IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia,
Plaintiff Below, Respondent,

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 REPLY BRIEF (2ND)

Respectfully submitted,
WILLIE EDWARD BELMONTE, JR.,
Petitioner

By Counsel

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully reasserts that per Rule 18 of the W. Va. Rules of Appellate Procedure that oral argument is unnecessary; that review of the briefs, record, and applicable law require reversal of the lower court's Order. *See* Petitioner's Brief (2nd) (hereinafter "Pet'r's Br.") at 3.

REPLY ARGUMENT

STANDARD OF REVIEW

"The 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).**

"Where the issue on an appeal from a 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, because Petitioner's assignment of error regarding restitution implicates interpretation of a statute and constitutional commands, review 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.

As argued and set forth in Pet'r's Br., the State only proved restitution amounts pertaining to the victim's mother in the amount of $578.10, and it was error for the lower court to grant

restitution to the victim's mother, a third party, in the amount of $2,089.30. *See* Pet'r's Br. at 4-7; (AR 145-153).

Within Respondent's Brief (hereinafter "Resp.'s Br."), Respondent argues that the lower court's restitution order, as pertaining to the victim's mother, was correct, because minors are wholly dependent on parental support, even after turning eighteen, and that any loss by a minor's parents directly impacts the minor victim. *See* Resp.'s Br. at 11-14. Respondent then incorrectly argues that Petitioner is a seeking a loophole that would, "allow a defendant who perpetrates abuse upon a child to escape restitution simply because his victim had not achieved the age of majority or is unable to provide for herself, regardless of the trauma and harm inflicted upon her." *See* Resp.'s Br. at 11-14.

Respondent's argument misconstrues and misstates Petitioner's assignment of error relating to the restitution payable to the victim's mother. Petitioner is arguing that the lower court exceeded the statutory authority in setting a restitution amount as it did, pertaining to the victim's mother. *See* Pet'r's Br. at 4-7. Respondent completely ignores Petitioner's arguments that restitution in this matter, set forth in the restitution statutes, as contained in W. Va. Code, Chapter 61, Article 11A, *et-seq.*, West Virginia's Victim Protection Act of 1984, is not permissible under the law, to a third-party, such as the victim's mother, for much of the restitution award contained within the lower court's Order of Restitution, entered on September 12, 2023. *See* W. Va. Code § 61-11A-4 (2019); *see also* Pet'r's Br. at 4-7; *see also* Resp.'s Br. at 11-17.

Respondent concedes that, "West Virginia Code § 61-11A-1, *et seq.*, does not explicitly provide that the parents of a victim are, themselves, victims." *See* Resp.'s Br. at 14. Respondent merely states in conclusory fashion the lower court's restitution order is correct, and attempts to formulate a legislative intent argument, not supported by, and in opposition to, the actual statutory

language contained within W. Va. Code, Chapter 61, Article 11A, *et-seq.*, that defines what is permissible as restitution. *See* W. Va. Code § 61-11A-4 (2019); *see also* Resp.'s Br. at 11-17.

The legal issue pertaining to what is permissible for courts to order as restitution, has already been thoroughly addressed by the Court in *State v. Cummings*, 214 W. Va. 317, 589 S.E.2d 48 (2003) (per curiam), as argued by Petitioner, and does not support the lower court's award of $2,089.30, to the victim's mother. *See* Pet'r's Br. 7; (AR 95-100, 247-252, 275-278). The Court in *Cummings*, discussed that in determining what constitutes permissible restitution, the language contained within the restitution statute controls. *See State v. Cummings*, 214 W. Va. 322-23, 589 S.E.2d 53-54 (2003).

Respondent conveniently ignores the fact, that under the statutory authority which sets forth what is permissible restitution, as well as the Court's ruling in *State v. Cummings*, even the victim herself would not be entitled to the restitution the lower court ordered. *See* Pet'r's Br. at 4-7. Further, West Virginia's Victim Protection Act of 1984, discusses how a victim impact statement shall include, "an itemization of any economic loss suffered by the victim as a result of the offense," provides that such statement, "shall be made available to the defendant," and "[t]he court shall, upon motion by or on behalf of the defendant, grant the defendant a hearing, whereby he may introduce testimony or other information related to alleged factual inaccuracies in the statement." *See* W. Va. Code § 61-11A-3 (1994).

