

64009-7

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NO. 64009-7-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAU CHONG GIENG,

Appellant.

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

APPELLANT'S OPENING BRIEF

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN 14 PM 4:40

NANCY P. COLLINS
Attorney for Appellant

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

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A. SUMMARY OF ARGUMENT.

Dau Gieng pled guilty to attempting to elude a pursuing police vehicle and agreed he owed restitution to the owner of a 1993 Dodge Spirit, but he disputed his responsibility for all of the damages the Dodge's owner claimed. Without holding an evidentiary hearing, the court ordered Gieng to pay for all estimated repairs requested, even though the evidence did not show that Gieng caused all of the damage alleged. The insufficiency of evidence supporting the restitution claim and lack of evidentiary hearing to resolve the factual dispute requires reversal.

B. ASSIGNMENT OF ERROR.

In the absence of sufficient proof to establish a causal connection between the claimed loss and Dau Gieng's criminal conviction, the trial court erred in entering the restitution order in this case.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

The superior court's authority to order restitution is limited to loss or damage caused by the crime in question and covers losses which are causally connected to the crime of conviction. When the available evidence did not support the extent of the damages alleged, did the court lack authority to order the full restitution

requested by the complaining witness without holding an evidentiary hearing?

D. STATEMENT OF THE CASE.

Police officers signaled Dau Gieng to stop his car, a Saturn. CP 3 (probable cause certification). Gieng did not stop and, instead, he kept driving. Id. When an officer tried to speak with Gieng while he paused at a traffic light, Gieng drove between two cars that were stopped at the light. Gieng side-swiped a car owned by Jason Sharp, damaging Sharp's side view mirror and marring the paint on Sharp's 1993 Dodge Spirit. Id.; CP 42-44.

Gieng pled guilty to one count of attempting to elude a pursuing police vehicle. CP 6-26. He did not agree to the requested amount of restitution. 3/20/09RP 2-3. At a restitution hearing, the prosecution did not present any witnesses to the accident. 7/16/09RP 1. Instead, the prosecution offered an estimate for repairing Sharp's Dodge written by an auto body shop. CP 43-44. The estimate listed repairs to Sharp's front and rear bumpers, in addition to the side of the car that Gieng had swiped. CP 42-44.

Gieng objected to restitution ordered for repairing the bumpers, because he did not believe the bumpers had been

damaged in the incident. 7/16/09RP 2-3. The available reports only indicated damage to the side of the car. CP 3-4. The court ordered Gieng to pay all damage repairs estimated by the auto body shop unless he had evidence that the complainant was falsifying his claim. 7/16/09RP 6.

Gieng timely appeals the court's order requiring him to pay the costs of damage that was not proven to have been caused by the offense for which Gieng pled guilty. CP 35-37.

E. ARGUMENT.

WITHOUT ANY EVIDENCE SHOWING THE VICTIM'S CAR BUMPERS WERE DAMAGED IN THE ACCIDENT AT ISSUE, THE COURT LACKED AUTHORITY TO ORDER GIENG TO REIMBURSE THE VICTIM FOR HIS BUMPERS

1. Restitution ordered in a criminal case must be based on actual compensation for loss incurred and predicated on easily ascertainable amounts. It is axiomatic that a court's restitution order must be based on actual compensation for loss caused by the offense of conviction, not upon speculative claims, general equity concerns that apply in civil courts, or intangible loss. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008); State v. Ewing, 102 Wn.App. 349, 353-54, 7 P.3 835 (2000); State v.

Woods, 90 Wn.App. 904, 907, 953 P.2d 835 (1998); State v. Johnson, 69 Wn.App. 189, 191, 847 P.2d 960 (1993).

Restitution ordered as part of a criminal sentence is not a substitute for civil remedies. See RCW 9.94A.753(9) (“This section does not limit civil remedies . . . available to the victim [or] survivors of the victim”). The criminal court is not a civil court with broad equity powers to craft a just resolution. Ewing, 102 Wn.App. at 353-54. Instead, the court’s power to impose restitution is strictly statutory in nature and the court may not exceed the authority allotted by the Legislature. Griffith, 164 Wn.2d at 965.

When the amount of restitution is disputed, the prosecution must prove the damages at an evidentiary hearing. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 250 (2005). Although the Rules of Evidence do not apply at a restitution hearing, the hearing must comply with due process. State v. Strauss, 119 Wn.2d 401, 417-19, 832 P.2d 78 (1992); U.S. Const. amend. 14. The prosecution must support the claimed loss with “substantial credible evidence.” Griffith, 164 Wn.2d at 965.

