

2016

**The State of Utah, Plaintiff/ Appellee, vs. Jason Jvichael Speed,  
Defendant/ Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,

Plaintiff/Appellee,

vs.

JASON MICHAEL SPEED,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

Appellate Case No.: 20150011-CA

Trial Court Case No.: 101901272 FS

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An appeal from a final Sentence, Judgment, and Conviction for Attempted Theft by Deception, a Third-Degree Felony, in violation of Utah Code Ann. § 76-6-405, in the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Judith Atherton presiding. The defendant is not incarcerated.

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## ARGUMENT

**I. The trial court abused its discretion in denying Mr. Speed’s Motion for Relief from Judgment and Request for a Restitution Hearing.**

**A. Defendant’s argument that the sentencing court deprived him of his right to a restitution hearing was preserved.**

Contrary to the State’s assertion, Defendant’s argument that the sentencing court improperly denied him a restitution hearing was preserved. To “preserve an issue for appeal, a defendant must raise the issue before the district court in such a way that the court is placed on notice of potential error and then has the opportunity to correct or avoid the error.” *State v. Diaz–Arevalo*, 2008 UT App 219, ¶ 10, 189 P.3d 85.

On September 11, 2014, counsel for Defendant filed a Motion for Relief from Judgment and Request for Restitution Hearing. (R85-90.) In the Motion, Defendant argued two points: that the restitution order is void because it was not entered within one year of sentencing, and that he was entitled to a full restitution hearing. (*See id.*) Because his right to a restitution hearing was raised before the district court, the issue was properly reserved for appeal.

Even if the issue was not properly preserved by Defendant’s trial counsel, this Court should consider the issue under the plain error exception to the preservation rule because (1) an error occurred; (2) the error should have been obvious to the trial court; and (3) the error was prejudicial. *See State v. Holgate*, 2000 UT 74, ¶13, 10 P.3d 346. As demonstrated below, the plain language of the statute clearly requires the trial court to hold a full restitution hearing if a defendant objects to “the imposition, amount, or

distribution of the restitution.” Utah Code Ann. § 77-38a-302(4). Such an error should have been obvious to the trial court because the statutory language is clear. Finally, the error was prejudicial because Defendant was deprived of his due process rights inherent in a restitution hearing. *See State v. Gibson*, 2009 UT App 108, ¶ 15, 208 P.3d 543.

**B. The trial court improperly denied Defendant his due process right to a restitution hearing.**

The plain language of the statute requires the trial court to hold a full restitution hearing if a defendant objects to “the imposition, amount, or distribution of the restitution.” Utah Code Ann. § 77-38a-302(4). The defendant is not required to file a formal motion for a restitution hearing or first negotiate with the State to “come closer” on an agreed-upon restitution. Therefore, by imposing an order of restitution prior to holding a hearing, the trial court abused its discretion.

The plain language controls the interpretation of a statute, and a court may only look beyond the plain language if there is ambiguity in the statute. *See Lorenzo v. Workforce Appeals Bd.*, 2002 UT App 371, ¶ 11, 58 P.3d 873. “Unambiguous language ... may not be interpreted to contradict its plain meaning.” *Id.* (internal citations omitted). Courts also “avoid adding to or deleting from statutory language, unless absolutely necessary to make it a rational statute.” *Id.* (internal citations omitted).

Utah Code § 77-38a-302(4) reads as follows: “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.” The plain language of the statute places the onus on the trial court to hold a hearing on restitution if the defendant objects at all to restitution. There is

no requirement that the Defendant file a formal motion or first negotiate with the State to “come closer” on an agreed-upon restitution. Reading such a requirement into the statute would “add” statutory language, which is not absolutely necessary and therefore prohibited. *Lorenzo*, 2002 UT App 371, ¶ 11.

While Defendant cites no case law regarding a trial court’s admonition that a defendant file a formal request for a restitution hearing or a stipulation *after* the defendant has objected to restitution, the State similarly cannot point to any law that imposes additional requirements on Defendant to request a restitution hearing in addition to simply objecting to “the imposition, amount, or distribution of the restitution.” Utah Code Ann. § 77-38a-302(4). In the absence of any case law interpreting the statute otherwise, the plain language of the statute should control.