In the instant case, no such statement was made by the victim, to the extent that economic loss suffered by the victim, rather than the victim's mother, was claimed, that would warrant the lower court's award of restitution to the victim's mother.

Likewise, Respondent's argument, "that regardless of whether the order is a violation of the statutory provisions. . . any error must be construed as harmless because the circuit court could

still properly order Petitioner to pay that same amount to the West Virginia Crime Victims Compensation Fund," is also without merit. While third parties are allowed to be compensated by the Crime Victim Compensation Fund (hereinafter "CVCF"), they still must qualify as a claimant, and any such claim, must be from an obligation: (1) "of a victim;" and, (2) "incurred as a result of the injurious conduct that is the subject of the claim." W. Va. Code § 14-2A-3 (2022).

This did not occur in the instant case; there has been no claim presented by the victim, that economic loss was suffered **by the victim**, much less that such loss was, "incurred as a result of the injurious conduct that is subject of the claim," that was later reimbursed or voluntarily paid by a third-party claimant, i.e., the victim's mother. **(Emphasis Added).** Nor was any such CVCF claim made or approved regarding the restitution claim by the victim's mother, and even had it been, Petitioner would still have the ability under the law, to be provided a meaningful opportunity under the law to refute such claim. Therefore, Respondent's claim that any such error in relation to restitution claims of the victim's mother being harmless error, as potentially being reimbursable through a CVCF claim, also fails.

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.

Respondent's incorrectly asserts, essentially, that: (1) Petitioner has no right to an evidentiary hearing to refute restitution claims; (2) that the language in the plea agreement pertaining to restitution acts as a waiver to refute the properness of the restitution amount; (3) Petitioner did not request an evidentiary hearing pertaining to the CVCF claim; (4) that Petitioner is seeking the Court create a presumption against the payment of restitution such that the same types of procedural safeguards applicable to the guilt phase of a jury trial would apply to a circuit

court's determination of restitution; and, (5) that Petitioner is merely "table-pounding" in his argument that he has a right to refute a restitution claim.

Each of Respondent's arguments pertaining to the Petitioner's due process claim regarding the CVCF restitution order are either completely incorrect, patently false, or at best, misapply Federal restitution standards to the State restitution claim made by Petitioner, based upon cherry-picked citations from Federal case law that Respondent fails to properly analyze to support any argument.

The legislature set forth authority for courts to order restitution as contained within W. Va. Code, Chapter 61, Article 11A, *et-seq.*, and this article of the West Virginia Code: (1) defines what is permissible restitution; and, (2) states that in the event that there is a dispute as to restitution that the State bears the burden of proof by a preponderance of the evidence. *See* W. Va. Code §§ 61-11A-4 (2019), 61-11A-5 (1984). Restitution must be related to the injurious or criminal conduct. Any restitution involving CVCF claims, must still be authorized under W. Va. Code, Chapter 61, Article 11A, *et-seq.*, under W. Va. Code § 61-11A-4(e) (2019), as a third-party restitution claim.

It is well-settled that no person may be deprived of property without due process of law, pursuant to W. Va. Const. art. III § 10, and U.S. Const. amend. V., and it is absurd for Respondent to argue that the State's submission of a series of documents making a restitution claim after the actual restitution hearing, when a defendant has actively asserted that they refute such restitution claim, can alone, satisfy due process and the State's burden of proof by a preponderance of the evidence. The lower court's award of restitution based upon these documents did not provide the Petitioner any meaningful opportunity to be heard on the issue, such as in a hearing, as required by law.

W. Va. Code § 61-11A-3 (1994), provides Petitioner a statutory right, under W. Va. law, to demand that the lower court set a hearing upon Petitioner's motion, to review a victim's claim of loss relevant toward a restitution determination. While there might not be explicit West Virginia statutory language, or case law holdings, that specify this must be "an evidentiary hearing," pertaining to a defendant's right to challenge or refute restitution claims, it is difficult to imagine a circumstance where the State's mere submission of documents alone which make a claim of restitution would be enough to satisfy the State's burden of proof to satisfy due process protections.

