

2005

Utah v. Keele : Brief of Appellant

Utah Court of Appeals

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Mark L. Shurtleff; Utah Attorney General; Attorney for Appellee.

John Pace; Ralph W. Dellapiana; Salt Lake Legal Defender Association; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

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| THE STATE OF UTAH, | : | |
| Plaintiff/Appellee, | : | |
| | : | |
| CHRISTI KEELE, | : | Case No. 20050154-CA |
| Defendant/Appellant. | : | |

BRIEF OF APPELLANT

An appeal from a final judgment denying Defendant's Amended Motion to Terminate Restitution, in the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable John Paul Kennedy, presiding. Defendant is not incarcerated.

John Pace (5624)
Ralph W. Dellapiana (6861)
Salt Lake Legal Defender Association
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

Mark L. Shurtleff (4666)
Utah Attorney General
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

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424 East 500 South, Suite 300
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Mark L. Shurtleff (4666)
Utah Attorney General
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF JURISDICTION | 1 |
| STATEMENT OF ISSUES | 1 |
| DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS | 3 |
| STATEMENT OF CASE | 3 |
| STATEMENT OF FACTS | 4 |
| SUMMARY OF ARGUMENT | 9 |
| ARGUMENT | |
| Point I: The Trial Court Exceeded Its Statutory Authority by Calculating Court-Ordered Restitution Based upon Conduct for which Ms. Keele Did Not Admit Responsibility. | 11 |
| Point II: The Trial Court Abused Its Discretion by Calculating Court-Ordered Restitution Based upon Irrelevant and Conclusory Evidence. | 16 |
| CONCLUSION | 19 |
| Addendum A: Order denying Amended Motion to Terminate Restitution | |
| Addendum B: Utah Code Ann. § 76-3-201 (1995 [effective until April 29, 1996]) | |

TABLE OF AUTHORITIES

Page

CASES

| | |
|--|---------|
| <u>Merriam v. Merriam</u> , 799 P.2d 1172 (Utah Ct. App. 1990) | 15 |
| <u>State v. Butterfield</u> , 2001 UT 59, 27 P.3d 1133 | 16 |
| <u>State v. Casarez</u> , 656 P.2d 1005 (Utah 1982) | 17 |
| <u>State v. Galli</u> , 967 P.2d 930 (Utah 1998) | 13 |
| <u>State v. Gomez</u> , 887 P.2d 853 (Utah 1994) | 18 |
| <u>State v. Lipsky</u> , 608 P.2d 1241 (1980) | 16 |
| <u>State v. Mast</u> , 2001 UT APP 402, 40 P.3d 1143 | 1-2, 13 |
| <u>State v. Schweitzer</u> , 943 P.2d 649 (Utah Ct. App. 1997) | 2 |
| <u>State v. Watson</u> , 1999 UT APP 273, 987 P.2d 1289 (per curium) | 12 |
| <u>State v. Weeks</u> , 2002 UT 98, 61 P.3d 1000 | 14, 17 |
| <u>State v. Westerman</u> , 945 P.2d 695 (Utah Ct. App. 1997) | 2 |

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

| | |
|---|----------------|
| Utah Code Ann. § 76-3-201 (1995 [effective until April 29, 1996]) | 3 |
| Utah Code Ann. § 76-3-201 (1995) | 10, 12, 13, 14 |
| Utah Code Ann. § 77-38a-102 (2003) | 12 |
| Utah Code Ann. § 77-38a-302 (2003) | 12, 13 |

| | <u>Page</u> |
|---------------------------------------|-------------|
| Utah Code Ann. § 78-2a-3 (2002) | 1 |

OTHER AUTHORITIES

| | |
|---|---|
| <i>The Business Journal – Portland</i> (Sept. 9, 1997) (Smith’s and Fred Meyer merged in September, 1997) (available at: http://www.bizjournals.com/portland/stories/1997/09/08 daily4.html) | 5 |
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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
Plaintiff/Appellee, :
 :
v. : Case No. 20050154-CA
 :
CHRISTI KEELE, :
 :
Defendant/Appellant. :

STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (2002).
The trial court denied the defendant's Amended Motion to Terminate Restitution. (R. 94 [Amended Motion], 151 [Findings of Fact and Conclusions of Law], 155 [Order].) See Addendum A. No other matters are pending in the trial court.

STATEMENT OF ISSUES

Issue I: Whether the trial court exceeded the authority prescribed by law in calculating court-ordered restitution where the amount was not based upon conduct for which Ms. Keele was convicted or admitted responsibility.

Standard of Review: When a trial court's order of restitution is premised upon statutory interpretation, the trial court's legal conclusions are afforded no deference and are reviewed for correctness in light of the statute's plain meaning. *State v. Mast*, 2001

UT APP 402, ¶ 7, 40 P.3d 1143; *State v. Westerman*, 945 P.2d 695, 696 (Utah Ct. App. 1997).

Preservation: At a hearing convened January 6, 2005, defense counsel argued that any restitution ordered in excess of \$280 was improper because it must have been calculated from alleged acts or cases for which Ms. Keele did not admit responsibility when, in 1995, she entered a guilty plea. (R. 171, at 6:14-23, 49:10-21, 50:14-20.)

