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June 2, 2015
Court of Appeals
Division I
State of Washington
No. 72698-6-I
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

E.B.G. (D.O.B. 6/20/99),

Appellant.

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

The Honorable Roger Rogoff
The Honorable John Erlick

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 7

The juvenile court’s restitution order violated due process because the evidence presented was unreliable, did not provide a reasonable basis for estimating the complainant’s loss, and required the court to engage in speculation or conjecture..... 7

1. Restitution is part of sentencing, to which due process protections apply..... 7

2. The evidence presented in support of the State’s restitution demand failed to provide a reasonable basis for estimating loss and depended on speculation and conjecture 8

3. The juvenile court erroneously shifted the burden of proof to E.B.G. to disprove the State’s restitution claim..... 13

4. The remedy is vacation of the restitution order 14

E. CONCLUSION 15

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012) 7, 13

Washington Court of Appeals Decisions

State v. Awawdeh, 72 Wn. App. 373, 864 P.2d 965 (1994)..... 9
State v. Dedonado, 99 Wn. App. 251, 991 P.2d 1216 (2000)..... 13
State v. Dennis, 101 Wn. App. 223, 6 P.3d 1173 (2000)..... 14
State v. Fleming, 75 Wn.App. 270, 877 P.2d 243 (1994)..... 8
State v. Hahn, 100 Wn. App. 391, 996 P.2d 1125 (2000) 8, 10
State v. Kisor, 68 Wn. App. 610, 844 P.3d 1038 (1993) 7, 9
State v. Pollard, 66 Wn. App. 779, 834 P.2d 51 (1992) 7, 8, 10
State v. Tobin, 132 Wn. App. 161, 130 P.3d 426 (2006) 9, 11

Washington Constitutional Provisions

Const. art. I, § 3..... 7

United States Constitutional Provisions

U.S. Const. amend. XIV 1

Statutes

RCW 13.40.020 8
RCW 13.40.190 7

A. ASSIGNMENTS OF ERROR

1. In violation of the Fourteenth Amendment guarantee of due process, the State presented insufficient reliable evidence to support the juvenile court's restitution award to complainant Charles Oliver.

2. The juvenile court improperly shifted the burden of proof regarding restitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Restitution is part of sentencing to which the Fourteenth Amendment's guarantee of due process applies. Accordingly, the evidence presented in support of a restitution claim must afford the court a reliable basis for ascertaining the victim's damages that does not require the court to engage in speculation or conjecture. The complainant in E.B.G.'s case flat-out refused to provide documentation for his claimed losses, which included allegedly valuable items of jewelry and costly repairs. The juvenile court rightly declined to award restitution for some of the losses given the absence of documentation, but inexplicably accepted the complainant's assertions regarding the jewelry and repairs to a grandfather clock at face value even though they were wholly unsubstantiated. Did the court abuse its discretion in awarding restitution to the complainant?

2. Because due process protections apply to restitution, the State bears the burden of presenting sufficient evidence to prove a claim by a preponderance of the evidence. Did the juvenile court improperly shift the burden of proof when it awarded restitution in part because it had “no controverting evidence from either of the respondents saying we didn’t take this stuff”?

C. STATEMENT OF THE CASE

E.B.G. was convicted in juvenile court of one count of residential burglary in connection with an incident in which several young men broke into the Des Moines, Washington home of Charles Oliver and Aloncita Monroe.¹ CP 21-22, 28-31. The State submitted a claim for restitution seeking reimbursement of \$15,792.68 to the primary victims and \$8,197.45 to the Homesite insurance company (hereafter “Homesite”) for damages paid out under the victims’ insurance policy. Supp. CP ___ (Restitution Hearing Ex. 1).

The juvenile court held a contested restitution hearing at which Charles Oliver appeared. Oliver claimed multiple valuables had been stolen during the burglary, and asserted the total cash value of his losses was \$21,886.11. Id. Since Homesite had only partially reimbursed these losses, he insisted that E.B.G. and his co-defendant, D.M., should be liable

¹ His co-respondent, D.M., pleaded guilty to the crime and is appealing the restitution order under cause number 72826-1-I.

for the remainder. RP 9-11.² He was indignant, however, that he was being asked to supply proof of his losses. Even though he had apparently corresponded with the victim advocate regarding his expectations, and the advocate indicated to defense counsel that he would bring receipts for his missing items to the hearing, he testified,

I didn't say I was going to bring them in ... why should I have to follow up on something about receipts and somebody burglarized my house, and I have to prove it. I shouldn't have to prove nothing.

RP 11; Restitution Hearing Ex. 2.

