

No. 81525-9

SANDERS, J. (dissenting)—We are asked to determine whether the State violated RCW 9.94A.753¹ when it sought additional restitution from Robert Bustmante Gonzalez two-and-one-half years after the court originally ordered him to pay restitution. Gonzalez was convicted of assault and robbery in the first degree and ordered to pay \$21,306.45 in restitution to the crime victims' compensation program (CVCP) as part of his judgment and sentence. The restitution order was amended

¹ RCW 9.94A.753(1) provides:

When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause.

RCW 9.94A.753(4) provides:

For an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime.

RCW 9.94A.753(7) provides:

Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order.

once by stipulated order but, 907 days after Gonzalez was sentenced, the State sought an additional \$25,561.30 in restitution, which the trial court ordered.

Because the second restitution order violated both RCW 9.94A.753 and double jeopardy, I would reverse the trial court.

I. RCW 9.94A.753

We review interpretation of the restitution statute de novo. *State v. Edelman*, 97 Wn. App. 161, 165, 984 P.2d 421 (1999). A court derives its authority to order restitution from statute. RCW 9.94A.753(1); *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Here we must determine whether the State violated RCW 9.94A.753 when it sought the additional \$25,561.30 in restitution from Gonzalez.

To interpret a statute we first look to its plain language. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the plain language is subject to one interpretation only, our inquiry ends because plain language does not require construction. *Id.*; *State v. Thornton*, 119 Wn.2d 578, 580, 835 P.2d 216 (1992). If the statute remains subject to multiple interpretations after analyzing the plain language it is ambiguous. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). A statute is ambiguous if “susceptible to two or more reasonable interpretations,” but “a statute is not ambiguous merely because different interpretations are conceivable.” *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996). “If a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent

legislative intent to the contrary.” *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005) (citing *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998)).

RCW 9.94A.753(1) requires the court to determine restitution within 180 days of a judgment and sentence, except as provided in subsection (7). RCW 9.94A.753(7) allows the Department of Labor and Industries CVCP to petition the court within one year of judgment and sentence for entry of a restitution order, if the court has not already ordered restitution. Here the court ordered Gonzalez to pay restitution to the CVCP, so the CVCP could not petition under subsection (7) for restitution from Gonzalez.

RCW 9.94A.753(4) allows a restitution order to be modified as to amount while the offender is under the court’s jurisdiction; the offender remains under the court’s jurisdiction until the obligation is satisfied. The State asserts subsection (4) allows a court to modify the principal amount of restitution owed at any time the offender is under the court’s jurisdiction. The State argues the statute is plain and unambiguous, and it was merely modifying the restitution ordered when it sought to more than double Gonzalez’s original restitution order after two-and-one-half years.

Gonzalez, on the other hand, argues RCW 9.93A.753(4) is ambiguous, specifically the phrase “restitution may be modified as to amount.” He argues the phrase refers only to a change in the scheduled payment amount, not a change in the

principal amount. He contends the only change allowed under the statute is a procedural change, not a change in the principal amount owed.

The majority agrees with the State's argument. In doing so the majority strains to construe the statute in a light favorable to the State. Majority at 7-10. This difficulty of labor itself indicates RCW 9.94A.753's inherent ambiguity. The only thing clear about the statute is that it is susceptible to two reasonable interpretations. It is ambiguous whether the principal amount of restitution owed may be modified or whether only the scheduled payment amount may be modified. RCW 9.94A.753 is ambiguous, and the rule of lenity should favor Gonzalez's interpretation of the statute.

The majority's reading of RCW 9.94A.753(4) does not dovetail with the statutory limitations in subsections (1) and (7). It attempts to reach beyond the scope permitted by those subsections. A court must set restitution within 180 days unless good cause is shown under subsection (1), and the CVCP may petition the court within one year of a judgment and sentence for an entry of a restitution order, if the court has not already ordered restitution under subsection (7). Here the court set restitution within 180 days, but then the State sought a new restitution order two-and-one-half years later, arguing it had authority to do so under subsection (4). The State was essentially seeking a new restitution order, not merely modifying or amending the previous order. That violates the statute. The majority today allows for an endless stream of restitution orders under RCW 9.94A.753 with no finality whatsoever. This

is not the command of RCW 9.94A.753(1) and (7).

