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SUPREME COURT  
STATE OF WASHINGTON  
3/22/2019 4:32 PM  
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Supreme Court No. 96490-4  
Court of Appeals No. 76618-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

SHACON FONTANE BARBEE,

Petitioner.

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ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUMMARY OF APPEAL

The order awarding restitution to the victim of one count of second degree theft was untimely because it was entered more than three years after Shacon Barbee’s sentencing hearing. That the sentence on a different count was reversed on appeal and remanded for resentencing did not re-start the statutory time clock for restitution. The new restitution order was not a permissible “modification” of the original order because it added a new victim and was based on a different count. The order is void and must be vacated.

B. ISSUE PRESENTED

The restitution statute requires the court to “determine the amount of restitution due at the sentencing hearing or within one hundred eighty days.” RCW 9.94A.753(1). Is the restitution order for count IX untimely where it was entered more than one hundred eighty days after Barbee’s “sentencing hearing” for that count?

C. STATEMENT OF THE CASE

Shacon Barbee was charged with several crimes related to his alleged participation in a prostitution enterprise. CP 45-49. The charges included three counts of theft: two counts of first degree theft from the United States Social Security Administration (counts VII and VIII) and

one count of second degree theft from the Department of Social and Health Services (DSHS) (count IX). CP 48. The State alleged Barbee received regular payments from the Supplemental Security Income Program and DSHS, based on claimed disabilities and poverty, but did not report his prostitution-related income to these agencies. CP 85.

Following a jury trial, Barbee was convicted of all three theft counts as charged, as well as most of the other charges. CP 50. His sentencing hearing was held on November 15, 2013.

A restitution hearing was held within 180 days, on May 7, 2014. The State requested \$15,078 in restitution for the Social Security Administration, the victim of counts VII and VIII. CP 48, 71, 73-76. The court entered an order in accordance with the State's request. CP 66. The State did not request and the court did not award any restitution for DSHS, the victim of count IX.

On appeal, this Court reversed the sentence for count I because it exceeded the statutory maximum of 120 months. CP 154-55. The Court remanded to the trial court for "resentencing on that count." CP 79, 155. The Court left the remainder of the judgment and sentence intact. The Court mandated the case to the superior court "for further proceedings in accordance" with its opinion. CP 77. The parties did not

challenge the restitution order on appeal and neither this Court nor the Court of Appeals addressed restitution.

The trial court resentenced Barbee on count I at a hearing on March 22, 2017. 3/22/17RP 15; CP 216. Neither the parties nor the court mentioned restitution at any point during the resentencing hearing. See 3/22/17RP 8-20.

Despite this Court's limited mandate only to resentence Barbee on count I, the State filed additional restitution documents and requested a new restitution order. CP 259-73. The State requested an additional \$4,150.09 in restitution for a second victim—DSHS. Id. The State's documentation included a copy of a letter sent from DSHS to Barbee several years earlier in July 2011, long before his sentencing hearing, notifying him of the alleged overpayment of medical and food assistance benefits. Id.

No restitution hearing was held. The court entered a second restitution order on June 14, 2017, three and a half years after the November 2013 sentencing hearing, in accordance with the State's request. CP 257-58. In addition to the original amount of \$15,078 awarded to the Social Security Administration, the court awarded an additional amount of \$4,150.09 to DSHS. Id.

D. ARGUMENT

**The order awarding restitution to the victim of count IX was untimely in violation of the statute because it was entered more than three years after the “sentencing hearing.”**

The order awarding restitution to DSHS, the victim of count IX, was entered in June 2017, more than three years after the “sentencing hearing” for that count, which was held in November 2013. This was untimely in violation of the plain language of the statute.

1. The restitution award to DSHS was untimely because it was entered more than 180 days after the “sentencing hearing” for that count.

A court’s authority to order restitution is derived wholly from statute. State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010).

The restitution statute provides, “When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days.”<sup>1</sup> RCW 9.94A.753(1).

The statutory 180-day time limit is mandatory unless extended by the court for good cause. State v. Gray, 174 Wn.2d 920, 925-26, 280 P.3d 1110 (2012); State v. Moen, 129 Wn.2d 535, 542-43, 919 P.2d 69

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<sup>1</sup> The statute provides an exception to the deadline for restitution payable under the crime victims’ compensation act. RCW 9.94A.753(1), (7). That exception does not apply in this case.

(1996); State v. Krall, 125 Wn.2d 146, 148-49, 881 P.2d 1040 (1994).

The State bears the burden to ensure that restitution is accurately determined within the 180-day deadline. Moen, 129 Wn.2d at 542.

The proper application of this statutory provision depends upon its plain meaning. Gray, 174 Wn.2d at 926-27. Plain meaning is 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. Id. If the statute is unambiguous after a review of the plain meaning, the Court's inquiry is at an end. Id.

If the provision is still subject to more than one reasonable interpretation, it is ambiguous. State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). The rule of lenity requires the Court to adopt the interpretation that favors the defendant. Id.

