

No. 66258-9-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SHAUN WALLEN,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 JUL 27 PM 4:55

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 4

THE TRIAL COURT ERRED IN ORDERING
RESTITUTION BASED ON ROUGH ESTIMATES
WHICH USED ROUND FIGURES AND FAILED TO
ACCOUNT FOR THE AGE AND WEAR OF THE
ITEMS 4

1. Restitution may only be imposed for loss or injury
caused by the crime in question 4

2. This restitution claim did not satisfy the statutory or
constitutional requirements..... 5

3. Lack of adequate notice of the scope of the
restitution claim limits recovery 8

4. Reversal of the restitution order is required 10

E. CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

United States Supreme Court

Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473,
176 L.Ed.2d 284 (2010) 10

Washington Supreme Court

Harris v. Drake, 152 Wn.2d 480, 99 P.3d 872 (2004) 12

In re Isadore, 151 Wn.2d 294, 99 P.3d 390 (2004) 11

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) 12

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999)..... 7

State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)..... 5, 10

State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005)..... 6

State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011)..... 10, 11

State v. Strauss, 119 Wn.2d 401, 832 P.2d 78 (1992) 7

State v. Tobin, 161 Wn.2d 517, 166 P.3d 1167 (2007)..... 6

Washington Court of Appeals

<u>In re Postsentence Review of Hudgens</u> , 156 Wn.App. 411, 233 P.3d 566 (2010).....	11
<u>State v. Burns</u> , 159 Wn.App. 74, 244 P.3d 988 (2010).....	9
<u>State v. Dedonado</u> , 99 Wn. App. 251, 991 P.2d 1216 (2000)	8, 9
<u>State v. Fleming</u> , 75 Wn.App. 270, 877 P.2d 243 (1994).....	8
<u>State v. Kisor</u> , 68 Wn.App. 610, 844 P.2d 1038 (1993).....	10
<u>State v. Milton</u> , 160 Wn.App. 656, 252 P.3d 380 (2011)	10
<u>State v. Pollard</u> , 66 Wn.App. 779, 834 P.2d 51, <u>rev. denied</u> , 120 Wn.2d 1015 (1992)	7

Statutes

RCW 9.94A.753.....	1, 5-6, 10
RCW 9A.46.030(1)(a).....	2
RCW 9A.52.025(1).....	2
RCW 9A.82.050.....	2

A. ASSIGNMENTS OF ERROR

1. The sentencing court erred by imposing restitution where the lack of specificity in the claimed items failed to satisfy the restitution statute or constitutional right to due process of law.

2. The trial court erred by imposing restitution where inadequate notice of values claimed in restitution was provided prior to Mr. Wallen's guilty plea.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The restitution statute limits awards to "easily ascertainable damages for injury or loss to property." RCW 9.94A.753(3). The claim for restitution failed to provide information regarding the date of purchase, degree of use or condition for the items claimed. In the absence of this rudimentary information, did the sentencing court err in finding there was sufficient specificity to support the award?

2. Restitution represents a statutorily prescribed portion of the punishment following conviction in Washington. Offenders are entitled to notice of the punishment to which they may be subject to upon conviction. Where Mr. Wallen was not provided meaningful notice regarding the amount of restitution, the trial court erred by imposing a materially greater amount?

C. STATEMENT OF THE CASE

Shaun Wallen was charged by information, filed in Skagit County Superior Court, with residential burglary (RCW 9A.52.025(1)) of the home of Jack and Karen Moffet, in August 2009. CP 1. He was also charged with theft in the first degree (Former RCW 9A.46.030(1)(a)) for various items taken in the burglary and trafficking in stolen property in the first degree (RCW 9A.82.050) for allegedly selling a pool table taken as well. CP 2.

Mr. Wallen subsequently pled guilty to the theft charge, while the burglary and trafficking charges, as well as several other pending matters, were dismissed. CP 6-12; 5/7/10RP 3-7. Mr. Wallen was later sentenced to 52 months in prison. CP 13-22; 5/20/10RP 3-6.

