

2006

State of Utah v. Marvin Lyn Gotell : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Utah v. Gotell*, No. 20060605 (Utah Court of Appeals, 2006).

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff / Appellee	:	
	:	
vs.	:	Case No. 20060605-CA
	:	
MARVIN LYN GOTELL,	:	
	:	
Defendant / Appellant	:	
	:	

BRIEF OF APPELLANT

APPEAL FROM THE FIFTH DISTRICT, WASHINGTON COUNTY
STATE OF UTAH, FROM AN ORDER OF RESTITUTION
BEFORE THE HONORABLE G. RAND BEACHAM

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FILED
JUN 15 2007

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff / Appellee	:	
	:	
vs.	:	Case No. 20060605-CA
	:	
MARVIN LYN GOTELL,	:	
	:	
Defendant / Appellant	:	
	:	

JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to Utah Code Annotated § 78-2a-3(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred in ordering Gotell to pay more restitution than he agreed to pay under the plea agreement without making additional findings, or hearing additional evidence. “Under usual circumstances, ‘[a]n appellate court will not disturb a trial court’s restitution order unless it exceeds that prescribed by law or otherwise abused its discretion.’” *State v. Mast*, 2001 UT App 402, ¶7, 40 P.3d 1143 (alteration in original) (quoting *State v. Breeze*, 2001 UT App 200, ¶5, 29 P.3d 19). However, this Court reviews “a trial court’s interpretation of restitution statutes for correctness.” *State v. Bickley*, 2002 UT App 342, ¶5, 60 P.3d 582 (citing *Mast*, 2001 UT App 402 at ¶7). This

issue was not preserved and should be reviewed for obvious and harmful error under the plain error standard of review. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

CONTROLLING STATUTORY PROVISIONS

All relevant statutory provisions are set forth in the Addenda of the Appellant's Brief.

STATEMENT OF THE CASE

A. Nature of the Case

Marvin Gotell appeals from the restitution order of the Fifth District Court.

B. Trial Court Proceedings and Disposition

Marvin Gotell was charged by Information filed in Fifth District Court on or about February 9, 2006 with: Counts 1-3 Money Laundering, second degree felonies, in violation of Utah Code Annotated § 76-10-1903; Count 4 Theft by Deception, a second degree felony, in violation of Utah Code Annotated § 76-6-405; Counts 5-6 Theft by Deception, third degree felonies, in violation of Utah Code Annotated § 76-6-405; Count 7 Issuing a Bad Check, a third degree felony, in violation of Utah Code Annotated § 76-6-505; and Counts 8-9 False Information to a Peace Officer, class C misdemeanors, in violation of Utah Code Annotated § 76-8-507 (R. 2-3).

On April 20, 2006 Gotell entered guilty pleas to Counts 1-2 Money Laundering, second degree felonies (R. 40-41, 48-49, 50-51). In the statement before pleading guilty he agreed to pay restitution in the amount of \$14,150.00 (R. 44, 71: 2).

On June 8, 2006 Gotell was placed on probation for 36 months, sentenced to consecutive one year terms in the Washington County Jail, and was ordered to pay restitution totaling \$14,609.00 (R. 55-56, 57-60, 62-63, 72: 7). The restitution requested in the PSI report was \$14,609.00. This figure was taken from the police reports (PSI at 2, 5). The PSI also references a dispute from Gotell in regards to restitution to one alleged victim which “needs clarification by the Court” (PSI at 7). No clarification was made by the trial court. No evidence was taken by the trial court at sentencing, nor were any findings made for the additional \$509.00 in restitution that was ordered.

On June 27, 2006 Gotell filed a notice of appeal in Fifth District Court (R. 55).

