STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable J. Mark Hayes, Circuit Court Judge

Opinion No. 2018-UP-126
(S.C. Ct. App. Filed March 21, 2018)

THE STATE,

PETITIONER,

V.

RICHARD P. KROCHMAL,

RESPONDENT

APPELLATE CASE NO. 2018-001138

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEY FOR RESPONDENT

INDEX

CERTIFICATE OF COUNSEL

Counsel for respondent certifies that the Petition for Rehearing was made by the state 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 act.

COUNTER QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the restitution court awarding the victim $30,100 in restitution since that: (1) was the amount expert testimony established was the actual damage to the victim, and, (2) the relevant restitution statute, case law, and established principles of contract law provide the victim should be made whole, but is not entitled to a windfall, particularly where: (3) it was undisputed the victims benefited from respondent's services, and, (4) restitution was meant to make the victim whole, and not to provide a windfall to the victims merely because respondent was not licensed at the time the victims used him?

STATEMENT OF THE CASE

Respondent agrees with the state's procedural history of the case.

ARGUMENT

The Court of Appeals correctly affirmed the restitution court awarding the victim $30,100 in restitution since that: (1) was the amount expert testimony established was the actual damage to the victim, and, (2) the relevant restitution statute, case law, and established principles of contract law provide the victim should be made whole, but is not entitled to a windfall, particularly where: (3) it was undisputed the victims benefited from respondent's services, and, (4) restitution was meant to make the victim whole, and not to provide a windfall to the victims merely because respondent was not licensed at the time the victims used him.

Introduction

The victims were awarded $30,100.00 in restitution by Judge J. Mark Hayes, II., after a hearing where respondent presented expert testimony. The state claims for the first time before this Court that this decision is "contrary to the Victim's Bill of Rights in our State Constitution." Certiorari petition at 5. See Rule 242 (d)(2), SCACR,

The state also maintains that the "S.C. Code §17-25-322 (B) factors cited by the Court of Appeals in their decision play no part in the restitution calculation they affirmed." Certiorari petition at 5. However, the state cited S.C. Code §17-25-322 in its brief before the Court of Appeals, and it would seem to follow that the §17-25-322 (B) factors are therefore not improper considerations when determining restitution. App. 562.

Finally, the state takes exception to the application of Lenz v. Walsh, 362 S.C. 603, 608, 608 S.E.2d 471, 47 (Ct.App. 2005), principles in this criminal restitution case. With all

due respect to able counsel, the state's argument is that the victims are entitled to an absolute windfall because respondent was not licensed when the victims used him. Further, every person paying restitution in a criminal case is a technically a "criminal," and continuously repeating that word does not make a restitution windfall for the victims, and the economic destruction of the convicted person "justice." The restitution court, and the Court of Appeals correctly applied the law, and accepted the testimony of respondent's expert on calculating gains and losses. The state certainly had many more resources when it came to hiring experts, and their failure to present any contrary expert testimony to counter respondent's well qualified credible expert at the restitution hearing remains telling. The restitution court set $30,100.00 as the proper amount of restitution, that was affirmed on appeal, and certiorari by this Court is respectfully, not justified pursuant to Rule 242 (b), SCACR.

Relevant facts

At the January 28, 2015, guilty plea held before the Honorable Roger Couch, Judah Vansyckel represented appellant. Brian Petrano was the assistant attorney general representing the state. R. 25. Respondent told the judge that he was guilty because he did not properly supervise other people. "I accept it. I'm guilty. I didn't supervise them. I didn't do what I was supposed to do. I am guilty." However, respondent said he greatly increased the value of the victim's wealth. R. 46, l. 20 – 47, l. 8.

The state agreed to a point: "*[T]here was some accumulation of the wealth*, but it was not three hundred to a million." R. 48, 11. 18-19. (emphasis added).

A restitution hearing was later held before the Honorable J. Mark Hayes, IL Respondent presented the expert testimony of Marcus Hodge. Hodge was a "forensic accountant, fraud examiner, and business evaluation analyst." Hodge had a master's degree in business administration with an emphasis on accounting. R. 58, 1. 8 – 59, 1. 3. The state had no objection to recognizing Hodge as an expert in forensic accounting and a fraud examiner. R. 59, 11. 8-19.

