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No. 96490-4

NO. 76618-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SHACON FONTANE BARBEE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE PATRICK OISHI

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The defendant entered into an agreed order of restitution and now raises the following issues:

1. Did the trial court exceed its statutory authority in entering the restitution order?
2. Were the defendant's due process rights violated?

B. STATEMENT OF THE CASE

On June 18, 2013, a jury found Barbee guilty of two counts of Promoting Commercial Sex Abuse of a Minor, two counts of Promoting Prostitution in the Second Degree, three counts of First-Degree Theft and one count of Leading Organized Crime. CP 50-51. The defendant was sentenced on November 15, 2013. CP 50-65.

The defendant's offender score was 21+ on the greater offenses. Id. The court imposed an exceptional sentence of 420 months on count 1 relying on two independent aggravating factors — the “pattern of sexual abuse of a minor aggravator,” under RCW 9.94A.535(3)(g), and the high offender score and multiple current offenses (“free crimes”) aggravator, under RCW 9.94A.535(2)(c).

The court imposed a concurrent exceptional sentence of 420 months on count 2 relying on the “free crimes” aggravator. Id. The sentences on counts 1 and 2 were ordered concurrent with the remaining lesser standard-range sentences on the other counts.

Id.

On May 7, 2014, a restitution hearing was held wherein the court ordered the defendant to pay \$15,078.00 to the Social Security Administration, the listed victim of the thefts charged in counts 7 and 8. CP 66-67; CP 45-49.

The defendant appealed his conviction, with the Supreme Court ultimately issuing an opinion upholding the defendant’s convictions but ordering that the case be “remand[ed] to the trial court for resentencing.” CP 79; State v. Barbee, 187 Wn.2d 375, 386 P.3d 729 (2017), as amended (Jan. 26, 2017). The reason the Court ordered that the defendant be resentenced was because the trial court had mistakenly believed the crime of promoting commercial sexual abuse of a minor as charged in count 1 was a Class A felony with a maximum penalty of life, when in fact it was a

Class B felony with a maximum term of confinement of 120 months.
CP 101.¹

The defendant was resentenced on March 22, 2017. CP 211-27. The judgment and sentence indicated that restitution was to be determined at a future date. CP 215. On June 14, 2017, an agreed restitution order was signed by the court, the prosecutor, defendant's counsel, and then it was filed with the clerk's office. CP 257-58.

The order required that the defendant pay the previously ordered restitution of \$15,078 to the Social Security Administration, as well as \$4,150.09 to the victim of the theft charged in count 9, the State of Washington, Health Care Authority (formerly DSHS). CP 257-58; CP 45-49. It is this order that the defendant now challenges.

¹ The 420-month exceptional sentence on count 2 for promoting commercial sexual abuse of a minor was legally sufficient because at the time the defendant committed the acts that formed the basis of that conviction, the legislature had amended the statute elevating the crime from a Class B felony to a Class A felony. See Barbee, 187 Wn.2d at 392 (citing Engrossed Substitute S.B. 6476, 61st Leg., Reg. Sess. (Wash. 2010)).

C. ARGUMENT

1. THE COURT'S ENTRY OF THE RESTITUTION ORDER DID NOT VIOLATE THE RESTITUTION STATUTE

The defendant contends that the restitution statute does not permit a trial court to impose a restitution order upon a resentencing where the resentencing involves only a single count of a multicount conviction. The defendant's interpretation of the statute is not supported by the language of the statute, the policies supporting the statute or any case law.

"A court's authority to order restitution is derived solely from statute." State v. Gray, 174 Wn.2d 920, 924, 280 P.3d 1110 (2012) (quoting State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010)). Here, the resolution of this case depends solely on statutory interpretation. The defendant does not contest the accuracy of the restitution amount. Rather, he challenges only the court's authority to order restitution under the statute.

RCW 9.94A.753(1) governs the restitution order in this case. In pertinent part, the subsection provides that "[w]hen 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.”²

The meaning of a statute is a question of law reviewed *de novo*. State v. Breazeale, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001). In interpreting a statute, a reviewing court’s fundamental objective is to ascertain and carry out the legislature’s intent. Gray, at 926 (citing Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)).

