STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GENE D. COOK,

APPELLANT

APPELLATE CASE NO. 2015-001922

FINAL BRIEF OF APPELLANT

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II.

The restitution court erred by ordering Appellant to pay $9,999 in restitution, where the restitution court's order overruled the earlier determination of the sentencing court, which had accepted Appellant's guilty plea for "possession of stolen goods valued between $2,000 and $5,000 dollars" based on the State's summation of the case at Appellant's guilty plea hearing.

STATEMENT OF THE CASE

On March 27, 2013, the Edgefield County Grand Jury indicted Appellant Donald Cook for one count of grand larceny. R. 38.

On June 11, 2013, Appellant pled guilty before the Honorable Thomas A. Russo to one count of possession of stolen goods valued between one thousand and five thousand dollars. R. 2, ll. 1-11; R. 9, l. 9 - 11, l. 5; R. 40. The grand larceny charged was *nol processed.* W. Greg Seigler represented Appellant, and Assistant Solicitor H. Franklin Young, III, represented the State.

Judge Russo sentenced Appellant to five years imprisonment suspended on upon time served (196 days) and five years of probation. R. 10, l. 20 - 11, l. 6. Judge Russo ordered that the amount of restitution be determined at a later hearing and ordered that restitution be paid as a condition of probation. *Id.*

On September 3, 2015, a restitution hearing was held before the Honorable R. Knox McMahon. Bennett E. Castro represented Appellant. Assistant Solicitor Ervin J. Maye represented the State. Judge McMahon ordered that Appellant pay $9,999 in restitution. R. 34, ll. 13-20.

STATEMENT OF THE FACTS

Phillip Frew's Edgefield County home was burglarized on August 19, 2012. He reported that a shotgun and other personal items, including two Babe Ruth autographed baseballs, were taken. R. 6, l. 6 - 8, l. 5. Some weeks later, Frew reported that a stolen check had been cashed on his account in Aiken county. *Id.*

Law enforcement interviewed the man who cashed the check - identified only as "Williams" by the solicitor at the guilty plea hearing. Williams explained to police that he had received Frews' checks from a man named Chris Green. *Id.* Law enforcement then interviewed Green, who explained that he had purchased the checks from Appellant.

According to Green, Appellant had visited Green in the days after the robbery and offered to sell him the checks and other items that Appellant was carrying in his truck. Green also mentioned to law enforcement that Appellant was trying to sell two Babe Ruth autographed baseballs. *Id.*

After his arrest, Appellant helped the police recover the baseball, that he paid Green four hundred dollars for, from an area pawn shop, but denied involvement in the burglary. R. 15, ll. 7-16. Despite indicting Appellant for allegedly stealing: a television, a laptop, a DVD player, a handgun, a second Babe Ruth autographed baseball, and two shotguns, in addition to the one recovered baseball, the police did not find any other items connected to the Frew burglary in Appellant's possession. R. 38.

Guilty Plea

Appellant pled guilty to one count of possession of stolen goods valued between $1,000 and $5,000. R. 2, ll. 1-11; R. 10, l. 20 - 11, l. 6. In its recitation of the facts, the State lamented that it was unable to prove that Appellant was involved in the robbery, "[w]e, essentially have word of mouth connecting back to [Appellant]." R. 7, ll.4-11.

Defense counsel informed the plea court, "[q]uite frankly, Mr. Cook is guilty of receiving stolen goods, which he's pleading to and that's about all they can prove, because Mr. Green has a record about three times as long as Mr. Cook's and one of the baseballs was recovered." R. 8, ll. 6-13.

The State requested that restitution be held in abeyance so that Frew could testify as to the value of the baseball. R. 7, ll. 23-24. Defense counsel then objected to the State insinuation that Appellant was involved in the burglary. R. 8, ll. 6-23.

The court accepted the guilty plea. R. 10, l. 20 - 11, l. 6. Appellant was sentenced to a sentence of five years suspended on upon credit for 196 days of pretrial incarceration and probation. *Id.* Appellant was ordered to pay restitution as a condition of probation. Once restitution was paid in full, Appellant's probation was to be terminated.