State v. Cummings, 214 W. Va. 317, 589 S.E.2d 48, contains the closest case analysis of restitution issues similar to the issue raised by Petitioner's assignment of error, with arguably, the Court's analysis in *State v. Atwell*, 234 W. Va. 293, 765 S.E.2d 182 (2014), being the next closest. Throughout West Virginia jurisprudence, courts throughout West Virginia have held hearings regarding restitution and addressed restitution claims either in the sentencing hearing or at a separate restitution hearing, which involved actual witness testimony and evidence; the practice of holding a hearing regarding restitution assessments properly allows a defendant to present argument, to have the ability to cross-examine State witnesses regarding restitution, and a meaningful opportunity to be heard on the issue of restitution, in order to protect a defendant's due process rights.[1]

Rather than address Petitioner's argument, that the statutory language of W. Va. Code, Chapter 61, Article 11A, *et-seq.*, and the Court's holdings in *State v. Cummings*, forbid the lower court to assess restitution as it did, Respondent argues that Federal law addressing the requirements for Federal restitution should be persuasive to the Court in denying Petitioner a hearing on issues

[1] *See State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997); *see also State v. Cummings*, 214 W. Va. 317, 589 S.E.2d 48 (2003); *see also State v. Atwell*, 234 W. Va. 293, 765 S.E.2d 182 (2014); *see also State v. Wasson*, 236 W. Va. 238, 778 S.E.2d 687 (2015); *see also State v. Bagent*, 238 W. Va. 736, 798 S.E.2d 862 (2017).

of restitution related to the CVCF claims. *See* Resp.'s Br. 20-21, 23. Petitioner asserts that the Federal cases cited by Respondent, for Respondent's misguided proposition that due process does not require a hearing or meaningful opportunity to be heard, regarding restitution, misstates the legal analysis from these cases and ignores the factual scenarios which these decisions were based.

Even though Petitioner asserts that analysis of Federal law regarding Federal restitution statutes has limited, if any applicability to Petitioner's assignments of error, nonetheless, Respondent's case law citations to Federal law are addressed herein.

Respondent cites to *United States v. Ziadeh*, 104 Fed.Appx. 869, 874 (4th Cir. 2004), for the proposition that the decision to, "hold an evidentiary hearing is committed to the discretion of the district court." *See* Resp.'s Br. at 20. Respondent does not mention that *Ziadeh* involved financial crimes, where there was a stipulation made by the Appellant related to the amount of restitution contained as part of his plea agreement, where Appellant admitted by stipulation to an amount of restitution that was higher than what he was ultimately ordered to pay, and that due to this stipulation to a higher restitution amount, the Court determined that it could not conclude an abuse of discretion by the district court in failing to hold an evidentiary hearing. *See U.S. v. Ziaheh*, 104 Fed.Appx. 875 (4th Cir. 2004).

Respondent cites to *In re Sealed Case*, 702 F.3d 59, 66 (D.C. Cir. 2012), for the proposition that restitution need not, "be proven with exactitude," and restitution may be based upon grand jury testimony. *See* Resp.'s Br. at 20-21, 23. *In re Sealed Case*, involved a child sex trafficking case where multiple evidentiary hearings were conducted to address restitution, where there was expert witness testimony presented in said hearings in regards to the proper restitution amount.

Respondent cites to *United States v. Monzel*, 641 F.3d 528, 540 (D.C. Cir. 2011), for the proposition that that evidence offered in support of a restitution claim only need demonstrate the

amount to some reasonable certainty. *See* Resp.'s Br. at 20. *Monzel* was a case where a defendant was convicted of possession of child pornography as pertaining to a particular identified victim and said victim filed both an appeal and writ of mandamus challenging the restitution assessed as too low; the victim was seeking over three million dollars. The *Monzel* Court was primarily dealing with whether the victim had a right to appeal a defendant's sentence, and in regards to restitution, the *Monzel* Court stated in its opinion that a defendant is only liable for harms that he proximately caused and instructed the district court to order restitution equal to losses attributable to the defendant. *See U.S. v. Monzel*, 641 F.3d 535-40 (D.C. Cir. 2011).

