STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Pickens County
The Honorable Letitia Verdin, Circuit Court Judge

Appellate Case No. 2014-00420

THE STATE,

Respondent,

v.

JASON MORGAN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court properly awarded restitution in this case. The settlement of the civil action between Appellant and Victim did not bar restitution as a condition of Appellant's probationary sentence.

II.

Appellant took no exception to the trial court's order below, thereby failing to preserve his argument that the court failed to set out in its order specific findings under S.C. Code §17-25-322(B) and (C).

STATEMENT OF THE CASE

On June 27, 2013, Appellant Jason Morgan entered a guilty plea to Assault and Battery in the Second Degree before the Honorable Letitia Verdin. (R. p. __, Sentencing Sheet.) He was sentenced to a prison term of three years, suspended upon the service of three years of probation. (R. p. __, Sentencing Sheet.) After eighteen months of probation, the sentence could be terminated upon payment of all associated collections. (R. p. __, Sentencing Sheet.) At that time, the amount of restitution was to be set at a future hearing. Appellant also entered a guilty plea to Reckless Driving with a sentence of one day of imprisonment. (R. p. __, Sentencing Sheet.)

On October 3, 2013, a restitution hearing was held before Judge Verdin. (R. pp. __, October 13, 2013 Tr.) After taking the matter under advisement, Judge Verdin ordered $238,660.10 in restitution in a written order dated December 16, 2013, and filed December 17, 2013. (R. p. __, Restitution order.)

ARGUMENT

I.

The trial court properly awarded restitution in this case. The settlement of the civil action between Appellant and Victim did not bar restitution as a condition of Appellant's probationary sentence.

The partial settlement of a civil claim for damages does not bar a trial court from fulfilling its obligation to consider restitution in a criminal case. The order of restitution calls upon the court to consider the victim and defendant's circumstances and society's interests in determining an appropriate amount of restitution within the range of pecuniary damages suffered by the victim. Appellant's claim that restitution is barred as a matter of law where a civil settlement has been reached between the parties raises a matter of law and should be reviewed de novo. State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012).

The criminal charges in this case arise from an automobile accident. (Tr. p. 4.) Appellant was originally indicted for Felony Driving Under the Influence. (Tr. p. 4.) Through negotiations, Appellant entered his pleas to Assault and Battery Second Degree and Reckless Driving. (Tr. p. 4.) Appellant does not appeal the validity of his convictions and seeks only to have the order of restitution overturned or, in the alternative, to have the matter remanded for a new restitution hearing.

The civil action between Appellant and victim was entirely separate from the criminal proceeding, and recovery in the civil proceeding does not preclude restitution as a condition of probation. When a defendant is convicted of a crime which resulted in pecuniary damages or loss to a victim, S.C. Code §17-25-322(A) states, "… in addition to any other sentence which [the court] may impose, the court *shall* order the defendant

make restitution or compensate the victim for any pecuniary damages." [Emphasis supplied.] S.C. Code §16-3-1110(12)(a) defines "restitution" as:

> ... payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender's criminal conduct. It includes, but is not limited to:
>
> (i) medical and psychological counseling expenses;
>
> (ii) specific damages and economic losses;
>
> (iii) funeral expenses and related costs;
>
> (iv) vehicle impoundment fees;
>
> (v) child care costs; and
>
> (vi) transportation related to a victim's participation in the criminal justice process.
>
> Restitution does not include awards for pain and suffering, wrongful death, emotional distress, or loss of consortium.
>
> *Restitution orders do not limit any civil claims a crime victim may file.*

[Emphasis supplied.] That restitution is distinct from a civil judgment has been noted:

> Generally, a state criminal justice system that imposes restitution during sentencing as a condition of probation and as part of the judgment of conviction is considered a penal sanction rather than civil in nature. Restitution imposed as a condition of probation is not a legal obligation equivalent to a civil judgment, but rather an option which may be voluntarily exercised by the defendant for the purpose of avoiding the serving of an active sentence.

21 Am. Jur. 2d Criminal Law §847 (2015).

While South Carolina has never directly addressed the question of whether a settlement and release of a civil suit between a victim and defendant prior to sentencing impacts restitution, at least one other state has addressed the question. In State v. Kirby, 863 So.2d 238 (Fla. 2003), Florida's Supreme Court held:

> Because civil settlements and criminal restitution are distinct remedies with differing considerations, we hold that a settlement and release of liability on a civil claim for damages between private parties does not prohibit the trial court from fulfilling its mandatory obligation to order restitution in a criminal case.

Much like the case at bar, in Kirby, the defendant caused a traffic accident and settled victim's civil suit against him with $25,000 policy limits from his auto insurance policy. The release signed in the Kirby case was much the same as the covenant not to execute in Appellant's case.

Kirby discussed restitution's twofold purpose in the criminal context: "(1) to compensate the victim and (2) to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system." Id. at 242. In determining the appropriate amount of restitution, the victim's wishes are to be considered, but the judge must also weigh society's interests. This is entirely consistent with South Carolina's statutory construct which permits, but does not require, a judge to consider aspects such as the defendant's resources, the victim's resources, the rehabilitative effect, and hardship on the victim. S.C. Code §17-25-322(B). In contrast, a civil judgment, upon a finding of a defendant's negligence, is only concerned with the victim's losses. Moreover, civil judgment is not limited to pecuniary damages. Plainly, the constructs of restitution and civil judgment are separate and distinct.