Issue II: Whether the trial court abused its discretion in concluding a hand-written letter from a *pro se* defendant complaining about service and collection fees being added to the restitution balance she was told she owed constituted a *post hoc* admission of responsibility for the entirety of said balance, especially where the *pro se* defendant was never informed of her right to challenge the initial calculation.

Standard of Review: An appellate court will disturb a trial court's restitution order only where "it exceeds that prescribed by law or otherwise abused its discretion." *State v. Schweitzer*, 943 P.2d 649, 653 (Utah Ct. App. 1997).

Preservation: At the January 2005 hearing, defense counsel argued that the 1996 restitution calculation occurred illegally and without supporting evidence. Defense counsel argued, therefore, that the trial court in 2005 should finally calculate court-ordered restitution based upon evidence in the record. (R. 171, at 4:23-5:2, 6:8-23.)

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Ann. § 76-3-201 (1995 [effective until April 29, 1996]): Attached as Addendum B.

STATEMENT OF CASE

In 1995, three cases were filed against Ms. Keele: Case Nos. 951901411, 951901412 and 951901413. (R. 3-5; R. 171, Ex. 7, 8.) (The actual charges are discussed in the Statement of Facts, *infra*.) On October 30, 1995, Ms. Keele agreed to plead guilty to counts I and II of the first case, No. 951901411, and to pay restitution "on all cases." (R. 32.) The State agreed to dismiss counts III-V of the first case, dismiss the other two cases in their entirety, and to not file any additional cases for alleged criminal conduct prior to July 13, 1995. (R. 32-39.) At Ms. Keele's sentencing hearing, December 11, 1995, the Hon. David S. Young, presiding, the State again recommended "full restitution on all cases." (R. 170, at 7:7.¹) The court ordered that restitution be paid "as set by Adult Probation and Parole" ("AP&P"). (R. 170, at 8:23-24; *see also* R. 46 [Judgment/Sentence (restitution to be determined by AP&P)].) No further mention of restitution occurred at the 1995 sentencing hearing.

¹ The cover of the sentencing hearing transcript is dated January 11, 1995. The actual date of the hearing, however, was December 11, 1995.

On May 16, 1996, AP&P received a memo from Smith's [Food and Drug] Returned Check Department claiming that, with service fees added, Ms. Keele owed Smith's a total of \$17,319.44. (R. 171, Ex. 1.)

Ms. Keele, proceeding *pro se*, filed the Motion to Terminate Restitution in 2004. (R. 77.) Counsel from this law office was appointed to represent Ms. Keele, additional pleadings were filed, and a hearing was held. The court denied the amended motion to terminate restitution on February 7, 2005. (R. 155.) The Notice of Appeal was filed on February 14, 2005. (R. 158.)

STATEMENT OF FACTS

In 1995, three cases were filed against Ms. Keele. The first was Case No. 951901411. It alleged as follows:

Count I: the defendant attempted to cash a forged check for \$497, but did not succeed (R. 3, 5, 33);

Count II: the defendant did pass a forged check for \$100 (R. 3, 5, 33); and,

Counts III - V: the defendant possessed forged checks (R. 4).

The second, Case No. 951901412, alleged that the defendant received checks stolen from a trucking firm, that the defendant passed one such check for \$180 at Fred Meyer, and that she possessed other stolen checks. (R. 171, Ex. 7.) The third, Case No. 951901413, alleged possession of a controlled substance and drug paraphernalia. (R. 171, Ex. 8.)

Based upon the State's documents and notations in the court file, Ms. Keele's conduct as alleged in the three cases resulted in the actual passing of two forged checks totaling \$280: \$100 to Smith's, and \$180 to Fred Meyer. (R. 3, 5, 33, 171 at Ex. 7.) In 1995, Smith's and Fred Meyer were separate corporations and had not merged. *See The Business Journal – Portland* (Sept. 9, 1997)(Smith's and Fred Meyer merged in September, 1997) (*available at: <http://www.bizjournals.com/portland/stories/1997/09/08/daily4.html>*).

On October 30, 1995, Ms. Keele agreed to plead guilty to counts I and II of the first case, and to pay restitution "on all cases." The State agreed to dismiss counts III-V of the first case, dismiss the other two cases in their entirety, and to not file any additional cases for alleged criminal conduct prior to July 13, 1995. (R. 32-39, 40-41.)

The Presentence Investigation ("PSI") included the following victim impact statement regarding Smith's:

Smith's Food King took the loss on all checks forged by this defendant. No statement was received regarding sentencing in this matter. Emily, with the returned checks department of Smith's Food King was unable to provide information regarding restitution in this matter. She indicated Ms. Keele's name was on so many of the forged checks they are holding it would take them "some time" to gather all of the information.

(R. 47, at 4.) The PSI does include a victim impact statement from Fred Meyer.

At Ms. Keele's sentencing hearing, December 11, 1995, the Hon. David S. Young, presiding, the State again recommended "full restitution on all cases." (R. 170, at 7:7.) The court ordered that restitution be paid "as set by Adult Probation and Parole."

(R. 170, at 8:23-24; *see also* R. 46 [Judgment/Sentence (restitution to be determined by AP&P)].) No further mention of restitution occurred at the 1995 sentencing hearing.