Respondent cites to *United States v. Baston*, 818 F.3d 651, 665 (11th Cir. 2016), for the proposition that courts may properly determine the amount of restitution on evidence offered if it only demonstrates the amount to some reasonable certainty. *See* Resp.'s Br. at 20-21. In *Baston*, the Appellant was convicted of sex trafficking, and a restitution hearing was held; Appellant Baston had previously been given the opportunity to cross-examine the victims, and the *Baston* Court noted that district courts have broad discretion in what procedures to use at a restitution hearing, "so long as the defendant is given an adequate opportunity to present his position as to matters in dispute." *U.S. v. Baston*, 818 F.3d 665 (2016) (citing *United States v. Maurer*, 226 F.3d 150, 151 (2d Cir.2000).

Respondent cites to *United States v. Hairston*, 888 F.2d 1349, 1353 n.7 (11th Cir. 1989), for the proposition that hearsay evidence is sufficient to calculate an award of restitution. *See* Resp.'s Br. at 20-21, 23. In *Hairston*, the defendant went to trial on financial crimes, was convicted, and restitution was based upon a hearsay letter submitted, which was addressed at sentencing. The restitution amount was upheld, and the *Hairston* Court discussed hearsay evidence being admissible for purpose of restitution so long as the defendant is given an opportunity to refute the

evidence and the evidence bears "minimal indicia of reliability." *U.S. v. Hairston*, 888 F.2d 1353-54 (11th Cir. 1989). The *Hairston* Court also noted that the defendant did not argue factual inaccuracies in the presentence investigation report and that there was proof established at trial as to the amount of restitution. *Id.* at 1353 n.6, n.7.

Respondent cites to *United States v. Bernadine*, 73 F.3d 1078, 1080-81 (11th Cir. 1996), for the proposition that evidence in support of a restitution claim does not need to be put through the rigors of cross-examination, so long as the evidence possesses sufficient indica of reliability. *See* Resp.'s Br. at 21. *Bernadine* was a case that was reversed by the appellate court, because a district court granted a sentence enhancement based upon information contained in a presentence investigation report and a prosecutor's statements, without satisfying the requisite burden of proof for sentence enhancement. The *Bernadine* Court found this "evidence" neither reliable nor evidentiary and concluded it was error for the district court to rely upon it in sentencing. *U.S. v. Bernadine*, 73 F.3d 1080-82 (11th Cir. 1996). The *Bernadine* Court even discussed how a relaxed evidentiary standard at sentencing did not grant district courts a license to sentence a defendant in absence of sufficient evidence when a defendant objected to information within a PSI's conclusory recitals. *Id.* at 1080-1081 (citing *United States v. Lawrence*, 47 F.3d 1559, 1566-67 (11th Cir. 1995).

Therefore, even should the Court disagree with Petitioner's assertions that the analysis of Federal law pertaining to Federal restitution should not be considered in deciding Petitioner's assignment of error related to restitution, all Federal cases cited by Respondent do not necessarily stand blanketly for the propositions to which Respondent asserts. Respondent simply cherry picks certain phrases and quotes from these cases, when some of these cases resulted in outcomes favorable to the Appellant, or at least involved discussions by the respective courts, of how

protections provided by the lower courts provided the respective Appellants a meaningful opportunity to refute the restitution evidence.

In the instant case, the lower court's entry of restitution, after mere submission of documents alleging a restitution claim by the CVCF does not meet the required burden of proof by a preponderance of the evidence, nor provide Petitioner a meaningful opportunity to refute the restitution claim. Thus, even if the Federal standard is applied, rather than West Virginia's statutory protections which require the court to set a hearing when a defendant refutes restitution, it is clear that the lower court's failure to allow Petitioner a meaningful opportunity to be heard on the issue by holding a hearing, would require remand for a corrected restitution order involving the lack of foundation for the CVCF restitution claim.