A restitution hearing was held thereafter, in which the Moffets claimed a total loss of \$33,384.99.¹ 10/27/10RP 3-4; Supp CP __ (Sub no 41) (attached as Appendix A for reference). Mr. Wallen waived his presence at the hearing, but objected through counsel that the amount of restitution sought greatly exceeded what was identified in the discovery prior to his guilty plea. 10/27/10RP

¹ Although the Victim Loss Statement indicated the total loss was \$33,384.99, the itemized listing of the items totaled \$34,984.99, which is what Judge Rickert ultimately ordered. 10/27/11RP 12; CP 23-24.

5-6. In the absence of receipts, bills of sale, or other documentation establishing what the items had cost and how long the Moffets' had owned them, defense counsel also explained that she was unable to make an assessment of the amounts.

10/27/10RP 6.

The prosecutor explained the discrepancies in the number of items and their estimated value were the result of the initial report having been made by the Moffets' daughter, Ms. Ammonds, who had been watching the house for her parents. 10/27/10RP 9. The prosecutor also acknowledged that although defense counsel had timely requested supporting documentation, the Moffets' were unable to provide any at the time. Id.

Judge Rickett concluded that given the scope of the theft, the limits of Ms. Ammonds preliminary report were not unusual and the Moffets' subsequent estimates "do not seem to be extremely out of line." 10/27/10RP 10-11. Judge Rickett then ordered restitution in the amount of \$34,984.99. Id.; CP 23-24.

This appeal timely followed. CP 26.

D. ARGUMENT

THE TRIAL COURT ERRED IN ORDERING
RESTITUTION BASED ON ROUGH ESTIMATES
WHICH USED ROUND FIGURES AND FAILED TO
ACCOUNT FOR THE AGE AND WEAR OF THE
ITEMS

1. Restitution may only be imposed for loss or injury caused by the crime in question. Restitution is part of an offender's sentence and must be determined at sentencing or at a later evidentiary hearing. RCW 9.94A.753(1); State v. Hughes, 154 Wn.2d 118, 155, 110 P.3d 192 (2005). The Sentencing Reform Act (SRA) requires the trial court to order restitution "whenever the offender is convicted of an offense which results in ... damage to or loss of property..." RCW 9.94A.753(5).

The statute further directs that "restitution ordered by a court ... 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." RCW 9.94A.753(3). Thus, restitution is limited to loss "causally connected" to the crimes charged." State v. Griffith, 164 Wn.2d 960, 965-66, 195

P.3d 506 (2008) (quoting State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007)).²

Where an offender disputes the factual basis of a restitution claim, the prosecution must prove the damages at an evidentiary hearing by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). Although this may not require the victim's loss be established with complete accuracy, there must be substantial credible evidence providing a reasonable basis for estimating the loss and not mere speculation or conjecture. State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005); State v. Griffith, 164 Wn.2d at 965.

2. This restitution claim did not satisfy the statutory or constitutional requirements. Mr. Wallen objected to the sufficiency of the State's evidence supporting the restitution claim because the simple recitation of round figures for the items involved failed to provide the specificity and certainty regarding value that was called for by the statute. 10/27/10RP 5-6.

² A court can, in its discretion, order restitution up to double the amount of the victim's loss. RCW 9.94A.753(3). In this case, however, the court did not identify any reason to vary upward from the claimed damages.

