

July 19, 2016

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>TERRY SIMMONS,<br><br>Appellant.  | No. 47962-1-II<br><br>Consolidated with:<br><br>No. 47969-9-II |
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JOANNE SIMMONS,<br><br>Appellant. | UNPUBLISHED OPINION  |

LEE, J. — In this consolidated appeal, Terry Simmons and his wife, Joanne Simmons, appeal the restitution amount the sentencing court imposed following their individual convictions for two counts of misdemeanor second degree animal cruelty. In their first appeal, the Simmonses argued the sentencing court erred by imposing restitution for costs associated with animal cruelty charges that were previously dismissed. In an unpublished opinion, this court agreed and remanded for modification of the restitution order. *See State v. Simmons*, 186 Wn. App. 1035, 2015 WL 1331688 at \*2 (2015) (*Simmons I*). On remand, the sentencing court doubled the amount of restitution recommended by the State. The Simmonses again appeal, this time arguing the

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sentencing court lacked the authority to double the restitution amount. We agree, and again reverse the restitution orders and remand to correct the restitution orders.

#### FACTS

The Simmonses each pleaded guilty to two counts of misdemeanor second degree animal cruelty. *Simmons I*, 2015 WL 1331688 at \*2. The sentencing court imposed restitution in the amount of \$20,589.42. *Id.* This court reversed the amount and remanded for modification of the restitution amount, holding restitution could not be imposed for dismissed charges. *Id.* at \*4. This court noted in *Simmons I* that the parties relied upon the wrong statute (former RCW 9.94A.753(5) (2003)) to grant the sentencing court authority to impose restitution. *Id.* This court directed the parties to former RCW 16.52.200(6) (2011) as the governing statute.<sup>1</sup> *Id.*

On remand, only the restitution amount was before the sentencing court. Other aspects of the Simmonses' sentence, including a court-imposed \$500.00 fine, were not remanded. The State recommended restitution in the amount of \$4,533.54. The sentencing court doubled that amount to \$9,067.08, stating the amount was "doubled, according to law." Clerk's Papers (CP) (Oct. 15, 2015) at 22. In its oral ruling, the sentencing court stated, "[P]ursuant to statute, I'm doubling it. This is exactly the kind of case where double restitution is appropriate." Report of Proceedings (RP) at 6. The Simmonses appeal.<sup>2</sup>

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<sup>1</sup> Our legislature amended both RCW 9.94A.753 and RCW 16.52.200, effective June 9, 2016. The amendments do not affect the subsections relevant to this appeal.

<sup>2</sup> The Simmonses have separate appellate counsel and filed separate opening briefs. Counsel for Joanne Simmons, however, incorporates Terry Simmons' counsel's argument and does not add additional assignments of error.

## ANALYSIS

The Simmonses contend the sentencing court did not have the authority to double the restitution amount on their animal cruelty convictions. Specifically, the Simmonses argue that since former RCW 16.52.200(6) does not authorize restitution doubling, the sentencing court lacked authority to double the amount of restitution in its order. We agree.

In general, we review a sentencing court's order of restitution for abuse of discretion. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). The court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or untenable reasons. *State v. Harris*, 181 Wn. App. 969, 973, 327 P.3d 1276 (2014), *review denied*, 181 Wn.2d 1031 (2015).

A sentencing court derives its authority to impose restitution from statutory law and may not exceed that statutory authority. *Griffith*, 164 Wn.2d at 965. Therefore, we review a sentencing court's authority to order restitution under a statute de novo. *State v. Oakley*, 158 Wn. App. 544, 552, 242 P.3d 886 (2010).

Former RCW 16.52.200(6) provides, "In addition to fines and court costs, the defendant . . . shall be liable for reasonable costs incurred pursuant to this chapter by law enforcement agencies, animal care and control agencies, or authorized private or public entities involved with the care of the animals." Reasonable costs include expenses of the investigation, and the animal's care, euthanization, or adoption.

The State argues that because second degree animal cruelty is a gross misdemeanor under RCW 16.52.207(3), RCW 9A.20.030(1) governs the imposition of restitution in this case and not former RCW 16.52.200(6). RCW 9A.20.030(1) states that "in lieu of imposing the fine authorized for the offense . . . [the sentencing court] may order the defendant to pay an amount, fixed by the

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court, not to exceed double the amount of the defendant's gain or victim's loss from the commission of a crime.”

Here, the sentencing court did not set forth its basis for doubling the restitution amount.<sup>3</sup> While the State directs us to RCW 9A.20.030(1), that statute applies to restitution amounts imposed “in lieu” of a fine. Here, the sentencing court imposed a fine at the original sentencing hearing, and this court did not reverse that portion of the sentence in *Simmons I*. RCW 9A.20.030(1) differentiates between a fine and doubling restitution as separate sentencing options. Here, the court imposed a \$500 fine. This court affirmed that portion of the *Simmons*'s sentence in *Simmons I* and did not remand the fine. Thus, because RCW 9A.20.030(1) clearly states that doubling restitution is an option when there is no fine, and because the sentencing court imposed a fine, RCW 9A.20.030(1) does not provide a legal basis for doubling restitution here.

The other statute that provides a basis for doubling restitution in Washington is former RCW 9.94A.753(5). But, this statute only applies to felonies. *State v. Deskins*, 180 Wn.2d 68, 78, 322 P.3d 780 (2014). And that is what we held in *Simmons I*. Accordingly, we find no basis for doubling the restitution amount based on former RCW 9.94A.753(5).

While “[r]estitution is an integral part of the Washington system of criminal justice,” and there is “a strong public policy to provide restitution whenever possible,” we still require statutory authority for the restitution ordered. *State v. Shannahan*, 69 Wn. App. 512, 517-18, 849 P.2d 1239 (1993). In this case, RCW 9A.20.030(1) does not grant the court authority to double restitution because the sentencing court imposed a fine and doubling restitution is authorized only in lieu of

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<sup>3</sup> Washington requires statutory authority to impose restitution, but there is no legal authority requiring sentencing court to include the statutory authority in the order.

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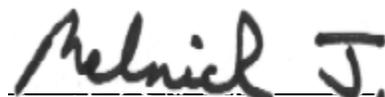
imposing a fine. And former RCW 9.94A.753(5) does not grant the court authority to double restitution because the offense in this case is not a felony. The only applicable statute, as noted by this court in *Simmons I*, is former RCW 16.52.200(6), which provides for the imposition of reasonable costs as restitution, which “include expenses of the investigation, and the animal’s care, euthanization, or adoption.” The plain language of this statute does not provide a legal basis for doubling.

A restitution order is void if the trial court exceeds its statutory authority under the restitution statute or fails to follow the statutory provisions. *State v. Johnson*, 96 Wn. App. 813, 815, 981 P.2d 25 (1999). Because former RCW 16.52.200(6) does not provide authority for doubling the restitution amount, the sentencing court’s order is void. Thus, we reverse the sentencing court’s restitution orders and remand for correction of restitution to the amount calculated before doubling.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
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Lee, P.J.

We concur:

  
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Melnick, J.

  
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Sutton, J.