

81525-9

No. 26070-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

APR 25 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON

Respondent,

vs.

ROBERT BUSTAMANTE GONZALEZ

Appellant.

BRIEF OF APPELLANT

Attorney for Appellant:

JEFF GOLDSTEIN, WSBA NO. 33989
P.O. BOX 17125
SEATTLE, WASHINGTON 98127
Tel: (206) 313-3644
Fax: (206) 260-3804

TABLE OF CONTENTS

	Page
ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE	2
NATURE OF ACTION.....	2
ARGUMENT	4
ASSIGNMENT OF ERROR A.....	4
ASSIGNMENT OF ERROR B	10
CONCLUSION	14

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases:

<u>State v. Bennett</u> , 92 Wash.App. 637, 641, 963 P.2d 212 (1998).....	10
<u>State v. Cole</u> , 128 Wash.2d 262, 274, 906 P.2d 925 (1995).....	12
<u>State v. Dorenbos</u> , 113 Wash.App. 494, 497, 60 P.3d 1213 (2002).....	10
<u>State v. Edelman</u> , 97 Wash.App. 161, 165, 984 P.2d 421 (1999).....	3
<u>State v. Henning</u> , 129 Wash.2d 512, 527, 919 P.2d 580 (1996)	5, 11
<u>State v. Gocken</u> , 127 Wash.2d 95, 102, 896 P.2d 1267 (1995).....	9,10
<u>State v. Johnson</u> , 96 Wash.App. 813, 815, 981 P.2d 25 (1999)	3
<u>State v. Kinneman</u> , 122 Wash.App. 850, 859, 95 P.3d 1277 (2004).....	10
<u>State v. Kinneman</u> , 155 Wash.2d 272, 284, 119 P.3d 350 (2005)	8,10
<u>State v. Krall</u> , 125 Wash.2d 146, 149, 881 P.2d 1040 (1994)	3
<u>State v. Martinez</u> , 78 Wn. App. 870, 881, 889 P.2d 1302 (1995).....	8
<u>State v. Moen</u> , 129 Wash.2d 535, 542, 919 P.2d 69 (1996)	8
<u>State v. Pierson</u> , 105 Wash.App. 160, 165, 18 P.3d 1154 (2001)	3
<u>State v. Reed</u> , 103 Wash.App. 261, 266, 12 P.3d 151 (2000)	5
<u>State v. Schultz</u> , 138 Wash.2d 638, 649, 980 P.2d 1265 (1999)	10
<u>State v. Tejada</u> , 93 Wash.App. 907, 909-910, 971 P.2d 79 (1999).....	11
<u>State v. Tetreault</u> , 99 Wash.App. 435, 437, 998 P.2d 330 (2000)	3, 4, 6

United States Supreme Court Cases:

<u>Helvering v. Mitchell</u> , 303 U.S. 391, 58 S.Ct 630 (1938)	11,12
<u>Hudson v. United States</u> , 522 U.S. 93, 99, 118 S.Ct. 488 (1997).....	12

Constitutional Provisions

United States Constitution

Fifth Amendment	1, 9
-----------------------	------

Washington State Constitution

Article I, Section 9	1, 9
----------------------------	------

Statutes

RCW 9.94A.753(1)	1, 3, 7
RCW 9.94A.753(4).....	1, 5, 9
RCW 9.94A.753(7).	1, 4, 6

ASSIGNMENTS OF ERROR

A. RCW 9.94A.753 does not authorize a new restitution hearing to allow additional restitution to be imposed, once restitution has been ordered, unless a continuance for good cause has been put before the court and ordered within the 180 day restitution window, or within the one year window from date of sentencing by L&I.

B. By allowing the State a second restitution hearing and the court ordering restitution a second time, Mr. Gonzalez has been subjected to double jeopardy, violating his constitutional rights under Article 1 section 9 of the Washington State Constitution, and the Fifth Amendment of the United States Constitution.

STATEMENT OF THE CASE

1. Nature of Action

Appellant, Robert Gonzalez, appeals the trial court's decision to permit the state to proceed with a restitution hearing beyond the statutory limits, in the Grant County Superior Court, No. 03-1-00617-6, the Honorable Evan E. Sperline presiding.

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. 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, and on June 30, 2006, the state moved the court for an amended order of restitution. CP at 28-31.

