

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

RECEIVED

AUG 17 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROBERT STEVEN JOLLY,

APPELLANT

APPELLATE CASE NO. 2015-002399

ANDERS BRIEF OF APPELLANT

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the plea court impose an illegal sentence on Appellant when it ordered Appellant to pay \$4,500.00 in restitution, enforceable by the court's contempt powers, where Appellant had already served the maximum ten year sentence for obtaining property by false pretenses and, thus, the court's restitution order presents a substantial risk that Appellant will be incarcerated beyond the legal sentence of his crime?

STATEMENT OF THE CASE

On March 12, 2009, the Honorable J. Michael Baxley issued an order directing Appellant to appear for a hearing and show cause as to why he should not be sanctioned, held in contempt, and dismissed from further involvement in a number of pending foreclosure cases. A hearing was conducted on the motion on April 16, 2009.

On May 4, 2009 Judge Baxley issued an order holding Appellant in criminal contempt of court and sentencing him to six months of incarceration. Later that month, the Horry County Grand Jury indicted Appellant for one count of unauthorized practice of law. R. 3, l. 9 - 9, l. 21. In July of 2009, the Horry County Grand Jury additionally indicted Appellant for five counts of obtaining property by false pretenses. *Id.*

On April 12, 2011, Appellant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. Prior to trial, Appellant moved to dismiss the indictments based on an alleged double jeopardy violation. At the conclusion of the hearing, Judge Culbertson granted Appellant's motion to dismiss the indictments with respect to two counts of obtaining property by false pretenses. *Id.*

The trial proceeded on the remaining indictments. J. Wesley Locklair, III, represented Appellant. Assistant Attorney General W. Allen Myrick represented the State. The jury was unable to reach a verdict on the unauthorized practice of law count and Judge Culbertson declared a mistrial. However, the jury found appellant guilty of two counts of obtaining property by false pretenses.

Judge Culbertson sentenced appellant to concurrent terms of ten years imprisonment and a fine of five hundred dollars. After trial, the State appealed Judge Culbertson's ruling dismissing the indictments.

On May 8, 2013, this Court reversed Judge Culbertson's dismissal of the two counts of obtaining property by false pretenses and remanded the case back to the trial court. *State v. Jolly*, 405 S.C. 622, 749 S.E.2d 114 (2013).

On May 19, 2015, Appellant pled guilty to one of the remaining indictments for obtaining property by false pretenses before Judge Culbertson. Johnny Gardner represented Appellant. Assistant Attorney General W. Allen Myrick represented the State. R. 9, 1. 10 - 17, 1. 23.

Judge Culbertson sentenced Appellant to ten years of imprisonment. *Id.* The sentences were concurrent with Appellant's prior convictions and Appellant was given credit for time served. As a result, Appellant has already served his full sentence. He is not incarcerated. He is not on probation. *Id.* At the guilty plea, the State requested that the Court order restitution. Judge Culbertson held over the issue of restitution for a later hearing.

On September 1, 2015, Judge Culbertson held a hearing to determine the amount of restitution Appellant owed as a result of having pled guilty to two counts of obtaining property by false pretenses. R. 22, 1. 1 - 34, 1. 3.

On October 29, 2015, Judge Culbertson issued a written order for restitution, requiring Appellant to pay \$4,500 to Esther Reinhardt, one of the individuals that transferred the title of her home to Appellant in the belief that Appellant could prevent her bank from foreclosing on it. R. 45-48. The court specifically ordered that the restitution be paid from a frozen bank account belonging to Appellant's company and that it would be enforced through the court's contempt powers. *Id.*

ARGUMENT

The plea court imposed an illegal sentence on Appellant when it ordered Appellant to pay \$4,500.00 in restitution, enforceable by the court's contempt powers, where Appellant had already served the maximum ten year sentence for obtaining property by false pretenses and, thus, the court's restitution order presents a substantial risk that Appellant will be incarcerated beyond the legal sentence of his crime.

Relevant Facts

During the height of the foreclosure crisis, Appellant began advertising throughout Horry County that he could help people avoid losing their homes in foreclosures. Appellant had the homeowner sign over their title to the property, so that he could represent the property in the foreclosure action. R. 9, l. 10-21.

Appellant would appear in court and undertake unconventional challenges to the master's right to foreclose on the houses they owned the title on. *Id.* Rather than paying their mortgage monthly, the homeowners paid Appellant a monthly fee. Appellant's actions resulted in a substantial backlog of foreclosure cases in Horry County. *Id.*

Horry County equity courts became so paralyzed as a result of Appellant's conduct that Chief Justice Toal ordered Judge Baxley to resolve the backlog. Following a hearing, Judge Baxley found Appellant in criminal contempt of court in May 4, 2009. R. 24, l. 2 - 25, l. 19. Appellant was indicted shortly thereafter on five counts of obtaining property by false pretenses and one count of unauthorized practice of law.

Prior to Appellant's trial, Judge Culbertson dismissed two of the indictments for obtaining property by false pretenses on double jeopardy grounds as these incidents also formed the basis for Judge Baxley's finding of contempt. *See State v. Jolly*, 405 S.C. 622, 749 S.E.2d 114 (2013). The Court of Appeals reversed Judge Culbertson and remanded the case to proceed on the two previously dismissed indictments. *Id.*

Guilty Plea and Restitution Hearing

Esther Reinhardt was one of the people who transferred the title of their homes to Appellant after falling behind in her mortgage payments. Reinhardt paid Appellant at least \$4,500 in lieu of paying her mortgage. R. 24, l. 2 - 25, l. 19. Following Appellant's arrest and termination of his foreclosure challenges, Reinhardt lost her house to foreclosure.

