

2005

Utah v. Keele : Reply Brief

Utah Court of Appeals

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Jeanne B. Inouye; 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

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

REPLY BRIEF OF APPELLANT

An appeal from a final judgment denying the 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. The defendant is not incarcerated.

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

Attorneys for Appellant

Jeanne B. Inouye (1618)
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

ORAL ARGUMENT IS REQUESTED

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Jeanne B. Inouye (1618)
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

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REPLY BRIEF OF APPELLANT

Argument

Point I: Response to Appellee's Statement of Facts.

The Brief of Appellee erroneously states that there was actual documentation substantiating the claim of Smith's Food and Drug ("Smith's") that Ms. Keele owed \$17,319 in restitution. This is relevant to the legality of the initial calculation, the state's waiver theory, and the 2005 court's abuse of discretion.

The Brief of Appellee, at 3, states that Adult Probation and Parole ("AP&P") calculated Ms. Keele's restitution obligation based upon "a letter and documentation from Smith's," and cites to R. 152. The Brief of Appellee, at 6, states that "the losses defendant caused Smith's were calculated at \$17,319.44, based on documentation from Smith's returned check department," and cites to R. 66 and 152.

No objective documentation ever existed. The Record, at 152, is page 2 of the Findings of Fact and Conclusions of Law on Defendants's [sic] Motion to Terminate Restitution (Feb. 7, 2005). Paragraph 9 of page 2 references the letter from Smith's as the basis for the calculation; it does not reference actual documentation. (The letter was admitted as Exhibit 1 at Ms. Keele's Jan. 26, 2005 restitution hearing; the several hearing exhibits are collected in the record on appeal at R. 154.) The Record, at 66, is page 1 of a 1997 AP&P progress report, which merely recites that Ms. Keele's initial restitution obligation was \$17,319.44. None of this constitutes actual documentation upon which the initial restitution obligation was calculated.

In fact, nothing in the record suggests that such documentation ever existed. In 1996, Smith's could not provide any information as to how the restitution claim was calculated. (R. 171, at 38:1-39:9.) Ms. Keele's probation officer in 1996 knew only that the \$17,319.44 total was what Smith's claimed to be owed. (R. 171, at 39:13-19.) At the 2005 restitution hearing, the same probation officer testified that Ms. Keele's AP&P file contained nothing evidencing the basis for the initial restitution calculation. (R. 171, at 13:17-14:2.) In 2005, Smith's could not provide Ms. Keele with any information about how much restitution was owing, and admitted it had no record whatsoever of Ms. Keele's indebtedness. (R. 171, at 32:11-33:2.) In 2005, the State of Utah 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.)

Point II: Ms. Keele Did Not Waive Her Right to Object to Restitution.

The Brief of Appellee asserts that Mr. Keele cannot now challenge the 2005 court's affirmation of AP&P's extrajudicial, illegal calculation of restitution because she waived her opportunity to object back in 1996 when the probation officer told her she owed \$17,319.¹ No such waiver occurred for three related reasons: (1) one cannot waive the violation of the statute at issue; (2) Rule 22(e) authorizes the challenge of a sentence imposed in an illegal manner; and (3) Ms. Keele cannot waive her right to challenge a sentence when she received notice that violated her right to due process.

1. Cannot waive a statutory violation. Utah law in 1995 unqualifiedly required the sentencing court to calculate complete and court-ordered restitution, and to impose court-ordered restitution at the time of sentencing. Utah Code Ann. § 76-3-201(4) (1995) (§ 76-3-201 (1995) is attached to the Brief of Appellant as Addendum B).² The only statutory provision that entitled a defendant to object to the actual restitution calculation required that the defendant do so "at the time of sentencing." § 76-3-201(4)(e) (1995).

¹ The Brief of Appellee misconstrues Point I of the appellant's brief as a challenge to the initial restitution calculation. In fact, Point I challenges the 2005 affirmation of the initial calculation because the initial calculation violated the law. The illegality of the initial, extrajudicial restitution calculation is relevant to the trial court's refusal in 2005 to recalculate restitution based upon evidence in the record.

² A court in 1995 may have deferred its calculation and imposition of restitution based upon certain circumstances inapplicable to this case. Section 76-3-201(8)(d) states, "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."

No statute or court rule in 1995 undermines the clear statutory mandate that restitution calculation and imposition occur at time of sentencing.³

The sentencing court in 1995 violated this statutory mandate by delegating calculation of restitution to AP&P. (R. 170, at 8:23-24; *see also* R. 46 [Judgment/Sentence].) Ten months later, in 1996, based upon a conclusory letter from Smith's and nothing more, AP&P calculated and imposed upon Ms. Keele the obligation to pay \$17,319 in restitution. Absolutely no judicial process occurred.

