


FILED
Feb 24, 2016
Court of Appeals
Division I
State of Washington

FILED
FEB 26 2016 
WASHINGTON STATE
SUPREME COURT

No. 
COA No. 72847-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MELVIN,

Petitioner.

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

The Honorable James D. Cayce

PETITION FOR REVIEW

THOMAS M. KUMMEROW
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A. IDENTITY OF PETITIONER

Michael Melvin asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Michael Melvin*, No. 72847-4-I (January 25, 2016). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

The State bears the burden of proving the amount of restitution. Recoupment for the costs of litigation is not compensable pursuant to restitution. Here, several of the medical professionals that were consulted and evaluated the child did so solely for the purpose of providing the proof necessary to charge and convict Mr. Melvin. Was it error to impose restitution amounts which were solely for the recoupment of the costs of litigation and where a civil remedy was available?

D. STATEMENT OF THE CASE

Michael Melvin was charged with two counts of second degree assault of a child. CP 7-8. He proceeded to trial which resulted in a mistrial. Mr. Melvin subsequently pleaded guilty to a single count of second degree assault of a child. CP 20-42. Mr. Melvin was sentenced to a 60 month term of imprisonment. CP 14.

The State thereafter sought restitution in the amount of \$2254.10; \$866.94 to the child's mother for out-of-pocket expenses related to the incident, and \$1,387.16 to the mother's insurance provider, Delta Health Systems. CP 44. Mr. Melvin objected to the request for restitution. CP 53-56; RP 2-4. Following a hearing, the trial court imposed the full amount of requested restitution. CP 57-58. The trial court was persuaded that the restitution requested did not include any reimbursement for the trial testimony of the medical professionals. RP 3.

The Court of Appeals ruled the amount of restitution was not for the purpose of recouping the costs of litigation. Decision at 2-3.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

Portions of the restitution awarded was for the purpose of improperly recouping the costs of litigation.

A court's authority to impose restitution is derived solely from statute. *State v. Martinez*, 78 Wn.App. 870, 881, 899 P.2d 1302 (1995), review denied, 128 Wn.2d 1017 (1996). RCW 9.94A.753(5) provides that "[r]estitution 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."

Restitution must be based upon easily ascertainable damages, in other words, the court finds there is a causal connection between the crime proved and the injuries suffered. RCW 9.94A.753(3); *State v. Fleming*, 75 Wn.App. 270, 274, 877 P.2d 243 (1994); *State v. Johnson*, 69 Wn.App. 189, 190, 847 P.2d 960 (1993) (*per curiam*). "While damages need not be proved with certainty, the evidence of damages must be sufficient to afford a reasonable basis for estimating the loss and must not subject the trier of fact to mere speculation or conjecture." *State v. Awawdeh*, 72 Wn.App. 373, 379, 864 P.2d 965 (1993), review denied, 124 Wn.2d 1004, cert. denied, 513 U.S. 970 (1994). A causal connection exists if "but for" the offense, the loss or damages to the

victim would not have occurred. *State v. Tobin*, 161 Wn.2d 517, 519, 524-25, 166 P.3d 1167 (2007). The State must prove this causal connection between the expenses and the offense by a preponderance of the evidence. *State v. Kinneman*, 122 Wn.App. 850, 860, 95 P.3d 1277 (2004) *aff'd*, 155 Wn.2d 272, 119 P.3d 350 (2005).

“[C]ompensation is not the primary purpose of restitution, and the criminal process should not be used as a means to enforce civil claims.” *Martinez*, 78 Wn.App. at 881.

Several of the doctors listed in the restitution documentation treated C.N.N.D. for her injuries. But, doctors such as Dr. Naomi Sugar and Dr. Maneesh Batra were consulted solely for the purpose of establishing that a crime had been committed and were thus, part of the cost of litigation. Some of these medical professionals collected evidence, including photographs. In addition, the medical professionals, who were also experts in child abuse, were consulted and evaluated the child. This was all part of a forensic examination that was part of the investigative process used in charging and ultimately convicting Mr. Melvin. The fact that these doctors did not testify is of no moment. The doctors were consulted solely for the purpose of providing the proof necessary to establish a crime had been committed.

The Court of Appeals focused solely on the issue of causal connection; was there a causal connection between the offense and the injuries suffered. Decision at 2-3. Of course there was a causal connection. But that was not the issue that was raised. The issue was whether the costs of physicians who were consulted to determine whether a crime occurred were recoupment for costs of litigation, which should not have been allowed since there was a civil remedy available. *Martinez*, 78 Wn.App. at 881. This Court should accept review to determine whether the costs of litigation are properly recouped in restitution where a civil remedy is available to the victim to recoup those same damages.

