

APR 19 2012

STATE OF WASHINGTON  
COURT OF APPEALS NO. 30375-6-III

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STATE OF WASHINGTON,  
RESPONDENT

vs.

THEODORE SAROFF,  
APPELLANT,

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The Superior Court of Spokane County, State of Washington, erred in cause No. 07-1-02620-8 in issuing its order dated August 30, 2011, the order being unreasonable under the facts presented. [CP 31-32].

2. The Superior Court of Spokane County, State of Washington, in particular, erred in cause no. 07-1-02620-8, in undertaking to make changes and modifications to the monthly terms of restitution increasing the monthly payments from \$50 to \$1,250 per month in that Judge Price erred in his consideration of the time it would take to extinguish the total judgment rather than focusing on present ability to pay toward the total judgment. [RP 20 lines7-25; 21 lines1-8].

3. The Superior Court of Spokane County, State of Washington, further erred in cause no. 07-1-02620-8 in basing a ruling on evidence not in the record but upon the Court's alleged own personal knowledge when it stated "\$1650 per month for rent in Spokane, Washington is a huge sum of money. Two people can live very comfortably in a very nice accommodation for a lot less than \$1650. How do I know that? I know that because I am a landlord. I have an apartment available that is available for \$540 per month that has been vacant for four months. It is very nice, there is \$1,100 available right there in terms of reasonable rent. I happen to know that all those

complexes in the building where I have my apartment are around \$500 to \$550 range for two bed-rooms, two baths on the South Hill of Spokane, Washington.” [RP 22 lines 19-25; 23 lines1-6].

4. The Superior Court of Spokane County, State of Washington, further erred on October 06, 2011, in cause no. 07-1-02620-8 in entering the order denying reconsideration. [CP 30].

#### **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the Superior Court’s consideration of the total amount of restitution as a major factor was an abuse of discretion [RP 20 lines 7-25; 21 lines1-8] [Assignments of Error Nos. 1, 2, 3, and 4].

2. Whether the Superior Court Judge’s consideration of his own personal business made the judge a witness and/or constitutes improper judicial notice, making the decision an abuse of discretion? [RP 22 lines 19-25; 23 lines1-6].[Assignments of Error Nos. 1, 2, 3, and 4].

#### **C. STATEMENT OF THE CASE**

On September 19, 2008 a judgment and sentence was entered against Mr. Saroff as a first time offender. [CP 2-16] The judgment and sentence included a restitution order in the total amount of \$268,593.11. [CP 2; 6] Mr. Saroff owed \$356,408.89 as the date of hearing, including

costs and interest. [RP 4 lines 13-16; 20 lines 9-13] The restitution order required payments of \$50 per month. [CP 7; 22]

At a hearing scheduled for September 30, 2010 Mr. Saroff failed to appear. Thereafter, on July 01, 2011 an order enforcing sentence was issued based upon a motion to modify the restitution order [CP 17-18] based upon a report dated July, 01, 2011. Subsequent orders set another hearing date for August 26, 2011.

On August 26, 2011 the trial court raised Mr. Saroff's monthly restitution payment from \$50 dollars per month to \$1,250 per month. [CP 19-20] On October 06, 2011 Mr. Saroff's motion for reconsideration [CP 24] was denied without explanation. [CP 30]

Mr. Saroff is sixty years old. [CP 22] He has a Bachelor's of Arts degree from Eastern Washington University. [CP 62] He has a bad shoulder and a heart condition. [CP 22] He also has high blood pressure. [CP 22]

Mr. Saroff earns a living boarding dogs and horses on a short term and long term basis. [CP 22 lines 2-3; 61] and purchasing vehicles for a dealer in Libby, Montana. [RP 61] In the summer he earns between \$1,500.00 to \$2,000.00 per month from the dog boarding business. [CP 22 lines 3-5; 61] He also has earned \$400 per month from the vehicle

purchasing [CP 61] or approximately \$2,300 per month [CP 61] Mr. Saroff's wife, with whom he resides, earns \$1,779 per month and brings home \$1005. [CP 61]

Mr. and Mrs. Saroff have total monthly expenses of \$3,343 and an income of \$3,300 for monthly negative of \$143. [CP 62] Their 2009 federal income tax return shows a combined adjusted gross annual income of \$42,641. [CP 37-46]

Mr. Saroff and his wife reside in a manufactured home on real property owned by their son Nicholas. [CP 21 lines 23-24; 22 lines 1-2] Nicholas purchased the home as part of Mr. Saroff's 2008 bankruptcy. [CP 64-78] Nicholas charges Mr. and Mrs. Saroff \$1,650.00 per month for residing on the property. [CP 21 lines 23-25]

At the August 2011 hearing the court's oral ruling was:

. . . Some significant numbers we are talking about. I am used to a certain degree hearing restitution and costs that are all over the map, but the State's recitation would suggest that Mr. Saroff owes just around \$263,000 right now. If you add interest into that calculation, it would take over \$350,000 or so. He has been paying \$50 a month. I don't think anybody ever suggested – I stand corrected if I am wrong – that Mr. Saroff hasn't been paying his monthly payment, but his monthly payment at this point is the contention. It is \$50 a month right now. The State's math would seem to indicate it would take 443 years for Mr. Saroff to pay back the funds he owes at \$50 a month. Even

at \$1500 a month, as the state suggested it is over fifteen years for Mr. Saroff to pay.

