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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions
Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2015-001002

THE STATE,RESPONDENT

v.

CHRISTOPHER JARED GREENE.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the sentencing judge properly ordered Appellant, who pled guilty to receiving a stolen vehicle, to pay restitution for the commercial lawnmowers stolen along with the vehicle because: (1) Appellant agreed to allow the judge to hold a restitution hearing in which the State could present evidence of the victim's damages, including missing commercial lawnmowers and other equipment; and (2) there was some evidence Appellant bought, but later traded, the lawnmowers in question, and that the remaining stolen equipment was in the victim's truck at the time of its theft.

STATEMENT OF THE CASE

On May 19, 2014, Appellant pled guilty for possession of a stolen vehicle, valued \$10,000 or more, and possession of a stolen vehicle, valued more than \$2,000 but less than \$10,000. He was sentenced to two years' imprisonment, suspended upon one year of probation, with restitution to be determined at a later restitution hearing.

On June 16, 2014, a restitution hearing was held in front of the Honorable Diane Goodstein on the possession of a stolen vehicle valued \$10,000 or more charge. Nicholas Gray Thomas, Esquire, represented Appellant; Senior Assistant Solicitor Harrison Bell represented the State. Appellant did not attend the hearing, and waived his presence through his attorney.

In a written order filed November 17, 2014, Judge Goodstein ordered Appellant pay \$30,999.55 in restitution, and extended his probation to a term of five years to ensure he had ample time to make full payment to the victim.

Appellant filed a Notice of Appeal¹ and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

¹ The State notes Appellant did not submit his notice of appeal until May 5, 2015, nearly six months after Judge Goodstein filed her order. In the notice of appeal, Appellant claims neither he nor his counsel learned of the signed order until Monday, April 27, 2015, when the Orangeburg County Office of the South Carolina Department of Probation, Parole, and Pardon Services informed counsel that an order had been issued. However, Appellant failed to include the restitution order. After the Court of Appeals' Clerk of Court sent Appellant a letter regarding the deficiency, Appellant submitted a copy of the restitution order.

STATEMENT OF FACTS

On May 19, 2014, Appellant pled guilty before the Honorable Diane Goodstein. During the plea hearing, the State informed the sentencing judge that Appellant's charge for possession of a stolen vehicle valued \$10,000 or more was for a truck which had been stolen along with a trailer and lawnmowers. The State claimed the victim and Appellant could not agree on a restitution amount, and that it was requesting a restitution hearing to be held subsequent to the plea to determine what damages Appellant would be responsible for.

The sentencing judge then addressed Appellant directly, and stated:

Q: Okay, Now, with regards to the restitution, is that what you wish . . . to just . . . have a hearing about that; in other words, you don't believe that – you got a truck, wasn't anything attached to it or anything like that, and so you have concerns about being responsible for a trailer as well as equipment; is that correct?

A: That's correct, ma'am.

Q: And you're okay with [the case] staying open for 60 days to give everybody a chance to discover more information about that and have a hearing if necessary?

A: Yes, ma'am.

(R.p.31, line 12–R.p.33, line 19).

The restitution hearing was held before the trial judge on June 16, 2014. At the hearing, the State called two witnesses to testify. The first witness was the victim, Richard Henthorne. He testified that in 2012, he owned a landscaping business. He claimed that each day after finishing his full time job as a Charleston County bus mechanic, he would go out and landscape. He stated that he would often drive his

landscaping truck and trailer to work so that he could immediately landscape after work. (R.p.57, line 11–R.p.58, line 3).

The victim testified his landscaping truck, trailer, and all the equipment therein, were stolen from his workplace on October 24, 2012, sometime between 7:00 and 8:00 a.m. After he discovered his vehicle missing, he reported the thefts to the police, and provided them with the serial numbers for all the missing items. (R.p.58, line 4–R.p.59, line 11).

The victim also stated that his truck was found in January 2013, in Appellant's possession. (R.p.59, lines 12–19). However, the truck required significant repairs, and numerous items were missing from the truck, including the trailer with the commercial lawnmowers. He then presented a list of his damages to the sentencing judge, including the items which were in the truck at the time of the theft, but were not recovered with the truck. Included in the list were:

- (1) \$3,332.45 for the various items missing from the truck, which included a push mower, trimmer, edger, spool rack, five gallon gas can and rack, backpack blower rack, and a backpack blower;²
- (2) \$1,940 in lost wages from his state job and lawn mowing business, including accounts lost as a result of the loss of his truck and equipment;
- (3) \$940.34 in insurance costs, including his deductible, betterment, and costs for six months of insurance on the truck during the period it could not be used;
- (4) \$2,786.76 of truck expenses for the six months loss of uses, which included loan payments, taxes, and new tags.

