

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**State of West Virginia,
Plaintiff Below, Respondent,**

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vs.) No. 23-588

**Appeal from Final Order of Jefferson County
Circuit Court (22-F-11)**

**Willie Edward Belmonte, Jr.,
Defendant Below, Petitioner**

PETITIONER'S BRIEF (2ND)

Respectfully submitted,
WILLIE EDWARD BELMONTE, JR.,
Petitioner

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ASSIGNMENT OF ERROR

I. The lower court erred by setting restitution in the amount of an aggregate \$11,006.84, to be paid between the victim's mother and the West Virginia Crime Victim Compensation Fund, when this figure was derived either from evidence which was not statutorily authorized to be classified as restitution, or was based solely upon documentation filed subsequent to the restitution hearing, and not admitted as evidence in said hearing, without giving Petitioner the ability to contest said amount in violation of his Due Process rights.

STATEMENT OF THE CASE

On August 29, 2023, Petitioner filed Petitioner's Brief and Appendix Record in his first appeal involving the instant case, under West Virginia Supreme Court Docket No. 23-65, challenging his convictions and sentence, stemming from a plea agreement previously entered. On September 12, 2023, the lower court entered its Order of Restitution, subject of the instant appeal.

Petitioner was convicted of various felony offenses, under W. Va. Code §§ 61-8A-4 (2016), 61-3C-14b (2016), and 61-8D-5 (2010), in pursuance with a plea agreement, and sentenced to an aggregate prison term of twenty-three years, nine months (23 years, 9 months), to seventy-five years (75 years), followed by a supervised release term of fifty years (50 years), and lifetime registry on the sex offender registry, as reflected in the lower court's "Sentencing Order," entered on January 5, 2023; restitution was left pending at sentencing to be determined in the future. (AR 19-28, 71-74, 195-238).

At the time Petitioner's appeal was perfected in Docket No. 23-65, the issue of restitution had not yet been determined by the lower court, even though a hearing was held on June 12, 2023, by the lower court, to address restitution, and the parties had filed various pleadings regarding

restitution. (AR 85-108, 195-279). The original restitution request was made as part of the Pre-Sentence Investigation Report (hereinafter “PSI”), totaling \$6,954.00, be paid to the victim’s mother as further expanded upon in a restitution hearing, which was held on June 12, 2023. (AR 33, 56-57, 83-84, 239-279).

On June 12, 2023, the victim’s mother testified regarding restitution requests for gas mileage for transportation to various therapy appointments, medical appointments, court proceedings, trial preparation, and lost wages of the victim’s parents stemming from the same. (AR 239-279). In this hearing, the State admitted exhibits regarding dates that served the basis for the restitution claim. (AR 85-89). Petitioner conceded to pay restitution for travel expenses regarding therapy and medical appointments, which when calculated, amounts to an approximate restitution amount of \$578.10, but contested all other restitution claims. (AR 56-57, 85-89, 247-248).

After the June 12, 2023, hearing, the State submitted various documents to bolster an additional claim for restitution through W. Va. Code § 14-2A-4 (1999), the West Virginia Crime Victim’s Compensation Fund (hereinafter “CVCF”), for tutoring expenses, and the parties submitted memos of law. (AR 92-144). On September 12, 2023, the lower court entered its “Order of Restitution,” to reflect payment in the amount of \$2,089.30 to be paid to the victim’s mother, and an amount of \$8,917.54 to be paid to the CVCF for the tutoring expenses referenced above. (AR 145-154).

SUMMARY OF ARGUMENT

Petitioner asserts that the lower court erred by ordering restitution as outlined within the lower court’s “Order of Restitution,” entered on September 12, 2023.

Petitioner asserts that: (1) the maximum amount of restitution that should have been assessed in relation to the victim's travel for medical and therapy appointments as conceded by Petitioner on June 12, 2023, would amount to \$578.10, and W. Va. law does not authorize restitution for lost wages of third parties, even if a victim's parent; and, (2) Petitioner was improperly assessed restitution to the CVCF in the amount of \$8,917.54, for tutoring expenses, based solely upon documentation filed into the record by the State, which was not based on any evidence admitted in the restitution hearing held on June 12, 2023, in violation of Petitioner's Due Process rights.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully asserts that pursuant to Rule 18 of the W. Va. Rules of Appellate Procedure that oral argument is unnecessary in the instant matter because the facts and legal arguments will be adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument, as the impropriety of the lower court's "Order of Restitution," can be easily established from review of pertinent parts of the lower court's record and from already established principles of law.

