

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENWOOD COUNTY  
Court of General Sessions

Frank R. Addy, Jr., Circuit Court Judge

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General Sessions Case No. 2011GS2401613  
Appellate Case No. 2013-000548

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The State, . . . . . Respondent,

v

Donkevius Durell Jones, . . . . . Appellant.

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FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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## STATEMENT OF ISSUES ON APPEAL

- 1. The Court erred in holding the restitution hearing when over 15 months had passed since Jones was sentenced.**
- 2. The Court erred in granting restitution for pecuniary loss for damage to property that Jones was never charged with damaging and did not plead guilty to damaging.**
- 3. The Court erred in failing to properly consider Jones's financial resources and his ability to pay restitution.**

## STATEMENT OF THE CASE

On April 22, 2011, Appellant Donkevius Durell Jones ("Jones"), along with two other co-defendants and a fourth unidentified male who was never charged, entered Lakelands Cycles and Detailing in Greenwood, South Carolina. They gained entry by prying open a door of the business. Once inside, Jones and his co-defendants loaded some of the inventory and equipment into the back of a Chevrolet pickup truck. Law enforcement officers arrived on the scene while Jones and his co-defendants were still present at the business. Jones and two of the other participants (a co-defendant and the unidentified male) fled the scene by driving the truck out of the garage of the business, through a partially-raised metal garage door. Officers were standing in front of or near the garage door when the truck exited the garage. Officers fired on the truck as it left the incident location. The other co-defendant was apprehended on the scene and implicated Jones when questioned. The truck and stolen items were recovered shortly afterward about half a mile away from the incident location.

Officers obtained arrest warrants for Jones for the following offenses: Assault and Battery of a High and Aggravated Nature ("ABHAN") (two counts), Burglary 2<sup>nd</sup>

(Violent); Malicious Injury to Real Property between \$2,000 and \$10,000 (“MIRP”); and Grand Larceny over \$10,000 (R.p. 1-5). Jones came to the Sheriff’s Office and turned himself in on the afternoon of April 22, 2011, and was arrested on all but the two ABHAN warrants. On April 26, 2011, law enforcement obtained two additional arrest warrants for Mr. Jones for the offenses of Autobreaking and Petit Larceny (R.p. 6-7). These two warrants were related to the theft of the Chevrolet pickup truck used in the burglary. Jones was served with those two warrants as well as the two ABHAN warrants on April 29, 2011. On August 19, 2011, the Greenwood County Grand Jury indicted Jones on two counts of Assault and Battery 1<sup>st</sup> (“A&B1st”), Burglary 2<sup>nd</sup> (Violent), MIRP between \$2,000 and \$10,000, Petit Larceny, Grand Larceny over \$10,000, and Autobreaking (R.p. 8-21).

On September 1, 2011, Jones pled guilty to two counts of A&B1st, Burglary 2<sup>nd</sup> (Violent), and Petit Larceny. After accepting Jones’s plea, Eugene C Griffith, Jr., Circuit Court Judge, recessed the hearing until the following day, when he sentenced Jones to time served on the Burglary and Petit Larceny charges, and a term not to exceed six years under the Youthful Offender Act on the two A&B1st charges, with a recommendation for Shock Incarceration.<sup>1</sup> The sentencing sheet for one of the A&B1st charges notes that a restitution hearing would be deferred. At sentencing, counsel for Jones requested that the

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<sup>1</sup>Although the sentencing sheets are all dated September 1, 2011, it is clear from the sentencing transcript that Jones’s guilty plea was taken on that date, but that the sentences were actually imposed the following day after Judge Griffith called a recess and deferred sentencing until September 2, 2011 (R p 41, ll 11-18)

issue of restitution be held open for a limited amount of time (R.p 39, ll. 16-25) Judge Griffith noted that a hearing was required and said, “[t]he schedule – hopefully October term – subject to everybody [sic] availability.” (R.p 46, ll 23-25). There were terms of court for Greenwood County General Sessions cases during the weeks of October 10 and October 17, 2011, but the state did not attempt to hold the restitution hearing during either of those terms.

