

2016

**State of Utah, Plaintiff, Appellee, and Cross-Appellant, v. Frank J. Steed and Joan A. Steed, Defendants, Appellants, and Cross-Appellees**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff, Appellee, and  
Cross-Appellant,

v.

FRANK J. STEED and JOAN A.  
STEED,

Defendants, Appellants,  
and Cross-Appellees.

Case Nos. 20141044-CA  
20141045-CA  
(Consolidated)

Dist. Ct. No. 081907872  
Dist. Ct. No. 081907873

REPLY BRIEF OF APPELLANTS

Appeal from the Third Judicial District Court, Salt Lake County, Utah  
Honorable Robin W. Reese, Presiding

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UTAH APPELLATE COURTS

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## ARGUMENT

### I. THE STEEDS' ARGUMENTS HAVE NEITHER BEEN WAIVED NOR FALL OUTSIDE THE MANDATE.

The State argues that the Steeds cannot seek return of monies that were paid pursuant to the now-reversed convictions because, although the Steeds appealed the convictions, they did not ask that the consequences of the convictions also be vacated. This is like arguing that the convictions can be reversed but the sentence must stand because the defendants did not ask to be let out of jail. Like the incarceration orders, the challenged payments were incidents of the convictions themselves; thus, when the convictions were reversed those penalties that were jurisdictionally dependent on the convictions were likewise reversed.

In essence, the State is asking the Court to require an appellant to supply an itemized list of all conceivable consequences of reversal, or be forever subject to those consequences even though they have no underlying legal foundation. Even the State acknowledges that the prison terms, the fines, the probation, and the supervision requirements do not survive the reversal. It is illogical to treat the other consequences of the very same conviction orders any differently.

In the present case, the underlying notices of appeal identified the final judgments of conviction (R. 959-61 (Joan); 1334-36 (Frank)), which included the probation conditions at issue here. The probation conditions were integral consequences of the judgments appealed from, and their reversal is inherent in the

reversal of those judgments of conviction. Indeed, a bare "conviction" without the accompanying sentencing is not even a final order for purposes of appeal. See *State v. Ingleby*, 2004 UT App 447, ¶ 10, 104 P.3d 657.

The State cites *UDOT v. Ivers*, 2009 UT 56, 218 P.3d 583, for the proposition that the mandate rule required the trial court to enter judgments of acquittal but precluded the trial court from undoing the consequences of the reversed orders. The *Ivers* case, however, does not stand for that proposition. In *Ivers*, the mandate was to determine whether the already-condemned land was necessary to the highway project and if so to award severance damages. On remand, UDOT attempted to change the scope of the take, an action the court held impermissible. 2009 UT 56, ¶¶ 14, 16.

The State also cites *J. Pochynok Co. v. Smedsrud*, 2007 UT App 88, 157 P.3d 822, for the same proposition. In *Smedsrud*, however, the question was whether the trial court was free to reconsider a garnishment order that had been specifically appealed and affirmed. Obviously, it was not. 2007 UT App 88, ¶ 16.

The foregoing cases do not preclude the trial court from undoing the consequences of the reversed orders. Neither the waiver doctrine nor the mandate doctrine require the result the State seeks here. Rather, logic and common sense demand that unwinding the consequences of the reversed orders is inherent in, and indeed required by, the mandate to enter judgments of acquittal. To do oth-

erwise would allow for the imposition of criminal penalties and consequences in the absence of criminal convictions.

## **II. THE STATE TAX COMMISSION IS NOT A SEPARATE LEGAL ENTITY FOR PURPOSES OF THIS CASE.**

The State's second argument is that the State Tax Commission is a non-party to the case and therefore cannot be compelled to return the funds it received pursuant to the trial court's restitution order. The State cites *State v. Lang*, 2009 UT 35, 212 P.3d 529, for the obvious proposition that the State is a party to a criminal case. The case actually involved an attempt by a victim to file a notice of appeal and stands for the proposition that the victim is not a party to a criminal case. 2009 UT 35, ¶ 16.