ARGUMENT

STANDARD OF REVIEW

In *State v. Lucas*, the Court held that, "[t]he Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, **unless the order violates statutory or constitutional commands.**" Syl. Pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997) **(Emphasis Added).**

Petitioner asserts that the lower court's restitution determination is not supported by the lower court's record, and was made without sufficient evidence laid to support such determination in the June 12, 2023, restitution hearing, in violation of Petitioner's Due Process rights under W. Va. law and Federal law, as established under W. Va. Code § 61-11A-5(d) (1984). *See* W. Va. Const. art. III, § 10; *see also* U.S. Const. amend. V; *see also* U.S. Const. amend. XIV *see also* W. Va. Code § 61-11A-5 (1984). West Virginia law establishes that the proper amount of restitution must be established by a preponderance of the evidence when the restitution amount is disputed, with this burden of loss sustained by the victim to be established by the prosecutor. *See* W. Va. Code § 61-11A-5 (1984). As Petitioner is asserting that the restitution amount determined by the lower court was not authorized by statute, this assignment of error clearly involves a question of law.

The Court has held that, “[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). Thus, the proper standard of review, as it pertains to Petitioner's assignment of error regarding restitution is *de novo*.

- I. The lower court erred by setting the restitution amount at \$11,006.84, when there was no evidence admitted in the restitution hearing to support this amount, and no authorization in law to support this amount.**
 - A. The proper amount of restitution, as conceded by Petitioner in the restitution hearing, should only relate to the victim's therapy and medical appointments, which would result in a restitution amount of \$578.10.**

The lower court's record establishes that following entry of Petitioner's guilty pleas on November 1, 2022, the original restitution claim in the instant case, was for an amount of \$6,954.00, made by the victim's mother, as outlined in a table of expenses contained within the PSI, dated December 5, 2022. (AR 33, 56-57). This restitution request by the victim's mother

includes various entries for travel and lost wages related to various events, which include, medical appointments, therapy sessions, court hearings, and trial preparation. (AR 56-57). The bulk of this claim was for “lost wages.” (AR 56-57). The lower court’s record contains no claim by the victim, for restitution, as the restitution claim submissions in the instant case were made either a third-party, the victim’s mother, or from documentation filed by the State and received from the CVCF. (AR 32-60, 85-89, 92-144, 239-279).

The West Virginia Code, as related to restitution, contained within W. Va. Code § 61-11A-4(a) (2019), establishes that:

[t]he court, when sentencing a defendant convicted of a felony. . . causing physical, psychological, or economic injury or loss **to a victim**, shall order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense to the greatest extent economically practicable when considering the defendant’s financial circumstances.

(Emphasis Added). The victim’s mother is not the victim, and is not entitled to restitution for physical, psychological, or economic injury.

Petitioner is aware that W. Va. Code § 61-11A-4(e) (2019), provides that a court can order restitution to a third party, “who has compensated the victim for loss to the extent that the person paid the compensation.” W. Va. Code § 61-11A-4(e) (2019). However, all claims by the victim’s mother within the lower court’s record, whether from the PSI, from testimony, or elsewhere, are not seeking reimbursement for loss of the victim, they are seeking personal loss for the third party, which is not authorized by statute. (AR 32-60, 85-89, 92-144, 239-279).

The lower court’s record establishes that even though the victim was a juvenile, seventeen-years-old, at the time of the offenses, she had access to a vehicle, presumably a valid driver’s license, and drove herself to perform consensual sex acts with Petitioner which serve the basis for many of Petitioner’s convictions. (AR 1-3, 19-28, 35-36, 167-171). The victim in this case would

have turned eighteen-years-old, becoming an adult, at some point in April of 2022, and been an adult at the time of many of the specific entries to which the victim's mother made restitution claims. (AR 21, 56-57, 85-89).

Petitioner's guilty pleas were entered by the lower court on November 1, 2022, by which time the victim was an adult for over six months; yet, the victim in this case did not request restitution, as shown by the lower court's record, neither within a victim impact statement, nor by testimony at any hearing, including the sentencing hearing on January 4, 2023, and restitution hearing on June 12, 2023. (AR 21, 56-57, 85-89, 155-279). The victim was an adult for over seven months at the time the PSI report containing her mother's third-party restitution claim was completed, but made no restitution claim. (AR 21, 56-57, 85-89).

