

66978-8

66978-8

NO. 66978-8-1

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

STATE OF WASHINGTON,
Respondent,
v.
LUIS COSGAYA-ALVAREZ,
Appellant.

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

BRIEF OF APPELLANT

Elaine L. Winters
Attorney for Appellant

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

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A. ASSIGNMENT OF ERROR

The trial court erred by ordering Luis Cosgaya-Alvarez to pay \$100,200 restitution to Crystal Morgan.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The superior court's authority to order a felony offender to pay restitution derives solely from the Sentencing Reform Act (SRA). RCW 9.94A.753(3) limits restitution to "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."

a. Where Luis Cosgaya-Alvarez pled guilty to second degree murder, which did not involve injury to or loss of property, does the plain language of RCW 9.94A.753(3) permit the superior court to order restitution for the deceased's future child support payments?

b. Is the computation of the value of future child support payments too complex and speculative to be "easily ascertainable" as required by RCW 9.94A.753(3)?

2. The trial court determined the amount of restitution for the deceased's child support payments by multiplying the amount of the child support payments with the number of payments remaining

until each child turned 18, resulting in the sum of \$100,200. Luis argued this award was greater than the value of the child support payments if they were paid monthly and suggested the court award \$67,687.33, which is the amount of money that could be invested in an annuity with twelve percent interest to produce the required monthly amount. The trial court rejected this argument on the grounds that Luis did not provide adequate proof of his proposed figure. Where the State has the burden to prove the amount of restitution, did the trial court abuse its discretion by rejecting the defense argument and ordering Luis to pay restitution of \$100,200 for future child support payments?

C. STATEMENT OF THE CASE

Pursuant to a plea agreement with the King County Prosecutor's Office, Luis Cosgaya-Alvarez pled guilty to murder in the second degree with a firearm enhancement. CP 23-50; RCW 9A.32.050(1)(a), (b); RCW 9.94A.533(3). In the Statement of Defendant on Plea of Guilty, Luis admitted that he shot Omero Mendez with a handgun, causing his death. CP 32. As part of the plea agreement, Luis agreed to pay restitution "in full," but no specific loss or amount was agreed to. CP 46.

Charged as adult, Luis was 16 at the time of the offense and had no prior record. CP 4, 47; 8/6/10RP 20. The Honorable Hollis R. Hill imposed a standard-range sentence of 216 months in prison followed by 24 to 36 months community custody. CP 54-55.

At a later hearing, the State requested Luis pay restitution of \$118,704.80. CP 68-80. The request included \$4,743.19 to Lorena Mendez for funeral and burial expenses; \$100,200 to Crystal Morgan for child support payments for Mr. Mendez's two children; and \$13,761.61 to the Crime Victim's Compensation Program for payments for medical and funeral expenses and dependent child pension payments. CP 70; 3/11/11RP 35.

Mr. Mendez had been court-ordered to pay child support payments of \$300 per month for his two children. CP 82-83. The prosecutor (1) calculated the number of months of child support obligations that would accrue for each child from the date of Mr. Mendez's death until the child's eighteenth birthday and (2) multiplied that number by the monthly support amount to reach the \$100,200 figure. CP 84.

Defense counsel contested this amount. He argued that the lump sum of \$100,200 would provide the children with significantly more money than if they received \$300 monthly payments over the

next several years and asked the court to impose restitution of \$67,687.33. 3/11/11 at 36-38, 44-45. The defense reasoned that, if that amount was placed in an annuity bearing twelve percent interest, the children would receive \$300 per month.¹ 3/11/11 at 38. Counsel calculated a twelve percent annual return because that is the statutory rate of interest charged by the clerk's office on unpaid restitution. 3/11/11RP 43-44; RCW 10.82.090(1); RCW 4.56.110(4); RCW 19.52.020(1).

The trial court stated Luis had a good point, but there was "too much unknown" to adopt his proposal and no proof that the money could currently be invested at twelve percent interest. 3/11/11RP 46-48. The court therefore ordered the lump sum of \$100,200 as well as the other restitution requested by the State. CP 59-60; 3/11/11RP 49. No monthly payment amount was set. Id. This appeal follows. CP 61-64.

