

2016

State of Utah, Plaintiff/Appellee vs. Dalton Thomas, Defendant/ Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff / Appellee,

vs.

DALTON THOMAS,

Defendant / Appellant.

Case No: 201500624-CA

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF
UTAH, FROM A RESTITUTION ORDER FOLLOWING A CONVICTION OF
BURGLARY AND CRIMINAL MISCHIEF, THIRD DEGREE FELONIES,
BEFORE THE HONORABLE JUDGE JAMES TAYLOR

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Counsel for Appellant

Appellant is not currently incarcerated on this case

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BRIEF OF APPELLANT

JURISDICTION OF THE UTAH COURT OF APPEALS

The Court of Appeals has appellate jurisdiction in this matter pursuant to the provisions of Utah Code §78A-4-103(2)(e) as an appeal from a court of record in a criminal case not involving a charge of a first degree or capital felony.

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court abused its discretion by ordering court ordered restitution? “In the case of restitution, a reviewing court will not disturb a district court’s determination unless the court exceeds the authority prescribed by law or abuses its discretion.” *State v. Laycock*, 2009 UT 53, ¶10, 214 P.3d 104. “[W]hether a restitution award is proper... depends solely upon interpretation of the governing statute, and the trial court’s interpretation of a statute presents a question of law, which we review for correctness.” *State v. Miller*, 2007 UT App 332, ¶6, 170 P.3d 1141 (*citing State v.*

Gibson, 2006 UT App 490, ¶6, 153 P.3d 771).

This issue was preserved initially at sentencing when the parties stipulated to the amount of complete restitution, \$10,629, but sought an evidentiary hearing “to determine Court ordered restitution based on his ability to pay.” R.071, 072. The Court set a hearing “to determine the ability to pay.” R.072. At the restitution hearing the defense argued the trial court should not order the full amount of restitution as a court-ordered condition of probation. R.097-98.

CONTROLLING STATUTORY PROVISIONS

Any controlling statutory provisions are set forth in full in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

Defendant, Dalton Thomas, appeals from the restitution order following judgment, sentence, and commitment on one count of Burglary, a third degree felony, and one count of Criminal Mischief, a third degree felony.

B. Trial Court Proceedings and Disposition

On March 23, 2015 Dalton Thomas was charged by information with one count of Burglary (dwelling), a second degree felony, and one count of Criminal Mischief, a second degree felony. R.001-02. On May 7, 2015 Thomas waived his right to a preliminary hearing and entered guilty pleas to amended charges of Burglary, a third degree felony, and Criminal Mischief, a third degree felony. R.064-67. Sentencing was held on June 18, 2015 where the district court gave Thomas credit for the 94 days served in jail, suspended the prison terms, and placed him on probation for 36 months.

R.071-74, R.043-44. At sentencing the parties agreed to an amount of complete restitution, \$10,629, but Thomas requested a hearing “to determine Court ordered restitution based on his ability to pay.” R.071. The district court scheduled a restitution hearing for July 30, 2015. R.075.

At the restitution hearing the State called Brian Miller who testified as a construction manager for the victim. R.081. Ultimately the judge cut short Miller’s testimony because the parties had already stipulated to the amount of complete restitution. R.083-85. Thomas then testified about his financial situation, his financial obligations and bills, and he presented an affidavit reflecting his finances. R.087-92, R.046-52. Thomas’ father, Clinton Wynn, was called to testify. R.093. He discussed what Thomas’ financial obligations would be once he began having regular income. R.094.

After hearing the evidence, the court didn’t “see any reason [Thomas] can’t pay this off if I give him enough time.” R.095. The court ordered Thomas to pay \$125 per month for eight years. The court “modified” probation “to make it right now eight years.” R.096. The court noted that supervised probation could “terminate when the treatment objectives are reached”, but that court probation would continue to while Thomas paid restitution. R.096.

Defense counsel argued that the court did not properly consider Thomas’ ability to pay. R.097. The court disagreed and maintained its decision to “modify the probation”. R.098.

Thomas timely filed his notice of appeal on August 3, 2015.

STATEMENT OF RELEVANT FACTS

In his statement in advance of plea Thomas admitted that on or about March 12, 2015 he “forcibly entered a building without the owner’s permission by kicking in the door. While in the building he cause (sic) damage in excess of \$20,000.” R.022. At the entry of plea, the State provided a factual basis for the guilty pleas. R.066. It noted that “the defendant forcefully entered a home under construction without the owner’s permission by kicking in the door. While in the home he used a hatchet to damage cabinets, walls, a (inaudible) post and a bathtub, totaling at least \$20,000.” R.066.