Ms. Keele subsequently reviewed the "Special Conditions of Probation" with an AP&P agent. Ms. Keele was required to initial each paragraph relating to the terms of her probation. When Ms. Keele initialed the restitution paragraph, the space for the court-ordered amount read, "TBD," or To Be Determined. (R. 152, para. 6, 7.)

On May 16, 1996, AP&P received a memo from Smith's Returned Check Department claiming that, with service fees added, Ms. Keele owed Smith's \$17,319.44. (R. 171, Ex. 1.) The memo does not itemize the charges or list individual checks. The memo does not indicate when the checks were passed. The memo does not indicate the quantity of checks involved. The memo provides no detail about how the total claim was calculated. (*Id.*)

AP&P informed Ms. Keele that she was required to pay \$17,319.44 in restitution on or about October 17, 1996, more than ten months after the sentencing hearing. (R. 152, para. 10.) Ms. Keele disputed the amount said to be owing, and was advised by her AP&P agent to contact an attorney. (R. 171, at 16:10-24.) During the time between the sentencing hearing and when Ms. Keele learned of the initial restitution calculation, she successfully completed a 60-day inpatient drug rehabilitation program. (*See* R. 170, at 7:21-8:8, 9:6-11.) During the same period, getting on with her life and trying to be a good person were uppermost in Ms. Keele's mind. (R. 171, at 37:7-18.)

Ms. Keele contacted Smith's in or about 1996 to determine how Smith's calculated its restitution claim. Ms. Keele spoke to a man named Miller, who was the supervisor of Smith's "Bad [sic] Check Department." The supervisor could not provide any detail as to how the total restitution claim was calculated. (R. 171, at 38:1-39:9.) When Ms. Keele asked her AP&P agent how the total restitution claim was calculated, she was told only that the \$17,319.44 total was what Smith's claimed to be owed. (R. 171, at 39:13-19.) When Ms. Keele contacted Smith's on three separate occasions during January 2005, Smith's could not provide any information about how much restitution was owing, instead indicating that it had no record whatsoever of Ms. Keele's indebtedness. (R. 171, at 32:11-33:2.) In 2005, the State assigned a paralegal to work with Smith's to substantiate the initial claim, and Smith's was unable to do so. (R. 171, at 46:25-47:4.) The State conceded at the 2005 hearing that Smith's likely has no further evidence with which to substantiate the initial calculation. (R. 171, at 51:11-12 ["I agree ... we're probably not going to find anything further from Smith's records"].)

No court findings or order calculated either complete restitution or court-ordered restitution. No notice to defense counsel that restitution had been fixed at \$17,319.44 was provided. No sentencing hearing occurred at which Ms. Keele could object to the amount of court-ordered restitution, which would have invoked her right to a "full hearing" on the issue. No notice of Ms. Keele's right to inspect the evidence upon which

the amount was calculated was provided. No formal notice to Ms. Keele that she was entitled to a hearing with assistance of counsel to challenge the calculation was provided.

Ms. Keele consistently worked at least 40 hours per week since 1996, and, despite health problems and a limited disposable income related to attempts at starting her own small business, she has consistently paid approximately \$50 per month toward her obligation. (R. 39:23-42:18.) As of the 2005 hearing, Ms. Keele had paid approximately \$4,679 towards restitution: \$1,355 to AP&P; and, \$3,275 to the Office of State Collections (hereinafter, "OSC"). (R. 171, at 22:12-20.)

In May 1999, Ms. Keele wrote a letter to Judge Young in which she complained that OSC's collection fees had increased the balance of restitution by more than \$3,000 from the \$16,014.14 she was told she still owed: "As of this February I owe \$16,014.14 for restitution. After GC Services got ahold [sic] of my account they informed me I now owe \$19,897.12." (R. 171, Ex. 9.) The hand-written 1999 letter included no objection to the manner in which the restitution amount was calculated, nor did it request a hearing. (*Id.*) In apparent response to the 1999 letter, Judge Young first ordered Ms. Keele's account returned to AP&P administration (R. 73), and then *sua sponte* reversed that order "after further examination." (R. 75.)

Ms. Keele, proceeding *pro se*, filed the Motion to Terminate Restitution in 2004. The *pro se* motion does not challenge the method by which the original calculation was made, request a hearing thereon, or challenge the lack of notice and opportunity to be

heard at the time of the initial calculation. (R. 77.) Only after the *pro se* motion was filed, and this office became involved,² was Ms. Keele's right to challenge the initial calculation invoked. (*See* R. 94.)

At the 2005 hearing, defense counsel noted that said hearing constituted Ms. Keele's first opportunity to challenge the accuracy of the initial restitution calculation. (R. 171, at 47:20-24.) Defense counsel contended that, owing to the irregularities surrounding the initial calculation, the trial court was required to conduct its own calculation. (*E.g.*, 171, at 49:8-50:1, 50:14-20.) The trial court, however, concluded that Ms. Keele's 1999 hand-written letter (R. 171, Ex. 9) constituted an admission by Ms. Keele that she owed the amount claimed by Smith's. (R. 171, at 5:11-17, 54:9-14 ["So the court is going to enter a finding based on defendant's agreement and admission in her letter, that as of February of 1999 she owed \$16,014.14"].)

