

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2013-000548

THE STATE,RESPONDENT

v.

DONKEVIS DURELL JONES,APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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JAN 06 2015

SC Court of Appeals

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court's decision to conduct a restitution hearing pursuant to section 17-25-322 of the S.C. Code complied with Appellant's due process rights despite a fifteen-month delay where: (1) the sentencing judge ordered that while restitution was "deferred," a hearing was "required", (2) Appellant's term of probation had not yet expired, and (3) Appellant suffered no prejudice from the delay.
2. Whether the circuit court properly awarded restitution for pecuniary loss for property damaged during the commission of the crimes where there was an evidentiary basis for the amount of restitution ordered.
3. Whether the circuit court properly awarded restitution in the reduced amount requested by the victims after duly considering all relevant factors including Appellant's ability to pay.

STATEMENT OF THE CASE

Donkevis Durell Jones,¹ Appellant, was indicted at the August 2011 term of the grand jury for Greenwood County for breaking into a motor vehicle (2011-GS-24-1608); larceny (2011-GS-24-1609); burglary (2011-GS-24-1610); grand larceny (2011-GS-24-1611); malicious injury to real property (2011-GS-24-1612); and two counts of first-degree assault and battery (2011-GS-24-1613 & -1614). He was represented by Assistant Public Defender Janna Nelson of the Eighth Circuit Public Defender's Office. The State was represented by Assistant Solicitor Andrew M. Hodges of the Eighth Circuit Solicitor's Office. On September 1, 2011, Appellant appeared at the Greenwood County Courthouse before the Honorable Eugene C. Griffith, Jr., and pled guilty to petit larceny (2011-1609), second-degree burglary (violent) (2011-1610); and two counts of first-degree assault and battery (2011-1613 & -1614). He was sentenced, pursuant to the Youthful Offender Act (YOA), to concurrent indeterminate terms of imprisonment not to exceed six (6) years for the two counts of first-degree assault and battery, with a recommendation of shock incarceration; one hundred thirty-four (134) days' concurrent imprisonment for second-degree burglary, and thirty (30) days' concurrent imprisonment for petit larceny. As a special condition of the sentence, Judge Griffith ordered that "restitution" be "deferred" and noted "hearing required." (R.p.26; p.46, line 21-p.48, line 5; p. 8-25). In an order dated October 26, 2011, Judge Griffith amended the sentence on the two first-degree assault and battery convictions to six (6) years' imprisonment suspended upon the service of fifteen (15) months' imprisonment and thirty-six (36)

¹ Appellant's first name is spelled "Donkevis" on the Notice of Appeal and in the Initial Brief of Appellant, however, his name is spelled "Donkevis" on the arrest warrants, indictments and sentencing sheets

months' probation, with probation to terminate upon payment of financial obligations, including any restitution. (R.p.50).

On December 18, 2012, the State called Appellant's case before the Honorable Frank R. Addy, Jr., for a restitution hearing. Appellant was present and was again represented by Ms. Nelson while the State was again represented by Mr. Hodges. (R.p.52). On December 21, 2012, Judge Addy issued a six-page Restitution Order requiring that Appellant pay restitution to the victim, Brad Boggs, in the amount of six thousand nine hundred fifty-nine dollars and thirty-seven cents (\$6,959.37). (R.p 105) On December 31, 2012, Appellant timely filed a "Motion to Reconsider Restitution Order." (R.p.111). On February 23, 2013, Judge Addy issued an order denying the motion. (R.p.115). Appellant timely filed a notice of intent to appeal the restitution order and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Appellant was indicted for seven separate crimes, all of which stemmed from the April 22, 2011 burglary of Lakelands Cycles in Greenwood County and Appellant's efforts to flee the scene when law enforcement officers arrived to investigate. Appellant pled guilty to four of the seven indicted offenses and the State nol prossed the other three in consideration of the plea. (R.p.8-25). At the guilty plea proceeding, the solicitor advised the court of the terms of the plea and noted there was an outstanding matter of restitution in the case. He explained: "The State had asked for restitution of \$20,000 plus dollars. The defense has declined to agree to that, so we will need to schedule a restitution hearing with regard to the restitution to a later day." (R.p.28, lines 3-15). Appellant was then sworn-in and was asked a series of questions by the court. He testified he understood his due process rights under the constitution and wished to waive those rights and plead guilty. (R p.31, line 4-p.32, line 17). The solicitor then summarized the facts of the case. Appellant clarified an issue regarding a gun used in the burglary, but otherwise agreed the facts as recited were accurate. (R.p.32, line 21-p.34, line 16). He testified no one promised him anything or forced him to plead guilty, admitted he was in fact guilty of the crimes, and testified he was pleading guilty freely and voluntarily. (R p.34, line 17-p.35, line 18). The court found Appellant's decision to plead guilty was made freely, knowingly, and intelligently with the advice of competent counsel, and accepted the plea before asking to hear from Appellant's counsel in mitigation. (R.p.36, lines 9-17).