Although the rules of evidence do not apply at a sentencing or restitution hearing, the hearing must comply with due process. State v. Ford, 137 Wn.2d 472, 484, 973 P.2d 452 (1999); State v. Strauss, 119 Wn.2d 401, 418, 832 P.2d 78 (1992); State v. Pollard, 66 Wn.App. 779, 784-85, 834 P.2d 51, rev. denied, 120 Wn.2d 1015 (1992). Due process requires the defendant not be sentenced based upon information that is false, lacks minimum indicia of reliability, or is not supported by the record. Ford, 137 Wn.2d at 481. The evidence supporting a restitution order is only sufficient then “if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.” Hughes, 154 Wn.2d at 154, quoting State v. Fleming, 75 Wn.App. 270, 274, 877 P.2d 243 (1994). Accord Pollard, 66 Wn.App. at 785.

The list of items the Moffets lost or had to replace, without any further supporting documentation to establish the actual value at the time of the theft, fails to meet the statutory or constitutional standard for an order of restitution. This simple list of items leaves the court speculating as to the actual loss caused by Mr. Wallen’s offenses because the record fails to establish the value of the various items at the time of the theft, by a preponderance of the

evidence. Proof of expenditures for replacing stolen property is not sufficient. State v. Dedonado, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000).

In Dedonado the court explained:

A causal connection is not established simply because a victim or insurer submits proof of expenditures for replacing property stolen or damaged by the person convicted. Such expenditures may be for items of substantially greater or lesser value than the actual loss. As pointed out by Dedonado at the hearing in the instant case, it is not possible to determine from the documentation provided by the State whether the HP generator was a proper replacement of the Adret generator. Similarly, it is not possible to determine from the documentation provided by the State whether all of the repairs to the van were related to the damaged ignition switch. The State did not meet its burden of proving the restitution amounts here by a preponderance of the evidence because the documentation it provided did not establish a causal connection between Dedonado's actions and the damages.

Id.

While the claimed loss need not be established with specific accuracy, it must be supported by substantial credible evidence. State v. Burns, 159 Wn.App. 74, 78, 244 P.3d 988 (2010). In the absence of receipts, bills of sale, or other documentation establishing what the items had cost when they were purchased, how long the Moffets' had owned them, or what a current

replacement would cost, the record fails to satisfy either the constitutional standards of due process of law or the statutory requirements for proof of “easily ascertainable for injury to or loss of property,” by a preponderance of the evidence.

3. Lack of adequate notice of the scope of the restitution claim limits recovery. The setting of restitution is an integral part of sentencing and restitution represents a statutorily prescribed portion of the punishment following conviction in Washington. State v. Milton, 160 Wn.App. 656, 659, 252 P.3d 380 (2011); State v. Kisor, 68 Wn.App. 610, 620, 844 P.2d 1038 (1993); RCW 9.94A.753(1); State v. Hughes, 154 Wn.2d at 155. Fundamental principles of due process require that a defendant be fully and accurately informed of all direct consequences of his plea, meaning those consequences that have an immediate and largely automatic effect on the defendant's sentence. See e.g. Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); State v. Sandoval, 171 Wn.2d 163, 169-70, 249 P.3d 1015 (2011); In re Isadore, 151 Wn.2d 294, 297-98, 99 P.3d 390 (2004); State v. Conley, 121 Wn.App. 280, 284, 87 P.3d 1221 (2004); State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). Restitution is certainly such a direct consequence.

If the guilty plea is based on misinformation of the sentencing consequences, however, it is not knowing or voluntary and, therefore, invalid. Sandoval, 171 Wn.2d at 169; Isadore, 151 Wn.2d at 298; In re Postsentence Review of Hudgens, 156 Wn.App. 411, 416, 233 P.3d 566 (2010). When a guilty plea is invalid, the defendant has the initial choice of specific performance or withdrawal of the plea. Isadore, at 303. Once the choice is made, the State carries the burden of showing that there are compelling reasons not to allow the remedy chosen. Id.

In Mr. Wallen's case he was not provided meaningful or accurate notice regarding the amount of restitution. 10/27/10RP 5-6. The prosecutor acknowledged this discrepancy and sought to explain the challenges they faced in obtaining supporting documentation. 10/27/10RP 9. While their difficulties may have been real and substantial, that does not reduce the State's constitutional burden of providing notice of the sentencing consequences, including restitution. To impose a sentence greater than that outlined at the time of the guilty plea is a manifest injustice and the trial court therefore erred by imposing restitution in this materially greater amount.