The presentence report contains a “Factual Summary of Offense” which refers to the police reports in the case. R.033. Those reports claim “officers responded to a home under construction in Orem, Utah. The home had been vandalized, having the front door kicked in and an axe or hatchet used to damage a significant amount of woodwork throughout the home.” R.033. The construction company estimated “damages at \$20,000.” R.003. Thomas “turned himself into (sic) the Orem Police Station. He admitted to breaking into the home under construction”, that he had been drinking alcohol, and that he “chopped the house up due to his frustration.” R.033.

At sentencing the parties agreed to stipulate that the amount of complete restitution would be \$10,629. R.071. The district court accepted that stipulation and ordered the “[t]otal restitution” of \$10,629; but we’re going to conduct a hearing to decide how much I can reasonably order you to pay as a condition of probation.” R075.

Thomas filed a “Financial Declaration for Restitution” for the restitution hearing. R.046-52. In it he reported he worked as a “dough boy” at “little ceasers” making \$10 per

hour and working 25 hours per week. R.047. He estimated he made about \$1000 per month before taxes. R.047. Thomas did not know what his tax liability would be because he “just started” the job. R.048. On the expenses portion of the form Thomas reported that he was not “not sure” what his monthly expenses would be because he “just started working”, however, he did report \$80 per month for transportation costs, and \$50 per month for his telephone. R.049. Thomas did not report having any financial assets in the bank, bonds, or securities, or owning any property of value. R.050-51. Thomas reported owing debts to the “court” for Adult Probation and Parole (AP&P) supervision, “fines and fees”, and making payments of \$30 per month, but that those payments “will go up”. R.052.

At the restitution hearing Thomas testified he had worked at Little Caesars for “about two weeks” and was looking forward to his first paycheck “[t]his Sunday.” R.087. He reported that monthly payment he was making to AP&P would change now that he is employed. R.088. He testified that he was living with his dad in Lehi and did not have to pay for food yet, but would have to when he started having income. R.089, 090, 092. Thomas testified he paid \$22 per month for his medication. R.091. On cross examination the State asked about Thomas’ expenses involving a cell phone and cigarettes. R.089-90. Thomas testified that he paid \$50 per month for his cell phone but was not sure what he spent each month on cigarettes. Thomas smokes a “pack every other day.” R.090.

The defense also called Clinton Wynn, Thomas’ father. R.093. Wynn testified that up to this point Thomas had not been paying for household expenses but “once he found employment and started getting his paychecks, his income coming in, ... that we’d sit

down and evaluate that, you know, with his fines and his medication, he's now having to pay to -- with what he would be able to help towards, you know, food for himself, and also, you know, what he can toward the utilities, the electric and, you know, while he's living there with us." R.094. Wynn said Thomas would be expected to pay for "gas and such" "[w]hen he can". R.094.

SUMMARY OF ARGUMENT

The district court abused its discretion when it modified the of the term of Thomas' probation and ordered Thomas to pay the amount of complete restitution as court ordered restitution. The district court did not properly consider the statutory factors relevant to determining the monetary sum of court-ordered restitution.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING THOMAS TO MAKE COMPLETE RESTITUTION AS COURT-ORDERED RESTITUTION

A. Relevant Law

1. Statutes

UTAH CODE §77-18-1 outlines the procedure courts should take after a person is convicted of a crime. It proscribes how a court can suspend a statutory sentence and "place the defendant on probation" to be supervised by the Department of Corrections, an agency of local government, a private organization, or by the court. UTAH CODE §77-18-1(2)(a) (2015).

"[A]s a condition or probation, the court may require that the defendant:... (ix) make restitution or reparation to the victim or victims..." UTAH CODE §77-18-1(8).

“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...” UTAH CODE §77-38a-302(1). “In determining restitution, the court shall determine complete restitution and court-ordered restitution.” UTAH CODE §77-38a-302(2).¹ “‘Complete restitution’ means restitution necessary to compensate a victim for all losses caused by the defendant.” UTAH CODE §77-38a-302(2)(A). “‘Court-ordered restitution’ means the restitution the court having criminal jurisdiction orders the defendant to pay as part of the criminal sentence at the time of sentencing or within one year after sentencing.” UTAH CODE §77-38a-302(2)(b).