Ms. Nelson asked the court to impose some sort of probationary sentence. Appellant's grandmother echoed this request and explained it would allow Appellant to complete his education and "get a job to pay back restitution." Ms. Nelson

acknowledged restitution was appropriate in the case but said she had been surprised when presented with the proposed \$22,000 restitution order. She asked that the court hold restitution open “for a limited amount of time” and that Appellant be given a full five years of probation to make his monthly restitution payments as low as possible. After hearing from one of the officers who was a victim of the assault and battery, the court recessed for the day to consider whether to impose a YOA sentence. (R.p.36, line 18-p 41, line 20). The following day one of the burglary victims, Mr. Boggs, asked the court to impose the maximum sentence. The court explained the conflicting interests between sentencing a defendant to imprisonment as a punishment versus placing him on supervision to encourage the payment of restitution and noted restitution would be determined during a full hearing at a later date. The judge said he was not going to sign the proposed restitution order because a hearing was required and that hopefully the restitution hearing could be scheduled during the October term, subject to everybody’s availability. (R.p.41, line 21-p.46, line 25). The court then imposed a sentence. (R.p.47, lines 1-25). As a special condition of the sentence, Judge Griffith ordered that restitution be “deferred” and wrote “hearing required.” (R.p.22-25).

On December 18, 2012, the State called the matter before the Honorable Frank R. Addy, Jr., for a restitution hearing. Appellant was present and was again represented by Ms. Nelson while the State was again represented by Mr Hodges. (R.p.52). First, the parties explained that Judge Griffith had retained jurisdiction over the sentence and that due to a complication with the YOA portions of that sentence, Judge Griffith amended it by changing the YOA sentences to adult sentences. (R.p.55, line 24-p.56, line 14). Specifically, Judge Griffith amended the sentences on the two first-degree assault and

battery charges to six (6) years' imprisonment suspended upon the service of fifteen (15) months' imprisonment and thirty-six (36) months' probation (R.p.50). Next, Appellant made a motion asking the court to decline the State's request to conduct a restitution hearing, arguing it should not be held for two reasons. First, Appellant argued there had been an unreasonable delay which violated his rights to due process and fairness. He contended he was prejudiced by the delay because, despite having begun probation in December of 2011, he had been unable to begin paying restitution during his probation because the amount had not been set by the court. Second, Appellant argued the restitution statute itself was unconstitutional because it does not allow for a jury trial to determine the amount of restitution. (R.p.56, line 15-p 61, line 14). Judge Addy denied Appellant's request, finding Appellant had not suffered any prejudice from a factual standpoint and had not been denied due process. Judge Addy also found Appellant had no right to a jury trial on the issue of restitution and asked the State to call its first witness (R.p.63, line 23-p.66, line 14).

The State called one of the two owners of the business involved in the crimes, Michelle Boggs, to the stand. She explained she and her husband were now seeking only \$6,959.37 in restitution rather than the almost \$23,000 originally claimed because they had reviewed the original itemized list and determined certain items were not actually damaged, and because they were able to mitigate the damages for other items by repairing them rather than totaling them out. With reference to a prepared list of fifteen specific items, Mrs. Boggs then described the pecuniary damages suffered during the crimes. The State introduced photos, receipts and invoices in support of several of the fifteen items. Mrs. Boggs testified she believed \$6,959.37 was a conservative estimate in

terms of damages. (R.p.69, line 19-p.79, line 25). On cross-examination Mrs Boggs testified they had no insurance on the business and further explained the damage that had been caused to the 1971 Chevrolet truck when the burglars attempted to steal it during the burglary. (R.p.80, line 10-p.85, line 7). Appellant then testified on his own behalf in regard to his wages, child support obligations, probation fees, and fines stemming from his convictions. (R.p.85, line 10-p.91, line 22). On cross-examination Appellant mentioned that this was not the first time he had committed a burglary. (R.p.92, lines 3-7).