² To generate this number, Appellant used the receipts for some of the missing items, and looked up the purchase prices for the items for which he could not locate receipts. (R.p.76, lines 4–10).

Altogether, the victim sought \$8,999.55 in damages for his truck and the items stolen therefrom. (R.p.60, line 1–R.p.66, line 13).

The victim also testified about the trailer that was attached to his truck, but never recovered. He explained the trailer was towing two Exarch commercial-grade lawnmowers, which he bought for \$9,000 and \$13,000, respectively. He informed the sentencing judge that the commercial lawnmowers were not included in the itemized list he submitted to the court because the solicitor's office asked him to include only damages relating to the truck itself. He also informed the Court that he had to remove \$10,000 out of his 401k to buy two used commercial mowers, but that they were in "dire need[] of repair." (R.p.58, lines 6–17; R.p.67, line 25–R.p.68, line 8; R.p.73, lines 13–20).

The State's second witness, Investigator Johnny Thrower of the Orangeburg County Sheriff's Office, then testified about his involvement in the investigation. Thrower testified he received a tip that Appellant had stolen property, and after some investigation found the victim's truck, along with a stolen motorcycle, in his possession. (R.p.77, lines 4–9). Thrower testified that in Appellant's statement to police, he claimed: (1) he obtained the truck sometime around the end of October, 2012; (2) he bought the truck for \$1,000, and for that price "he knew it was stolen"; (3) and he had also purchased a trailer and two lawn mowers, but that he had traded them for the motorcycle. (R.p.77, line 10–R.p.78, line 13; R.p.79, lines 19–20). However, Appellant "shut down" when asked about the lawnmowers and did not provide Thrower with information about where he got them. Additionally, Thrower testified Appellant said that when he purchased the truck, he purchased it by itself and that it did not have any items inside. (R.p.81, lines 2–16).

During concluding remarks, the State informed the sentencing judge that he felt that the victim was entitled to restitution for all the items that were stolen, including the commercial lawnmowers. The State candidly admitted the trailer and lawnmowers were never recovered and that they did not have any evidence Appellant had been in possession of them, other than Appellant's own broad statements. (R.p.84, lines 4–25).

Appellant's counsel disputed the propriety of including the trailer and commercial lawn mowers in the restitution reward, arguing there was no "causal connection" between Appellant's purchase of the vehicle and the loss of mowers and other items. He contended Appellant bought the vehicle in the same condition it was found in, and that there was not any proof the lawn mowers Appellant traded for the motorcycle were the same ones that belonged to the victim, especially because Appellant bought the mowers at a different time than the vehicle. (R.p.88, line 15–R.p.90, line 16).

He further argued it was "grossly unjust" to punish Appellant by including the commercial lawnmowers in the restitution order, given he fully cooperated with the police investigation and provided Thrower with honest answers to his questions, and gave them names and information to allow him continue with his investigation. (R.p.90, lines 17–22).

At the conclusion of the hearing, the sentencing judge took both parties' arguments under advisement, and invited them to submit memoranda regarding some of the issues raised at the hearing, including the commercial mowers. (R.p.93, lines 11–20). On November 17, 2014, the sentencing judge filed her restitution order with the clerk of court. In the order, the sentencing judge ordered Appellant pay restitution for all of the victim's claimed damages associated with the truck itself, including the stolen equipment,

and set the amount of those damages at \$8,999.55, the same figure submitted by the victim at the hearing. (R.p.3).