When the South Carolina Department of Corrections determined that Jones was ineligible for Shock Incarceration due to his plea to a Burglary 2<sup>nd</sup> charge, Judge Griffith amended the sentence on the two A&B1st charges to six years suspended to the service of 15 months and 36 months probation, with credit for 134 days served, and with a provision that probation would terminate after conditions of probation were met, including payment of any restitution (R.p. 50-51) Jones was released from prison in December 2011 and began serving the probationary period of his sentence upon his release. A restitution hearing was not held until December 18, 2012, over 15 months after Jones was sentenced and approximately one year after he began serving the probationary period of his sentence.

Frank R. Addy, Jr., Circuit Court Judge, presided over the restitution hearing. The State presented testimony from Michelle Boggs (“Boggs”), owner of Lakelands Cycles and Detailing along with her husband, Bradley Boggs. Boggs originally sought restitution of almost \$23,000.00, but had modified that amount by the time of the hearing to a request for restitution in the amount of \$6,959.37 (R.p 70, ll. 4-6, 15-17). The defense presented testimony from Jones regarding his

ability to pay (R.p. 85 l. 17,-p. 89, l. 13). On December 21, 2012, Judge Addy ordered Jones to pay \$6,959.37, the full amount of restitution sought (R.p. 105-110). On December 31, 2012, counsel for Jones filed a Motion to Reconsider the restitution order (R.p. 111-114), and Judge Addy denied that motion on February 23, 2013 (R.p. 115-116) Jones's Notice of Appeal from that Order followed on March 5, 2013 and was filed in the South Carolina Court of Appeals on March 11, 2013.

### FACTS

The breakdown of the restitution claimed by Boggs is as follows.

- a. \$100 for repair to an electrical box allegedly damaged during the burglary. Boggs did not have a receipt to document this cost (R.p. 71, ll. 10 – p. 72, l. 2);
- b. \$840.00 to replace a metal roll-down garage bay door. However, Boggs testified that this was the value of the door that was damaged, but the cost of the door actually purchased to replace the damaged door cost \$400.00 less (R.p. 72, ll. 3-24);
- c. \$1,050 for a replacement entry door. However, Boggs testified that the door had not been replaced but that she had simply put a plate on it to conceal the damage (R.p. 73, ll. 9-25);
- d. \$53.55 for replacement door locks (R.p. 74, ll. 1-6);
- e. \$150 value of pressure washer (R.p. 74, ll. 7-17);
- f. \$140 for repairs to a Peace Sports scooter (R.p. 75, ll. 1-10),
- g. \$155.97 for repairs to a Suzuki JR 80 (R.p. 75, ll. 11-20);
- h. \$3,061.50 for repairs to a **1971 Chevrolet truck** (R.p. 75, l. 21 – p. 76, l. 23, p. 81) (emphasis added). However, Boggs later testified that insurance had paid \$1,221.00 for damage to the truck (R.p. 80, l. 25 – p. 81, l. 6, ll. 15-17). It is important to note that this truck is **not** the truck used to flee the business, which was a 1992 Chevrolet truck belonging to James Devore (R.p. 8-11). There was no restitution claimed by Mr. Devore related to the 1992 Chevrolet truck which Jones was charged with breaking into and stealing;
- i. \$62.96 for carpet cleaning. However, Boggs testified that she and her husband cleaned the carpet themselves and the actual cost of the supplies was only \$12.96 (R.p. 76, l. 24 – p. 77, l. 13);
- j. \$398 to replace batteries for two Razor scooters (R.p. 77, l. 14 – p. 78, l. 4),

- k. \$258 for repairs to a Coolster dirt bike (R.p. 78, ll. 5-13);
- l. \$490 for repairs to an Aelous scooter (R.p. 78, l. 21 – p. 79, l. 2);
- m. \$199.39 costs for repairs to the premises (R. p. 106)

Jones stipulated to \$440 for the actual cost of replacing the metal roll-down garage bay door and the cost of \$53.55 for replacement door locks (R.p. 80, ll.1-8).

Boggs testified that she did not have insurance on the business (R.p. 80, ll. 14-15). She also testified that she had prepared the list of claimed damages at least as long ago as October 2011, when Jones was resentenced (R.p. 84, ll. 15-23).

