

70534-2

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NO. 70534-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

WENDELL DOWNS,

Appellant.

2014 JAN 16 PM 3:05  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whereas there are no issues that could potentially be raised on review, should appellate counsel be permitted to withdraw from the case?

2. If the offender pleads guilty to fewer offenses than he committed, and he agrees with the prosecutor's recommendation to pay restitution to a victim of an offense that was not prosecuted pursuant to the plea agreement, restitution shall be ordered for any loss to that victim. Here, the State and Wendell Downs agreed that he would plead guilty for defrauding State Farm and pay restitution for the losses to State Farm and USAA; in exchange, the State would not file an additional count for the crime against USAA. Did the trial court properly order restitution for both victims?

3. When there is more than one participant to the crime, each offender is jointly and severally responsible for restitution because the relevant causal connection is between the damage and the committed offense, not just the damage and each individual's actions. Here, Wendell Downs stipulated to the fact that he and his wife defrauded two insurance companies, State Farm and USAA. Did the trial court properly find that Wendell

Downs was jointly and severally liable for the losses to both insurance companies?

**B. STATEMENT OF FACTS**

**1. PROCEDURAL FACTS**

The appellant, Wendell Downs, and his co-defendant, Janeice Renee Downs, were charged in King County Superior Court with one count of Fraudulent Insurance Claim on October 9, 2012.<sup>1</sup> CP 1-7. On January 29, 2013, Downs<sup>2</sup> pled guilty as charged. CP 8-20.

The Felony Plea Agreement signed by Downs and his attorney, dated January 13, 2013, indicates that "Pursuant to RCW 9.94A.753, the defendant shall pay restitution in full to victim(s) on charged counts and agrees to pay restitution for all losses to State Farm Insurance and USAA Insurance joint and several with co-defendant." CP 27. The State agreed to not file additional charges for a fraudulent claim to USAA. CP 27. In addition, Downs stipulated to the real facts set forth in the

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<sup>1</sup> Wendell Downs and Janeice Renee Downs were married at the time of the offense. 2RP 8; 3RP 9.

<sup>2</sup> This case involves family members who share the last name Downs. For the purpose of clarity, with the exception of the appellant they will be referred by first name. No disrespect is intended.

certification for determination of probable cause and the prosecutor's summary of the case for sentencing purposes. CP 27.

On February 12, 2013, the Honorable Andrea Darvas sentenced Downs within the standard range. CP 32-37; 2RP 17-18.<sup>3</sup> The sentencing court held a restitution hearing on June 18, 2013. 3RP 4-12. At the hearing, pursuant to the plea agreement, the State requested restitution to USAA in the amount of \$21,461.76 and to State Farm in the amount of \$11,994.70. 3RP 4; CP 109-10. Downs objected to the amount of restitution on the basis that although Downs had agreed to joint and several liability, he had only taken \$2,000 while his wife had taken the rest. 3RP 9. The court granted the State's request for restitution, finding that based on the stipulation for real facts and the additional information provided at the hearing, the amount requested was supported by the preponderance of the evidence. 3RP 9; CP 47-110. The court also ruled that since Downs had stipulated to restitution jointly and severally, the court had no basis to reduce the amount sought by the State. 3RP 9.

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<sup>3</sup> The Verbatim Report consists of three volumes referred to in this brief as: plea hearing, 1RP (January 29, 2013); sentencing hearing, 2RP (February 12, 2013); and restitution hearing, 3RP (June 18, 2013).

## 2. SUBSTANTIVE FACTS<sup>4</sup>

The certification for determination of probable cause that Downs stipulated to for purposes of real and material facts was signed on September 20, 2012, under penalty of perjury by Tukwila Police Department Detective Tom Stock. CP 3-6. According to the certification, on February 29, 2012, Downs was involved in a car accident, which resulted in little body damage. CP 3. At the time of the accident, there were five occupants in Downs' car, including children. CP 3. On March 1, 2012, Janeice Downs (Janeice) provided a recorded statement to a State Farm agent indicating how the accident happened. CP 3. On March 6, 2012, Janeice and Downs went to the State Farm office located in Tukwila and provided invoices from Valley Medical Center for soft tissue injuries on February 29, 2012. CP 3. The invoices indicated injuries to five people: Wendell Downs (Downs), Wendell Downs Jr. Sr., Dell Downs, Janeice Downs Jr., and Janeice Downs Sr. (Janeice). CP 3. Karen Fortin, a State Farm Claims Agent, prepared three checks payable to Wendell Downs totaling \$13,157.00. CP 3.

