

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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JUN 29 2015

Appeal from Horry County  
The Honorable D. Craig Brown, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2014-001250

THE STATE,

Respondent,

v.

KATHRYN CHESTNUT KING

Appellant.

**FINAL BRIEF OF RESPONDENT**

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ATTORNEYS FOR RESPONDENT

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## **STATEMENT OF ISSUE ON APPEAL**

**The trial court's committed no abuse of discretion when making a factual determination of the restitution amount, when evidence substantiated Appellant was credited for monies paid but still owed \$10,472.97 to vendor Homewood Depot.**

## STATEMENT OF THE CASE

On May 30, 2013, an Horry County grand jury indicted Appellant for violating S.C. Code Ann. §34-11-60, issuing a fraudulent check in an amount more than \$1000. (R. p. 50-51.) Appellant pled guilty before the Honorable D. Craig Brown on March 11, 2014. (R. p. 7, lines 10-11) Assistant Solicitor Thomas Terrell represented the State, and Melinda Knowles, Esquire represented Appellant. (R. p. 1.) Judge Brown sentenced Appellant to three years' imprisonment, suspended upon the service of two days, with thirty months' probation. (R. p. 10, lines 2-9.) A separate restitution hearing was held May 12, 2014, before the Honorable George C. James, Jr. (R. p. 11.) Judge James was able to determine restitution owed to victim Wilco Hess. (R. p. 31, lines 20-24.) The court was unable to order restitution to the other victim, Homewood Depot, and ordered a second restitution hearing. (R. p. 31, lines 1-5.) That hearing was held May 29, 2014 before the Honorable Roger M. Young. (R. p. 34.) Judge Young ordered restitution to Homewood Depot in the amount of \$10,472.97. (R. p. 47, line 1.) This appeal follows.

## STATEMENT OF FACTS

Appellant owns the business JBK trucking with her husband. (R. p. 8, lines 18-19.) In the ordinary course of business, she would write a blank check for her drivers to pay their vendors for gasoline. (R. p. 8, lines 21-23.) The drivers frequently wrote checks for over the allowed amount, resulting in her financial distress. (R. p. 8, lines 21-25.) She has since changed her business practices and has turned over her accounting to her son. (R. p. 9, lines 6-11.) Appellant had an open account with her vendors and was billed every fifteen days. (R. p. 16, lines 12-15.) Periodically she would make payments on her account in the form of cashier's checks, cash, or signed over checks from customers of her business. (R. p. 43, lines 11-16) In the case for which she was charged, the amount in dispute for restitution concerned four checks: two to vendor Wilco Hess and two to vendor Homewood Depot. (R. p. 18, lines 3-4.) Neither Appellant nor the vendors presented meticulous accounting evidence, but Appellant agreed to the amount of \$2,850.66 to Wilco Hess at the first restitution hearing. (R, p. 28, lines 1-3.)

At the second restitution hearing concerning Homewood Depot, the State presented evidence of two checks written on insufficient funds: one dated December 14, 2012 in the amount of \$5,000.00 and the other dated December 18, 2012, in the amount of \$5,472.97. (R. p. 37, lines 11-25 and p. 38, lines 1-5.) The owner of Homewood Depot, Mr. Vijay Tolani, testified he deposited these checks December 21, 2012, and was notified by the bank the checks could not be honored December 27, 2012. (R. p. 37, lines 16-20 and p. 38, lines 1-9.) In an attempt to argue she made some restitution for those bad checks, Appellant presented evidence of several cashier's checks payable to Homewood Depot (R. p. 37, line 5; p. 38, line 25; p. 53-54.)

Mr. Tolani submitted a balance sheet of the invoices due and all the payments made on Appellant's account. (R. p. 46, lines 1-3.) He further testified all the cashier's checks (deposited by December 18, 2012) were payment on a previous balance due, not a repayment of the dishonored checks deposited December 21, 2012. (R. p. 42, lines 7-11.) Mr. Tolani pointed out in his accounting records where the cashier's checks were reflected as payment credited to Appellant. (R. p. 41, lines 11-16.) As he noted, the deposited cashier's checks could not have been for repayment of the dishonored checks, as the cashier's checks pre-dated December 27, when the checks were returned by the bank. (R. p. 42, lines 7-11; pp. 53-54.)

The court, admitting some confusion as to which checks were used to pay which invoices, ultimately found the Mr. Tolani's testimony concerning Appellant's repayments credible: "He was saying, from what I understand, that she got credit for everything she made that wasn't dishonored." (R. p. 46, lines 23-25.) The judge found the preponderance of the evidence supported the State's request for restitution in the amount of \$10,472.97, the sum of the two dishonored checks. (R. p. 47, lines 1-2.)