On January 2, 2007, the court denied the defense motion to prohibit the State from having a second restitution hearing beyond the 180 day statutory limit to seek restitution. CP at 36. On April 17, 2007, the State's motion for additional restitution was granted in the amount of \$25,561.30. CP 53-54.

Notice of Appeal to the Washington Court of Appeals was timely filed on April 17, 2007 CP at 74-96. Appellant's counsel at trial was public defender Randy Smith. Appellant's counsel at the trial court for the

restitution issue was Public Defender Jeff Goldstein. Appellant's counsel on appeal, pro bono, is Jeff Goldstein.

ARGUMENT

A. RCW 9.94A.753 DOES NOT AUTHORIZE A NEW RESTITUTION HEARING TO ALLOW ADDITIONAL RESTITUTION TO BE IMPOSED, ONCE RESTITUTION HAS BEEN ORDERED.

When interpreting the restitution statute, the court shall review all questions de novo. State v. Edelman, 97 Wn.App. 161, 165, 984 P.2d 421 (1999). It is well established that the authority to impose restitution is statutory. State v. Pierson, 105 Wash.App. 160, 165, 18 P.3d 1154 (2001). As such, the sentencing court in the context of restitution may not exceed the authority granted under the controlling statute. State v. Johnson, 96 Wn.App. 813, 815, 981 P.2d 25 (1999). The statutory time limit for restitution is mandatory. State v. Tetreault, 99 Wn.App. 435, 437, 998 P.2d 330 (2000). State v. Krall, 125 Wn.2d 146, 149, 881 P.2d 1040 (1994) (“Shall” is presumptively mandatory.)

RCW 9.94A.753 (1) 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.

RCW 9.94A.753 (7) creates the following exception:

Regardless of the provisions of subsections (1) through (6) of this section, the court *shall* [emphasis added] 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 (1) and (7) are plain and unambiguous. Under section (1), the court shall determine restitution within 180 days of a judgment and sentence. However, "... the trial court may continue the restitution hearing beyond 180 days for good cause if the request is made timely." State v. Tetreault, 99 Wn.App. 435, 438, 998 P.2d 330 (2000). The Tetreault court ruled that an extension of the 180 day time period to seek restitution had to be brought within that 180 day window. If the state filed a motion to extend the 180 day time limit to seek restitution outside of the 180 day window, with the exception of RCW 9.94A.753(7), it would be considered untimely. Id. at 438.

Under RCW 9.94A.753(7), the Department of Labor and Industries, Crime Victims Compensation Program, may petition the court within one year of a judgment and sentence for entry of a restitution order, but only if the court had not already ordered restitution.

However, the State relies on a portion of RCW 9.94A.753(4), to which the State believes takes precedence over the statutory time limits stated in RCW 9.94A.753(1) and (7). CP AT 28-31. Section (4) states:

(4) "...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).

The appellant contends that RCW 9.94A.735(4) is ambiguous, specifically the phrase, "*restitution may be modified as to amount.*" CP at 32-35. The court is governed by the basic rules of statutory construction which, "... permit judicial interpretation of a statute only if it is ambiguous." State v. Henning, 129 Wn.2d 512, 522, 919 P.2d 580 (1996). "Where an ambiguity exists, the primary duty of the court in interpreting the statute is to ascertain and give effect to the intent and purpose of the Legislature." Id. at 522.

The State argues that the phrase "*restitution may be modified as to amount,*" means that the State may modify the principle amount of restitution that had been previously ordered by the trial court. CP at 28-31. This would be a substantive change, by holding a second restitution hearing. The appellant argues that the phrase "*restitution may be modified as to amount,*" refers only to a change in the scheduled payment amount. CP at 32-35. This would be a procedural change, not a change to the amount of actual principle owed for restitution.

