STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM YORK COUNTY

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2015-001914

THE STATE, ...APPELLANT,

v.

RICHARD P. KROCHMAL,..RESPONDENT.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

ARGUMENT 1

WHETHER THE RESTITUTION COURT ERRED AS A MATTER OF LAW BECAUSE A CRIMINAL IS NOT ENTITLED TO MONETARY COMPENSATION FOR COMMITTING CRIMINAL ACTS?

ARGUMENT 2

WHETHER, ASSUMING A CRIMINAL IS ENTITLED TO OFFSET RESTITUTION FOR FAIR COMPENSATION OF SERVICES RENDERED, RESPONDENT FAILED TO PROVIDE ANY LEGITIMATE SERVICES AND IS NOT ENTITLED TO COMPENSATION?

STATEMENT OF THE CASE

This appeal is taken from the "ORDER OF RESTITUTION" issued by the Honorable J. Mark Hayes, II on August 24, 2015. (Order of Restitution, p.___). The restitution hearing occurred on March 30, 2015. The Respondent was indicted by the York County Grand Jury on February 20, 2014 for the following four (4) offenses:

- 2014GS4600563
  - CDR 2615, Securities Fraud >$20k, S.C. Code § 35-1-508(a)(1)
    - Date of offense "sometime in 2009, 2010, 2011"
    - employed a scheme to collect exorbitant fees from investments in Mutual Modeling Assoc. Inc. far in excess of the fee agreement
- 2014GS4600564
  - CDR 2615, Securities Fraud >$20k, S.C. Code § 35-1-508(a)(1)
    - Date of offense "sometime in 2009, 2010, 2011"
    - transacting business in this State as an unregistered investment advisor
- 2014GS4600565
  - CDR 3437, Forgery >$10k, S.C. Code § 16-13-0010(A)
    - Date of offense "sometime in 2009"
    - forging the signature of victim1 on an Investment Advisory Form(s) dated July 6, 2009
- 2014GS4600566
  - CDR 3437, Forgery >$10k, S.C. Code § 16-13-0010(A)
    - Date of offense "sometime in 2009"
    - forging the signature of victim2 on an Investment Advisory Form(s) dated July 6, 2009

(Indictments, p. ___).

On January 28, 2015, pursuant to a negotiated plea agreement, Respondent pled guilty to lesser included offenses of each charge and was sentenced on each count to consecutive 2.25 years in SCDC suspended on the service of 22

days in the detention center and probation for 60 months.[1] (Sentencing sheets, p. __). The restitution hearing was deferred until after the Respondent was released from his four (4) consecutive sentences of 22 days in the local county detention facility. He is currently on probation.

[1] The sixty (60) month probationary sentence is not consecutive, S.C. Code § 24-21-440.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

ARGUMENT 1

THE RESTITUTION COURT ERRED AS A MATTER OF LAW BECAUSE A CRIMINAL IS NOT ENTITLED TO MONETARY COMPENSATION FOR COMMITTING CRIMINAL ACTS

"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." S.C. Code § 17-25-322. Respondent has been convicted of crimes, and during the commission of his criminal acts he took money from the victims – they are entitled to restitution.

The restitution court erred when it found that the total restitution amount owed by the Respondent is only $30,100 when it is undisputed that the Respondent took $159,800 from the victims during the commission of his criminal acts. At the March 30, 2015 restitution hearing, the Respondent presented the testimony and reports from his retained expert, Marcus B. Hodge, CPA/ABV/CFF, MBA, CFE. (Restitution hearing transcript, p. 6). Respondent's expert calculated the total dollar amount of money received by the Respondent from the victims during "2009 to 2011." (Restitution hearing transcript, p. 13, L. 20). Respondent's expert calculated that Respondent "overcharged" the victims $30,100 when the total Respondent *should* have charged was $129,700 and the actual "fees" charged totaled $159,800. (Restitution hearing transcript, p. 13). Appellant submits that restitution is

the entire amount ($159,800) received by the Respondent during the indictment period because the Respondent was engaged in criminal acts during that time and cannot be entitled to any compensation for committing crimes.

It is undisputed that Respondent's "services" were illegal, in part, because he operated as an unregistered investment advisor (indictment 2014GS4600564).[2] All of the trades performed during the indictment period by Respondent regarding the victim's investments were done so illegally because he was not a registered investment advisor. Not only was he unregistered, he also committed additional acts in his scheme to defraud the victims with nonsensical trades/fees (indictment 2014GS4600563). In addition, when questioned by the Securities Commissioner regarding the calculation of fees, Respondent presented forged investment fee agreements (indictments 2014GS4600565 and 2014GS4600566).

