

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 81525-9
)	
v.)	
)	EN BANC
ROBERT BUSTMANTE GONZALEZ,)	
)	
Appellant.)	Filed February 18, 2010
_____)	

FAIRHURST, J. — Robert Bustmante Gonzalez seeks to reverse an order modifying the total amount of his restitution. He argues that the State violated RCW 9.94A.753, the restitution statute, when it sought to modify his restitution order more than two years after the order was originally entered. He also argues that imposing additional restitution constituted a second punishment in violation of double jeopardy. We reject both of Gonzalez’s arguments and affirm the order of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

On March 23, 2003, Gonzalez struck Denny Thoren in the face and robbed him of his truck. The blow crushed the right side of Thoren's face. Thoren was airlifted to Harborview Medical Center and underwent extensive reconstructive surgery. Even after surgery, Thoren lost most of the vision in his right eye.

A court found Gonzalez guilty of first degree assault and first degree robbery. On January 5, 2004, Gonzalez was sentenced to 288 months in prison and was ordered to pay \$21,306.45 in restitution to the crime victims' compensation program (CVCP). On June 28, 2004, the restitution order was amended to correct a clerical error, and the amount was reduced to \$20,886.60. Gonzalez appealed his conviction, and the Court of Appeals affirmed.

After restitution was ordered, Thoren continued to accrue medical bills which CVCP continued to pay. When Thoren's medical treatment was complete, CVCP paid Thoren \$22,624.99 for permanent partial disability due to his injuries. In addition to the payment for permanent partial disability, CVCP paid Thoren \$7,594.91 for time loss and \$16,228.00 for medical expenses. In total, CVCP paid Thoren \$46,447.90 for the injuries sustained on March 23, 2003.

On June 30, 2006, 907 days after sentencing, the State moved for an amended

order of restitution to add \$25,561.30 to the order of restitution. The total would then match the \$46,447.90 that CVCP had paid because of Thoren's injuries. Gonzalez challenged the motion, arguing that it could not be brought more than 180 days after sentencing and that it violated double jeopardy. The trial court granted the motion and amended the restitution order. Gonzalez appealed to the Court of Appeals, Division Three, and then moved to transfer his appeal to this court. We granted Gonzalez's motion to transfer.

II. ISSUES

- A. Did the amended restitution order violate RCW 9.94A.753 when it was entered more than 180 days after Gonzalez was sentenced?
- B. Did the amended restitution order violate double jeopardy?

III. ANALYSIS

- A. The amended restitution order did not violate RCW 9.94A.753 when it was entered more than 180 days after Gonzalez was sentenced

A court's authority to order restitution is derived solely from statute. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). The amended restitution order in this case is governed by RCW 9.94A.753.¹

¹RCW 9.94A.753 states:

(1) 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. The court shall then set a

minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(2) During the period of supervision, the community corrections officer may examine the offender to determine if there has been a change in circumstances that warrants an amendment of the monthly payment schedule. The community corrections officer may recommend a change to the schedule of payment and shall inform the court of the recommended change and the reasons for the change. The sentencing court may then reset the monthly minimum payments based on the report from the community corrections officer of the change in circumstances.

(3) Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction 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. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The 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.

(4) . . . 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. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The offender's compliance with the restitution shall be supervised by the department only during any period which the department is authorized to supervise the offender in the community under RCW 9.94A.728, 9.94A.501, or in which the offender is in confinement in a state correctional institution or a correctional facility pursuant to a transfer agreement with the department, and the department shall supervise the offender's compliance during any such period. The department is responsible for supervision of the offender only during confinement and authorized supervision and not during any subsequent period in which the offender remains under the court's jurisdiction. The county clerk is authorized to collect unpaid restitution at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations.

