

FILED
NOV 09 2016
WASHINGTON STATE
SUPREME COURT

SUPREME COURT NO. 93773.7

NO. 73759-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VINOD RAM,

Petitioner.

FILED
Sep 16, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Carol Schapira, Judge

PETITION FOR REVIEW

JENNIFER J. SWEIGERT
Attorney for Petitioner

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

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A. IDENTITY OF PETITIONER/DECISION BELOW

Vinod Ram requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Ram, No.73759-7-I, filed July 25, 2016. The Court of Appeals denied Ram's motion for reconsideration on August 19, 2016. A copy of the opinion is attached as Appendix A. A copy of the order denying reconsideration is attached as Appendix B.

B. ISSUE PRESENTED FOR REVIEW

Appellant was convicted of theft via fuel card fraud. Many of the cardholders did not pay the fraudulent charges to their accounts. Several of the fuel account companies simply replaced the missing fuel. No evidence was presented of what it cost them to do so. Did the court err in awarding the retail price of the stolen fuel to the cardholders, who suffered no loss?

C. STATEMENT OF THE CASE

Petitioner Vinod Ram was convicted of 16 counts of first-degree identity theft and one count of conspiracy to commit identity theft. CP 51-64. The counts largely corresponded to the various companies whose fuel account cards Ram was convicted of using. CP 38-50.

The cards are issued by companies that operate so-called "cardlock" fuel stations, which are largely unstaffed and patronized by businesses with

fleets of vehicles. 6RP¹ 53-54. The self-serve fueling kiosks are unlocked using a card and pin number, and the fuel is charged to the cardholder's account. 7RP 47-50; 10RP 58; 11RP 117-18. Petrocard and Associated Petroleum Products (APP) are two companies that issue the fuel cards. 10RP 52-53; 11RP 116-18.

The evidence at trial showed that either Ram or an accomplice would contact local owner-operator truck drivers and offer them steeply discounted fuel. 7RP 43-61. He would then meet them at a card-lock station, activate the fuel pump using a stolen or copied fuel account card, pump the fuel, and charge the truck driver a steeply discounted price. 7RP 43-61.

At trial, representatives of 16 cardholder companies testified to the amounts of fraudulent charges made on each of their accounts. 6RP 78, 80; 7RP 30-31, 218-19, 238-39; 9RP 31-32; 10RP 149-50. At the restitution hearing, the State requested restitution for all the fraudulently charged amounts shown at trial. 15RP 3. The State presented no evidence at the restitution hearing, but rested entirely on the evidence presented at trial. The total requested was \$578,590.10. 15RP 3.

¹ Ram also appealed the underlying convictions in case number 72654-4-I. The two appeals were linked for consideration by the same panel in the Court of Appeals. This statement of the facts summarizes the trial testimony pertaining to the restitution issues and references the transcripts (1RP –14RP) in that appeal. 15RP refers to the report of proceedings from the July 31, 2015 restitution hearing.

Ram presented a declaration by defense investigator Ray Ward. Ward contacted the fuel card companies and learned that several of the cardholders did not actually pay the fraudulent charges. CP 80-82. Instead, the card company absorbed the loss and replaced the lost inventory by purchasing additional fuel from its suppliers. CP 81-82. Because they were able to replace their inventory, the card companies did not lose out on any sales as a result of the offenses. The card companies either could not or would not reveal to the defense investigator what their actual replacement cost was or how much financial loss they incurred. CP 81-82.

Of the 16 cardholder companies whose cards were used, Ward's declaration established that seven of them did not pay the fraudulently incurred charges: Genesee Fuel and Heating Co. (Count 3), General Teamsters Local 174 (count 7), James J. Williams Bulk Service Transport (count 9), Graham Trucking (count 11), Port-Pass (count 13), Schnitzer Steel (count 14), and Metals Express (count 15). CP 80-82. Ram did not challenge the \$105,941.59 awarded to Bartelson Trucking because that company actually paid the charged amounts. 15RP 7. For the remaining companies, there was no information as to whether they actually paid any of the fraudulently charged amounts. CP 82.

Ram argued the restitution (aside from that owed to Bartelson) was not tied to actual losses suffered by the cardholder companies. 15RP 7-13.

The court rejected Ram's argument and awarded the full amount of the fraudulent charges to the cardholder companies. 15RP 23; CP 83-85. The order includes a notation that "Should the State learn that any of the victim companies have been reimbursed by Petrocard, Associated Petroleum Products, or an insurance company, this Order Setting Restitution shall be amended to reflect the change in payee. The State will provide a copy of this order to Petrocard and APP." CP 85.