In Hodge's expert opinion respondent overcharged the victims $30,100. R. 65, 11. 19-23. Hodge explained from his report that respondent should have charged $129,700 during the indictment period. However, respondent actually charged $159,800. Thus, in Hodge's expert opinion appellant was responsible for $30,100 in excess fees charged during the indictment period as restitution. See, Calculation Report at 2. App. 104.

The defense agreed respondent owed $30,100.00 in restitution. R. 77, 1. 7 – 78, 1. 22. The state maintained that respondent owed the victim $159,809.00 -- the entire amount of fees charged during the indictment period. R. 78, 1. 23 - 79, 1. 14. It is important to note that the state did not dispute Hodge's mathematics. The state simply took the position that restitution was every dollar respondent ever received from the victim's which was $159,800.00. R. 78, 1. 23 – 79, 1. 4.

In Judge Hayes's order of restitution filed August 27, 2015, he determined the proper amount of restitution be $30,100.00. The judge ordered that the restitution payments be made to the victims at an address in Oregon. App. 8

A. S.C. CODE § 17-25-322 – cited by the Court of Appeals. App. 587.

S.C. Code§ 17-25-322 provides for a hearing "[w]hen a defendant is convicted of a crime which has resulted in pecuniary damages or loss to a victim." The state must prove a pecuniary damage or loss to the victim, and that the defendant's actions were the proximate cause of that damage or loss.

Restitution is intended to reimburse victims for their loss. It is intended to "make a victim whole again." In order to qualify as restitution, an amount must therefore qualify as "pecuniary damages or loss."

The state agreed that § 17-25-322 was a proper mechanism for determining restitution – it was cited in its brief -- but its argument disregards the plain language of the statute. Again, the statute speaks of "pecuniary damages or loss."

The state continues to argue that the victims should be entitled to restitution in the form of *all the fees paid.* However, again, this would simply result in a windfall for the victims. Even if the victims had hired a licensed investor, they would have had to pay him similar fees. The only measurable loss in the case is $30,100, the amount of fees that the victims were improperly overcharged by the respondent.

Restitution under § 17-25-322 is meant to restorative, to make one who has suffered a loss whole. Further, as stated above, the state admitted at the guilty plea that respondent aided the victims - it just disagreed with how much.

S.C. Code §17-25-322 (b) provides:

> In determining the manner, method, or amount of restitution to be ordered, the court may take into consideration the following:
>
> (1) the financial resources of the defendant and the victim and the burden that the manner or method of restitution will impose upon the victim or the defendant;
>
> (2) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
>
> (3) the anticipated rehabilitative effect on the defendant regarding the manner of restitution or the method of payment;
>
> (4) any burden or hardship upon the victim as a direct or indirect result of the defendant's criminal acts;
>
> (5) the mental, physical, and financial well-being of the victim.

As seen above, the statute is not designed to punish the defendant to whatever extent the restitution court determines is warranted. It even speaks of "rehabilitative effect on the defendant." Here, the restitution court ensured there was a factual basis for the $30,100 award of restitution, and it did not consider improper factors to economically punish respondent for punishments sake. Cf. State v. Fussell, 299 S.C. 162, 383 S.E.2d 1 (1989).

B. CONTRACT LAW PRINCIPLES – cited by the Court of Appeals, App. 587.

Contract law can also be instructive in the area of a mistake or misrepresentation of fact in a contract. Where a misrepresentation as to the quality of goods is discovered after delivery, the buyer has two possible remedies: (1) to avoid the contract, return the goods, and receive the purchase price in return; or (2) to retain the goods and receive an abatement in the price if they are worth less. See,e.g., Southern Iron & Equipment Co. v. Bamberg, Ehrhardt, & Walterboro Ry. Co., 151 S.C.506, 149 S.E. 271 (1929).

In contract law, under Principles of Quantum Meruit, based on quasi-contract, respondent in this case conferred a benefit upon the victims. The victims realized that benefit, and even the state, as seen above, admitted respondent conferred a benefit on the victims that was realized by the victims. The victims retained that benefit under conditions that would make it unjust for them to retain the entire benefit without some offset of its value. See, Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 703 S.E.2d. 221 (2010). The same result would apply from our case law which does not allow a windfall to the plaintiff or the victim because the defendant engaged in conduct that was criminal. See, Lenz v. Walsh, 362 S.C. 603, 608 S.E.2d 471 (Ct. App. 2004).

