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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Orangeburg County

Diane S. Goodstein, Circuit Court Judge  
\_\_\_\_\_

RECEIVED

JUL 05 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CHRISTOPHER JARED GREENE,

APPELLANT,

APPELLATE CASE NO. 2015-001002  
\_\_\_\_\_

FINAL BRIEF OF APPELLANT  
\_\_\_\_\_

NICHOLAS GRAY THOMAS  
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ATTORNEY FOR APPELLANT

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### STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err in ordering restitution for items which the Defendant was not charged, indicted, or convicted of possessing, receiving or stealing?

### STATEMENT OF THE CASE

Christopher Greene (herein, "Defendant") pleaded guilty before the honorable Diane S. Goodstein on May 19, 2014 to Possession of a Stolen Vehicle greater than \$10,000, Section 16-21-80, Code of Laws of South Carolina, and received a sentence of two years, suspended upon one year probation, with restitution to be determined by a restitution hearing. On June 16, 2014, a restitution hearing was held in front of Judge Diane Goodstein. Senior Assistant Solicitor Harrison Bell was present for the state. Attorney Nicholas Gray Thomas was present representing the defendant. The defendant was not present; his presence was waived by his attorney.

The State's first witness at the hearing, Richard Henthorne (herein, "Victim") testified that in October of 2012, a truck, trailer, two lawnmowers, and other lawn equipment were stolen from his workplace in Charleston County. He further testified his truck was found in Orangeburg County in the possession of the defendant in January of 2013 (R.p.57, line 11-R.p.58, line 24). He further testified and offered a list, which was submitted as State's Exhibit 1 (without objection), which included the following: a calculation of lost wages, personal property items in the truck, a calculation of insurance loss, and estimated costs associated with not having use of the truck as a result of this incident (R.p.60, line 5 – R.p.65, line 22). He also testified the two lawnmowers allegedly stolen along with his truck were worth approximately \$9,000 and \$13,000, respectively (R.p.58, lines 6-11). Information regarding the theft of the two lawnmowers, or their loss or replacement value, was not included on the list submitted as State's Exhibit 1. No evidence at the

scene, or later obtained by the State, established the victim's two lawnmowers were ever in the possession of the defendant.

Victim testified to damages for the following: \$1,940.00 in lost wages from his state job, lost profits from his lawn mowing business, and accounts lost as a result of the loss of his truck and equipment; \$3,332.45 in equipment stolen from the truck; \$940.34 in insurance costs, including his deductible, insurance betterment, and costs for six months of insurance on the truck during the period it could not be used; \$2,786.76 of truck expenses for the six months loss of use, including loan payments, taxes, and new tags (R.p.60, line 1 – R.p.66, line 13). The total of the sums the victim included on State's Exhibit 1 were \$8,999.55. The total sum proposed by the State's Order was \$30,999.55 (R.p.3).

Investigator Johnny Thrower of the Orangeburg County Sherriff's Office was the second witness to testify for the State. He testified he found the stolen truck, a Kawasaki motorcycle, and two garden sprayers at the house of the defendant's sister. Per the testimony, the defendant told Thrower that he purchased the truck for \$1,000 and knew that it was stolen (R.p.78, line 1 – R.p.79, line 16). Thrower further testified that the defendant gave no indication that lawnmowers that were once in his possession were the lawnmowers stolen from the victim (R.p.79, line 24 – R.p.80, line 7). The defendant did not make any statements regarding whether the lawn mowers or trailer were stolen or thought to be stolen, and were never described other than, "a trailer and two lawnmowers" (R.p.77, lines 8-11). Additionally, Thrower testified that he found the defendant to be cooperative and forthright in regard to the criminal investigation (R.p.78, line 22 – R.p.79, line 6).

The defendant was charged under warrant 2013A3810700018 with Possession of a Stolen Vehicle, value \$10,000 or more (for the Ford F-350 truck) and warrant 2013A3810700019 with Possession of a Stolen Vehicle, value more than \$2,000, but less than \$10,000 (Kawasaki motorcycle) (R.p.97-98). Defendant was not charged with the theft of either vehicle named above, nor was he charged with or indicted for the theft or possession of any lawn mowers, trailers, or other materials relating to lawn care or additional personal property.

#### ARGUMENT

The Trial Court erred in application of Section 17-25-322, Code of Laws of South Carolina, 1976 as amended, and erred in the application of case law cited and relied upon, by including in its Restitution Order items the defendant was never charged with, indicted, or convicted for having stolen, received, or been in possession of.

The Court is allowed wide discretion in its determination of proper restitution, including the use of evidence - whether admissible during the preceding trial or not - in order to effectively calculate the value of the items stolen and for which the defendant was convicted. *See, State v. Gullede*, 487 S.E.2d 590 at 595. In *Gullede*, the thefts involved instances of financial theft which occurred over many years, thus making it difficult to accurately ascertain how much money was actually stolen without the use of further evidence, regardless of its admissibility at trial. In *Gullede*, as well as Section 17-25-322, the Court is given wide latitude with regard to admissible evidence because without such evidence, in complicated financial cases, it would otherwise be an impossible task to calculate the restitution due the victim. However, neither the case law nor the Code allow the use of evidence at a sentencing hearing to essentially retry the defendant in order to pile on charges and trump up restitution due to the victim. The use of evidence at the restitution

hearing is not to establish guilt or innocence, but to aid the Court in accurately determining the value of items stolen.