The items for which Mr. Oliver did not bring receipts included the following:

- A grandfather clock, for which Mr. Oliver was claiming a \$559 repair bill, on the basis that it “had something to do with the burglary” because it stopped working at around the time of the offense, RP 20-21;
- Numerous items of men’s and women’s jewelry; Restitution Hearing Ex. 1;
- Men’s suits, id.;
- Replacement car keys for several vehicles, for a total combined value of \$2,100.96, id.;
- \$7,200 in cash, which Mr. Oliver asserted consisted of moneys he had borrowed for a new washer/dryer and his wife’s

² Although multiple proceedings were transcribed for purposes of appeal, only the transcript containing the restitution hearing on October 30, 2014, and two later sentence modification hearings is cited in this brief. It is referenced as “RP” followed by page number.

unemployment payments that she allegedly stored in cash in the home, id.

Mr. Oliver claimed that he had conducted internet searches to ascertain the approximate value of the stolen items, but testified that he “[could not] recall” whether he gave the results of those searches to the prosecutor’s office. RP 28. Mr. Oliver claimed that he had presented receipts for the replacement car keys to his insurance company, but did not produce these for the restitution hearing either. RP 30-31. He asserted that he obtained much of the jewelry at annual conferences for an organization called “Blacks in Government”, but averred he had no way of knowing what vendors were affiliated with the group, and that the group itself was independent of the vendors. RP 37. He did not even explain which items he had obtained from “Blacks in Government” vendors, and which he had purchased elsewhere.

In response to questions from the court, Mr. Oliver claimed that he provided receipts to the insurance company, but did not give them to the State for purposes of the restitution hearing because he “didn’t understand the process.” RP 40. When the court inquired what, specifically, he had gotten receipts for, Mr. Oliver responded,

Like jewelry, I didn’t even try too much on that because they said – they showed me I think it was a thousand dollars or \$2,000. So that wasn’t relevant. I think what was I got receipts mostly was dealing with my – all my

keys to my cars and the remotes or something. They had gone missing, and I wanted to change because I didn't want where they would have the remote and start the ignition. So I went to the dealers to change my remotes and stuff and get the value of what it would cost on that.

RP 41.

When he was asked whether he had retained the receipts for these transactions, Mr. Oliver said, "I didn't try to keep anything because matter of fact I haven't looked at this since May, maybe the last time. So once I got paid by the insurance, as far as I was concerned, the case was closed."

RP 42.

The State asserted that it had proven the restitution amount by a preponderance of the evidence because Mr. Oliver had testified under penalty of perjury. RP 54. The court was troubled by the fact that Mr. Oliver had not supplied corroborative documentation, particularly since he presumably had to give some form of documentation to the insurance company. RP 58-59. The court stated that notwithstanding Mr. Oliver's oath, he was "an individual who just hands-down refuses to provide any documentation, and that brings into question some of the information."

RP 60.

Ultimately, however, the court determined that the State had met its burden with regard to the "vast majority" of the items claimed. RP 73. The court rested its conclusion partly on the fact that it is a crime to falsify

an insurance claim, and partly on the fact that it had “no controverting evidence from either of the respondents saying we didn’t take this stuff[.]” Id.

The court felt it needed documentation of (1) the \$2,500 loan; (2) the \$5,200 cash from unemployment checks; and (3) the keys, and set the matter over so such documentation could be provided. Supp. CP __ (Sub No. 62). The court afforded two weeks for Mr. Oliver to give the State the further documentation. Id. Lastly, since the defense had produced proof via an internet search that a fourteen-carat gold lion’s head ring with diamonds in the eyes and mouth (item 3 in the list of missing items) could be purchased for \$1,299, rather than the \$2,190 requested by Mr. Oliver, the court awarded the lower amount. Id.

Despite being given an additional fourteen days to supply documentation of his losses, Mr. Oliver apparently produced no additional proof or receipts, since the restitution order that was entered by the court did not include the reserved items. CP 45. Nevertheless, it did include an award for the other items identified and valued by Mr. Oliver, despite the absence of receipts or other evidence corroborating the claim. The court also awarded restitution to Homesite for the money paid out under Mr. Oliver’s insurance policy. Id.

D. ARGUMENT

The juvenile court’s restitution order violated due process because the evidence presented was unreliable, did not provide a reasonable basis for estimating the complainant’s loss, and required the court to engage in speculation or conjecture.

