

05367-9

05367-1

No. 65367-9-1

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

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ADAM GRAY,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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MAUREEN M. CYR  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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COURT OF APPEALS  
STATE OF WASHINGTON  
CLERK OF COURT

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**A. SUMMARY OF ARGUMENT**

William Gray pled guilty to first degree manslaughter and the trial court entered a timely restitution order. Eleven months after sentencing, however, the court modified the restitution award, ordering Mr. Gray to pay an additional \$15,253.32 to the victim's family to reimburse them for funeral expenses. Although those expenses were incurred prior to sentencing, the State did not offer any evidence to prove them until it filed the motion to modify. Because the amount of a restitution award must be determined within 180 days of sentencing, and may be modified only to cover expenses incurred after the initial award, the trial court exceeded its statutory authority in modifying the restitution order.

**B ASSIGNMENT OF ERROR**

The trial court exceeded its statutory authority in modifying the amount of the restitution award.

**C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

The Sentencing Reform Act (SRA) requires a trial court to determine the amount of restitution due in a criminal case at the sentencing hearing or within 180 days. The statute allows courts to modify the amount of a restitution award after that time, but the purpose of the modification provision is to allow courts to award

restitution for a victim's ongoing expenses resulting from a crime. Did the trial court exceed its statutory authority in modifying the amount of the restitution award more than 180 days after sentencing, where the expenses underlying the modified award were already incurred at the time of the initial award and the State simply failed to provide documentation to prove the additional expenses at that time?

**D. STATEMENT OF THE CASE**

In May 2009, William Gray pled guilty to one count of first degree manslaughter, RCW 9A.32.060(1)(a), for recklessly causing the death of Sanelive Hikila; and one count of assault in the second degree, RCW 9A.36.021(1)(c), for intentionally assaulting Vita Moimoi with a handgun. CP 6-27. The allegations arose out of an incident that occurred at Pounders Bar and Grill in Renton on November 5, 2006. CP 3.

The guilty plea agreement provided: "Pursuant to RCW 9.94A.753, the defendant shall pay restitution in full to the victim(s) on charged counts." CP 23. The amount of restitution was "to be determined" on an unspecified future date. CP 23. In the guilty plea statement, Mr. Gray acknowledged that "[i]f this crime resulted in injury to any person or damages to or loss of property, the judge

will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate." CP 10-11.

A sentencing hearing was held on June 5, 2009. The victim Sanelive Hikila's father and uncle were present and addressed the court. 6/05/09RP 2, 4-6. In addition to the other terms of sentence, the deputy prosecutor requested that the court order Mr. Gray to pay restitution and that the amount be determined on some future date. 6/05/09RP 3. The court ordered that "[r]estitution will be reserved." 6/05/09RP 8; see also CP 30 (judgment and sentence providing that restitution would be determined on future unspecified date).

Two months later, on August 12, 2009, the court entered an order requiring Mr. Gray to pay restitution in the amount of \$6,730.82 to "Crime Victims Compensation" for "Claim # VL49710 (Sanelive Hikila)." CP 37.

On April 30, 2010, more than 180 days after sentencing, the State filed a motion to modify the restitution award. CP 41-44. A hearing was held on May 4, 2010. The prosecutor explained that Sanelive Hikila's family was now requesting restitution for funeral expenses they had incurred prior to the initial restitution award.

5/04/10RP 2. But the prosecutor did not offer any evidence to prove those expenses until it filed the motion to modify.

The prosecutor explained the prosecutor's office had sent a letter to the Hikilas soon after sentencing, inquiring whether they were seeking restitution, but the family never responded.

5/04/10RP 3; CP 42. Therefore, the prosecutor initially requested restitution for only the amount that had been paid from the Crime Victim's Compensation Fund. 5/04/10RP 3; CP 42. Subsequently, in early April 2010, Hikila's mother Salome telephoned the prosecutor's office inquiring about restitution. 5/04/10RP 3; CP 42. She never received the letter sent by the prosecutor's office in June 2009. She stated the family had incurred funeral expenses of \$15,253.32 in addition to the amount reimbursed from the Crime Victim's Compensation Fund. 5/04/10RP 3-4; CP 42. The prosecutor therefore asked the court to modify the original restitution award and order Mr. Gray to pay the additional \$15,253.32. 5/04/10RP 4.

Defense counsel objected, arguing the court could not modify a restitution award more than 180 days after sentencing to cover expenses that were incurred prior to sentencing. 5/04/10RP 7; CP 38-40. The court overruled the objection and ordered Mr.

Gray to pay additional restitution in the amount of \$15,253.32 to Salome Hikila. CP 45-46.