Even *assuming arguendo*, that the victim in the instant case personally made a claim for lost wages and mileage that was identical to that contained within the PSI, which did not happen, rather than her mother, a third-party, under W. Va. Code § 61-11A-4 (2019), these claims should be denied as well, because economic loss is only authorized if the loss is a result of the criminal act, not for attendance at court proceedings, not for trial preparation, nor for travel to therapy sessions or medical appointments, outside of W. Va. Code § 61-8B-13 (1986).

W. Va. Code § 61-11A-4(b)(2)(c) (2019) only authorizes for restitution to be assessed against a defendant for lost income when the victim, not a third-party, was the victim of an offense in which the victim suffered bodily injury, and the lost income is directly tied to the offense itself. Nothing is contained within the lower court's record that establishes that the victim sustained bodily injury as a result of the offenses, nor that the victim suffered lost income as a result of the same.

The Court addressed a claim for lost wages of an actual victim, not a third-party claimant, in *State v. Cummings*, 214 W. Va. 317, 589 S.E.2d 48 (2003) (per curiam), and determined that West Virginia's restitution statute did not provide authorization for lost wages of a victim outside of economic loss directly as a result of the offense. Petitioner asserts that it is illogical, and contrary to W. Va. law, for the lower court to have assessed restitution for economic loss of a third-party, the victim's mother, when to do so is contrary to what is authorized by law, within W. Va. Code § 61-11A-4 (2019), and *State v. Cummings*, where even the victim herself would not have been entitled to this restitution.

Outside the context of whether Petitioner's guilty pleas were voluntarily entered, Petitioner recognizes that the plea agreement he signed, establishes within numbered paragraph twenty-nine (29), that the lower court could assess restitution for, "the cost of medical, psychological or psychiatric treatment of the victim," regardless of whether the victim sustained bodily injury. (AR 26). Should the Court determine the plea agreement was entered into voluntarily, Petitioner concedes that the restitution claims related to the cost of medical appointments and therapy would be properly assessed in an amount of \$578.10.

Petitioner asserts that the proper amount of restitution, \$578.10, can be derived from five of the restitution claim entries contained within the PSI, corresponding to mileage for the entries on September 2, 2021 (\$22.40), September 10, 2021 (\$11.20), and various therapy appointments (\$151.20, \$280.80, and \$112.50). (AR 56-57). This total of \$578.10, should be the maximum extent of the restitution assessed in regard to "medical, psychological or psychiatric treatment of the victim," to the extent that upon review, the Court finds the plea agreement was voluntarily entered.

B. The lower court erred when it assessed restitution in the amount of \$8,917.54 to the Crime Victim Compensation Fund, without requiring the State to prove such loss by preponderance of evidence, and there was no evidence elicited in a hearing to support this restitution claim.

After the June 12, 2023, restitution hearing, the State filed a series of documents into the lower court's record attempting to establish a restitution claim of \$8,917.54, to be paid to the CVCF. (AR 92-144). No testimony or documentary evidence related to this claim was ever presented within any hearing to the lower court. (AR 195-279). While it is certainly true, that W. Va. Code § 61-11A-4(e) (2019), allows authorization for a court to award restitution to third-parties, and delineates that a restitution award to the CVCF for funds compensated to a victim for loss is permitted, the lower court's restitution order which awards \$8,917.54 to the CVCF violates both W. Va. law and Federal law pertaining to Petitioner's Due Process rights, as well as W. Va. Code § 61-11A-5 (1984). *See* W. Va. Const. art. III, § 10; *see also* U.S. Const. amend. V; *see also* U.S. Const. amend. XIV (establishing that no person may be deprived of property without due process of law).

Because claims of restitution by the CVCF are governed by W. Va. Code § 61-11A-4(e) (2019), because the State submitted these documents after evidence was taken at the restitution hearing, and because W. Va. Code § 61-11A-5 (1984) provides that when a defendant is challenging restitution, the State bears the burden of proof as to the amount of loss sustained by the victim by a preponderance of evidence, the lower court violated Petitioner's right to not be deprived of property without due process of law by granting the CVCF's restitution request as it did.