STATEMENT OF RELEVANT FACTS

The factual basis for Gotell’s pleas is as follows: “On November 15, 2005 defendant deposited \$4000 into victims account at Well’s Fargo Bank. Defendant then contacted victim to report he meant to deposit \$2000 and mistakenly deposited \$4000 and instructed victim to wire the extra \$2000 back to him. Victim told defendant that she felt uncomfortable about the deposited money and told defendant she did not want the money. The defendant requested that victim wire the total \$4000 to his assistant. Victim did withdraw the \$4000 and wired to defendant. After completing the wire transfer, victim discovered the original \$4000 deposit had been returned non-sufficient funds. Defendant befriended another victim and offered to give victim \$400 and requested bank information. Defendant claimed to have deposited money by use of telephone and in so doing transferred \$4000 instead of \$400 and defendant requested that the victim return

the excess \$3600 to him. Victim withdrew \$3600 and hand delivered the money to defendant” (R. 42).

SUMMARY OF THE ARGUMENT

Gotell asserts that the trial court committed plain error in ordering him to pay more restitution than he agreed to pay in his plea agreement without making additional findings, or hearing additional evidence.

ARGUMENT

I. The Trial Court Erred In Its Interpretation of the Restitution Statute and Abused Its Discretion in Its Award of Restitution.

When an individual is convicted of criminal activity that results in pecuniary damages, the trial court must order the defendant to make restitution to the victims subject to the provisions of Utah Code Annotated § 76-3-201. *See*, Utah Code Annotated § 76-3-201(4)(a). This applies to any offense for which the defendant is convicted, or for which he admits responsibility for, or for which he has agreed to make restitution as part of a plea agreement. Utah Code Annotated §§ 76-3-201(1)(b), 201(4)(a). *See also*, *State v. Bickley*, 2002 UT App 342, ¶¶ 8-9, 60 P.3d 458; and *State v. Watson*, 1999 UT App 273, ¶ 3, 987 P.2d 1289.

“However, a defendant cannot be ordered to pay restitution for criminal activities for which the defendant did not admit responsibility, was not convicted, or did not agree to pay restitution. *See* Utah Code Annotated § 76-3-201.” *Bickley*, 2002 UT App 342 at

¶ 9. The restitution statute “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.” *Watson*, 1999 UT App 273 at ¶ 5. “Restitution should be ordered only in cases where liability is clear as a matter of law and where commission of the crime clearly establishes causality of the injury or damages.” *State v. Robinson*, 860 P.2d 979, 983 (Utah App. 1993), *cert. denied*, 878 P.2d 1154 (Utah 1994).

In this case Gotell asserts that it was obvious and harmful error for the trial court to exceed the agreed upon amount of restitution without taking additional evidence, or making additional findings that his conduct caused additional damages. He plead guilty to two counts of money laundering. The restitution from those two acts totaled \$7600.00 (R. 42). He agreed to pay restitution in the amount of \$14,150.00 (R. 47, 71: 7). The trial court ordered that he pay \$14,609.00 in restitution, which was the amount the pre-sentence investigator obtained from the police reports (R. 55-56, 57-60, 62-63, 72: 7; PSI at 2, 7). No clarification was made by the trial court. No evidence was taken by the trial court at sentencing, nor were any findings made for the additional \$509.00 in restitution that was ordered. The Utah Code and Utah case law place the obligation of determining restitution squarely on the shoulders of the trial court. However, “Restitution should only be ordered in cases where liability is clear as a matter of law.” Defendant admitted responsibility for \$14,150.00 in restitution. He did not admit responsibility for the additional amount ordered by the trial court. Nor did the trial court establish the causality

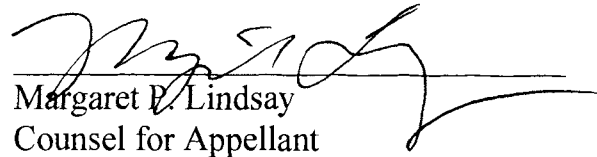
of this additional amount. In fact, the pre-sentence report clearly indicates that in regards to one alleged victim, there was a dispute which would require clarification.

Accordingly, Gotell asks that this Court reduce the trial court's award of restitution by \$459.00 dollars.

CONCLUSION AND PRECISE RELIEF SOUGHT

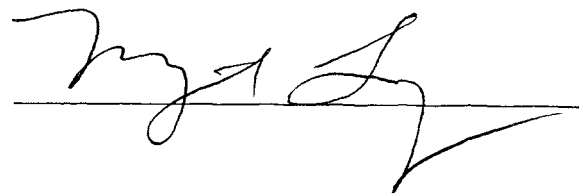
Gotell asks that this Court reduce the trial court's award of restitution in this matter.

