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NO. 86359-8

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM GRAY,

Petitioner.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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A. ISSUES

1. The court has express statutory authority to modify restitution "as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction." The restitution statute does not limit modifications to expenses incurred after the original restitution order was entered. A restitution order was entered against Gray within 180 days of sentencing and was subsequently modified to include burial costs not previously brought to the court's attention. Did the court have the authority to modify restitution based on the newly available information?

2. As a condition of his plea agreement, Gray promised to pay restitution in full to the family of the deceased. Gray has never disputed the amount of restitution requested by the family. Does Gray's plea agreement foreclose a challenge to the modified restitution order?

B. FACTS

On November 5, 2006, Gray pursued and shot at close range two unarmed men in a tavern parking lot following a dispute. CP 3-4. One bullet fired by Gray hit Sanelive Hikila in the chest, causing him to bleed to death at the scene. Id. Another bullet hit

Vita Moimoi in the leg. Id. Although Gray immediately fled the scene, he was identified by investigators and charged with felony murder in the second degree, first degree assault, and unlawful possession of a firearm. CP 1-2. Gray was apprehended about two years later and proceedings commenced. CP 42. Eventually, Gray entered a guilty plea to an amended information charging manslaughter in the first degree and assault in the second degree. CP 6-7. Gray summarized his offenses as follows:

On 11-5-2006 . . . I knowingly and recklessly discharged a pistol during a fight at Pounders Bar in Renton. My first shot struck and fatally wounded Sanlive (sic) Hikila. My second shot was intentional and struck Tevita Moimoi in the leg.

CP 17.

The Felony Plea Agreement signed by Gray provided that ". . .the defendant shall pay restitution *in full* to the victim(s) on charged counts . . ." CP 23 (italics added). Paragraph 6(e) of the Statement of Defendant on Plea of Guilty said, "If this crime resulted in injury to any person . . . the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate." CP 10-11. The prosecutor explicitly asked for restitution. CP 11, 27.

At sentencing on June 5, 2009, the prosecutor noted that restitution information was not yet complete, so the State requested a hearing in case agreement could not be reached. RP 6/5/09 at 3. The court ordered restitution, to be determined at a future hearing. CP 30 (Judgment and Sentence, § 4.1). The defendant waived his right to be present at any future restitution hearing. CP 30; RP 6/5/09 at 8. As it turned out, restitution was agreed and an order was signed on August 6, 2009. CP 37. The order included restitution in the amount of \$6,730.82 to be paid to the Crime Victims Compensation Fund (CVC).

In early April 2010, Hikila's mother called the State's Victim Assistance Unit inquiring about restitution. CP 42; RP 5/4/09 at 2-3. The State had earlier sent a letter to the Hikila family asking about restitution but the Hikila family did not receive the letter. CP 42; RP 5/4/09 at 2-3. Mrs. Hikila produced burial receipts for her son's casket, headstone, memorial placement, interment, and other items. CP 42, 53-69.

Based on this information, the State moved on May 4, 2010 to modify the initial restitution order to include the unreimbursed funeral costs. CP 41-44. Gray did not object to the requested amount but he objected to the timeliness of the State's motion. CP

38-40; RP 5/4/09 at 7. The court granted the State's motion and entered a modification order awarding Mrs. Hikila an additional \$15,253.32 for the unreimbursed burial costs. CP 45-46.

Gray appealed the restitution order. The Court of Appeals affirmed, finding that the plain language of the statute permitted an increase based on information newly available to the court, regardless of whether the additional expenses were incurred before the original restitution order was entered. State v. Gray, No. 65367-9-I, slip op. (Wash.Ct.App. June 6, 2011).

C. ARGUMENT

Gray argues that the sentencing court had no authority to increase restitution after the 180-day statutory period, except as to expenses *incurred* after the 180-day period had run. Pet. for Review at 4-12. Gray's argument conflicts with the plain statutory language and undercuts the legislature's clear and frequently expressed desire that defendants pay restitution. His arguments also undercut his plea agreement. The arguments should be rejected.