The plain language of the restitution statute unambiguously requires the trial court to determine the amount of restitution within 180 days of "the sentencing hearing." RCW 9.94A.753(1). Here, the "sentencing hearing" was held in November 2013. The restitution order for count IX was entered in June 2017, more than three years later. That exceeds the statutory 180-day deadline.

The “resentencing hearing” held in March 2017 was not “the sentencing hearing.” As the deputy prosecutor stated, the purpose of the March 2017 hearing was “for resentencing as to Count I.” RP 8. The court noted that, pursuant to this Court’s mandate, the purpose of the hearing was to “correct” the sentence for count I because it exceeded the statutory maximum. RP 10-11. The court said it was “only adjusting Count I.” RP 15. The court did not resentence Barbee on any of the other counts.

The restitution statute does not define “sentencing hearing.” It is reasonable to conclude “sentencing hearing” means the hearing at which the sentence is determined for the specific offense for which restitution is imposed. Other provisions of the statute plainly state that restitution is tied to a particular offense or conviction. See RCW 9.94A.753(3) (“restitution ordered by a court *pursuant to a criminal conviction* shall be based on easily ascertainable damages for injury to or loss of property”) (emphasis added); .753(4) (“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”) (emphasis added); .753(5) (“Restitution shall be ordered whenever the offender is convicted of *an offense* which results in injury to any person

or damage to or loss of property . . . .”) (emphasis added); .753(8) (“an offender who has been found guilty of *an offense* involving fraud or other deceptive practice or an organization which has been found guilty of any *such offense* may be ordered by the sentencing court to give notice of *the conviction* to the class of persons or to the sector of the public affected by *the conviction* or financially interested in the subject matter of *the offense* by mail, by advertising in designated areas or through designated media, or by other appropriate means.”) (emphases added).

Similarly, other provisions of the statute plainly state that restitution is tied to *a particular victim*. See RCW 9.94A.753(3) (“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.”) (emphasis added); .753(6) (“Restitution for the crime of rape of a child in the first, second, or third degree, in which *the victim* becomes pregnant, shall include: (a) All of *the victim’s* medical expenses . . . .) (emphases added); .753(7) (“the court shall order restitution in all cases where *the victim* is entitled to benefits under the crime victims’ compensation act”) (emphasis added); .753(9) (“This section does not

limit civil remedies or defenses available to *the victim* . . . .) (emphasis added).

Related provisions of the sentencing statute also indicate that restitution is tied to a particular victim and a particular offense. A trial court may award restitution only to victims as defined by the Sentencing Reform Act. State v. Kinneman, 122 Wn. App. 850, 866, 95 P.3d 1277 (2004), aff'd, 155 Wn.2d 272, 119 P.3d 350 (2005). The Sentencing Reform Act defines “victim” as “any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of *the crime charged*.” RCW 9.94A.030(54) (emphasis added).

Thus, under the plain language of the statute, a restitution award is linked to a particular victim and a particular offense.

In light of the plain language of the statute, the case law holds that restitution must be separately “determined” for each charge and each victim within 180 days of the sentencing hearing. State v. Chipman, 176 Wn. App. 615, 622, 309 P.3d 669 (2013) (holding restitution must be “determined” separately for each victim before expiration of statutory deadline) (citing RCW 9.94A.753(1)); State v. Burns, 159 Wn. App. 74, 79-80, 244 P.3d 988 (2010) (holding

restitution must be “determined” separately for each charge before expiration of 180-day deadline) (citing 9.94A.753(1)).

Thus, restitution must be “determined” for each offense and each victim within 180 days of “the sentencing hearing.” RCW 9.94A.753(1). It is reasonable to conclude “the sentencing hearing” refers to the hearing at which the offender is sentenced for the particular offense for which restitution is to be imposed. Contrary to the Court of Appeals’ opinion in this case, it is not reasonable to conclude “the sentencing hearing” refers to a hearing at which the offender is resentenced for a different offense involving a different victim.

Here, Barbee was sentenced for count IX, involving the victim DSHS, at a hearing in November 2013. The restitution order for that offense and that victim was entered in June 2017, well beyond the statutory 180-day deadline. RCW 9.94A.753(1). The court acted without statutory authority in entering the untimely award.

2. The restitution award to DSHS was not a timely “modification” of the original restitution order because it added a new charge and a new victim.

Once a timely restitution order is entered, the court has “broad power” to modify it “as to amount, terms, and conditions during any

period of time the offender remains under the court's jurisdiction.”

RCW 9.94A.753(4); Gray, 174 Wn.2d at 925.

But the statute does not authorize a court to “modify” a restitution order beyond the statutory time deadline by adding a new victim or a new charge that was not covered by the original order. Chipman, 176 Wn. App. at 621-22. That is because there is no restitution to modify if it is not “determined” in the first place. Gray, 174 Wn.2d at 932 (quoting RCW 9.94A.753(1)). A restitution award that is not timely “determined” may not be modified. Gray, 174 Wn.2d at 926, 932.