.....
(7) 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

Gonzalez argues that the amended restitution order was untimely because it was entered more than 180 days after entry of the judgment and sentence. RCW 9.94A.753(1) provides that the amount of restitution shall be set at the sentencing hearing or within 180 days unless the court continues the restitution hearing beyond the 180 days for good cause. RCW 9.94A.753(1) provides for an exception to this requirement that is found in RCW 9.94A.753(7). Under RCW 9.94A.753(7), if no restitution order has been entered and the victim is entitled to benefits through the CVCP, the Department of Labor and Industries has one year from sentencing to petition for entry of a restitution order. Gonzalez argues that the order amending the restitution amount on June 30, 2006, was untimely because it was entered beyond the 180 day period, the State did not seek a continuance for good cause, and the requirements of RCW 9.94A.753(7) were not met.

The State asserts that the amendment was proper under RCW 9.94A.753(4). RCW 9.94A.753(4) provides that “restitution may be modified as to amount, terms, and conditions.” Whether the amended order was appropriate in this case turns on

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. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

the meaning of the word “amount.” Gonzalez argues that the term “amount” is ambiguous because it may mean either the total amount of restitution or the amount of the monthly payment. He argues that we should construe “amount” to mean the monthly payment amount. The State argues that “amount” means the total amount of restitution.

We review questions of statutory interpretation de novo. *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003). When we interpret a statute, our goal is to carry out the legislature’s intent. *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). The first step in interpreting a statute is to examine its plain language. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Plain meaning “is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). If the statute is unambiguous after a review of the plain meaning, the court’s inquiry is at an end. *Armendariz*, 160 Wn.2d at 110. A statute is ambiguous when it is “susceptible to two or more reasonable interpretations,’ but ‘a statute is not ambiguous merely because different interpretations are conceivable.’” *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489,

498, 210 P.3d 308 (2009) (quoting *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)).

When a statutory term is undefined, the words of a statute are given their ordinary meaning, and the court may look to a dictionary for such meaning. *Id.* The noun “amount” means “the total number or quantity : aggregate,” “the sum of individuals,” and “a principal sum and the interest on it.” Webster’s Third New International Dictionary 72 (2002). These definitions indicate that “amount” generally signifies a total or aggregate quantity. This court’s prior use of the word “amount” within the meaning of the restitution statute supports its use as a synonym for total restitution owed. *See, e.g., State v. Hunsicker*, 129 Wn.2d 554, 919 P.2d 79 (1996) (employing the word “amount” in former RCW 9.94A.142, *recodified as* RCW 9.94A.753 (2001), to describe the principal amount of a restitution order).

In contrast, the word “terms” is defined as “propositions, limitations, or provisions stated or offered for the acceptance of another and determining . . . the nature and scope of the agreement.” Webster’s, *supra*, at 2358. The monthly payment schedule is better described as a proposition, limitation, or provision that affects the nature and scope of the agreement than as a total quantity. The dictionary definitions and prior usage in case law of the words “amount” and

“terms” demonstrate that “amount” signifies total restitution.

When we look to the other provisions, it becomes even more clear that “amount” cannot mean “monthly payment.” “[W]hen similar words are used in different parts of a statute, ‘the meaning is presumed to be the same throughout.’” *Welch v. Southland Corp.*, 134 Wn.2d 629, 636, 952 P.2d 162 (1998) (internal quotation marks omitted) (quoting *Cowles Publ’g Co. v. State Patrol*, 109 Wn.2d 712, 722, 748 P.2d 597 (1988)). RCW 9.94A.753(1) instructs the court to “determine the *amount* of restitution due.” (Emphasis added.) Later in the same section, the court is instructed to “set a minimum *monthly payment* that the offender is required to make towards the restitution that is ordered.” *Id.* (emphasis added). Here, the legislature clearly did not contemplate “amount” to mean the amount of the “monthly payment” because it separately orders the trial court to determine both.

In addition, RCW 9.94A.753(2) provides a specific mechanism for adjusting the monthly payment schedule. Under that provision, a community corrections officer may determine whether there has been a change in circumstance that merits an amendment of the monthly payment schedule. *Id.* If the officer recommends a change, the court may reset the monthly minimum payment schedule. *Id.* When read in combination with RCW 9.94A.753(2), the word “amount” in RCW

9.94A.753(4) cannot reasonably be interpreted as encompassing a monthly payment schedule.