1. A TIMELY RESTITUTION ORDER CAN BE MODIFIED TO INCLUDE BURIAL EXPENSES INCURRED BY THE VICTIM'S FAMILY WHERE DOCUMENTATION OF THOSE EXPENSES WAS UNAVAILABLE AT THE ORIGINAL HEARING.

Victims have a statutory right to restitution. RCW

7.69.030(15). Restitution is defined in the Sentencing Reform Act to mean

. . . a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specified period of time as payment of damages. The sum may include both public and private costs.

RCW 9.94A.030(42). Restitution is both punitive and compensatory. State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005); David Boerner, Sentencing in Washington, § 4.8 (1985). A court's authority to impose restitution is wholly statutory and will be upheld on appeal unless the court abuses its discretion. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). The obligation to pay is broad, State v. Gonzalez, 168 Wn.2d 256, 226 P.3d 131 (2010), and is capped at twice the victim's damages or twice the defendant's gain:

. . . restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. . . . 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).

In general, restitution must be determined within 180 days of the judgment. RCW 9.94A.753(1). However, once determined, modifications are allowed as long as the court retains jurisdiction over the offender:

. . . 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. 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) (italics added). Thus, under the plain language of the statute, a restitution order may be modified as to amount at any time before the court loses jurisdiction, regardless of when the cost was incurred.

This flexible rule was designed with the practical difficulties of crime victims in mind. Criminal cases sometimes last a long time. During this time, victims may change their residence, they

may become ill, they might misplace and then rediscover receipts or case-related paperwork, they might lose track of their restitution obligations in the sometimes tumultuous grieving period following the murder of a loved one, or they might suffer depression or mental illness following the crime. Mail might be misdirected, misplaced, or simply never delivered for reasons beyond the control of the State and the victim. Or, the victim might incur new expenses after the original order was entered. All of these possibilities suggest that a flexible rule allowing modification of restitution orders is fair and appropriate.

In this case, Gray's restitution obligation was initially determined by the court, the order was modified while the court still had jurisdiction, and the amount was unchallenged. It is apparent from the record that a substantial period of time had passed between the victim's murder and the defendant's sentencing, largely because the defendant fled prosecution for about two years. CP 42. It is also apparent that the victim's mother was ill and heartsick. Her husband attended sentencing and addressed the court:

Thank you, Your Honor. My name is Tonga Hikila.
I am the father Sanelive Hikila. This is his picture.
My wife is not here. She's home. She's very sick.

She doesn't want to hear any talk about this case.
But she gave me a message to come over here to
speak to William Gray.

RP 6/5/09 at 4. Mr. Hikila and an uncle then explained how the Hikila family had forgiven Gray. RP 6/5/09 at 4-7. As for the restitution documents, the record shows that restitution was initially postponed, a letter asking for restitution documentation was sent to the Hikila family but the family never received it. RP 5/4/10 at 2-3. Restitution was initially determined based on information from the Crime Victims Compensation Fund.

These facts are hardly unique to this case, and they illustrate the challenges facing victims and the wisdom of the flexible modification rule. The circumstances raise the policy question of what should occur if restitution cannot be perfectly and completely determined in the first 180 days after sentencing. Should the victims suffer denial of restitution? Should the defendant realize a windfall? Or, should the order be amended? The plain language of the statute answers the question: the order should be amended at the sentencing court's discretion, as long as the court has initially determined restitution within the first 180 days. This result is certainly consistent with the legislative preference for restitution and with this defendant's stated intent to pay full restitution.

Gray argues for an interpretation of the statute that would permit modifications only where expenses were incurred after the initial restitution order. Restitution is wholly a creature of statute, meaning that it may not be ordered unless expressly authorized, and it may not be curtailed unless expressly restricted. The statute defines the sentencing court's authority at both ends of the spectrum. No statutory language imposes the limit Gray seeks.