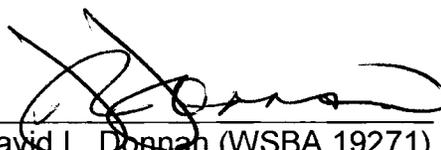
4. Reversal of the restitution order is required. Because the state failed to meet its burden, the trial court abused its discretion when it ordered restitution. See Dedonado, 99 Wn. App. at 257. A trial court abuses its discretion if its decision is exercised on untenable grounds, is manifestly unreasonable, or is arbitrary. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); Harris v. Drake, 152 Wn.2d 480, 493, 99 P.3d 872 (2004). The court's decision here was exercised on untenable grounds because it exceeded the scope of what is permitted by the relevant statutes. See RCW 9.92.060(2)(b); RCW 9.95.210(2)(b) (authorizing restitution only where there is "loss or damage"). Furthermore, the imposition of restitution in an amount materially greater than that for which Mr. Wallen was on notice was manifestly unreasonable and the order should be vacated.

E. CONCLUSION

For the reasons discussed herein, Mr. Wallen requests this Court reverse the order for restitution and remand for further proceedings.

DATED this 21th day of July 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Donnan", written over a horizontal line.

David L. Donnan (WSBA 19271)
Washington Appellate Project
Attorneys for Appellant

OK

SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA
Date Filed: May 17, 2010
2010 OCT 27 AM 10:27

SKAGIT COUNTY PROSECUTING ATTORNEY'S OFFICE

Courthouse Annex 605 South 3rd Street, Mount Vernon, WA 98273-3867
Telephone (360) 336-9460 Fax (360) 336-9347

VICTIM LOSS STATEMENT

Restitution is financial reimbursement made by the offender to the victim and is limited to easily determined damages for loss of property. Restitution does not include reimbursement for damages for mental anguish, pain or suffering or other intangible losses. (RCW 13.40.020) Please return this form within fifteen (15) days. If we do not hear from you we will assume there is no restitution.

Victim's Name and Address:

JACK WAYNE MOFFET
96 S. SANCTUARY LOOP
HERON, MT 59844

Defendant's Name: Cause number

JEREMY LEE ANDERSON 09-1-00844-1

Co-Defendant: SHAUN CLINTON WALLEN
09-1-00845-0

Investigating Agency, Case Number(s): Skagit County Sheriff, 09-12132

Please answer each question as completely as possible. We understand that you may have given this information to law enforcement, insurance companies, etc., but we need to confirm your loss for restitution purposes. Provide the most accurate and complete information available to you at this time. If this information changes (items are recovered and returned or estimates are higher or lower) please contact this office to make the necessary changes. It is important that we have accurate information regarding your loss to provide to the Court.

1. **TOTAL AMOUNT OF DAMAGE OR LOSS:** List all items missing or damaged and the value or repair of each (attach additional sheets if necessary). List only those items not recovered.

3

Item	Value/Repair	Item	Value/Repair

Total Amount of Loss: \$ _____

2. **INCLUDE DOCUMENTATION:** Please include copies of receipts, bill, estimates, insurance itemizations, etc. that you have concerning the value of this loss.