Restitution Hearing

On September 3, 2015, a restitution hearing was held before Judge McMahon. At the beginning of the hearing, defense counsel objected to the imposition of restitution, explaining that Appellant pled guilty to possessing stolen goods and that the "goods" in this case was a Babe Ruth autographed baseball, that had been returned to Frew. R. 15, ll. 7-16. Defense counsel further explained that Appellant had purchased the baseball from Chris Green, but that Appellant was not involved in the underlying burglary. *Id.*

Judge McMahon denied the objection and held that, since Appellant had already pled guilty, the only issue was how much restitution should be ordered based on Frew's total losses in the burglary, not on the value of the baseball Appellant admitted to possessing. *Id.* at ll. 17-25. "He's been sentenced by the judge. The judge indicates restitution is ordered; amount to be determined,

hearing to be held. So that's already the Order of the Court. It's not a matter of whether he objects or doesn't; it's a matter of how much." *Id.*

Defense counsel then objected to the restitution court's decision to not limit its restitution order to the value of the Babe Ruth baseball that Appellant pled guilty to receiving. R. 16, ll.1-11. The objection was overruled. The solicitor then argued that Frew's total loss as a result of the burglary was $23,249. Insurance covered only $4,389. This left Frew with an out of pocket loss of $18,860. *Id.* at ll. 20-25.

The solicitor then alleged that Appellant had approached Frew and questioned why they were holding a restitution hearing as Frew had recovered the baseball that Appellant had purchased. R. 13 - 18, l. 2. The court again questioned why Appellant was objecting to the restitution hearing:

> He stood before a judge and entered his plea of guilty to at least having possession of stolen goods with a value of 2,000 but not less (sic) than $10,000. The judge at the time indicated restitution is ordered. Payment terms must be determined at a hearing. . . .
>
> It seems somewhat disingenuous to me for him to now say, oh well, I didn't accept it; I didn't steal it. And the restitution statute that you cite, that at the restitution hearing, the defendant, the victim, the attorney general, the solicitor or other interested party may object to the imposition amount or distribution of restitution, or the manner or method of them, and the Court shall allow all of these objections to be heard and preserved as a matter of record.

R. 18, l. 12 - 19, l. 4.

Defense counsel objected and clarified that the restitution issue should be limited to the Babe Ruth baseball that Appellant had admitted knowing was stolen when he bought it. R. 19, l. 10 - 20, l. 2. This baseball had since been returned and was the only item, of the numerous items stolen from Frew, that Appellant had come into contact with. *Id.* The restitution court agreed that Appellant only pled guilty to possessing the baseball. *Id.*

However, the court then demanded to know why Appellant was contacting Frew, as the State had alleged, thus violating his probation. Defense counsel stated that he was unaware of the alleged contact until the solicitor mentioned it earlier in the hearing. The court then speculated that Appellant "wants to do what he wants to do other than follow the authority of the Court and the law of the State of South Carolina is what I think." R. 20, l. 25 - 21, l. 2.

Testimony of Gene Donald Cook

Cook testified that he purchased a Babe Ruth autographed baseball from Chris Green that he knew was stolen. He paid $400 for the baseball which also included signatures from other members of the Yankees. R. 21, l. 24 - 22, l. 25. He further stated that he then sold the baseball to a friend who was later interviewed by police. *Id.*

Law enforcement recovered the baseball and interviewed Appellant. While being interrogated, Appellate identified the people he believed were involved in the burglary and tried to help law enforcement with their investigation. R. 25, ll. 15-25. "I bought a baseball; I shouldn't have. I sold it to try to make some money and ultimately they got that same baseball that I bought back. That's the only thing I know about. But I told them who I got it from . . . I couldn't do anything else." R. 25, l. 15-25.

State's Argument

Frew never testified, the State presented no witnesses, and entered no evidence into the record. Despite Appellant never having been charged with conspiracy nor having any co-defendants, the solicitor argued that "oftentimes co-defendants are jointly and severally liable for restitution. I think there's an overwhelming amount of circumstantial evidence in this case." R. 26, ll. 9-16.

The solicitor then informed the court that, despite Appellant having been released from custody after his guilty plea some two and half years before the restitution hearing, the police "**just intercepted** communications between [Appellant] and his girlfriend where he's talking about guns that were stolen." R. 26, ll. 9-16 (*emphasis added*). The solicitor produced an apparently newly-discovered book that he claimed Appellant exchanged with his girlfriend while in jail.