Gray specifically argues that "the restitution statute requires the *total* amount of restitution be determined within 180 days of sentencing unless 'good cause' is shown." Reply Br. of App. at 7 (*italics added*). The statute does not say that the total restitution must be determined within 180 days; Gray has simply added the word "total." Gray also argues, "It is well-established that the purpose of the mandatory 180-day deadline is to secure finality of the judgment." Pet. for Rev. at 7 (citing State v. Moen, 129 Wn.2d 535, 542-43, 919 P.2d 69 (1996), and State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989)). Neither Moen nor Shove says that a restitution award must be final within the initial period. Indeed, the language of the statute expressly permits modification. If the order can be modified, it is not final, so it cannot be said that the 180-day period is intended to ensure "finality of the judgment."

Gray also argues that modifications should not be liberally granted because "it is in the victim's best interest to have restitution set in a timely fashion." Pet. for Rev. at 9. This argument is half-correct but does not support his proposed rule. While it is certainly true that an early determination of restitution benefits victims, it is also true that victims prefer full rather than partial compensation. At most, the 180-day requirement establishes a time period within which the sentencing court must make an initial determination, subject to later modification at the court's discretion. The timeliness goal is subsidiary to the primary goal that an offender be punished and the victim compensated. Gray's argument would elevate the subsidiary timeliness goal above the primary punitive and compensatory goals, effectively defeating the primary goal. Such a strained interpretation is inappropriate, especially where the express language of the statute is to the contrary.

In short, the legislature determines when a restitution judgment is final, and what will best serve the interests of victims and justice. The statutory provision allowing modification of restitution after the 180-day limit evidences the legislative judgment that an initial determination can be changed, and thus is not final 180 days after sentencing.

Gray argues that State v. Gonzalez supports his position because in that case this Court upheld a restitution award of medical costs incurred after the original 180-day period. Reply Br. of App. at 4-5. In Gonzalez, this Court noted that because restitution is limited to "actual expenses incurred" in the past, the court cannot order restitution for future expenses. Gonzalez, 168 Wn.2d at 266. The only way to order restitution under such circumstances is to modify the original determination. Id. But a restitution award for continuing medical care is simply one circumstance under which a court may modify restitution; Gonzalez did not hold that restitution could be modified *only* if expenses were incurred after the original order. Neither Gonzalez nor the statute says that these are the only circumstances where restitution can be modified. Indeed, as this Court expressly observed in Gonzalez, throughout the history of the Sentencing Reform Act, the legislature has consistently made clear that restitution provisions are to be liberally construed:

When the legislature enacted the restitution statute, it clearly stated its intent that victims be afforded legal protections at least as strong as those given criminal defendants. That is, victims of crime were to be "honored and protected by law enforcement agencies, prosecutors, and judges in a

manner no less vigorous than the protections afforded criminal defendants." Laws of 1981, ch. 145, § 1.

Legislative changes can also be considered when determining legislative intent. State v. Mendoza, 165 Wn.2d 913, 921, 205 P.3d 113 (2009). The legislature's amendments to the restitution statute demonstrate that the legislature has consistently sought to ensure that victims of crimes are made whole after suffering losses caused by offenders and to increase offender accountability. It established the monthly minimum payment system, for example, as part of its effort to "hold[] offenders accountable to victims ... for the assessed costs associated with their crimes" and provide "remedies for an individual or other entities to recoup or at least defray a portion of the loss associated with the costs of felonious behavior." Laws of 1989, ch. 252, § 1.

Thus, according to the statute's plain language and legislative history, it is clear the statute is intended to ensure that defendants fulfill their responsibility to compensate victims for losses resulting from their crimes. The plain meaning of the modification provision of RCW 9.94A.753(4) advances this intent by allowing an amendment to restitution in order to compensate a victim for losses resulting from a defendant's assault.

Gonzalez, 168 Wn.2d at 265. Gray's interpretation of the statute would defeat the clear intent of the legislature, even though nothing in the statute provides that modification of a defendant's broad restitution obligations is restricted to newly-incurred costs. The legislature can limit modifications to recent expenses if it believes

that strict adherence to the 180-day rule is more important than providing full restitution to victims.

