



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-08-00233-CR

MARK E. STRETCHER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Fourth Judicial District Court
Rusk County, Texas
Trial Court No. CR08-136

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Justice Carter

MEMORANDUM OPINION

I. School Superintendent and State Enter Negotiated Plea Agreement

Mark E. Stretcher was the superintendent of the Overton Independent School District (District). He was accused of improperly acquiring some District property or money; he agreed to resign and immediately paid the District \$10,000.00 as restitution. But that was not the end of the problem.

This impropriety was reported to the officials in Rusk County, and a criminal investigation began. Before the matter was presented to a grand jury, Stretcher and his attorney agreed with the State's attorney to enter a negotiated plea agreement. Stretcher appeared in court, waived indictment, and pled guilty to a charge of theft by a public servant of property valued between \$1,500.00 and \$20,000.00. The negotiated plea agreement stated:

As a result of negotiations with the State, a plea bargain agreement has been reached to recommend to the Court that punishment be assessed in this case as follows:

Deferred Adjudication Community Supervision for five (5) years
Restitution to be determined by the Court, payable to the Overton ISD,
PO Box 130, Overton, Texas 75684
Defendant voluntarily surrender his Texas Educator Certificate.

After entering his plea of guilty June 27, 2008, Stretcher was placed on deferred adjudication for five years. A judgment was entered reciting that restitution was "to be determined by the court." Apparently, it was thought at the time that the restitution order would be approximately \$6,000.00.

II. The Trial Court Establishes Restitution

A hearing was held November 20, 2008, for the trial court to establish the amount of restitution. At that hearing, the State presented evidence that due to Stretcher's wrongdoing, the District had incurred losses approaching \$40,000.00. Approximately \$10,000.00 was for an attorney's fee for assisting the District to hire Stretcher's replacement and another approximately \$10,000.00 was for an accountant's work. After reviewing the evidence, the trial court found that Stretcher was to pay \$36,988.34 in restitution to the District. This was added to the terms of Stretcher's community supervision; the judgment was never amended. Stretcher complains that the restitution ordered was contrary to law, not incurred due to his actions, and that this Court should correct that injustice by overturning that award. Stretcher does not request the judgment be reversed and remanded for an entire new trial.

III. Issues

1. Was the notice of appeal timely filed?
2. Did the parties enter a negotiated plea agreement and if so, can Stretcher appeal this matter?
3. If Stretcher can appeal the restitution order, is the order valid?

IV. Notice of Appeal

Stretcher filed his notice of appeal after the restitution hearing in November, even though the plea and judgment were entered in June. The State argues that the notice was not timely, and if the

June judgment begins the time for filing the notice of appeal, the State is correct. But if the notice of appeal requirement is calculated from the restitution hearing in November, it is timely. So the question is—when was Stretcher's sentence finally imposed or suspended within the meaning of the Texas Code of Criminal Procedure.¹

The Texas Court of Criminal Appeals has made it very clear that the original order of restitution is a part of the sentencing process. *Bailey v. State*, 160 S.W.3d 11 (Tex. Crim. App. 2004).² It logically follows that when restitution is to be a part of the punishment, sentencing is not complete until the court determines the restitution. *Id.* at 16. In *Bailey*, the defendant was not ordered to make restitution until thirty days after the original sentencing order. The Texas Court of Criminal Appeals held that the day the sentence was "suspended in open court," within the meaning of Rule 26.2(a)(1), was the day the last condition of community supervision (restitution) was decided, and a notice of appeal filed within thirty days of that date was timely. Thus, Stretcher's notice of appeal was timely filed.

V. Did the Parties Enter a Plea Bargain? If So, Can Stretcher Appeal?

The State argues Stretcher entered a negotiated plea agreement and thereby is precluded from this appeal. Texas law authorizes an appeal from a plea bargain case only as to matters raised by

¹See TEX. R. APP. P. 26.2 (requiring the defendant to file a notice of appeal within thirty days after the day sentence is "imposed or suspended . . .").