Respondent argued that the victim's investment accounts increased in value and that he therefore performed a valuable [albeit illegal] service. Respondent's assertion lacks any causality – there was no evidence presented that the capital gains in the victim's accounts were due to anything other than the appreciation of the mutual fund market during 2009-2011. There was no evidence presented whatsoever that Respondent had any sort of "Midas touch." To the contrary, the fact is the only service Respondent

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[2] The Securities Act declares it unlawful for a person "to transact business in this State as an investment adviser unless the person is registered under [the Act] as an investment adviser or is exempt from registration as an investment adviser." S.C. Code § 35-1-403(a).

rendered for the victims was fraud.

This Court previously held in a civil home construction case that homeowner victims were not entitled to recuperation of payments made to an unlicensed contractor.

> (1) the statutes requiring licenses do not specifically authorize the recovery of money paid; (2) such laws are penal in nature and must be strictly construed; (3) the specification of particular penalties precludes the addition of other penalties by judicial interpretation; (4) allowing the recovery of such payments is not necessary to effectuate the policy of licensing statutes; and (5) equity and the principles of restitution do not require that unlicensed contractors be completely uncompensated or that contracting homeowners receive the completed construction without cost.

Lenz v. Walsh, 362 S.C. 603, 608, 608 S.E.2d 471, 473 (Ct. App. 2005) (citing Hawkins v. Holland, 97 N.C. App. 291, 294, 388 S.E.2d 221, 223 (1990)).

Appellant submits that the underlying rationale of Walsh does not apply to this criminal case. While applicable for common pleas, the specific five (5) Walsh factors are not applicable in a criminal restitution analysis.

S.C. Code § 17-25-322(A) specifically authorizes the recovery of money paid - "the court shall order the defendant make restitution or compensate the victim for any pecuniary damages." The Constitution of South Carolina Victim's Bill of Rights also specifically authorizes the recovery of money paid – "prompt and full restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury, including both adult and juvenile offenders". S.C. Const. art. I, § 24(A)(9). Unlike Walsh, this is a criminal case; it is by its very nature penal and the addition of penalties is not precluded but is available in the form of fine(s) and incarceration.

Similarly, the final "equity" factor from Walsh is not applicable when fraud occurs.[3] Respondent is not entitled to the protections of equity when he has unclean hands. Straight v. Goss, 383 S.C. 180, 678 S.E.2d 443 (Ct. App. 2009). Respondent's hands are unclean, stained with the guilt of his frauds.

"Crime doesn't pay" is the concept of criminal restitution.[4] The restitution court's order entitles Respondent to be paid for committing his crimes - this is error an error of law.

"Amount of Loss" v. Restitution

There is some case law as well as secondary source material suggesting it is appropriate to offset the fair market value of services performed when calculating the "amount of loss." However, "amount of loss" is a term of art not applicable for restitution but is instead for figuring the applicable federal sentencing guideline offense level. United States Sentencing Commission, Guidelines Manual, §2B1.1, comment (n. 3(E)(i)) (Nov. 2015). *See also*, U.S. v. Hausmann, 345 F.3d 952, 960 (2003) (explaining amount of loss reduced by fair market value of services rendered by the defendant applies to

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[3] The fifth factor from Lenz v. Walsh explains, "equity and the principles of restitution do not require that unlicensed contractors be completely uncompensated or that contracting homeowners receive the completed construction without cost." Lenz v. Walsh, 362 S.C. 603, 608, 608 S.E.2d 471, 473 (Ct. App. 2005). Tracing this proposition leads to Hawkins v. Holland, 97 N.C. App. 291, 294, 388 S.E.2d 221, 223 (1990) which cites Homeland Insurance Co. v. Crescent Realty Co., 277 Ala. 213, 168 So.2d 243 (1964). Homeland Insurance Co. traces to H.A. Edwards Ins. Agency which explains: "For the rule is well settled that a person cannot recover back money which he has voluntarily paid with full knowledge of all the facts, without fraud, duress or extortion in some form." H.A. Edwards Ins. Agency v. Jones, 242 Ala. 624, 626, 7 So. 2d 567, 568 (1942).

[4] So called "Son of Sam" laws went even further and attempted to have *future* earnings set aside for victims of crimes. S.C. Code § 15-59-40 (repealed 2000).

"calculation of fraud victim loss amounts for sentencing guideline purposes"). Yet, even within the federal sentencing guidelines no offset would apply for this Respondent's services because he was "falsely posing as [a] licensed professional..." a specific category of exclusion. USSG §2B1.1, comment (n. 3(F)(v)). Similarly, there has been no evidence presented that the $129,700 the Respondent claims is based on any sort of fair-market-value calculation for the "services" rendered.