Unidentified handwriting in the book stated that "Say only this, that you went with me to sell the ball that I got from Chris Green. I traded some guns for the ball and you did not know it was stolen from anywhere." R. 27, l. 21 - 28, l. 5. Notwithstanding the fact that the State agreed to allow Appellant to plead guilty to possessing a baseball that he knew or should have known was stolen, the State theorized that:

> "[w]e believe that [Appellant] was involved in total in this criminal enterprise and it was not just limited to his possession of that single stolen item. I think that that was just the one thing they were able to conclusively put on him because he took that one item over to that pawn shop, Your Honor. But believe, we believe he was a part and parcel involved in all of it. . . ."

R. 26, ll. 17-25.

Accordingly, the State asked the court to order restitution "in at least the amount of $18,860. R. 27, ll. 2-9. **Again, Appellate pled guilty to possession of stolen goods valued between $1,000 and $5,000.**

Defense counsel then reiterated that the baseball, the only item that Appellant pled guilty to possessing, was valued at $5,000. The solicitor agreed with this valuation, but insisted that Appellant was a participant in the burglary and should have to compensate Frew for all of the stolen items.

Court's Restitution Order

The court ordered Appellant to pay $9,999.99 to Frew. R. 33, l. 15 - 36, l. 3. The court specifically warned Appellant against contacting Frew in the future and made "no victim contact" a condition of his probation. *Id.* Defense counsel then renewed his objection to the court setting restitution in an amount higher than the established value of the baseball that Appellant pled guilty to knowing was stolen when he bought it. *Id.*

ARGUMENTS

I.

The restitution court abused its discretion by ordering Appellant to pay $9,999 in restitution to compensate the victim for all items stolen during a burglary where Appellant only pled guilty to receiving stolen goods valued between $1,000 and $5,000 dollars as a result of Appellant having purchased a Babe Ruth autographed baseball that he knew or should have known was stolen, thus, the imposition of $9,999 in restitution was without an underlying conviction or factual basis.

When the elements of the crime justifying restitution are admitted or proven beyond a reasonable doubt, the court must determine by a preponderance of the evidence if the state has proven the amount of restitution. *State v. Gulledge*, 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) (*emphasis added*).

As in most sentencing proceedings, a court may conduct a broad inquiry at a restitution hearing, "largely unlimited as to the kind of information . . . or the source from which [information] may come." *State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976); S.C. Code Ann. § 24-21-430 (2010). However, there must be a factual basis which shows that the victim suffered the claimed losses **as a result of appellant's conduct**. *State v. Fussell*, 299 S.C. 162, 383 S.E.2d 1 (1989)(*emphasis added*).

Like South Carolina courts, the Fourth Circuit has repeatedly held that there must be a causal connection between the defendant's "offense of conviction" and the victim's losses. *United States v. Blake*, 81 F.3d 498 (4th Cir. 1996). In imposing restitution, a court must look into the "specific conduct that is the basis of the conviction." *Id.* at 502.

Here, the restitution court erred in imposing $9,999 in restitution where the established value of the baseball that Appellant pled guilty to knowing was stolen when he purchased it was

between $1,000 and $5,000. The restitution court failed to consider that the baseball at issue was returned to Frew, thus restitution should have been limited to whatever "specific damages and economic losses" Frew suffered as a result of not having continuous possession of the Babe Ruth autographed baseball that Appellant admitted to knowing was stolen when he purchased it.

In all material respects, Appellant's case is indistinguishable from *State v. Fussell*. 299 S.C. 162, 383 S.E.2d 1 (1989). In *Fussell*, the defendant pled guilty to two counts of grand larceny, three counts of second-degree burglary, and one count of burglary. *Id.* The trial court ordered Fussell to pay $1,500 in restitution "'just for antagonizing the man' whose place of business had been broken into a number of times." *Id.* at 164, 383 S.E.2d 1.

In contrast to the large restitution award, the only evidence put forward by the State regarding the **victim's losses attributable to Fussell's admitted to criminal conduct** was "office and stereo equipment, office supplies and some other small items worth over $200." *Id.* Accordingly, our Supreme Court held that "the judge's reasons for ordering restitution are improper and the solicitor's statement is insufficient to support the amount of restitution ordered." *Id.*

Like the victim in *Fussell*, it is undisputed that Frew experienced serious losses as a result of his home being burglarized. The record also makes clear that the solicitor passionately believed that Appellant participated in the burglary, but simply had no evidence of Appellant's involvement. R. 26, l. 9 - 28, l. 5. Whatever the reason, the State declined to try Appellant on the grand larceny indictment and must now live with their decision.