To ask for restitution in the amount requested by the state in the lower court would essentially be requesting to avoid the contract as a whole. Again, however, it is undisputed that the victims have already received the benefit from the contract - profit off their investments during the time period in question. The victims obviously have not returned their financial gain, the benefit they received under the contract. Consequently, for this reason and others, Judge Hayes correctly ruled that the victims would receive restitution under the second theory. They retain the benefit of respondent's work, and they will receive an abatement in price as their remedy- the overcharged amount, $30,100.00.

The state's contention that every dollar paid to respondent had to be ordered repaid as restitution because respondent was not licensed in that time or place at the time of the agreement is just seeking economic punishment for the sake of economic punishment -- because this is a criminal restitution case -- to result in a windfall for the victims. Cf. S.C. Code §17-25-322, supra.

C. RELEVANT CASE LAW – Cited by the Court of Appeals, App. 587.

In South Carolina a license is required to do many things: to practice medicine, to practice law, to be a barber, or to build houses. In Lenz v. Walsh, 362 S.C. 603, 608 S.E.2d 471 (Ct. App. 2004), the Court of Appeals (Goolsby, J. Hearn, CJ, and Williams) considered the case of an unlicensed homebuilder sued to enforce the final payment on a home he built for the appellants. The original cost was $120,000. The home was 95% completed when the final dispute arose. The buyers refused to pay the final 20% draw or installment, consisting of $18,000 on the contract. The buyers thereafter paid $2, 792.65 on labor and $1, 207.91 on materials to complete the house.

The appellant homeowners counterclaimed for damages in the amount they had to spend to complete the home. The Court of Appeals held that although the plaintiff builder could not sue to enforce the contract pursuant to state statute, the appellants also could not recover the amount they spent to finish the home because it was not in excess of what they would have paid to the plaintiff under the contract. In doing so, the court stated: "Allowing the Walshes to recover these sums would be indistinguishable from allowing them to recover money paid directly to the builder to purchase construction materials." *Id.* at 609,474.

In Lenz, state law specifically prohibited the unlicensed homebuilder from enforcing the contract. *Id at* 607, 473. State law also criminally prohibited this offense. The applicable law here makes transacting business as an unlicensed investment advisor illegal but makes no mention of enforcement of contracts. Even with such a prohibition, the Court in Lenz held that the homeowners could not recover amounts paid to finish the home unless they were in excess of the contract amount. In short, this Court determined that the Appellant homeowners had not

suffered any damage or loss under the contract, even though the plaintiff's actions constituted a criminal offense.

The Court adopted the holding from a North Carolina Court of Appeals Case, Hawkins v. Holland, 97 N.C. App. 291, 388 S.E.2d 221 (Ct.App. 1990). The court held that homeowners could not recover payments that they had already made to an unlicensed builder under a residential building contract. The Court found the Hawkins court's reasoning to be persuasive, specifically the principle that "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* at 608, 473. (emphasis added).

Here, even though respondent was not licensed at the time of the transactions and his actions thus constituted a criminal offense -- for which he was prosecuted and to which he ultimately pled guilty -- the only monetary loss suffered by the victims consisted of the amount of money that they were charged in excess of the fee agreement. Judge Hayes properly reasoned that the victims were charged $159,800, and that they should have been charged $129,700. The difference between the two amounts was the $30,100, the amount of restitution ordered by the lower court.

The Court of Appeals affirmed that order in an unpublished opinion that cannot by cited as precedent -- even though it was correctly decided -- and certiorari is not warranted to address the state's contention that the victims were entitled to a windfall, which again, is respectfully their argument.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 9th day of August, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
Honorable J. Mark Hayes, Circuit Court Judge

Opinion No. 2018-UP-126
(S.C. Ct. App. Filed March 21, 2018)

THE STATE,

PETITIONER,

V.

RICHARD P. KROCHMAL,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a copy of the Return to Petition for Writ of Certiorari in this case has been served on Brian Petrano, Esquire, at P.O. Box 11549, Columbia, SC 29211; and Richard P. Krochmal, at 2564 Carya Pond Lake, Charlotte, NC 28212, this 9th day of August, 2018.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE
ME this 9th day of August, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.