Restitution must be “determined” as to each victim before expiration of the 180-day deadline before it may be modified. Chipman, 176 Wn. App. at 622. In Chipman, the trial court timely ordered restitution to the victim in count II. Id. at 617. After the deadline passed, the court ordered additional restitution to the victim of count I. Id. 619. The Court of Appeals held this was not a timely modification because the original restitution order had not “determined” the amount of restitution for the victim of count I. Id. 619-21. The second restitution order was not merely a modification of the original order but was “an independent restitution order that was the

product of a separate restitution hearing relating to a different victim with different injuries named in a different count.” Id. at 622. As such, it was independently subject to the 180-day deadline. Id.

Similarly, restitution must be “determined” as to each offense within 180 days before it may be modified. Burns, 159 Wn. App. at 79-80. In Burns, Burns entered an Alford<sup>2</sup> plea and was sentenced for four theft and forgery charges. Id. at 76. The court entered a timely restitution order related to those charges. Id. More than 180 days later, the court ordered additional restitution for uncharged crimes. Id. The Court of Appeals held this was not an authorized modification of the original restitution order because the trial court had not “determined” restitution as to the uncharged crimes within 180 days. Id. at 79-80.

Here, the trial court held a hearing and awarded restitution to the Social Security Administration—the victim of counts VII and VIII—within 180 days of the sentencing hearing. CP 66. This order was timely. RCW 9.94A.753(1). More than three years later, the court entered a second restitution award to DSHS, the victim of Count IX.

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<sup>2</sup> North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

CP 257-58. That award was not a permissible “modification” of the original award because it covered a different victim and a different charge. Chipman, 176 Wn. App. at 622; Burns, 159 Wn. App. at 79-80. Restitution had not yet been “determined” for that charge and that victim. Because the new order was entered more than 180 days after the sentencing hearing, it was untimely. Chipman, 176 Wn. App. at 622; Burns, 159 Wn. App. at 79-80; RCW 9.94A.753(1).

3. This Court’s opinion remanding for resentencing on count I did not restart the statutory time clock because the original restitution order remained valid and final.

This Court’s opinion reversing the sentence on count I and remanding for “resentencing on that count,” see CP 79, 155, did not restart the time clock for restitution. Neither Barbee nor the State challenged the restitution order on appeal and this Court did not address it. The Court reversed only a portion of the sentence—the prison term for count I. That portion of the sentence was erroneous because it exceeded the statutory maximum. But the remaining portions of the sentence remained valid and final. The trial court did not need to revisit the restitution award in order to correct the portion of the sentence that was erroneous. The trial court’s decision to enter a new restitution award on remand exceeded the scope of this Court’s mandate.

It is well established that “the imposition of an unauthorized sentence does not require vacation of the entire judgment or granting of a new trial. The error is grounds for reversing only the erroneous portion of the sentence imposed.” In re Pers. Restraint of West, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005) (quoting State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980)).

This Court has consistently held that “[c]orrecting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed.” In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). In other words, when only a portion of the sentence is reversed on appeal, “the finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced’ is unaffected.” State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009) (quoting In re Pers. Restraint of Carle, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980)).

When a portion of a sentence is reversed on appeal, the trial court’s discretion to resentence on remand is limited by the scope of the appellate court’s mandate. State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992) (plurality opinion). The trial court has discretion to

decide those issues that are necessary to resolve the case on remand. State v. Schwab, 134 Wn. App. 635, 645, 141 P.3d 658 (2006), aff'd, 163 Wn.2d 664, 185 P.3d 1151 (2008).

Here, this Court held that only the sentence for count I was erroneous because it exceeded the statutory maximum. CP 154-55. The Court reversed only that portion of the sentence and remanded to the trial court only for “resentencing on that count.” CP 79, 155. The Court left the remaining portions of the sentence untouched.

The Court’s opinion did not affect the finality of those portions of Barbee’s judgment and sentence that were correct and valid when imposed. Goodwin, 146 Wn.2d at 877. The restitution order was not challenged or reviewed on appeal. It remained valid and final. Id.

The trial court did not need to readdress restitution in order to correct the portion of the sentence that was erroneous. By revisiting restitution, and entering a new restitution order, the court exceeded the scope of this Court’s mandate. Schwab, 134 Wn. App. at 645.

Because the restitution order was still final and valid on remand, the trial court did not have authority to change the terms of restitution.

4. The restitution order for count IX is void.

“A restitution order is void if statutory provisions are not followed.” State v. Johnson, 96 Wn. App. 813, 815, 981 P.2d 25 (1999). Here, the restitution award to DSHS was entered beyond the 180-day statutory deadline. RCW 9.94A.753(1). Because statutory procedures were not followed, the restitution award to DSHS is void. Johnson, 96 Wn. App. at 815.

E. CONCLUSION

The restitution order for count IX was untimely in violation of the statute. It is void and must be vacated.

Respectfully submitted this 22nd day of March, 2019.

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MARIA ANA ARRANZA RILEY, Legal Assistant      Date: March 22, 2019  
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