The court cited several reasons for granting the requested restitution: first, the court observed that the card companies are not full retailers, so the amounts awarded do not reflect the same profit mark-up that an average person would pay at the pump. 15RP 23. Second, the court declared it had a high degree of confidence in the numbers presented by the State. 15RP 23. Third, the court noted that restitution can be modified in the future to prevent double recovery. 15RP 23-24. Finally, the court noted that the restitution order matches the evidence at trial. 15RP 24.

Ram appealed the restitution order. CP 87. The Court of Appeals affirmed, concluding that the potential financial liability incurred when the cardholders' cards were charged was sufficient loss to warrant awarding the cardholders with restitution in the amount of the fraudulent charges. State v. Ram, 2016 WL 3982934, no. 73759-7-I, slip opinion at 7-8.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

BY AFFIRMING A RESTITUTION AWARD THAT IS UNHINGED FROM ACTUAL LOSS, THE OPINION IN THIS CASE CONFLICTS WITH PRECEDENT AND PRESENTS A CONSTITUTIONAL ISSUE OF SIGNIFICANT PUBLIC INTEREST.

The amount of restitution must be based on “easily ascertainable damages” that provide a “reasonable basis for estimating loss.” RCW 9.94A.753(3); State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51 (1992). But the one requirement does not automatically satisfy the other. The retail price of the fuel at issue in this case is, indeed, easily ascertainable based on the invoices presented at trial. But under the evidence presented at the restitution hearing, for several of the companies, it does not reflect any actual loss.

The trial court abused its discretion in awarding restitution to companies who did not suffer any actual loss. The restitution award is both manifestly unreasonable and in excess of the court’s statutory authority because it awards restitution for the retail price of the fuel when no party sustained losses in that amount and it awards that restitution to cardholders who suffered no loss at all. In short, the court awarded restitution a) to the wrong party and b) in the wrong amount.

a. The Invoices Presented by the State Fail to Establish Any Actual Loss by the Cardholders.

The court's authority to impose restitution is purely statutory. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991) (citing State v. Eilts, 94 Wn.2d 489, 495, 617 P.2d 993 (1980); State v. Lewis, 57 Wn. App. 921, 923, 791 P.2d 250 (1990)). Washington's restitution statute limits the court's authority to award restitution in two primary ways. First, restitution is limited to victims who suffered losses. Second, the amount of restitution must be based on the actual loss suffered by the victim. In short, there must be a causal relationship between the offense and the victim's losses. State v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000). When the court fails to adhere to these principles, its restitution order is void. Id. The State must establish the amount of loss by a preponderance of the evidence at the restitution hearing. State v. Dennis, 101 Wn. App. 223, 227-28, 6 P.3d 1173 (2000).

The retail invoices showing potential financial liability do not provide a reasonable basis for estimating the loss to the cardholders.² The potential financial liability of having one's account charged is not actual loss. Washington's restitution statute does not refer to liability. It refers to "loss of property." RCW 9.94A.750.

² As in the opening brief, this argument refers to cardholders other than Bartelson. Ram concedes Bartelson's loss was established by sufficient evidence.

In the absence of any other evidence, the retail charges might amount to some evidence that the cardholders actually paid, and therefore suffered losses, in that amount. But the evidence at the restitution hearing refuted that proposition. According to information from the card companies, the following cardholders paid nothing on the false charges: Genesee Fuel and Heating Co. (Count 3), General Teamsters Local 174 (count 7), James J. Williams Bulk Service Transport (count 9), Graham Trucking (count 11), Port-Pass (count 13), Schnitzer Steel (count 14), and Metals Express (count 15). CP 80-82.

The State argues the court was not obliged to accept Ram's evidence at face value. But there is no sign in the record that the Court found it somehow inaccurate or untrustworthy. Hearsay is permissible in restitution hearings. State v. Deskins, 180 Wn.2d 68, 83, 322 P.3d 780 (2014) ("Courts may rely on a broad range of evidence—including hearsay—because the rules of evidence do not apply to sentencing hearings.") (citing ER 1101(c)(3)).

Because these cardholder companies did not pay the amounts reflected on their statements, they did not suffer any tangible loss from Ram's use of their accounts, and restitution is inappropriate. Even if the restitution to most of the companies is upheld, the order should be vacated as to those seven companies who, the evidence shows, suffered no loss.

b. The Invoices Fail to Provide a Reasonable Basis for Estimating the Amount of Loss to the Fuel Companies.