Even if we were to find that the word “amount” is ambiguous, legislative intent is best effectuated by interpreting “amount” to mean total quantity. When the legislature enacted the restitution statute, it clearly stated its intent that victims be afforded legal protections at least as strong as those given criminal defendants. That is, victims of crime were to be “honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants.” Laws of 1981, ch. 145, § 1.

Legislative changes can also be considered when determining legislative intent. *State v. Mendoza*, 165 Wn.2d 913, 921, 205 P.3d 113 (2009). The legislature’s amendments to the restitution statute demonstrate that the legislature has consistently sought to ensure that victims of crimes are made whole after suffering losses caused by offenders and to increase offender accountability. It established the monthly minimum payment system, for example, as part of its effort to “hold[] offenders accountable to victims . . . for the assessed costs associated with their crimes” and provide “remedies for an individual or other entities to recoup or at least defray a portion of the loss associated with the costs of felonious

behavior.” Laws of 1989, ch. 252, § 1.

Thus, according to the statute’s plain language and legislative history, it is clear the statute is intended to ensure that defendants fulfill their responsibility to compensate victims for losses resulting from their crimes. The plain meaning of the modification provision of RCW 9.94A.753(4) advances this intent by allowing an amendment to restitution in order to compensate a victim for losses resulting from a defendant’s assault.

In contrast, not allowing an amendment would severely undermine the legislature’s intent. Restitution must “be based on . . . actual expenses incurred” for treatment or lost wages resulting from injury. RCW 9.94A.753(3). In other words, the State is not permitted to seek restitution for likely future medical costs or lost wages. If no amendment were available after 180 days, the victim would be limited to restitution for only the first six months of treatment after sentence. Disallowing amendments after 180 days would fundamentally undermine the purpose of the restitution statute where the victim is burdened with an ongoing serious injury.

Because of the plain language, legislative history, and legislative purpose of the restitution statute, we hold that RCW 9.94A.753(4) unambiguously allows the total amount of restitution to be modified “during any period of time the offender

remains under the court’s jurisdiction.” Gonzalez was under the court’s jurisdiction at the time the amended order was entered. *See* RCW 9.94A.753(4). Accordingly, we hold that the trial court did not violate RCW 9.94A.753 when it entered the amended order of restitution on June 30, 2006.

B. The amended restitution order did not violate double jeopardy

The Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.”² Similarly, the Washington State Constitution provides that “[n]o person shall be . . . twice put in jeopardy for the same offense.” Wash. Const. art. I, § 9. Washington’s double jeopardy clause “is given the same interpretation the Supreme Court gives to the Fifth Amendment.” *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). The double jeopardy clause of the Fifth Amendment has been held to provide three protections: first, it protects against a second prosecution for the same offense after an acquittal; second, it protects against a second prosecution for the same offense after a conviction; and third, it “protect[s] against ‘multiple punishments for the same offense’ imposed in a single proceeding.” *Jones v.*

²Here, the State asserts that restitution is civil in nature and, therefore, does not implicate double jeopardy. While we have not yet determined whether restitution is civil or criminal, we do not reach that issue today. Even if restitution were criminal, the amended order in this case does not violate double jeopardy.

Thomas, 491 U.S. 376, 381, 109 S. Ct. 2522, 105 L. Ed. 2d 322 (1989) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)). Gonzalez argues that the amended order of restitution constitutes multiple punishments in violation of the third protection against double jeopardy.

The Supreme Court addressed multiple punishments in *United States v. DiFrancesco*, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980). In *DiFrancesco*, a defendant was found to be a “dangerous special offender” under a federal statute and sentenced to two concurrent 10-year sentences. *Id.* at 124. However, due to a preexisting 9-year sentence, the 10-year sentence would have only added one year to the defendant’s time in federal prison. *Id.* at 125. A federal statute permitted the government to appeal the sentence to the Second Circuit Court of Appeals where the appellate court had the discretion to increase the sentence. *Id.* at 121 n.2. The government appealed and sought to increase the sentence. *Id.* at 125. On appeal, the Second Circuit concluded that the statute violated the prohibition on multiple punishments under the double jeopardy clause. *Id.* at 126. The Supreme Court reversed. *Id.* at 143.