A court’s order for complete restitution must consider “(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense; (ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; (iii) the cost of necessary physical and occupational therapy and rehabilitation; (iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim; (v) up to five days of the individual victim’s determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim’s current

¹ See *State v. Laycock*, 2009 UT 53, ¶20, 214 P.3d 104 (“We find the plain language of this subsection to be a clear directive that district courts are to make two separate restitution determinations, one for complete restitution and a second for court-ordered restitution.”)

employment at the time of the offense; and (vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.” UTAH CODE §77-38a-302(5)(b).

A court’s order for court-ordered restitution must consider “(i) the factors listed in Subsections (5)(a) and (b); (ii) the financial resources of the defendant, as disclosed in the financial declaration described in Section 77-38a-204; (iii) the burden that payment of restitution will impose, with regard to the other obligations of the defendant; (iv) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court; (v) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and (vi) other circumstances that the court determines may make restitution inappropriate.” UTAH CODE §77-38a-302(5)(c).

Probation for a felony “may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation...” UTAH CODE §77-18-1(10)(a)(i). However, there appears to be no statutory limitation to the amount of time a court may order a defendant to serve on probation.² If at the end of the term of probation “there remains an unpaid balance upon the account receivable”, including court ordered restitution amounts, “the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable.” UTAH CODE §77-18-1(10)(a)(ii)(A).

2. Cases

In *State v. Laycock*, 2009 UT 53, 214 P.3d 104 the Utah Supreme Court analyzed

² See *State v. Wallace*, 2006 UT 86, 150 P.3d 540 (interpreting the permissive “may” language of UTAH CODE §77-18-1(10)).

the restitution statutes and explained the duties of sentencing courts to determine both complete restitution and court-ordered restitution. While the issues raised in *Laycock* were primarily directed at a district court's refusal to order a complete restitution amount, the Supreme Court's discussion of the court-ordered restitution requirements are relevant to this case. For example, the Court noted that district courts are "under no obligation to impose court-ordered restitution in an amount equal to complete restitution." *Laycock*, 2009 UT 53, ¶28 (citing UTAH CODE §77-38a-301). This is because an order for court-ordered restitution must consider additional factors not relevant to the question of complete restitution, if it were not so, there would be no distinction between complete restitution and court-ordered restitution, effectively reading "court-ordered restitution" out of the statute." *Laycock*, at ¶30.

While it is true that "[c]ourt-ordered restitution may be identical in amount to complete restitution, [] it need not be so." *Laycock*, at ¶30. In fact, the two amounts can only be identical if the additional factors that the court must consider for court-ordered restitution had no effect on the analysis. Thomas asserts that, in this case, those additional factors and the uncontested facts presented to the court, must necessarily have had an effect upon the court-ordered restitution analysis, and that the district court abused its discretion by not considering and applying these factors. The district court found that "it is not an astronomical amount" but that "it's a reasonable amount for him to pay." R.098. Thomas challenges that conclusion by the court and asserts that, under the statutory factors for court-ordered restitution, the district court abused its discretion.

B. The trial court abused its discretion

The trial court was presented with evidence and argument related to the required statutory factors. First the court “shall” consider “the factors listed in Subsections (5)(a) and (b)”, in other words, the court must begin with the complete restitution amount. UTAH CODE §77-38a-302(5)(c). Then after starting with the complete amount, the trial court court “shall consider” “the financial resources of the defendant, as disclosed in the financial declaration...” UTAH CODE §77-38a-302(5)(c)(ii).

From the financial declaration in the record, the district court was informed that Thomas had just recently begun working as a “dough boy” at Little Caesars Pizza, making \$10 per hour and working 25 hours per week. R.047. His total **gross** income was approximately \$1000 per month, before expenses.

The trial court did not consider Thomas’ “financial resources” in any reasonable way. When the court ordered Thomas to pay \$125 per month for the next eight years it was not reasonably considering the obviously limited resources he had access to. How could it have? The fact that the court-ordered amount remained the same as the complete restitution even after Thomas presented evidence that he was living on \$1000 gross per month with no savings and no assets should convince anyone who lives in modern America that the trial court was not reasonable.