The fuel companies suffered loss, but that the amount of that loss is unrelated to the retail amount they charge their customers. The State has provided no authority for its assertion that retail price is a reasonable basis for estimating a loss in the amount of the wholesale cost. If there were some commonly used amount of profit mark-up, this might be true. But the fact that mark-up amounts vary widely and the fuel companies' unwillingness to reveal any information about their profit margin leaves the Court with no reasonable basis for estimating their actual loss.

The notation requiring a change in payee if the Court learns that the fuel company has reimbursed a cardholder does not resolve this issue. Awarding the fuel company the retail price of the fuel based on the invoices to its customers would result in a windfall for the fuel companies. Their loss was only the wholesale cost of replacing the fuel, but they will be awarded restitution including a profit mark-up even though they did not lose out on any sales.

The doubling provision of the restitution statute does not save this restitution award from Ram's claim of insufficiency. "The ability to impose up to twice the amount of the victim's loss or offender's gain does not . . . preserve an otherwise erroneous restitution order. Any increase or doubling

of restitution pursuant to the statute should be a consciously exercised choice by the court.” State v. Fleming, 75 Wn. App. 270, 276, 877 P.2d 243 (1994). There was no indication the court opted to specifically increase any amount under this provision.

The fuel invoices do not provide a reasonable basis for estimating any victim’s loss. Nor do they show the gain to Ram. Ram did not actually gain the retail value of the fuel. He charged the truck drivers much less than the actual retail value. Like the fuel companies’ loss, his actual gain was far less than the retail amount they would have charged their customers. 7RP 43-61. No attempt was made at the restitution hearing to calculate the amount of Ram’s gain.

- c. Review Should Be Granted Because this Case Presents a Novel Constitutional Issue of Public Interest and the Court of Appeals Opinion Conflicts with Case Law Requiring Restitution Be Based on a Showing of Actual Loss.

Washington’s restitution statute does not refer to potential financial liability. It refers to “loss of property.” RCW 9.94A.750. It is well established that restitution orders must be based on the amount of actual loss. See, e.g., State v. Dedonado, 99 Wn. App. 251, 257, 991 P.2d 1216, 1220 (2000) (Restitution award may not be based solely on receipts for replacements, which may be for “items of substantially greater or lesser value than the actual loss.”); Pollard, 66 Wn. App. at 786-87 (remanding

to establish amount of victim's "actual losses"). Review should be granted because the Court of Appeals opinion relying on the potential financial liability to support the restitution award is in conflict with these cases. RAP 13.4(b)(2).

Due process is offended when a court orders a defendant to pay restitution based merely on a rough estimate of damages without any further corroboration. State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993) (citing Pollard, 66 Wn. App. 784-85). Due process requires that the amount of loss be established by evidence that does not require the trier of fact to engage in speculation or conjecture. Id. (citing State v. Fambrough, 66 Wn. App. 223, 225, 831 P.2d 789 (1992)). Here, the restitution award is based on speculation that the retail price charged to the cardholders reflects the actual loss to the fuel companies of replacing their fuel from their wholesale suppliers. Review should also be granted because the imposition of restitution with a speculative factual basis is an issue of constitutional due process. RAP 13.4(b)(3). Finally, this case also presents an issue of substantial public interest, namely, whether retail price is a sufficient basis for awarding restitution for a loss in the amount of wholesale cost. RAP 13.4(b)(4).

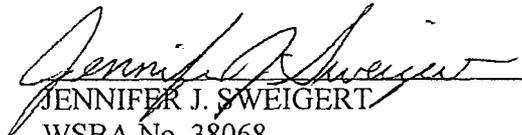
E. CONCLUSION

The Court of Appeals opinion conflicts with prior decisions of the Court of Appeals and presents significant questions of constitutional law and public interest. Ram, therefore, requests this Court grant review under RAP 13.4 (b)(2), (3), and (4).

DATED this 16th day of September, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

Appendix A

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COURT OF APPEALS
STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 73759-7-1
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
VINOD CHANDRA RAM,)	
)	
Appellant.)	FILED: July 25, 2016

APPELWICK, J. — Ram was convicted of conspiracy to commit identity theft in the first degree and 16 counts of identity theft in the first degree. The trial court ordered restitution to be paid to the 16 victims of Ram’s crimes. Ram argues that the trial court erred in setting the payees and amount of restitution. We affirm.

FACTS

Ram was convicted of conspiracy to commit identity theft and 16 counts of identity theft. The charges were related to his unauthorized use of 18 companies’ fuel account cards.¹

Companies with fleets of vehicles, such as trucking companies, often use fuel cards issued by fuel companies. These cards allow the companies’ drivers to

¹ Ram was initially charged with the identity theft of 18 victim companies. One count was dismissed when a company employee failed to testify at trial, and the jury acquitted Ram of another count.

purchase fuel at unattended "card lock" stations by swiping the card and entering a personal identification number (PIN). Two major fuel companies in Washington are Associated Petroleum Products (APP) and PetroCard.