ARGUMENT 2

ASSUMING A CRIMINAL IS ENTITLED TO OFFSET RESTITUTION FOR FAIR COMPENSATION OF SERVICES RENDERED, RESPONDENT FAILED TO PROVIDE ANY LEGITIMATE SERVICES AND IS NOT ENTITLED TO COMPENSATION

There was no evidence presented at the restitution hearing regarding Respondent's ability to pay, and the restitution court made no specific findings of fact in the Restitution Order related to Respondent's ability to pay.

Respondent pled guilty for criminal activity during 2009-2011. Respondent claimed that under his interpretation of a 2002 fee agreement he *could* charge a "base fee which is percentage of the assets, a $29.95 per trading fee, and a $31.95 per trade advisement fee." (Restitution Hearing Transcript, p. 11, L. 13 - 15). Respondent's expert explained that his conclusions presupposed that this 2002 agreement was legitimate. (Restitution Hearing Transcript, p. 22 L. 16). The 2002 agreement is a red herring and has nothing to do with the indictment period, 2009-2011.

There was no legitimacy to Respondent's fees. Respondent's expert explained that there were 8.66 quarters during the indictment period and 1,733 "trades" made. (Restitution Hearing Transcript, p. 10-11). Respondent's own expert was unable to refute that the fees Respondent charged lacked any legitimacy. For example, the supposed "fees" for January 2011 charged by Respondent were "16,661.50" for a fund balance of "$438,000." (Restitution

Hearing Transcript, p. 16, L. 23; p. 18, L. 18). Respondent's own expert agreed that Respondent was overlapping charges in January 2011:

> Q. And obviously, sir, and stop me if I'm wrong here, but when looking at lines three and lines four, there's clearly an overlap of [January] 14th, the 15th, the 16th, and the 17th. He's charging for those days multiple times; is that correct, sir?
>
> A. It does look he is -- there is an overlap, yes.

(Restitution Hearing Transcript, p. 19 L. 12 – 17).

Another example is nonsensical "monthly management" fees. Respondent's own expert explained:

> Q. And those are all dated in April; is that right?
>
> A. That is correct, yes.
>
> Q. So that would be three monthly management fees in April?
>
> A. Yes.

(Restitution Hearing Transcript, p. 22 L. 6 – 10).

It is undisputed that Respondent was engaged in criminal acts between 2009 and 2011. Respondent was not operating off of any legitimate fee agreement. Respondent was careful in his presentation regarding the 2002 agreement. His argument is that presupposing the 2002 agreement was legitimate, he *should* have charged $129,700. Even if the 2002 agreement was valid for 2009-2011 (it is not), the Respondent's own expert concluded that the fees Respondent was charging failed to follow any sort of agreement.[5]

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[5] For the 2009-2011 time frame, Respondent pled guilty to multiple crimes, there is no "fee agreement" available to support his fee scheme in his attempt to avoid restitution.

1. 2014GS4600563, employed a scheme to collect exorbitant fees from investments in Mutual Modeling Assoc. Inc. far in excess of the fee agreement
2. 2014GS4600564, transacting business in this State as an unregistered investment advisor

Q. And is that should have charged, is that something you see in what he did charge? I mean, does it look like he was charging by transaction and by quarterly, or does it look all over the place, like he was just jumping in and grabbing money when he felt like it?

A. That's a great question. It looks like there -- and it's possible there's multiple types of fees within there. They're not distinguished between the fees that were agreed upon under the 2002 agreement.

(Restitution Hearing Transcript, p. 20 L. 1 – 9).

There is no legitimacy to the Respondent's "fees." Accordingly, the restitution court erred in concluding that while Respondent had taken $159,809 under the guise of fees, the Respondent was nonetheless entitled to be compensated for his services in the amount of $129,700 – with a net restitution ordered in the amount of $30,100.

---

3. 2014GS4600565, forging the signature of victim1 on an Investment Advisory Form(s) dated July 6, 2009
4. 2014GS4600566, forging the signature of victim2 on an Investment Advisory Form(s) dated July 6, 2009.

CONCLUSION

For these reasons, Appellant submits that the victims are entitled to restitution for the $159,800 in "fees" the Respondent charged while committing securities fraud. The restitution court should be reversed for holding otherwise.

Respectfully submitted,

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Columbia, South Carolina
February 3, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appellate Case No. 2015-001914

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THE STATE,

Appellant,

vs.

RICHARD P. KROCHMAL,

Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter by depositing a copy of it in the United States Mail; postage prepaid, on February 3, 2016, addressed to his attorney of record:

Mr. Robert Michael Dudek
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SC Court of Appeals

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February 3, 2016

The Honorable Jenny Abbott Kitchings
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RE: State v. Richard P. Krochmal, Appellate Case No. 2015-001914

Dear Ms. Kitchings:

Enclosed for filing in the above matter are the following:

(1) Initial Brief of Appellant.

(2) Designation of Matter with Certificate of Counsel.

(3) Proof of Service of the above items to Respondent's Appellate Defender.

Sincerely,

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