Gray mistakenly argues that the Court of Appeals decision in this case conflicts with several cases. First, he argues that Gray conflicts with State v. Griffith, 164 Wn.2d 960, 195 P.3d 506 (2008). Griffith pled guilty to possession of a finite number of stolen items, but there were indications that she had participated in a burglary where many more items were stolen. A full evidentiary hearing was held to determine restitution and the State presented evidence to prove that Griffith was responsible for jewelry stolen in the burglary. The sentencing court ordered restitution for the items Griffith wrongfully possessed, and for jewelry stolen in the burglary. 164 Wn.2d 963-64.

This Court reversed the order, holding that the State had presented insufficient evidence to support restitution as to the items stolen in the burglary. This Court then restricted the scope of the remand hearing to evidence admitted in the original hearing. Id. at 968. The rationale for this restriction was explained in a single-sentence footnote: "Introducing new evidence on remand would conflict with the statutory requirement that restitution be set within

180 days after sentencing. RCW 9.94A.753(1); see State v. Dennis, 101 Wn. App. 223, 229-30, 6 P.3d 1173 (2000)."¹

In this case, there was no contested factual hearing that preceded the first restitution order. Gray's counsel simply signed an agreed order that was then signed by the court. RP 5/4/10 5; CP 37. This is much different than a situation where the State has been put to its proof in a contested hearing and failed. This factual distinction alone is sufficient to make Griffith non-binding as to this case. Moreover, it appears that the remand language in Griffith was inconsistent with this Court's own precedent and inconsistent with legislative changes that nullify the precedential value of a single case cited in support of the narrow remand. See Griffith, at 510-12 (Madsen, J., dissenting) (noting the difference between restitution and offender score calculations and noting that subsequent legislation has undercut Dennis).

An additional consideration is the tension between the remand language in Griffith and RCW 9.94A.753(4). To the extent that Griffith suggests that a restitution order is immutably fixed after

¹ Although Griffith requested this restrictive remand in a short passage in her supplemental brief, a review of the briefs shows that Griffith did not cite to authority for the request, and the State did not file a supplemental brief, so this Court did not have the benefit of full briefing as to the scope of the remand.

the 180-day period, it is clearly inconsistent with the statute, which expressly allows an order to be modified after 180 days. This point was not discussed in the Griffith briefing, nor was it addressed in the majority or dissenting opinions. Whether a restrictive remand is required after a full contested hearing can be reconsidered in a case that directly raises the issue, after full briefing. For purposes of this case, however, it is sufficient to distinguish the case by noting that its summary treatment of the issue is not binding authority in a case like this one, where there was not a full, contested evidentiary hearing where the State presented insufficient evidence. In a case like this one, RCW 9.94A.735(4) controls.

Gray also argues that the Court of Appeals' decision in this case conflicts with an older decision in State v. Ryan, 78 Wn. App. 758, 899 P.2d 825 (1995). Pet. for Rev. at 13-15. He is mistaken. Ryan involved two consolidated cases wherein the sentencing court had entered *ex parte* restitution orders subject to approval by the defendant. The defendants objected but the court did not hold a timely hearing to adjudicate the objections. The Court of Appeals held that because the defendant could, and did, contest the *ex parte* orders, restitution had not been "determined" until the

untimely hearing. Contrary to Gray's assertion, Ryan did not hold either that a restitution determination must be completed by the statutory deadline, or that modifications could cover only new expenses.

Nor does Gray conflict with State v. Burns, 159 Wn. App. 74, 244 P.3d 988 (2011). Reply Br. of App. at 9-10. In Burns, restitution was agreed at sentencing and ordered by the court as to *charged* counts. Restitution was disputed as to *uncharged* counts, and the prosecutor was directed to provide supporting documentation for a hearing within 180 days. The hearing did not occur until much later. Burns, 159 Wn. App. at 76-77. Under these facts, the Court of Appeals concluded that because restitution was never determined as to the uncharged counts, there was nothing to modify, so RCW 9.94A.753(4) was inapplicable. By contrast, in this case restitution was determined within the required 180 days, so the modification provision may be invoked.

Finally, Gray argues that it would be absurd to say the statute allows increases after the 180-day period, because it would allow a court to increase restitution years after the initial period has run. Pet. for Rev. at 12-13. This is not an absurd result. "Absurd" means "ridiculously unreasonable, unsound, or incongruous."