Well, the first point of discussion, it is clear to me that at \$50 a month, we are just never going to get anywhere. That is not to the benefit of Mr. Saroff, certainly not to the benefit of the victims. I don't think it is really something that can be satisfied just by purposes of working through these numbers over and over again, because I suspect that Mr. Saroff, given his age, sixty years old or so, and with the life span that he can expect from this point forward, it wouldn't surprise me if this is never paid off. But we have to make some diligent efforts I think to get this under control.

I am satisfied today that having review this file in detail – I indicated that Mr. Saroff's information was provided to me in advance ... I am satisfied that Mr. Saroff, has, frankly, a significant amount of expenses in discretionary income. What do I mean by that? Let me rephrase, discretionary expenses on his side of the ballot (sic) sheet ... cell phones aren't mandatory, internet service ... is not necessary, Cable TV, or satellite TV is nice, but it certainly is not mandatory; ... tithing should not be in the budget. ... Mr. Saroff lost his home in the bankruptcy as a result of the underlying criminal conviction I assume. It is curious he continues to live in that same home which is now owned by his son. Interesting situation, which frankly, does create some real credibility issues for me. I would probably just let it go, though, except for the fact that Mr. Saroff is in this home that was purchased by his son out of the bankruptcy resulting from his criminal conviction and he is paying \$1650 a month in rent to his son per month ... "\$1650 per month for rent in Spokane, Washington is a huge sum of money. Two people can live very comfortably in a very nice accommodation for a lot less than \$1650. How do I know that? I know that because I am a landlord. I have an apartment available that is available for \$540 per month that has been vacant for four months. It is very nice, there is \$1,100 available right there in terms of reasonable rent. I

happen to know that all those complexes in the building where I have my apartment are around \$500 to \$550 range for two bedrooms, two baths on the South Hill of Spokane, Washington.

So it strikes me that there is significant opportunity here for Mr. Saroff to pay much more than the \$50 per month that he is paying ... I will set his obligation at \$1250 per month starting October, 2011. That will be due on the 15<sup>th</sup> of each and every month. [RP 20-23]

This appeal follows. [CP 28-32]

### **C. STANDARD OF REVIEW**

A restitution order is reviewed for abuse of discretion. State v. Enstone, 137 Wn. 2d 675, 974 P. 2d 828 (1999) A trial court abuses discretion when its discretion is manifestly unreasonable or exercised upon untenable grounds or imposed for untenable reasons. *Id.*, at 679-680. A properly authorized restitution award will not be disturbed on appeal absent abuse of discretion. State v. Lohr, 130 Wn. App. 904, 125 P. 3d 977 (Div. III, 2005).

Additionally a trial court's finding an offender is able to pay legal financial obligations is review under clearly erroneous standard, State v. Bertrand, 165 Wn App 393, 267 P3d 511 (2011) citing, State v. Baldwin, 63 Wn. App. 303, 818 P. 2d 1116 (1991) as the determination is essentially factual. *Id.* In this regard, "although Baldwin does not require formal findings

of fact about a defendant's present or future ability to pay legal financial obligations, the record must be sufficient to review whether the trial court took into account the offender's financial resources and the nature of the burden imposed by the legal financial obligations. *Id.* But see, State v. Earls, 51 Wn. App. 192, 752 P. 2d 402 (1998) criticized in State v. Curry, 118 Wn. 2d 911, 829 P. 2d 166 (1992). In any event, before a State can collect legal financial obligations, there must be a determination the offender has the ability to pay the obligations, taking into account his resources and the nature of the financial burdens on him. *Id.* And a trial court must base the decision on the evidence presented not upon the court's personal knowledge. ER 201(b); Vandercook v. Reece, 120 Wn. App. 647, 86 P. 3d 206 (2004); ER 605. See also, State ex rel Carroll v. Junker, 79 Wn. 2d 12, 482 P. 2d 775 (1971). Whether the trial court exceeded its statutory authority is an issue of law reversed de novo. Likewise, interpretation of the restitution statute is an issue of law reviewed de novo. State v. Burns, 159 Wn App 74 244 P3d 988 (2010), citing, Gonzalez, infra.