## ARGUMENT

**The trial court's committed no abuse of discretion when making a factual determination of the restitution amount, when evidence substantiated Appellant was credited for monies paid but still owed \$10,472.97 to vendor Homewood Depot.**

Appellant contends trial court erred by requiring Appellant to pay restitution in the amount of \$10,472.97. Appellant's brief asserts the judge abused his discretion when he failed to take into account her payments to the complainant, Homewood Depot, in determining that figure. The judge appropriately considered the payments made by Appellant, but found sufficient evidence to support his finding that the payments were for previous debts, not the dishonored checks in question. The judge reached this determination after considering all the evidence presented and the credibility of the witnesses providing testimony. Thus, the trial court judge did not abuse his discretion in ordering restitution of \$10,472.97 in this case. Appellant's sentence should be affirmed.

### A. Standard of Review

In criminal cases, the appellate courts sit to review errors of law only. In re Walter M., 386 S.C. 387, 390, 688 S.E.2d 133, 134 (Ct. App. 2009). A trial judge has broad discretion in sentencing within the statutory limits, and a sentence will not be overturned absent an abuse of discretion 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). Generally, appellate courts will only interfere with the discretion of a judge in the imposition of a sentence in rare and unusual circumstances. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952).

## **B. Reliance on Complainant's Accounting**

During a restitution hearing, the trial judge is allowed broad discretion in the manner of conducting the hearing. State v. Gulledge, 326 S.C. 220, 230, 487 S.E.2d 590, 595 (1997). The trial judge's decisions are reviewed for an abuse of discretion. Id. The judge is permitted to consider any and all information pertinent to the proper sentence for a particular defendant. State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008); see State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("A trial judge generally has wide discretion in determining what sentence to impose. It is also true that before making this determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come."); see also State v. Cantrell, 250 S.C. 376, 379-380, 158 S.E.2d 189, 191 (1967) ("Highly relevant, if not essential, to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."). Furthermore, evidentiary rules are inapplicable. Gulledge, 326 S.C. at 228, 487 S.E.2d at 594; "However, the admissibility of evidence is limited by constitutional provisions which require the evidence to be relevant, reliable, and trustworthy." Id. at 229, 487 S.E.2d at 595.

In Appellant's case, the trial court judge did not commit an abuse of discretion by considering the spreadsheet prepared by Mr. Tolani of Homewood Depot for purposes of the restitution hearing. Mr. Tolani was able to identify when he billed Appellant and whether the invoices had been paid. (R. p. 39, lines 6-15). Mr. Tolani also testified the spreadsheet was an accurate representation of Appellant's balances. The judge found his testimony reliable and trustworthy. (R. p. 13, lines 23-25.) When he ordered restitution, he relied on the actual amounts of the dishonored checks and found no credible evidence

supporting a deduction from that amount. Mr. Tolani's testimony refuted Appellant's assertion that she owed less than the amount of the dishonored checks, and was clearly relevant to the final determination of monies owed. As evidentiary rules are not stringently applied in restitution hearings, the accounting spreadsheet was not required to be entered into evidence for the judge to consider it. Thus, he did not abuse his discretion when he made his ruling based, in part, on Homewood Depot's accounting.

### **B. Propriety of the Order of Restitution**

As used by the courts to determine how the victims of crime can be made whole again by the defendants, "restitution" is defined 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: . . . specific damages and economic losses" S.C. Code Ann. § 16-3-1110(12). Fortunately, in the instance of a fraudulent check, the amount of restitution is fairly evident on its face.

Here, the trial judge diligently looked beyond the face of the check to determine if the restitution amount warranted a reduction. He was in the best position to weigh the credibility of the witnesses and evidence and was free to accept or reject Appellant's claim she had made significant attempts at repayment of the dishonored checks. See State v. Smith, 383 S.C. 159, 167-168, 679 S.E.2d 176, 181 (2009) ("Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial."); State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) ("The trial judge, not this Court, is in the best position to be the arbiter of [the witness's] credibility."). The timing of the cashier's checks in relation to the dates the dishonored checks support an inference the cashier's checks were for payment of a

preceding debt. (R. pp. 53-54.) Judge Young's order of restitution in Appellant's case was supported by the evidence and is consistent with South Carolina case law.

The trial court judge followed the requirements of S.C. Code Ann. §16-3-1110 in setting the restitution award. He was in the best position to weigh the credibility of the witnesses and evidence and followed the statutory requirements in setting the restitution award at \$10,472.97. The restitution award ordered was supported by the evidence in the record, and the judge did not abuse his discretion in setting the amount. Appellant has failed to establish any error warranting an invasion into the judge's broad discretion in regards to sentencing and restitution. Appellant's conviction and sentence should be affirmed.

**CONCLUSION**

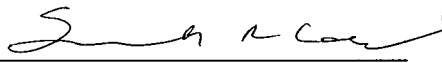
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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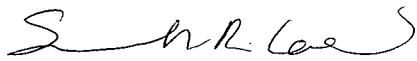
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**CERTIFICATE OF COUNSEL**  
\_\_\_\_\_

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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**PROOF OF SERVICE**

I, Anne Mueller, 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:

John H. Strom, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
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I further certify that all parties required by Rule to be served have been served.  
This 29<sup>th</sup> day of June, 2015.

  
ANNE MUELLER  
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