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State v. Houser Appellant's Reply Brief Dckt. 39903

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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|------------------------|---|-------------------|
| STATE OF IDAHO, |) | |
| |) | |
| Plaintiff-Respondent, |) | NO. 39903 |
| |) | |
| v. |) | WASHINGTON COUNTY |
| |) | NO. CR 2011-1049 |
| DONALD LEONARD HOUSER, |) | |
| |) | REPLY BRIEF |
| Defendant-Appellant. |) | |

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

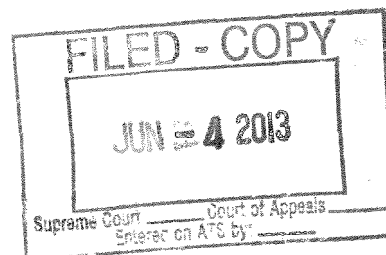
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STATEMENT OF THE CASE

Nature of the Case

Donald Houser appeals challenging the amount of restitution ordered by the district court. He contends that the district court improperly awarded restitution to his brother, Douglas "Doogie" Houser, for time he took off work unrelated to any of the proceedings in this case. The State responds that the district court could rightfully award restitution because Doogie spent time at the hearings, not just those hearings at which Doogie testified. Even accepting that assertion as true, it is still improper for the district court to award restitution for the time Doogie took off of work but was *not* attending a hearing in this case. Additionally, the State asserts that the district court did not award credit for the time taken on August 22, 2011, just as it did not award credit for August 24 and 25, 2011. That is factually inaccurate, as the district court did award the time for August 22, 2011. Since Doogie was requesting that award because he was emotionally shaken, that award was not authorized by the statute. Therefore, this Court should vacate the improper restitution awards, or, alternatively, remand this case for a new restitution hearing

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Houser's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Whether the district court exceeded its statutory authority when it ordered Mr. Houser to pay restitution for losses which were not the result of his criminal conduct, and for losses which were claimed for emotional distress.

ARGUMENT

The District Court Exceeded Its Statutory Authority When It Ordered Mr. Houser To Pay Restitution For Losses Which Were Not The Result Of His Criminal Conduct, And For Losses Which Were Claimed For Emotional Distress

A. Introduction

This Court should vacate the restitution award in this case because it exceeded the district court's statutory authority to award. The restitution statute is intentionally narrow in scope, allowing recovery for only those damages caused by the defendant's culpable actions and not every out of pocket expense the victim could potentially claim. In this case, the district court awarded restitution for entire days that Doogie Houser took off work so that he could attend court proceedings that lasted minutes. Those lost wages, apart from the time Doogie was in court, were not caused by Mr. Houser's culpable actions, and as such, not properly awarded under the restitution statute. As such, those awards should be vacated. Nevertheless, the State contends that these awards should be affirmed. In addition, the district court awarded restitution for the time Doogie took off work on August 22, 2011, which Doogie claimed he took off for emotional reasons. The State erroneously believes there was no award for that date. Since such an award is not authorized under the statute, it should be vacated as well.

B. There Is No Statutory Authority For The Damages Not Caused By Mr. Houser's Criminal Conduct, Notably, The Wages Lost Because Of Doogie's Optional Choice To Attend Hearings Rather Than Go To Work

Idaho's restitution statute only allows for recovery of those necessary expenses the victim endures to address the defendant's culpable conduct. *State v. Parker*, 143 Idaho 165, 168 (Ct. App. 2006). Such expenses may include those where the victim

took time to be in court or otherwise address the effects of the culpable actions. See, e.g., *State v. Russell*, 126 Idaho 38, 39 (Ct. App. 1994) (holding the time spent in court by a victim “who has been called to testify about the losses caused to him through criminal conduct of defendant” was recoverable as restitution); *State v. Doe*, 140 Idaho 873, 880-81 (Ct. App. 2004), *abrogated on other grounds* (affirming the magistrate’s award of restitution for “earnings lost by [the minor victim’s] parents for time they were off work to attend court proceedings or other matters *related to Doe’s case*”) (emphasis added); *State v. Olpin*, 140 Idaho 377, 379 (Ct. App. 2004) (allowing restitution for the time employees of the victim business “spent away from their normal duties *in order to determine the extent of Olpin’s theft*. . . . The victim’s expenses in sending its vice president to the restitution hearing are much [the same]”) (emphasis added). Even though such losses may be claimed as restitution, “[i]t does not follow, however, that restitution may be ordered . . . for *any* out-of-pocket expense that the victim would not have incurred but for the defendant’s crime.” *Parker*, 143 Idaho at 168. (emphasis in original). The difference between Doogie’s claims and those in *Russell*, *Doe*, and *Olpin*, is that there is no evidence that Doogie was doing anything related to Mr. Houser’s case after the hearings. (See generally R., Tr.) The State bears the burden to make a *prima facie* showing of loss. *State v. Card*, 146 Idaho 111, 114 (Ct. App. 2008). As there is no evidence in this regard, the State has failed to meet that burden, and therefore, the restitution award for the whole day on each of those occasions is inappropriate under the statute.