F. CONCLUSION

For the reason stated, Mr. Melvin asks this Court accept review and reverse the order of restitution where it awarded damages for the costs of litigation.

DATED this 23rd day of February 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

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2016 JAN 25 AM 9:16

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

STATE OF WASHINGTON,)	No. 72847-4-I
)	
Respondent,)	
)	
v.)	
)	
MICHAEL MELVIN,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: January 25, 2016

VERELLEN, A.C.J. — Michael Melvin appeals a restitution order imposed after he pleaded guilty to assault of a child. He contends the restitution improperly recouped litigation costs in the form of physicians' forensic examinations of the victim. But "actual expenses incurred for treatment for injury to persons" as a result of Melvin's conduct are a proper basis for a restitution order.¹ The physicians did not bill for any testimony or trial preparation. The billings were all for time spent by physicians examining and treating the victim. But for Melvin's criminal conduct, the victim's mother and the insurance company would not have incurred medical expenses for the victim's injuries.

We affirm the restitution order.

FACTS

The State charged Melvin with two counts of second degree assault of a child. A jury trial resulted in a mistrial. Melvin later pleaded guilty to one count of second degree

¹ RCW 9.94A.750(3).

assault of a child. The State requested restitution of \$2,254.10 for medical costs incurred in 2013 while the child was at Children's Hospital on March 11, 12, and April 1, and for office care on April 29. Melvin objected because the physicians who examined the child "testified and also provided forensic evidence" against him.² The trial court reviewed the dates of the services and concluded that none of the billings were solely for the purpose of litigation. The court awarded \$866.94 to the victim's mother for out-of-pocket medical expenses related to the victim's treatment and \$1,387.16 to the mother's insurance provider for its coverage of the medical expenses.

Melvin appeals the restitution order.

ANALYSIS

Melvin contends the restitution order improperly encompassed litigation costs. We disagree.

We review a restitution order for abuse of discretion.³ A trial court abuses its discretion if its restitution order is not authorized by statute.⁴

A trial court's authority to impose restitution is statutory.⁵ Restitution applies if a crime "results in injury to any person or damage to or loss of property."⁶ Restitution extends to "actual expenses incurred for treatment for injury to persons."⁷ Investigative costs may constitute damages supporting restitution if the costs were "expended by a

² Report of Proceedings (Nov. 18, 2014) at 2.

³ State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991).

⁴ State v. Horner, 53 Wn. App. 806, 807, 770 P.2d 1056 (1989).

⁵ State v. Deskins, 180 Wn.2d 68, 81, 322 P.3d 780 (2014).

⁶ RCW 9.94A.753(5).

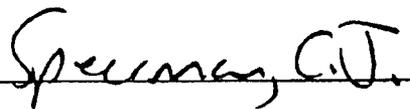
⁷ RCW 9.94A.750(3).

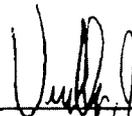
victim as a direct result of the crime."⁸ There must be a causal connection between the defendant's crime and the victim's damages to support a restitution order.⁹ A causal connection exists if, "but for the charged crime, the victim would not have incurred the loss."¹⁰

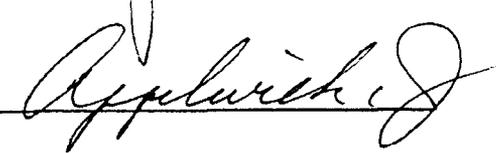
A review of the restitution documentation reveals that several physicians provided medical treatment to the victim. While some of these physicians testified at trial, the billings did not include any time spent by physicians testifying or preparing to testify. Because the medical expenses relate solely to the victim's examination and treatment for injuries caused by Melvin, they are not prohibited litigation costs. But for the assault, the victim's mother and the insurance company would not have incurred those medical expenses.¹¹

We affirm the trial court's restitution order.

WE CONCUR:







⁸ State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (quoting State v. Kinneman, 155 Wn.2d 272, 287, 119 P.3d 350 (2005)).

⁹ State v. Johnson, 69 Wn. App. 189, 191, 847 P.2d 960 (1993).

¹⁰ State v. Griffith, 164 Wn.2d 960, 966, 195 P.3d 506 (2008).

¹¹ E.g., State v. Enstone, 89 Wn. App. 882, 886, 951 P.2d 309 (1998) ("Because H.J. would not have had to be treated at the hospital but for her serious head injuries, there was a sufficient causal relationship between the assault and the restitution imposed."), affirmed, 137 Wn.2d 675, 974 P.2d 828 (1999).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72847-4-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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petitioner

Attorney for other party



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Date: February 24, 2016

WASHINGTON APPELLATE PROJECT

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