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STATE OF SOUTH CAROLINA **RECEIVED**

IN THE COURT OF APPEALS

AUG 04 2016

SC Court of Appeals

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Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

THOMAS MARETT,

APPELLANT

APPELLATE CASE NO. 2015-002407  
\_\_\_\_\_

INITIAL BRIEF OF APPELLANT  
\_\_\_\_\_

TIFFANY L. BUTLER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the probation court erred by ordering Appellant to pay restitution in the amount determined by the trial court after Appellant was found guilty at trial where the trial court failed to hold a restitution hearing and Appellant did not agree to the restitution amount in open court, since Appellant asked the probation court for a restitution hearing?

## STATEMENT OF THE CASE

On February 22, 2013, Appellant was indicted by the Spartanburg County Grand Jury for obtaining signature or property by false pretenses for allegedly failing to pay for an exterior air conditioning unit that Appellant had gotten installed. R.\* Appellant alleged breach of contract and that he did not receive the air conditioning unit that he had originally ordered. Tr. 5, ll. 16 – 24.

On September 11, 2013, Appellant's case proceeded to a jury trial before the Honorable B. Keith Kelly. R.\* Sentence Sheet. Mary Stuart Lyall represented Appellant. Brittany D. Scott represented the State. R.\* Sentence Sheet.

Appellant was found guilty and sentenced to five years' imprisonment suspended to six months' imprisonment and five years of probation. R.\* Sentence Sheet. Appellant was also ordered to pay restitution in the amount of \$2,321.40 as special condition of probation. R.\* Order of Restitution. There was never any mention by the judge of a restitution hearing. Appellant appealed his conviction and sentence.

Deputy Chief Appellate Defender Wanda H. Carter represented Appellant on appeal. On March 18, 2015, the South Carolina Court of Appeals issued an unpublished opinion affirming Appellant's conviction and sentence. State v. Marett, Op. No. 2015-UP-149 (S.C. Ct. App. filed March 18, 2015).

On October 13, 2014, Appellant was served with a probation citation for failing to pay restitution, supervision fees, court fees, and drug test fees. R.\* Citation. On October 16, 2015, a probation violation hearing was held before the Honorable J. Derham Cole. Tr. 1. Charles William Snyder, III. represented Appellant. Probation Agent B. Scruggs represented the State. Tr. 1 – 3.

## STATEMENT OF FACTS

Counsel for Appellant, Charles William Snyder, III., explained to the revocation court that Appellant had appealed his conviction and sentence and Appellant's probation case had been held in abeyance while his direct appeal was pending in the South Carolina Court of Appeals. Tr. 3, ll. 9 – 12. Counsel asserted that appellate counsel advised Appellant to continue to have his probation case held in abeyance until after a PCR application had been addressed. Tr. 3, ll. 15 – 18.

Appellant explained that he had filed a PCR application and had been appointed an attorney from Greenville, Savannah Ross. Tr. 4, ll. 2 – 5. Appellant confirmed that he was advised by appellate counsel to request an abeyance of his probation case until his PCR case had been heard. Tr. 4, ll. 6 – 13. Appellant was also advised to request a restitution hearing, since Appellant never received a hearing. Tr. 4, ll. 6 – 13.

Appellant asserted that his first probation agent, Ethan Weston, advised him not to pay any restitution or fees until the direct appeal had been decided. Tr. 4, ll. 14 – 18. When Agent Scruggs became Appellant's probation agent, Scruggs told Appellant that the restitution issue should be resolved in court at a hearing. Tr. 4, ll. 19 – 21. Appellant "believe[d] the restitution hearing would give . . . clarification" on the restitution issue. Tr. 4, ll. 22 – 24.

Appellant disputed the restitution amount and explained to the revocation court that he never received a restitution hearing. Tr. 5, ll. 2 – 3. Instead, the trial court ordered that restitution be paid in the amount of \$2,321.40 after Appellant was found guilty. Tr. 6, ll. 8 – 14. The restitution amount was based on the cost of the air conditioning unit listed on the invoice, which was the amount for the unit Appellant "was supposed to have gotten." Tr. 5, ll. 8 – 14; R. Invoice.

Appellant explained:

“[I]nstead they installed something else, which would have been much less. And since then the city code department picked this up, and the guy came over and they said you can’t sell him one thing and install something else, and said you didn’t get a permit. And he said, well he can just have it.

So, anyway, I haven’t received any paperwork from him to that effect. But the city code department, their people were witnesses to his statement, Your Honor.”