The sentencing judge also ordered Appellant to pay restitution for the two commercial lawnmowers, totaling \$22,000. She noted that during restitution and sentencing hearings, she was permitted to consider "any evidence [she] deems to have probative value, . . . regardless of its admissibility under the rules of evidence," and that S.C. Code Ann. Section 17-25-322(b) allowed her to consider: "(4) any burden or hardship upon the victim as a direct or indirect result of [Appellant]'s criminal acts (emphasis added), and (5) the mental, physical, and financial well[- being of the victim." See S.C. Code Ann. § 17-25-322(b)(4)-(5) (Supp. 2010); State v. Gullede, 326 S.C. 220 487 S.E.2d 590, 595 (1997). She found that, based on Thrower's testimony that Appellant admitted he acquired two lawnmowers and a trailer when he bought the truck, which he subsequently traded for the stolen motorcycle, that there was circumstantial evidence that Appellant "had contact with the victim's trailer and mowers" and that the loss of the lawnmowers and trailer was "directly connect to [Appellant]'s criminal action." (R.pp.3-4).

The sentencing judge further noted that the victim's testimony showed that he was forced to remove money from his retirement account in order to replace the stolen items, which indicated his "financial well[-]being is not substantial enough to absorb the loss," and that no testimony or evidence was presented regarding Appellant's ability or inability to pay restitution. The sentencing judge extended Appellant's probation to five years, to allow him adequate time to complete his restitution payments. (R.pp.4-5).

ARGUMENT

The sentencing judge properly ordered Appellant, who pled guilty to receiving a stolen vehicle, to pay restitution for the commercial lawnmowers stolen along with the vehicle because: (1) Appellant agreed to allow the judge to hold a restitution hearing in which the State could present evidence of the victim's damages, including missing commercial lawnmowers and other equipment; and (2) there was some evidence Appellant bought, but later traded, the lawnmowers in question, and that the remaining stolen equipment was in the victim's truck at the time of its theft.

Appellant argues the sentencing judge erred in ordering him to pay restitution for the loss of items he was not charged with possessing, namely the items stolen from the truck and the commercial lawn mowers. He contends the sentencing judge misapplied S.C. Code Ann. § 17-25-322 and Gulledge, to his case: Appellant believes § 17-25-322(b)(4), which refers to burden and hardships suffered by a victim as a "direct or indirect result of the defendant's criminal" acts refers to the truck, the only item of the victim's which Appellant pled guilty to possessing (the direct result) and the indirect consequences of such theft, such as increased insurance rates, lost business, etc. Appellant further contends Gulledge, which involved the circuit court allowing a handwritten summary of a victim's losses at a defendant's restitution hearing to prove damages, is distinguishable from the instant case because the sentencing judge, unlike the court in Gulledge, admitted evidence of the victim's losses for crimes to which Appellant did not plead guilty, essentially "retrying" the defendant on additional crimes for which he had no opportunity to defend himself, and ultimately violating his constitutional right to due process. The State submits Appellant's arguments are without merit and should be dismissed on several grounds.

Initially, to the extent Appellant is arguing his due process rights were violated, the State submits the argument is not preserved for review because Appellant affirmatively waived all constitutional due process rights as part of his guilty plea. The restitution hearing is part of the sentencing proceeding. Gulledge, 326 S.C. at 228, 487 S.E.2d at 594. Likewise, the sentencing proceeding is part-and-parcel of the guilty plea proceeding. South Carolina does not recognize conditional guilty pleas. State v. Rice, 401 S.C. 330, 331, 737 S.E.2d 485, 485 (2013); State v. Truesdale, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982). Indeed, a guilty plea constitutes a waiver of non-jurisdictional defects and claims of violations of constitutional rights. Rice, 401 S.C. at 331-32, 737 S.E.2d at 485-86. Appellant's attempt to challenge the amount of the restitution awarded by claiming a violation of his constitutional rights after he knowingly and voluntarily waived those rights and entered a guilty plea is akin to offering a conditional guilty plea. Thus, this argument should be denied and dismissed as unpreserved.

Moreover, Appellant's argument is without merit because the sentencing judge's restitution award is supported by South Carolina law. A judge has discretion to impose any sentence which is within the limits prescribed by statute. State v. Bynes, 304 S.C. 62, 64, 404 S.E.2d 126, 127 (Ct. App. 1991). A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support. In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

The South Carolina Code provides:

(B) 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.

S.C. Code Ann. § 17-25-322(B) (Supp. 2013) (emphasis added).