The prosecutor customarily files the petition on behalf of Department of Labor and Industries in restitution cases. State v. Reed, 103 Wn.App. 261, 266, 12 P.3d 151 (2000). According to RCW 9.94A.753(7), the Department of Labor and Industries has a one year window from the date of the judgment and sentence to file a petition. In this instance, the prosecutor

filed the petition for restitution on behalf of the Department of Labor and Industries, the Crime Victims Compensation Fund, and restitution was order on their behalf on January 5, 2004, the sentencing date for Mr. Gonzalez. (1/5/04 RP 9)

On June 30, 2006, two and half years after Mr. Gonzalez was sentenced, the Department of Labor and Industries, through the Grant County Prosecutor's office, filed a second restitution claim. CP at 28-31. However, the window for the Department of Labor and Industries to file a restitution claim had closed, barring them from seeking additional restitution. According to RCW 9.94A.753(7), the Department of Labor and Industries can only file a petition for restitution within one year of the defendant being sentenced. Since restitution had already been ordered on January 5, 2004, the Department of Labor and Industries was barred from seeking additional restitution, unless during the 180 day restitution period, the Prosecutor's office requested a court ordered continuance based on good cause. State v. Tetreault, 99 Wn.App. 435, 438, 998 P.2d 330 (2000).

At the January 5, 2004 sentencing hearing, the State did not make a request for the court to continue the restitution portion of the hearing for good cause, nor did the State do so during the June 28, 2004 hearing to amend a clerical error to the restitution amount. (1/5/04 RP 1-12) (6/28/04 RP 13)

Accordingly, even if the Grant County Prosecutor's Office acted alone in seeking additional restitution, the appellant contends that the time

for obtaining additional restitution had expired. The State believes that the court may amend the restitution order to reflect restitution which accrued after the conclusion of the 180 day window prescribed by RCW 9.94A.735(1). CP at 28-31.

The appellant contends that using phrases like “amend the restitution order” or “modify the restitution order,” is misleading; in reality, the state is requesting a new restitution hearing. When the court ordered the additional restitution on April 17, 2007, it was not an amendment to the past restitution order; it was a new restitution order. CP at 53-54. However, RCW 9.94A.753(1) allows restitution hearings to be continued past the 180 day limit, only when the State requests the court to find good cause to allow for an extension of the restitution hearing, *within* the 180 day window. The State did not produce evidence for a continuance for good cause being entered by the trial court *within* the 180 day window prescribed by RCW 9.94A.753(1). (1/5/04 RP 1-12) (6/28/04 RP 13)

Time limits that bar compensation to an injured party are common place in our court system. It is unacceptable when a defendant is made to pay restitution in violation of the restitution statute, in order to make a victim whole, when the state has failed to comply with the statutory time limits imposed by such statute. State v. Moen, 129 Wn.2d 535, 542, 919 P.2d 69 (1996).

The criminal justice system should not be used as a substitute for a civil judgment against a criminal defendant. Moen, 129 Wn.2d. at 542.

Washington 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).

Both the Moen and Kinneman Courts are in agreement that there must be finality for the restitution process in a criminal matter. Moen and Kinneman clearly state that restitution should not be used as a substitute for a civil action in a criminal proceeding. The Respondent’s interpretation of RCW 9.94A.735(4), that “*restitution may be modified as to amount,*” meaning the principle, is contrary to Moen and Kinneman. If that were the case, for example, the State could ask for \$5 restitution on day 179 of the statutory restitution period, than seek more restitution at some arbitrary time period down the road, whether it be a year later; ten years later; or fifty years later. That would circumvent the legislature’s purpose of instituting the 180 day window for seeking restitution. That would allow the state to have the ability to drag a defendant back into court over an infinite period of time. There would be no end to the process. Moen and Kinneman call for a definitive end to the restitution process.

The courts have decided that the restitution process must have finality. Accordingly, it logically follows that the meaning of RCW 9.94A.753(4), “*restitution may be modified as to amount,*” refers only to a change in the

scheduled payment amount, a procedural change; not a change in the principle, a substantive change.

B. BY IMPOSING RESTITUTION A SECOND TIME, MR. GONZALEZ HAS BEEN SUBJECTED TO DOUBLE JEOPARDY, VIOLATING HIS CONSTITUTIONAL RIGHTS UNDER ARTICLE 1 SECTION 9 OF THE WASHINGTON STATE CONSTITUTION, AND THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The double jeopardy clause in both the Fifth Amendment and Article 1 Section 9, have been construed to be virtually identical by Washington State courts. State v. Gocken, 127 Wn.2d 95, 102, 896 P.2d 1267 (1995). No “person be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V sect. 3. The double jeopardy clause provides three constitutional protections: “It protects against a second prosecution for the same offense after acquittal; it protects against a second prosecution for the same offense after conviction; and it protects against multiple punishments for the same offense.” State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995).