The state's explanation: Ms. Keele somehow waived her right to object. Obviously, Ms. Keele could not have objected to the initial calculation at the time of sentencing because, at the time of sentencing, no such calculation had occurred. Further, ten months following the sentencing hearing, when AP&P finally informed Ms. Keele that she owed \$17,319, Ms. Keele *did* object. (R. 171, at 16:13-16.)

Further still, one may not waive the violation of a statute enacted pursuant to the state's police power to legislate for the public good. *Short v. Bullion-Beck & Champion Mining Co.*, 20 Utah 20, 57 P. 720, 721 (Utah 1899). *Cf. IFG Leasing Co. v. Gordon*,

³ The Brief of Appellee, at 9, cites *State v. Larsen*, 876 P.2d 391, 393 (Utah Ct. App. 1994) for the proposition that a court may delegate calculation and imposition of restitution to AP&P. In *Larsen*, however, the propriety of such a delegation was never at issue. Therefore, the state's suggestion that this court has condoned such delegation is entirely mistaken. Moreover, that another court may have practiced such delegation in no way justifies violation of an otherwise clear statutory mandate. *Commonwealth v. Dinoia*, 801 A.2d 1254 (Pa. Super. Ct. 2002)(where statute clearly requires calculation and imposition of restitution at time of sentencing, a common practice to delegate calculation does not excuse violation of the statute).

776 P.2d 607, 614 n.32 (Utah 1989)(“plain, unambiguous language of statute [may not be disregarded and] mandates disposition of the case” (brackets from original), *citing Johnson v. Utah State Retirement Office*, 755 P.2d 161, 162 (Utah 1988)).

The statute at issue in this case, § 76-3-201 (1995), declares the court shall calculate and impose court-ordered restitution at the time of sentencing. The statutory process for arriving at an accurate restitution calculation not only benefits the defendant, it also benefits the victims of a crime by ensuring the defendant pays all she owes and is able to pay. It follows that Ms. Keele may not waive a statute that inures to the benefit of others. As already noted, AP&P’s extra-judicial calculation and imposition of restitution upon Ms. Keele violated the statute. Ms. Keele could not have waived these statutory protections enacted for the public good.

Especially where the statute in question goes to the very jurisdiction of the court, it may not be waived. *Utah Dep’t of Business Regulation, Div. of Pub. Utils. v. Public Serv. Comm’n*, 602 P.2d 696, 699 (Utah 1979). Subject matter jurisdiction includes “the authority and competency of the court to decide the case.” *Salt Lake City v. Ohms*, 881 P.2d 844, 853-54 (Utah 1994), *quoting Dept. of Social Servs. v. Vigil*, 784 P.2d 1130, 1132 (Utah 1989). In *Ohms*, the Court invalidated the legislature’s attempt to grant adjudicative and sentencing jurisdiction to non-judges as an unconstitutional delegation of subject matter jurisdiction. *Id.* at 851; *see also United States v. Johnson*, 48 F.3d 806,

809 (4th Cir. 1995)(where statute defines restitution calculation as a judicial function, calculation may not be delegated to non-judges).

The statute at issue herein, § 76-3-201 (1995), authorizes the court to calculate and impose restitution as part of a criminal sentence. No law grants AP&P subject matter jurisdiction to calculate and impose restitution. AP&P's illegal usurpation of the court's subject matter jurisdiction may not be waived.

2. Rule 22(e) may be invoked any time. Rule 22(e), Utah R. Crim. P., provides that “a sentence imposed in an illegal manner [may be corrected] at any time.” Ms. Keele, therefore, cannot be prevented from challenging the initial calculation of restitution.

As noted above, the restitution amount was calculated and imposed extrajudicially in violation of both statute and constitution. AP&P's calculation and imposition of restitution also violated Ms. Keele's right pursuant to Utah R. Crim. P. 22(a), to be present – with counsel – at the time of sentencing. *State v. Wanosik*, 2003 UT 46, ¶ 18, 79 P.3d 937. AP&P effectively imposed Ms. Keele's restitution obligation upon its receipt of the letter from Smith's without any involvement from Ms. Keele or her attorney.

The 2005 hearing was the first and only court proceeding in which Ms. Keele contested the legality of the initial calculation of restitution. Pursuant to Rule 22(e),

therefore, Ms. Keele was merely invoking her right to challenge an illegally imposed sentence when, in 2005, she challenged the initial extrajudicial calculation.

