

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUN 20 2018

APPEAL FROM YORK COUNTY

S.C. SUPREME COURT

The Honorable J. Mark Hayes, II, Circuit Court Judge

Court of Appeals Appellate Case No. 2015-001914

THE STATE,PETITIONER,

v.

RICHARD P. KROCHMAL,RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 24, 2018.

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS DECISION AFFIRMING THE CIRCUIT COURT SHOULD BE REVERSED BECAUSE THE CIRCUIT COURT ERRED AS A MATTER OF LAW AS A CRIMINAL IS NOT ENTITLED TO MONETARY COMPENSATION FOR COMMITTING CRIMINAL ACTS.

STATEMENT OF THE CASE

This is a State's appeal taken from the "ORDER OF RESTITUTION" issued by the Honorable J. Mark Hayes, II on August 24, 2015. (App. p. 8). The restitution hearing occurred on March 30, 2015. The Respondent was indicted by the York County Grand Jury on February 20, 2014 for the following four (4) offenses:

- 2014GS4600563
 - CDR 2615, Securities Fraud >\$20k, S.C. Code Ann. § 35-1-508(a)(1) (Supp. 2006).
 - Date of offense "sometime in 2009, 2010, 2011"
 - employed a scheme to collect exorbitant fees from investments in Mutual Modeling Assoc. Inc. far in excess of the fee agreement
- 2014GS4600564
 - CDR 2615, Securities Fraud >\$20k, S.C. Code Ann. § 35-1-508(a)(1) (Supp. 2006).
 - Date of offense "sometime in 2009, 2010, 2011"
 - transacting business in this State as an unregistered investment advisor
- 2014GS4600565
 - CDR 3437, Forgery >\$10k, S.C. Code Ann. § 16-13-10(A) (2003).
 - Date of offense "sometime in 2009"
 - forging the signature of victim1 on an Investment Advisory Form(s) dated July 6, 2009
- 2014GS4600566
 - CDR 3437, Forgery >\$10k, S.C. Code Ann. § 16-13-10(A) (2003).
 - Date of offense "sometime in 2009"
 - forging the signature of victim2 on an Investment Advisory Form(s) dated July 6, 2009

(App. pp. 87 - 94).

On January 28, 2015, pursuant to a negotiated plea agreement, Respondent pled guilty to lesser included offenses of each charge and was sentenced on

each count to consecutive 2.25 years in SCDC suspended on the service of 22 days in the detention center and probation for 60 months.¹ (App. pp. 4 - 7). The restitution hearing was deferred until after the Respondent was released from his four (4) consecutive sentences of 22 days in the local county detention facility.

A timely notice of appeal of was filed and the Court of Appeals issued its decision affirming the lower court in an unpublished order filed March 21, 2018. State v. Krochmal, Unpub. Op. No. 2018-UP-126 (S.C. Ct. App. filed March 21, 2018). (App. p. 586). The Petition for Rehearing was denied on May 24, 2018. (App. p. 592). This Petition for Writ of Certiorari follows.

¹ The sixty (60) month probationary sentence is not consecutive, S.C. Code Ann. § 24-21-440 (2017).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). “On appeal, the trial court’s ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law.” State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs where the trial court’s conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 860 (Ct. App. 2010).

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS DECISION AFFIRMING THE CIRCUIT COURT SHOULD BE REVERSED BECAUSE THE CIRCUIT COURT ERRED AS A MATTER OF LAW AS A CRIMINAL IS NOT ENTITLED TO MONETARY COMPENSATION FOR COMMITTING CRIMINAL ACTS

The Court of Appeals should be reversed for three (3) primary reasons. First, their decision is contrary to the Victim's Bill of Rights in our State Constitution. Second, the Court of Appeals improperly based its decision on a prior civil case [Walsh] that is inapplicable for criminal cases. Third, the S.C. Code Ann. § 17-25-322(B) (2014) factors cited by the Court of Appeals in their decision play no part in the restitution calculation they affirmed.

Restitution and the Victim's Bill of Rights

Victims are to "receive prompt and full restitution from the person or persons convicted of the criminal conduct that caused the victim's loss..." S.C. Const. art. I, 24(A)(9). "When 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 of the defendant's criminal acts." S.C. Code Ann. § 17-25-322 (2014). Respondent has been convicted of crimes, and during the commission of his criminal acts he took \$159,800 from the victims – they are entitled to that amount of restitution.

The circuit court erred when it found that the total restitution amount

owed by the Respondent was only \$30,100 when it is undisputed that the Respondent took \$159,800 from the victims during the commission of his criminal acts. Petitioner submits that restitution is the entire amount (\$159,800) received by the Respondent during the indictment period because the Respondent was engaged in criminal acts during that time and cannot be entitled to any compensation for committing crimes.