Jones testified that he worked at Carolina Pride driving a forklift, and had held that job for approximately eight months (R.p. 85, ll. 17-23). He made \$7.25 per hour for working 28 hours per week, which was the maximum amount of hours available to him in that position (R.p. 86, ll. 3-24). Child support of \$64.86 plus a \$3.00 service fee was deducted from each weekly check, for the support of one of his children, leaving him with net pay of \$126.40 per week (R.p. 87, ll. 2-15). Jones testified that he paid child support of \$100 per month directly to the mother of his second child (R.p. 87, l. 16 – p. 88, l. 2). He also paid \$50.00 per month for his probation fee, along with other probation costs (R. p. 88, ll. 3-19). Finally, Jones testified that he lived with his mother and tried to give her \$50.00 every two weeks to help with household expenses (R.p. 88, l. 23 – p. 89, l. 9).

Jones denied doing any damage to an electrical box during the burglary (R. p. 89, l. 21 – p. 90, l. 11). He acknowledged that he did not plead guilty to anything related to a 1971 Chevrolet truck for which Boggs was claiming \$3,061.50 in damages, but rather that he plead guilty only to burglary for going into the building, assault on the two police

officers, and, petit larceny for the truck he and his co-defendants actually drove away from the business (R.p. 90, l. 24 – p. 91, l. 17). There was no request made at the hearing for any damages related to the theft of the 1992 truck driven away from the business, nor was there any request for damages from the two police officers who were victims in the A&B1st cases.

## ARGUMENTS

### **1. The Court erred in holding the restitution hearing when over 15 months had passed since Jones was sentenced.**

While S.C. Code Sec. 17-25-322, the statute providing for a hearing to determine the amount of restitution owed to a crime victim, does not provide a time limit in which the hearing should be held, case law interpreting the statute holds that the restitution hearing is part of the sentencing proceeding. As such, a delay of over 15 months should be considered to be an extreme delay in resolution of the case that unduly prejudiced Jones, in violation of his due process rights under the Constitutions of the United States and South Carolina USCA Const. Amend V, SC Const. Art I, Sec 3.

When Judge Griffith amended Jones's sentence on October 26, 2011, he provided that Jones spend three years on probation after completing his active prison sentence of 15 months, and with the provision that Jones's probation could terminate on payment of any restitution and other costs (R.p. 50-51). By the time the restitution hearing was finally held, Jones had already completed nearly a year of his probationary sentence, and therefore lost the opportunity to pay toward restitution for that entire time. The delay was not of Jones's own making as he never asked for any continuance of the hearing or raised any conflict with having the hearing

set at an earlier date. Rather, the delay was entirely on the part of the state not taking steps to seek restitution for the victims in an appropriate time frame. Furthermore, at the original sentencing hearing on September 1, 2011, counsel for Jones asked that the issue of restitution be held open for a limited time, and Judge Griffith's response suggested the October term, which would take place about six weeks later (R.p. 39, ll. 16-25, p. 46, ll. 23-25). The state failed to seek a restitution hearing during that term, even though Jones's sentence was amended by Judge Griffith during that same term.

Federal law also provides for restitution hearings to determine pecuniary loss. 18 USCA Sec. 3664. The federal statute provides that when a hearing is required, it is to take place no later than 90 days after sentencing. 18 USCA Sec. 3664(d)(5). While South Carolina's statute does not have a similar provision, it is useful to see this time limit as a guideline for a reasonable amount of time for a restitution issue to remain outstanding. Holding a hearing within 90 days after sentencing is certainly reasonable and ensures finality for the defendant in addition to ensuring that payments to victims begin sooner rather than later.

There are federal cases holding that there are circumstances in which a restitution hearing can be held beyond the 90-day statutory time limit, but in the majority of those cases, the delay was short and not comparable to the situation in the case at bar. In *U.S. v. Martinez*, 295 Fed. Appx. 460 (2d Cir. 2008), the court held there was no prejudice to defendant when the hearing took place 112 days after sentencing. In that case, no prejudice was raised, and the delay of only a few weeks after the 90-day deadline was