²See TEX. CODE CRIM. PROC. ANN. art. 42.037(e) (Vernon Supp. 2009) (which refers to restitution as part of the sentencing process).

written motion and filed and ruled on before trial or after getting permission of the trial court. TEX. R. APP. P. 25.2(2). Stretcher does not meet these requirements and in fact, when he entered his guilty plea, he acknowledged this limitation on his right of appeal. Further, the trial court here has certified that a plea bargain was entered and Stretcher has no right of appeal. These facts appear to establish that Stretcher cannot appeal.

The only difficulty with this simple analysis is the unusual nature of this plea agreement. Generally, when parties enter plea agreements, the terms of the plea are established. If restitution is contested, the trial court resolves the issue, but it should be done as a part of the sentencing process.³ When the court accepts the plea agreement and enters a judgment, all parties should know what is required. This differs from a modification of the terms and conditions of community supervision, which the court may enter after the sentence is complete. *Bailey*, 160 S.W.3d at 15. The State argues the trial court can amend the terms and conditions of community supervision; a proposition with which we agree. But when no restitution has been ordered and the judgment states it will be determined by the court, the sentencing process is not complete. Establishing the initial restitution at a later date is not simply an amendment of community supervision terms.

Further, the concept of a negotiated plea agreement has been equated to a contract. *Ex parte Williams*, 637 S.W.2d 943, 948 (Tex. Crim. App. 1982). Rules of construction applicable to

³"The court shall resolve any dispute relating to the proper amount or type of restitution. The standard of proof is a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on the prosecuting attorney." TEX. CODE CRIM. PROC. ANN. art. 42.037(k) (Vernon Supp. 2009).

contracts have been incorporated into the "plea bargain" relationship. To be enforceable, a contract's material terms must be sufficiently definite for a court to determine the obligations of the parties. *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000).

Here, Stretcher does not argue that the negotiated plea agreement has indeterminate terms or that the agreement fails because the restitution amount was not sufficiently definite; Stretcher only argues that the restitution amount established by the trial court is unfair. But this is the agreement that Stretcher entered as to restitution—to allow the trial court to establish the amount. Consequently, Stretcher's appeal is restricted by the existence of the negotiated plea agreement accepted by the trial court. The stated purpose of Stretcher's appeal does not come within the appellate avenues as set out by the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 25.2. The fact that Stretcher entered a negotiated plea agreement and specifically agreed that the trial court could set the amount of restitution distinguishes this case from those where a trial court, without plea bargain or agreement of the defendant, has set restitution when there was no factual basis for it. *Cartwright v. State*, 605 S.W.2d 287 (Tex. Crim. App. 1980). By entering into this agreement, Stretcher received the benefit of deferred adjudication community supervision, rather than risking a judgment of conviction and possibly imprisonment. The Texas Court of Criminal Appeals has held that when a plea agreement involves sentencing a defendant to a term of confinement that is not authorized by law, the relief available is an entire retrial. ("When a defendant attacks the sentence he received, and for which he bargained, he is attacking the entire judgment of conviction. To permit

resentencing in this situation is to bind only one party to the agreement. This is neither logical nor fair.") *Shannon v. State*, 708 S.W.2d 850, 852 (Tex. Crim. App. 1986). Stretcher has made it clear he is not attacking the entire judgment and does not seek a retrial.

Stretcher essentially argues that when he agreed to allow the trial court to set the amount of restitution, he did not anticipate such a large amount. Since the parties entered a negotiated plea agreement and that agreement specifically allowed the trial court to set the amount of restitution, which it did after conducting an evidentiary hearing, we find that Stretcher does not meet the narrow grounds available to appeal a negotiated plea agreement. *See* TEX. R. APP. P. 25.2. Based on this holding, we need not address the remaining issues. We cannot entertain this appeal; it is dismissed for want of jurisdiction.

Jack Carter
Justice

Date Submitted: October 21, 2009
Date Decided: November 6, 2009

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