The State concedes that Defendant objected to the restitution proposed in the pre-sentence report. In response to that objection, the trial court conditioned a restitution hearing on defense counsel collecting certain information for the judge to review prior to the hearing, and admonished the parties to “get closer” on an amount before filing a motion for a hearing. (R122:10-11.) That defense counsel wanted to investigate some issues prior to the hearing does not obviate Defendant’s overall objection to the extremely high amount of restitution proposed, and the hearing that he was entitled to as a result of his objection. Because the trial court failed to hold a restitution hearing after Defendant objected to restitution, and instead imposed additional requirements on Defendant not contained in the governing statute, it abused its discretion.



**II. Defendant's trial counsel performed deficiently as demonstrated by the record, resulting in prejudice to Defendant.**

**A. Defendant can prove his trial counsel's deficient performance on the record.**

Contrary to the State's assertion, there is sufficient evidence on the record from which this Court can find a deficient performance by Defendant's counsel. At sentencing, Defendant's counsel stated that a restitution hearing was needed to address Defendant's ability to pay the large amount of restitution proposed. (R122:4-5, 10-22.); *see also* Utah Code § 77-38a-302(5)(c). Defense counsel argued that Defendant was working two jobs, making no more than \$7.50 an hour, and that a felony conviction may hamper his future employment. (R122:7-8.) Defendant testified that he had not yet been able to save anything for restitution because he was catching up on previous debt that he had. (R122:5.) Further, "fundamental principles of procedural fairness in sentencing require that a defendant have the right to examine and challenge the accuracy and reliability of the factual information upon which his sentence is based." *See State v. Gomez*, 887 P.2d 853, 855 (Utah 1994).

Based on the testimony and argument given at sentencing, Defense counsel could not have reasonably determined that he had no legitimate basis upon which to challenge Defendant's ability to pay the restitution; particularly when Defendant has the fundamental right to "examine and challenge the accuracy and reliability of the factual information upon which his sentence is based." By failing to file a motion for a restitution hearing after the trial court directed him to do so, defense counsel performed deficiently.

**B. Defendant was prejudiced by his counsel's deficient performance.**

Defendant can prevail on the second prong of Strickland by either showing that there is a reasonable probability that the amount of restitution would have been reduced if Defendant had obtained a restitution hearing, or that he was deprived of his fundamental due process rights. Because he can prove both, he can prevail on his ineffective assistance of counsel claim.

Any theory that a restitution amount would have been reduced at a hearing is inherently speculative; however, there is sufficient evidence on the record that there is a reasonable probability the amount of restitution would have been reduced after a hearing. At a hearing, the trial court would have been required to consider "(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; [and] (iv) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court." *See* Utah Code § 77-38a-302(5)(c). As noted in the previous section, Defendant had few financial resources and a low ability to pay a \$126,547 restitution award. Assuming he worked 50 hours per week at \$7.50 per hour, it would take him six and a half years to pay off the restitution award, without taking into account interest accruing on the award, taxes, and any other personal expenses he may have. Given that the trial court would be required to consider his ability to pay the award, there is a reasonable probability that the total award would have been reduced at a restitution hearing.

Further, as discussed in Appellant's Opening Brief, Defendant's right to a restitution hearing is protected by the United States and Utah State Constitutions, in addition to Utah statutory law. *See State v. Gomez*, 887 P.2d 853, 854 (Utah 1994). The mere deprivation of Defendant's due process right to a restitution hearing—even if the resulting award would have been the same—is prejudicial.

**CONCLUSION**

For the reasons stated above, Mr. Speed requests that the restitution order be vacated. In the alternative, Mr. Speed requests that this Court remand the case to the trial court for a full restitution hearing.

DATED this 3<sup>rd</sup> day of June, 2016.

RICHARDS BRANDT MILLER NELSON

  
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**CERTIFICATE OF DELIVERY**

I, KRISTINA H. RUEDAS, hereby certify that I have caused to be delivered a copy of the foregoing **REPLY BRIEF OF APPELLANT** by way of U.S. mail, to Kris Leonard, 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 3<sup>rd</sup> day of June, 2016.



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

**CERTIFICATE OF COMPLIANCE**

Appellant, by and through counsel of record, Kristina H. Ruedas of and for the law firm RICHARDS BRANDT MILLER NELSON, hereby certifies that the Reply Brief of Appellant complies with the type-volume limitation of Rule 24(f)(1) of the Utah Rules of Appellate Procedure. Specifically, Reply Brief of Appellant contains 1,502 words (according to the word count feature in Microsoft Word), exclusive of the cover page, table of contents, table of authorities, certificate of service, and the addenda.

DATED this 3<sup>rd</sup> day of June, 2016.

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