The State agreed to have Appellant plead guilty to possession of stolen goods. Specifically, one Babe Ruth autographed baseball. R. 19, l. 10 - 20, l. 2. This baseball was recovered, with Appellant's assistance, and returned to Frew. Rather than establishing the

financial loss attributable to the "specific conduct that is the basis of the conviction," the State used the restitution hearing to extract a level of retribution upon Appellant to compensate for their aversion to trying him for grand larceny. R. 26, ll. 9-16.

Nonetheless, the fact remained that Appellant only admitted to receiving one Babe Ruth autographed baseball that he knew or should have known was stolen. That admission is the sole factual basis for restitution. *State v. Fussell.* 299 S.C. at 163, 383 S.E.2d at 1.

The State's allegations at the restitution hearing were neither admitted to by Appellant at the guilty plea hearing nor proven by the State at trial. The solicitor's unsubstantiated feelings, however strong, cannot support a restitution award. *See State v. Wilson*, 274 S.C. 352, 264 S.E.2d 414 (1980) (holding that an evidentiary basis must exist before the court may impose restitution).

Accordingly, there was no factual basis for the court to impose $9,999 in restitution where Appellant pled guilty to receiving one Babe Ruth autographed baseball that he knew was stolen that was valued at, at most, $5,000. Moreover, the court, when imposing restitution, erred in not taking into consideration that the baseball Appellant pled guilty to knowing was stolen when he purchased it was returned to Frew.

Therefore, Appellant's case should be remanded for a recalculation of restitution that recognizes Appellant pled guilty to buying what he knew or should have known was a stolen Babe Ruth autographed baseball and that the baseball was later returned to the victim.

II.

The restitution court erred by ordering Appellant to pay $9,999 in restitution, where the restitution court's order overruled the earlier determination of the sentencing court, which had accepted Appellant's guilty plea for "possession of stolen goods valued between $2,000 and $5,000 dollars" based on the State's summation of the case at Appellant's guilty plea hearing.

Relevant Facts

At Appellant's June 11, 2013 guilty plea hearing, the solicitor informed the court that "[t]he State is accepting a plea of guilty of receiving stolen goods from a $1,000.00 to $5,000.00 amount". R. 2, ll. 1-11. The sentencing court accepted that there was a factual basis for the guilty plea as Appellant admitted that he purchased a Babe Ruth autographed baseball that he knew had very likely been stolen. R. 6, l. 6 - 7, l. 11; R. 8, l.14 - 11, l. 6.

After expressing skepticism about the authenticity of the baseball - the State maintained that Frew had two Babe Ruth autographed baseballs, a claim the court found incredulous - the sentencing court ordered that a restitution hearing be held at a later date to determine the value of the baseball. *Id.*

The sentencing sheet signed by Judge Russo stated unambiguously, in Judge Russo's handwriting, that Appellant pled guilty to "**receiving stolen goods $1,000 - $5,000.**" R. 40. The sentencing sheet further notes that Appellant violated S.C. Code Ann. § 16-13-180(2). This specific code section does not exist. However, S.C. Code Ann. § 16-13-180 details the elements and penalties for receiving stolen goods.

At the restitution hearing, Judge McMahon incorrectly stated that Appellant had pled guilty to possessing stolen goods with a value of between $2,000 and $10,000. R. 18, ll. 3-20. Defense counsel objected to the imposition of restitution. R. 15, ll. 7-16. Prior to setting restitution, Judge

McMahon observed that Appellant had possessed the baseball "as a stolen item which he then pled guilty to that was of a value up to $4,000. R. 20, ll. 3-5.

Despite Judge Russo's earlier determination that the maximum value of the baseball was $5,000 when accepting Appellant's guilty plea to possession of stolen goods valued between $1,000 and $5,000, Judge McMahon ordered Appellant to pay $9,999 in restitution. R. 2, ll. 1-11; R. 9, l. 18 - 11, l. 6; R. 34, ll. 13-21.