1. Restitution is part of sentencing, to which due process protections apply.

The setting of restitution is an integral part of sentencing. State v. Kisor, 68 Wn. App. 610, 620, 844 P.3d 1038 (1993). Because it is part of sentencing, a juvenile respondent is entitled to due process of law. State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); U.S. Const. amend. XIV; Const. art. I, § 3. Due process of law requires (1) an opportunity to refute a restitution demand; and (2) that the evidence presented in support of restitution be reliable. State v. Pollard, 66 Wn. App. 779, 784-85, 834 P.2d 51 (1992).

According to the provisions of the Juvenile Justice Act (JJA), the court is obligated to require the respondent to make restitution “to any persons who have suffered loss as a result of the offense committed by the respondent” as part of its dispositional order. RCW 13.40.190(1). The definitional section of the JJA limits restitution to “easily ascertainable damages for injury to or loss of property, actual expenses incurred for medical treatment for physical injury to persons, lost wages resulting from

physical injury, and costs of the victim's counseling reasonably related to the offense if the offense is a sex offense." RCW 13.40.020(26).³

Easily ascertainable damages need not be proven with "specific accuracy." State v. Fleming, 75 Wn.App. 270, 274, 877 P.2d 243 (1994). However, evidence of damages must provide the trial court with a "reasonable basis for estimating losses" and require "no speculation or conjecture." State v. Hahn, 100 Wn. App, 391, 399, 996 P.2d 1125 (2000) (citing Fleming, 75 Wn. App at 274-75 and Pollard, 66 Wn. App. at 785).

2. The evidence presented in support of the State's restitution demand failed to provide a reasonable basis for estimating loss and depended on speculation and conjecture.

The evidence presented by Mr. Oliver in support of his restitution claim, such as it existed, was unreliable, failed to supply a reasonable basis for estimating loss, and required the court to engage in speculation and/or conjecture. Consequently, the court erred in awarding restitution.

In evaluating the sufficiency of the State's proof, the focus is on whether the State supplied a *reasonable basis* for the court to assess the victim's loss. Cf. State v. Awawdeh, 72 Wn. App. 373, 379, 864 P.2d 965

³ The portions of the definition of restitution in the JJA relevant to the disposition of this matter are essentially identical to parallel provisions in the Sentencing Reform Act (SRA). See, RCW 9.94A.750(3). Decisions interpreting the SRA may be used in cases arising under the JJA where the statute does not evince a contrary intent and the purposes of the statutes are consistent. State v. P.B.T., 67 Wn.App. 292, 302, 834 P.2d 1051 (1992), review denied, 120 Wn.2d 1021 (1993).

(1994) (trial court’s estimate of losses incurred lacked a reasonable basis); State v. Tobin, 132 Wn. App. 161, 174, 130 P.3d 426 (2006). Thus, although it is permissible to award restitution based on an estimate, the estimate must have some grounding in fact.

In Tobin, for example, a case in which the defendant was convicted of multiple criminal counts in connection with stealing crabs and geoducks from the State of Washington and Native American Tribes, the State used a forensic accountant to estimate the losses sustained. Even though the amounts submitted were estimated, the Court noted that the accountant had conducted “extensive investigation, which included reviewing invoices and other sales records, both from Tobin’s company and his product purchasers, witness statements, and airway freight bills.” Id. at 175. The Court accordingly held that it was within the trial court’s discretion to award restitution based on the estimated amounts. Id.

By contrast, in Kisor, the Court reversed a restitution award where it was based on “nothing more than a rough estimate” of costs associated with the loss. Kisor, 68 Wn. App. at 620. This case is like Kisor.

Mr. Oliver resisted bringing in receipts or any other documentation to support his claim for restitution. Indeed, with respect to the jewelry, he testified, “I didn’t even try too much on that.” RP 41. He was very vague with regard to both price and description of most of the items alleged to

have been stolen, even designer items like suits and a name-brand watch. As to one item that was described specifically, the 14-karat gold lion's head ring, E.B.G.'s defense attorney was able to research Mr. Oliver's claim regarding value. What she discovered was telling: he had inflated the replacement cost of the ring by approximately sixty percent. The juvenile rightly declined to award Mr. Oliver the greater amount claimed of \$2,190 for this item, and instead limited his recovery to \$1,299. Supp CP __ (Sub No. 62).

This discrepancy – in addition to Mr. Oliver's obdurate refusal to substantiate in any way his assertions regarding cash loans, replaced keys, and his wife's unemployment reimbursement, despite being expressly afforded an additional two weeks to do so – should have led the court to question Mr. Oliver's veracity with regard to the value of the other stolen items. But, even though Mr. Oliver's insurance company evidently disbelieved Mr. Oliver's claims regarding the value of these items, Restitution Hearing Ex. 1, the court inexplicably credited his claims.