II. Double Jeopardy

As the majority correctly points out, both our state and federal constitutions protect against double jeopardy. Majority at 11. The Fifth Amendment to the United States Constitution requires that no person shall be “subject for the same offense to be twice put in jeopardy of life or limb.” Our state analog provides: “No person shall be . . . twice put in jeopardy for the same offense.” Const. art. I, § 9. To date our courts have interpreted the provisions identically. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Here the relevant protection afforded by both provisions is against multiple punishments for the same offense imposed in a single proceeding. *See Jones v. Thomas*, 491 U.S. 376, 381, 109 S. Ct. 2522, 105 L. Ed. 2d 322 (1989).

The majority correctly notes, “the interest the double jeopardy clause seeks to protect is ‘limited to ensuring that the total punishment did not exceed that authorized by the legislature.’” Majority at 14 (internal quotation marks omitted) (quoting *Jones* 491 U.S. at 381). “The purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments.” *Jones*, 491 U.S. at 381. Yet this is exactly what the majority permits. By allowing the State to effectively issue two separate restitution orders, the majority permits a punishment that exceeds the well-defined boundaries of RCW 9.94A.753(1).

No. 81525-9

As explained in section I above, the legislature authorized courts to order restitution within 180 days unless good cause is shown under subsection (1). RCW 9.94A.753(1). In the alternative, the CVCP may petition the court within one year of a judgment and sentence for an entry of a restitution order, if the court has not already ordered restitution under subsection (7). RCW 9.94A.753(7). All other readings of the statute are ambiguous and should be construed in favor of the defendant. Here the second restitution order (i.e., the punishment) exceeds that authorized by the legislature because the additional \$25,561.30 does not comply with RCW 9.94A.753(1) or (7). It violates double jeopardy.

We have also recognized double jeopardy prohibits multiple punishments for the same offense when the defendant has a legitimate expectation of finality. *State v. Hardesty*, 129 Wn.2d 303, 311, 915 P.2d 1080 (1996). “[T]he analytical touchstone for double jeopardy is the defendant’s legitimate expectation of finality in the sentence” *Id.*

The majority relies heavily on *United States v. DiFrancesco*, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980), for the proposition that a sentencing decision does not “enjoy the same level of finality as an acquittal.” Majority at 12-13. It reads *DiFrancesco* to hold “because federal law provided for appeal to the circuit court, and people are deemed to know the law, the defendant had no legitimate expectation of finality in his sentence.” *Id.* at 13.² But the majority omits an essential element of the

case; namely, that the government in *DiFrancesco* properly sought review. As we recognized in *Hardesty*:

In *DiFrancesco*, the Court held the defendant lacked an expectation of finality in the sentence because he was charged with knowledge the racketeering statute provided for review of the sentencing determination, *and the government had promptly sought review within the relevant statutory period.*

Hardesty, 129 Wn.2d at 312 (emphasis added) (citing *DiFrancesco*, 449 U.S. at 136-39). Here the State did not properly seek review of the restitution order. Instead, it waited 907 days—well beyond the bounds of RCW 9.94A.753(1) and (7). Thus *DiFrancesco* does not support the majority; instead it suggests Gonzalez’s expectation of finality was strengthened by the State’s failure to properly seek review.

The case law supporting *DiFrancesco* also fails to support the majority’s position. We have recognized a “defendant acquires a legitimate expectation of finality in a sentence, substantially or fully served, unless the defendant was on notice the sentence might be modified, due to either a pending appeal or the defendant’s own fraud in obtaining the erroneous sentence.” *Hardesty*, 129 Wn.2d at 312. We have looked approvingly on precedent suggesting “a defendant has an expectation of finality in the sentence *once she or he begins to serve it*, unless a review process is employed or the defendant ‘intentionally deceive[d] the sentencing authority or thwart[ed] the

² This analysis fails right off the bat because, due to the inherent ambiguity of RCW 9.94A.753(4), there is no way Gonzalez could be “deemed to know the law.” Moreover in *DiFrancesco* the federal law allowing the government to appeal was explicit, straightforward, and unambiguous, in stark contrast to the statute in question here. *See DiFrancesco*, 449 U.S. at 120 n.2 (quoting 18 U.S.C. § 3576).

sentencing process.”” *Id.* (emphasis added) (alterations in original) (quoting *United States v. Jones*, 722 F.2d 632, 638 (11th Cir. 1983)).

Gonzalez had substantially begun to repay the restitution owed under the first order. He began to serve his punishment. The State did not undertake a timely review process, and Gonzalez did not deceive the sentencing authority. *DiFrancesco* suggests Gonzalez’s expectation of finality after the first restitution order was legitimate. The improper second restitution, which was ordered 907 days after the first, violated double jeopardy.

Because the second restitution order for \$25,561.30 violated both Gonzalez's statutory and constitutional rights, I dissent.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

Justice Tom Chambers
