A Double Jeopardy Violation?

B. Whether RCW 9.94A.753 Has Been Incorrectly Interpreted by State v. Goodrich?

ARGUMENT

A. Modification of the Defendant's Restitution Order to Add Reimbursement For the Victim For Medical Bills Violated the Defendant's Right to be Free From Multiple Punishments; A Double Jeopardy Violation.

1. Restitution is Punishment.

The State argues in its brief that restitution is not punishment, but instead, a form of compensation that is more civil in nature. (States Brief, P. 15-19.) However, that belief would be contrary to both RCW 9.94A.753 (2) and the interpretation of the Washington State Courts. Initially, in Washington State, "restitution was authorized for punitive purposes, RCW 9A.20.030, ... and for rehabilitative ones. RCW 9.95.210." State v. Young, 63 Wn.App. 324, 333, 818 P.2d 1375, FN 4, (1991).

This was prior to the Sentencing Reform Act of 1981 (SRA). Young, 63 Wn.App. at 333, FN 4. Since 1981, "...restitution is still authorized for punitive purposes - or as the Supreme Court has put it, to provide 'punishment which is just.'" Id. (quoting State v. Davison, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991)). Washington State Courts agree, stating that "...compensation is not the primary purpose of restitution..." State v. Moen, 129 Wn.2d 535, 542, 919 P.2d 69 (1996), (quoting State v. Barr, 99 Wn.2d 75, 79, 658 P.2d 1247 (1983)). In short, "under the SRA, punishment is the paramount purpose." In Re Mota, 114 Wn.2d 465, 476, 788 P.2d 538 (1990); State v. Rice, 98 Wn.2d 384, 393, 655 P.2d 1145 (1982).

In contrast, under the Juvenile Justice Act, the purpose of restitution for juveniles is not punitive. Instead, restitution is imposed on juvenile offenders for the purpose of victim compensation and offender accountability. State v. Bennett, 92 Wn.App. 637, 641, 963 P.2d 212 (1998); State v. Tejada, 93 Wn.App. 907, 909-910, 971 P.2d 79 (1999). The Legislature and the Courts have made a conscious distinction in characterizing restitution: Partially punitive for adults; accountability and compensation for juveniles.

Whether it is before 1981 in the pre-SRA era, or post-SRA, the Washington State Courts have stated unequivocally that in a non-juvenile setting, restitution is partially punitive in nature. State v. Kinneman, 155 Wn.2d 272, 279, 119 P.3d 350 (2005).

2. The Legislature Intended RCW 9.94A.753 to be Punishment.

The Washington State Legislature clearly intended that restitution be used for punitive purposes. One of the most important aspects of the SRA was "...to promote respect for the law' by providing punishment which is just." State v. Davison, 116 Wn.2d. 917, 922, 809 P.2d 1374 (1991) (quoting 9.94A.010(2)). The restitution statute states the following:

"The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime." RCW 9.94A.753 (3).

The courts were given discretion in imposing twice the amount of restitution, but not for the reason of protecting a victim from being awarded

an amount of restitution that was below the fair value of a loss; nor to protect against a defendant from profiting from a crime. State v. Fleming, 75 Wn.App. 270, 276, 877 P.2d 243 (1994). The Courts have the discretion to impose double the amount of restitution, which "...illustrates that the Legislature made a policy determination that restitution need not always be for the value of the stolen item at the time of the crime." Id. at FN2. Mr. Gonzalez believes that the intent by both the Legislature and the Courts is clear: that restitution is partially punitive.

3. Other Jurisdictions Handling Of Restitution.

The State cites restitution case law from other jurisdictions that support both Mr. Gonzalez's argument that restitution is punitive in nature, and the State's argument that restitution is civil in nature, depending upon the legislature's intent and the construct of each individual states restitution statute. (States Brief p.15, FN5). One of the cases that the State cites to bolster their argument is People v. Harvest, 84 Cal.App. 4th 641, 101 Cal.Rptr.2d 135 (2000).

California's restitution statute differs greatly from Washington State's statute. In California, when the Court wants to punish a defendant economically, they can impose a restitution fine. People v. Harvest, 84 Cal.App. 4th 641, 101 Cal.Rptr.2d 135 (2000).