Washington State relies on the Blockburger Test to determine if a double jeopardy issue is present. This is also referred to as the “same elements” test. State v. Gocken, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995).

In Washington, restitution is considered part punishment, part compensatory, whether it is for a conviction or a plea agreement. State v. Kinneman, 155 Wn.2d 272, 279, 119 P.3d 350 (2005). 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 critical distinction between the adult and juvenile schemes is that the adult scheme effects a strong punitive component, while the juvenile schemes purpose is geared towards rehabilitation, with no punitive component. Bennett. 92 Wn.App. at 641. This distinction between juvenile restitution and adult restitution implies that the courts have made a public policy decision indicating that adult restitution must be viewed seriously as a punitive component of a criminal sentence.

Washington 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 appellant contends that if the court imposes restitution a second time for the same case, that a double jeopardy violation would occur. A second restitution order would violate the defendant’s constitutional rights under the Fifth Amendment and Article 1 section 9, that is, “...multiple punishments, for the same offense, imposed in separate proceedings.” State v. Hennings, 129 Wn.2d 512, 527, 919 P.2d 580 (1996).

In Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct 630 (1938), the issue at bar was the following: In a criminal matter involving the government, if the defendant were convicted, and the government then pursued a civil action based on the same conduct that occurred in the criminal matter, were the defendant's constitutional rights violated by double jeopardy?

Helvering was a tax fraud case that occurred in 1929. The defendant, Charles Mitchell, had fraudulently deducted from gross income an alleged loss of \$2,872,305.50 from a sale of 18,300 shares of National City Bank stock to his wife. He also fraudulently failed to return over \$600,000 received by him as a distribution from National City Bank, of which he was the chairman. The purpose of the fraud was to evade taxes. The total that Mitchell failed to pay in taxes was \$728,709.84. Helvering, 303 U.S. at 395. After obtaining the criminal conviction, a separate civil case was initiated by the government. A fifty percent addition was also required, as a civil penalty, in the amount of \$364,354.92. Id. at 395-396. The issue was whether or not the fifty percent civil fine was actually a criminal punishment for the tax evasion. The Helvering court determined that the fifty percent civil fine was not criminal punishment. Id. at 406.

The Helvering court ruled that where the purpose of the second proceeding was viewed as punishment, that the defendant would be subjected to double jeopardy. Helvering v. Mitchell, 303 U.S. 391, 398, 58 S.Ct 630 (1938). While the legislature may impose both criminal and civil

sanctions for the same act, the double jeopardy clause does not allow the defendant to be punished twice criminally for the same offense. Hudson v. United States, 522 U.S. 93, 99, 118 S.Ct. 488 (1997); Helvering, 303 U.S. at 399. “Multiple punishments are permissible if imposed in the same proceeding; they are barred if imposed in separate proceedings.” State v. Cole, 128 Wash.2d 262, 274, 906 P.2d 925 (1995).

In the case at bar, Mr. Gonzalez was sentenced January 5, 2004, with restitution of \$21,306.45 also ordered that same day. CP at 1-21. Due to a clerical error, on June 28, 2004, the court modified and lowered the amount of restitution to \$20,886.60. CP at 22-24. Mr. Gonzalez’s April 17, 2007 restitution hearing was not a civil action; it was the State revisiting the first criminal proceeding. The second restitution claim, three years after the imposition of the judgment and sentence, was the State’s attempt to punish Mr. Gonzalez a second time, because the State was dissatisfied with the first punishment. CP at 52. However, the State was barred from seeking a new restitution claim in this matter, once restitution had been court ordered, because restitution was now officially part of Mr. Gonzalez’s sentence. CP at 3-21. The second restitution hearing initiated by the State caused a violation of Mr. Gonzalez’s double jeopardy protection/Fifth amendment rights by the State.

However, the trial court ordered \$25,561.30 additional restitution at a second restitution hearing on April 17, 2007, almost three and a half years after the first restitution order had been imposed. CP at 53-54. Mr.

Gonzalez is being punished a second time for the same offense. The defense contends that any restitution ordered after January 5, 2004 should be void, due to a double jeopardy violation.

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,



Jeff Goldstein, WSBA No. 33989
Attorney for Appellant