The Court determined that sentencing decisions did not enjoy the same level of finality as an acquittal. *Id.* at 132. The Supreme Court described double jeopardy in general when it stated:

“The constitutional prohibition against ‘double jeopardy’ was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.”

Id. at 127-28 (alteration in original) (quoting *Green v. United States*, 355 U.S. 184, 187-88, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)). The Court recognized that while these considerations are sensible with regard to retrials on guilt, they “have no significant application to the . . . review [of] a sentence.” *Id.* at 136. The appeal at issue did not “approximate the ordeal of a trial on the basic issue of guilt or innocence.” *Id.* Furthermore, the Court concluded that 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.* “The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be.”

Id. at 137. The Court remanded the case for further determination. *Id.* at 143.

In later cases, the Court has clarified what double jeopardy requires with regard to multiple punishments. The Court has recognized that “in the multiple punishments context” 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.”” *Thomas*, 491 U.S. at 381 (quoting *United States v. Halper*, 490 U.S. 435, 450, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), *abrogated on other grounds by Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 149 L. Ed. 2d 450 (1997)). However, even if the sentence is within the range authorized by the legislature, double jeopardy may still pose a bar if the defendant has a legitimate expectation of finality in his or her sentence. *See Pennsylvania v. Goldhammer*, 474 U.S. 28, 30-31, 106 S. Ct. 353, 88 L. Ed. 2d 183 (1985); *accord State v. Hardesty*, 129 Wn.2d 303, 311, 915 P.2d 1080 (1996).

We recognized the legitimate expectation of finality standard in *Hardesty*. *Hardesty* was accused of fraud for failing to accurately relate his criminal history as part of a plea agreement. *Hardesty*, 129 Wn.2d at 305. After *Hardesty* had fully served his sentence, the prosecutor determined that *Hardesty* had a more extensive criminal history and moved to increase his sentence. *Id.* at 307. The trial court

granted the motion and extended Hardesty's sentence. *Id.* at 308. The Court of Appeals reversed on double jeopardy grounds. *Id.* at 309. On review, we determined that those who commit fraud on the court may be subject to a resentencing because they have no expectation of finality in their sentences. *Id.* at 315. We stated that a legitimate expectation of finality "may be influenced by many factors such as the completion of the sentence, the passage of time, the pendency of an appeal or review of the sentencing determination, or the defendant's misconduct in obtaining the sentence." *Id.* at 311.

Here, Gonzalez was on notice that his sentence could be modified. As explained above, the restitution statute allows for the total amount to be amended. RCW 9.94A.753(4). Because everyone is charged with knowing what the law is, Gonzalez is deemed to know that his restitution order was amendable. While it is conceivable that the passage of time alone could be sufficient to give rise to a legitimate expectation of finality, sufficient time has not passed in this case. At trial, Gonzalez was made aware of the nature and extent of Thoren's injuries. He knew that Thoren's injuries were severe and would take substantial treatment time. Therefore, Gonzalez could not have had a legitimate belief that the restitution order was final at the time the amended restitution order was entered.

Because Gonzalez did not have a legitimate expectation of finality in the restitution portion of his sentence, and because the restitution amount is consistent with RCW 9.94A.753(3), double jeopardy was not violated when the trial court entered the amended order of restitution.

IV. CONCLUSION

When an order of restitution is entered, the amount of restitution may be later modified by the court. RCW 9.94A.753(4). A modification that increases the amount of restitution does not violate double jeopardy unless the offender had a legitimate expectation in the finality of the restitution order. Here, restitution was properly amended under RCW 9.94A.753(4). The amendment did not constitute a violation of double jeopardy because the statute put Gonzalez on notice that restitution could be amended. Also, due to the nature and extent of Thoren's injuries, Gonzalez should have been aware that his restitution could have been modified even two and a half years after sentencing. The amended order of restitution is affirmed.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Chief Justice Barbara A. Madsen

Justice Susan Owens

Justice Charles W. Johnson

Justice Gerry L. Alexander

Justice James M. Johnson

Justice Debra L. Stephens