Nevertheless, the State claims that, even though Doogie was not subpoenaed to testify, nor did he give testimony at any of those hearings, the award of a full day’s

wages is still appropriate under the restitution statute. (See Resp. Br., pp.3-6.) Even if the State's premise – that Doogie should get restitution for the time he was in court but not testifying (see Resp. Br., p.5) – is accepted as true, its conclusion that he should get a full day's wage is still wrong.¹ To properly be awarded as restitution, the time off must still be used to address the defendant's culpable actions. See, e.g., *Russell*, 126 Idaho at 39; *Doe*, 140 Idaho at 880-81; *Olpin*, 140 Idaho at 379. While Doogie did testify that he was in court on most of the days in question,² the record is clear that those hearings did not last all day. The hearing on August 31, 2011, only took thirteen minutes. (R., p.21.) Doogie admitted he only spent an hour in the courtroom on that date. (Tr., Vol.1, p.177, L.24 - p.178, L.2.) The hearing on August 23, 2011, lasted seven minutes. (R., p.16.) The hearing on September 6, 2011, took only ten minutes. (R., pp.25-26.) By his own admission, Doogie only spent thirty minutes in the courtroom on that date. (Tr., Vol.1, p.178, Ls.7-14.) The hearing on September 12, 2011, lasted a total of seventeen minutes. (R., p.31.) The hearing on December 12, 2011, only took six minutes. (R., p.43.) And the hearing on January 23, 2012, took only eight minutes. (R., p.48.) Yet, even though the hearings took fifty-six *minutes*, Doogie received

¹ There is no evidence, as discussed in detail in the Appellant's Brief, that Doogie testified at any of the hearings in question. (See App. Br., pp.10-12.) As such, his attendance was optional and he chose to leave work to attend those hearings; while he may have a right to attend those hearings, he did not have to do so. The restitution statute does not provide for recovery for losses caused by the optional exercise of a right. See I.C. § 19-5304; *Parker*, 143 Idaho at 167-68; *State v. Waidelich*, 140 Idaho 622, 624 (Ct. App. 2004); *Card*, 146 Idaho at 114-17.

² He could not remember being in court on November 14, 2011, nor could he refute the assertion by defense counsel that he was not. (Tr., Vol.1, p.178, L.16 - p.179, L.4.) Since the State bears the burden to make a *prima facie* showing of loss, see *Card*, 146 Idaho at 114, it has failed to meet its burden in regard to November 14, 2011, and that award should be vacated.

restitution for sixty-four *hours* of work. (Augmentation – State’s Exhibit 1; Tr., Vol.1, p.188, Ls.1-3.) That is improper under the statute, and therefore, those awards should be vacated.

Even assuming that Doogie was there for more than just the hearing time itself, as the district court indicated he might have been (see Tr., p.188, Ls.3-5), his own admissions reveal that he was not spending the whole day waiting for a hearing to begin, but was rather spending an hour at most at the courthouse on these dates. (See, e.g., Tr., Vol.1, p.177, L.24 - p.178, L.2; Tr., Vol.1, p.178, Ls.7-14.) There is no evidence that Doogie spent the remainder of his day doing anything related to Mr. Houser’s culpable conduct. (See *generally* R., Trs.) As such, the State failed to make its *prima facie* showing of loss and those awards are improper under the restitution statute. *Card*, 146 Idaho at 114; *Parker*, 143 Idaho at 168. Therefore, those awards, not authorized by the statute, should be vacated.

C. There Is No Statutory Authority For The Damages For Emotional Distress

Awards for less tangible damages, such as emotional distress damages, are expressly excluded by the restitution statute. *State v. Straub*, 153 Idaho 882, 889 (2013). Nevertheless, Doogie requested restitution for the time he took off work on August 22, 2011, specifically, “Time Taken For Being Emotionally Shaken.” (Augmentation – State’s Exhibit 1.) The district court decided: “First item is August 22nd. [Doogie] testified that the reason he didn’t go into work that day was because the defendant had not been taken into custody. I find that reasonable given the circumstances of this case, so I will allow that 10 hours.” (Tr., Vol.1, p.187, Ls.6-10 (emphasis added).) The State appears to have misinterpreted that statement, since it

asserted "restitution was not ordered for those days," referring to August 22, 24, and 25, 2011. (Resp. Br., p.7.) The district court properly disallowed restitution for August 24 and 25, 2011, because they were claiming emotional damages. (Tr., Vol.1, p.187, Ls.17-22.) As such, all Mr. Houser challenged in this regard was the restitution for August 22, 2011, awarded because Doogie was "Emotionally Shaken." (See App. Br., p.15.) Such awards are expressly excluded under the statute, and so, should be vacated as well. *Straub*, 153 Idaho at 889.

CONCLUSION

Mr. Houser respectfully requests this Court vacate the restitution order in his case. Alternatively, he requests that his case be remanded to the district court for a new restitution hearing.

DATED this 4th day of June, 2013.



BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of June, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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BRD/eas