STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Court of General Sessions

Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2015-001002

THE STATE .....RESPONDENT

v.

CHRISTOPHER JARED GREENE ..... APPELLANT

APPELLANT'S REPLY BRIEF

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I. Because the trial court erred in ordering restitution for crimes that were never proved or even charged, the Court should reverse.

Victim Richard Henthorne testified that someone stole a truck, a trailer, two lawnmowers, and some other equipment from him. Defendant was not involved in the thefts, but he admitted that he later bought some of the property despite knowing that it had been stolen. Even then, however, Defendant never agreed that he had been in possession of the two professional lawnmowers, and an investigator for the Orangeburg County Sherriff never disputed that fact.

Defendant was charged only with two counts of being in possession of stolen vehicles (viz., a truck and a motorcycle) and not any of the personal property. At a restitution hearing, Victim submitted an exhibit showing only about $9,000 in losses associated with the lost vehicles, not the personal property. His itemized list did not include the two lawnmowers valued at $22,000. Nevertheless, the State sought restitution of about $31,000, an amount that included the two mowers.

The trial court ordered Defendant to repay the $31,000 sought by the State, including the value of the two lawnmowers. Defendant appealed, arguing that the trial court erred by including restitution based on criminal conduct that was never charged and certainly never proved. In a restitution heading, the rules of evidence are relaxed, and the trial court may consider evidence that might otherwise run afoul of the South Carolina Rules of Evidence. However, while the *type* of admissible evidence is broadened, the trial court may not use that latitude to backdoor irrelevant evidence and impose restitution for unproven (and uncharged) crimes.

A. Defendant did not waive his constitutional rights in perpetuity by pleading guilty to two very specific crimes.

When a defendant pleads guilty to a crime, he admittedly waives objections to existing defects in the process *up to that point*.

Contrary to the State's position, a defendant quite obviously does not also waive all objections to constitutional errors that occur for the first time at later proceedings. For example, in *State v. Rice*, 401 S.C. 300, 737 S.E.2d 485 (2013), a minor charged with violent crimes had his case transferred to the Court of General Sessions where he then pled guilty. On appeal, the defendant tried to attack the transfer to General Sessions that had preceded his guilty plea. The South Carolina Supreme Court refused to reopen the door to such procedural attacks and explained that the guilty plea was a waiver of whatever non-jurisdictional defects might have led to the guilty plea.

The Court did not, however, rule that the defendant forever waived any objection to any errors occurring thereafter. Indeed, the Court quoted from the seminal United States Supreme Court case on the point, highlighting the importance of the timing of the waiver and supposed error:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights *that occurred prior to the entry of the guilty plea.*

Tollett v. Henderson, 411 U.S. 258, 267 (1973) (emphasis added); *see also Vogel v. City of Myrtle Beach*, 291 S.C. 229, 231, 353 S.E.2d 137, 138 (1987) ("A plea of guilty constitutes a waiver of nonjurisdictional defects and defenses. . . . It conclusively disposes of all *prior issues* including independent claims of deprivations of constitutional rights." (emphasis added)). If the State's position were correct, a defendant who pled guilty to jaywalking would have no recourse

if a judge refused to allow the defendant to have a lawyer present for sentencing and imposed the death penalty.

In this case, Defendant is not attacking the validity of his plea, the sufficiency of the evidence of the underlying crimes, or any other error that might have happened *before* he pled guilty. Rather, only for the first time after he waived any such errors by pleading guilty did the trial court commit a new and unrelated error by unilaterally finding Defendant guilty of an uncharged offense and imposing a sentence based on that uncharged crime. Because accepting guilt does not mean that a defendant surrenders all constitutional protections in perpetuity, Defendant has clearly not waived his right to appeal.

B. The trial court erred when it based the amount of its restitution order on uncharged and unproved conduct.

Although a trial court may relax the rules of evidence during a sentencing hearing, the trial court may not use that latitude to consider matters that are simply irrelevant to the purpose of the hearing.

Indeed, even the cases cited by the State for its position explicitly refute the State's own position. In *State v. Gulledge*, 326 S.C. 220, 487 S.E.2d 590 (1997), a lead case relied upon by the State, the defendant pled guilty to breach of trust in excess of $5,000 and was sentenced, in part, to restitution. The trial judge reviewed a handwritten summary of the victim's losses provided by a co-worker of the defendant. The court found that the State had proved an embezzlement of more than $460,000, but awarded only $210,000 in restitution. *Id.* at ___, 487 S.E.2d at 591.

On appeal, the defendant argued, among other issues, that the trial court had erred in weighing the handwritten summary because it was hearsay, but the Supreme Court disagreed. The lower court had recognized that under the relaxed standards used in sentencing a trial court

is "largely unlimited either as to the *kind of information* it may consider or the *source from which the information may come*." *Id.* at 228, 487 S.E.2d at 594. The Supreme Court agreed that the form of the evidence admitted was proper, but very specifically limited what might have otherwise been read too broadly; regardless of the appropriate evidentiary obstacles, the Court noted that constitutional requirements still apply: "[T]he admissibility of evidence is limited by constitutional provisions which require the evidence to be relevant . . . ." *Id.* at 229, 487 S.E.2d at 594 (citations omitted).

One of the constitutional limits on relevance is that unindicted crimes are simply not relevant in calculating restitution. *United States v. Freeman*, 741 F.3d 426, 434-35 (4th Cir. 2014) (holding restitution must be for "victims of the offense of conviction" not "'relevant conduct,' 'a related offense,' or a 'factually relevant offense'"). In *State v. Bynes*, 304 S.C. 62, 403 S.E.2d 126 (Ct. App. 1991), also cited by the State, the defendant, Jerome Bynes, pled guilty to two charges of forgery. "With Bynes' consent" the judge ordered him to pay restitution to the victims of his forgeries, including some for which he had not been indicted. *Id.* at 63, 403 S.E.2d at 126. Bynes later appealed on the basis of having to pay restitution for uncharged offenses.

Far from the State's position, the Court of Appeals in *Bynes* began by noting that a trial court lacks the jurisdiction to sentence for an offense when there is no indictment charging the defendant with the offense. *Id.* at 63, 403 S.E.2d at 126. The only exception to that limitation is when "the defendant knowingly consents to the judge's consideration of those crimes" and the amount awarded has support. *Id.* at 64, 403 S.E.2d at 127.

In *Bynes*, the trial court was affirmed because restitution for the uncharged forgeries had been a specific part of Bynes' plea bargain. The solicitor in that case had openly offered to seek indictments for each forgery if Bynes did not consent to the scope of restitution. *Id.* at 64, 403

S.E.2d at 127. In fact, Bynes even signed a statement that read: "I recognize I have not been charged on all checks, but I agree to make full restitution." *Id.* at 64, 403 S.E.2d at 127.

In this case, there was absolutely no consent whatsoever by Defendant to have the trial court consider uncharged crimes as part of setting restitution. The State falsely states in the Respondent's Brief that "Appellant explicitly consented to the sentencing judge holding a later restitution hearing to determine whether Appellant would be responsible for restitution for not only the truck, but the missing commercial lawnmowers and missing equipment." (Resp. Brief at 12.) Not surprisingly, the State has not offered a single citation to any such consent appearing anywhere in the Record. There was none.

CONCLUSION

For all of these reasons and those presented in Appellant's primary brief, this Court should reverse the decision of the trial court.

Respectfully submitted,

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