E. ARGUMENT

THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN MODIFYING THE RESTITUTION AWARD, WHERE THE EXPENSES COVERED BY THE MODIFIED AWARD WERE INCURRED PRIOR TO SENTENCING

1. Where restitution is ordered, the trial court must accurately determine the amount of restitution at the sentencing hearing or within 180 days. A court's authority to order restitution is derived solely from statute. State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010). A restitution award is generally reviewed for abuse of discretion. State v. C.A.E., 148 Wn. App. 720, 724-25, 201 P.3d 361 (2009). To the extent a court bases its ruling on an incorrect interpretation of the statute, it abuses its discretion. Id. An order imposing restitution is void if statutory provisions are not followed. State v. Lewis, 57 Wn. App. 921, 924, 791 P.2d 250 (1990).

A restitution award must be based on "easily ascertainable damages for injury to or loss of property," or "actual expenses incurred" for treatment or lost wages resulting from injury. RCW 9.94A.753(3). The court may base a restitution award on facts

admitted or acknowledged by the defendant, or by proof by the State by a preponderance of the evidence. State v. Ryan, 78 Wn. App. 758, 761-62, 899 P.2d 8245 (1995); RCW 9.94A.530(2). Where the record does not contain sufficient evidence, the court must hold an evidentiary hearing. Id.

The restitution statute establishes a time limit for determining the amount of a restitution award:

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)<sup>1</sup> of this section. The court may continue the hearing beyond the one hundred eighty days for good cause.

RCW 9.94A.753(1).

The 180-day period for determining the amount of restitution is mandatory unless extended by the court for good cause. State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994); State v. Tetreault, 99 Wn. App. 435, 437, 998 P.2d 330 (2000). Even where the defendant agrees to pay restitution as part of a plea agreement, or the court orders restitution at the sentencing hearing, the actual amount must be set within 180 days or else the restitution order is void. State v. Hunsicker, 129 Wn.2d 554, 559-62, 919 P.2d 79

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<sup>1</sup> Subsection (7) provides that if no restitution order has been entered and the victim is entitled to benefits through the Crime Victims Compensation

(1996); State v. Duback, 77 Wn. App. 330, 332-33, 891 P.2d 40 (1995).

The amount of restitution must be correctly determined within the 180-day time limit and procedural infirmities may not be corrected later by the sentencing court. Ryan, 78 Wn. App. 758. In Ryan, trial courts in consolidated cases entered *ex parte* orders setting restitution and providing that the defendants could request evidentiary hearings if they objected to the amounts. Ryan, 78 Wn. App. at 760-61. Both defendants objected but no hearings were held within the statutory time limit. Id. This Court concluded the restitution orders did not comply with the mandatory time limit. The Court explained, "[b]ecause a hearing is necessary to accurately make an appropriate determination when a defendant objects to the amount set in the *ex parte* order, the restitution hearing must be held within" the required statutory time limit. Id. at 763. In other words, the restitution amount must be *accurately* determined within 180 days of sentencing. Id. at 761. Although, as discussed more fully below, a court may modify a restitution order as to its amount, terms, or conditions for as long as the court retains jurisdiction over the offender, RCW 9.94A.753(4), "the trial court's ability to modify

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Act, the Department of Labor and Industries has one year from sentencing to petition for entry of a restitution order. RCW 9.94A.753(7).

an order of restitution does not impact its initial obligation to accurately determine the amount within" the mandatory statutory time limit. Ryan, 78 Wn. App. at 763.

The purpose of the mandatory time limit is to secure finality. State v. Moen, 129 Wn.2d 535, 542-43, 919 P.2d 69 (1996); State v. Johnson, 96 Wn. App. 813, 817, 981 P.2d 25 (1999). Although barring restitution when the order is entered too late means the victim will not receive compensation, that is a necessary result when the State's delay precludes compliance with the mandatory time limit. Moen, 129 Wn.2d at 542. As the Washington Supreme Court has explained: "The principle that time limits exist which may bar compensation to injured persons is not a novel concept in our jurisprudence. At some point, rights will be cut off." Id. When the State fails in its burden to comply with the statutory time requirement, it is inappropriate to hold a defendant accountable, even for the purpose of advancing victims' rights. Id. For one thing, "Washington courts have recognized that the criminal justice system is not a substitute for a civil judgment against a criminal defendant." Id. "[C]ompensation is not the primary purpose of restitution, and the criminal process should not be used as a means to enforce civil claims." Id. (quoting State v. Martinez, 78 Wn. App.

870, 881, 899 P.2d 1302 (1995)). For another thing, it is generally in the victim's best interest to have restitution set in a timely fashion, when evidence of loss is fresh and the victim's need is often at its greatest. Moen, 129 Wn.2d at 543. Therefore, it is "imperative that the State obtain a timely restitution order both to serve the victim's interest and to comply with the Legislature's mandate that the amount of restitution be determined" within 180 days of sentencing. Id.