3. **INSURANCE COVERAGE:** Was this loss submitted to your insurance? YES NO *If yes, please complete the following:*

NAME OF INSURANCE COMPANY: None PHONE: _____
ADDRESS: _____
AGENT: _____ CLAIM/POLICY NO. _____
DEDUCTIBLE: _____ TOTAL PAID BY INSURANCE: _____

4. **TOTALS**
TOTAL LOSS OR DAMAGE \$ 33,384.99
LESS INSURANCE PAYMENT (IF ANY) \$ _____
TOTAL OUT OF POCKET EXPENSE FOR YOU \$ _____

5. **WAIVER OF RESTITUTION:** If you are not requesting restitution, please mark the appropriate box:
 Restitution has already been made to my satisfaction No restitution is requested

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

Jack W. Moffet 7/16/10 Idaho MT
Signature Date City State

OK

0
0.00 +
2,105.99 +
2,000.00 +
3,000.00 +
155.00 +
250.00 +
3,330.00 +
1,100.00 +
800.00 +
600.00 +
100.00 +
900.00 +
700.00 +
500.00 +
4,500.00 +
300.00 +
800.00 +
400.00 +
250.00 +
4,200.00 +
2,200.00 +
1,300.00 +
600.00 +
400.00 +
200.00 +
400.00 +
300.00 +
45.00 +
75.00 +
80.00 +
250.00 +
200.00 +
250.00 +
1,150.00 +
850.00 +
1,200.00 +
150.00 +
150.00 +
150.00 +
34,964.99 G+

ATTN: KAREN Himes
CASE # 09 1 008450

COSTCO 5 piece brown leather recliner set \$2,199.99

Big screen RCA TV 52 inch \$2000.00

Bedroom set 5 piece walnut queen bed head board w/ lights mirror shelves, 7 foot dresser w/mirror, 2 dresser drawers and matching tables \$3000.00 memory bed foam \$135.00

2 lamps milk glass & wood \$250.00

John deer riding tractor 25 hoarse used 3 months \$3,300.00

Maytag washer & dryer almond extra large \$1100.00

Living room 2 floral sofas \$800.00, 2 solid oak drop leaf coffee tables & 2 matching end tables \$600.00

2 table lamps \$100.00

Dining room 5 foot oak china hutch, leaded glass \$900.00

Antique glass ware in above hutch \$700.00, serving dishes in hutch \$500.00

Silverware platters bowls tea and coffee sets All antique \$4000.00

Antique rocking chair 149 years old \$300.00, oak sec. desk \$800.00 large oak leaf table \$400.00

Walnut crib table \$250.00, 2 train sets antiques Lionel 1 1925 as per e bay \$ 4000.00 to 6000.00

1 Lionel small gauge train and complete Bavarian village \$2,200.00

6 Fenniwick Fishing poles and reels sets 2 fresh water 4 salt water \$1000.00 Misc. tackle \$600.00 2 scotty down riggers \$400.00

2 sewing machines 1 Kenmore 1 brother \$200.00

Dining room chandelier \$ 400.00 2 hanging lights \$300.00

MR coffee new \$45.00, espresso machine \$75.00, harvest dehydrator \$80.00. in box new Jenn air stove tops \$250.00

Antique large black granite clock \$200.00 Crafting and sewing tools and supplies \$250.00

Custom made Pool table was returned in pieces cost to repair \$1150.00

Lane hope chest maple 53 years old my Mom bought for me when I was 15 \$850.00

Antique pump organ black made in 1920 \$1200.00 Bench \$150.00

Antique wood butter churn \$150.00

Plus many glass, wood and Iron wood nick naks \$150.00

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66258-9-I
v.)	
)	
SHAUN WALLEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JULY, 2011, 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:

- | | | |
|---|----------------------------|--|
| <p>[X] ERIN DYER, DPA
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S THIRD ST.
MOUNT VERNON, WA 98273</p> | <p>(X)
()
()</p> | <p>U.S. MAIL
HAND DELIVERY
_____</p> |
| <p>[X] SHAUN WALLEN
278205
AIRWAY HEIGHTS CORRECTIONS CENTER
PO BOX 1899
AIRWAY HEIGHTS, WA 99001-1899</p> | <p>(X)
()
()</p> | <p>U.S. MAIL
HAND DELIVERY
_____</p> |

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF JULY, 2011.

X _____ 

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