RESPECTFULLY SUBMITTED this 11th day of June, 2007.


Margaret P. Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 11th day of June, 2007.



ADDENDA

Utah Code Annotated § 76-3-201. Definitions--Sentences or combination of sentences allowed-- Civil penalties--Hearing

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, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Title 77, Chapter 38a, Crime Victims Restitution Act.

(e)(i) "Victim" means any person who 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.

1) 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 or disqualification from public or private office;
- c) to probation unless otherwise specifically provided by law;
- d) to imprisonment;
- e) on or after April 27, 1992, to life in prison without parole; or

(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) 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 the victims, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement.

(b) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Title 77, Chapter 38a, Crime Victims Restitution Act.

(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.

Restitution of governmental transportation expenses under Subsection (5)(a)(i) shall be calculated according to the following schedule:

-) \$75 for up to 100 miles a defendant is transported;
-) \$125 for 100 up to 200 miles a defendant is transported; and
-) \$250 for 200 miles or more a defendant is transported.

The schedule of restitution under Subsection (5)(c)(i) applies to each defendant transported regardless of the number of defendants actually transported in a single trip.

If a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to face 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 litigation.

In addition to any other sentence the court may impose, the court shall order the defendant to make court-ordered restitution to the county for the cost of incarceration in the county correctional facility before and after sentencing if:

the defendant is convicted of criminal activity that results in incarceration in the county correctional facility; and

A) the defendant is not a state prisoner housed in a county correctional facility through a contract with the Department of Corrections; or

B) the reimbursement does not duplicate the reimbursement provided under Section 64-13c-301 if the defendant is a state prisoner housed in a county correctional facility as a condition of probation under Subsection 77-18-1(8).

The costs of incarceration under Subsection (6)(a) are:

) the daily core inmate incarceration costs and medical and transportation costs established under Section 64-13c-302; and

) the costs of transportation services and medical care that exceed the negotiated reimbursement rate established under Subsection 64-13c-302(2).

The costs of incarceration under Subsection (6)(a) do not include expenses incurred by the county correctional facility in providing reasonable accommodation for an inmate.

THE DISABILITIES ACT OF 1976, 42 U.S.C. 12101 through 12213, including medical and mental health treatment for the inmate's disability.

(c) In determining the monetary sum and other conditions for the court-ordered restitution under this Subsection (6), the court shall consider the criteria provided under Subsections 77-38a-302(5)(c)(i) through (iv).

(d) If on appeal the defendant is found not guilty of the criminal activity under Subsection (6)(a)(i) and that finding is final as defined in Section 76-1-304, the county shall reimburse the defendant for restitution the defendant paid for costs of incarceration under Subsection (6)(a).

(7)(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, except as provided in Subsection (8).

(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) In determining a just sentence, the court shall consider sentencing guidelines regarding aggravating and mitigating circumstances promulgated by the Sentencing Commission.

(8)(a) The defendant shall be sentenced to the highest minimum term in prison if the trier of fact finds that:

(i) during the commission of any of the following offenses the defendant causes substantial bodily injury to the child:

(A) Section 76-5-301.1, child kidnapping;

(B) Section 76-5-402.1, rape of a child;

(C) Section 76-5-402.3, object rape of a child; or

(D) Section 76-5-403.1, sodomy on a child; or

(ii) at the time of the commission of any of the offenses in Subsections (8)(a)(i)(A) through (D), the defendant had been previously convicted of:

(A) Section 76-5-402, rape;

(B) Section 76-5-402.1, rape of a child;

(C) Section 76-5-402.2, object rape;

(D) Section 76-5-402.3, object rape of a child;

(E) Subsection 76-5-403(2), forcible sodomy;

(F) Section 76-5-403.1, sodomy on a child;

(G) Section 76-5-404, forcible sexual abuse;

(H) Section 76-5-404.1, sexual abuse of a child and aggravated sexual abuse of a child;

(I) Section 76-5-405, aggravated sexual assault;

(J) any offense in any other state or federal jurisdiction which constitutes or would constitute a crime in Subsections (8)(a)(ii)(A) through (I); or

(K) the attempt to commit any of the offenses in Subsections (8)(a)(ii)(A) through (J).

b) This Subsection (8) takes precedence over any conflicting provision of law.