As noted, although the State need not prove a restitution claim with exactitude, its evidence must nevertheless (1) be reliable; (2) afford the court a reasonable basis for estimating loss; and (3) not require the court to engage in speculation or conjecture. Hahn, 100 Wn. App. at 399; Pollard, 66 Wn. App. at 785.

In Tobin, the Court excused the State's use of an estimate to evaluate its losses in part because Mr. Tobin's illegal enterprise had been conducted without recordkeeping, and thereby had prevented the State from being able to document the losses with specificity. 132 Wn. App. at 165. The same is not true here. Mr. Oliver personally bought the items that were stolen. If his assertions are taken at face value, he kept zero record of any of his purchases of numerous valuable items of jewelry and clothing. Although he claimed he provided receipts and documentation to Homesite when he submitted his insurance claim, he had apparently kept no records of any of the documents he gave them and was incapable, even, of retrieving them.

The court plainly did not find Mr. Oliver credible, or it would not have continued the hearing for two weeks to obligate him to produce documentation of the loan, unemployment reimbursement, and replaced car keys. Had Mr. Oliver's claimed losses been true, it would have been easy enough for him to produce this proof. Banks keep records of loans, bank account statements are available electronically, the State maintains records of unemployment disbursements, and automobile dealerships record transactions and repairs. Given that Mr. Oliver's assertion of the value of the lion's head ring was disproved at the restitution hearing, the court should have similarly conditioned any restitution award for the

jewelry, clock repairs, and clothing items on Mr. Oliver's ability to produce *some evidence* of the value of the items.

Not much would have been required. Insurance companies are surely accustomed to providing courts with copies of claim-related documentation. These materials would have supplied a reasonable basis for estimating Mr. Oliver's loss. If Mr. Oliver had been unable to obtain the materials he claimed he gave to Homesite, perhaps he could have conducted internet searches for items of jewelry and clothing similar to the pieces for which he sought recovery.

Mr. Oliver claimed that he spent over five hundred dollars to have a grandfather clock in his home repaired. Although the nexus between the broken clock and the burglary was tenuous at best, it was within the court's discretion to conclude that the State proved a causal link between the crime and this loss. However the court should have obligated Mr. Oliver to prove the cost of this repair. Again, it would have been easy to contact the person or store that made the repairs to find out what Mr. Oliver actually paid. Some proof, beyond his mere assertion, should have been required.

This Court should conclude the State failed to meet its burden of proving "easily ascertainable damages", as required to support its

restitution demand. The portion of the restitution order granting damages to Mr. Oliver should be reversed and vacated.

3. The juvenile court erroneously shifted the burden of proof to E.B.G. to disprove the State's restitution claim.

Despite the troubling gaps in Mr. Oliver's testimony, the juvenile court awarded restitution in part because there was "no controverting evidence from either of the respondents saying we didn't take this stuff[.]" RP 73. But the State bears the burden of proving restitution by a preponderance of the evidence. State v. Dedonado, 99 Wn. App. 251, 256-57, 991 P.2d 1216 (2000). "Restitution is an integral part of sentencing, and it is the State's obligation to establish the amount of restitution." Id. at 257.

The trial court's ruling, in effect, amounted to a determination that once the State presented a prima facie case, irrespective of its reliability, then the burden shifted to E.B.G. and his co-respondent to refute it or suffer the consequences. This is contrary to what due process demands. Cf. Hunley, 175 Wn.2d at 916-17 (holding sentencing statute unconstitutional as applied where it made a prosecutor's "criminal history summary" prima facie proof of the existence and validity of the convictions recited therein).

Additionally, whether E.B.G. and D.M. “[took] this stuff” was beside the point. Even if they had ransacked the home and stripped it of every item, the State would still have the obligation to prove damages at a restitution hearing. The trial court erred in shifting the burden of proof to E.B.G.

4. The remedy is vacation of the restitution order.

Where the State has failed to present an adequate factual basis for a restitution demand, the remedy is vacation of the restitution order. State v. Dennis, 101 Wn. App. 223, 229, 6 P.3d 1173 (2000). Here, the trial court abused its discretion in awarding restitution to Mr. Oliver given the absence of reliable evidence to support the claim. The portion of the restitution order granting compensation to Mr. Oliver must be vacated.

E. CONCLUSION

This Court should conclude the State did not meet its burden of proving restitution. The order should be vacated.

DATED this 2nd day of June, 2015.

Respectfully submitted:

/s/ Susan F. Wilk
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 72698-6-I
)	
E.B.G.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF JUNE, 2015, 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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