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<sup>4</sup> The facts in this section are taken from the certification for determination of probable cause. CP 3-6.

After Downs and Janeice left the office, Fortin was alerted that both of them had been involved in prior claims from similar accidents. CP 4. Fortin attempted to stop payment on the checks but the checks had already been cashed. CP 4. Ben Remark, a State Farm investigator, reviewed the case and through his investigation he located a similar claim with USAA Insurance involving the same people in a similar accident from August 30, 2011. CP 4. Remark contacted Valley Medical Center and confirmed that the invoices presented by Downs and Janeice were not prepared by Valley Medical Center. CP 4. Through his investigation, Remark learned that Valley Medical Center did not treat Wendell Downs Jr. Sr. on February 29, 2012, and the actual medical bills on that day for the Downs family were \$1,162.30. Therefore, State Farm suffered a loss of \$11,994.70. CP 4, 91.

After Remark verified all of the pertinent information, he contacted Downs via telephone on March 8<sup>th</sup>, March 9<sup>th</sup>, and March 28<sup>th</sup> of 2012 to discuss the incident. CP 4-5. On all three occasions, Downs told Remark that the invoices he and Janeice had provided were from Valley Medical Center in Renton. CP 4-5.

Simultaneously, a USAA agent, Mauro Ferreira, started to investigate the claims the Downs family had presented in August of

2011. CP 5. In doing so, Ferreira found the invoices that Downs and Janeice had provided to USAA for treatment of injuries to themselves, their minor children, and two other passengers as a result of a car accident. CP 5. These invoices appeared to be from Columbia Health Center, although through his investigation, Ferreira learned that none of the invoices were generated by Columbia Health Center. CP 5.

According to the certification for determination of probable cause, Ferreira believed that USAA paid claims to Downs and Janeice in the amount of \$17,894.76. CP 5. During the restitution hearing, the State indicated that there had been a discrepancy between the amount stated in the certification for determination of probable cause and the information provided by Ferreira in the order seeking restitution, in the amount of \$3,567. 3RP 6-7. The order included an additional claim that had not been accounted for at the time when the certification for determination of probable cause was prepared. 3RP 6-7. The State contacted Ferreira to confirm the total loss and provided the court with copies of two separate claims, two separate vouchers, and two separate checks that accounted for the difference. 3RP 6-7. Hence, the total loss to USAA was \$21,461.76. CP 49-50; 3RP 4, 6-7.

**C. ARGUMENT**

**1. THIS COURT SHOULD PERMIT COUNSEL TO WITHDRAW BECAUSE THERE ARE NO NON-FRIVOLOUS ISSUES TO BE RAISED.**

RAP 15.2(i) provides, "If counsel can find no basis for a good faith argument on review, counsel should file a motion in the appellate court to withdraw as counsel for the indigent as provided in rule 18.3(a)." RAP 18.3(a)(2) provides, in relevant part, "The motion shall identify the issues that could be argued if they had merit and, without argument, include references to the record and citations of authority relevant to the issues." That procedure has been invoked in this case.

Counsel for the State has reviewed the prosecutor's file, the appellant's brief, the court file, and the transcripts in this case. The record demonstrates that the issues set forth in appellant's brief lack merit under the facts of this case. Accordingly, the State concurs in appellate counsel's motion to withdraw and requests dismissal of the appeal.

**2. THE TRIAL COURT PROPERLY EXERCISED DISCRETION WHEN IT IMPOSED RESTITUTION FOR BOTH INSURANCE COMPANIES AND WHEN IT ORDERED THE RESTITUTION TO BE JOINT AND SEVERAL.**

Downs could argue that the trial court abused its discretion when it imposed restitution for the total losses to USAA and State Farm Insurance when the State had not charged Downs with defrauding USAA, and when, according to Downs, his co-defendant benefited from most of the money that was stolen. Downs' argument would be rejected because as part of the plea agreement with the State, he agreed to pay restitution for the losses to USAA, and he also agreed that restitution would be joint and several with his co-defendant.