The lower court was required by law, pursuant to W. Va. Code § 61-11A-5 (1984), to make the State meet its burden of proof in regards to the CVCF's restitution claim, and failed to do so. The lower court simply granted the State's request for restitution to the CVCF without allowing

Petitioner an opportunity to be heard or to test the State's evidence on the issue in any meaningful manner. The lower court failed to allow Petitioner to confront witnesses against him, or to cross-examine either the victim, the victim's mother, who was the claimant with the CVCF, or any representative from the CVCF regarding any issues that allegedly substantiated the CVCF's claim of restitution. (AR 145-154, 239-279).

The documents from the CVCF requesting restitution reimbursement merely set forth that a claims investigator determined that tutoring services were necessary for the claimant's minor child as a "replacement services loss." (AR 94, 109-143).

W. Va. Code § 14-2A-3(h) (2022), defines "replacement services loss," as, "expenses reasonably incurred or to be incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed for the benefit of," the injured person had they not been injured. Thus, in violation of Petitioner's Due Process rights, Petitioner was never given the opportunity to challenge whether such "replacement services loss" for tutoring services was an expense which was reasonably incurred, nor ordinary and necessary service, nor whether it involved a service which the victim would have performed.

Petitioner asserts that it is not reasonable, ordinary, or necessary, for private tutoring for an extended period of approximately fourteen months, to be a substitute or replacement for education within a public-school setting. Private tutoring is not an expense reasonably incurred, nor necessary and ordinary, to a service that the victim would have performed absent an injury caused by Petitioner's offenses.

Additionally, none of the documentation regarding the CVCF's restitution claim contain an itemization of said tutoring services in any sufficient detail, nor contain any information as to who provided these services, nor whether such services were provided at a reasonable rate. (AR

109-143). This CVCF claim documentation also states that it was for services which range from February of 2022, to June of 2023, for the claimant's minor child. (AR 111-114). The victim in the instant case reached adulthood in April of 2022, so even if Petitioner had been able to challenge this claim, as was required by law, only two of the sixteen months covered during this time period would have involved the claimant's "minor child;" thus, over eighty-seven percent (87%) of this requested restitution amount, would have arguably been premised on a falsehood that the victim was a minor during this date range. (AR 21, 111-114).

Additionally, over five of the sixteen months covered by this claim would have occurred after the Petitioner's sentencing hearing in January of 2023. (AR 111-114). Restitution is normally to be imposed at sentencing. Petitioner asserts it was error for the lower court to assess restitution based on any restitution claim for services uncertain at the time of his sentencing hearing and not sufficiently supported by evidence.

Petitioner asserts that not only were his Due Process rights violated by the lower court's failure to provide him a hearing regarding the award of restitution as contained within the CVCF's restitution claim, but that it appears obvious that the CVCF's claim did not meet the statutory definition required to be classified as "service replacement loss." (AR 111-114). Restitution is designed to compensate victims for loss sustained as a result of a criminal act. Restitution is not supposed to be a windfall to continue in perpetuity to enrich a victim, much less a third-party claimant, which is what the lower court's Order of Restitution mandates occur in the instant case.

Therefore, even ignoring Petitioner's argument that the lower court violated his Due Process rights by ordering restitution as it did, without any admissible evidence addressed in any hearing in regards to the CVCF's claim, this claim does not meet the statutory definition required; thus, the lower court was without legal authority to assess restitution as it did.

CONCLUSION

WHEREFORE, for the reasons stated above, and in addition to the assignments of error asserted in Petitioner's first appeal, under West Virginia Supreme Court Docket No. 23-65, Petitioner respectfully requests that in addition to the primary relief requested in Docket No. 23-65, should the Court not reverse the convictions based upon involuntary entry of the guilty pleas, that the Court reverse the lower court's Order of Restitution, entered on September 12, 2023, and remand this case to the lower court with instruction to direct entry of a new restitution Order be entered in an amount of \$578.10, as outlined above, to be paid to the victim's mother, and for such further relief as the Court deems proper.

Respectfully submitted,
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**Willie Edward Belmonte, Jr.,
Defendant Below, Petitioner**

CERTIFICATE OF SERVICE

I, Jonathan T. O'Dell, do hereby certify that on January 5, 2024, a true copy of the foregoing Petitioner's Brief (2nd) and Appendix Record (2nd), was served via efilings to all File & Serve participants to the following:

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