3. The probation officer's advice did not comport with due process and, therefore, may not support the state's waiver theory. The Brief of Appellee asserts that Ms. Keele was put on notice of her right and obligation to object to the initial calculation of restitution when, sometime *after* the probation officer's announcement that Ms. Keele owed \$17,319 in restitution, the officer responded to Ms. Keele's objection by advising, "contact [your] attorney and attempt to settle the amount through a hearing." (R. 171, at 16:17-24.) This post-deprivation, so-called notice was insufficient to satisfy due process. Ms. Keele could not have waived something about which she never received adequate notice.

Ms. Keele's due process rights stem from state and federal constitutional guarantees against fundamentally unfair seizures of property and liberty. U.S. Const. amend. VI, XIV; Utah Const. art. I, §§ 1, 7. A defendant being sentenced is entitled to due process. *E.g.*, *State v. Lipsky*, 608 P.2d 1241, 1248 (Utah 1980) ("In our view, fundamental fairness requires that procedures both in the guilt phase and in the sentencing phase of a criminal proceeding be designed to insure that the decision-making process is based on accurate information"). Calculation and imposition of restitution implicate due process protections not only because they constitute part of a criminal sentence, but also

because they obligate the defendant's property, constitute a civil judgment amenable to collection proceedings, and threaten imprisonment upon nonpayment.

Due process protections surrounding the calculation of restitution require proper notice and a hearing. *See State v. Allen*, 2000 UT App 340, ¶ 13 n.2, 15 P.3d 110. "All parties are entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence and argument on that issue before decision." *State v. Rawlings*, 893 P.2d 1063, 1069 (Utah App. 1995), *quoting Plumb v. State*, 809 P.2d 734, 743 (Utah 1990). In the case on review, by contrast, restitution was calculated and imposed before the so-called notice issued, and without providing an opportunity to object. Only later, following Ms. Keele's independent investigation uncovered no factual basis for the extrajudicial calculation and she voiced this concern to the probation officer, did the probation officer advise her to get a lawyer and request a hearing.

"Sufficient notice is informing a party 'of the specific issues which they must prepare to meet' and giving the party a 'reasonable opportunity to know the claims of the opposing party and to meet them.'" *Rawlings*, 893 P.2d 1069, *quoting W&G Co. v. Redevelopment Agency*, 802 P.2d 755, 761 (Utah App. 1990)(citations and quotation omitted). In the case on review, by contrast, the advice rendered by the probation officer only after restitution was calculated and imposed was, at best, scant. He was unable to explain how the amount was calculated. He did not inform Ms. Keele of her right to

counsel. He did not mention that she still might be entitled to a hearing to challenge the initial calculation, or that a failure to request a hearing might result in its waiver.

Notice should also inform the defendant of the process available to challenge a proposed sentence. In an analogous situation, Utah law requires written notice of the process by which one may challenge a driver's license revocation. *Mabus v. Blackstock*, 1999 UT App 389, ¶¶ 6-8, 994 P.2d 1272. This notice requirement mirrors due process requirements. *Id.* at ¶ 8 n.2. Where a driver is required to request a hearing on a timely basis to preserve her right to contest revocation, minimally adequate notice must include detail about how and when such a hearing may be requested. *Id.* Here, by contrast, Ms. Keele was initially told nothing more than that she owed \$17,319 in restitution.

Sometime after the \$17,319 obligation was calculated and imposed, and Ms. Keele's independent investigation yielded no objective basis for that calculation, Ms. Keele complained to the probation officer. Only then did the officer advise Ms. Keele to get a lawyer and ask for a hearing. The officer did not advise that Ms. Keele still enjoyed a right to counsel, or that she might be statutorily entitled to a restitution hearing, or that a failure to request a hearing might result in its waiver. The officer's so-called notice was insufficient to inform Ms. Keele that waiver was even an issue.

Point III: Because the 1995 Court Exceeded Its Statutory Authority, the 2005 Court Erred When It Did Not Recalculate Restitution.

Point I of the Brief of Appellant, at 11-14, explains that the initial restitution calculation was illegal because it must have been based upon conduct for which Ms.

Keele did not assume responsibility in the plea agreement, and it certainly was not based upon facts in the record. From there, the Brief argues that the 2005 court should have recalculated Ms. Keele's restitution obligation based upon conduct in the three cases for which she did accept responsibility, and based upon evidence in the record. *See also id.* at 4-5 (the record establishes that the three cases for which Ms. Keele assumed responsibility involve checks totaling \$280).

The state responds that Ms. Keele, by agreeing to pay restitution "on all cases," effectively accepted responsibility for any and all illegal conduct, regardless of when it occurred. In other words, the state maintains that Ms. Keele assumed responsibility not merely for the three cases, but for any and all illegal conduct in or outside of those cases.

