

2009

## State of Utah v. Michael J. Birkeland : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH, :  
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 Plaintiff/Appellee, :  
 :  
 vs. : Case No. 20090766-CA  
 :  
 MICHAEL J. BIRKELAND, :  
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 Defendant/Appellant :  
 :  
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**REPLY BRIEF OF APPELLANT**

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APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, FROM THE RESTITUTION ORDER FOLLOWING A NO CONTEST PLEA TO THEFT, A CLASS A MISDEMEANOR, BEFORE THE HONORABLE CLAUDIA LAYCOCK

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*ORAL ARGUMENT REQUESTED*

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REPLY BRIEF OF APPELLANT

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ARGUMENT

**I. CRIMINAL RESTITUTION IS PROPER ONLY WHEN PECUNIARY HARM IS SHOWN**

The State rebuts Defendant’s claim that the trial court erred in ordering restitution by claiming that Stewart “could have recovered damages in a civil action for conversion.” Appellee Br. at 10. Meanwhile the State ignores, however, the underlying fact that criminal restitution, in this case, rests on whether any *pecuniary* (or economic) harm resulted. Defendant reasserts that because the prosecution demonstrated no pecuniary harm to Stewart the trial court erred in ordering restitution in the amount of \$9,838 under Utah Code Ann. §77-38a-102.

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**a. Conversion of Property Does not Entitle a Victim to Restitution Without a Showing of Pecuniary (Economic) Harm**

All restitution based on criminal activity is necessarily predicated on whether the victim suffered pecuniary harm. “‘Restitution’ means full, partial, or nominal payment for *pecuniary damages* to a victim....” Utah Code Ann. §77-38a-102(11) (emphasis added). “‘Pecuniary damages’ means all demonstrable *economic injury*, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities....” Utah Code Ann. §77-38a-102(6) (emphasis added). Thus, any court-ordered restitution must be based on evidence that the victim suffered economic injury that could have been recovered in a civil action. Stewart suffered no such economic injury.

Here, the State does not, nor could it, dispute that Stewart, despite Defendant’s criminal activity, continued to receive his annual salary of \$64,000 from Utah Valley University. (R. 78:20). Stewart’s economic injury, by statute, is the basis for restitution. However, by his own admission Stewart testified that he suffered no adverse economic impact. The State seems to ignore this fact in claiming that because Stewart “could have recovered damages in a civil action” that the restitution is still justified. This argument obviates the economic damage requirement. See, Appellee Br. at 10.

In support, the State cites Jones v. Salt Lake City Corp., 2003 UT App 355, 78 P.3d 988. The State erroneously claims that just because Defendant interfered with Stewart’s “chattel” that he is entitled to recovery. Jones, however, supports Defendant’s assertion that an “economic” harm must have occurred.

In Jones, this Court dealt with whether the trial court in dismissing defendant's claim, at summary judgment, that the city had interfered with his possessory rights to seized weapons by destroying those weapons. Jones, 2003 UT App 355, ¶¶ 1-6. This Court, in Jones, recited rudimentary grounds for damages based on the civil theory of conversion and held that because the defendant did not properly state a claim for conversion the trial court properly dismissed the claim. Jones, 2003 UT App 355, ¶¶ 19-20. It appears that the State's argument hinges upon this court's recital of "conversion" to establish that Stewart was entitled to \$9,838 in restitution.

While Jones does affirm that a person who has immediate possessory rights to property may be entitled to damages for conversion, the fact remains that damages must still exist. Jones, 2003 UT 355, ¶ 9; see also, Appellee Br. at 10. The real issue in Jones was whether the complainant had possessory rights to weapons destroyed by the city. While damages is a predicate of possession, it is not determinative; the issue of damages is a separate and unique analysis that must be established beyond possession. Damage is the real issue in this case.

Much like in State v. Brown, 2009 UT App 281, 221 P.3d 273, in which this Court held that the victim's relocation expenses were not proper restitution, the prosecution never established any economic harm to Stewart. Furthermore, the State's argument that Stewart's labor is a proper basis for restitution seems to avert the fact that Stewart was fully compensated for his work by his employer. (R. 78: 20) (Stewart testified that he was fully compensated despite Defendant's conduct).

In support of its position, the State cites State v. Horner, 770 P.2d 1056 (Wash App. 1989) and People v. Hamblin, 568 N.W.2d 339 (Mich. App. 1997). While Defendant does not refute the persuasive nature of these cases – in that a criminal defendant is responsible for actual damage/loss to a victim – they are inapplicable here.

Ostensibly, the State’s reliance on Horner and Hamblin is to circumvent the requirement that the victim incur actual economic harm. In Horner, the Washington appellate court determined that the uncontroverted evidence that the victim’s labor in repairing a window damaged by a juvenile was not speculative was proper restitution. Horner, 770 P.2d 1056, 807-09. In Hamblin, the Michigan appellate court, relying on Horner, justified the trial court’s use of testimony regarding the price to replace a broken window (\$45) and estimated labor costs in assessing total restitution. Hamblin, 568 N.W.2d 339, 345-46.