It is undisputed that Respondent's "services" were illegal, in part, because he operated as an unregistered investment advisor (indictment 2014GS4600564).² All of the trades performed during the indictment period by Respondent regarding the victim's investments were done so illegally because he was not a registered investment advisor. Not only was he unregistered, he also committed additional acts in his scheme to defraud the victims with nonsensical trades and fees (indictment 2014GS4600563). In addition, when questioned by the Securities Commissioner regarding the calculation of fees, Respondent presented forged investment fee agreements (indictments 2014GS4600565 and 2014GS4600566).

Respondent's expert calculated that Respondent "overcharged" the victims \$30,100 when the total Respondent *should* have charged was \$129,700 and the actual "fees" charged totaled \$159,800. (App. p. 65). Respondent argued that the victim's investment accounts increased in value

² The Securities Act declares it unlawful for a person "to transact business in this State as an investment adviser unless the person is registered under [the Act] as an investment adviser or is exempt from registration as an investment adviser." S.C. Code Ann. § 35-1-403(a) (Supp. 2006).

and that he therefore performed a valuable [albeit illegal] service. Respondent's assertion lacks any causality – there was no evidence presented that the capital gains in the victim's accounts were due to anything other than the appreciation of the mutual fund market during 2009-2011. There was no evidence presented whatsoever that Respondent had any sort of "Midas touch." To the contrary, the fact is the only service Respondent rendered for the victims was fraud, and he should not be able to profit from the criminal acts.

Lenz v. Walsh, is not applicable for criminal restitution.

In Lenz v. Walsh, the Court of Appeals applied an equitable analysis as explained in their fifth and final inclusive factor: "and (5) equity and the principles of restitution do not require that unlicensed contractors be completely uncompensated or that contracting homeowners receive the completed construction without cost." Lenz v. Walsh, 362 S.C. 603, 608, 608 S.E.2d 471, 473 (Ct. App. 2005). Unlike the purely civil claims at issue in the Court of Appeals' opinion in Walsh, Respondent's criminal convictions trigger the application of S.C. Const. art. I, § 24(A)(9) authorizing the victims to "receive prompt and full restitution from the person or persons convicted of the criminal conduct that caused the victim's loss..." S.C. Const. art. I, 24(A)(9) (emphasis added). Applying the civil analysis of Walsh denies victims of crimes the very rights guaranteed to them under our State Constitution and the companion criminal restitution statutes. See generally

State v. Morgan, 417 S.C. 338, 790 S.E.2d 27, (Ct. App. 2016) (citing S.C. Code Ann. § 16-3-1110 (2015) and S.C. Code Ann. § 17-25-322 (2014)) (explaining that civil damages and restitution are distinct remedies with different consideration).

Petitioner submits that criminal restitution is not akin to a civil windfall as was the equitable analysis in Walsh when Mr. Lenz was an unlicensed residential homebuilder hired to construct the Walsh's home. The five (5) inclusive factors cited in Walsh are as follows:

(1) the statutes requiring licenses do not specifically authorize the recovery of money paid; (2) such laws are penal in nature and must be strictly construed; (3) the specification of particular penalties precludes the addition of other penalties by judicial interpretation; (4) allowing the recovery of such payments is not necessary to effectuate the policy of licensing statutes; and (5) equity and the principles of restitution do not require that unlicensed contractors be completely uncompensated or that contracting homeowners receive the completed construction without cost.

Lenz v. Walsh, 362 S.C. 603, 608, 608 S.E.2d 471, 473 (Ct. App. 2005) (citing Hawkins v. Holland, 97 N.C. App. 291, 294, 388 S.E.2d 221, 223 (1990)).

While applicable for common pleas, the specific five Walsh factors are not applicable in a criminal restitution analysis.

1. Walsh factor #1: "the statutes requiring licenses do not specifically authorize the recovery of money paid":
 - a. S.C. Code Ann. § 17-25-322(A) (2014) specifically authorizes the recovery of money paid - "the court shall order the defendant make restitution or compensate the victim for any pecuniary damages." The Constitution of South Carolina Victim's Bill of Rights also specifically authorizes the recovery of money paid - "prompt and full restitution from the person or persons

convicted of the criminal conduct that caused the victim's loss or injury, including both adult and juvenile offenders". S.C. Const. art. I, § 24(A)(9).