Respondent then further argues that the waiver provision of the plea agreement, as contained in paragraphs twenty-eight (28) and twenty-nine (29) of the plea agreement provided the lower court statutory authority to order restitution as it did. *See* Resp.'s Br. at 21-22; (AR 26). The relevant provision of the plea agreement provides that Petitioner would agree to, "pay restitution through the Jefferson County Circuit Clerk to the victim and/or any person or entity that already paid or will pay for any expense that can be considered restitution." *See* Resp.'s Br. at 21-22; (AR 26). This waiver does not prevent Petitioner from challenging what expense, "can be considered restitution," nor does it provide that Petitioner has no right to refute restitution claims presented by the State; thus, Respondent's argument regarding waiver by language of the plea agreement also fails.

Respondent then further argues that Petitioner's failure to request a restitution hearing regarding the CVCF claim, after being provided notice of the CVCF claim, should allow imposition of restitution in accordance with the CVCF claim. *See* Resp.'s Br. at 22.

Petitioner specifically argued in his Memorandum of Law Regarding Restitution, that the lower court entering an order granting the CVCF claim without providing Petitioner the opportunity to examine and cross-examine the evidence violates Petitioner's due process rights to a hearing on the issue. *See* Resp.'s Br. at 22; (AR 98-100). Petitioner specifically argued, the CVCF claim, "should be denied and the defendant given a chance to examine the evidence supporting the tutoring costs." (AR 99). This is clearly a request for a hearing on the issue, made by Petitioner, and denied by the lower court prior to entry of the lower court's Order of Restitution, entered on September 12, 2023, subject of the instant appeal.

Respondent's argument that Petitioner did not request a hearing on the issue, also attempts to impermissibly shift the burden of proof regarding the amount of restitution from the State to Petitioner, when the amount is in dispute, in violation of W. Va. law, as contained in W. Va. Code § 61-11A-5 (1984).

Respondent then incorrectly argues that Petitioner is seeking the Court create a presumption against the payment of restitution such that the same type of procedural safeguards applicable to the guilt phase of a jury would apply to restitution hearings. *See* Resp.'s Br. at 22-23. Petitioner simply argues that the lower court erred by assessing restitution based upon claimed expenses by a third-party, the victim's mother, which was not permissible under W. Va. law, as argued above and throughout Pet'r's Br., and that the lower court failed to provide Petitioner minimal due process rights to not be deprived of property without a meaningful opportunity to be heard, as required by law, regarding the CVCF claim.

Petitioner is not seeking the Court to create any new presumptions or protections, just to require the lower court to apply the law as it exists pertaining to restitution. Petitioner asserts the lower court ignored the law surrounding the issuance of restitution in the instant case, assessed

restitution based upon mere submission of documents that he had no meaningful opportunity to challenge or examine, which circumvented the State's burden of proof and duty to prove restitution claims by a preponderance of evidence.

Finally, Respondent's classifications of Petitioner's arguments as mere table-pounding, is entirely baseless. *See* Resp.'s Br. at 24. Petitioner's arguments that the lower court erred in entry of the restitution order, are based upon statutory authority contained within the West Virginia Code, West Virginia case law pertaining to classification of restitution, and well-settled constitutional principles of due process. *See State v. Cummings*, 214 W. Va. 317, 589 S.E.2d 48; *see also* W. Va. Code, Chapter 61, Article 11A, *et-seq.*; *see also* W. Va. Const. art. III, § 10; *see also* U.S. Const. amend. V.

Respondent seeks to have the Court to ignore well-settled law, based upon Respondent's ill-founded policy and legislative intent arguments, which contradict the actual statutory language enacted by the legislature, are based upon cherry-picked citations from Federal case law, which has limited to no bearing on West Virginia's restitution statutes or case law, and when the cases cited by Respondent generally stand for the premise that a meaningful opportunity has to be heard must be provided to a defendant prior to assessment of restitution.

CONCLUSION

WHEREFORE, for the reasons stated above, and contained within Petitioner's Brief (2nd), 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, to be paid to the victim's mother, and for such further relief as the Court deems proper.

Respectfully submitted,
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Appeal from Final Order of Jefferson County Circuit Court (22-F-11)

Willie Edward Belmonte, Jr.,
Defendant Below, Petitioner

CERTIFICATE OF SERVICE

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

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