The State cites no authority in support of its argument that the tax commission is a legal entity separate from the State. There is nothing in the code to suggest that the commission, which collects taxes for the State of Utah, is separate from the State. The State cites no statute that requires the commission to segregate income tax funds and associated penalties, or to otherwise maintain a barrier or distinction between itself and the State.

To the contrary, the code provides that the commission "shall represent the state in a matter pertaining to the collection of a tax, fee, or charge." UTAH CODE § 59-1-1403(6). This suggests that, in the context of collection of taxes and penalties—which is the context here if the restitution order is disregarded—the



commission is the State. And that is consistent with the way this case was prosecuted: the tax commission investigated it and provided the information to Mr. Baer who, although he works for the attorney general, is assigned to the tax commission and handles tax cases.

Next, the State relies on the statutory process for obtaining a refund of a tax or penalty assessed by the commission. *See* UTAH CODE § 59-1-1410(8). The cited code section provides a civil process for the commission to assess a tax, fee, or charge, provides that the commission may not do so after three years have passed, and describes the process one must follow to obtain a refund of an assessment imposed under those circumstances. By laying out certain procedures, the code ensures that an individual receives adequate process and opportunity to challenge the amount of the fee or charge. *See* UTAH CODE §§ 59-1-1405, -1410. In this case, the commission did not—and now cannot because of the passage of time—assess the penalties and interest at issue. Rather than supporting the State's position, the section reinforces the Steeds' position that the statutory assessment scheme and the statutory refund scheme go hand-in-hand. The refund scheme is not applicable because the State elected not to follow the statutory assessment scheme.

### III. THE STEEDS ARE ENTITLED TO A REFUND OF ALL FEES AND COSTS PAID FOR PROBATION AND INCARCERATION.

The State finally reaches the merits of the Steeds' arguments at page 13 of its brief. The State's argument, however, ignores the cases cited in the Steeds' opening brief. Those cases stand for the proposition that a judgment of acquittal deprives the trial court of the jurisdiction to impose penalties, *State v. Piekkola*, 90 S.D. 335, 241 N.W.2d 563, 564 (1976), *overruled on other grounds by Matter of Estate of Erdmann*, 447 N.W.2d 356 (S.D. 1989), and for the further proposition that the touchstone for triggering the defendant's due process rights in this area is the coercive nature of the trial court's sentencing orders, *State v. Lewis*, 342 F. Supp. 833 (E.D. La. 1972), *aff'd*, 478 F.2d 835 (5th Cir. 1973).

Instead, the State attempts to sidestep the due process problem with the argument that the Steeds owed the tax and the commission *could have* imposed the penalties. It is a "no-harm no-foul" argument that characterizes the State as having lost a "gamble" and ignores the procedural realities of the case at hand.

Whether the commission *could have* imposed a penalty is irrelevant. The fact is that it chose not to do so. Instead, the commission took a shortcut: the trial court simply imposed a 20 percent surcharge, plus interest, and threatened the Steeds with immediate imprisonment if they did not pay it. This is not the statutory assessment process. It is the coercive process of criminal sentencing.

The statutory civil process was not triggered and the Steeds were not afforded a forum to argue that a penalty was not appropriate, or that the penalty was excessive under the circumstances.<sup>1</sup>

The State correctly argues that the obligation to pay penalties “does not depend” on a criminal conviction or imposition of a restitution order. While in the abstract neither conviction nor restitution is required in order for the commission to assess a penalty, that abstraction has no place here. Here, the penalty “depends” on the restitution order because restitution incident to the convictions was the basis the State chose for imposition of the penalties. The commission did not assess the penalty based on civil process or a statutory proceeding.

In a parallel argument, the State argues that the Steeds had “independent obligations” to pay the penalties and interest. This is simply incorrect. No obligation to pay penalties and interest arose under the tax code until assessment by the commission. See UTAH CODE §§ 59-1-1401 *et seq.* (containing procedures for assessments. The code affords the State a statutory civil process for imposing the

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<sup>1</sup> In the federal system prior to 2010, the I.R.S. routinely pursued separate civil assessments independent of the criminal conviction to determine the amount of tax liability. See, e.g., Office of Chief Counsel, Internal Revenue Service, Memo No. 200734020, at 4-5 (Oct. 2, 2006), *available at* <https://www.irs.gov/pub/irs-wd/0734020.pdf> (distinguishing between civil and criminal orders). In 2010, Congress amended the Internal Revenue Code to clarify that restitution could be awarded in criminal cases involving violations of federal tax law, but provided that the I.R.S. — rather than the court charged with sentencing — would civilly assess the restitution amount, and only after criminal appeals had been exhausted. See 26 U.S.C. § 6201(a)(4).

penalties. The process would also have afforded the Steeds their due process rights. The process was not followed, however, so no statutory obligation exists.