Judge Culbertson had dismissed the indictment related to her case because it was one of the cases related to Appellant's criminal contempt. After Judge Culbertson's dismissal was overruled, Appellant agreed to plead guilty to one count of obtaining property by false pretenses arising out of Reinhardt's case. R. 17, ll. 7-23.

On May 19, 2015, Judge Culbertson accepted Appellant's guilty plea and sentenced him to time served based on the ten year sentence Appellant served for the other indictments. R. 16, l. 4 - 17, l. 23.

On September 1, 2015, Judge Culbertson held a hearing to determine the amount of restitution Appellant should pay Reinhardt. The State asked the court to order that Appellant pay \$4,500 from a frozen bank account owned by Appellant's now-defunct company. R. 24, l. 2 - 25, l. 19.

Judge Culbertson expressed concern that he did not have the power to impose restitution as Appellant had already completed his entire sentence and was no longer even on probation. R. 28, l. 15 - 29, l. 10. The defense agreed with the court.

However, the State posited that the court was obligated by S.C. Code Ann. § 17-25-322 to order Appellant to make full restitution to Reienhardt regardless of any sentence the court imposed. R. 29, l. 14 - 30, l. 24. Judge Culbertson declined to rule at the hearing and requested that the parties submit proposed orders for the court's approval.

Restitution Order

On October 29, 2015, Judge Culbertson issued an order for restitution that Appellant pay Reinhardt \$4,500 dollars from his defunct company's frozen bank account. R. 45 - 48. In so ruling, the court determined that § 17-25-322 gave the court the authority to impose restitution despite Appellant having completed his sentence. *Id.* The court also concluded that it had the ability to enforce the restitution order with its contempt powers. *Id.*

Discussion

When the elements of the crime justifying restitution are admitted or proven beyond a reasonable doubt, the trial court must determine by a preponderance of the evidence if the state has proven the amount of restitution. *State v. Gullede*, 326 S.C. 220, 487 S.E.2d 590 (1997). "Restitution" is defined as "payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender's criminal conduct." S.C. Code Ann. §16-3-1110 (Supp. 2005).

Before a court may order restitution to a victim, it must hold a hearing and determine the actual amount of damage or loss. *State v. Wilson*, 274 S.C. 352, 264 S.E.2d 414 (1980); S.C. Code Ann. § 24-21-430 (2010). Determining the amount of restitution that a victim is owed is an integral part of the sentencing process. *Gullede*, 326 S.C. at 220, 487 S.E.2d at 594-595.

Typically, restitution is ordered as a condition of probation. A defendant's failure to pay usually will result in a revocation of probation with the defendant serving more of his sentence incarcerated than he otherwise would. Under such a circumstance, a defendant will never be incarcerated beyond his sentence. *Cf. State v. Petty*, 245 S.C. 40, 41-42, 138 S.E.2d 643, 644 (1964) (holding that when a statute provides for punishment by fine or imprisonment, court has

discretion to fix punishment by giving defendant choice of fine or imprisonment, but sentence to both fine and imprisonment exceeds bounds of such statute and is illegal).

Here Appellant has already served the maximum sentence possible and is not on probation. To incentivize Appellant making prompt restitution, the court ordered that the failure to pay restitution would constitute contempt of court. R. 45 - 48.

Making restitution enforceable with the threat of criminal contempt of court was an error. Appellant is at risk of further imprisonment, which exceeds the statutory maximum. In the event Appellant is unable to pay restitution and is incarcerated, he will serve a sentence beyond the maximum prescribed for the crime he committed.

The fact that the additional incarceration is being enforced by means of contempt, as opposed to probation revocation, is immaterial to whether Appellant has been given an illegal sentence. *See Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764 (2002) (holding that suspended sentence that may end up in actual deprivation of person's liberty may not be imposed unless defendant was provided counsel).

Therefore, Appellant is entitled to resentencing that takes into account that he has already served the maximum sentence of incarceration. *State v. Johnston*, 333 S.C. 459, 510 S.E.2d 423 (1999) (the remedy on appeal for correcting an illegal sentence that presents a substantial risk that the defendant will be incarcerated beyond the legal sentence of his crime is to remand the case for resentencing).

CONCLUSION

Based on the foregoing, Appellant Robert Jolly respectfully requests that this court remand his case for resentencing.

A handwritten signature in black ink, appearing to read "John H. Strom", written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of August, 2016.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Steven Jolly states:

1. Counsel is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. Counsel has reviewed the record of appellant's guilty plea and restitution hearing before Judge Benjamin H. Culbertson and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Counsel has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, Counsel asks the Court to relieve him as counsel for Robert Steven Jolly.

Respectfully Submitted,



John H. Strom
Appellate Defender
ATTORNEY FOR APPELLANT

This 17th day of August, 2016.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Entire Guilty Plea Hearing Transcript (May 19, 2015);
- (3) Entire Restitution Hearing Transcript (September 1, 2015); and
- (4) All Restitution Hearing Exhibits.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 17, 2016



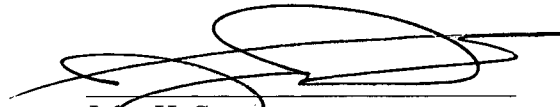
John H. Strom
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330
ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

August 17, 2016.



John H. Strom
Appellate Defender

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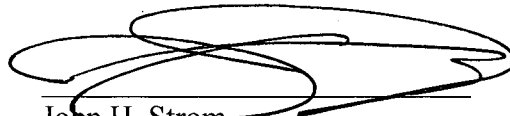
V.

ROBERT STEVEN JOLLY,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Robert Steven Jolly, at 288 Stacey Lane, Thomasville, NC 27360, this 17th day of August, 2016.



John H. Strom
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of August, 2016.

U Li (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025