STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of General Sessions

The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2015-001922

State of South Carolina, ...Respondent,

v.

Gene Donald Cook, Jr., ...Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. The restitution hearing judge did not abuse his discretion in ordering Appellant to pay $9,999.99 in restitution.[1]

[1] This combines the two issues raised in the Final Brief of Appellant.

STATEMENT OF THE CASE

Appellant was indicted at the April 2013 term of the Edgefield County Grand Jury for grand larceny (2013-GS-19-0240). (R. p. 38).

On June 11, 2013, Appellant pled guilty to receiving stolen goods ($1000 - $5000). (R. p. 2). He was represented by W. Gregory Seigler, Esquire. On that date, the Honorable Thomas A. Russo levied a sentence of five (5) years suspended on the service of time-served and five (5) years probation. (R, p. 10; p. 40). Judge Russo also noted a "[s]pecial condition of probation is that I'm going to order restitution in an amount to be determined at a hearing to be held, but I'm going to provide that once that amount is set, this probation can end, terminated, once that restitution is paid in full." (R. pp. 10-11; p. 40).

A restitution hearing was held on September 3, 2015. Appellant was represented by Bennett E. Casto, Esquire. On that date, the Honorable R. Knox McMahon ordered restitution to the victim in amount of $9,999.99. (R. p. 34; p. 40).

STATEMENT OF FACTS

Guilty Plea Hearing

At the beginning of the guilty plea hearing, the assistant solicitor noted Appellant had been indicted for grand larceny but would be pleading guilty to receiving stolen goods.[2] (R. p. 2). Appellant indicated he understood the constitutional rights he would waive if he pled guilty. (R. p. 4). Appellant agreed his understanding of the plea recommendation was "that the Court consider a probationary sentence that would involve some amount of restitution with the understanding that once [he] completed the payment of that restitution, that that probation could end." (R. p. 5). Appellant stated that, other than the recommendation, no one made any promises or threats in order to induce his guilty plea. (R. p. 5).

The assistant solicitor recited the facts of the case. The victim's house was burglarized while he was absent and "shotguns and a variety of other items were taken." (R. p. 6). When someone subsequently attempted to cash one of the victim's checks, police determined the checks came from Appellant. (R. p. 6). A second individual stated Appellant

> came by my house and he had a tarp over the back of the truck and in the time frame involved here right after it happened, he said he had a way and maybe he might be interested in some of the products he had. He saw the butt of a shotgun, what looked to him to be something like that, and some signed Babe Ruth baseballs, which was peculiar to the items of larceny taken from the residence, relatively rare items. Those items, he said, were in the back of the car.

(R. pp. 6-7).

After reciting Appellant's record of prior convictions, the assistant solicitor asked the plea judge to "delay and hold open restitution" so the victim could "present some evidence"

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[2] The assistant solicitor also noted a first-degree burglary charge would be nol prossed. (R. p. 2)

about the stolen items. (R. pp. 7-8). Plea counsel stated they wanted to hold restitution open so the value of the items could be determined. (R. p. 8).

Plea counsel, in mitigation, stated Appellant "made a mistake" and "intends on paying for the items he's responsible for." (R. p. 10). The plea judge imposed sentence and noted a "[s]pecial condition of probation is that I'm going to order restitution in an amount to be determined at a hearing to be held, but I'm going to provide that once that amount is set, this probation can end, terminated, once that restitution is paid in full." (R. pp. 10-11).

Restitution Hearing

At the start of the restitution hearing, counsel for Appellant objected to the imposition of restitution in this case. (R. pp. 15-16). The judge found the hearing would proceed, however, because the guilty plea ordered restitution and Appellant did not file an appeal. (R. p. 15; pp. 18-19).

The assistant solicitor stated the victim had $23,249 in actual losses and had been reimbursed by his insurer for $4,389, which left him with out-of-pocket losses of $18,860. The assistant solicitor noted the victim had provided detailed documentation. (R. p. 16). Counsel argued Appellant pled guilty to possessing a stolen item (an autographed Babe Ruth baseball) and this was the only stolen item Appellant possessed. (R. pp. 19-20).

Appellant offered testimony on his own behalf. Appellant knew the Babe Ruth baseball was stolen when he purchased it for $400. (R. pp. 21-23; p. 24). Appellant did not purchase any other stolen items. (R. p. 23; p. 24). Appellant sold the Babe Ruth baseball to another individual for $1,000. (R. p. 23).

The assistant solicitor stated the victim provided an itemized list of the property that was taken and noted "oftentimes co-defendants are jointly and severally liable for restitution." (R. p. 26). The assistant solicitor stated his belief – based on intercepted communications between Appellant and his girlfriend – that Appellant "was involved in total in this criminal enterprise" and the victim should be awarded $18,860 in restitution. (R. pp. 26-28). After the judge inquired into whether Appellant's co-defendant was ordered to pay restitution, the assistant solicitor replied the co-defendant pled guilty to other burglary charges (and the burglary charge in the victim's case was dismissed), and so he was not ordered to pay restitution. (R. pp. 30-32). The judge clarified the $5,000 baseball was recovered, so the balance sought by the victim was $13,859 and thus ordered $9,999.99 in restitution. (R. pp. 33-35).

ARGUMENT

The restitution hearing judge did not abuse his discretion in ordering Appellant to pay $9,999.99 in restitution.