At the conclusion of the testimony, Ms. Nelson asked the court to reduce the restitution below the amount requested by the victims based on Appellant's ability to pay and the now shortened term of his remaining probation. She also argued he should not be held liable for damage to the 1971 truck because he had not been convicted of any crime specifically related to that truck. Finally, Ms. Nelson asked the court to hold Appellant responsible for only one-third of the restitution amount rather than holding him jointly and severally with his two co-defendants. (R.p.94, line 4-p.95, line 17). Judge Addy announced he had read the requirements of Section 17-25-322 of the South Carolina Code and proceeded to make detailed findings pursuant to those requirements before ordering Appellant to pay the full amount of restitution sought by the victims of \$6,959.37 (R p.98, line 3-p.103, line 11).

On December 21, 2012, Judge Addy issued a six-page Restitution Order memorializing his findings of fact and conclusions of law. He required that Appellant pay restitution to the victim, Brad Boggs, in the amount of six thousand nine hundred and fifty-nine dollars and thirty-seven cents (\$6,959.37). (R.p.105). On December 31, 2012,

Appellant timely filed a “Motion to Reconsider Restitution Order.” (R.p.111). On February 23, 2013, Judge Addy issued a “Restitution Order” denying the motion. (R.p.115).

ARGUMENT

I.

The circuit court’s decision to conduct a restitution hearing pursuant to section 17-25-322 of the S.C. Code did not violate Appellant’s due process rights despite a fifteen month delay where: (1) the sentencing judge ordered that while restitution was “deferred,” a hearing was “required”; (2) Appellant’s term of probation had not yet expired; and (3) Appellant suffered no prejudice from the delay.

Appellant argues the delay of over fifteen (15) months between imposition of the original sentence and the restitution hearing “should be considered an extreme delay in resolution of the case that unduly prejudiced [Appellant], in violation of his due process rights ” He claims he suffered prejudice because he “lost the opportunity to pay toward restitution” during a delay which was not of his own making and was caused entirely by the State by “not taking steps to seek restitution for the victims in an appropriate time frame.” Appellant then references a Federal statute² regarding the timeliness of restitution hearings and argues the time frames in that statute should serve as a guideline for what constitutes a permissible amount of time for a restitution issue to remain outstanding in South Carolina. The State submits Appellant’s arguments are wholly without merit and should be dismissed on several grounds.

Initially, to the extent Appellant is arguing his due process rights were violated, the State submits the argument is not preserved for review because Appellant affirmatively waived all constitutional due process rights as part of his guilty plea. (R. p.31, line 4-p.32, line 17). The restitution hearing is part of the sentencing proceeding. State v. Gullede, 326 S C 220, 228, 487 S E.2d 590, 594 (1997). Likewise, the sentencing proceeding is part-and-parcel of the guilty plea proceeding. South Carolina

² 18 U S C § 3664(d)(5)

does not recognize conditional guilty pleas. State v. Rice, 401 S.C. 330, 331, 737 S.E.2d 485, 485 (2013); State v. Truesdale, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982). Indeed, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights Rice, 401 S.C. at 331-32, 737 S.E.2d at 485-86. Appellant's attempt to challenge the imposition of restitution as a violation of his constitutional rights after he knowingly and voluntarily waived those rights and entered a guilty plea is akin to offering a conditional guilty plea. Thus, this argument should be denied and dismissed as unpreserved. To the extent this Court disagrees, the State submits Appellant's argument is nevertheless without merit.

The South Carolina Code provides in part that:

When a defendant is convicted of a crime which has resulted in pecuniary damages or loss to a victim, the court must hold a hearing to determine the amount of restitution due the victim or victims of the defendant's criminal acts. The restitution hearings must be held unless the defendant in open court agrees to the amount due, and in addition to any other sentence which it may impose, the court shall order the defendant make restitution or compensate the victim for any pecuniary damages.

S.C. Code Ann. § 17-25-322(A) (Supp. 2010) (emphasis added). Here, the circuit court recognized that a restitution hearing was mandatory because the defendant did not agree to the amount due. The court appropriately ordered such a hearing was "required" at some point in the future. Both Appellant and the State agreed a hearing must be held, and although Appellant asked that the hearing be conducted in a "limited amount of time," the order does not reflect any such time limit. Thus, as long as the circuit court retained jurisdiction over restitution, Judge Addy committed no error in conducting the restitution hearing, regardless of the length of the delay. The circuit court acted in

compliance with both the statute and Judge Griffith's order. The decision to conduct the restitution hearing should be affirmed.