<http://www.merriam-webster.com/dictionary/absurd>. Given the legislature's oft-stated and strong desire to see defendants punished and victims compensated via restitution orders, it should not be surprising that the legislature would authorize modification of an initial order if that order was shown to be deficient. Nor is it surprising that the legislature would prefer full compensation over partial, but more expeditious, compensation. The 180-day provision protects victims' rights by ensuring that an initial determination is made within a reasonable time, but the provision is not a trump card for the defendant; a sentencing court has discretion to add or subtract restitution based on new information. This approach is wholly consistent with the legislative scheme; it is hardly "ridiculously unreasonable, unsound, or incongruous."

2. GRAY SHOULD BE FORECLOSED FROM CHALLENGING FULL RESTITUTION BECAUSE HE AGREED AS PART OF HIS GUILTY PLEA TO FULLY REIMBURSE THE VICTIM'S FAMILY.

Gray argues that his plea agreement does not bar a challenge to the restitution order. Pet. for Review at 7 n.2.² He is

² This argument was not discussed in either the trial court or in the Court of Appeals but Gray raises the argument in his Petition for Review. Because the argument may appear in his supplemental brief and it applies in many other cases, the State sets forth its position on the issue in this brief, and asks the Court to adopt that position.

mistaken. In State v. Hunsicker, 129 Wn.2d 554, 919 P.2d 79 (1996), the defendant promised as part of his plea agreement to pay restitution in full and specified a dollar amount. A restitution order was not timely entered, however, so the defendant argued that the court did not have the authority to order restitution. This Court rejected that argument, holding that Hunsicker's plea agreement was a contract, that he had agreed as part of that contract to pay a certain amount in restitution, that he had benefited by avoiding additional charges, and that he should not be permitted to renege on his agreement. Thus, this Court held, restitution could be ordered. Hunsicker, 129 Wn.2d at 559-60.

This case is similar to Hunsicker, but it presents an even more compelling case for affirmance. Gray agreed to pay restitution in full to his victims, charges were reduced from murder to manslaughter pursuant to his plea, and there was never any dispute as to the amount of the burial expenses. Moreover, restitution was timely ordered to the extent possible. Thus, Gray's plea agreement should foreclose any objection to the court's order. The order simply effectuated the contract that allowed Gray to avoid trial and possible punishment for murder.

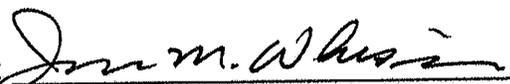
D. CONCLUSION

For the foregoing reasons, the trial court's order modifying the restitution obligation to cover burial expenses incurred by the deceased victim's family should be affirmed. The order modified a timely determination of restitution and simply effectuated the deal Gray had already negotiated. If the legislature believes that the modification rule undercuts the 180-day rule, it can amend the plain language of the statute to provide further guidance on when modifications will be permitted.

DATED this 16th day of December, 2011.

Respectfully submitted,

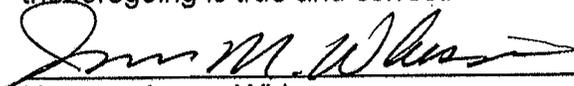
DANIEL T. SATTERBERG
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By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the petitioner, Maureen Cyr @ maureen@washapp.org, containing a copy of the Supplemental Brief of Respondent, in STATE V. WILLIAM GRAY, Cause No. 86359-8, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name James Whisman
Done in Seattle, Washington

12/16/11

Date 12/16/2011

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To: OFFICE RECEPTIONIST, CLERK
Cc: 'Maureen Cyr'
Subject: State v. Gray, No. 86359-8

Dear Supreme Court Clerk,

Attached is the Supplemental Brief of Respondent in State v. Gray, No. 86359-8 with certification of service. Please let me know if you have difficulties with this electronic filing.

Sincerely,

James M. Whisman
Senior Deputy Prosecuting Attorney
Appellate Unit
King County Prosecuting Attorney's Office

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