SUMMARY OF ARGUMENT

Both Points I and II recall the same theme: the extra-judicial calculation and imposition of restitution in 1996 violated the plea agreement, state statute, and Ms. Keele's constitutional rights to due process and assistance of counsel; the trial court, in 2005, was required to address these problems by calculating both complete and court-ordered restitution based upon conduct for which Ms. Keele admitted responsibility in

²The notice of hearing that issued following the State's response to the *pro se* motion was not addressed to this law office, but rather to Ms. Keele's home address in Idaho. (R. 89-91.)

1995; and, by not doing so, the 2005 trial court exceeded its statutory authority (Point I) and abused its discretion (Point II).

Point I: The court exceeded its statutory authority by imposing restitution based upon "criminal activities" for which Ms. Keele was not convicted and for which she did not admit responsibility.

Ms. Keele agreed to pay restitution stemming from the conduct alleged in three cases filed in 1995. The State agreed that no other cases would be filed that stemmed from conduct prior to July 13, 1995. Evidence in the form of the informations, the plea agreement and State counsel's notations thereon, and the sentencing hearing transcript establish that the conduct for which Ms. Keele admitted responsibility caused approximately \$280 in pecuniary damages, including \$100 to Smith's. Smith's, however, submitted a restitution claim to AP&P in the amount of \$17,319.

Pursuant to Utah law then in place, court-ordered restitution could only be based upon actual conduct for which the defendant was convicted or admitted responsibility. Utah Code Ann. § 76-3-201(1)(b), (4)(c)(ii) & (8)(a) (1995).

At the 2005 hearing – the first "full hearing" at which Ms. Keele was permitted to challenge the initial calculation – the trial court expressly based its calculation of restitution upon a letter written by Ms. Keele in 1999 without assistance of counsel and addressing an entirely different restitution issue. Most significantly, the 1999 letter did not admit responsibility to any conduct; rather, it merely recited what Ms. Keele was told

she owed. By its reliance upon the 1999 letter, the trial court exceeded its statutory authority by calculating restitution based upon sources not permitted by law.

Point II: The trial court abused its discretion by characterizing the 1999 letter as an admission of responsibility, rather than calculating court-ordered restitution based upon accurate and reliable facts.

Ms. Keele agreed to pay restitution for the three cases filed in 1995. Those cases allege the passing of two bad checks that totaled \$280. The trial court in 2005, however, calculated court-ordered restitution based upon the 1999 letter written by Ms. Keele without assistance of counsel, attempting to raise an issue unrelated to the initial calculation of restitution, and merely confirming Ms. Keele's lack of knowledge of her right to challenge that calculation.

ARGUMENT

Point I: The Trial Court Exceeded Its Statutory Authority by Calculating Court-Ordered Restitution Based upon Conduct for which Ms. Keele Did Not Admit Responsibility.

In December 1995, the trial court was limited by statute to order restitution based only upon conduct for which Ms. Keele was either convicted or admitted responsibility:

When a person 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 subsection, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement....

Utah Code Ann. § 76-3-201(4)(a)(i) (1995); *see* Utah Code Ann. § 77-38a-302(1) (2003)(the current statutory section that imposes similar restrictions). Criminal activities, in turn, were defined as any "offense" for which a defendant was convicted or "conduct" for which a defendant admitted responsibility. Utah Code Ann. § 76-3-201(1)(b) (1995); *see* § 77-38a-102(2) (2003).

Whereas "complete" restitution might encompass all monetary damages caused by a defendant, actual "court-ordered" restitution was limited only to those damages flowing from criminal conduct admitted by the defendant. The trial court lacked jurisdiction to order restitution for conduct that was neither the subject of a conviction nor an admission of responsibility. Utah Code Ann. § 76-3-201(4)(c)(i) & (ii) (1995); *see* Utah Code Ann. § 77-38a-302(2)(a) & (b) (2003). Even the provision that guided the actual calculation of restitution, Utah Code Ann. § 76-3-201(8) (1995), focused upon "conduct" for which the defendant admitted responsibility. *See* Utah Code Ann. § 77-38a-302(5) (2003).

In *State v. Watson*, 1999 UT APP 273, 987 P.2d 1289 (*per curium*), the trial court inferred from the evidence that the defendant was responsible for certain criminal conduct. This court, interpreting statutory language nearly identical to that at issue here, held that court-ordered restitution could stem only from conduct for which the defendant clearly admitted responsibility:

To conclude that [defendant] admitted responsibility for the murder and that there was a sufficient nexus to hold her accountable to the victim's family for restitution, the trial court examined and made inferences about [defendant's] state of mind based upon the evidence before it. However, the statute is more narrow.

It does not ask the trial court to analyze a defendant's state of mind, but rather asks it to focus on admissions made to the sentencing court. In other words, the statute requires that responsibility for the criminal conduct be firmly established, much like a guilty plea, before the court can order restitution.

Id., at ¶ 5; *accord State v. Galli*, 967 P.2d 930, 937-38 (Utah 1998)(court-ordered restitution may be based upon uncharged criminal activity only if the defendant admits responsibility therefor); *Mast*, at ¶¶ 16-19 (vacating order of restitution based upon conduct for which the defendant neither was convicted nor admitted responsibility).