Finally, the State argues that the only effect of the acquittals was to ensure that the Steeds would not go to prison if they violated the restitution order. This argument simply illustrates the ridiculous result that follows if a judgment of acquittal does not remove the jurisdictional premise for imposition of fines, penalties, and restitution. The State is correct that the acquittals did not excuse the Steeds from obeying the law, but the State is incorrect to insist that the acquittals did not excuse the Steeds from the requirements of the restitution order that was premised on the now-reversed convictions.

**IV. EVEN IN THE CASE OF RESTITUTION PAID TO NON-PARTIES, THE BETTER POLICY APPROACH IS TO REQUIRE RETURN OF THE FUNDS FROM THE STATE.**

Although this case does not present the question whether or how restitution payments should be recovered from a non-governmental third-party victim, the Steeds recognize that that question lurks in the background of this case and is at least tangentially raised by the issue of the recovery of the “pay-for-stay” funds from Wasatch County. The issue was confronted in *State v. Parker*, 872 P.2d 1041 (1994), but the resulting decision—discussed extensively in the Steeds’ opening brief—is so fractured that no clear guiding principle emerges from it.

The Colorado appellate courts recently grappled with this issue in *People v. Nelson*, 2013 COA 58, 2013 WL 1760903 (Colo. Ct. App. 2013), *rev'd*, 2015 CO 68, 362 P.3d 1070 (Colo. 2015). The case involved a defendant who had been convicted of child abuse through the testimony of a forensic interviewer who should not have been qualified as an expert. The conviction was reversed, and then the defendant was acquitted in a second trial. In the interim, however, she had been incarcerated and had paid restitution and other costs associated with the conviction. The trial court denied her request for return of those funds.

The court of appeals reversed the trial court. It held that the defendant was entitled to seek recovery of not just fines and penalties, but all funds paid as restitution, reasoning that the trial court had an obligation to vacate all aspects of the overturned conviction because the state had “failed to prove that the defendant is guilty.” 2013 COA 58, ¶ 20. The court went on to hold that the repayment should come from the state, not the ultimate recipient of the restitution, reasoning persuasively:

In reaching our conclusion here, we are not unmindful of the fact that in certain cases, the state may be required to refund monies that it has already disbursed to third parties (i.e., people and entities not controlled by the state). For several reasons, however, we believe that such a result is reasonable and appropriate.

First, it was the state’s action that ultimately resulted in the wrongful payment of restitution.

Second, when the state chose to disburse the funds, it necessarily assumed the risk that the conviction could ultimately be overturned.

Third, we do not believe it appropriate to create a scenario in which former criminal defendants are left to seek out and file lawsuits or other proceedings against third parties, and especially crime victims, to recover the restitution amounts that the defendants previously paid.

Fourth, when a former defendant seeks a refund from the state, there is nothing to preclude the state, in its discretion, from seeking to recover such restitution amounts from the third parties, and we view this as a more palatable option, given that the state would have had prior dealings with the victims and any service providers. In addition, the state would be in the best position to assess whether the amount of the restitution at issue or the impact on the victims or service providers justifies any effort to recover such funds.

Finally, in a situation like that present here, where either the former defendant or the state must bear the risk of a wrongly paid restitution award, we believe that the risk should rest with the state, which collected the restitution funds but then ultimately failed to prove its case and which would likely be better able to bear the risk.

2013 COA 58, ¶¶ 28-33.

The Colorado Supreme Court reversed the court of appeals. While not disagreeing that the defendant was entitled to return of restitution,<sup>2</sup> it held that the defendant could not pursue that claim by motion in the criminal case, in part because the state constitution and prior case law prevented Colorado courts from “authorizing a refund from public funds without statutory authority to do so.”

