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STATE OF WASHINGTON
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NO. 96490-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHACON FONTANE BARBEE,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

When an appellate court orders that a defendant be resentenced, does the trial court have the authority to order restitution that was not ordered when the defendant was first sentenced?

B. STATEMENT OF THE CASE

For his acts of prostituting three young girls, and for falsely claiming disabilities and poverty and receiving payments from the Supplemental Security Income Program and from DSHS, a jury convicted Barbee of the following crimes:

- Count 1:** Promoting Commercial Sex Abuse of a Minor
- Count 2:** Promoting Commercial Sex Abuse of a Minor
- Count 4:** Promoting Prostitution in the Second Degree
- Count 5:** Promoting Prostitution in the Second Degree
- Count 6:** Leading Organized Crime
- Count 7:** Theft in the First Degree
- Count 8:** Theft in the First Degree
- Count 9:** Theft in the Second Degree

CP 50-51. The jury also found the “pattern of sexual abuse of a minor” aggravating factor charged in count 1. CP 52, 59;

RCW 9.94A.535(3)(g). The court found a “free crimes” aggravating factor. CP 52; RCW 9.94A.535(2)(c).

Barbee was sentenced on November 15, 2013. CP 50-60. With an offender score of 21, Barbee’s standard range was 240 to 318 months on counts 1 and 2. CP 52. Finding that each aggravating factor provided a substantial and compelling reason to impose an exceptional sentence, the court imposed a 420-month sentence on counts 1 and 2 – concurrent with each other and the remaining counts, for a total term of confinement of 420 months. CP 52, 55-56, 59-60. The court ordered that restitution would be determined at a future hearing. CP 54.

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

Barbee filed a direct appeal of his conviction. This Court affirmed his conviction, but ordered that the case be “remand[ed] to the trial court for resentencing.” State v. Barbee, 187 Wn.2d 375, 386 P.3d 729 (2017).

The reason Barbee needed to 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, at the time Barbee committed the acts charged in count 1, it was a Class B felony with a maximum term of confinement of 120 months. Id. Thus, the 420-month term of confinement on count 1 exceeded the statutory maximum for the offense. The 420-month term of confinement on count 2 did not exceed the statutory maximum for the offense because at the time Barbee committed the acts that formed the basis of count 2, the legislature had amended the statute, elevating the crime from a Class B felony to a Class A felony.¹ See Barbee, 187 Wn.2d at 392 (citing Engrossed Substitute S.B. 6476, 61st Leg., Reg. Sess. (Wash. 2010)).

Barbee was resentenced on March 22, 2017. CP 211-27. The judgment and sentence indicated without objection that restitution would be determined at a future date. CP 215. On June 14, 2017, an agreed restitution order was entered. CP 257-58.

The agreed restitution order required that Barbee pay the previously ordered restitution of \$15,078.00 to the Social Security

¹ At the same time the legislature also increased the seriousness level from a level VIII offense to a level XII offense. See RCW 9.68A.101, LAWS OF 2010, ch. 289, § 14. Thus, Barbee's listed seriousness level and corresponding standard range on count 1 were also incorrect. See CP 52, 213.

Administration, plus \$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 Barbee now challenges.

In an unpublished opinion, the Court of Appeals affirmed the trial court's entry of the restitution order. State v. Barbee, 76618-0-I, 2018 WL 4865045 (Oct. 8, 2018).

C. ARGUMENT

THE RESTITUTION STATUTES PERMIT A TRIAL COURT TO IMPOSE A NEW RESTITUTION ORDER UPON RESENTENCING

Barbee contends that the restitution statutes do not permit a trial court to impose a new restitution order after a remand for resentencing. Barbee's interpretation of the restitution statutes is not supported by the language of the statutes, the policies supporting the statutes, 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)). Thus, the resolution of this case depends solely on statutory interpretation.

“Restitution” is “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.” RCW 9.94A.030(43). When a person is convicted of a felony offense, “the court *shall* order restitution as provided in RCW 9.94A.750 and 9.94A.753.”² RCW 9.94A.505(8) (emphasis added). RCW 9.94A.753(1) 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.”³ (emphasis added).

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, 174 Wn.2d at 926.

The primary purpose of the restitution statutes is compensatory; to make victims whole again for losses suffered as a result of a defendant’s criminal acts. Gonzalez, 168 Wn.2d at 265-

² RCW 9.94A.750 applies to offenses committed on or before July 1, 1985 and thus has no application to this case.

³ Subsection (7) applies to cases involving the crime victims’ compensation act and thus has no application to this case.

66; State v. Mathers, 193 Wn. App. 913, 920, 376 P.3d 1163, rev. denied, 186 Wn.2d 1015 (2016). With this purpose in mind, restitution statutes must not be given an “overly technical construction” that would permit a defendant to circumvent the goal of compensating victims of criminal behavior. State v. Ashenberner, 171 Wn. App. 237, 248, 286 P.3d 984 (2012), rev. denied, 176 Wn.2d 1029 (2013). Rather, the “language of the restitution statutes indicates legislative intent to grant broad powers of restitution.” State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991).

