

2007

The State of Utah v. Corey Edward Harvell : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Utah v. Harvell*, No. 20070967 (Utah Court of Appeals, 2007).
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Carroll
June 29, 2009
9:30am

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee :
 :
 v. :
 :
 COREY EDWARD HARVELL, : Case No. 20070967-CA
 :
 Defendant/Appellant. : Appellant is incarcerated.

APPELLANT'S REPLY BRIEF

Appeal from an Order of restitution resulting from a conviction for Attempted Burglary, a third degree felony, in violation of Utah Code Ann. § 76-6-202 (2003), and Attempted Theft by Receiving Stolen Property, a third degree felony, in violation of Utah Code Ann. § 76-6-408 (2003), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Judith Atherton, presiding.

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APR 15 2009

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ARGUMENT

POINT. RESTITUTION IS INAPPROPRIATE WHERE AN INSUFFICIENT NEXUS EXISTS BETWEEN THE DAMAGES CLAIMED AND THE ADMITTED CRIMINAL CONDUCT.

Under the restitution statute applicable in criminal proceedings, “[a] court may order restitution only if the defendant has been convicted of a crime that resulted in pecuniary damages and agrees to pay restitution or admits to the criminal conduct. State v. Watson, 1999 UT App 273, ¶3, 987 P.2d 1289 (emphasis added); see also Utah Code Ann. §76-3-201(4)(a) (Supp. 2008). While restitution has several purposes, restitution is appropriate only for “the loss caused by the specific conduct that is the basis of the offense of conviction.” Hughey v. United States, 495 U.S. 411, 413 (1990). Hence, restitution cannot be awarded where the conduct underlying the criminal offense is too far removed from the damage or in situations where the damage would have occurred despite the defendant’s conduct. See Watson, 1999 UT App 273 at ¶4-5 (requiring

defendant's admitted conduct to bear "sufficient nexus" to damages claimed by victim before restitution can be ordered). Even the State's argument that Mr. Harvell could be held liable under a civil claim for conversion requires a showing that the damages were "sustained as a natural and proximate result of the defendant's wrong." State's Response Br. 13. Furthermore, no reliable evidence establishes a sufficient nexus between Mr. Harvell's admitted criminal conduct and the damages claimed by Ms. Losee; therefore the trial court erred in ordering restitution for brake replacement and damaged property inside the vehicle.

To establish a sufficient nexus between the damages suffered by a victim and a defendant's admitted criminal conduct, a sentencing judge must determine that "liability is clear as a matter of law and [that] commission of the crime clearly establishes causality of the injury or damages." State v. Robinson, 860 P.2d 979, 983 (Utah Ct. App. 1993) ("The issues of fault and proximate cause are crucial in determining damages in a civil case."). The law is clear that a defendant cannot be ordered to pay restitution "for criminal activities for which the defendant did not admit responsibility, was not convicted, or did not agree to pay restitution." State v. Bickley, 2002 UT App 342, ¶9, 60 P.3d 582. The same formalities required before admissions supporting a guilty plea can be entered into the record govern the admissions supporting restitution. Watson, 1999 UT App 273 at ¶5.

For the purposes of determining the basis for restitution, the admission of a defendant is essentially the same as a plea of guilty that would support a conviction, but a judgment of conviction is not entered because of a plea

bargain. Because such an admission can result in liability for substantial sums of money, defendant's responsibility for the criminal activities ought to be firmly established.

Id. (citation omitted).

The state's offer of support for its argument fails to take into consideration the heightened standard of insuring that restitution is based on firmly established admissions. Instead, the State erroneously argues that restitution is appropriate because Mr. Harvell did not make a specific objection to each itemized repair given relating to the brake repair and the triple hearsay statements made in Ms. Losee's letter that she "was told [her] car was finally recovered when someone reported seeing it being driven recklessly." R. 45; Losee ltr. As the record supports, Mr. Harvell clearly objected to the lump sum Ms. Losee submitted for her vehicle repairs totaling \$539.24. R. 87:4 (defense counsel "tak[ing] issue" with the amount of vehicle repair in "that the repair that was made, is a brake replacement."). Moreover, the triple hearsay statements supporting that Ms. Losee's vehicle was driven recklessly are not remotely reliable in establishing that it was Mr. Harvell who was seen driving the vehicle, let alone reliable enough to firmly establish a sufficient nexus to Mr. Harvell. See State v. Johnson, 856 P.2d 1064, 1071 (Utah 1993) ("Although hearsay evidence can be admissible in a sentencing proceeding, double hearsay is so inherently unreliable and presents such a high probability for inaccuracy that it cannot stand alone as a basis for sentencing.").

Due process under both the state and federal constitution "requires criminal proceedings including sentencing to be based upon accurate and reasonably reliable

information.” State v. Weeks, 2000 UT App 273, ¶8. 12 P.3d 110. Because a defendant’s responsibility must be firmly established like that of a guilty plea, restitution must be based on more than unsubstantiated triple hearsay statements and “gotcha” arguments where a defendant sufficiently objects to the sum total of a brake repair rather than each of its individual parts. Such arguments undermine the due process requirement that the trial court’s determination in clearly establishing a sufficient nexus “be based upon accurate and reasonably reliable information.” Id.

As argued in Mr. Harvell’s opening brief, a sufficient nexus does not exist that Mr. Harvell’s admitted criminal responsibility of attempted possession of the vehicle for a very limited duration “resulted in” the brake damage rather than a result of regular wear and tear on a vehicle. Ms. Losec’s triple hearsay statements that she was told that someone saw her vehicle being driven recklessly are not the type of reliable evidence needed to firmly establish Mr. Harvell’s liability. Moreover, Mr. Harvell’s admitted conduct does not establish any nexus to the broken IPOD. Mr. Harvell did not admit to the broader offense of stealing the vehicle but merely to attempting to possess it. Therefore he “cannot be held to answer for all damages resulting from” the stolen vehicle. State v. Mast, 2001 UT App 402, ¶18, 40 P.3d 1143.

CONCLUSION

As more fully set forth in the Opening Brief, Appellant, Corey Edward Harvell, respectfully requests that this Court reverse the order imposing restitution for the brake repair and broken IPOD.

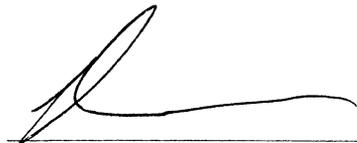
SUBMITTED this 15 day of April, 2009.

A handwritten signature in black ink, appearing to be 'D. Nelson', written over a horizontal line.

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Attorneys for Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114; and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 15 day of April, 2009.



DEBRA M. NELSON

DELIVERED this _____ day of April, 2009.