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<sup>2</sup> Colorado has previously held, in *People v. Hargrave*, 179 P.3d 226, 229–30 (Colo. Ct. App. 2007), that the trial court has ancillary jurisdiction to entertain a post-conviction motion for the return of property.

2015 CO 68, ¶ 34. Applying this principle, the court held that she was required to file a separate suit under the Colorado Exoneration Act, which provides a remedy for those who are “factually innocent” but wrongfully convicted. *Id.*, ¶ 44.

In a dissent, Justice Hood methodically dismantled the majority’s reasoning. He noted that the Exoneration Act places the burden on the defendant to prove factual innocence by clear and convincing evidence, and thus reverses the presumption of innocence that should be available to the acquitted defendant. 2015 CO 68, Dissent ¶ 12. “[R]eversal is reversal. And an invalid conviction is no conviction at all.” *Id.*, ¶ 9. “[J]ust as the State was required to release Nelson from incarceration, it should also be required to release Nelson’s money paid as costs, fees, and restitution.” *Id.*, ¶ 6. “Refunds simply recognize that the legislature lacks power to punish people who have not been validly convicted.” *Id.*, ¶ 21.

Utah’s Post-Conviction Remedies Act, UTAH CODE §§ 78B-9-101 *et seq.*, is not susceptible to the majority’s analysis in *Nelson*, and thus reinforces the conclusion that the reasoning of the court of appeals and of the dissent is more persuasive. Utah’s act, like Colorado’s, reverses the burden of proof, requiring the claimant to prove factual innocence by clear and convincing evidence. *Id.*, § 78B-9-404(1)(b). Both acts provide for a specific monetary remedies. *Id.*, § 78B-9-

405(1)(a). Unlike Colorado, however, the Utah Act is silent on the question of refund of fines, restitution, and other penalties.

Most importantly, however, the Utah Act only applies to a person “who has exhausted all other legal remedies, including a direct appeal . . . .” *Id.*, § 78B-9-102. *See also* § 78B-9-106(1)(a) (“A person is not eligible for relief under this chapter upon any ground that may still be raised on direct appeal . . . .”). The remedy under the Utah Act is only available to “[a] person who has been convicted of a felony offense . . . .” *Id.*, § 78B-9-402(1). The Steeds, however, have not been convicted. A jury found them guilty, but the trial court’s order was reversed on appeal and a judgment of acquittal was entered. The Steeds were not convicted and then acquitted or found factually innocent. They were acquitted. By its plain language, the Post-Conviction Remedies Act is not applicable to a person who was not convicted. Consequently, the remedies and process spelled out in the Act have no application to the Steeds. Although not stated quite this plainly, this is the foundational premise of Judge Hood’s dissent in *Nelson* as well.

Thus, to the extent the court views this case as involving a request for refund from a non-party to the criminal case, the Steeds urge the reasoning of the Colorado Court of Appeals and Justice Hood’s dissent as persuasive and rational from a policy perspective. It is the State that accepted and disbursed the Steeds’




money knowing that the case was on appeal.<sup>3</sup> It is therefore the State that took the risk that its actions might be premature, and it is the State that has the ability, and the obligation, to return the money it accepted and disbursed. Requiring a criminal defendant to retain counsel and to then pursue a civil case against a victim and others is not necessary, and would be a poor policy choice.

### CONCLUSION

For the foregoing reasons, defendants request that this Court reverse the trial court's judgment insofar as it refused to refund the restitution, incarceration costs, and supervision fees that were imposed as a consequence of the convictions.

DATED this 16 day of March, 2016.

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<sup>3</sup> If the State lost a "gamble," it was only because it chose to disburse the restitution monies before the judgments of conviction became final. The State knew within 12 days that the Steeds had appealed. (R. 959-61, 971-73.) It assumed the risk of reversal when it disbursed funds without waiting for a final disposition on appeal. See *United States v. Hayes*, 385 F.3d 1226, 1230 (9th Cir. 2004) ("if the government retains the monies until the conviction becomes final and then distributes it to identifiable victims . . . the defendant has no right to recover any such sums from the government.").

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