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.505(8) directs that the sentencing court “shall order restitution.” In this context, “shall”

means “mandatory.” State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). The plain language of RCW 9.94A.753(1) informs the court when the order of restitution must occur. The trial court must order restitution “at the *sentencing hearing* or within one hundred eighty days.” The language could not be clearer, the triggering event is a “sentencing hearing,” without qualification as to whether it is a sentencing hearing held after a remand by an appellate court. A plain language reading of the restitution statutes resolves this issue. Moreover, Barbee’s narrow interpretation of the statutes would thwart the legislative intent and purpose behind the restitution statutes.

Barbee does not contest that he unlawfully and fraudulently obtained over \$4,000.00 from the Social Security Administration; money that should have gone to others truly in need. Still, Barbee asserts that the term “sentencing hearing” in the restitution statute refers only to an “initial” sentencing hearing. Thus, under his narrow reading of the statute, Barbee asserts he cannot be ordered to pay money he clearly owes. There is no limiting language in the restitution statute that supports such a narrowly, strained reading. A reviewing court will not add words or clauses to an unambiguous statute. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). As

the Court of Appeals aptly stated, the Court will not “rewrite the statute by inserting the word ‘initial’ before the term ‘sentencing hearing,’ so that the 180 day deadline would run after the 2013 sentencing hearing but not after the 2017 sentencing hearing.”

Barbee, 76618-0-I, 2018 WL 4865045, at *2.

With the guiding purposes of ensuring that defendants have a “self-awareness” of the impact of their crimes, and compensating victims who suffer from those criminal acts, a reading that allows a court to impose restitution when a defendant is resentenced on remand best effectuates the legislative intent. See Gonzalez, 168 Wn.2d at 265-66; State v. Barr, 99 Wn.2d 75, 79 P.2d 1247 (1983). After all, this Court has repeatedly stated that the language of the restitution statute shall be “interpreted broadly” to further the purposes of the statute. Davison, 116 Wn.2d at 920.

Before the Court of Appeals, Barbee argued that because his second sentencing hearing was the result of an illegal sentence that was imposed on a single count of his multi-count conviction, that both the restitution statute and this Court’s decision remanding the case for resentencing, barred the trial court from entering the restitution order. This argument fails for a number of reasons.

By rule and case law, the trial court had the discretion to reconsider other portions of its sentence, including the restitution order. In pertinent part, RAP 12.2 provides as follows:

The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require. Upon issuance of the mandate of the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court, unless otherwise directed upon recall of the mandate as provided in rule 12.9, and except as provided in rule 2.5(c)(2).

Here, this Court identified the sentencing error pertaining to count 1. This Court then directed that the error be rectified, and ordered that Barbee be resentenced.

Barbee requests resentencing, and the State concedes that resentencing is appropriate. Accordingly, we remand to the trial court for resentencing.

Barbee, 187 Wn.2d at 393.

In pertinent part, this Court's mandate stated as follows:

This case is mandated to the superior court from which the appellate review was taken for further proceedings in accordance with the attached true copy of the opinion and order amending opinion.

There is nothing in this Court's decision, or the mandate, that barred the trial court from imposing restitution in accord with the restitution statutes upon resentencing.

In addition, RAP 12.2 provides also that “[a]fter the mandate has issued, the trial court may . . .hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court.” The validity or amount of the prior restitution order was not an issue raised in Barbee’s direct appeal. Thus, under RAP 12.2, the trial court could -- at its discretion, revisit the restitution question. See State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 292 (2009) (a trial court may “revisit issues that were not the subject of an earlier appeal”).

Finally, in the Court of Appeals, Barbee cited a number of cases that he purports limit a trial court’s authority upon remand. However, none of the cases cited involve the power granted to the trial court under the restitution statute, and none of the cases purport to limit a trial court’s authority granted by statute.

In In re Pers. Restraint of West,⁴ the judgment and sentence unlawfully ordered that West receive no earned early release credit. On remand, West attempted to void his entire sentence. This Court held that imposition of the unauthorized sentence provision did not

⁴ 154 Wn.2d 204, 110 P.3d 1122 (2005).

require vacation of the entire judgment and sentence. This Court did not address what discretion the trial court had on remand.

In In re Pers. Restraint of Goodwin,⁵ the judgment and sentence contained an incorrect offender score calculation. This 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, this Court reiterated that 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. Like West, this Court did not address the trial court's discretion on remand.

To say that the trial court was not required to revisit the question of restitution, is not to say that the trial court is prohibited from doing so. It is within the trial court's discretion. So if the trial court had declined to enter a new restitution order, under the case law cited, the original restitution order would remain valid. But this line of cases does not hold that because portions of an original sentence remain valid, the trial court is divested of the power granted to it by statute upon resentencing.

⁵ 146 Wn.2d 861, 50 P.3d 618 (2002).

“A trial court only possesses the power to impose sentences provided by law.” In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). “A court’s authority to order restitution is derived solely from statute.” Gray, 174 Wn.2d at 924. The trial court’s authority to enter the restitution order here emanated from the restitution statute, not from any grant or limit of power from a reviewing court. Thus, the trial court had the discretion and power to enter a new restitution order upon Barbee’s resentencing.

D. CONCLUSION

For the reasons cited above, this Court should affirm the trial court’s order directing Barbee to pay restitution for the crimes he committed.

DATED this 22nd day of March, 2019.

Respectfully submitted,

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