Although the statutory provision sets no time limit in which the restitution hearing should be held, in a parallel scenario this Court has held the family court retains jurisdiction to order restitution for a juvenile delinquent as long as the juvenile's term of probation has not yet expired. In re Terrence M., 368 S.C. 276, 279, 628 S.E.2d 295, 296-97 (Ct. App. 2006). In the case of an adult defendant, the Code indicates the circuit court likewise retains jurisdiction to order restitution until the defendant's sentence and probation or parole expires. See S C. Code Ann. § 17-25-323(A) (Supp. 2010) ("The trial court retains jurisdiction of the case for the purpose of modifying the manner in which court-ordered payments are made until paid in full, or until the defendant's active sentence and probation or parole expires."). Where the circuit court retained jurisdiction, the fifteen-month delay in Appellant's case was not extreme, particularly in comparison to the delay in Terrance M. Terrance M. was adjudicated delinquent on November 21, 2002, and his restitution hearing was not held until January 20, 2005, twenty-six (26) months later, nearly a year longer than the delay in Appellant's case. The circuit court had jurisdiction to conduct Appellant's restitution hearing because Appellant's sentence, including his active sentence and probation, had not expired, and Appellant was afforded due process at that hearing. Therefore, the decision to conduct the restitution hearing should be affirmed.

Additionally, the claim that Appellant was somehow prejudiced by the delay because he was unable to make restitution payments while waiting for the restitution hearing is absurd. Appellant knew he would owe restitution for the victims' pecuniary

damages when he entered his plea and he knew the State was originally seeking over \$22,000 dollars in restitution. Absolutely nothing prevented Appellant from taking steps to set aside or save money during the delay in anticipation of this restitution obligation, regardless of whether a total restitution amount had been determined or a monthly payment schedule imposed. To suggest, much less argue, that Appellant has suffered some wrong or prejudice by the delay in holding his restitution hearing offends the very nature of restitution and the primary goal of making an innocent victim whole. See Dolan v. United States, 560 U.S. 605, 611 (2010) (holding that a sentencing court which misses the federal statute’s 90-day deadline for conducting a restitution hearing, even through its own fault or the fault of the Government, does not deprive that court of the power to order restitution) In Dolan, the United States Supreme Court listed six considerations supporting its holding including that: (1) “the statute seeks speed primarily to help the victims of crime and only secondarily to help the defendant”; (2) “to read the statute as depriving the sentencing court of the power to order restitution would harm those – the victims of crime – who likely bear no responsibility for the deadline’s being missed and whom the statute also seeks to benefit”; and (3) “the defendant normally can mitigate any harm that a missed deadline might cause-at least if, as here, he obtains the relevant information regarding the restitution amount before the 90-day deadline expires.” Dolan, 560 U.S. at 611-16. Appellant has failed to demonstrate any actual prejudice, such as a delay that deprived him of evidence to rebut the claimed restitution amount. Thus, the only interested parties to suffer from the delay were the victims, Mr. and Mrs. Boggs. Their suffering should not be extended by creating an arbitrary time

frame for conducting a restitution hearing in South Carolina where the circuit court still clearly had jurisdiction to act.

Finally, to the extent this Court finds prejudicial error in either the timing or the manner in which restitution was imposed, the State submits any grant of relief must include a new sentencing proceeding, with reconsideration of both the imposition of the sentence and the imposition of restitution.

II.

The circuit court properly awarded restitution for pecuniary loss for property damaged during the commission of the crimes where there was an evidentiary basis for the amount of restitution ordered.

Appellant argues Judge Addy did not have the power to award restitution for alleged pecuniary damages or losses that bear no connection whatsoever to the crimes to which he pled guilty. He contends that because neither he nor his co-defendants were actually charged with any criminal activity related to the 1971 Chevrolet truck in the parking lot of the business, the circuit court could not order restitution for damages allegedly caused to that truck during the commission of the burglary. Appellant also argues there was no evidence presented by the State to prove that the damages to some of the recovered property did not exist prior to the burglary and that therefore, he should not be liable for those damages. The State disagrees and submits Appellant's arguments are without merit.