¹ Defense counsel utilized an annuity calculator found on the bankrate.com website. 3/11/11RP 45-46; see <http://bankrate.com/calculators>

D. ARGUMENT

1. THE SENTENCING REFORM ACT DOES NOT
AUTHORIZE THE IMPOSITION OF RESTITUION
FOR CHILD SUPPORT PAYMENTS

a. The superior court may only require an offender to pay restitution authorized by the SRA. The superior court's power to order restitution is statutory, not inherent. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008); State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). When the defendant is convicted of a felony, the court's authority to impose restitution is derived from the Sentencing Reform Act (SRA). The SRA requires the trial court to order restitution when the defendant is convicted of an offense that resulted in injury to a person or damage to property. RCW 9.94A.753(5).²

Restitution must be based upon "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). In addition, restitution is limited to loss "causally connected' to the crimes charged." Griffith, 164 Wn.2d at 965-66 (quoting State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007)). Restitution is not a substitute for a civil judgment,

² A copy of RCW 9.94A.753 is attached as an appendix.

and the award of restitution does not limit a survivor's civil remedies. RCW 9.94A.753(9); State v. Dennis, 101 Wn.App. 223, 229, 6 P.3d 1173 (2000) (SRA restitution is primarily punitive rather than compensatory); State v. Lewis, 57 Wn.App. 921, 925-26, 791 P.2d 250 (1990).

A challenge to a restitution order requires this Court to review whether the trial court exceeded its statutory authority in ordering restitution. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003); State v. Burns, 159 Wn.App. 74, 78, 244 P.3d 988 (2011). The interpretation of a restitution statute is an issue of law reviewed de novo. Id. In interpreting a statute, the appellate court tries to discern the legislature's intent, looking first at the statute's "plain language and its ordinary meaning." J.P., 149 Wn.2d at 450. The plain meaning may be found in the language of the statute itself as well as related statutes. Id. Definitions provided in the statutes control, but if a term is not defined courts look to the ordinary meaning as found in a standard dictionary. State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002).

b. RCW 9.94A.753 does not authorize restitution for a victim's future child support payments. In the present case, Luis caused Mr. Mendoza's death, and was thus responsible for his

medical bills, which were “incurred for treatment for injury to persons.” RCW 9.94A.753(3). The plain language of the statute, however, does not authorize restitution for a crime victim’s child support obligations or outstanding debts unrelated to the crime, as these are not “treatment for injury to persons” or “lost wages resulting from injury.” Id.

RCW 9.94A.753(5) states, “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 . . .” Luis’s offense, second degree murder, resulted in terminal injury to another person. He was not convicted of a crime that resulted in loss of property, such as theft, robbery, or malicious mischief. Thus the child support payments do not fit within the restitution permitted by the SRA.

Additionally, the computation of the future child support payments is too complex and speculative to constitute “easily ascertainable damages” as required by RCW 9.94A.753(3). This Court reversed a restitution order in a vehicular homicide case that required the defendant to reimburse an insurance company for a \$500,000 payment to the victim’s surviving spouse for lost future earnings. Lewis, 57 Wn.App. at 922, 924-26. This Court first noted

that the calculation of the victim's future earnings was so complex that the criminal justice system was ill-equipped to make the determination. Id. at 924. Coupled with the statute's explicit statement that restitution does not limit the civil remedies of a crime victim or his survivors, this Court concluded future earnings were not "easily ascertainable" damages and thus not authorized by statute. Id. at 924-25.

The Lewis Court also found that future earnings were not authorized by the SRA because they were not "lost wages resulting from injury" given the statute's use of the past tense. Lewis, 57 Wn.App. at 926. "The Legislature has chosen to phrase "lost wages" in the past tense, strongly suggesting it was only meant to cover expenses already incurred." Id.

Division Two, however, upheld restitution for the decedent's future child support payments in State v. Young, 63 Wn.App. 324, 818 P.2d 1375 (1991). The Young Court reasoned that the child support judgment was the children's property, the death of their father caused the children a "loss of property," and they were thus entitled to restitution under Former RCW 9.94A.140.³ Young, 63

³ Former RCW 9.94A.140 has been recodified and amended many times since Mr. Young's crime in 1985. However, the language at issue appears to be similar.

Wn.App. at 331. Under this theory, however, any judgment creditor would be able to collect restitution when the debtor is killed. This Court should reject the Young Court's reasoning because future child support payments do not fit within the type of damage for which the SRA permits restitution to be ordered.