Even before the 1993 enactment of Section 17-25-322 of the South Carolina Code in 1993, our Supreme Court recognized that the court of general sessions may order reparation to a victim, but in doing so it must hold a hearing and determine the actual amount of damage or loss, and there must be a factual basis for the determination. State v. Fussell, 299 S.C. 162, 163, 383 S.E.2d 1, 1 (1989). The Code now mandates that the court hold a hearing to determine the amount of restitution due the victim or victims of a defendant's criminal acts. S.C. Code Ann. § 17-25-322(A) (Supp. 2013). "Restitution means payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender's criminal conduct" and includes "specific damages and economic losses." S.C. Code Ann. § 16-3-1110(12)(a) (Supp. 2010). The trial judge is allowed broad discretion in conducting the restitution hearing. Gulledge, 326 S.C. at 228–230, 487 S.E.2d at 594–95. However, the defendant must receive notice of the hearing, and during the hearing, the defendant must be given the opportunity to be heard

and to cross-examine witnesses. Id. Further, the evidence admitted during the restitution hearing must be reliable and trustworthy. Id.

Absent a positive rule limiting this discretion, 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. Bynes, 304 S.C. at 64, 404 S.E.2d at 127 (emphasis added).

In Gulledge, the defendant was ordered to pay \$210,000.00 in restitution, even though the State only had evidence that the defendant had used approximately \$90,000 of the victim's funds for her personal benefit. Relying on a handwritten summary, a representative of the victim testified the total amount of missing funds was \$347,486, and that the defendant was the sole person in charge of accounting for the victim, and also performed other financial operations essential to the victim's daily operations. The Supreme Court of South Carolina found the sentencing judge's use of the summary in determining the restitution award was not improper because: (1) the trial judge has broad discretion in conducting a restitution hearing and determining restitution, provided he holds an adversarial hearing and allows a defendant to be heard and cross-examine witnesses; (2) a restitution hearing is governed by the same rules as a sentencing hearing, meaning any evidence that is "reliable and trustworthy" which the court deems to have probative value may be received, "regardless of its admissibility under the rules of evidence"; (3) defense counsel knew prior to the hearing that the State intended to use the summary as the sole evidence of the victim's financial loss; and (4) the defendant was

permitted to cross-examine the victim's representative on the accuracy of the summary. See Gulledge, 326 S.C. at 229–230, 487 S.E.2d at 595.

In the instant case, the sentencing judge did not err in ordering Appellant to pay the full restitution sum. Appellant explicitly consented to the sentencing judge holding a later restitution hearing to determine whether Appellant would be responsible for restitution for not only the truck, but the missing commercial lawnmowers and missing equipment. Accordingly, the sentencing judge was permitted to include restitution for the commercial lawnmowers as a condition of Appellant's probation. See Bynes, 304 S.C. at 64, 404 S.E.2d at 127.

The State also notes that any economic damage suffered by the victim as a result of those crimes meets the statutory definition for restitution. There is no requirement that each item of personal property lost or damaged in a crime must be charged and indicted as a separate offense. Indeed, such a requirement would be unworkable. Here, the victim testified that \$3,332.45 worth of equipment was in his vehicle when it went missing, and that the equipment was never recovered. He provided receipts and other evidence for the value of the missing items at the restitution hearing. The sentencing judge found his testimony credible. This testimony provided a sufficient evidentiary basis to support the award of restitution. Because the evidentiary threshold was met, the circuit court did not abuse its discretion and the restitution should be affirmed. Undoubtedly, the loss of Appellant's equipment, which was removed from the truck by Appellant or some other party, was simply not restitution for an unindicted offense.

Moreover, there was evidence that Appellant was in possession of the commercial lawnmowers. Appellant told Investigator Thrower that he also obtained two lawnmowers

around the same time that he obtained the truck, but that he traded those lawnmowers for a motorcycle. The evidence was sufficient to justify including restitution for the lawnmowers and missing equipment in the restitution award. See Gulledge, 326 S.C. at 229–230, 487 S.E.2d at 594–95; Bynes, 304 S.C. at 64, 404 S.E.2d at 127. The restitution order should be affirmed.

To the extent this Court disagrees and finds error in any portion of the restitution award, the State submits any grant of relief must include a new sentencing proceeding, with reconsideration of both the imposition of the sentence and the imposition of restitution.

CONCLUSION

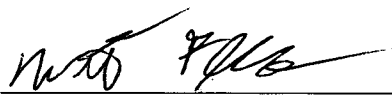
For all the foregoing reasons, Respondent respectfully requests that the judgment and restitution order of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

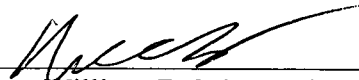
The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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