Conversely, however, while the victims in Horner and Hamblin used their own efforts to replace/repair personal property and thus were not compensated for the extra efforts, Stewart did not suffer any economic harm. Both the victims in Horner and Hamblin chose to pay for repairs out of their own pockets in addition to choosing to repair their personal items by their own labor. Here, no evidence was given to show that Stewart lost pay or suffered some other economic harm.<sup>1</sup>

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<sup>1</sup> Speculatively, the State argues that “Stewart could have spent this time [time to recover the data] in other activities, including, had he chosen, other activities that generated income.” Appellee Br. at 12. The trial court made no such findings and is purely speculative and thus irrelevant.

Although Stewart testified that he spent time recreating the documents, again, he also testified that he suffered no economic harm. Stewart testified that he spent and additional 30 hours on top of his 30-40 hour work-week recreating these files. (R. 78:19). However, that time was voluntarily spent reconstructing work-related items and it was for work that he was compensated for. As Defendant argued in his brief, if the circumstances were different and Stewart's employment was affected such that he could show actual economic loss instead of speculating that he *could have* earned money doing other activities, the analysis would be different. See, Appellant Br. at 12-13; Appellee Br. at 11-12.

Basically, if this Court is to uphold the trial court's restitution order Stewart, who continued to earn his standard salary through UVU of \$64,000, would gain an additional \$9,758 income.<sup>2</sup> This windfall is inappropriate because Stewart did not suffer pecuniary harm and does not serve the purposes of restitution. See, State v. Laycock, 2009 UT 53, ¶ 18, 214 P.3d 104, 109 (affirming that restitution has a two-fold purpose: compensate the victim for pecuniary damages and for deterrence and rehabilitation as determined by the court based on society's competing needs.).

## **II. THE MODIFIED "BUT FOR" ANALYSIS APPLIES ONLY TO CRIMINAL ACTIVITY ADMITTED TO BY DEFENDANT WHICH RESULTED IN PECUNIARY HARM**

Defendant agrees with the State that "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, ¶

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<sup>2</sup> Total restitution ordered was \$9,838, \$80 of which was to UVU for employing Simply Mac to retrieve documents.

3, 987 P.2d 1289 (emphasis in original); see also, Utah Code Ann. §76-3-201(b) and (c). This principle was also codified: “When a defendant is convicted of criminal activity that has resulted in pecuniary damages..., the court shall order that the defendant make restitution to victims of crime... or for conduct for which the defendant has agreed to make restitution as part of a plea disposition.” Utah Code Ann. § 77-38a-302(1). The State seems to claim that Defendant need not have allocated to the damage of files on the computer, only that there be a “but for” connection between the theft and the resulting damage. The “but for” test, is applicable, however, only once “pecuniary” harm is established.

**a. Because Stewart Suffered No Pecuniary Harm, the Modified “But For” Test is Inapplicable**

Defendant asserts that because Stewart did not suffer pecuniary (economic) harm, any “but for” analysis is moot. In State v. McBride, 940 P.2d 539, 541 (Utah Ct. App. 1997), this Court addressed whether the “intervening and superseding negligence of the police in failing to contact the car's owners’ relieves [defendant] of any liability for any loss resulting from the sale of the impounded Camaro.” In McBride, the defendant pled guilty to a lesser charge of joyriding and, following a restitution hearing, was ordered to pay the victim \$600 – the value of the vehicle. Id. at 541-42. At issue in McBride was the applicability of any intervening or superseding negligence by the police department that was the actual result of the vehicle being sold without the victim’s consent or knowledge. What was not in dispute in McBride, which clearly distinguishes itself from these facts, was whether the victim suffered pecuniary harm.

Here, and unlike the victim in McBride, Stewart did not suffer pecuniary harm. As stated, restitution may only be ordered if the victim suffered *pecuniary damages*. See, State v. Watson, 1999 UT App 273, ¶ 3; Utah Code Ann. §77-38a-302(11) (“Restitution” means full, partial, or nominal payment for pecuniary damages to a victim...). Thus, a determination of pecuniary damage serves as the gatekeeper for any “but for” analysis. Because no harm befell Stewart, restitution is inappropriate. Cf., McBride, 940 P.2d 539 (victim’s personal vehicle was sold without his knowledge or consent and thus suffered a \$600 economic harm because he was unable to sell it on his own); State v. Watson, 1999 UT App 273 (pecuniary damages were established because the victim’s family required counseling).

#### **CONCLUSION AND PRECISE RELIEF SOUGHT**

Because the trial court committed error in its interpretation and ultimate application of the law, in that no pecuniary damage occurred Defendant respectfully requests that this Court reverse the trial court’s restitution order of \$9,838.00.

RESPECTFULLY SUBMITTED this 27th day of October, 2010.



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Michael S. Brown  
Counsel for Appellant

**CERTIFICATE OF MAILING**

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 27th day of October, 2010.



A handwritten signature in black ink, appearing to read "W. B. ...", is written over a solid horizontal line.