Statutory interpretation begins with a statute’s plain meaning. Lake v. Woodcreek Homeowners Ass’n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Plain meaning “is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). If the statute is unambiguous after a review of the plain meaning, the court’s inquiry is at an end. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The plain language of RCW 9.94A.753(1) gives the trial court the power to order restitution “at the *sentencing hearing* or within one hundred eighty days.” The language could not be more

² Subsection (7) deals with the crime victims’ compensation act. The provision is not applicable to this case.

clear, the triggering event is a “sentencing hearing” regardless of the number of counts to be sentenced or whether it is a sentencing hearing held after a remand.

Still, the defendant argues that because only one count of the eight he was originally sentenced was in error, when his case was remanded to the trial court and the court imposed sentence, this was somehow not a “sentencing hearing.” The defendant does not point to any language in the statute to support his argument. This is because nowhere in the statute does the defendant’s claimed limitation appear.³

While the plain language of the restitution statute resolves the issue, the defendant’s interpretation of the statute would also thwart the legislative intent and purpose behind the statute.

The Supreme Court has repeatedly stated that the language of the restitution statute shall be “interpreted broadly” to further the purposes of the statute. State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991). One of the guiding purposes of the

³ The State agrees with the defendant that the challenged restitution order is not a “modification” of the order entered when the defendant was first sentenced. While modifications of an existing order are permissible under the statute, adding an additional victim to an existing order past the statutory deadline is not a permissible modification. See State v. Gray, 174 Wn.2d 920, 280 P.3d 1110 (2012) (modifications are permissible even after the 180-day deadline has passed); State v. Chipman, 176 Wn. App. 615, 309 P.3d 669 (2013) (but it is impermissible to add another victim to a restitution order as a modification past the 180-day deadline).

restitution statute is to ensure that a defendant compensate victims who have suffered from the detrimental impact of the crimes committed by the defendant. Gonzalez, 168 Wn.2d at 265-66. In addition, restitution is a rehabilitative tool as it “increases the defendant’s self-awareness and sense of control over his/her own life.” State v. Barr, 99 Wn.2d 75, 79 P.2d 1247 (1983). The defendant’s limiting interpretation of the statute would run counter to these purposes.

Finally, the defendant cites to a number of cases that purport to limit a trial court’s authority upon remand. None of the cases cited involve the restitution statute and none of the cases purport to limit the trial court’s authority granted by statute.

In re West, 154 Wn.2d 204, 110 P.3d 1122 (2005), involved a situation where the judgment and sentence unlawfully ordered that the defendant receive no earned early release credit. West attempted to get his entire sentence voided but the Supreme Court held that imposition of the unauthorized sentence provision did not require vacation of the entire judgment and sentence.

In re Goodwin, 154 Wn.2d 204, 110 P.3d 1122 (2005), was a case that involved an incorrect offender score calculation. The Supreme Court stated that when a sentence has been imposed for

which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, however, correcting an erroneous sentence does not affect the finality of that portion of the judgment and sentence that was correct and valid when sentence was originally imposed.

The cases above and the other cases cited by the defendant are inapplicable because the defendant assumes that the validity of the restitution order entered when the defendant was first sentenced matters. It does not. "A trial court only possesses the power to impose sentences provided by law." In re Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The trial court's authority to enter the restitution order here emanates from the restitution statute, not from any grant or limit of power from a reviewing court. Thus, the validity or invalidity of the restitution order that was entered when the defendant was first sentenced is irrelevant.⁴

⁴ The defendant also cites to State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992). Collicott involved the application of collateral estoppel. When Collicott was first sentenced the trial court exercised its discretion in determining not to impose an exceptional sentence. Upon resentencing, with all the elements of issue preclusion being present, the trial court was not permitted to relitigate the issue. Collateral estoppel is not present nor argued here.