The evidence at trial showed that Ram was the leader of a ring that used stolen and cloned fuel cards to purchase fuel at card lock stations. Ram's accomplices, Manny Chuks and Damiun Prasad, testified that they used fuel cards and PIN numbers that Ram had given them to activate the fuel pumps. The fuel cards Ram gave them sometimes looked like normal fuel cards with colors and writing on them, and sometimes the cards were completely blank. Ram and his accomplices gave the truck drivers a discount below the retail price of the fuel. These truck drivers paid Ram for the fuel using cash.

Employees from 17 companies testified at trial, and invoices from each company were admitted into evidence. Many of these invoices had been highlighted and marked by company employees to indicate which purchases were unauthorized.

The jury found Ram guilty of conspiracy to commit identity theft in the first degree and 16 counts of identity theft in the first degree.

The court later held a restitution hearing. The State requested restitution for all of the victim companies that Ram was convicted of defrauding. These companies were: Genesee Heating & Fuel Co., PetroCard for Knight Transport, Security Contractor Services, Jackson Oil Company, General Teamsters Local 174, James J. Williams Bulk Service Transport, Bartelson Transport, Graham Trucking Inc., General Transport, Port-Pass, Schnitzer Steel Industries, Metals

Express, Diamond Express Auto Transport, Quality Towing, C&C Logging, and Marc Nelson Oil Products Inc. for Freres Lumber Co. The State relied on the evidence admitted at trial.

Ram submitted the declaration of his investigator, Ray Ward. Ward stated that he spoke with PetroCard and APP representatives. Ward claimed that these representatives told him that Genesee Fuel & Heating Co., General Teamsters Local 174, James J. Williams Bulk Service Transport, Graham Trucking Inc., Port-Pass, Schnitzer Steel Industries, and Metals Express did not make any payments toward the fraudulent purchases. And, Ward asserted that the PetroCard and APP representatives told him that PetroCard and APP replaced the inventory and wrote off the loss for these transactions.

The court ultimately decided to enter the restitution order as the State requested. In reaching this decision, the court noted that it had reviewed Ward's declaration, which "raises some interesting issues." But, the court was persuaded that the State had met its burden.

Ram appeals the order of restitution.

DISCUSSION

Ram argues that the trial court erred in awarding restitution to the trucking companies in the amount of the retail price of the fuel. He contends that the fuel companies were the true victims, and their loss is not equal to the price they charged for the fuel.

The authority to impose restitution is purely statutory. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). When the type of restitution ordered is

authorized by statute, the trial court has discretion to impose restitution. Id. This court does not reverse a restitution order absent an abuse of discretion. Id.

RCW 9.94A.753(3) requires that a restitution order “shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury.” It specifies that restitution shall not include intangible losses. RCW 9.94A.753(3). And, it provides that “[t]he amount of restitution 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). For purposes of this statute, “victim” is defined as “any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.” RCW 9.94A.030(54).

A restitution order must be based on a causal relationship between the crime proven and the victim’s damages. State v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000). Once the fact of damage has been established, the amount need not be shown with mathematical certainty. State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984). Evidence supporting a restitution order is sufficient if it provides a reasonable basis for estimating loss. State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000).

Ram contends that Ward’s declaration proves that the defrauded trucking companies were not the proper victims for purposes of restitution. He argues that these companies did not suffer any losses as a result of Ram’s actions, so the restitution award is a windfall for them.

The State argues that Ram does not have standing to make this argument, because it asserts the rights of the fuel companies that may wish to be substituted as payees. The State compares this case to State v. Tobin, 132 Wn. App. 161, 130 P.3d 426 (2006, aff'd, 161 Wn.2d 517, 166 P.3d 1167 (2007)). Tobin pleaded guilty to charges related to his theft of geoducks and crab. 132 Wn. App. at 164-65. The court awarded restitution to be distributed first to the State and then allocated by agreement among the State and several Native American tribes. Id. at 166. The court adopted the State's calculations regarding the total amount of restitution. Id. at 165-66. On appeal, Tobin argued that the restitution order erroneously included geoducks that belonged to a Native American tribe, and to which the State had no right. Id. at 180. The court of appeals rejected this argument, because Tobin had no standing to assert the interests of the Native American tribes. Id.