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FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. MARTIN LYNN GOTELL, Defendant.	JUDGMENT, RESTITUTION JUDGMENT, SENTENCE, STAY OF EXECUTION OF SENTENCE AND ORDER OF PROBATION Criminal No. 061500216 Judge
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The above-captioned matter came before the Court for sentencing on June 8, 2006. James R. Weeks, Deputy Washington County Attorney, represented the plaintiff, and the defendant, MARTIN LYNN GOTELL, was present and represented by Douglas D. Terry. As the defendant had previously entered a plea of guilty to the offense(s) of Count 1: Money Laundering, a second degree felony, Count 2: Money Laundering, a second degree felony.

Both counsel made their sentencing recommendations to the Court. Therefore, the Court, having received and read a Pre Sentence Investigation Report from the Department of Corrections, and being fully advised in the premises, now makes and enters the following Judgment, Restitution Judgment, Sentence, Stay of Execution of Sentence and Order of Probation:

JUDGMENT

IT IS HERE BY ORDERED that the defendant, MARTIN LYNN GOTELL, is guilty of the offense(s) of: Count 1: Money Laundering, a second degree felony, in violation of Section 76-10-1903, Count 2: Money Laundering, a second degree felony, in violation of Section 76-10-1903

RESTITUTION JUDGMENT

IT IS HEREBY FOUND, upon the Court's consideration of the statutory criteria, pecuniary damages were incurred as a result of the criminal activity of the defendant, and that restitution is appropriate in this case.

IT IS HEREBY ORDERED, that a Restitution Judgment is awarded in favor of the victims and against the defendant as follows:

1. Traci Stokes-Lopez in the amount of \$3000.00;
2. Kimette Hughes in the amount of \$2003.50;
3. Kali Roberts in the amount of \$2003.50;
4. Josephine Miller in the amount of \$7600.00;
5. Amy Crawford in the amount of \$2.00

SENTENCE

IT IS HEREBY ORDERED that the defendant, MARTIN LYNN GOTELL, be sentenced to the following:

COUNT 1: Money Laundering, a second degree felony, Count 2: Money Laundering, a second degree felony, serve a term of 1-15 in the Utah State Prison, and pay a fine in the amount of \$10,000.00, plus an 85% surcharge; and

COUNT 2: Money Laundering, a second degree felony, Count 2: Money Laundering, a second degree felony, serve a term of 1-15 in the Utah State Prison, and pay a fine in the amount of \$10,000.00, plus an 85% surcharge; and

STAY OF EXECUTION OF SENTENCE

IT IS ORDERED that execution of the sentence imposed herein is hereby stayed.

ORDER OF PROBATION

IT IS ORDERED that said defendant, MARTIN LYNN GOTELL, is hereby placed on supervised probation for a period of 36 months, strictly within the following terms, provisions and conditions:

1. The defendant shall serve one (1) year in the Washington County Jail for each count to be served consecutively, with credit for time served, no work release or good time to be given.
2. The defendant shall pay restitution in the amount of \$14,609.00.
3. The defendant shall not leave the State of Utah without permission.
4. The defendant shall sign agreement with Adult Probation and Parole and abide by its terms.
5. The defendant shall not commit any law violations during the term of probation.

This Court specifically retains jurisdiction over the above-cause and over the person of

said MARTIN LYNN GOTELL for the purpose of making such Orders and Judgments or Commitments as the same may become necessary or proper.

Dated: 23 June 2006

G. David Boehm
DISTRICT COURT JUDGE

CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

I, Carolyn Smitherman, Clerk of said District Court of Washington County, State of Utah, do hereby certify that the Honorable , whose name is subscribed to the preceding certificate, is the Judge of said Court, duly commissioned and qualified, and that the signature of said Judge to said certificate is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Court on this date: 6-23-06.

CAROLYN SMITHERMAN
Clerk of District Court
By [Signature]
Deputy Clerk