Even before the 1993 enactment of Section 17-25-322 of the South Carolina Code in 1993, our Supreme Court recognized that the court of general sessions may order reparation to a victim, but in doing so it must hold a hearing and determine the actual

amount of damage or loss, and there must be a factual basis for the determination. State v. Fussell, 299 S.C. 162, 163, 383 S.E.2d 1, 1 (1989). The Code now mandates that the court hold a hearing to determine the amount of restitution due the victim or victims of a defendant's criminal acts S.C. Code Ann. § 17-25-322(A) (Supp. 2010). "Restitution' means payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender's criminal conduct" and includes 'specific damages and economic losses.'" S.C. Code Ann. § 16-3-1110(12)(a) (Supp. 2010). The trial judge is allowed broad discretion in conducting the restitution hearing. State v. Gullledge, 326 S.C. 220, 487 S.E.2d 590, 594-95 (1997). However, the defendant must receive notice of the hearing, and during the hearing, the defendant must be given the opportunity to be heard and to cross-examine witnesses. Id. Further, the evidence admitted during the restitution hearing must be reliable and trustworthy. Id. The restitution hearing is part of the sentencing proceeding. Id. A judge had discretion to impose any sentence which is within the limits prescribed by statute. State v. Bynes, 304 S.C. 62, 64, 404 S.E.2d 126, 127 (Ct. App. 1991). Absent a positive rule limiting this discretion, a judge acts properly in considering restitution for unindicted offenses as a condition of probation as long as the defendant knowingly consents to the judge's consideration of those crimes and there is some evidentiary basis for the amount of restitution ordered. Id.

In the instant case, the circuit court considered and ordered restitution for specific damages associated with the crimes for which Appellant pled guilty. Any economic damage suffered by the victim as a result of those crimes meets the statutory definition for restitution. There is no requirement that each item of personal property damaged in a crime must be charged and indicted as a separate offense. Indeed, such a requirement

would be unworkable. The damage to the 1971 truck was simply not restitution for an unindicted offense. However, even if it is characterized as such, Appellant implicitly consented to the judge considering that unindicted crime when he pled guilty to the remaining offenses.

Here, the victim testified the truck was damaged when the burglars tried to steal it during the burglary. She also testified the damage to the recovered items was incurred during the burglary. The circuit court found her testimony credible. This testimony provided a sufficient evidentiary basis to support the award of restitution. Because the evidentiary threshold was met, the circuit court did not abuse its discretion and the restitution should be affirmed.

III.

The circuit court properly awarded restitution in the reduced amount requested by the victims after duly considering all relevant factors including Appellant's ability to pay.

Appellant argues that in ordering the full amount of restitution claimed, the circuit court failed to properly consider his limited income and the fact that his expenses consumed the majority of that income. To the contrary, the court specifically considered these factors, along with others, prior to imposing a restitution amount that was less than one-third of the amount originally requested by the victims.

The South Carolina Code provides:

(B) In determining the manner, method, or amount of restitution to be ordered, the court may take into consideration the following:

(1) the financial resources of the defendant and the victim and the burden that the manner or method of restitution will impose upon the victim or the defendant;

(2) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(3) the anticipated rehabilitative effect on the defendant regarding the manner of restitution or the method of payment;

(4) any burden or hardship upon the victim as a direct or indirect result of the defendant's criminal acts;

(5) the mental, physical, and financial well-being of the victim.

S.C. Code Ann. § 17-25-322(B) (Supp. 2010). The restitution hearing is part of the sentencing proceeding. Gulledge, 326 S.C. at 228, 487 S.E.2d at 594 (1997). A sentencing court is allowed broad discretion in sentencing within statutory limits. Brooks v. State, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997). A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support. In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). This Court has previously affirmed an award of restitution where the judge carefully considered the enumerated statutory factors and made specific findings of the underlying facts and circumstances on the record before imposing restitution. State v. Cox, 326 S.C. 440, 442-43, 484 S.E.2d 108, 109-10 (Ct. App. 1997). A similar analysis controls here. Judge Addy carefully considered each of the enumerated statutory factors and made specific findings on the record to support the award of restitution. The circuit court did not abuse its discretion and its restitution determination should be affirmed.

CONCLUSION


For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, sentence, and restitution order of the lower court be affirmed.

Respectfully submitted,

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DONKEVIS DURELL JONES, APPELLANT


CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Final Brief of Respondent complies with Rule
211(b), SCACR

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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated January 6, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served.
This 6th, day of January, 2015.



Angela Bennett
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Re: The State v Donkevis Durell Jones
Appellate Case No. 2013-000548

Dear Counsel:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case

Sincerely,

J. Benjamin Aplin
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S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original & 14 copies enclosed)
Victim Services