due to administrative problems with transporting the defendant to the hearing. In contrast, Jones does claim prejudice in this case due to his having spent a year on probation without any restitution order being issued and with the delay being solely caused by the state's failure to seek a hearing within a reasonable time frame. *See also, U.S v Douglas*, 525 F.3d 225, 252-53 (2d Cir. 2008) (holding that, where restitution order was entered 94 days after sentencing, "an extension of the proceedings beyond the 90-day period provides no basis for vacating the restitution order unless the defendant can show that the extension caused him actual prejudice"); *U S v Brannon*, 476 Fed. Appx. 386 (11<sup>th</sup> Cir. 2012) (holding that a restitution hearing held approximately five months after sentencing did not prejudice defendant when defense counsel waived the 90-day time limit); *Dolan v. U.S.*, 560 U.S. 605, 130 S.Ct. 2533 (2010) (holding that a restitution hearing held approximately six months after sentencing did not prejudice defendant, but leaving open the possibility that a delay could cause prejudice to a defendant)

In considering the federal scheme for the award of restitution, it is also important to note that the statute provides for both the probation office and the attorney for the government to cooperate in compiling information in a timely fashion for the court to use to determine the appropriate amount of restitution, as well as provisions for the defendant to provide information on his ability to pay. 18 USCA Sec. 3664(a), (d). The South Carolina statute does not assign responsibilities such as these that would help to move the restitution hearing process along more quickly. Furthermore, if the restitution hearing

had not been allowed to proceed due to the delay, the victims would still have had the right to pursue a civil suit against Jones for the claimed damages. Although he might have been required to pay a civil judgment, Jones would not have been required to remain on probation or pay a twenty percent collection fee.

The State's failure to seek a restitution hearing in a timely fashion in this case prejudiced Jones and violated his due process rights, and the hearing should not have been held over 15 months after sentencing for those reasons.

**2. The Court erred in granting restitution for pecuniary loss for damage to property that Jones was never charged with damaging and did not plead guilty to damaging.**

The statute providing for restitution to crime victims provides, in part, that “[w]hen 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.**” S.C Code Sec 17-25-322(A) (emphasis added). It is clear from the plain language of the statute that the amount of restitution awarded is directly linked to the crime(s) for which the defendant is convicted. Based on this language, Judge Addy did not have the power to award restitution for alleged pecuniary damages or losses that bear no connection whatsoever with the crimes to which Jones pled guilty.

In this case, Jones did not dispute that restitution was appropriate for the actual replacement cost of \$440.00 for the metal roll-down garage bay door that was damaged when he and his co-defendants fled from the building (R.p. 80, ll. 1-8). If restitution is allowed to be awarded after such a long delay, it would also be appropriate to order \$53.55, which covered the cost of replacement locks and a plate for the entry door.

However, it was undisputed that the stolen items were recovered shortly after being taken from the business, and as counsel for Jones argued at the hearing, there was no evidence taken to indicate that the damages alleged to the recovered property did not exist prior to the burglary (R.p. 94, l. 25 – p. 95, l. 9). While Jones did plead guilty to burglary and can arguably be held responsible for the damage related to entering and leaving the business if the issue of delay is disregarded, he did not plead guilty to the Grand Larceny or MIRP charges. Even considering those charges, the stolen property was recovered in a very short time, and the damaged property listed in the indictment for the MIRP charge was limited to “two (2) doors of a building of Lakelands Custom Cycles ” (R.p. 16-17).

Most significantly, neither Jones nor either of his co-defendants were charged with any criminal activity related to the 1971 Chevrolet truck in the parking lot of the business (see R.p. 8-21). The damages of \$3,061.50 alleged for repair of that truck are in no way Jones’s responsibility, since the restitution statute limits recovery for losses related to crimes for which the defendant is actually convicted. S.C. Code Sec 17-25-322. Furthermore, the facts supporting Jones’s plea at sentencing made absolutely no reference whatsoever to the 1971 Chevrolet truck in the parking lot of the business, so there can be no argument that Jones either implicitly or explicitly agreed that a restitution hearing should cover damage to a truck that was in no way related to any crime with which he was charged (R.p. 32, l. 20 – p. 33, l. 23).

Although evidence received during a restitution hearing is not subject to the rules of evidence regarding admissibility, the evidence must nevertheless have probative value and must therefore be relevant and reliable. *State v Gullledge*, 326 S.C. 220, 487 S.E.2d 590 (1997). In this case, at a minimum, the testimony regarding the alleged damages to the 1971 Chevrolet truck was neither relevant nor reliable and should not have been considered by the court in awarding restitution.

