

No. 79935-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

NICKOLAS ZYLSTRA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

BRIEF OF APPELLANT

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A. INTRODUCTION

Nickolas Zylstra entered an agreed order continuing a restitution hearing to 30 days after the issuance of the mandate on his appeal. Although the mandate issued March 29, 2019, the hearing did not take place until May 6, 2019, where the superior court entered an order of restitution. Because entry of the restitution order was untimely, this Court should reverse.

B. ASSIGNMENT OF ERROR

The trial court erred by entering an untimely order of restitution.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

RCW 9.94A.753 requires the trial court to “determine the amount of restitution” either at sentencing or within 180 days unless the hearing is continued for good cause. Here, the parties agreed to continue the restitution hearing to 30 days after issuance of the mandate in Mr. Zylstra’s then-pending appeal. However, the restitution hearing did not occur until more than 30 days after the mandate issued. Did the trial court err in entering the restitution order after the 30 days had elapsed?

D. STATEMENT OF THE CASE

On June 29, 2017, Mr. Zylstra entered an agreed order continuing his restitution hearing to 30 days after issuance of the mandate in his then-pending appeal. RP 3-7; CP 19. Although there was no dispute regarding the amount of restitution potentially owed, the parties disagreed about whether the trial court retained jurisdiction to enter a restitution order while the underlying case was on appeal. RP 3-5, 13. In an abundance of caution, the trial court entered the order continuing the hearing, finding “the law is kind of silent” on whether the superior court retained jurisdiction to enter a restitution order while a case was pending on appeal. RP 6; CP 19. The order states:

Speedy restitution is waive [sic] for the period to 30 day [sic] past mandate from the Court of Appeals.

CP 19.

The Court of Appeals issued a mandate in Mr. Zylstra’s case on March 29, 2019, following denial of petition for review. CP 20. Although the 30-day timeline would have elapsed on April 29, 2019, the State did not seek a restitution hearing until May 6, 38 days after the mandate issued. The State did not dispute the date of the mandate, but rather urged the court to find the 30-day period began when the

State received the mandate rather than when it was issued. RP 14. The State claimed to have received the mandate on April 19, 2019.¹ RP 14-15. The State also argued the mandate took effect when it was filed with the Superior Court. RP 15-16.

The court agreed with the State and entered an order of restitution. RP 16; CP 31-32. Mr. Zylstra appeals.

E. ARGUMENT

The trial court erred when it entered an order of restitution more than 30 days after the issuance of the mandate in Mr. Zylstra's underlying appeal.

A mandate is “the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision termination review.” RAP 12.5(a). Where a timely petition for review has been filed and denied by the Supreme Court, the Court of Appeals will issue a mandate upon denial of the petition for review. RAP 12.5(b)(3).

A mandate becomes effective once issued, and renders a Court of Appeals decision final. *See* RAP 12.7(a), *see also State v. Kilgore*, 141 Wn. App. 817, 826, 172 P.3d 373 (2007) (holding judgment and

¹ The Court may take judicial notice the mandate was served on all parties on April 9, 2019. *See* ER 201. The service email is attached as Appendix A.

sentence became final when Supreme Court issued its mandate from direct appeal). The exact date a mandate issues is important not only because it finalizes an appeal, but also because it triggers other significant time limits, such as the time for a collateral attack. *See* RCW 10.73.090(3)(b) (one year time limit for collateral attack begins “[t]he date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction”).

The Court of Appeals issued its mandate in Mr. Zylstra’s underlying appeal on March 29, 2019. CP 20. In addition to finalizing Mr. Zylstra’s direct appeal, the mandate also triggered a 30-day time limit for entry of a restitution order, pursuant to the parties’s agreement.

Typically when restitution is at issue, the trial court must determine the amount of restitution at sentencing or within 180 days of sentencing. RCW 9.94A.753(1). The court may continue the hearing outside this time limit if it finds good cause. *Id.* The State must request a continuance before the 180-day time limit expires. *State v. Chipman*, 176 Wn. App. 615, 619, 309 P.3d 669 (2013).

The parties in this case requested a continuance on June 29, 2017, more than month before the original 180-day time limit for the restitution hearing would have expired. RP 3. The parties agreed to a

new expiration date 30 days after issuance of the mandate. CP 19; RP 6. The court's order explicitly and unambiguously states the time limit for the restitution order expired "30 day [sic] past mandate from the Court of Appeals." CP 19.

Despite this explicit and unambiguous time limit, the State did not seek a restitution hearing until May 6, 2019, 38 days after the mandate issued. RP 11-17; CP 31-32. The State argued the 30-day time limit did not begin until the State received the mandate, or when the mandate was filed with the Superior Court. RP 15-16.

This argument is untenable. In no other circumstance does a mandate become effective or trigger a time limit only when the State receives a copy of the mandate or when it is filed with the Superior Court. *See, e.g., Matter of House*, 9 Wn.App.2d 1071, *1 (2019) (personal restraint petition untimely where defendant argues time limit triggered when mandate filed with trial court because "[the Court of Appeals], not the trial court, 'issues' the mandate").² The date a mandate is issued is the very date an appellate court decision becomes final, and it is that date which triggers the time limit for a collateral attack. *See Kilgore*, 141 Wn. App. at 826; RCW 10.73.090(3)(b).

² *House* is unpublished. Mr. Zylstra cites it as persuasive authority pursuant to GR 14.1(a).

There is no logical reason why the 30-day restitution time limit ordered by the court in this case would be triggered by anything other than the exact date the mandate issued. Indeed, the plain language of the order makes clear the State had until 30 days after the mandate to seek a restitution order. CP 19. The State simply failed to do so within the time limit.

Because the trial court entered the order of restitution more than 30 days after this Court issued its mandate in Mr. Zylstra's appeal, this Court should reverse the restitution order.

F. CONCLUSION

For the reasons stated above, Mr. Zylstra asks this Court to reverse the order of restitution.

DATED this 25th day of November 2019.

Respectfully submitted,

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