

1993

State of Utah v. Russell Catalano : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee	:	
	:	
v.	:	Case No. 930678-CA
	:	
RUSSELL CATALANO,	:	Priority: 2
	:	
Defendant/Appellant	:	
	:	

REPLY BRIEF OF DEFENDANT-APPELLANT

APPEAL OF AN AMENDED ORDER REGARDING RESTITUTION
IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH
COUNTY, STATE OF UTAH, THE HONORABLE JUDGE
LYNN W. DAVIS, PRESIDING

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what types of expenses qualify for restitution" Id. (citations omitted).¹ Reference to Oregon law is helpful in the case at bar.

The Utah Supreme Court has agreed with the Oregon Supreme Court that damages available at a restitution hearing are only those that "would otherwise be special damages recoverable in a civil proceeding." Id.; Oregon v. Dillon, 637 P.2d 602, 607 (1981). The Oregon Court has further stated that restitutional damages apply "only to expenses actually incurred and to those expenses which are easily measurable . . . and . . . those future expenses reasonably predictable. Oregon v. Hart, 699 P.2d 1113, 1117-18 (1985).

The analogous civil proceeding under Utah law would be damages for loss of work, wages or profits for a tortious act. Under civil standards, any losses tied to the defendant's behavior "may be recovered when the evidence submitted provides a basis for estimate them with reasonable certainty. While the evidence must not be so indefinite as to allow the [trier of fact] to speculate as to their amount, some degree of uncertainty is tolerable." Acculog, Inc. v. Peterson, 692 P.2d 728, 732 (Utah 1984). The Utah Supreme Court has also stated that the evidence of damages must not be "so meager as to invite sheer speculation" Winsness v. M.J. Conoco Distributors, Inc., 593 P.2d 1303, 1306 (1979).

¹The Utah Court of Appeals has also given deference to Oregon's case law concerning the restitution statute. In State v. Garcia, 866 P.2d 5 (1993), defendant was convicted of unlawful distribution of a controlled substance and ordered to pay restitution to a police agency. This court stated: "Our Oregon counterpart has already decided the exact issue presented by the facts of this case in State v. Pettit We agree with the Oregon court's conclusion in Pettit. Id. at 7.

The trial court in Mr. Catalano's case failed to adhere to these standards in accepting Mr. Valgardson and Mrs. Hernandez's guesses of lost time and profits from their respective businesses. Their opinions were speculation and should not have been relied upon in determining restitution costs.

The trial court found that Mr. Valgardson had suffered a \$3,000 loss to his business although he presented no evidence at the restitution hearing. (R.117 at 67). The court allowed Mr. Valgardson to estimate his losses although he acknowledged his estimates were "subjective" and that he "couldn't really say, because [he]'d have to do a time and motion study to see" how the loss affected his business. (R.117 at 45).

Mr. Valgardson testified at the restitution hearing that the missing paint sprayers slowed his business by backing up the assembly line process he used to build homes. (R.117 at 40-41). He estimated that he was probably working on eighteen to twenty-four houses at a cost of \$23,000 a day for total operation costs in 1992. (R.117 at 40). In response to the delays, Mr. Valgardson replaced one of the paint sprayers four or five days after the break-in and the other two sprayers within the next six weeks. (R.117 at 40). Moreover, the trial court awarded Mr. Valgardson "purchase price" restitution for paint-sprayers when his actual loss was paint-sprayers that were three to six years old. (R.117 at 34, 66) and in spite of testimony in regards to the actual market value of used paint-sprayers (R.117 at 27, 30, 64). None of these figures or facts were documented by Mr. Valgardson or the state.

Mr. Catalano argues that the delays were not as great as Mr. Valgardson testified. Mr. Catalano testified that when he worked for Mr. Valgardson, often only one sprayer

was used on the assembly line at a time. (R.117 at 61-62). In those circumstances, the new paint sprayer obtained four or five days after the break-in could have eliminated all back-up or delay. Again, there was no evidence before the court of how the events actually affected Mr. Valgardson's business. He testified of how things worked hypothetically but gave no evidence about the specifics of that time period. Mr. Valgardson did not produce business receipts (even for the new sprayers (R.117 at 37-38)), no work records of employee overtime, or documentation of lost or delayed orders. Any of these items would have informed the trial court of Mr. Valgardson's actual costs, not just the hypothetical costs.

Similarly, Mrs. Hernandez testified that her husband's business suffered losses although she repeatedly said she "fel[t] inadequate putting a dollar amount on how much [was] lost." (R.117 at 97.) The trial court allowed Mrs. Hernandez to speculate as to the amount her husband was paid for each job and how many jobs he lost during the time he did not have a paint sprayer. (R.117 at 96-97). Mrs. Hernandez did not produce any business records or receipts proving that business was lost, she simply restated what she was told by her husband. (R.117 at 96-97).

Furthermore, the trial court made no inquiry into the costs for lost wages submitted by Mrs. Hernandez. The Utah Supreme Court has held that in seeking civil damages for loss of profits, a party is entitled to recover only net profits, not gross profits. Sawyers v. FMA Leasing Co., 722 P.2d 773, 774 (1986). The court reasoned that "In addition to proof of gross profits, there must generally be supporting evidence of overhead expenses, or other costs of producing income from which a net figure can be

derived." Id. In Sawyers, the court found the plaintiffs could not recover the sought costs as they had failed to introduce "financial summaries, monthly sales volume breakdowns, costs of sales expenses, or any other overhead expenses, from which the trial court could reasonably have calculated plaintiff's lost net profit" Id. at 775.