As a starting point, this court should examine the language of the plea agreement, as well as the definitions of "case" and "conduct." As with statutory interpretation, the "plain and ordinary meaning" of the plea agreement's terms should guide this task. *State v. Mooney*, 2004 UT 49, ¶ 11, 98 P.3d 420 (citations omitted). Further, the meaning of an ambiguous term may be determined by the context in which it is used. *Mouty v. The Sandy City Recorder*, 2005 UT 41, ¶ 26, 529 Utah Adv. Rep. 26; *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 32, 104 P.3d 1208, citing *Bumpus v. United States*, 325 F.2d 264, 266 (10th Cir. 1963). Finally, the court should assume that the lawyers chose their words for a reason. *E.g., Atlantic & Gulf Stevedores, Inc. v. Kominers*, 456 F.2d 1146, 1149 (2nd Cir. 1972) ("The client invests considerable trust and money in the lawyer's ability to

express himself precisely. The lawyer invites this reliance and is properly held accountable... In short, lawyers are supposed to be wordsmiths; [non-lawyers] are not.”).

“Case” typically refers to a discrete proceeding: “A proceeding, action, suit, or controversy at law or in equity <the parties settled the case>.” *Black’s Law Dictionary*, 206 (7th ed. 1999). Each of the other definitions of “case” that follow the primary definition quoted above likewise reference a discrete investigation, individual, occurrence, etc. *Id.* at 207. The definition of conduct, by contrast, is open ended: “Personal behavior, whether by action or inaction; the manner in which a person behaves.” *Id.* at 292.

Had the lawyers who negotiated the plea agreement intended it to include all conduct, they would have – or should have – written “conduct,” not “cases.”

To interpret the plea agreement and the 1995 court order to include any and all illegal conduct, means that Ms. Keele was assuming responsibility for damages caused on any date and by any legal violation. In *State v. Reedeker*, 534 P.2d 1240, 1241-42 (Utah 1975), the Court overturned a restitution order that was calculated upon conduct not at issue and facts outside the record. *See also Commonwealth v. Reed*, 543 A.2d 587, 589 (Pa. Super. Ct. 1988)(“an order of restitution which was not supported by the record was illegal”). In this context, if the attorneys and the court had intended for Ms. Keele to assume unknown and unlimited liability, they should have and would have said so.

Instead, they defined the scope of Ms. Keele's liability in reference to the pending "cases."

The 2005 court erred by failing to recalculate restitution based upon facts in the record.

Point IV: The 2005 Court Abused Its Discretion.

The Brief of Appellant, at 16-18, describes how the 2005 trial court abused its discretion by affirming AP&P's extrajudicial, illegal restitution calculation based upon the letter hand-written by Ms. Keele in 1999 without the assistance of counsel, which addressed an issue completely unrelated to the initial restitution calculation.

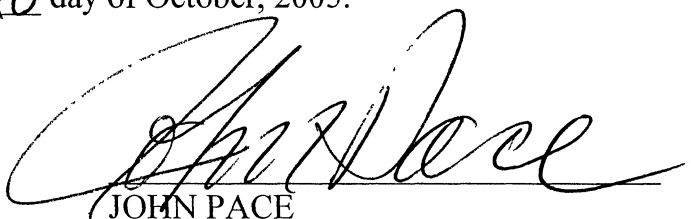
The Brief of Appellee, at 20-21, however, reframes this issue in relation to Ms. Keele's 2004 *pro se* motion (which challenged the payment terms and schedule), rather than the amended motion subsequently filed by defense counsel (which was based in large part upon the illegality of the initial calculation). The state, therefore, does not address the 2005 court's refusal to recalculate restitution based upon facts in the record despite Ms. Keele's right to recalculation at a restitution hearing. Nor does the state address the 2005 court's misplaced reliance upon the 1999 letter. Rather, harkening back to Ms. Keele's *pro se* motion that challenged the fairness of the payment schedule and terms, the Brief of Appellee, at 21-22, asserts only that the 2005 court could have imposed a more onerous payment schedule than it did.

In reply, Ms. Keele maintains that the 2005 court abused its discretion by refusing to recalculate restitution based upon facts in the record, instead relying upon the 1999 letter to affirm AP&P's illegal calculation of restitution.

Conclusion

The 2005 order affirming the 1996 extrajudicial, illegal restitution calculation should be vacated, and this case remanded to the trial court with direction to calculate court-ordered restitution based only upon the conduct alleged in the three cases for which Ms. Keele accepted responsibility, and based only upon facts in the record.

SUBMITTED this 20th day of October, 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 REPLY brief 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 Asst. Utah Attorney General JEANNE B. INOUE, 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 21 day of October, 2005.

By 
John Pace

DELIVERED to the Utah Court of Appeals and Jeanne B. Inouye as indicated above this _____ day of October, 2005.

By _____