 72933-1

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Court of Appeals
Division I
State of Washington

COA NO. 72933-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ELYAS KEROW,

Appellant.

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

The Honorable Theresa B. Doyle, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT LACKED AUTHORITY TO ENTER RESTITUTION AFTER THE STATUTORY DEADLINE PASSED WITHOUT FINDING GOOD CAUSE FOR THE CONTINUANCE.

a. No invited error.

The State claims Kerow invited the error by "proposing" a hearing date for restitution beyond the statutorily allowed period. Brief of Respondent (BOR) at 3-4. The record belies the State's claim.

"The invited error doctrine applies only where the defendant engaged in some affirmative action by which he knowingly and voluntarily set up the error." State v. Phelps, 113 Wn. App. 347, 353, 57 P.3d 624 (2002). The State bears the burden of proving invited error. State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 154 (2014). The State cannot meet its burden here.

This is what the record shows. The trial court told the attorneys "So go ahead and set it over to a date that you both agree on." 2RP 10. The restitution hearing was continued to a future date, unspecified on the record. CP 65. The parties returned to court on November 18, 2014. 3RP. At this point, defense counsel argued the 180 day time period had passed without a finding of good cause. 3RP 6-9.

The prosecutor claimed defense counsel waived the objection when he "agreed" to the date, protesting that counsel should not be allowed to "lay in the weeds" by objecting after the continuance, which the prosecutor described as "gamesmanship in its worst form." 4RP 11. The prosecutor alleged "the Defense knew that this was going to be beyond the 180 days." 4RP 13.

Defense counsel told the court "We set everything over to a date *that turned out to be* after the 180 days." 4RP 16 (emphasis added). Counsel continued: "I understand the -- the State's frustration that it picked a date that was beyond the 180 days. I would suggest that calling this gamesmanship by the Defense is inaccurate and indeed is contrary --" 4RP 16. The court jumped in with "I don't agree with that," thereby relieving counsel of defending himself further, and turned to the substantive legal issue before it. 4RP 16.

In summary, the State accused defense counsel of knowingly agreeing to a date beyond the 180 day period. The defense denied doing so. And the court sided with the defense on this point.

Further, the State chose the date, to which counsel agreed. 4RP 16. Contrary to the State's argument on appeal, defense counsel did not propose the date. The State chose the date.

The State cannot show anything beyond an inadvertent error in picking a date beyond the 180-day period. The invited error doctrine does not apply to inadvertent errors. In re Personal Restraint of Call, 144 Wn.2d 315, 326, 28 P.3d 709 (2001) (no invited error where sentencing error was inadvertent). It is apparent that neither the parties nor the trial court were aware that the continuance date was beyond the 180-day period. See In re Pers. Restraint of Thompson, 141 Wn.2d 712, 724-25, 10 P.3d 380 (2000) (no invited error: "the State has provided no evidence that Thompson knowingly pleaded to an invalid charge. Instead, it appears that neither of the parties nor the trial court was aware of the error."). After all, if the trial court had realized it, then another date would have been chosen. If the prosecutor had realized it, then another date would have been chosen. Yet the prosecutor accused defense counsel of knowingly agreeing to a bad date. That is pure speculation, and the trial court appropriately rejected the accusation. The prosecutor did not realize the problem, so on what basis is there to assume defense counsel did? No one realized the problem.

For the invited error doctrine to apply, the State must prove the defendant "materially contribute[s] to the error challenged on appeal by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error." Mercado, 181 Wn. App. at 630. Under

the circumstances present here, the State fails to establish that defense counsel "set up" the trial court by knowingly inducing the error. The invited error doctrine does not apply in this case.

The State's citation to State v. Pierson, 105 Wn. App. 160, 167, 18 P.3d 1154 (2001) is misleading. It describes Pierson as holding "error invited where defendant agreed to amount of restitution owed but objected to entry of order based on timeliness." BOR at 4. Clarification is needed. Pierson applied the invited error doctrine solely to the issue of whether the trial court abused its discretion in ordering the amount of restitution. Pierson, 105 Wn. App. at 166-67. Any error was invited because the record showed the defendant stipulated to the amount of restitution. Id. at 167. Invited error had nothing to do with the timeliness of the restitution hearing. On the timeliness issue, Pierson simply held a trial court may continue the restitution hearing after the 60 day period it initially set to another date within the 180-day statutory limit. Id. at 162, 166.

b. Invited error does not apply when the sentencing court exceeds its statutory authority.

Assuming arguendo that defense counsel knowingly agreed to a date beyond the 180-day period, Kerow is still entitled to relief because the trial court exceeded it statutory authority in entering restitution beyond the 180-day period without good cause. "[T]he invited error doctrine does

not apply where a sentence is outside the authority of the sentencing court." In re Personal Restraint of West, 154 Wn.2d 204, 214, 110 P.3d 1122 (2005); see also Mercado, 181 Wn. App. at 631 (where "the sentencing court exceeded its statutory authority, the invited error doctrine will not preclude appellate review."). The trial court's authority to impose restitution is statutory and a restitution order is void when statutory provisions are not followed. State v. Johnson, 96 Wn. App. 813, 815, 981 P.2d 25 (1999). As argued, the trial court here exceeded its statutory authority in entering a restitution order after the 180-day statutory deadline expired without a finding of good cause. The invited error doctrine does not apply for this reason. See State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993, 995 (1980) ("By requiring defendant to pay restitution to all victims of the stock fraud, the court acted in excess of its statutory authority. Even assuming the court's order may have been based largely upon defendant's promise of repayment, a defendant cannot empower a sentencing court to exceed its statutory authorization."); Phelps, 113 Wn. App. at 354 ("although Phelps clearly invited the challenged sentence, to the extent he can show that the sentencing court exceeded its statutory authority, the invited error doctrine will not preclude appellate review.").

c. Kerow challenged the restitution amount and the court continued the restitution hearing as a result without finding good cause.

Finally, the State contends Kerow "agreed to the amount claimed" at the initial restitution hearing. BOR at 5. That is not accurate. Defense counsel did not dispute the amount of $3,461.71 owed to the insurance company. 2RP 8. Counsel did dispute whether Braaten was entitled to the $1000 deductible. 2RP 5-7. And the court continued the hearing because the State was unable to show to the court's satisfaction that Braaten was entitled to that money at the initial hearing. 2RP 9-10. The failure to obtain documentation in support of a restitution claim does not establish good cause for extension past the mandatory deadline. State v. Tetreault, 99 Wn. App. 435, 436-37, 998 P.2d 330, review denied, 141 Wn.2d 1015, 10 P.3d 1072 (2000). And the trial court never found good cause anyway, which renders the restitution order untimely and invalid. State v. Grantham, 174 Wn. App. 399, 405-06, 299 P.3d 21, review denied, 178 Wn.2d 1006, 308 P.3d 642 (2013).

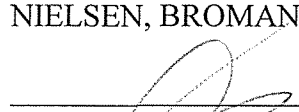
B. CONCLUSION

For the reasons set forth above and in the opening brief, Kerow requests the restitution order be vacated.

DATED this 23rd day of October 2015

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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