This is different from the compensation portion of restitution. The California courts have clearly stated that "...unlike a [restitution] fine,

victim restitution is not expressly and statutorily defined as punishment.”

People v. Harvest, 84 Cal.App. 4th 641, 101 Cal.Rptr.2d 135 (2000).

Washington State does not separate restitution into different categories the way California does. There is only one type of restitution in Washington State, and both the Legislature and the Courts agree that it is partially punitive in nature. State v. Kinneman, 155 Wn.2d 272, 279, 119 P.3d 350 (2005); State v. Fleming, 75 Wn.App. 270, 276, 877 P.2d 243 (1994) FN2; RCW 9.94A.753.

4. The Restitution Statute is Unconstitutional, Because it Violates the Double Jeopardy Clause of the Constitution, Since Restitution Is Considered Partially Punitive, and RCW 9.94A.753 (4) Gives the Courts Jurisdiction To Modify A Defendant's Sentence By Having a New Restitution Hearing.

The pertinent portion of RCW 9.94A.753 that is unconstitutional states:

“The portion of the sentence concerning restitution may be *modified as to amount*, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime.” RCW 9.94A.753 (4) (emphasis added).

Washington State Courts have ruled that “a restitution order becomes part of the offender’s sentence once imposed.” State v. Kinneman, 122 Wn.App. 850, 859, 95 P.3d 1277 (2004); State v. Dorenbos, 113 Wn.App. 494, 497, 60 P.3d 1213 (2002). The Washington State Courts have interpreted RCW 9.94A.753 as clearly having a punitive component. State v. Kinneman, 155 Wn.2d 272, 279, 119 P.3d 350 (2005); State v. Fleming, 75 Wn.App. 270, 275, 877 P.2d 243 (1994) FN2. It therefore

stands to reason that a new restitution hearing that allows the Court to increase the amount of principle from previously court ordered restitution would be a violation of the Double Jeopardy Clause in both Article 1, Section 9 of the Washington State Constitution, and the Fifth Amendment. Since the Courts and the Legislature have determined that restitution is partially punitive, for the State to avoid a double jeopardy violation, only one restitution hearing is allowable. If the State later discovers additional restitution that needs to be recovered, then the crime victims fund can file a civil suit to ensure the rest of the recovery.

5. The Future Medical Issues of The Victim Were Foreseeable. Had the State Shown The Proper Due Diligence To Contact either the Crime Victims Fund Or The Victim, Thus, The Constitutional Prohibition Against Multiple Punishments Does Prohibit A Subsequent Increase Of The Restitution Amount.

RCW 9.94A.753 is flexible enough to allow the State to have the complete amount of restitution, without having to modify a restitution order at a later date. In the present case, the State needed only to make a minimal effort and show proper due diligence in making inquiries as to the status of the victims medical condition.

The restitution statute states, “The court may continue the hearing beyond the one hundred eighty days for good cause.” RCW 9.94A.753(1). The Legislature’s intent was to limit restitution to the 180 day window following sentencing, with the exception of good cause, or RCW 9.94A.753(7).

In the present case, the State only needed to make at most two phone calls: One to the crime victim's fund, and one to the victim himself, and ask if medical treatment was still ongoing for the victim. If the answer was yes, the State could have requested that the trial court continue the restitution hearing beyond the 180 day window for good cause. RCW 9.94A.753(1). In all likelihood, the trial court would have found good cause and continued the restitution portion of the sentencing.

The State said in its brief that "It is undisputed that at the time of the entry of the restitution order, the State did not know what specific medical expenses Mr. Thoren would incur." States Brief P. 22. However, when looking at the medical bills that were submitted to the Court, treatment appeared to be an ongoing process for the victim. CP at 40-50. There was never any lag time between medical treatments for the victim; it was continuous. CP at 40-50. There was no surprise of any new medical problem three years later as the State alleged in their brief. State's Brief at p.6. The victim's medical issues were foreseeable, had the State made just a modicum of an inquiry.