2. Walsh factor #2: "such laws are penal in nature and must be strictly construed":
 - a. Unlike Walsh, this is a criminal case; it is by its very nature penal.
3. Walsh factor #3: "the specification of particular penalties precludes the addition of other penalties by judicial interpretation":
 - a. Unlike Walsh, restitution is specifically guaranteed to the victims.
4. Walsh factor #4: "allowing the recovery of such payments is not necessary to effectuate the policy of licensing statutes":
 - a. Unlike Walsh, this is not a regulatory statute issue, this is a criminal case and restitution is specifically guaranteed to the victims.
5. Walsh factor #5: "equity and the principles of restitution do not require that unlicensed contractors be completely uncompensated or that contracting homeowners receive the completed construction without cost":
 - a. Similarly, the final "equity" factor from Walsh is not applicable when fraud occurs.³ Respondent is not entitled to the protections of equity when he has unclean hands. Straight v. Goss, 383 S.C. 180, 206-207, 678 S.E.2d 443, 457-458, (Ct. App. 2009).

³ The fifth factor from Lenz v. Walsh explains, "equity and the principles of restitution do not require that unlicensed contractors be completely uncompensated or that contracting homeowners receive the completed construction without cost." Lenz v. Walsh, 362 S.C. 603, 608, 608 S.E.2d 471, 473 (Ct. App. 2005). Tracing this proposition leads to Hawkins v. Holland, 97 N.C. App. 291, 294, 388 S.E.2d 221, 223 (1990) which cites Homeland Insurance Co. v. Crescent Realty Co., 277 Ala. 213, 168 So.2d 243 (1964). Homeland Insurance Co. traces to H.A. Edwards Ins. Agency which explains: "For the rule is well settled that a person cannot recover back money which he has voluntarily paid with full knowledge of all the facts, **without fraud**, duress or extortion in some form." H.A. Edwards Ins. Agency v. Jones, 242 Ala. 624, 626, 7 So. 2d 567, 568 (1942) (emphasis added).

Respondent's hands are unclean, stained with the guilt of his frauds.

"Crime doesn't pay" is the concept of criminal restitution.⁴ The Court Appeals decision affirms the circuit court's order entitling Respondent to be paid for committing his crimes - this is error an error of law.

The factors outlined in S.C. Code Ann. § 17-25-322(B)(1), (2), (3), (4), and (5) (2014) do not support the Court of Appeals' decision.

The Court of Appeals' opinion cites S.C. Code Ann. § 17-25-322(B)(1), (2), (3), (4), and (5) (2014) as factors that a sentencing court may generally consider. While that is generally correct, in the case at hand, the circuit court addressed those very factors and indicated they were not relevant:

[T]he Court may apply the factors outlined in 17-25-322(A) to determine the pecuniary damage or loss to the victim, and use the legislature's prescribed manner and method of determining restitution found in 17-25-322 (B)(1),(2),(3),(4),and (5). **In the present case before this court, the factors listed in (B)(1),(2).(3),(4), and (5) do not seem relevant.**

R. p. 10. (emphasis added).

There has been no argument presented that the circuit court abused its discretion by finding those factors irrelevant in this case. While the circuit court found the discretionary factors set forth in part (B) of S.C. Code Ann. § 17-25-322 (2014) to be inapplicable, the non-discretionary part (A) remains: "the court shall order the defendant make restitution or compensate the victim for any pecuniary damages." S.C. Code Ann. § 17-25-322(A) (2014).

⁴ So called "Son of Sam" laws went even further and attempted to have *future* earnings set aside for victims of crimes. S.C. Code § 15-59-40 (repealed 2000).

There is no valid fee agreement.

The Court of Appeals' opinion affirms the circuit court's adoption of the following argument advanced by the Respondent: "the only monetary loss suffered by the victims consists of the amount of money that they were charged in excess of the fee agreement." (App. p. 20).⁵ The restitution calculation affirmed by the Court of Appeals consists of the following simple formula:

$$\boxed{\text{Restitution Amount} = \{\text{fees Respondent actually charged}\} - \{\text{amount per fee agreement}\}}^6$$

The Court of Appeals' opinion overlooks the undisputed fact that there is no valid fee agreement enforcing that the victims pay Respondent for the very criminal conduct that was the factual basis for the guilty plea. Respondent's own expert witness testified that his calculation [\$30,100] presupposed that the agreement was valid. (App. p. 74, line 16). To adopt Respondent's fiction that there is a valid fee agreement for the indictment period nullifies the very existence of his criminal convictions for Securities Fraud.

CONCLUSION

For these reasons, it is respectfully submitted that this Court should

⁵ See also, R. p. 83, lines 3-9.

⁶ As applied: \$30,100 = \$159,800 - \$129,700. R. p. 104.

reverse the Court of Appeals decision that affirmed the circuit court because the circuit court erred as a matter of law ordering that a convicted criminal is entitled to be paid for committing crimes, as criminal conduct cannot be rewarded.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the *Petition for Writ of Certiorari and the Appendix* by depositing a copy in the United States Mail; postage prepaid, on June 20, 2018, addressed to his attorney of record:

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