The Kirby decision, however, provides for offset in the case of a civil settlement. Notably, in Kirby, the court discussed a Florida statute, Section 775.089(8) providing, "An order of restitution hereunder will not bar any subsequent civil remedy or recovery, but the amount of such restitution shall be set off against any subsequent independent civil recovery." Kirby noted that it did not matter whether the civil recovery was prior to

or subsequent to the pronouncement of restitution. The first part of this section is similar to §16-3-1110(12)(a)'s provision that "restitution orders do not limit any civil claims a crime victim may file." South Carolina law does not contain the provision requiring offset, however. As such, no offset is required.[1]

Further statutory support can be found for the consideration of civil judgment and restitution as separate and distinct. Pursuant to S.C. Code §17-25-322(C), it is not the victim who may enforce the order of restitution if the probationer falls into arrears:

> "...the [Department of Probation, Pardon, and Parole Services], through its agents, must initiate legal process to bring every probationer, whose restitution is six months in arrears, back to court, regardless of willful failure to pay. The judge shall make an order addressing the probationer's failure to pay.

Pursuant to our statutes, a victim may not institute any action against the accused for failure to pay restitution. Rather, SCDPPPS is required to present the matter to the circuit court. Clearly, where the victim has no independent recourse to enforce restitution, restitution is not akin to a civil judgment. As such, the matter of restitution is not intended to be within the scope of an agreement between the defendant and victim in a civil case.

Moreover, by its plain language, the covenant not to execute did not preclude further litigation between the parties, let alone restitution in the criminal court. The covenant not to execute allows the victim to obtain primary coverage limits but does not stop her from pursuing other benefits such as underinsured motorist coverage. As Judge

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[1] There is some authority for the premise that an offender may be required to reimburse an insurance company. See 1 Neil P. Cohen, The Law of Probation and Parole §11.11 (1999). Cohen notes, "If restitution to insurance companies were not permitted, clever criminals might even commit crimes against insured persons to avoid possible restitution conditions."

Verdin found, nothing in the agreement extinguishes the possibility of restitution in the criminal matter.

For all these reasons, Judge Verdin correctly determined that the covenant not to execute entered between Appellant and Victim in this matter did not, as a matter of law, preclude an order of restitution.

II.

Appellant took no exception to the trial court's order below, thereby failing to preserve his argument that the court failed to set out in its order specific findings under S.C. Code §17-25-322(B) and (C).

Appellant's remaining issues are not preserved for appeal. At no time during the hearing or in a motion to reconsider did he set forth the arguments that the court failed to consider and address each factor enumerated in S.C. Code §17-25-322(B) or that the court's order failed to comply with S.C. Code §17-25-322(C). Appellant focused his argument solely on the issue of whether the prior civil settlement barred restitution. An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997).

If the matter were preserved for appeal, Appellant's request for a new restitution hearing should not be granted. Appellant first complains that the trial court's order fails to account for the five factors which *may* be considered by the court as provided in S.C. Code § 17-25-322(B):

> (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.

It is notable that the statute utilizes the term "may." Appellant himself failed to present any evidence regarding his ability to pay or his financial resources. Therefore, the court should not be held at fault in failing to consider those factors, and Appellant should not receive a windfall opportunity to present additional arguments. In the absence of evidence, Appellant essentially asks this court to presume a financial hardship for him and to ignore the possibility of victim's financial hardship and physical disability. This illustrates the problem inherent in Appellant's failure to preserve these issues for review by presenting them to the trial court.

Appellant also complains that the amount of restitution awarded is excessive. Appellant claims that he will be required to pay an impossible monthly sum in restitution. While no evidence exists in the record to establish Appellant's ability (or inability) to pay the amount, it should be noted that enforcement measures, such as revocation, are only incurred when the probationer's failure to pay is willful. Willful failure is defined as the voluntary, conscious, and intentional failure to pay. State v. Spare, 374 S.C. 264, 269, 647 S.E.2d 709, 709 (Ct. App. 2007). In such situations, the court is required to consider the reasons for the failure to pay and the probationer's ability to pay, taking into account such factors as income and other financial obligations. Id.

Furthermore, while Appellant complains that the restitution amount is excessive, Appellant has means to address the restitution order. In addition to a hearing should he fall into arrears where he may plead his inability to pay, he may move to modify the

award pursuant to S.C. Code §17-25-326. Victim, however, has no means to lessen the burden of the injuries Appellant inflicted upon her regardless of her ability to pay.

Where Appellant failed to present the issues he now raises on appeal to the trial court, these matters should not be reviewed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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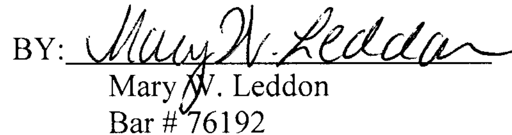
BY: 
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March 2, 2015

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THE STATE,

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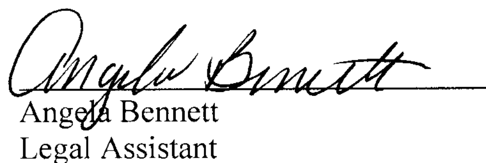
PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Daniel Farnsworth, Jr., Esquire
Farnsworth Law Offices, LLC
2 Williams Street
Greenville, SC 29604

I further certify that all parties required by Rule to be served have been served. This 2nd day of March, 2015.



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March 2, 2015

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RE: State v. Jason Morgan
Appellate Case No. 2014-000420

Dear Mr. Farnsworth:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mary W. Leddon
Assistant Attorney General
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MSW/ab
Enclosures

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