Like the future earnings discussed in Lewis, the calculation of the amount of Mr. Mendez's child support payments includes an analysis of "the appropriate discount and inflation factors," as well as the possibility that the payment amount might change over time based upon changes in the two parents' incomes. Lewis, 57 Wn.App. at 924. As in Lewis, the nature of future child support payments is too complex to be "easily ascertainable" and thus the subject of criminal restitution. Additionally, future child support payments are not compensation for "damages for injury or loss of property, actual expenses incurred for treatment of injury to persons," or "lost wages resulting from injury." RCW 9.94A.753(3). The trial court erred by ordering Luis to pay restitution for Mr. Mendez's future child support payments.

c. The order requiring Luis to pay \$100,200 to Ms. Moreno for future child support payments must be vacated. Restitution is an integral part of a felony sentence. State v. Dedonado, 99 Wn.App. 251, 257, 991 P.2d 1216 (2000). Luis may challenge the restitution order for the first time on appeal on the grounds that the trial court exceeded its statutory authority. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (sentence exceeding the court's statutory authority may be challenged for first time on appeal); State v Moen, 129 Wn.2d 535, 546-47, 919 P.2d 69 (1996) (defendant may challenge restitution order for first time on appeal that was entered outside statutory time period); Lewis, 57 Wn.App. at 924 (restitution not authorized by statute is "void").

This Court should vacate the portion of the restitution order requiring Luis to pay \$100,200 to Crystal Morgan and remand for the entry of an amended restitution order. Lewis, 57 Wn.App. at 926.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING RESTITUTION OF \$100,200 FOR THE DECEDENTS' FUTURE MONTHLY CHILD SUPPORT OBLIGATIONS

Washington law acknowledges the ability of a recipient to invest a lump sum payment in order to receive additional benefit when setting award figures for future economic damages in civil cases. The trial court ordered Luis to pay \$100,200 in restitution for Mr. Moreno's future child support payments, although the court acknowledged that, given inflation, this sum was probably more than the actual value of those future payments. The trial court thus abused its discretion by placing the burden on Luis to provide the proof needed to set a restitution figure that more accurately represented the value of the future payments.

In setting the \$100,200 restitution figure, the trial court simply multiplied the amount of Mr. Moreno's child support payments by the number of payments remaining until the children reached the age of majority. CP 84; 3/11/11RP 51. The court acknowledged that, given inflation, the lump sum probably exceeded the amount the children would have received if the payments occurred over their childhood. 3/11/11RP 49. The court nonetheless rejected Luis's suggestion that the court award the

amount of money that would provide a return of \$300 per month per child if invested at the statutory interest rate of twelve per cent.

3/11/11RP 49-51.

The computation of a civil damage award normally takes this type of information into account, and the parties may present expert testimony to establish the proper damage award to compensate for lost future earnings. Cornejo v. State, 57 Wn.App. 314, 324-29, 788 P.2d 554 (1990). In fact, the jury may be instructed that, "Present cash value' means the sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when the benefits would have been received." 6 Wash. Pract., Wash. Pattern Jury Instr. Civil, WPI 34.02 (5th ed.). The jury is entitled to use any rate of interest it deems reasonable. Id. In addition, the parties may present evidence as to the impact of inflation upon the future payments and thus the award. Sadler v. Wagner, 5 Wn.App. 77, 486 P.2d 330 (1971).

The trial court in Luis's case understood this, but reasoned that Luis did not provide proof to support his proposed restitution figure. The court expected Luis to produce an expert witness, as in a civil case, with information concerning the current marketplace

value of annuities. 3/11/11RP 43, 47-48. Restitution, however, is an integral part of the sentencing hearing, and the burden of proving the amount of restitution rests on the State. Griffith, 164 Wn.2d at 965; Dedonado, 99 Wn.App. at 257.

The State did not meet its burden of demonstrating that the \$100,200 figure did not exceed the value of the monthly payments the children's mother would have received in monthly payments over time. The court thus abused its discretion by placing the burden of proof on Luis. Tobin, 161 Wn.2d at 523 (court's use of incorrect legal analysis may constitute an abuse of discretion); Dedonado, 99 Wn.App. at 257 (abuse of discretion to set restitution based upon inadequate evidence to prove causal connection between victim's loss and defendant's crime). The restitution ordered for child support must be stricken. Dennis, 101 Wn.App. at 228-30.

