FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:	)	**No. 28855-2-III**
	)	
	)	**Division Three**
	)	
BRADY JOE LEWIS,	)	**UNPUBLISHED OPINION**
	)	
Petitioner.	)	
	)	

Kulik, J. — As part of a plea agreement, Brady Joe Lewis pleaded guilty to second degree murder in 2009 and the State dismissed other charges. But Mr. Lewis was ordered to pay restitution for the uncharged offenses. Nothing in the record shows that Mr. Lewis agreed to restitution for the uncharged offenses. Therefore, we grant Mr. Lewis's personal restraint petition and remand for vacation of the restitution related to the uncharged offenses.

FACTS

Brady Joe Lewis pleaded guilty to second degree murder on April 8, 2009. The State dismissed other charges as part of the plea agreement. The statement of defendant on plea of guilty agreed that the State would recommend a sentence as follows:

> Mid-Range Sentence of 347.5 months. Dismissal of other pending filed charges. Standard fines & costs. Restitution.

Br. of Resp't App. B at 4. Although the statement states that it incorporates a separate plea agreement, no such document exists.

At the sentencing hearing, the judge discussed the recommendation made by the State, noting that it included "standard fees and costs and restitution." Report of Proceedings (RP) at 9. The only mention made as to the details of the restitution was made by the prosecutor, who stated:

> The State is seeking the $500 victim assessment, $200 in court costs, $100 for the [deoxyribonucleic acid] collection fee and restitution. We have an agreed restitution schedule for $16,456.87. This is primarily burial costs as well as restitution regarding a property case that was added into this as negotiations.

RP at 19. The court accepted the State's recommendation and imposed standard fines and costs, which raised the total restitution cost to $17,256.87.

Once incarcerated, Mr. Lewis received a restitution schedule that showed the cost of restitution for the charge to which he pleaded guilty was $1,950.39. The remaining restitution in the amount of $14,506.48 related to the dismissed charges.

In February 2010, Mr. Lewis filed a letter with the Spokane County Superior Court. In that letter, he stated that he did not agree to this restitution and that his attorney

failed to inform him of the details of the restitution schedule. Moreover, he stated his belief that his attorney was ineffective for a variety of reasons, though the only one of legal significance relates to whether his attorney informed him of the nature of the restitution.

The letter was transferred to this court as a personal restraint petition pursuant to CrR 7.8(c). This court accepted the transfer, determined that Mr. Lewis raised nonfrivolous issues, and referred the matter to a panel for consideration pursuant to RAP 16.11(b).

When raising a nonconstitutional issue in a personal restraint petition, the petitioner must demonstrate that the claimed error "constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

To meet his initial burden, Mr. Lewis must state in his petition the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations which, if true, would entitle him to relief. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992). Mr. Lewis had to show that the factual allegations are based on more than speculation, conjecture, or inadmissible hearsay. *Id.* at 886.

Once the petitioner satisfies his or her initial burden, the State's response is examined; where the parties' materials establish the existence of a dispute as to a material issue of fact, a reference hearing is necessary to resolve the issue. *Id.* at 886-87.

Here, Mr. Lewis argues that the trial court erred in imposing restitution for the uncharged offenses because he did not agree to pay such restitution and was not aware of it until he received the schedule while in confinement. In its response, the State argues that Mr. Lewis was aware of the amount of restitution to be repaid, that it included the uncharged offenses, and that he entered into the agreement knowingly, voluntarily, and intelligently.

The requirement that a defendant agree to pay restitution for uncharged offenses has been construed to mean that he or she must expressly agree. *E.g.*, *State v. Dauenhauer*, 103 Wn. App. 373, 378, 12 P.3d 661 (2000). Thus, "restitution cannot be imposed based on a defendant's 'general scheme' or acts 'connected with' the crime charged, when those acts are not part of the charge." *Id.* When a sentencing court fails to abide by these principles, its restitution order is void. *State v. Duback*, 77 Wn. App. 330, 332, 891 P.2d 40 (1995).

Here, the parties agree that Mr. Lewis was assessed restitution for the uncharged offenses. But the statement on plea of guilty shows Mr. Lewis did not expressly agree to pay restitution for the uncharged offenses as part of the plea agreement. And there was no express agreement at the sentencing hearing.

Although the prosecutor did allude to a "property case"[1] that was part of the negotiation, there is no evidence as to what case or charge that was, and if it was simply one case, that statement would still fail to support an agreement to pay restitution for multiple uncharged offenses. Thus, the record supports Mr. Lewis's contention that he did not agree to pay restitution for the uncharged offenses and, thus, renders the restitution order void. *Duback*, 77 Wn. App. at 332.

Given our decision, we need not address Mr. Lewis's ineffective assistance of counsel claim.

The trial court exceeded its authority by ordering restitution on the uncharged offenses that Mr. Lewis did not expressly agree to pay as a condition of his plea agreement. We grant the personal restraint petition and remand for vacation of the restitution related to the uncharged offenses.

[1] RP at 19.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

_____ _____
Sweeney, J. Brown, J.