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NO. 70902-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

CAREY WYATT,

Appellant.

REC'D

FEB 28 2014

King County Prosecutor
Appellate Unit

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

The Honorable William Downing, Judge

BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The court exceeded its sentencing authority in imposing restitution for an uncharged offense.

Issue Pertaining to Assignment of Error

Where appellant was convicted of assaulting Isaac Graser, and appellant did not agree to pay restitution for uncharged offenses, did the court act outside its authority in imposing restitution for property damage to Jessica Smith's car?

B. STATEMENT OF THE CASE

On August 1, 2012, the King County prosecutor charged appellant Carey Wyatt and co-defendant Doris Boaz with second degree assault, allegedly committed against Isaac Graser on July 28, 2012. CP 1. The certification for determination of probable cause alleged that Boaz held Graser down while Wyatt hit him with a pipe. CP 3-4. Apparently, the attack was motivated by a theft Graser admitted his friend "Cheeto" committed. CP 4.

According to the certification, much of the altercation occurred on the hood of a car, belonging to Jessica Smith, which sustained damages:

Much of this assault happened on the hood of a car that was parked on John St. This car sustained damage to the hood and front drivers' side quarter-

panel (scratches and small dings/dents). Ofc. Stewart took pictures of this damage and identified Jessica Smith as the owner of the car. Smith said she wants to press charges against the responsible party for the damage caused to her vehicle. The victim vehicle is a 2002 BMW 330, WA License #AIN9601. Ofc. Stewart estimated the damage to Smith's vehicle at approximately \$1,050.

CP 3-4.

"[D]ue to the amount of damage sustained to Smith's vehicle from the actions of the suspects," the responding officer booked Wyatt and Boaz for investigation of malicious mischief, as well as assault. CP 4.

Pursuant to a plea agreement as to Wyatt only, Wyatt pled guilty to an amended charge of third degree assault against Graser. CP 7-29. As a factual basis for the plea, Wyatt made the following statement:

On 7/28/12, with criminal negligence, I caused bodily harm accompanied by substantial pain that extended for a period sufficient to cause considerable suffering to Isaac Graser by punching him. This happened in King County, WA

CP 19.

A "Felony Plea Agreement" is attached to Wyatt's Statement of Defendant on Plea of Guilty. CP 21. It indicates the following:

[x] REAL FACTS OF HIGHER/MORE SERIOUS AND/OR ADDITIONAL CRIMES: In accordance with

RCW 9.94A.530, the parties have stipulated that the following are real and material facts for purposes of this sentencing:

The facts set forth in the certification(s) for determination of probable cause and prosecutor's summary.

The facts set forth in Appendix C;

The defendant acknowledges and waives any right to have a jury determine these facts by proof beyond a reasonable doubt.

RESTITUTION: Pursuant to RCW 9.94A.753, the defendant shall pay restitution in full to the victim(s) on charged counts and

agrees to pay restitution in the specific amount of \$ _____

agrees to pay restitution TBD

CP 21.

The court sentenced Wyatt under the drug offender sentencing alternative to 19 months of incarceration and 19 months of community custody. CP 30-39. The court ordered restitution to be determined at a later date. CP 32.

At the restitution hearing on August 14, 2013, the state asked the court to impose \$1,616.22 for damage done to Jessica Smith's BMW and provided an estimate from a car shop. CP 41-45; RP 8/14/13) 2. The defense objected the court lacked authority to impose restitution for an uncharged offense, absent Wyatt's express agreement:

[He] [p]led guilty to an assault, not property destruction.

While it may be appropriate in some circumstances for part of negotiations in an agreement is to pay restitution for an uncharged offense. That never happened here. State never approached us with a request to pay restitution for the uncharged offense.

And the case law is pretty clear and I have these cases here if the Court wants to see them. There's State v. Johnson, which is 69 Wn. App. 189^[1] says, you know, a defendant may be required to pay restitution beyond the crime charged. May not be (inaudible) beyond the crime charged but other uncharged offenses. Restitution may not be based on acts connected with the crime charged when those acts are not part of the charge.

RP (8/14/13) 3.

By virtue of the stipulation to real facts in the felony plea agreement, however, the court found Wyatt agreed to pay restitution for the uncharged offense. CP 46-47; RP (8/14/13) 5. Although the defense protested the stipulation was for sentencing purposes not restitution, the court maintained its position and imposed the requested amount. CP 41-45; RP (8/14/13) 5-6. Wyatt timely appeals the restitution order. CP 48-54.

¹ State v. Johnson, 69 Wn. App. 189, 847 P.2d 960 (1993).

C. ARGUMENT

IN THE ABSENCE OF WYATT'S EXPRESS AGREEMENT, THE COURT ACTED OUTSIDE ITS AUTHORITY IN IMPOSING RESTITUTION FOR AN UNCHARGED OFFENSE.

