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Court of Appeals
Division II
State of Washington
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NO. 50289-5-11

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

STEPHEN MARK REICHOW, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01458-7

SUPPLEMENTAL BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court did not violate Reichow’s right to confront witnesses at the restitution hearing because there is no right to confront witnesses at a restitution hearing.**
- II. **The trial court only imposed mandatory legal financial obligations, thus it did not err by not doing an individualized inquiry into Reichow’s ability to pay those financial obligations.**

STATEMENT OF THE CASE

The State adopts and incorporates its statement of the case in its first Respondent’s brief. This brief responds to Reichow’s assignments of error related to his sentencing and restitution hearing. Accordingly, this statement of the case will include additional facts relevant to responding to Reichow’s new arguments.

On May 2, 2017, the parties proceeded to sentencing before the Honorable Suzan Clark. RP 1-25. Aside from the discussion of a restitution hearing, the trial court did not inquire of the defendant’s financial situation or his ability to pay legal financial obligations. RP 22-25. Nonetheless, the court struck all discretionary legal financial obligations, found that Reichow was “presently indigent but is not anticipated to be able to pay financial obligations in the future,” and

imposed only mandatory legal financial obligations such as the victim assessment. CP 306-07, 309-310.

On October 25, 2017, a restitution hearing was held. RP 31-47. At that hearing, the State called the victim's sister, Shannon Hendrickson, who testified about funeral and burial expenses, and through whom the State admitted a bill from the associated funeral home. RP 34-36, 39; Supp. CP 10. The State also presented a declaration from the Crime Victims Compensation Program claims consultant, which was admitted without witness testimony. RP 33; Supp. CP 8. Reichow objected to the admission of both exhibits on "confrontation grounds." RP 33-34. Based on the testimony and the admitted evidence the trial court entered an order setting restitution at \$9,466.41. RP 46; Supp. CP 15-16.

ARGUMENT

I. The trial court did not violate Reichow's right to confront witnesses at the restitution hearing because there is no right to confront witnesses at a restitution hearing.

The Sixth Amendment right to confrontation does not extend to restitution hearings. *State v. Fambrough*, 66 Wn.App. 223, 831 P.2d 789 (1992); *State v. Newcomb*, 181 Wn.App. 1026, 2014 WL 2601699, 3-4

(2014)¹ (citing cases); *State v. Lee*, 192 Wn.App. 1016, 2016 WL 244963, 2-3 (2016);² *U.S. v. Loreng*, 956 F.Supp.2d 213, 222 n. 4 (D.C.Dist. 2013) (noting that the “Confrontation Clause’s protections do not extend to restitution proceedings”). Moreover, the rules of evidence do not apply at restitution hearings. *State v. Deskins*, 180 Wn.2d 68, 322 P.3d 780 (2014); *State v. Pollard*, 66 Wn.App. 779, 838 P.2d 51 (1992); *State v. Kisor*, 68 Wn.App. 610, 844 P.2d 1038 (1993); ER 1101(c)(3). Instead, a restitution hearing must comply with due process, which requires that a defendant has the “opportunity to refute the evidence presented, and requir[es] that the evidence be reliable.” *Pollard*, 68 Wn.App. at 784-85 (citing *State v. Strauss*, 119 Wn.2d 401, 832 P.2d 78 (1992)); *Deskins*, 180 Wn.2d at 80-82.

Here, Reichow makes one complaint about the restitution hearing: that his right to confront witnesses was violated because he was not able to cross-examine the person from the funeral home who prepared the bill for the victim’s funeral and burial.³ Br. of App. at 4. As established above, the Sixth Amendment right to confrontation does not extend to restitution hearings. Thus, Reichow’s claim is without merit.

¹ This Court’s decision in *Newcomb* is unpublished. Pursuant to GR 14.1 unpublished decisions “may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate.”

² *Lee* is also an unpublished decision. See GR 14.1.

³ The victim’s sister confirmed that the bill was accurate and what she paid. RP 34-36.

II. The trial court only imposed mandatory legal financial obligations, thus it did not err by not doing an individualized inquiry into Reichow’s ability to pay those financial obligations.

Unlike discretionary legal financial obligations, “the legislature unequivocally requires imposition of the mandatory [legal financial obligations] at sentencing without regard to finding the ability to pay.” *State v. Shelton*, 194 Wn.App. 660, 378 P.3d 230 (2016); *State v. Lundy*, 176 Wn.App. 96, 308 P.3d 755 (2013) (holding that for “mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant’s ability to pay when imposing these obligations”) (emphasis in original). Mandatory legal financial obligations include restitution. *Lundy*, 176 Wn.App. at 102; *State v. Clark*, 191 Wn.App. 369, 362 P.3d 309 (2015); *Shelton*, 194 Wn.App. at 673-74 (citing cases); RCW 9.94A.753(5), (7). Accordingly, courts are not required to inquire into a defendant’s ability to pay before imposing restitution. *Washington v. Ugalde*, 2 Wn.App.2d 1001, 2018 WL 417968, 2 (2018);⁴ *Shelton*, 194 Wn.App. at 673-74; *State v. Clark*, 195 Wn.App. 868, 381 P.3d 198 (2016) *rev’d on other grounds* 187 Wn.2d 1009, 388 P.3d 487 (2017). As a result, if a trial court makes findings regarding a defendant’s current or

⁴ *Ugalde* is unpublished. Pursuant to GR 14.1 unpublished decisions “may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate.”

future ability to pay mandatory legal financial obligations such findings are “surplusage.” *Lundy*, 176 Wn.App. at 103.

Here, Reichow complains that “there is nothing in, either the sentencing hearing or the restitution hearing where the court completed an inquiry regarding Mr. Reichow’s ability to pay.” Br. of App. at 7.

Reichow argues that a resentencing is required. *Id.* But the trial court in this case did not impose *any discretionary* legal financial obligations. CP 306-07, 309-310. Instead, the trial court *only* imposed mandatory legal financial obligations to include restitution. RP 46; CP 306-07, 309-310; Supp. CP 15-16. Thus, the trial court was not required to inquire into Reichow’s ability to pay, and, accordingly, Reichow’s claims are without merit.

CONCLUSION

For the reasons argued above, this Court should affirm Reichow’s sentence.

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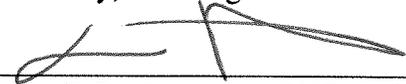
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DATED this 8 day of May, 2018.

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