The Court cites Section 17-25-322, “(4) any burden or hardship upon the victim as *a direct or indirect result of the defendant’s criminal acts* (emphasis in the Order)” in order to find the defendant guilty of a crime for which he was not charged or convicted (R.p.3). This is a misinterpretation of the authority granted to the Court for purposes of determining restitution. The “direct or indirect result” language refers to the items actually stolen (direct result) and the indirect consequences of such theft, such as increased insurance rates, lost business, etc. (indirect result). In its Order, the Court misinterprets the “indirect result” language to effectively try, and subsequently convict, the defendant without criminal charges for such theft having been brought against him, or allowing the defendant a chance to defend himself – which is in direct violation of his rights to Due Process. The Code language does not provide the State or the Court the authority to find a defendant guilty of crimes other than those for which the defendant was charged and convicted during the sentencing hearing. In its Order, the Court states, “Even though it was not proved that the trailer and the lawn mowers were the same that were stolen” and, “Therefore *the Court finds* that the lawn mowers and trailer stolen from the victim were the same lawnmowers and trailer that the defendant took possession of.” (R.p.3). The Court is effectively handing down a verdict at a sentencing hearing finding the defendant guilty of a crime for which he was never charged and for which he never had the opportunity to defend himself. The purpose of Section 17-25-322 is to provide for a hearing to determine restitution, and allows the Court certain factors to consider when making such a determination. The provision relied upon by the Court in this case simply authorizes the Court to consider not only the direct monetary consequences of a theft to a victim, but also the indirect consequences which might have caused further monetary losses

resulting from the theft such as loss of customers, increased insurance rates and missed payments, etc.

The Order also relied upon the findings in one criminal case to discover that it has wide discretion in its use of evidence in making the determination. “A restitution hearing is to be governed by the same rules as a sentencing hearing, therefore any evidence the court deems to have probative value shall be received regardless of its admissibility under the rules of evidence.” State v. Gulledge, 487 S.E.2d 590, 595 (1997). The error in the present case is that while Gulledge does establish the court’s discretion in using evidence in its exercise of such discretion, the case law only establishes that the court has wide discretion on what evidence can be used to effectively calculate the proper amount of restitution to be paid to a victim by a defendant for the crimes for which the defendant was convicted. Gulledge dealt with an ongoing embezzlement from a financing company over many years, making a determination of restitution difficult without the use of many pieces of evidence. In this case, the Court was faced with determining the value of losses to the victim resulting from the loss of use of his work truck, lost pay and wages, insurance costs, insurance betterment, and expenses associated with the use of a replacement vehicle. As previously demonstrated, under the Code and the case law, the Court may use a wide variety of evidence necessary to make a proper calculation of what restitution is due as either a direct or indirect result of the defendant’s acts. The evidence is not used to include additional crimes for which the defendant was not charged or convicted. “(4) any burden or hardship upon the victim as a direct or indirect *result of the defendant’s criminal acts*.” (emphasis added). Restitution is part of the sentencing of a defendant and is not a trial wherein guilt or innocence is established. The evidence should be properly used to determine the value of loss to the victim resulting from the crimes for which the defendant was convicted.

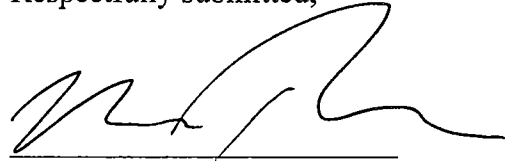
CONCLUSION

The trial court erred in its interpretation of Section 17-25-322, as well as the Court's findings in Gulledge, in ordering the defendant to make restitution in an amount that included the value of items the defendant was not convicted of stealing, receiving or possessing. At sentencing, a defendant is punished for those crimes for which he was convicted. Neither the language from the case law nor the code provide for the implementation of punishment for crimes which the defendant was not convicted. The restitution hearing, while legally broad in scope and with great judicial discretion in its application, still does not provide this defendant with proper procedural due process. In the case at the bar, for the defendant to be held accountable for restitution to a victim for items he never stole or possessed, nor was ever charged, indicted and convicted, would deny him of due process under the law.

The defendant therefor requests that the case be remanded and the Trial Court enter an Order of restitution based on the following in accord with the State's Exhibit 1:

\$1,940.00	Lost wages and pay.
\$940.34	Insurance costs, including victim's deductible, insurance betterment, and costs for six months of insurance.
\$2,786.76	Expenses paid for the six months loss of use of the truck, including truck payments, taxes, and new tags.
<b>\$5,667.10</b>	<b>Total Amount of Restitution Due</b>

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'N. Gray Thomas', written over a horizontal line.

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This 30<sup>th</sup> day of June, 2016