Three cases were filed against Ms. Keele herein based upon her July 13, 1995 arrest. For purposes of court-ordered restitution, Ms. Keele admitted responsibility for all conduct alleged in those three cases. The plea agreement executed by Ms. Keele, the State and the trial court stated, "Defendant agrees to restitution on all cases." (R. 32.) The trial court, therefore, in 1995, could not have based court-restitution upon any charge or allegation outside those three cases.

In 1995, moreover, Ms. Keele was denied an opportunity to challenge the initial calculation at sentencing. A defendant objecting to the amount of court-ordered restitution at sentencing in 1995 was entitled to a "full hearing" on the issue. Utah Code Ann. § 76-3-201(4)(e) (1995); *see also* Utah Code Ann. § 77-38a-302(4) (2003). Prior to Ms. Keele's sentencing, however, the PSI (R. 47) contained no calculation of complete restitution or a recommendation for court-ordered restitution. The sentencing court calculated neither complete nor court-ordered restitution at the sentencing hearing or in any court order that followed. Ms. Keele only learned of the initial restitution

calculation some ten months after the sentencing hearing – from AP&P. The trial court's failure to calculate court-ordered restitution not only violated Utah Code Ann. § 76-3-201(4)(a)(iii) & (c) (1995), but it denied Ms. Keele and her attorney the opportunity to object to any such calculation. Having been deprived of the opportunity to object to court-ordered restitution at sentencing, Ms. Keele was denied her opportunity to a full hearing on any such objection. Serving finally as the "full hearing," therefore, the 2005 proceedings were crucial.

At the 2005 hearing, the court was required to consider evidence relevant to the calculating court-ordered restitution. *See State v. Weeks*, 2002 UT 98, ¶ 20, 61 P.3d 1000 (while rules of evidence may not apply at the full hearing, "the dispositive question is whether the sentencing court correctly concluded that the restitution amount was justified on the basis of the evidence presented to it"). The determination critical to calculating court-ordered restitution should have been: For what conduct did Ms. Keele admit responsibility before the sentencing court. The answer, based upon the Informations, the plea agreement, and the transcript from the sentencing hearing, was that Ms. Keele admitted responsibility for conduct stemming from the three cases, which caused approximately \$280 in pecuniary damage.

The court, however, took a different track. It concluded that Ms. Keele's 1999 letter constituted an admission of responsibility upon which restitution could be based:

So that's why I think this letter from the defendant dated May of – in her handwriting – of '99 is so crucial, where she admits that she owes \$16,014.14. If

nothing – if the State wants to try to prove that there's really more than that owing, and if there's some order that would indicate that more than that is owing, I'll let them try, but that would be my starting point.

(R. 171, at 5:11-17; *see also* R. 171, at 54:9-14 ["So the court is going to enter a finding based on defendant's agreement and admission in her letter, that as of February of 1999 she owed \$16,014.14"].) Everything the trial court found, concluded and ordered during the 2005 proceeding was based upon its inalterable reliance upon the 1999 letter as an admission of responsibility.³

When she wrote the letter, Ms. Keele obviously did not know she could challenge the initial restitution calculation. Ms. Keele did question Smith's and AP&P as to the basis for the initial calculation – albeit unsuccessfully, as neither provided any detail or backup information. (R. 171, at 38:1-39:9, 39:13-19.) Clear from her failure to challenge further the initial calculation, not only in the 1999 letter (R. 171, Ex. 9), but also in the subsequent *pro se* motion (R. 77), Ms. Keele was unaware of her right to object formally to the initial calculation when she wrote the 1999 letter. Especially where Ms. Keele was unaware of her rights, the 1999 letter cannot be interpreted as some sort of knowing and informed *post hoc* admission of responsibility for undefined, uncharged conduct in addition to that alleged in the three 1995 cases. The 1999 letter constituted neither a conviction nor an admission of responsibility for conduct. The

³ The appellate court is not limited to reviewing just written findings, but may also examine findings "expressed solely from the bench...." *Merriam v. Merriam*, 799 P.2d 1172, 1177 (Utah Ct. App. 1990).

letter does not mention any offense or conduct outside of the three cases for which Ms. Keele admitted responsibility. The letter recited merely what Ms. Keele was told she owed.

As a matter of law, the 2005 trial court's reliance upon the 1999 letter exceeded its statutory authority. It should have recalculated the restitution amount based upon actual evidence of pecuniary damage Smith's suffered from the offenses and conduct alleged in the three cases for which Ms. Keele admitted responsibility.

Point II: The Trial Court Abused Its Discretion by Calculating Court-Ordered Restitution Based upon Irrelevant and Conclusory Evidence.

The trial court abused its discretion in denying the amended motion for termination of restitution. An abuse of discretion will be found when no reasonable person would take the view adopted by the trial court. *E.g., State v. Butterfield*, 2001 UT 59, ¶ 28, 27 P.3d 1133.

The evidence before the trial court at the 2005 full hearing was that Ms. Keele passed two bad checks in the context of the three cases: one check to Smith's for \$100 (R. 3, 5, 33), and the other to Fred Meyer for \$180 (R. 171, Ex. 7). The PSI provided no additional evidence of pecuniary damage stemming from the three cases.⁴

⁴ The Utah Supreme Court's rationale for requiring the provision of PSI's to defendants, set forth in *State v. Lipsky*, 608 P.2d 1241, 1248-49 (1980), applies with equal force where, as here, the PSI, although received by Ms. Keele, did not inform her what would be considered in calculating restitution.