Mr. Catalano argues that the civil damages analogy prohibits the trial court from accepting Mrs. Hernandez's estimated lost profits. There was no evidence of how much net profit her husband made on any of his painting jobs when supplies and other overhead costs were included. Mrs. Hernandez indicated her husband made "around \$1,700 and \$2,000" for each painting job. (R.117 at 97). Later when questioned by the court concerning whether this figure was gross or net profit, Mrs. Hernandez replied that her husband "would usually gross -- or net about between 1,500 to 1,800." She clarified that the figure was not an income "every single month" and was "just an estimate." (R.117 at 117). The court cannot properly assess a restitutionary amount from speculation. An itemized list of supplies and other costs needs to be submitted to provide a basis for estimating Mr. Hernandez's losses with reasonable certainty. See Acculog, Inc. v. Peterson, 692 P.2d 728, 732 (Utah 1984).

POINT II

MR. CATALANO'S OBJECTIONS TO THE COURT'S DETERMINATIONS PRESERVED HIS RIGHT TO APPEAL

The State argues that Mr. Catalano cannot appeal the trial court's failure to consider his financial resources when determining restitution. The state cites State v. Snyder, 747 P.2d 417 (Utah 1987) to support its contention. In Snyder, the defendant waived any challenge to the trial court's failure to enter written findings by not objecting

to the imposition, amount, or distribution of the ordered restitution. In the present case, the State represented to the trial court that it would seek full restitution and Mr. Catalano had agreed to pay this as part of the plea bargain. (R.117 at 5-6.) Mr. Catalano did not object to this statement. However, throughout the restitution hearing, Mr. Catalano objected to the valuation for certain losses and the amount of restitution to particular witnesses. Concerning the restitution for Mr. Valgardson's machines, Mr. Catalano objected to the amount based on purchase price. (R.117 at 68). Mr. Catalano also raised concern about the \$3,000 given for down-time which the court itself said was a "generic approximate." (R.117 at 68). Later in the hearing, Mr. Catalano objected to a figure Mrs. Hernandez gave for a spray hose which was double the price offered by another witness, Mr. Jespersen. (R.117 at 105). Mrs. Hernandez's speculation concerning the income from each job was objected to because of its wild estimation without support (R.117 at 117). Although not objecting to the imposition of restitution, Mr. Catalano's objections to the court's calculations and valuations preserves his claim to appeal on these issues.

Utah Code Annotated Section 76-3-201(3)(b)(i) (1990) requires the trial court to consider the financial resources of the defendant in its determination as to the type of restitution to be imposed as well as the financial burden such restitution would create. The trial court failed to consider the financial resources of Mr. Catalano--who typically earned \$6.00 per hour as a painter (R.117 at 50)--or the financial burden that a restitution award of such a speculative nature would cause him and his family. The trial court's

failure to make such considerations contravenes the plain meaning of Utah Code Annotated Section 76-3-201(3)(b)(i) (1990).

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN ARRIVING AT THE AMOUNT ORDERED AS RESTITUTION

In State v. Brown, 853 P.2d 851 (Utah 1992), Brown contested the trial court's order that he pay the county for his defense. The Utah Supreme Court held: "We will not set aside a sentence imposed by a trial court unless the sentence represents an abuse of discretion, the trial court failed to consider all relevant factors, or the sentence imposed exceeded the limits prescribed by law." Id. at 861. See also State v. Twitchell, 832 P.2d 866, 868 (Utah App. 1992) ("Unless a trial court exceeds the authority prescribed by law or abuses its discretion, we will not disturb its order of restitution.")

In the present case, the trial court abused its discretion by failing to base the restitution amount on expenses which had actually incurred or were easily measurable. Mr. Valgardson's subjective estimate of \$3,000 business loss was not reasonable because he had no documentation or proof. If Mr. Valgardson had conducted a time and motion study, the results could have been viewed by the court and used in finding an accurate restitution amount. Similarly, Mrs. Hernandez testified that she "would really feel inadequate putting a dollar amount on how much [she and her husband] lost." (R.117 at 97).

To allow Mr. Valgardson and Mrs. Hernandez to recover damages when their evidence is so indefinite as to allow speculation is abuse of discretion by the trial court. The evidence presented was contradicted by Mr. Catalano and Mr. Jespersen and was

neither reasonable nor satisfactory to reach the court's conclusions. See State In re Schroeder, 598 P.2d 373, 374 (Utah 1979) (Holding that the court's authority to order delinquent juvenile to make restitution extends only to damages which are shown by *satisfactory* evidence to have resulted from his wrongful conduct) (emphasis added). The trial court abused its discretion and the restitution granted was an improper measure of value.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, Mr. Catalano respectfully requests the Court of Appeals find the trial court abused its discretion in determining the amount of restitution and order that a new restitution hearing be held to assess the proper amount of damages.

DATED this 3 day of November, 1994.

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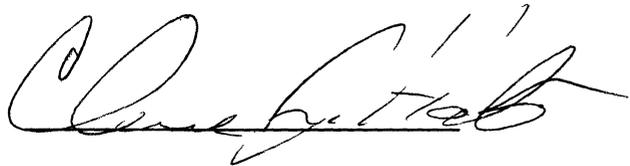
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MAILING CERTIFICATE

I, hereby do certify that two (2) copies of the Appellant's Reply Brief were mailed, postage prepaid to the following:

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Dated this 3 day of November, 1994.

A handwritten signature in black ink, appearing to read 'C. J. ...', is written over a horizontal line.