Appellant argues "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." (Final Brief of Appellant, pp. 11-12). Appellant argues that in imposing $9,999.99 in restitution, "the restitution court was, at a minimum, modifying an issue ruled upon by the plea court. The plea court accepted the guilty plea based on the State's explanation [ ] that Appellant was admitting to 'receiving stolen goods from a $1,000.00 to $5,000.00 amount.'" (Final Brief of Appellant, p. 16). Appellant's argument is without merit.

A.

"In criminal cases, the appellate court sits to review errors of law only." State v. Dawson, 402 S.C. 160, 163, 740 S.E.2d 501, 502 (2013) (citing State v. Jacobs, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011)). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law." Id.

B.

When a defendant is convicted of a crime causing pecuniary damages or loss to a victim, the court must hold a hearing to determine the amount of restitution due to the victim as a result of the defendant's criminal acts. S.C. Code Ann. § 17-25-322(A) (2014). "[I]n addition to any other sentence which [the court] may impose, the court shall order the defendant make restitution or compensate the victim for any pecuniary damages." Id. "Restitution means 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(12) (2014) (internal quotation marks omitted).

During a restitution hearing, the trial judge is allowed broad discretion in the manner of conducting the hearing. State v. Gulledge, 326 S.C. 220, 230, 487 S.E.2d 590, 595 (1997). The judge's decisions are reviewed for an abuse of discretion. Id. The judge is permitted to consider any and all information pertinent to the proper sentence for a particular defendant. State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) (citation omitted); see also State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (A judge "generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited

either as to the kind of information he may consider or the source from which it may come.") (citations omitted); State v. Cantrell, 250 S.C. 376, 379-80, 158 S.E.2d 189, 191 (1967) ("Highly relevant, if not essential, to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.").

C.

The restitution hearing judge neither abused his discretion nor circumvented the intent of Appellant's sentence in ordering restitution in the amount of $9,999.99. Pursuant to South Carolina Code Annotated § 17-25-125 (2014), when sentencing a defendant convicted of a crime involving the unlawful taking of another's property, the judge may order the defendant to make restitution to the victim in an amount equal to the monetary loss sustained by the victim – as determined by the sentencing judge. In the instant case, the judge had broad discretion to hear facts and evidence related to the issue of restitution. See Gulledge, 326 S.C. at 230, 487 S.E.2d at 595. The judge heard about the monetary loss suffered by the victim (who presented an itemized list documenting his losses). (R. p. 16; p. 26). The judge also heard about an intercepted communication between Appellant and his girlfriend in which Appellant mentioned guns and other items taken from the victim's residence. (R. pp. 26-28). This information was properly considered by the restitution hearing judge in determining the amount of restitution. See id. at 229, 487 S.E.2d at 594 ("A restitution hearing is part of the sentencing proceeding and thus, the trial court may consider information which may be inadmissible under evidentiary rules."). The judge did not abuse his broad discretion in considering information related to the burglary of the victim's residence – even though Appellant pled guilty to the charge of receiving

stolen goods – because as the sentencing judge, he can consider restitution for unindicted offenses. See State v. Bynes, 304 S.C. 62, 64, 404 S.E.2d 126, 127 (Ct. App. 1991) (citation omitted) ("[A] judge acts properly in considering restitution for unindicted offenses as a condition of probation as long as the defendant knowingly consents to the judge's consideration of those crimes and there is some evidentiary basis for the amount of restitution ordered."). The restitution hearing judge considered and ordered restitution for specific damages associated with the crime for which Appellant pled guilty. Any economic damage suffered by the victim as a result of this crime meets the statutory definition for restitution. The victim stated he incurred damage when items were stolen from his residence. The restitution hearing judge, in relying upon these figures in determining restitution, clearly found this evidence was credible. Cf. Marshall v. Lonberger, 459 U.S. 422, 433, 103 S. Ct. 843, 850 (1983) (applying presumption of correctness to implicit finding against the defendant's credibility, where that finding was necessarily part of the court's rejection of the applicant's claim). As such, the restitution hearing judge was well within his discretion to order Appellant to pay the victim restitution in an amount that included losses in excess of those contemplated by only the receiving stolen goods charge.

D.

Accordingly, the restitution hearing judge did not abuse his discretion in ordering Appellant to pay $9,999.99 in restitution to the victim in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the lower court be affirmed.

Respectfully submitted,

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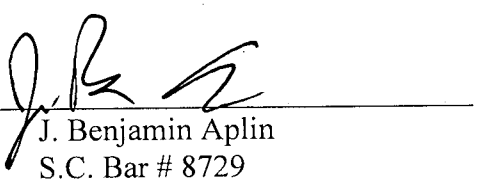
By: 
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November 28, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Edgefield County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2015-001922

THE STATE,

Respondent,

vs.

GENE DONALD COOK,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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November 28, 2016

(5)

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THE STATE,

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PROOF OF SERVICE

I, Keely Carter, certify that I have served the within corrected Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John H. Strom, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 28th day of November, 2016.

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(3)

ALAN WILSON
ATTORNEY GENERAL

November 28, 2016

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RE: State v. Gene Donald Cook – Appellate Case No. 2015-001922

Dear Mr. Strom:

I am enclosing two copies of the corrected Final Brief of Respondent, along with proof of service, in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar # 8729

JBA/kc
Enclosures

cc: Honorable Jenny A. Kitchings (original and nine enclosed)
Victim Services