As noted above, the trial court's 2005 calculation of court-ordered restitution began and ended with its characterization of the 1999 letter as an admission by Ms. Keele that she owed all that Smith's claimed. (R. 171, at 5:11-17, 54:9-14.)

The 1999 letter, however, was written with one purpose in mind: to complain about the more than \$3,000 added to the outstanding restitution balance, as initially calculated, when Ms. Keele's account was referred to OSC. As noted above, the 1999 letter constitutes little more than Ms. Keele's ill-informed attempt to stop OSC from making a bad situation worse.

The trial court's reliance upon the letter constitutes an abuse of discretion because the letter – and the restitution balance it recites – flow directly from AP&P's illegal, extrajudicial imposition of restitution in 1996. Calculation of restitution is a part of the sentencing process. *State v. Weeks*, 2002 UT, @ ¶16 & n.8. Sentencing is a "critical stage of a criminal proceeding in which a defendant is entitled to the effective assistance of counsel." *State v. Casarez*, 656 P.2d 1005, 1007 (Utah 1982). Procedural fairness is as vital at the sentencing phase as during the guilt phase of trial. *Id.* In 1996, Ms. Keele was completing inpatient addiction treatment, struggling to get back on her feet, and did not have legal representation. AP&P's imposition of Smith's claim upon Ms. Keele, ten months after the sentencing hearing and without providing effective notice of her right to counsel and a full hearing, violated her constitutional rights to due process and effective assistance of counsel.

The 2005 trial court's abuse of discretion is further illustrated by the inability of either Smith's or AP&P to substantiate the initial restitution claim, thereby preventing Ms. Keele from evaluating the reliability and accuracy of the initial calculation. Under both the Utah and the United States Constitutions, due process requires that sentencing be based upon accurate and reliable information. *State v. Gomez*, 887 P.2d 853, 854 (Utah 1994). "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." *Id.*, at 855.

Upon AP&P's extrajudicial imposition of Smith's \$17,319 restitution claim ten months after the sentencing hearing, Ms. Keele questioned both Smith's and AP&P concerning its validity. Smith's was unable to explain how the claim was calculated. (R. 171, at 38:1-39:9.) AP&P replied simply that the amount was what it was because Smith's said it was. (R. 171, at 93:13-19.) Even in 2005, Smith's not only was unable to substantiate the basis for the initial claim, it had no record of Ms. Keele's indebtedness. (R. 171, at 32:11-33:2; *see also* R. 171, at 46:25-47:4, 51:11-12 [State concedes Smith's inability to detail the basis for the claim].) In 1995, Ms. Keele was deprived of her right to evaluate and challenge the basis for Smith's claim. In 2005, the trial court's misplaced reliance upon the 1999 letter similarly foreclosed any such evaluation.

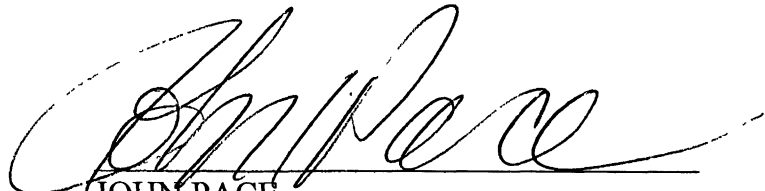
CONCLUSION

The trial court exceeded its statutory authority by relying upon the 1999 letter to calculate restitution, where the 1999 letter reflected neither a conviction nor an admission of responsibility for conduct upon which court-ordered restitution could lawfully be calculated.

The trial court's erroneous characterization of the 1999 letter as a *post hoc* admission of responsibility constituted an abuse of discretion where the 1999 letter was merely a recitation based upon AP&P's extrajudicial calculation and imposition of restitution, which themselves violated Ms. Keel's rights to due process and effective assistance of counsel. The court further abused its discretion by foreclosing evaluation of the accuracy and reliability of the facts upon which restitution was calculated.

The trial court's order should be vacated, and this case remanded to the trial court with direction to calculate court-ordered restitution based only upon the conduct for which Ms. Keele admitted responsibility in the plea agreement.

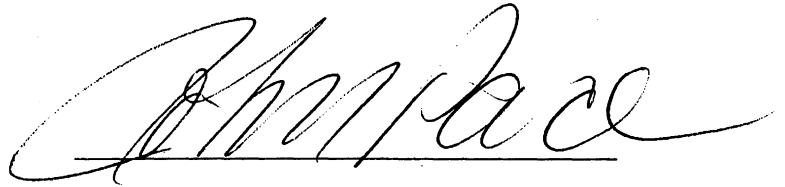
SUBMITTED this 21st day of June, 2005.

A handwritten signature in black ink, appearing to read "John Pace", written over a horizontal line.

JOHN PACE
RALPH W. DELLAPIANA
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I have caused to be delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, P.O. Box 140230, Salt Lake City, Utah, 84114-0230, and four copies to the Office of the Utah Attorney General, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 21st day of June, 2005.

A handwritten signature in cursive script, appearing to read "R. M. Wells", written over a horizontal line.

DELIVERED to the Utah Court of Appeals and the Office of the Utah Attorney General as indicated above this _____ day of June, 2005.