Tr. 5, ll. 13 – 24.

The revocation judge erroneously reasoned that since Appellant did not request a restitution hearing, the trial court “set the restitution at some amount.” Tr. 6, ll. 8 – 13. Since Appellant appealed his case and his conviction and sentence were affirmed by the Court of Appeals, “the case is over now” and “[w]hatever the Court ordered it what’s due.” Tr. 6, ll. 14 – 25.

The revocation court continued Appellant’s probation and ordered that Appellant pay the restitution amount originally ordered by the trial court. Tr. 6, ll. 20 – 25.

## ARGUMENT

The probation court erred by ordering Appellant to pay restitution in the amount determined by the trial court after Appellant was found guilty at trial where the trial court failed to hold a restitution hearing and Appellant did not agree to the restitution amount in open court, since Appellant asked the probation court for a restitution hearing.

According to S.C. Code Ann. § 17-25-322 (A)(1976), “[w]hen 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.” Such hearings “must be held unless the defendant in open court agrees to the amount due.” S.C. Code Ann. § 17-25-322 (A) (emphasis added). In determining the amount of restitution a defendant must pay, the trial court “must make specific findings of the underlying facts and circumstances on the record.” State v. Cox, 326 S.C. 440, 442, 484 S.E.2d 108, 109 (Ct. App. 1997).

“[T]he defendant, the victim, the Attorney General, the solicitor, or other interested party may object to the imposition, amount or distribution of restitution . . . and the court shall allow all of these objections to be heard and preserved as a matter of record.” S.C. Code Ann. § 17-25-322 (A). Thus, “the statute contemplates an adversarial hearing to prove the amount of restitution.” State v. Gullledge, 326 S.C. 220, 487 S.E.2d 590, 594 (1997).

Here, Appellant was entitled to a restitution hearing to determine the proper amount owed to the victim for the exterior air conditioning unit. After Appellant was convicted, he was never afforded a restitution hearing. There was never any mention by the judge of a restitution hearing. The trial court made no specific findings of facts on the record to support the restitution amount as required by statute. Thus, the restitution issue was not raised to the trial judge. Because the

restitution issue was not raised to the trial judge and objected to, appellate counsel could not argue the issue on appeal.

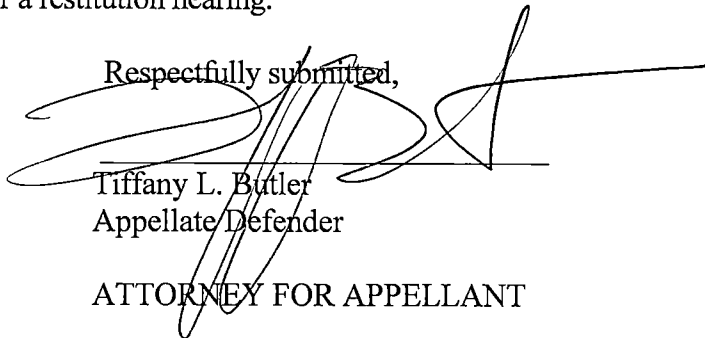
Appellant filed a PCR application. However, his PCR case was still pending at the time of his revocation hearing. Appellant, therefore, raised the restitution issue at the first opportunity – the probation revocation hearing. Appellant explained to the revocation judge that he disputed the restitution amount and requested a restitution hearing to get “clarification.” Tr. 3 – 4.

Because Appellant disputed the restitution amount and was deprived of a restitution hearing, to which he was entitled by statute, the probation judge should not have ordered Appellant to pay the restitution amount originally ordered by the trial judge and should have granted Appellant a restitution hearing.

CONCLUSION

For the reasons argued above, Appellant Thomas Marett respectfully requests this Court to reverse the lower court's order and remand for a restitution hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tiffany L. Butler', is written over a horizontal line. The signature is stylized and extends to the right of the line.

Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of August, 2016.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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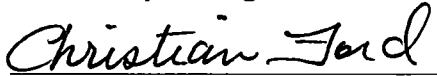
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Matthew Buchanan, Esquire, at the South Carolina Department of Probation, Parole and Pardon Services, Post Office Box 50666, Columbia, South Carolina 29250, and upon Thomas Marett, at 646 Southern Street, Spartanburg, South Carolina 29303, this 4th day of August, 2016.

  
Tiffany L. Butler  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 4th day of August, 2016.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: March 1, 2026