2. The trial court may not modify the amount of a restitution award where the expenses covered by the modified award were incurred prior to the initial award. Courts lack inherent authority to modify a sentence. State v. Shove, 113 Wn.2d 83, 86-89, 776 P.2d 132 (1989); State v. Murray, 118 Wn. App. 518, 524, 77 P.3d 1188 (2003). An SRA sentence may be modified only if it meets the requirements of the SRA provisions relating directly to the modification of sentences. Shove, 113 Wn.2d at 89. The SRA permits modification of a sentence only in specific, carefully delineated circumstances. Id. at 86 (citing David Boerner, Sentencing in Washington § 4.1, at 4-1 n.6 (1985)).

The restitution statute provides that restitution orders may be modified as follows:

For an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction until the obligation is completely satisfied, regardless of the statutory maximum for the crime. 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 meaning of this statutory provision must be discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. See Christensen v. Ellsworth, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007) (citing Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002)). The Court's ultimate objective is to give effect to the Legislature's intent. Christensen, 162 Wn.2d at 372-73 (citing Campbell & Gwinn, 146 Wn.2d at 9).

As a penal statute, the restitution provision must be construed strictly and may not be extended by construction to situations not clearly intended by the Legislature. Blanchard Co. v. Ward, 124 Wash. 204, 207, 213 P. 929 (1923). Furthermore, if the statute is ambiguous, under the rule of lenity, this Court must adopt the interpretation that favors the defendant. State v. Jacobs, 154

Wn.2d 596, 601, 115 P.3d 281 (2005). A statute is ambiguous if it is susceptible to two or more reasonable interpretations. Campbell & Gwinn, 146 Wn.2d at 12.

Courts construing the restitution modification statute have stated that the purpose of the statute is to provide victims an avenue for recouping ongoing costs resulting from a crime. State v. Gonzalez, 168 Wn.2d 256, 266, 226 P.3d 131 (2010); State v. Goodrich, 47 Wn. App. 114, 116-17, 733 P.2d 1000 (1987). In Gonzalez, the defendant was convicted of first degree assault and first degree robbery and after restitution was ordered, the victim continued to accrue medical bills. Gonzalez, 168 Wn.2d at 260. The Supreme Court upheld the trial court's decision to increase the total amount of restitution owed based on the victim's ongoing medical bills, even though the modified order was entered more than 180 days after sentencing. Allowing the modification effectuated the Legislature's intent that offenders compensate victims for losses resulting from an assault. Id. at 265-66. The court explained,

If no amendment were available after 180 days, the victim would be limited to restitution for only the first six months of treatment after sentence. Disallowing amendments after 180 days would fundamentally undermine the purpose of the restitution statute where the victim is burdened with an ongoing serious injury.

Id. at 266.

In Goodrich, the defendant was convicted of second degree assault and at sentencing the trial court ordered him to pay restitution that included amounts for past medical treatment *and* future projected medical treatment. Goodrich, 47 Wn. App. at 115. The Court reversed the restitution order, holding the statute empowers a court to order restitution only for "*actual expenses incurred for treatment for injury to persons.*" Id. at 116 (quoting former RCW 9.94A.140(1)) (emphasis in Goodrich). An expense is "incurred" only if the victim has an actual obligation to pay the expense. Goodrich, 47 Wn. App. at 116-17. Therefore, the trial court abused its discretion by awarding restitution for future projected medical expenses. Id.; see also C.A.E., 148 Wn. App. at 726-27 (court may not award restitution for cost of medical procedures not yet performed or billed at time of hearing, even if procedures are necessary and anticipated).

Although a trial court may not award restitution for expenses not yet incurred, the modification statute provides a remedy for victims who incur ongoing expenses. Goodrich, 47 Wn. App. at 116-17 (citing former RCW 9.94A.140(1)). The modification provision

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 117.

Thus, the purpose of the modification provision in the restitution statute is to provide a means for victims to recoup ongoing expenses resulting from a crime which were not yet "incurred" at the time of the initial restitution order. Modified restitution awards that cover ongoing expenses are not subject to the statutory 180-day time limit in order to ensure victims are fully reimbursed for their continuing losses. But this rationale does not apply where the modified award covers expenses that *were* incurred at the time of the initial restitution order. The Legislature did not intend to allow restitution awards be modified simply because the prosecutor failed to prove all of the victim's incurred expenses at the time of the initial restitution award.