The date of the crime was March 23rd, 2003. CP at p. 3-21. On January 5, 2004, as part of the judgment and sentence, the court entered an order for restitution in the amount of \$21,306.45. CP at 1-21. Due to a clerical error, the court allowed the restitution order to be amended, and on June 28, 2004, the court amended the January 5, 2004 restitution order by reducing it to \$20,886.60. CP at 23-24. The last medical bills for the victim

in the amount of \$25,561.30 were paid between January 6th, 2004 and February, 2005, with a majority of those bills being paid before the June 28th, 2004 amendment. CP at 40-50. While the very last medical bill came in approximately one year after the January 2004 restitution hearing, and 8 months after the June 28th, 2004 amendment, a great majority of those bills were paid well within the 180 day window for restitution. There were no surprise medical problems three years after the crime date, as the State alleged in their brief. State's Brief at p.6

However, there is no record or indication that the State ever contacted the crime victims fund or the victim in this regard, or made any inquiries as to whether treatment was continuous, or how much longer it would be before all of the medical treatment was finished. Had the State made the proper inquiries, they would have had a possible timeline as to how long the victim needed to be treated, and could have asked the court for a continuance for good cause beyond the 180 day window. RCW 9.94A.753(1). However, the State never requested the Court to continue the restitution hearing for good cause. The Legislature clearly intended for RCW 9.94A.753(1) to be used in this way, if the State wanted to recover all of the medical expenses associated with the present case in a constitutional manner.

If the State had motioned the court to continue the restitution hearing for good cause beyond the 180 day window, it would have allowed for all of the medical bills to be received before a final determination of restitution

was made. At the same time, because a portion of the sentence was being continued, Mr. Gonzalez would not have been in a position to have his constitutional rights violated. This seems like a cleaner approach for the State to recover restitution, as well as the way to avoid a double jeopardy issue.

6. State v. Goodrich

The State cited State v. Goodrich, 47 Wn.App. 114, 733 P.2d 1000, (1987) as one of the main cases in their brief. The Goodrich Court ruled that the language in the restitution statute allowed the court "...to increase a defendant's obligation to make restitution when a victim incurs further costs." Id at 116-117. Mr. Gonzalez believes that the holding in Goodrich was a double jeopardy violation similar to what has occurred in the present case.

7. State v. Halsey

Recently, Division Three decided Halsey, a restitution case with a similar issue to the present case. State v. Halsey, 140 Wn.App. 313, 165 P.3d 409 (2007). In Halsey, there was an agreed upon restitution order, which was modified after the 180 day window. The Halsey Court ruled that RCW 9.94A.753 (4) allowed a modification to the amount of restitution. State v. Halsey, 140 Wn.App. 313, 327,165 P.3d 409 (2007). Mr. Gonzalez believes that the present case is distinguished from Halsey, because Halsey was an agreed upon order between the defendant and the State to pay for the victims counseling. At the original restitution hearing, the State did not

have available to them the complete amount of the counseling bill, so the State needed an additional restitution hearing to ensure the rest of the recovery. Halsey, 140 Wn.App. at 318.

However, Halsey never made a double jeopardy argument. In the present case, Mr. Gonzalez never made an agreement with the State to pay any restitution. But for the agreed upon restitution in Halsey, Mr. Gonzalez believes that a double jeopardy violation occurred in Halsey as well as the present case.

B. RCW 9.94A.753 Has Been Incorrectly Interpreted by State v. Goodrich.

1. State v. Goodrich Incorrectly Interpreted RCW 9.94A.753(4).

The State cited State v. Goodrich, 47 Wn.App. 114, 733 P.2d 1000, (1987) to support its conclusion that a restitution order may be modified as to principle, once actual medical bills are presented to the court. The Goodrich Court stated,

“This language states an intent by the Legislature to allow a court to increase a defendant’s obligation to make restitution when a victim incurs further costs. While this imposes a burden on the victim and the court to hold an additional hearing, it also enables the court to order restitution for the ‘actual medical expenses incurred.’” Goodrich, 47 Wn.App. at 116.

Mr. Gonzalez disagrees with both the Goodrich Court, and the argument made by the State.

The relevant section of RCW 9.94A.753(4) states,

“The portion of the sentence concerning restitution may be *modified* as to amount, terms, and conditions during any period of time the offender

remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.” (Emphasis added).

Blacks Law Dictionary defines modification as 1. A change to something; an alteration. 2. A qualification or limitation to something. Garner, Bryan, Blacks Law Dictionary, Deluxe, p. 1020, (7th ed. 1999). Mr. Gonzalez believes that when the Legislature used the word *modified* in RCW 9.94A.753 (4), that the legislature’s purpose was to allow the court to limit a previous restitution orders amount, terms, and conditions. Its purpose was not to give the State the ability to come back into court and seek a new restitution hearing for more principle.