**3. The Court erred in failing to properly consider Jones's financial resources and his ability to pay restitution.**

It was undisputed at the restitution hearing that Jones made only \$7.25 per hour as a forklift operator and was limited to only 28 hours per week of work by his employer (R p. 86, ll. 3-24). The restitution statute allows the court to consider the "financial resources of the defendant" and the "burden that the manner or method of restitution will impose upon" him, as well as "the ability of the defendant to pay restitution on an installment basis or other conditions to be fixed by the court." S.C. Code Sec. 17-25-322(B)(1), (2). In ordering the full amount of restitution claimed, the court failed to properly consider Jones's limited income and the fact that his expenses consumed the majority of that income.

Furthermore, the restitution statute provides for a twenty percent collection fee. S.C. Code Sec 17-25-322(D). In this case, based on the amount Judge Addy awarded, 20 percent amounts to an additional \$1,391.87. Also, the statute requires that "[t]he restitution order shall specify a monthly payment schedule that will result in full payment for both restitution and collection fees by the end of eighty percent of the offender's supervision period. S.C. Code Sec. 17-25-322(C). In this case, eighty percent of Jones's

supervision period would have occurred at approximately 29 months of supervision. Since he had already served approximately one year of probation, this left only about 17 months in which the restitution and collection fees were required to be paid by statute. Jones would have had to pay nearly \$500.00 per month in order to pay off the restitution ordered in that time frame, which would have been impossible at his earning level.

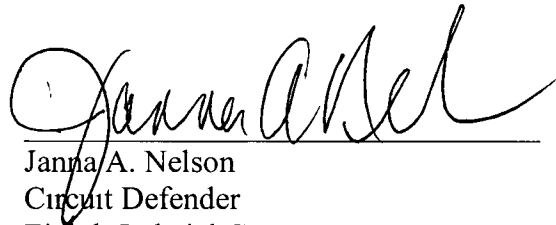
In cases where a defendant does not earn enough income to pay the full amount of damages claimed, our courts have ordered a lower amount of restitution or set a minimum amount due. In *State v. Gullede*, 326 S.C. 220, 487 S.E.2d 590 (1997), the court found the State had proven that petitioner embezzled \$464,820.91 from the victim, but ordered restitution of less than half that amount after considering, in part, the petitioner's ability to pay. *Id.* at 487 S.E.2d 591. In *State v. Cox*, 326 S.C. 440, 484 S.E.2d 108 (1997), although the trial judge ordered \$11,853.86 in restitution, he limited the amount each defendant was ordered to pay to \$30.00 per week, based on a forty-hour week at minimum wage. *Id.* at 442.

In this case, given the unrefuted testimony that Jones's net income was only \$126.40 per week, with his expenses consuming the vast majority of that amount, the court failed to adequately consider Jones's ability to pay and the hardship he would be caused by being required to pay the full amount of restitution requested. Furthermore, the delay of 15 months before the hearing took place impacted on Jones's ability to pay an unreasonable amount of restitution, given his income, before the expiration of eighty percent of his supervision period.

CONCLUSION

Because of the significant delay in holding a restitution hearing in this case, the judgment of the trial court ordering restitution should be reversed. Alternatively, if the court finds the delay was not prejudicial, this case should be remanded for restitution to be recalculated based on a consideration only of damages directly related to crimes for which Jones was convicted and by taking into consideration Jones's ability to pay.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Janna A. Nelson", written over a horizontal line.

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January 14, 2015

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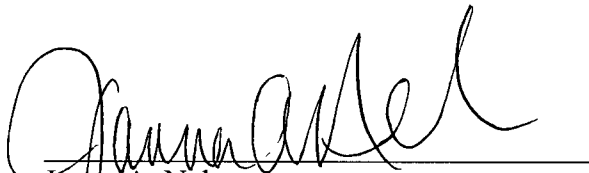
**PROOF OF SERVICE**

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I, Janna A Nelson, certify I served the Final Brief of Appellant by depositing a copy in the United States Mail, postage prepaid, addressed to:

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This 14<sup>th</sup> day of January, 2015.



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