E. CONCLUSION

The order requiring Luis Cosgaya-Alvarez to pay restitution of \$100,200.00 for Mr. Moreno's future child support payments is not authorized by the SRA and must be vacated. In the alternative, the order must be vacated because the trial court abused its discretion by awarding the lump sum payments.

DATED this 27th of December 2011.

Respectfully submitted,



Elaine L. Winters – WSBA #7780
Washington Appellate Project
Attorneys for Appellant

APPENDIX

RCW 9.94A.753

C

West's Revised Code of Washington Annotated Currentness

Title 9. Crimes and Punishments (Refs & Annos)

[Ⓜ] Chapter 9.94A. Sentencing Reform Act of 1981 (Refs & Annos) [Ⓜ] Restitution and Legal Financial Obligations → → **9.94A.753. Restitution--Application dates**

This section applies to offenses committed after July 1, 1985.

(1) When 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. The court may continue the hearing beyond the one hundred eighty days for good cause. The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(2) During the period of supervision, the community corrections officer may examine the offender to determine if there has been a change in circumstances that warrants an amendment of the monthly payment schedule. The community corrections officer may recommend a change to the schedule of payment and shall inform the court of the recommended change and the reasons for the change. The sentencing court may then reset the monthly minimum payments based on the report from the community corrections officer of the change in circumstances.

(3) Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction 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. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. 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.

(4) For the purposes of this section, for an offense committed prior to July 1, 2000, the offender shall remain under the court's jurisdiction for a term of ten years following the offender's release from total confinement or ten years subsequent to the entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend jurisdiction under the criminal judgment an additional ten years for payment of restitution. 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, regardless of the statutory maximum for the crime. The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime. The court may not reduce the total amount of restitution ordered because the offender may lack the ability

to pay the total amount. The offender's compliance with the restitution shall be supervised by the department only during any period which the department is authorized to supervise the offender in the community under RCW 9.94A.728, 9.94A.501, or in which the offender is in confinement in a state correctional institution or a correctional facility pursuant to a transfer agreement with the department, and the department shall supervise the offender's compliance during any such period. The department is responsible for supervision of the offender only during confinement and authorized supervision and not during any subsequent period in which the offender remains under the court's jurisdiction. The county clerk is authorized to collect unpaid restitution at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations.

(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 or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

(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 that are associated with the rape and resulting pregnancy; and (b) child support for any child born as a result of the rape if child support is ordered pursuant to a civil superior court or administrative order for support for that child. The clerk must forward any restitution payments made on behalf of the victim's child to the Washington state child support registry under chapter 26.23 RCW. Identifying information about the victim and child shall not be included in the order. The offender shall receive a credit against any obligation owing under the administrative or superior court order for support of the victim's child. For the purposes of this subsection, the offender shall remain under the court's jurisdiction until the offender has satisfied support obligations under the superior court or administrative order for the period provided in RCW 4.16.020 or a maximum term of twenty-five years following the offender's release from total confinement or twenty-five years subsequent to the entry of the judgment and sentence, whichever period is longer. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The department shall supervise the offender's compliance with the restitution ordered under this subsection.

(7) Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

(8) In addition to any sentence that may be imposed, 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.

(9) This section does not limit civil remedies or defenses available to the victim, survivors of the victim, or offender including support enforcement remedies for support ordered under subsection (6) of this section for a child born as a result of a rape of a child victim. The court shall identify in the judgment and sentence the victim or victims entitled to restitution and what amount is due each victim. The state or victim may enforce the court-ordered restitution in the same manner as a judgment in a civil action. Restitution collected through civil enforcement must be paid through the registry of the court and must be distributed proportionately according to each victim's loss when there is more than one victim.

CREDIT(S)

[2003 c 379 § 16, eff. Oct. 1, 2003. Prior: 2000 c 226 § 3; 2000 c 28 § 33; prior: 1997 c 121 § 4; 1997 c 52 § 2; prior: 1995 c 231 § 2; 1995 c 33 § 4; 1994 c 271 § 602; 1989 c 252 § 6; 1987 c 281 § 4; 1985 c 443 § 10. Formerly RCW 9.94A.142.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions and Initiative Measures 1163 and 1183

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END OF DOCUMENT

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66978-8-I
v.)	
)	
LUIS COSGAYA-ALVAREZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF DECEMBER, 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] LUIS COSGAYA-ALVAREZ 342730 WASHINGTON STATE PENITENTIARY 1313 N 13 TH AVE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF DECEMBER, 2011.

X _____ 

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