The next sentence after the one that contains the word *modified* states that “The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.” RCW 9.94A.753 (4). It was no accident that the Legislature included that sentence, right after the sentence about modifying restitution. Mr. Gonzalez believes that the Legislature’s intent was that once restitution had been ordered, that it could be limited as to amount, terms and conditions, except if the defendant did not have the ability to make payment.

In the 21 years since the Goodrich Court’s interpretation of RCW 9.94A.753(4), there have been no published Washington State cases that have followed Goodrich in allowing medical bills to be brought in as part of restitution as the bills come due.

2. RCW 9.94A.753 (4) As Interpreted By the Goodrich Court, Flies
Flies In The Face Of RCW 9.94A.753 (1) Which Limits The Window
That Restitution May Be Sought.

The Goodrich Court's decision flies in the face of RCW

9.94A.753 (1), which states,

“When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause...”

9.94A.753 (1)

It is clear from 9.94A.753(1) that the Legislature's intent was to not burden the criminal courts with a never ending restitution process. At some point, there must be an endgame. Most reasonable legal minds would agree that “The principle that time limits exist which may bar compensation to injured persons is not a novel concept in our jurisprudence.” State v. Moen, 129 Wn.2d 535, 542, 919 P.2d 69 (1996).

What sense does it make to limit the initial restitution process to a 180 day time frame, as stated in RCW 9.94A.753(1), when once restitution has been established, it can be extended “... until the obligation is completely satisfied, regardless of the statutory maximum for the crime.” RCW 9.94A.753(4). A person convicted of a felony usually does not have the ability to pay restitution while serving a prison sentence. Typically that means restitution doesn't begin getting paid down until long after the convicted felon is out of prison. A person serving a thirty year sentence could be under the Court's jurisdiction for restitution for another 10-20 years, depending on the amount of money owed.

Over the last decade, Washington State Courts have stated that the criminal justice system should not be used as a substitute for a civil judgment against a criminal defendant. State v. Moen, 129 Wn.2d 535, 542, 919 P.2d 69 (1996). Washington State Courts have held that “compensation is not the primary purpose of restitution, and the criminal process should not be used as a means to enforce civil claims.” State v. Martinez, 78 Wn. App. 870, 881, 899 P.2d 1302 (1995), review denied, 128 Wn.2d 1017 (1996). Restitution does not preclude civil remedies. State v. Kinneman, 155 Wn.2d 272, 284, 119 P.3d 350 (2005).

Mr. Gonzalez believes that the Legislature and the Courts intent was for restitution to be a process with a beginning and an end, and but for the limited exceptions in RCW 9.94A.753(1), the 180 day window should be the time frame for completing the restitution process. When more medical bills that were related to this case occurred after restitution was ordered, the crime victims fund had the option of filing a civil suit against the defendant, so that the proper amount of restitution could be recovered.

3. The State Did Not Act Promptly, And Thus, Should Be Barred From Seeking More Restitution.

The State wrote the following in their brief, “The State cannot seek amendment at just any time. The State can only seek amendment on the basis of newly discovered evidence and must act promptly upon receipt of such evidence.” States Brief p.12. The last medical bills for the victim in the amount of \$25,561.30 were paid between January 6th, 2004 and

February, 2005, with a majority of those bills being paid before the June 28th, 2004 amendment. CP at 40-50. On February 15, 2006, the State Office of the Crime Victim's Compensation Unit made a request to the Grant County Prosecutor's Office for further restitution in the amount of \$25,561.30. CP at 28-31. Then on June 30, 2006, the state moved the court for an amended order of restitution. CP at 28-31. Approximately 1 ½ to 2 ½ years passed from when the medical bills occurred to when the State filed the motion for new. Even if you count the time from when the State actually received the entire bill from the crime victim's fund, the State waited 135 days to seek amendment of their newly discovered evidence. Mr. Gonzalez believes that this would not be considered timely, even by the State's standards.

CONCLUSION

Based upon the foregoing legal argument, Appellant respectfully prays this Court to reverse the April 17, 2007 order for restitution as a matter of law.

DATED this 24th day of April, 2008.

Respectfully Submitted,

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