Discussion

Trial courts have wide discretion in determining what sentence to impose. *State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976). **The authority to change a sentence rests exclusively with the sentencing judge**. *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). Determining the amount of restitution to impose is a part of the sentencing of a convicted or admittedly guilty defendant's sentence.

When there is a discrepancy between an oral pronouncement of a sentence and a written sentencing order, **the oral pronouncement controls**. *Bordeaux v. State*, 410 S.C. 495, 500, 765 S.E.2d 143, 145 (2014) (PCR judge erred in ruling ambiguous sentencing sheets took precedence over unambiguous plea transcript). Any ambiguity or doubts relative to a sentence should be resolved in favor of the accused." *Tant v. South Carolina Dept. of Corrections*, 408 S.C. 334, 342, 759 S.E.2d 398, 402 (2014) (*citing State v. DeAngelis,* 257 S.C. 44, 50, 183 S.E.2d 906, 909 (1971).

Generally one circuit court judge does not have the power to review, modify, affirm, or reverse the findings of another circuit court judge. *Cook v. Taylor,* 272 S.C. 536, 252 S.E.2d 923 (1979); *Sheppard v. Kimbrough,* 282 S.C. 348, 318 S.E.2d 573 (Ct.App.1984). This principle is applies with particular force where the ruling involves a purely legal question. *Belton v. State*, 313 S.C. 549, 554, 443 S.E.2d 554, 557 (1994) (holding that one circuit court was without authority to

review findings of another as to whether Budget and Control Board had jurisdiction to hear reinstated employee's appeal of the Board's calculation of her "back pay").

The test for determining when one circuit court judge has infringed on the earlier findings of another circuit court judge is whether the second judge "entered findings on the issues ruled upon" by the first judge. *State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 488, 334 S.E.2d 528, 529 (Ct. App. 1985).

Here, the restitution court infringed on the earlier finding of the plea court. Specifically, by imposing $9,999 in restitution the restitution court was, at a minimum, modifying a ruling by the plea court. The plea court accepted the guilty plea based on **the State's explanation of that Appellant was admitting to "receiving stolen goods from a $1,000.00 to $5,000.00 amount".** R. 2, ll. 1-11.

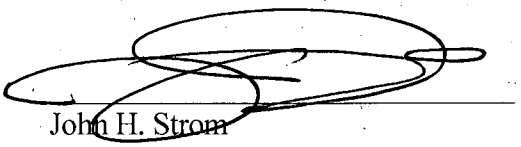
S.C. Code Ann. § 16-13-180(2), the code section cited to on the sentencing sheets, does not exist. While there is no statutory offense for possessing stolen goods with that value range, at the very least, the $1,000 to $5,000 range represents a determination by the plea court as to the potential value of the baseball. The plea court unambiguously accepted Appellant's guilty plea for "receiving stolen goods from a $1,000.00 to $5,000.00 amount". R. 2, ll. 1-11; R. 40.

This oral pronouncement by the plea court, a direct result of the State's own statement of the offense that Appellant was pleading guilty to, is controlling. Any ambiguity caused by the written reference to S.C. Code Ann. § 16-13-180(2) on the sentencing sheet, where the sentencing court also noted that Appellant pled guilty to "receiving stolen goods $1,000 - $5,000", must give way to the unambiguous oral acceptance of the terms of the guilty plea by Judge Russo. *Bordeaux*, 410 S.C. at 500, 765 S.E.2d at 145.

CONCLUSION

Based on the foregoing reason, the June 11, 2015 restitution order should be vacated and remanded for a new hearing.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of November, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

November 23, 2016

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IN THE COURT OF APPEALS

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R. Knox McMahon, Circuit Court Judge

THE STATE,

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V.

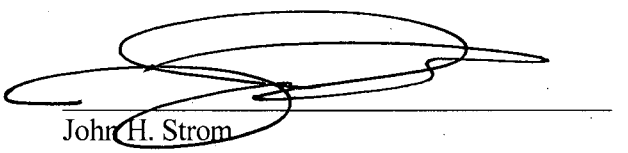
GENE D. COOK,

APPELLANT

APPELLATE CASE NO. 2015-001922

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant 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, this 23rd day of November, 2016.



John H. Strom
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ATTORNEY FOR APPELLANT

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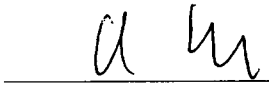
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