The authority to impose restitution is derived from statute. State v. Hiatt, 154 Wn.2d 560, 563, 115 P.3d 274 (2005). Restitution shall be ordered whenever the offender is convicted of an offense that results in injury to any person unless extraordinary circumstances exist that make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. RCW 9.94A.753(5). Restitution against a criminal defendant is proper when a causal connection exists between the crime and the injuries for which compensation is sought; in deciding

whether a restitution order is within a trial court's statutory authority, courts use a "but for" factual test to evaluate the causal link between the criminal acts and a victim's damages. State v. Tobin, 161 Wn.2d 517, 527, 166 P.3d 1167 (2007). The test is satisfied if the losses suffered by a victim are the direct result of the charged crime. Id. at 524. Thus, the trial court need only find that a victim's injuries were causally connected to a defendant's crime before ordering a defendant to pay restitution for the expenses that resulted. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999).

The trial court has discretion to determine the amount of restitution. State v. Dedonado, 99 Wn. App. 251, 255, 991 P.2d 1216 (2000). A reviewing court should reverse when it finds that a trial court's decision was an abuse of discretion and was "manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." Id. at 256. Because restitution is an integral part of sentencing, the courts have stated that in determining any sentence, including restitution, the sentencing court may rely on no more information than is admitted by the plea agreement. Id. Where the plea agreement stipulates that the facts in the certificate of probable cause are real facts for purposes of sentencing, they

become facts for purposes of restitution. State v. Tindal, 50 Wn. App. 401, 402-03, 748 P.2d 695 (1988).

- a. Downs Agreed To Pay Restitution To USAA Even Though The State Did Not File A Separate Count For That Fraudulent Claim.

If the offender pleads guilty to 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, restitution shall be ordered for an injury, loss, or damage to the victim.

RCW 9.94A.753(5). The trial court may determine the proper amount of restitution by either the defendant's admission, or by a preponderance of the evidence. State v. Ryan, 78 Wn. App. 758, 761, 899 P.2d 825 (1995).

In this case, there is a causal connection between Downs and the restitution ordered for both insurance companies. Had it not been for Downs and Janeice's actions, neither State Farm, nor USAA, would have suffered their respective losses. According to the facts Downs stipulated to for purposes of sentencing, he and Janeice presented fraudulent medical invoices from Valley Medical Center and Columbia Health Center to State Farm and USAA,

respectively. CP 3-6. Even though the State charged Downs only for his actions against State Farm, as part of the plea agreement, Downs agreed to pay for the total losses to State Farm and USAA. CP 27. Downs admitted to the proper amount through his stipulation to the certification for determination of probable cause. CP 27. And, the trial court found by the preponderance of the evidence that the amount requested was accurate. 3RP 9. The court properly relied on the facts in the certification for determination of probable cause, as those were facts stipulated to by Downs, and the additional documentation provided by the State that corrected the discrepancy in the amount owed to USAA. 3RP 6-7. Therefore, the sentencing court acted within its discretion when it imposed restitution for the losses to State Farm and USAA.

b. Downs Agreed To Be Jointly And Severally Liable For The Losses To Both Insurance Companies.

All defendants convicted of a crime are jointly and severally responsible for restitution because the relevant causal connection is between the damage and the committed offense, not just between the damage and the offender's individual conduct. Hiett, 154 Wn.2d at 564-65. The statutory provision for joint and several

responsibility demonstrates the legislature's intent: an individual's actual conduct does not determine the extent of his responsibility for restitution; instead, all acts that form the crime are imputed, for restitution purposes, to any participant. Id. at 565.

Downs could argue, as he did at the restitution hearing, that he did not benefit from the entire amount of money stolen from the insurance companies. However, this argument would fail because he agreed to restitution for all the losses to both insurance companies and agreed to be jointly and severally liable. More importantly, controlling authority establishes that the individual's conduct is not what determines the extent of responsibility but rather the entire damage resulting from the offense. Id. Additionally, in reading the certification for determination of probable cause, it is readily apparent that both Downs and Janeice equally participated in defrauding State Farm and USAA.

**D. CONCLUSION**

For the foregoing reasons, the potential issues raised by Downs' counsel are clearly without merit and would not support an arguable claim on appeal. After an independent review of the record in this case, the State could not identify any other potential

issues for review. Therefore, the State respectfully asks this Court to grant counsel's motion to withdraw and dismiss this appeal.

DATED this 16<sup>th</sup> day of January, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

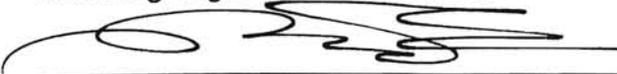
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. WENDELL DOWNS, Cause No. 70534-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Bora Ly  
Done in Seattle, Washington

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Date