The statute authorizing restitution mandates that it “shall be based on easily ascertainable damages.” RCW 9.94A.753(3);

Kinneman, 155 Wn.2d at 285. The statute “precludes restitution for speculative or intangible losses.” Kinneman, 155 Wn.2d at 285.

2. There was no evidence proving the car’s bumper was damaged in the course of the underlying car accident. Gieng pled guilty to one count of attempting to elude a pursuing police vehicle but he did not agree to the amount of restitution he would owe. CP 9.

At a contested restitution hearing, the only evidence submitted by the prosecution was an estimate for repairs to the complainant’s car. CP 42-45. Gieng agreed he would pay for the damage to the car’s side view mirror, which he damaged when he drove too closely to the side of the car. 7/16/09RP 3. He agreed that he had marred the paint on the side of the car when he swiped the car’s side. But he did not believe he damaged the car’s bumpers and questioned the restitution claim for damage to the front and rear bumpers. Id.

The probable cause certificate sets out the only evidence available regarding the circumstances of the collision that prompted the restitution order at issue. CP 3-4. It explains that Gieng refused to stop his car, a Saturn, when signaled to do so by a marked police car. In the course of his efforts to elude the police,

he “drove between two vehicles that were stopped for the [traffic] signal and struck the driver’s side,” of one car. CP 3.

Gieng’s attorney told the sentencing court that she had understood that by driving closely past a stopped car, Gieng had been close enough to damage the other car’s side view mirror. 7/16/09RP 2-3, 5. She did not contest that side-swiping the car could have cause paint damage, and even denting to the side of the car by the side mirror. But she did not expect, anticipate, or understand how Gieng could have damaged the front and rear bumpers of the car by driving closely past the side of the car based on the available allegations and descriptions of events. 7/16/09RP 5.

The prosecution did not offer evidence explaining the circumstances of the incident other than the probable cause certificate, which does not mention that Gieng had any collision with the car’s bumpers. The car’s owner, Jason Sharp, did not testify. He offered a repair estimate from an autobody shop and handwrote a “restitution estimate” for the prosecution’s victim assistance unit which also mentions that he suffered both paint damage and “dents and creases” that occurred “across driver side

of car.” CP 42-44. His written estimate claim does not mention any damage to the bumper.

Because of the lack of evidence regarding the bumpers, Gieng argued that there was no evidence that Gieng damaged the bumpers. The damage to the bumpers may have pre-existed the car accident.

Rather than resolve the issue by holding a restitution hearing, the court stated that “unless there is some evidence or reason to believe that he is trying to get more than” his damages, and “I don’t hear that kind of evidence” here, it would order the amount requested. 7/16/09RP 6. The court thought it could infer that Sharp’s bumper was damaged even if there were no actual allegations or evidence of that damage, and the court ordered Gieng to pay the total amount of the autobody repair estimate.

RCW 9.94A.753(3) limits restitution to “easily ascertainable damages.” The causal connection requirement exists between the crime of conviction and restitution imposed. Kinneman, 155 Wn.2d at 286; Woods, 90 Wn.App. at 907-08. Thus, a defendant cannot be made to pay restitution arising from uncharged crimes or for crimes dismissed as a part of a plea bargain, unless the defendant specifically agrees.

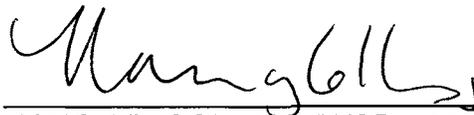
Here, the factual evidence and allegations do not support a restitution claim for damage that Gieng's guilty plea did not contemplate. At the least, the court should have held an evidentiary hearing to determine how Gieng could have caused bumper damage during the incident when he was not alleged to have touched the car's bumpers. The court applied the wrong legal standard when it simply surmised that any allegations put forth by the complainant must be true unless the defense proved he was lying. The court's order imposing restitution for bumper damage without adequate evidence that it was caused by the crime of conviction requires striking this portion of the restitution order.

F. CONCLUSION.

For the foregoing reasons, Mr. Gieng respectfully requests this Court reverse the portion of the restitution order that is based on insufficient evidence.

DATED this 14th day of January 2010.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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DIVISION ONE**

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF JANUARY, 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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APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] DAU GIENG
10761 19 TH AVE SW
SEATTLE, WA 98146 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF JANUARY, 2010.

X _____ 

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