ADDENDA

ADDENDUM A

DAVID E. YOCOM
District Attorney for Salt Lake County
KENNETH R. UPDEGROVE, 4931
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

FILED DISTRICT COURT
Third Judicial District

FEB 2 - 2005

SALT LAKE COUNTY
by _____
Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

| | |
|---|--|
| THE STATE OF UTAH, Plaintiff, -vs- CHRISTI EVETTE KEELE, Defendant. | ORDER ON DEFENDANT'S MOTION TO TERMINATE RESTITUTION Case No. 951901411 FS Hon. John Paul Kennedy |
|---|--|

The Court having reviewed the evidence and the law and having entered Findings of Fact and the Conclusion of Law based thereon;

HEREBY ORDERS that:

1. Defendant's Motion to Terminate Restitution is denied.
2. The State Office of Debt Collection will continue to collect future restitution payments from defendant.
3. Adult Probation and Parole will continue to monitor defendant's payments to the State Office of Debt Collection.
4. The fine ordered at sentencing is stricken.
5. Defendant will pay the ordered recoupment fee of \$150.00 for her publicly provided counsel.

155


ORDER ON DEFENDANT'S MOTION
TO TERMINATE RESTITUTION

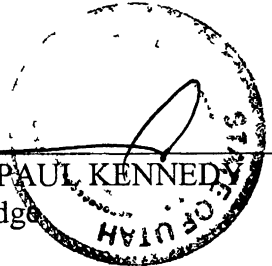
Page 2

6. Defendant will pay restitution, currently in the amount of \$11,384.14.
7. No additional collection fees will be added by the State Office of Debt Collection to the restitution owing.
8. The statutory interest on the restitution owing will be waived if defendant makes a minimum payment of \$100.00 per month, beginning on March 1, 2005, for a minimum total of \$1,200.00 per year. If the yearly payment is less than \$1,200.00, statutory interest will be added to the amount owed.

DATED this 7 day of February, 2005.

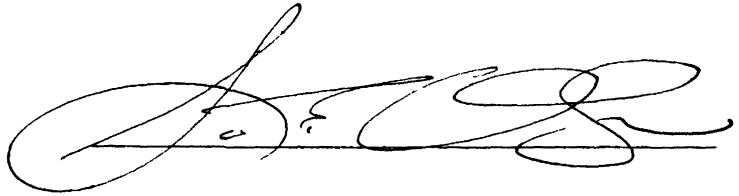
BY THE COURT:


HONORABLE JOHN PAUL KENNEDY
Third District Court Judge



CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the foregoing Findings of Fact and Conclusion of Law in addition to the Order were delivered to Ralph Dellapiana, Counsel for Defendant CHRIST EVETTE KEELE, by placing it in the Salt Lake Legal Defender box located in the Office of the Salt Lake County District Attorney on this 2 day of February, 2005.

A handwritten signature in black ink, appearing to read "Ralph Dellapiana", written over a horizontal line.

ADDENDUM B

4 of 10 DOCUMENTS

UTAH CODE ANNOTATED
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*** THIS SECTION CURRENT THROUGH 1995 SUPPLEMENT ***

*** ARCHIVE MATERIAL ***

TITLE 76. CRIMINAL CODE
CHAPTER 3. PUNISHMENTS
PART 2. SENTENCING

Utah Code Ann. § 76-3-201 (1995)

FIRST OF TWO VERSIONS OF THIS SECTION THIS SECTION HAS MORE THAN ONE DOCUMENT WITH VARYING EFFECTIVE DATES.

§ 76-3-201. Sentences or combination of sentences allowed -- Civil penalties -- Restitution -- Hearing -- Definitions -- Resentencing -- Aggravation or mitigation of crimes with mandatory sentences [Effective until April 29, 1996]

(1) As used in this section:

(a) "Conviction" includes a:

- (i) judgment of guilt; and
- (ii) plea of guilty.

(b) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.

(d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including the accrual of interest from the time of sentencing, insured damages, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Subsection (4)(c).

(e) (i) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(ii) "Victim" does not include any coparticipant in the defendant's criminal activities.

(2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:

(a) to pay a fine;

- (b) to removal from or disqualification of public or private office;
- (c) to probation unless otherwise specifically provided by law;
- (d) to imprisonment;
- (e) to life imprisonment;
- (f) on or after April 27, 1992, to life in prison without parole; or
- (g) to death.

(3) (a) This chapter does not deprive a court of authority conferred by law to:

- (i) forfeit property;
- (ii) dissolve a corporation;
- (iii) suspend or cancel a license;
- (iv) permit removal of a person from office;
- (v) cite for contempt; or
- (vi) impose any other civil penalty.

(b) A civil penalty may be included in a sentence.

(4) (a) (i) When a person 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 subsection, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement. For purposes of restitution, a victim has the meaning as defined in Section 77-38-2 and family member has the meaning as defined in Section 77-37-2.

(ii) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (4)(c) and (4)(d).

(iii) If the court finds the defendant owes restitution, the clerk of the court shall enter an order of complete restitution as defined in Subsection (8)(b) on the civil judgment docket and provide notice of the order to the parties.

(iv) The order is considered a legal judgment enforceable under the Utah Rules of Civil Procedure, and the person in whose favor the restitution order is entered may seek enforcement of the restitution order in accordance with the Utah Rules of Civil Procedure. In addition, the Department of Corrections may, on behalf of the person in whose favor the restitution order is entered, enforce the restitution order as judgment creditor under the Utah Rules of Civil Procedure.