The trial court may not order a defendant to pay restitution for a crime the defendant was not convicted of, unless the defendant agrees to pay the restitution. State v. Osborne, 140 Wn. App. 38, 39, 163 P.3d 799 (2007). Contrary to the court's conclusion, Wyatt did not agree to pay restitution for the uncharged property damage to Jessica Smith's car. The felony plea agreement indicates the parties stipulated to the facts as set forth in the certification "for purposes of this sentencing." CP 21. This paragraph expressly cites to RCW 9.94A.530,² which addresses how the court is to determine the proper standard range sentence. It has nothing to do with restitution. Defense counsel was absolutely correct when he stated the provision was designed to address exceptional sentencing concerns. RP (8/14/13).

² A portion of this statute was ruled unconstitutional in State v. Hunley, 175 Wn.2d 901, 917, 287 P.3d 584 (2012) (amendment to 9.94A.530(2) – which makes the defendant's failure to object to a criminal history summary an acknowledgment – unconstitutional).

In contrast, the paragraph that addresses restitution is set forth separately below under a new paragraph heading entitled "Restitution." CP 21. This paragraph expressly cites to RCW 9.94A.753 – which addresses restitution – and provides: "the defendant shall pay restitution in full to the victim(s) **on charged counts**" in an amount to be determined. CP 21 (emphasis added).

Wyatt was not charged with malicious mischief of Smith's car. Because Wyatt did not agree to pay restitution for this uncharged offense, the court's order requiring him to pay \$1,616.22 was entered without lawful authority. Osborne, 140 Wn. App. 38, 42, 163 P.3d 799 (2007).

The court's authority to order restitution is statutory. State v. Davison, 116 Wash.2d 917, 919, 809 P.2d 1374 (1991). "Restitution shall be ordered whenever the offender is convicted of an offense which results in ... damage to or loss of property." RCW 9.94A.753(5). And the amount of restitution ordered "shall be based on easily ascertainable damages for injury to or loss of property ... [and] shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime." RCW 9.94A.753(3). "[R]estitution 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." RCW 9.94A.753(5).

The victim's injuries must be causally related to the defendant's crime. State v. Enstone, 137 Wash.2d 675, 682, 974 P.2d 828 (1999). And, specifically, the court may not order restitution based on the defendant's general scheme or acts that are only connected with the charged crime "when those acts are not part of the charge." State v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000). The court must vacate the restitution order if the defendant did not make a specific agreement to pay when pleading guilty, or if the State failed to establish a causal connection between the defendant's crime and the damages. State v. Dennis, 101 Wash.App. 223, 229, 6 P.3d 1173 (2000).

This illegality of the restitution order entered in this case is evidenced by the court's decision in Osborne, 140 Wn.2d at 42. Osborne broke a car window and then ran to a nearby construction site as a neighbor gave chase. Once at the site, Osborne demanded the keys to Steve Paschell's truck and ordered Paschell into the truck at gunpoint. Paschell escaped but injured his back in

the process. Osborne went to David Durham's house, where he shot Durham and another occupant Shirleen Wood. Osborne, 140 Wn. App. at 40.

Although the state initially charged Osborne with eight felony counts, Osborne – pursuant to a plea agreement – pled guilty to only two: assault of Durham and assault of Wood. The charges involving Paschell were dismissed. Nonetheless, the court ordered Osborne to reimburse the department of labor and industries for payments made to Paschell for his back injury. Osborne, 140 Wn. App. at 41.

Division Three reversed the restitution order on grounds Paschell was an “uncharged victim” and therefore not connected to the crimes of conviction for which restitution could be ordered:

Here, the restitution order required payment for conduct relating to the uncharged crimes of kidnapping and robbery, all related to Mr. Paschell. Mr. Osborne did not agree to pay restitution for these uncharged offenses in exchange for dismissal of those offenses pursuant to RCW 9.94A.753(5). The court then erred in ordering restitution in the amount of \$36,477.28. Mr. Paschell was an “uncharged victim.” RCW 9.94A.753 (5); Dauenhauer, 103 Wn. App. at 378-80, 12 P.3d 661.

Osborne, 140 Wn. App. at 42 (citations to record omitted).

Just as Paschell was an “uncharged victim” in Osborne’s case, Jessica Smith was an “uncharged victim” in Wyatt’s case. The restitution order here required payment for conduct relating to the uncharged crime of malicious mischief relating to Jessica Smith. Like Osborne, Wyatt did not agree to pay restitution for this uncharged offense as part of the plea agreement. As indicated at the outset of this argument, the felony plea form indicates his agreement to pay restitution on “charged counts.” CP 21.

The court erred in concluding otherwise and the restitution order must be reversed. Dauenhauer, 103 Wn. App. at 378-80 (court not authorized to order restitution for damage to other driver’s truck occurring while defendant was fleeing the scene where defendant was convicted of burglarizing storage units).

D. CONCLUSION

Because Wyatt did not agree to pay restitution for uncharged offenses, the court was without authority to impose restitution for the damage to Smith's car.

Dated this 28th day of February, 2014

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	COA NO. 70902-0-1
)	
v.)	
)	
CAREY WYATT,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF FEBRUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CAREY WYATT
6834 20TH STREET E.
#D2
FIFE, WA 98424

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF FEBRUARY 2014.

X *Patrick Mayovsky*