2. THE DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED

The defendant contends that his due process rights were violated because he was not given an opportunity to object and request a hearing. This claim is without merit. A restitution packet was sent to the defendant's counsel with a proposed order that defense counsel signed. There was no hearing because there was no need for a hearing.

A defendant must be provided notice of a restitution hearing. State v. Saunders, 132 Wn. App. 592, 608, 132 P.3d 743 (2006), rev. denied, 159 Wn.2d 1017 (2007). A defendant also likely has a right to be present at a restitution hearing. See State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005); State v. Davenport, 140 Wn. App. 925, 167 P.3d 1221 (2007); State v. Hotrum, 120 Wn. App. 681, 87 P.3d 766 (2004).

The defendant asserts that “[t]here is no indication in the record that Barbee received advance notice of the State’s intent to seek a new restitution order.” Def. br. at 17. He adds that “[i]n fact, the documents the State submitted in support of its new restitution request were filed two weeks **after** the new order was entered.” Id.

(emphasis in original). The defendant's argument fails for multiple reasons.

The defendant was resentenced on March 22, 2017. CP 211-27. At the time of his sentencing, he was notified that restitution would be determined at a future hearing, with the date of the hearing to be set. CP 215.

A restitution packet was prepared by Restitution Investigator Christie Cano of the Victim Assistance Unit of the King County Prosecutor's Office. CP 259-60. The packet included a proposed restitution order, the supporting documentation for the requested restitution amount, and a cover letter to the defendant's attorney. CP 259-73. The cover letter asked defense counsel to review and sign the order. CP 260. Absent an agreement, a restitution hearing would be set. CP 260.

A signed restitution order – signed by the judge, the defendant's attorney and the prosecutor was filed on June 14, 2017. CP 257-58. No restitution hearing was held.

First, the defendant asks this court to presume that he had no notice or opportunity to request a hearing because the record does not show he received notice. However, the Supreme Court has stated that a reviewing court "will not, for the purpose of finding

reversible error, presume the existence of facts as to which the record is silent.” State v. Jasper, 174 Wn.2d 96, 123-24, 271 P.3d 876 (2012) (quoting Barker v. Weeks, 182 Wn. 384, 391, 47 P.2d 1 (1935)).

In Jasper, the defendant alleged that the trial court violated his due process rights by responding to jury inquiries without consulting his counsel and without allowing Jasper to be present. Besides boiler plate preprinted language in the “court response” form, the record did not show that the trial judge had contacted defense counsel and allowed for the defendant to be present. The court of appeals “assumed—based on the nonexistence of facts—that the trial court did not contact counsel and that Jasper was not present when the trial court considered and responded to the jury inquiries.” Jasper, 174 Wn.2d at 123. The Supreme Court stated that presuming such facts was contrary to the “well established principle” that the court “will not presume the existence of facts as to which the record is silent” “for the purpose of finding reversible error.” Id. at 123-24. Under Jasper, this Court will not presume that the defendant did not have notice of the restitution hearing.

Secondly, the defendant relies on the fact that the restitution packet was not filed with the clerk's office until June 28, ten days after the restitution order was signed and filed.⁵ See CP 257-59. This ignores the fact that the restitution packet shows that it was mailed to defense counsel on June 1, 2017, two weeks prior to the order being signed. CP 260. And in point of fact, defense counsel could only have signed the prepared restitution order if he had received it. This clearly shows that notice was provided.

As for the opportunity to object and be present in court, that right existed only if there was a restitution hearing of which there was not. Defense counsel signed the agreed order and with notice of presentation waived, the order was signed by all parties and filed within the 180-day time period allowed by statute. CP 258.

⁵ Unlike the death penalty statute, for example, the restitution statute does not require that written notice be filed with the court or that any other particular manner of notice is required. See RCW 10.95.040 ("If a person is charged with aggravated first degree murder. . . the prosecuting attorney shall file written notice of a special sentencing proceeding...").

D. CONCLUSION

For the reasons cited above, this Court should affirm the trial court's imposition of restitution for the crimes committed by the defendant.

DATED this 3 day of January, 2018.

Respectfully submitted,

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