(v) If the defendant fails to obey a court order for payment of restitution and the victim or department elects to pursue collection of the order by civil process, the victim shall be entitled to recover reasonable attorney's fees.

(vi) A judgment ordering restitution constitutes a lien when recorded in a judgment docket and shall have the same effect and is subject to the same rules as a judgment for money in a civil action. Interest shall accrue on the amount ordered from the time of sentencing.

(b) (i) If a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition.

(ii) In determining whether restitution is appropriate, the court shall consider the criteria in Subsection (4)(c).

(c) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(i) Complete restitution means the restitution necessary to compensate a victim for all losses caused by the defendant.

(ii) 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.

(iii) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (8).

(d) (i) If the court determines that restitution is appropriate or inappropriate under this subsection, the court shall make the reasons for the decision a part of the court record.

(ii) In any civil action brought by a victim to enforce the judgment, the defendant shall be entitled to offset any amounts that have been paid as part of court-ordered restitution to the victim.

(iii) A judgment ordering restitution constitutes a lien when recorded in a judgment docket and shall have the same effect and is subject to the same rules as a judgment for money in a civil action. Interest shall accrue on the amount ordered from the time of sentencing.

(e) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall at the time of sentencing allow the defendant a full hearing on the issue.

(5) (a) In addition to any other sentence the court may impose, the court shall order the defendant to pay restitution of governmental transportation expenses if the defendant was:

(i) transported pursuant to court order from one county to another within the state at governmental expense to resolve pending criminal charges;

(ii) charged with a felony or a class A, B, or C misdemeanor; and

(iii) convicted of a crime.

(b) The court may not order the defendant to pay restitution of governmental transportation expenses if any of the following apply:

(i) the defendant is charged with an infraction or on a subsequent failure to appear a warrant is issued for an infraction; or

(ii) the defendant was not transported pursuant to a court order.

(c) (i) Restitution of governmental transportation expenses under Subsection (a)(i) shall be calculated according to the following schedule:

(A) \$75 for up to 100 miles a defendant is transported;

(B) \$125 for 100 up to 200 miles a defendant is transported;

(C) \$250 for 200 miles or more a defendant is transported.

(ii) The schedule of restitution under Subsection (c)(i) applies to each defendant transported regardless of the number of defendants actually transported in a single trip.

(6) (a) If a statute under which the defendant was convicted mandates that one of three stated minimum terms shall be imposed, the court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.

(b) Prior to or at the time of sentencing, either party may submit a statement identifying circumstances in aggravation or mitigation or presenting additional facts. If the statement is in writing, it shall be filed with the court and served on the opposing party at least four days prior to the time set for sentencing.

(c) In determining whether there are circumstances that justify imposition of the highest or lowest term, the court may consider the record in the case, the probation officer's report, other reports, including reports received under Section 76-3-404, statements in aggravation or mitigation submitted by the prosecution or the defendant, and any further evidence introduced at the sentencing hearing.

(d) The court shall set forth on the record the facts supporting and reasons for imposing the upper or lower term.

(e) The court in determining a just sentence shall consider sentencing guidelines regarding aggravation and mitigation promulgated by the Commission on Criminal and Juvenile Justice.

(7) (a) (i) If a defendant subject to Subsection (6) has been sentenced and committed to the Utah State Prison, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the Board of Pardons and Parole, recall the sentence and commitment previously ordered and resentence the defendant

in the same manner as if the defendant had not previously been sentenced, so long as the new sentence is no greater than the initial sentence nor less than the mandatory time prescribed by statute.

(ii) The resentencing shall take into consideration the sentencing guidelines established under this section by the Commission on Criminal and Juvenile Justice to eliminate disparity of sentences and to promote uniformity of sentencing.

(iii) Credit shall be given for time served.

(b) (i) The court shall state the reasons for its choice of sentence on the record at the time of sentencing.

(ii) The court shall also inform the defendant as part of the sentence that, if the defendant is released from prison, the defendant may be on parole for a period of ten years.

(c) If during the commission of a crime described as child kidnapping, rape of a child, object rape of a child, sodomy upon a child, or sexual abuse of a child, the defendant causes substantial bodily injury to the child, and if the charge is set forth in the information or indictment and admitted by the defendant, or found true by a judge or jury at trial, the defendant shall be sentenced to the aggravated mandatory term in state prison. This subsection takes precedence over any conflicting provision of law.

(8) (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, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; the cost of necessary physical and occupational therapy and rehabilitation; and the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim; and

(iii) 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 the factors listed in Subsection (b) and:

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines make restitution inappropriate.

(d) The court may decline to make an order or may defer entering an order of restitution if the court determines that the complication and prolongation of the sentencing process, as a result of considering an order of restitution under this subsection, substantially outweighs the need to provide restitution to the victim.

NOTES APPLICABLE TO ENTIRE TITLE

REPEALS AND REENACTMENTS. --Former Title 76, Chapters 1 to 66, the Penal Code, was repealed by Laws 1973, ch. 196, § 76-10-1401, effective July 1, 1973. Present Title 76, the Utah Criminal Code, was enacted by § § 76-10-101 to 76-10-1306 of the act.