#### **D. ARGUMENT**

The trial court's consideration of the total restitution due and the time left to pay was error and beyond the statutory direction thus untenable and amounting to an abuse of discretion. [Issues One, Two]

A trial court's authority to impose restitution is purely statutory. State v. We, 138 Wn. App. 716, 158 P. 3d 1238 (2007). As also stated in We, "consideration of the defendant's ability to pay applies to the setting of the minimum monthly payment, not to the setting of the total restitution amount." Citing, RCW 9.94A.753 (1); State v. Huddleston, 80 Wn. App. 916, 912 P. 2d 1068 (1996); see also, RCW 9A.94A.753 (4), (permitting the trial court to modify the amount, terms, and conditions of restitution, but the total amount of restitution ordered may not be reduced based upon the offender's inability to pay the total amount.) Id. Judge Price erred in his consideration of the time it would take to extinguish the total judgment rather than focusing on Mr. Saroff's present ability/inability to pay toward the total judgment.

According to RCW 9.94A.753(2) "...The sentencing court may ... reset the monthly minimum payments based upon the report from the community corrections officer of the change in circumstances...."

According to RCW 9.94A.753(4) "... for an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction until the obligation is completely satisfied, regardless of the statutory minimum for the crime. The portion of the sentence concerning restitution may be modified as to amount, terms and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the

expiration of the offender's term of community supervision and regardless of the maximum statutory sentence for the crime ... the county clerk is authorized to collect unpaid restitution at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations..."

In State v. Gonzalez, 168 Wn. 2d 256, 226 P. 3d 131 (2010) the Supreme Court indicated the amount of restitution references the total amount ordered whereas the monthly payments are defined as terms of restitution and RCW 9.94A.753(4) provides restitution may be modified as to the amount, terms and conditions. As Gonzalez states at 264, "the monthly payment schedule is better described as a proposition, limitation, or provision that affects the nature and scope of the agreement than as a total quantity." As RCW 9.94A.753 makes clear, after the total amount has been set, any modification concerning the monthly payments is limited to consideration of the offender's present financial circumstances. There is no statutory provision for consideration of the length of time which might elapse before extinguishment of the restitution. Rather, the legislature clearly indicated jurisdiction remained until the total amount was paid off. It was therefore error for the court to increase the monthly payments based upon any concern as to the length of time to extinguish the total amount due.

The trial court's consideration of his own personal financial endeavors made the trial court a witness in the case and was improper judicial notice, as a major portion of the decision thus making the decision erroneous and untenable and an abuse of discretion [Issues One, Two]

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201(b) This doctrine does not extend to a judge's own memory and here the judge violated ER 605 by making himself a witness. Vandercook v. Reece, 120 Wn. App. 647, 86 P. 3d 206 (2004). No objection need be made in order to preserve the point. ER 605. See also, State ex rel Carroll v. Junker, 79 Wn. 2d 12, 482 P. 2d 775 (1971), (it was error for a judge to decide a motion partially on the basis of his own affidavit.)

The trial judge clearly made himself a witness to the case when he voiced his personal knowledge as to the local economy and real estate market and employed his personal experiences as a substantial basis for his decision. It was as if the trial judge decided the issues based upon his own affidavit when the trial judge stated:

. . . he is paying \$1650 a month in rent to his son per month  
... "\$1650 per month for rent in Spokane Washington is a  
huge sum of money. [RP 22 lines 19-21]

. . . Two people can live very comfortably in a very nice accommodation for a lot less than 1650. How do I know that? I know that because I am a landlord. I have an apartment available that is available for \$540 per month that has been vacant for four months. It is very nice, there is \$1,100 available right there in terms of reasonable rent. I happen to know that all those complexes in the building where I have my apartment are around \$500 to \$550 range for two bedrooms, two baths on the South Hill of Spokane, Washington.[RP22 lines 21-25; 23lines 1-6]  
So it strikes me that there is significant opportunity here for Mr. Saroff to pay much more than the \$50 per month that he is paying ... [RP 23 lines 7-11]

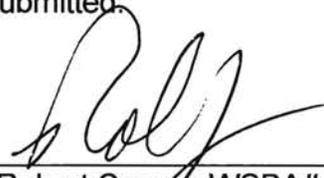
Herein lies clear error.

**E. CONCLUSION**

Based upon the foregoing points and authorities, Theodore Saroff, respectfully requests the trial court's order of August 20, 2011 as well as the order denying reconsideration, which were entered in this matter, be reversed.

DATED this 18 day of April, 2012

Respectfully submitted:

  
Robert Cossey WSBA# 16481  
Attorney for Appellant,  
Theodore Saroff

Declaration of Service

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington, on this day declarant personally delivered the original and two (2) true and correct copies of the document entitled BRIEF OF APPELLANT for filing directed to:

Court of Appeals of the State of Washington, Division III  
Clerk of the Court  
500 N Cedar Street  
Spokane, WA 99201

AND on this date declarant delivered a true and correct copy of the document entitled BRIEF OF APPELLANT for service upon:

Mark Lindsey  
Spokane County Prosecuting Attorneys  
1100 W. Mallon  
Spokane, WA 99260

Dated this 19 day of April 2012..

  
\_\_\_\_\_  
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