As stated, the State bears the burden to prove the facts underlying a restitution award by a preponderance of the evidence. Ryan, 78 Wn. App. at 761-62; RCW 9.94A.530(2). The court must determine the amount of restitution at the sentencing hearing or within 180 days. RCW 9.94A.753(1). The court's ability to modify a

restitution award does not impact its initial obligation to ensure the restitution is accurately determined within the 180-day time limit. Ryan, 78 Wn. App. at 763. Thus, the court may not modify the amount of restitution more than 180 days after sentencing, where the reason for the modification is that the State simply failed to prove the necessary facts at the time of the initial restitution award.

Moreover, to interpret the modification statute as permitting modification of a restitution award in order to cover expenses incurred prior to the initial award leads to absurd or strained results. "[T]he rule of statutory construction that trumps every other rule" is that the Court should not adopt an interpretation that results in absurd or strained consequences. Davis v. Dep't of Licensing, 137 Wn.2d 957, 970-71, 977 P.2d 554 (1999). The modification statute provides that a court may modify a restitution award as to amount, terms, and conditions for as long as the court retains jurisdiction over the offender, which is until the obligation is completely satisfied. RCW 9.94A.753(4). Allowing courts to modify restitution awards at any time up until the obligation is completely satisfied, simply in order to cover expenses that the State could have proved, but did not, at the initial restitution hearing, is an absurd and strained result that the Legislature plainly did not intend.

Moreover, allowing courts to modify restitution awards to cover expenses incurred prior to the initial award also undermines interests of finality and the underlying philosophy of the SRA. As stated, the purpose of the mandatory 180-day time limit for determining restitution is to advance finality. Moen, 129 Wn.2d at 542-43; Johnson, 96 Wn. App. at 817. That purpose is consistent with the underlying philosophy of the SRA. The SRA is "structured as a system of determinate sentencing." Shove, 113 Wn.2d at 86 (citing Washington Sentencing Guidelines Comm'n, Implementation Manual, Introduction at v (1988)). Under the SRA, a trial court is directed to impose on those convicted of crimes

"a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision, the number of actual hours or days of community service work, or dollars or terms of a fine or restitution."

Shove, 113 Wn.2d at 86 (quoting former RCW 9.94A.030(12) (now RCW 9.94A.030(18))). This "determinate sentence" is to be ascertained at the time of sentencing (or, when it comes to restitution, within 180 days) and generally is not subject to later change:

"The [SRA] is based on a just deserts philosophy under which sentences are to be based primarily on considerations of the seriousness of the crime of conviction and the prior criminal history. *Since these*

*factors can be known at the time of sentencing, there is no need to grant the power to modify the terms of sentences at some later date."*

Shove, 113 Wn.2d at 86 (quoting Boerner, Sentencing in Washington, supra, § 4.1, at 4-1) (emphasis in Shove). Consistent with this philosophy, the SRA permits modification of sentences only in specific, carefully delineated circumstances. Shove, 113 Wn.2d at 86, 89. Allowing courts to modify the restitution portion of a sentence at any time up until the entire obligation is paid, based simply on the State's failure to meet its burden of proving the necessary facts at the time of the initial restitution award, is contrary to the interest of finality and the underlying philosophy of the SRA and cannot be what the Legislature intended.

3. The trial court abused its discretion in modifying the restitution award where the expenses covered by the modified award were incurred prior to sentencing. The trial court entered a restitution award on August 12, 2009, two months after sentencing. CP 37. The defense did not object to the State's request and therefore no hearing was held. In the initial, timely, award, the court ordered Mr. Gray to pay restitution in the amount of \$6,730.82 to the Crime Victim's Compensation Fund. CP 37.

On April 30, 2010, more than ten months after sentencing, the State filed a motion to modify the restitution award, requesting an additional \$15,253.32 in restitution to be paid to the victim's family, to cover funeral expenses. CP 41-44; 5/04/10RP 2-4. But those expenses were incurred prior to sentencing. The prosecutor explained the reason for the untimely request was that the family did not notify the prosecutor's office about the additional funeral expenses until April 2010. But the victim's father and uncle were present at the sentencing hearing. The prosecutor could have addressed the issue of restitution with the family at that time.

It was the prosecutor's burden to establish the expenses underlying the restitution award. The statute placed a mandatory burden on the State to prove the expenses within 180 days of sentencing. The State simply failed to meet its burden of proving the expenses within the required time limit. Therefore, the sentencing court abused its discretion in modifying the restitution award to cover expenses that were incurred prior to sentencing. The modification order is void. Lewis, 57 Wn. App. at 924.

F. CONCLUSION

Because the sentencing court exceeded its authority in modifying the restitution award, the modified award must be reversed and vacated.

Respectfully submitted this 22nd day of September 2010.



MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project 91052  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 65367-9-I
v.	)	
	)	
WILLIAM GRAY,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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X \_\_\_\_\_ *gr*

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710