Unlike Tobin, Ram is not merely asserting one victim's right to the proper allocation of the restitution among several victims. Ram asserts that the court identified the wrong payees and as a result the wrong measure of restitution. He is asserting his own rights, not the rights of the fuel companies. Therefore, we decline the State's invitation to decide this case on the basis of standing.

Here, the trucking companies were the direct victims of Ram's crimes. Ram used stolen and cloned fuel cards to purchase fuel. The true owners of those fuel cards were billed for the purchases. They incurred a financial liability to pay those

charges as a direct result of Ram's actions.² The State proved the amount of each company's financial liability at trial through the testimony of the companies' employees and their invoices. We hold that the trial court did not err in ordering restitution to be paid to the trucking companies.

Ram has the right to dispute the amount of the restitution order. Here, the fuel distributors had contractual relationships with the victims which protected their right to payment. Ram asserts that the fuel companies waived payment from the trucking companies. Therefore, he argues that the fuel companies are the proper payees and the loss should be valued based on their loss rather than the waived invoice prices.

In support of this argument, Ram cites cases from other jurisdictions. Because the power to order restitution is purely statutory, out-of-state cases are of little utility in interpreting Washington's restitution statutes.³

And, Ram's argument concerning the amount of restitution is premised on his theory that the proper payees were APP and PetroCard. Because we conclude that the trial court did not err in ordering restitution to be paid to the victim trucking

² Ram cites State v. Martinez, 78 Wn. App. 870, 899 P.2d 1302 (1995) for the proposition that indirect losses cannot support a restitution order. But, the Washington Supreme Court explicitly rejected this proposition in State v. Kinneman, 155 Wn.2d 272, 287, 119 P.3d 350 (2005). Moreover, this argument has no relevance here, where the trucking companies incurred direct losses because of Ram's actions. Ram suggests that the trucking companies did not actually incur the losses. We disagree.

³ Ram argues that this case is directly analogous to People v. Chappelone, 183 Cal. App. 4th 1159, 107 Cal. Rptr. 3d 895 (2010). But, the California restitution statute gives much more specific guidelines on how to calculate restitution when the victim has suffered economic loss. Compare Cal. Penal Code § 1202.4(f)(3)(A), with RCW 9.94A.753(3). We do not view Chappelone as persuasive authority.

companies rather than the fuel companies, Ram's argument about the amount of restitution becomes largely irrelevant.⁴

Additionally, the amount of restitution is a matter squarely within the discretion of the trial court. State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51 (1992). So long as the amount of damages is supported by substantial credible evidence at the restitution hearing, this court will not find an abuse of discretion. Id. During trial, the State produced invoices from all of the victim companies. These invoices showed the cost of the unauthorized fuel purchases. And, employees from all of the companies testified as to the amount of unauthorized purchases charged to their companies. These amounts were the retail amount of the fuel—the price the victim companies owed to the fuel companies for the purchases.

Ram essentially asks us to require the State to also prove that each company had not been reimbursed or released from their obligation to pay. To do so would be to add a requirement not found in the statute before restitution can be ordered for any theft case. Such an additional requirement is not in line with one of the purposes of the restitution statutes—to require the defendant to face the consequences of his or her crimes. See State v. Enstone, 137 Wn.2d 675, 680, 974 P.2d 828 (1999). Such changes are left to the legislature. Here, the trial court

⁴ We note that the restitution order does appear to list two fuel companies as payees rather than the direct victims: Mark Nelson Oil Products, Inc. for Freres Lumber Co. and PetroCard for Knight Transport.

provided that the restitution order could be amended to reflect a change in payee, if the State learns that any of the victim companies have been reimbursed.⁵

Based on this evidence, the trial court did not abuse its discretion in setting restitution in the retail amount of the fuel.

We affirm.

WE CONCUR:

Trickey, ACJ

Appelwick, J.

Cox, J.

⁵ This provision properly allows the trial court to modify the order if additional information comes to light. See RCW 9.94A.753(4) (stating that restitution may be modified as to amount, terms, and conditions while the offender remains under the court's jurisdiction); State v. Gray, 174 Wn.2d 920, 927, 935, 280 P.3d 1110 (2012) (holding that courts may modify the total amount of restitution after 180 days).

Appendix B

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

STATE OF WASHINGTON,)	
)	No. 73759-7-I
Respondent,)	
)	ORDER DENYING MOTION
v.)	FOR RECONSIDERATION
)	
VINOD CHANDRA RAM,)	
)	
Appellant.)	

The appellant, Vinod Ram, has filed a motion for reconsideration herein, and a majority of the panel has determined that the motion should be denied;

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 19th day of August, 2016.


Judge

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