This problem is only compounded when the next factor is applied. After considering financial resources, the court “shall consider” “the burden that payment of restitution will impose, with regard to other obligations of the defendant”. UTAH CODE §77-38a-302(5)(c)(iii). The district court knew from Thomas’ testimony that the \$1000

figure would be discounted by some unknown amount for taxes. R.087-88. The court knew Thomas was paying AP&P supervision fees. R.088. The court knew Thomas would also have to begin paying toward his “fines and fees” now that he was employed. R.088. The court had previously ordered Thomas to pay \$988 on each of two charges in fines. R.044. The court knew Thomas was paying \$50 per month for a cell phone, and would also be required to help pay for food and other household expenses while he was working. R.089, 094. The trial court did not reasonably consider the burden that a \$125 per month payment would be upon Thomas in light of his other financial obligations. The district court failed to properly consider how difficult it would be to pay \$125 per month for eight years for someone with Thomas’ limited resources.

The final factor the court “shall consider” is any “other circumstances that the court determines may make restitution inappropriate.” UTAH CODE §77-38a-302(5)(c)(vi). In this case defense counsel argued that this amount of court-ordered restitution was inappropriate because of Thomas’ mental health conditions and his employment limitations. R.097-98. The court had been made aware that Thomas’ conduct in the case had come after he “had a mental snap”, arising from a lack of treatment for bipolar disorder. R.072. The court knew at the time of the restitution hearing he was being treated for substance abuse and some “mental -- psych --” condition. R.088. And yet the district court make no adjustment to the complete restitution amount to account for Thomas’ mental health and substance abuse needs. Instead the court merely “modified” the term of Thomas’ probation, from three years to eight years and ordered him to pay every dollar of

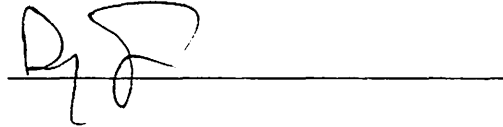
the restitution as a condition of his probation. This is not a reasonable order in light of the required factors that must be considered.

Because the district court failed to reasonably consider the statutory factors that must be accounted for when ordering court-ordered restitution its order constitutes an abuse of discretion.

CONCLUSION AND PRECISE RELIEF SOUGHT

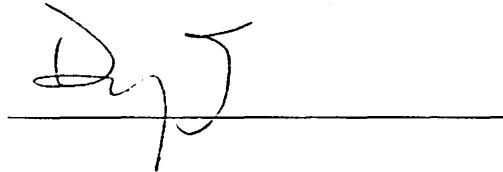
The district court abused its discretion in ordering Thomas to pay the full amount of complete restitution as the amount of court-ordered restitution. This Court should reverse the restitution order and remand for a determination of court-ordered restitution consistent with the statutory factors.

RESPECTFULLY submitted this 6th day of January, 2016.



CERTIFICATE OF MAILING

I herby certify that I mailed a true and correct copy of the foregoing postage prepaid to the Utah State Attorney General, Appeals Division, P.O. Box 140854, Salt Lake City, Utah 84114-0854 on this 6th day of January, 2016.



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Dated: 1/6/2016

77-38a-302 Restitution criteria.

- (1) When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition. For purposes of restitution, a victim has the meaning as defined in Subsection 77-38a-102(14) and in determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (2) through (5).
- (2) In determining restitution, the court shall determine complete restitution and court-ordered restitution.
 - (a) "Complete restitution" means restitution necessary to compensate a victim for all losses caused by the defendant.
 - (b) "Court-ordered restitution" means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing or within one year after sentencing.
 - (c) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (5).
- (3) If the court determines that restitution is appropriate or inappropriate under this part, the court shall make the reasons for the decision part of the court record.
- (4) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue.
- (5)
 - (a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.
 - (b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:
 - (i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;
 - (ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
 - (iii) the cost of necessary physical and occupational therapy and rehabilitation;
 - (iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;
 - (v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and
 - (vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.
 - (c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider:
 - (i) the factors listed in Subsections (5)(a) and (b);
 - (ii) the financial resources of the defendant, as disclosed in the financial declaration described in Section 77-38a-204;

- (iii) the burden that payment of restitution will impose, with regard to the other obligations of the defendant;
 - (iv) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
 - (v) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and
 - (vi) other circumstances that the court determines may make restitution inappropriate.
- (d)
- (i) Except as provided in Subsection (5)(d)(ii), the court shall determine complete restitution and court-ordered restitution, and shall make all restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing.
 - (ii) Any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole.
- (e) The Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution.

Amended by Chapter 74, 2013 General Session

