

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-148974-001 DT

08/10/2018

HONORABLE PATRICIA ANN STARR

CLERK OF THE COURT

C. Avena

Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

VIRGINIA YVONNE GILCHRIST (001)

JOHN W MOORE JR.

JUDGE STARR

REMAND DESK-LCA-CCC

SAN TAN JUSTICE COURT

MINUTE ENTRY

Lower Court Case No. JC2015148974.

Appellants GE¹ and the State of Arizona seek reversal of the order regarding restitution entered by the San Tan Justice Court. For the reasons that follow, the Court vacates that order, and remands for further proceedings consistent with this decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

The State charged Appellee/Defendant Virginia Gilchrist with one count of Dog at Large and one count of Failure to Wear. (Complaint, October 16, 2015.) Gilchrist pleaded guilty to Failure to Wear, a class 2 misdemeanor, and the State dismissed the Dog at Large Count. (Plea

¹ To protect the victim's privacy, the Court has identified her by her initials in this decision.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-148974-001 DT

08/10/2018

Agreement, July 4, 2016, at 1.) As part of the plea agreement, Gilchrist agreed to pay restitution “for all economic loss” to GE. (*Id.*)

In October of 2016, the trial court held a restitution hearing; the trial court did not enter a restitution award, but instead set a second hearing for January 18, 2017. On that date, the trial court set another hearing for March 23, 2017, and ordered GE’s attorney to provide information to the regarding anticipated future medical expenses and costs that would be incurred by GE. (Order, January 18, 2017.)²

At the March 23, 2017 hearing, the trial court considered two exhibits: a settlement letter including a release of claims and a letter from Allstate Insurance Company to GE. (Reporter’s Transcript of Proceedings, March 23, 2017 (“RT 3/23/17”) at 26.) At the hearing, GE’s attorney asked for additional time to “get full documentation for the two future surgeries and the two previous surgeries that have not been billed yet.” (RT 3/23/17 at 28.) The trial court declined to do so, finding that it was “compelled by the law” to find that GE agreed to accept the civil settlement as payment for her losses. (*Id.* at 38.) The trial court viewed the release in the civil case “as the very best evidence that I could possibly have on what is fair to make her whole because I am inclined to look at it as her saying, this is what I accepted as settlement for this matter.” (*Id.* at 40.) According to the trial court, nothing in the release said “that the Victim will get a second chance . . .” (*Id.* at 45.)

The trial court then determined that the matter should be continued to “give the State or Victim’s attorney time to get with the PI attorney and explain to me what was going on” and what GE understood when she signed the release. (*Id.* at 46.)

The trial court then changed course and found “the most compelling evidence of what would make the Victim whole is the release whereby she accepted \$85,000.” (*Id.* at 52.) Accordingly, the trial court granted “nothing in restitution.” (*Id.*)

The trial court later granted GE’s motion for reconsideration, set a restitution hearing for January 18, 2018, and ordered GE to provide a final summary of her economic loss to Gilchrist by November 22, 2017. The trial court later vacated the restitution hearing, finding that GE had not identified witnesses that would assist the trial court in making a determination about restitution. (January 9, 2018 Order.) The trial court reinstated its previous ruling finding that GE was not entitled to restitution. (*Id.*)

² Appellants have not provided transcripts for either of the first two restitution hearings.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-148974-001 DT

08/10/2018

The State timely appealed on behalf of GE. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUE

At issue is whether the trial court erred when it vacated the restitution hearing and reinstated its March 23, 2017 order finding GE was not entitled to restitution.

III. STANDARD OF REVIEW

An appellate court reviews a restitution order for an abuse of discretion. *State v. Slover*, 220 Ariz. 239, 242, ¶ 4 (App. 2009). In so doing, the appellate court views the facts and all reasonable inferences “in the light most favorable to upholding the trial court’s restitution order.” *State v. Lewis*, 222 Ariz. 321, 323, ¶ 2 (App. 2009).

IV. LEGAL ANALYSIS

On this record, the trial court abused its discretion when it reinstated its order denying a restitution award to GE, without hearing further evidence regarding her request or making any factual findings about what losses were and were not covered by the amount GE received in the civil settlement.

A person convicted of a criminal offense is required to pay restitution to any victim who has suffered an economic loss. A.R.S. § 13-603(C). “Economic loss” is defined as:

any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses that would not have been incurred but for the offense. Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages.

A.R.S. § 13-105(16).

A trial court may “enter any reasonable order” necessary to ensure that a crime victim receives full restitution. A.R.S. § 13-804(H). A trial court may order restitution for losses reasonably anticipated to be incurred in the future. *State v. Howard*, 168 Ariz. 458, 460 (App. 1991). Here, the record shows that the trial court had reason to believe that GE would incur losses in the future that would not have occurred but for the offense. Moreover, as part of her plea agreement, Gilchrist agreed to pay restitution.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-148974-001 DT

08/10/2018

The trial court appears to have conflated the civil settlement entered into by GE and the insurance company with restitution, which is a defendant's obligation. "Restitution and civil damages are independent under Arizona law, and the state's power to order restitution does not bar a victim from seeking damages in a civil action." *State v. Iniguez*, 169 Ariz. 533, 536 (App. 1991). Moreover, a victim's release of her claim via a civil settlement "does not encompass restitution: restitution is not a claim which belongs to the victim, but a remedial measure that the court is statutorily obligated to employ." *Id.*

Here, the trial court specifically found that GE had agreed to a sum certain in the civil case, and thus had agreed to receive only that amount in restitution. But regardless of what GE agreed to in the civil case, the trial court is required to impose restitution for any losses to GE not compensated as part of the settlement. As noted in *Iniguez*, restitution is not a claim belonging to GE, but rather a remedial measure that must be imposed as part of Gilchrist's sentence.

A victim is not entitled to a windfall – a trial court "should not order restitution exceeding the victim's actual economic losses after crediting payments received by the victim outside the criminal proceeding." *Iniguez, supra.* at 537. Thus, on remand, the trial court must determine what actual economic losses suffered by GE or losses reasonably anticipated to occur in the future were uncompensated by the civil settlement, and if there are any, award those losses as restitution. As noted above, restitution should not include damages for pain and suffering, punitive damages, or consequential damages.

V. CONCLUSION

For the foregoing reasons, this Court finds that the trial court abused its discretion when it entered an order finding GE was not entitled to restitution.

Therefore,

IT IS ORDERED vacating the order denying restitution.

IT IS FURTHER ORDERED remanding this matter to the San Tan Justice Court for all further appropriate proceedings, including a new determination of restitution.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-148974-001 DT

08/10/2018

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Patricia A. Starr
THE HON. PATRICIA A. STARR
JUDGE OF THE SUPERIOR COURT

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